

Award in Civil Procedure

Lecture Title: Judicial Procedure

Lecturer:

Date:



Diploma in Law (Malta)



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The Production of Evidence

- Our system follows the adversarial system meaning – the parties to the case bring and argue their case, have full access to the other parties' documents and evidence and are able to challenge the other parties and their evidence.
- The procedure is that the plaintiff starts with their evidence and then, after they have declared their evidence stage to be closed, the defendant starts with their evidence.
- Exception – If the defendant raises a preliminary plea

General Rules of Evidence

- All evidence presented must be relevant to the case at hand
- Best evidence rule – the parties need to present the best evidence that it is able to produce (for example: presenting the original document or a certified true copy, not a photocopy)
- Evidence should be *ai tempo vergine* (as authentic and as fresh as possible)



Rules of Evidence

- The court will disallow any evidence which it considers irrelevant or superfluous or which is not the best evidence the party can produce.
- Contesting the disallowing of evidence – the party can demand that the court's ruling on this is made by a decree. If only a question is disallowed to be asked, the party may only demand that this be recorded in the proceedings.



General Rules of Evidence

- Onus of proof – The burden of proving a fact shall, in all cases, rest on the party alleging it (he who alleges must prove).
- There are different types of evidence that can be produced:
 - Witnesses
 - Documents



Witnesses – Who is Admissible?

- Presumption that all persons are competent to testify, irrespective of age, provided he understands that it is wrong to give false testimony.
- Rebuttal – person is not of sound mind.
- No objection can be made on the fact that the witness is ‘biased’/has an interest.
- The parties to the suit (i.e. the plaintiff and the defendant) are considered to be competent witnesses and are admissible as witnesses, whether it is their decision to testify, or at the request of the other parties to the suit, or called by the court *ex officio*, in which case the same provisions on witnesses shall apply.

Witnesses – Who is Admissible?

- The spouse, civil union partner or cohabitant of a party to a suit are competent witnesses to give evidence in such suit at the request of any of the parties.
- Exceptions:
 - They may not be compelled to disclose any communication made to him by his spouse, civil union partner or cohabitant during marriage, civil union or co habitation and vice versa;
 - They may not be compelled to answer any question tending to incriminate his spouse, civil union partner or cohabitant;



Witnesses – Privileged Communication

- No advocate or legal procurator, without the consent of the client, and no clergyman without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession.



Witnesses – Privileged Communication

- Unless by order of the court, no accountant, medical practitioner or social worker, psychologist or marriage counsellor may be questioned on such circumstances as may have been stated by the client to the said person in professional confidence or as may have come to his knowledge in his professional capacity.;
- This privilege extends to the interpreter who may have been employed in connection with such confidential communications.



Summoning Witnesses

- Witnesses shall be summoned to appear by means of a subpoena issued on the application of the party intending to summon such witness.
- The subpoena shall contain an order to appear at a stated place and time, for the purpose of giving evidence, whether before the court, arbitrators, or before referees, or before one or more officers authorised by law to examine witnesses (ex. Judicial assistants).
- The subpoena shall be in the prescribed form by law.



Summoning Witnesses

- The subpoena may require the witness to produce any book, document or other thing that belongs to the contending parties or to any of them, or which is under the charge or custody of the witness, or which, according to law, he is bound to produce.
- A witness is bound to appear in court on the date and time prescribed in the subpoena provided that he is served with the subpoena at least 4 days before such date
- Exception – the court may (in urgent cases) order any witness to appear from day to day, or from hour to hour, or even within such interval as may be necessary for him to appear in court.
- Any person present in court may, upon the demand by any of the parties, be called to give evidence, as if he had been summoned by means of a subpoena.



Another Person Testifying on Behalf of

- Any officer or employee of a government department or any officer or other employee of any body having a distinct legal personality may be authorised by the person subpoenaed to give evidence in his stead on any matter about which he is more knowledgeable and relating to the said department or body and on which the said person subpoenaed was required to give evidence.



