

# Admissibility of the Use of Electronic Means of Evidence Obtained Unlawfully in a Civil Proceeding

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The admissibility of the use of evidence obtained unlawfully, referred to as the fruit of the poisonous tree, still remains an unresolved issue on the basis of Polish procedural law. The author in her paper will focus on such forms of evidence, which are more and more often the subject of evidentiary procedures, noting that this mainly concerns the content of private conversations conducted with the use of messengers and community portals, call recordings, and telephone billings, data obtained from mobile phones, or so-called print screens, which are often obtained in an illegal manner, interfering with the sphere of privacy of the other person.

**Keywords:** civil proceeding, electronic evidence, illegal evidence, evidence obtained unlawfully.

## Neteisėtai gautų elektroninių įrodinėjimo priemonių naudojimo civiliniame procese leistinumas

Remiantis Lenkijos proceso teise, neteisėtai gautų įrodymų, vadinamų nuodingo medžio vaisiais, naudojimo leistinumas vis dar neišspręstas klausimas. Autorė savo darbe sutelkia dėmesį į tuos įrodymus, kurie vis dažniau yra įrodinėjimo procedūrų dalykas, pažymi, kad tai daugiausia susiję su privačių pokalbių, vykstančių naudojant pasiuntinius ir bendruomenės portalus, turiniu, skambučių įrašais ir telefono sąskaitomis, duomenimis iš mobiliųjų telefonų arba vadinamųjų spausdinimo ekranų, kurie dažnai gaunami neteisėtai, trikdamas kito asmens privatumą.

**Pagrindiniai žodžiai:** civilinis procesas, elektroniniai įrodymai, neteisėti įrodymai, neteisėtai gauti įrodymai.

## Introductory Issues

The growing need to collect and use the so-called digital evidence in court proceedings involves many challenges set out in the procedural rules. The transition from physical to digital evidence often leads to contentious issues related to its collection and its admissibility.<sup>1</sup> The issue of the admissibility of the

<sup>1</sup> PINYOSINWAT, J. Civil Search and Seizure of Digital Evidence: the Example of Thai Central IP & IT Court. *Digital Evidence and Electronic Signature Law Review*, 2008, No 5, p. 235.

use of evidence obtained illegally, referred to as the fruit of the poisonous tree, is still valid from the perspective of procedural civil law. The admissibility of using the evidence obtained in this way during the court proceedings remains an issue that is still unresolved on the basis of the Polish civil procedure. In the preliminary deliberations, it is necessary to emphasize that the doctrine of the fruit of poisonous tree originates from the United States. According to its assumptions, if the source of evidence (the tree) or the evidence itself is “poisoned,” then everything that is derived from this tree, i.e., the fruit – is also “poisoned.”<sup>2</sup> Often, representatives of the Polish doctrine identify with each other such concepts as “evidence obtained contrary to law” and “inadmissible evidence.” It seems that the first of them should include the evidence that was obtained in a manner inconsistent with both substantive and civil procedural law, and the second of them evidence that was obtained in a manner contrary to law, rules of social coexistence, as well as ethical standards.<sup>3</sup> Moreover, in the literature of the subject, there is a view that it is possible to use the terms “unlawful evidence,” “illegal evidence,” or “evidence obtained contrary to law” interchangeably, which is dictated by the lack of a clear normative basis, as well as the fact that these concepts are only a product of the doctrine. It is also possible to use the concept of “evidence obtained or taken contrary to the Act, in violation of the Act or in a manner contrary to the Act,” which will include evidence obtained or taken in violation of the exclusionary rule or evidence privilege on which the entitled entity has invoked.<sup>4</sup> Considering the lack of appropriate regulations in the Polish Code of Civil Procedure clarifying the status of the so-called illegal evidence – the practice in this area was shaped by the doctrine and judicature. However, it is not possible in this regard to see an unambiguous position of the representatives of the two indicated circles. In the absence of appropriate legal regulations, there is no uniform position expressed by the representatives of the justice system and doctrine, which would categorically accept or exclude the possibility of using evidence obtained contrary to law in the course of court proceedings.

As indicated, the practice in this area is shaped while taking into account the circumstances justifying the use or omission of the so-called illegal evidence in a specific case. Often the admissibility or lack thereof of the use of this type of evidence is determined by a specific type of a case. An example may be litigation between spouses or cases involving employees, in which the position of a party can be proved only based, e.g., on secretly made recordings of conversations or screenshots, which determines the basic consent of the procedural bodies to use evidence obtained in a manner contrary to law. However, this is a casuistic practice that is created in the absence of unambiguous legal regulations in this area. The Polish legislator has constructed an open catalogue of means of evidence, while omitting the issue of evidence obtained illegally. Also in the proposed changes and amendments to the Code of Civil Procedure, this issue was not addressed. For this reason, it is necessary to refer to the views expressed by the doctrine of civil procedural law, the representatives of which are not in agreement on the status of evidence obtained contrary to law in civil proceedings. This issue will be discussed in more detail later in the study.

Another issue naturally related to the admissibility of evidence obtained contrary to law is the issue of electronic evidence. Constant and inevitable technological progress increases the possibility

<sup>2</sup> BIAŁECKI, M. Doktryna „Owoców Zatrutego Drzewa” (Fruits of the Poisonous Tree) w Postępowaniu Cywilnym. In: K. Flaga-Gieruszyńska and A. Klich (eds.) *Współczesne Problemy Prawa Cywilnego Procesowego. Zbiór studiów*. 2015, Toruń, p. 202.

<sup>3</sup> LASKOWSKA, A. Dowody w Postępowaniu Cywilnym Uzyskane w Sposób Sprzeczny z Prawem. *Państwo i Prawo*, 2003, No 12, p. 89.

<sup>4</sup> KAROLCZYK, B. Dopuszczalność „Dowodów Uzyskanych z Naruszeniem Prawa” w Postępowaniu Cywilnym. *Przegląd Sądowy*, 2012, No 4, pp. 88–89, 93.

of using modern technological solutions for the purpose of “obtaining” evidence to be the subject of court proceedings in civil matters. The systematic of the Polish procedural law clearly determines the open catalogue of means of evidence, which should be assessed in a positive way, because the scope of evidence regulated by the Polish legislator (e.g., evidence from documents, witness testimony, expert opinion, hearing of parties, or audiovisual evidence) is – in light of continuous technological progress – insufficient. As a consequence, leaving the so-called open gate for other, unknown means of evidence will enable the permanent use of scientific advances in the proceedings.<sup>5</sup> The so-called audiovisual evidence includes evidence from film, television, photocopies, photographs, plans, drawings, sound tapes, and other devices that capture or transmit images or sounds.

The purpose of this article is to discuss the status of electronic evidence obtained contrary to law on the basis of Polish civil proceedings, with particular reference to evidence obtained through the public Internet network. This issue is particularly important because – as indicated – in some categories of cases it is not possible to base the evidentiary proceedings solely on statements of witnesses or parties to proceedings, because this evidence is characterized by a lack of proper objectivity, and a decision of court issued solely on the basis of such evidentiary proceedings may be subject to a material error and deficiencies in determining the actual circumstances that constitute the basis of the legal dispute. Examples of this type of dispute, in which the parties strive to obtain evidence “at all costs,” are disputes in matrimonial matters or in labor matters.

## 1. Unlawfulness in Obtaining Evidence and Court Proceedings in Civil Matters

When analyzing the issues of the so-called unlawful evidence, it is possible to observe a tendency to equate with each other the terms of unlawful evidence, illegal evidence, and evidence obtained contrary to law. In the first impression, it is possible to state that the terms may be different from each other. However, taking into account the conditions for considering particular evidence to be unlawful, illegal or obtained contrary to law – in the end it is possible to use the abovementioned terms interchangeably. The reason for this is, above all, that the specific gradability of evidence recognized in a broad sense as illegal (contrary to law) is created only by doctrine, without a clear normative basis. Bearing in mind the above, in order to establish the unlawfulness in obtaining evidence, it is necessary to identify a violation of legal provisions, which in particular should be related to violation of provisions of criminal law, civil law, administrative law or to actions contrary to the principles of social coexistence.<sup>6</sup> In turn – according to the position of the representatives of the doctrine – illegal evidence is evidence obtained contrary to law (e.g. forged, remade or stolen document, photography or photomontage, private document, letter or email printouts). The position, according to which the documents that violate the right to privacy and the good name should also be considered illegal, seems right.<sup>7</sup> It is important that when gathering evidence confirming the statement of a party to the proceeding, there are no infringements that may raise doubts as to the reliability and legality of the actions taken in order to prove the allegations raised.

For this reason, when talking about unlawful or illegal evidence, it should be noted that an open catalogue of evidence often gives the opportunity to direct the evidentiary proceedings in such a way that it is inevitable to use the content of private conversations conducted with the use of numerous

<sup>5</sup> RESICH, Z. *Poznanie prawdy w procesie cywilnym*. 1958, Warsaw, p. 56.

<sup>6</sup> KRAKOWIAK, M. Potajemne Nagranie na Taśmę Jako Dowód w Postępowaniu Cywilnym. *Monitor Prawniczy*, 2005, No 24, p. 1251.

<sup>7</sup> NARTOWSKI, W. Drzewo Zatrute, Owoc Niekoniecznie. [in press] Submitted to: *Rzeczpospolita*, 17.10.2011.

communicators and social networking sites, as well as content fixed on recordings of calls, or phone billings, and data that originate from computers, or mobile phones, tablets – the so-called print screens, the content of text messages, files stored on hard drives of computers and web servers, email records, data from mobile phones or back-up systems. In many cases, this evidence is obtained by the parties in an illegal manner or without the consent and knowledge of the other party. Importantly, the content of private conversations is more and more often obtained in an illegal manner, which involves interference in the sphere of privacy of the other person. As indicated, technical and technological progress, as well as more and more common access to high quality electronic and IT equipment, contributes to the popularization of the tendency to gather evidence focused around the broadly understood communication process. Such activities are also encouraged by the conviction of the parties to the proceedings about greater credibility, and thus the probative value of such evidence in comparison with its traditional form.<sup>8</sup> It seems that the behavior of the parties characterized by the use of means of evidence that was obtained as a result of violation of the law, which qualifies as violation of the constitutionally guaranteed right to intimacy, is incorrect. Only exceptional circumstances justify the admission and taking of evidence obtained in that way, provided that the violation of the intimate sphere of another person is moderate.<sup>9</sup> On the other hand, evidence that violates the broadly defined personal rights of the other party or third parties should not be used in civil proceedings without their consent. A different opinion in this respect was presented by the Court of Appeal in Białystok, according to which it is permissible to take evidence from recordings made personally by persons appearing as parties who, being participants of the conversation, do not violate the provisions protecting the secrecy of communication guaranteed in Art. 49 of the Constitution of the Republic of Poland.<sup>10</sup> It seems that in a case of a request of a party to take evidence obtained in a way that significantly interfered with the intimacy of the opposing party, one of the most difficult decisions of the judicial body is to determine the limits of admissibility of interference in the sphere of privacy of the other person.

Bearing in mind the above, it should be pointed out that in the absence of an unambiguous legislative resolution by the Polish legislator, three positions regarding the admissibility of the so-called illegal evidence in civil law disputes can be seen among the representatives of the Polish civil procedural law doctrine. The first of the concepts recognizes the full admissibility of the use of unlawful means of evidence, which, however, has not been fully approved by the majority of the representatives of the literature on the subject. Proponents of this view accept the full admissibility of the so-called illegal evidence in pending civil proceedings.<sup>11</sup> This position was individually approved by the Polish Supreme Court, which, in one of the judgments, supported the admissibility of evidence presented by the party that had been obtained contrary to law.<sup>12</sup> However, this position should be denied, because the full admissibility of the use of unlawful evidence can lead to numerous abuses, and the proceedings

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<sup>8</sup> MISZTAŁ-KONECKA, J. Billingi i Nagrania Rozmów jako Dowody w Postępowaniu Cywilnym. In: J. Miształ-Konecka and G. Tylec (eds.) *Ewolucja Prawa Polskiego pod Wpływem Technologii Informatycznych. Elektroniczne Aspekty Wymiaru Sprawiedliwości*. 2012, Lublin, pp. 159–160.

<sup>9</sup> WENGEREK, E. Korzystanie w Postępowaniu Cywilnym ze Środków Dowodowych Uzyskanych Sprzecznie z Prawem. *Państwo i Prawo*, 1977, No 2, pp. 33 and 40.

<sup>10</sup> Judgment of the Court of Appeal in Białystok of 31 December 2012, IACA 504/11, OSAB 2013 No. 1, p. 17.

<sup>11</sup> OKOLSKI, J.; and JACZEWSKI, P. Rola Środków Dowodowych Uzyskanych w Sposób Sprzeczny z Prawem. In: M. Łaszczuk (ed.) *Arbitraż i Mediacja. Księga Jubileuszowa Dedykowana Doktorowi Andrzejowi Tynelowi*. 2012, Warsaw, p. 362; and Juchnowicz-Bierbasz, D. (23.02.2010) Czy Strona Może Wykorzystać Dowody Uzyskane Sprzecznie z Prawem. [in press] Submitted to: *GP*.

<sup>12</sup> Judgment of the Supreme Court of 25 April 2003, IV CKN 94/01, Legalis.

of procedural bodies in line with this concept may be perceived as the legalization of the unlawful conduct of the parties. The second concept is characterized by an extreme – in comparison with the first approach – view, because its supporters strictly prohibit the admission of evidence obtained contrary to law. This type of action may also adversely affect the course of proceedings, especially in those cases in which there are no other objectively possible ways of proving the claims and circumstances raised by the parties (e.g., in the aforementioned matters between spouses or in cases involving employees). Proponents of this concept do not provide for any exceptions that would justify the use of the so-called illegal evidence in special circumstances.<sup>13</sup> On the other hand, the third concept seems to be the most appropriate for the current practice of justice, because its supporters are in favor of a relative prohibition on the use of evidence obtained contrary to law. This approach seems to be the most optimal one out of those noticeable in the literature on the subject. The practice seen in the courtrooms confirms that there are exceptional situations that fully justify the use of evidence obtained in an illegal manner during civil proceedings in civil cases. Among the circumstances justifying this practice, one should notice both the nature of the case and other evidence difficulties of an objective nature. Due to the specificity of this type of cases (e.g., cases of mobbing), it may be acceptable to refer to evidence obtained contrary to law, e.g., recordings of conversations without the consent of the persons being recorded, which results from the fact that in some cases the acquisition of direct, “legal” evidence is difficult or even impossible.<sup>14</sup> In my opinion, this concept is connected with the attribution of a relative nature to the prohibition of using unlawful evidence, which is justified by the exceptional circumstances that appear in certain categories of cases.

In the absence of unambiguous legal regulations in this area, the approach of the procedural body to the potential possibility of using unlawful evidence seems to be the most appropriate. This position is also supported by the lack of a clear prohibition expressed by the legislator, which indirectly may indicate the need for the court to individually perceive the circumstances of a given case, which may often justify the taking of such evidence. In this respect, the rule of the judge’s discretionary power is strengthened. It seems that not every submission of evidence by the party – the so-called fruit of poisonous tree – should be considered unacceptable in the course of the proceedings. Both in the doctrine and jurisprudence, total freedom in the process of using evidence obtained contrary to law was not accepted. Moreover, it is difficult to speak of an absolute ban on the use of such evidence. The position that using such evidence is possible provided that the court also has other evidence at its disposal seems to be correct.<sup>15</sup> Summarizing the considerations in this respect, it should be emphasized that failure to include in the Code of Civil Procedure a clear prohibition on the admissibility of evidence obtained illegally cannot be equated with full consent to use illegal means. Such an interpretation of the lack of legal regulation in this area could lead to the popularization of actions of the parties aimed at showing the existence or non-existence of facts using tools or methods that could unambiguously indicate a deliberate violation of the law.

<sup>13</sup> See also: KLICH, A. *Dowód z Opinii Biegłego w Postępowaniu Cywilnym. Biegły Lekarz*. 2016, Warsaw, p. 63.

<sup>14</sup> Judgment of the Court of Appeal in Szczecin of 30 December 2013, III APA 9/13, Legalis.

<sup>15</sup> BIAŁECKI, M. Doktryna „Owoców Zatrutego Drzewa” (Fruits of the Poisonous Tree) w Postępowaniu Cywilnym. In: K. Flaga-Gieruszyńska and A. Klich (eds.) *Współczesne Problemy Prawa Cywilnego Procesowego. Zbiór studiów*. 2015, Toruń, p. 220.

## 2. The So-Called Illegal Electronic Evidence: Procedural Problems

The use of electronic evidence in civil proceedings is an increasingly common phenomenon around the world. Regardless of the tradition, the use of computers, mobile phones, and various electronic devices, all of which are now part of the public network, is more and more common. It should be remembered that currently used types of mobile phones or smart phones include: a) basic telephones, which are primarily simple devices for voice communication; b) advanced telephones that offer additional possibilities and multimedia services, and c) smart phones or high-end phones that combine the capabilities of an advanced phone with the so-called personal digital assistant.<sup>16</sup> Regardless of what device we are dealing with, the information currently stored on the electronic equipment is potential evidence. For this reason, there are numerous problems affecting the whole legal situation, i.e., information to which the parties to the proceedings will have access, the possibility of obtaining it in a legal or illegal manner, or issues related to numerous restrictions on access to these data, also on a procedural basis.<sup>17</sup> Along with technological progress, the role of evidence obtained from the Internet in the form of data from mobile devices (e.g. mobile phones), data from other devices, servers, or social networking sites, and the so-called clouds is increasing. These data are referred to as ESI (Electronic Stored Data) or Electronic Discovery (e-discovery). In turn, in the American jurisprudence, evidence from discoverable documents, i.e., documents that have been deleted by the party, is also allowed.<sup>18</sup> One of the most important problems – in the case of a positive court decision aimed at admitting evidence obtained illegally – is a matter considering all jurisdictions around the world, which requires the determination of the authenticity of such evidence. Modern technological solutions allow not only faster and easier obtaining of evidence confirming a given circumstance, but also carry huge threats resulting from the potential ease of modification and forgery of evidence, which is stored in a digital format. For this reason, the authentication of electronic evidence is becoming one of the more common problems seen in court disputes. Technological innovations available today pose many challenges for privacy, trust, and security.

Situations in which the unauthorized retrieval of information entering the sphere of opposing party's privacy may occur can be broadly divided into two groups. On the one hand, it is possible to create opportunities to facilitate access to private information unintentionally, and on the other – it can be an intentional action, aimed at facilitating access to numerous electronic devices or IT resources. In the first case, the threat in the potential acquisition by the opposing party of access in an illegal manner to the information constituting the basis for requesting taking evidence from a particular means of evidence is, for example, not logging out of an IT system that contains relevant information that may be important to the substantive resolution of the case, or not logging out of a social networking site (e.g., Facebook), or a communicator enabling remote communication, allowing direct access to the correspondence, as well as an unsecured information carrier (electronic or paper), or leaving a computer, telephone, tablet, etc. turned on without any restrictions to access the content stored in them. In turn, when referring to the intentional behavior, it is necessary to pay attention to the possible actions

<sup>16</sup> TAYLOR, M., *et al.* Digital Evidence From Mobile Telephone Applications. *Computer Law and Security Review*, 2012, No 28, p. 335.

<sup>17</sup> ASTRUP HJORT, M. Electronic Evidence in Control of and Adversely Affecting the Opposing Party: a Comparative Study of English and Norwegian law. *Digital Evidence and Electronic Signature Law Review*, 2011, No 8, p. 76.

<sup>18</sup> BIAŁECKI, M. Problem Dowodów Nielegalnych na Przykładzie Środków Dowodowych Pozyskanych z Internetu w Sprawach Rodzinnych. In: K. Flaga-Gieruszyńska, J. Gołaczyński and D. Szostek (eds.) *E-obywatel. E-sprawiedliwość. E-usługi*. 2017, Warsaw, p. 218.

of both parties to the proceedings, aiming directly or indirectly at obtaining information that may be the subject of taking evidence, as well as facilitating access to such information. In this case, attention should be paid to, for example, the rules for protecting with passwords that block the possibility of gaining access to information stored on various types of electronic media. Among the actions that can be taken to acquire information important for the resolution of the case without the knowledge of the relevant person the following should be mentioned: saving passwords in an open manner and placing them in places accessible to other people; using passwords based on associations, easy to guess or infer from information about a given person (e.g., names, phone numbers, dates of birth, etc.); using the same passwords in different operating systems and applications, sharing passwords with other users and bystanders, entering “permanent” passwords (e.g., in login scripts); and using the option to auto-remember passwords (e.g., in web browsers), or attempting to break passwords by the opposing party. These actions, consisting in both intentional and unintentional facilitation of access for third parties to carriers containing information that may be of importance in the process of taking evidence, unambiguously bring the party of the proceedings closer to the attempt to acquire digitally-recorded information without the knowledge of the opposing party. In such a case, the court’s task is not only to assess the admissibility of the evidence obtained in such a way, but also – in the case of a positive resolution in this respect – to assess its truthfulness and authenticity in the event of an appropriate claim being raised by the opposing party.

As indicated, taking into account the issue of the admissibility of using electronic evidence in civil proceedings, the key is the concept of trust in the content that is embedded in it. According to the well-known traditional principles of proving, the authenticity of evidence is therefore of fundamental importance, which in practice can be questioned by the opposing party. In this case, the shift of the burden of proof on the person who challenges the authenticity of the electronic evidence takes place. From the perspective of procedural civil law, such allegations may connect with a requirement to access the system that generated the information in order to determine whether it actually acted correctly at the time of generating the evidence.<sup>19</sup> When referring to taking evidence from electronic evidence in the course of court proceedings, in particular when it was obtained, for example, without the knowledge of an opposing party, the potential need to take evidence from an expert opinion on the authenticity and integrity of electronic evidence should be taken into account. The reason for this is, above all, the fact that the person who does not have the knowledge necessary to assess the authenticity of the record is based on the credentials of the expert who authenticates it. The growing need to collect and use the so-called digital evidence in civil proceedings has naturally influenced the generation of many challenges in procedural law. Considering the current wide possibilities of the adulteration, modification, or destruction of digital evidence, there is a fairly high probability of a reduction of the quantity of potential evidence that may be subject to the analysis of an IT expert. The procedural significance of an IT expert should be reduced primarily to the truthfulness and authenticity of digital evidence, in order to exclude any manipulation and confirm its credibility.

Analyzing the problems of the status of the so-called illegal digital evidence on the basis of the Polish legal system, it should be pointed out that in cases where it is not possible to prove the truthfulness of the facts and circumstances using traditionally available means of evidence, there is some acceptance in the field of requests for taking evidence obtained without the knowledge of the other party (e.g., evidence from a secretly made recording). However, it should be remembered that the

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<sup>19</sup> DURANTI, L.; and ROGERSS, C. Trust in Digital Records: An Increasingly Cloudy Legal Area. *Computer Law and Security Review*, 2012, No 28, p. 527.

right to privacy, which was highlighted in this study, is, on the one hand, a personal good, and on the other – a good that is widely protected and recognized. For this reason, it is not possible to accept the position according to which the right to court and its implementation will have primacy over the right to privacy. The exercise of the right to court cannot take place against a third party and with defiance for one of the fundamental human and civil rights, i.e., the right to intimacy and privacy. For this reason, it is not possible to fully approve actions aimed at implementing the right to court “at all costs” without taking into account the rights and freedoms of third parties, which are often opposing parties. This does not mean, however, that evidence, including digital evidence obtained contrary to law in an automatic manner, is automatically excluded in the civil proceedings. As indicated, this issue should be settled individually in relation to the specifically marked circumstances, legal and factual situation of the parties to the proceedings.

## Conclusions

The digital revolution, noticeable over the last years, has significantly and permanently changed the way of storing and transferring information. Traditional methods of proving circumstances significant for the resolution of a case (e.g., testimonies of witnesses or parties to the proceedings) may currently be “offered” in the same traditional form, or may be authenticated via an electronic medium, which, for example, stores a record of a conversation confirming or excluding the disputable position of persons testifying in a court case. As a consequence, we are currently dealing with a number of pieces of evidence that was almost unimaginable several decades ago.<sup>20</sup> It is becoming more and more common that the vast majority of documentation is stored or generated in digital form, which does not prevent taking evidence from it in the course of court proceedings. This applies to materials downloaded from websites, emails, text messages, instant messages, data from GPS devices, computer animations and simulations, digital photos, or improved images. It seems that a large part of the representatives of the doctrine and judicature presents a sceptical approach to electronic evidence, although the approach of practitioners, who strive to develop new standards, including in their scope the admissibility of the use of this type of evidence, is also evident. The Polish legislator definitely presented the second of the indicated approaches, as evidenced by the open catalogue of means of evidence, taking into account the future technical and technological conditions, which favor the emergence of new models of means of evidence, hitherto unknown to the traditional evidentiary proceedings.

Certainly, the biggest challenge for the proceedings is to make a decision by the procedural body on the admission of evidence, including electronic evidence obtained contrary to law. The key problem from the point of view of the analyzed issue is the necessity to answer the question whether each submission by the party of evidence obtained illegally should be considered inadmissible in the course of court proceedings.<sup>21</sup>

In conclusion, it is necessary to emphasize that referring to the problem of the admissibility of using evidence obtained contrary to law in civil cases, it is extremely difficult to clearly define the so-called general clause, applicable in all cases. It seems that the court should treat this type of evidence with particular caution, while making an individual assessment of the nature of the case and the evidence

<sup>20</sup> GOODE, S. The Admissibility of Electronic Evidence. *The Review of Litigation*, 2009, No 29, p. 2.

<sup>21</sup> BIAŁECKI, M. Problem Dowodów Nielegalnych na Przykładzie Środków Dowodowych Pozyskanych z Internetu w Sprawach Rodzinnych. In: K. Flaga-Gieruszyńska, J. Gołaczyński and D. Szostek (eds.) *E-obywatel. E-sprawiedliwość. E-usługi*. 2017, Warsaw, p. 209.

collected so far. This assessment should clearly take into account the obvious interests of the parties to the proceedings, which would determine the decision accepting the legitimacy of taking the so-called illegal evidence, which, in practice, is most often justified by the lack of sufficient means to prove the facts of significant importance for the resolution of the proceedings in a different way.

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#### **S u m m a r y**

The admissibility of the use of evidence obtained unlawfully, referred to as the fruit of a poisonous tree, still remains an unresolved issue on the basis of Polish procedural law. Practice in this area is mainly shaped by doctrine and judicature, although there is no categorical position of both the courts and the representatives of the doctrine in this respect, which accepts the use of means of evidence obtained in violation of the law during the proceedings. Taking under consideration the progressing process of computerization, electronization, and informatization of almost every sphere of life, it is important to notice an increasing potential possibility of using electronic means of evidence obtained illegally in court proceedings. The author in her paper focuses on those forms of evidence that are more and more often the subject of evidentiary procedures, noting that this mainly concerns the content of private conversations conducted with the use of messengers and community portals, call recordings and telephone billings, data obtained from mobile phones, or so-called print screens, which are often obtained in an illegal manner, interfering with the sphere of privacy of the other person.

### **Neteisėtai gautų elektroninių įrodinėjimo priemonių naudojimo civiliniame procese lestinumas**

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#### **S a n t r a u k a**

Remiantis Lenkijos proceso teise, neteisėtai gautų įrodymų, vadinamų nuodingo medžio vaisiais, naudojimo lestinumas vis dar neišspręstas klausimas. Praktiką šioje srityje daugiausia formuoja doktrina ir teismai, nors šiuo klausimu nėra kategoriškos nei teismų, nei doktrinos, kurios sutinka su įrodymų, gautų pažeidžiant įstatymus, naudojimu proceso metu, atstovų pozicijos. Atsižvelgiant į visose gyvenimo srityse vykstantį kompiuterizacijos, elektronizacijos ir informavimo procesą, svarbu pažymėti didėjančią galimybę naudoti teismo procese neteisėtai gautas elektronines įrodinėjimo priemones. Autorė savo darbe sutelkia dėmesį į tuos įrodymus, kurie vis dažniau yra įrodinėjimo procedūrų dalykas, pažymi, kad tai daugiausia susiję su privačių pokalbių, vykstančių naudojant pasiuntinius ir bendruomenės portalus, turiniu, skambučių įrašais ir telefono sąskaitomis, duomenimis iš mobiliųjų telefonų arba vadinamųjų spausdinimo ekranų, kurie dažnai gaunami neteisėtai, trikdant kito asmens privatumą.