Penalty for Not Attending

- If a witness, duly summoned, fails to appear when called on, he shall be guilty of contempt of court and shall be punished accordingly.
- It is also lawful for the court, by means of a warrant of escort or arrest, to compel such witness to attend for the purpose of giving evidence.
- On good cause being shown for non-attendance, the court may remit the punishment.

Witnesses Testimony

- A witness must only testify on the facts, he is not to give his opinion unless it is made as a way of conveying relevant facts personally perceived by him.
- An opinion of a witness is only admissible if in the opinion of the court, he is suitably qualified in the relevant matter.



Witnesses Testimony

- The witnesses shall be examined in open court at the trial of the action and *viva voce*
- Witnesses may not be assisted or advised by any person
- Witnesses shall be take an oath prior to giving their testimony
- A witness may refresh his memory by referring to any writing made by himself or by another person under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in writing, but in such case, the writing must be produced and may be seen by the opposite party.



The Questions Asked – The Procedure

- Witnesses may be asked questions:
 - In examination (by the party summoning them)
 - In cross-examination (by the opposing party)
 - In re-examination (by the party summoning them)
- In examination, it is not permitted for the witness to be asked leading or suggestive question (without permission of the court)
- The opposing party has a right to cross-examine, in which instance, he is allowed to ask leading or suggestive questions.
- The examination or cross-examination of any witness shall not be interrupted, without leave of the court.

Cross-Examination

- In cross-examination, a witness may only be questioned on the facts on which he testified in his examination in chief, or on matters which are intended to attack his character/credibility
- When the party cross-examining desires to prove by the same witness, circumstances which are not connected with the facts on which the witness testified in examination, he must, produce such witness in due time as his own witness. In such case, the court may order the witness not to leave court and order that he may be called again and questioned in examination.



Re-Examination

- When both the examination and cross-examination are concluded, no further questions may be asked to the witness by either parties but, it shall be lawful for the court or for the party who produced such witness, with the permission of the court, to ask questions which solely arise out of the answers given by that witness in the course of the cross-examination.



Questions by the Court

- It is lawful for the court, at any stage of the examination or cross-examination, to put to the witness such questions as it may deem necessary or expedient.



Questions on Credibility of the Witness

- The party producing the witness is not allowed to impeach the credit of that witness by evidence of bad character but may contradict him by other evidence and may also show that he has made at other times statements inconsistent with his present testimony
- A witness may be impeached by the party against whom he is called by contradictory evidence, or by evidence that his general reputation for truth is bad.
- Before impeaching the credibility of a witness by evidence that he has made at other times statements inconsistent with his present testimony, the alleged statements together with the circumstances of time, place and persons present must be given and he must be asked whether he has made such statements and given time to explain.
- If the statements be in writing, they must be shown to the witness before a question concerning such statements is put to him.

Witness Compelled to Answer

- The witness is bound to answer all questions which the court allows to be put to him and the court can compel him to do so by committing him to detention until he shall have sworn and answered.
- Exception – a witness cannot be compelled to answer any question the answer to which may subject him to criminal prosecution
- It is the court's discretion to determine in each case, when a witness is not bound to answer a particular question on the ground that the answer might tend to expose his own degradation, or when a witness will not be compelled to give evidence as to facts the disclosure of which will be prejudicial to the public interest.
- No witness may leave the court until he is dismissed by the court.



Influencing Witnesses

- No person who has been present during the trial of a cause may be produced as a witness in the same cause
- The court may dispense with this rule for a just cause
- Each witness is examined separately
- It is lawful for the court to allow two or more witnesses to be confronted with each other – in which case they may be questioned in each others' presence.
- Referees – examined in the presence of each other unless the court otherwise directs
- It shall be lawful for the court, to prevent any witness who has been examined from communicating with any other witness who is about to be examined.



Notes on the Evidence

- The substance of the answers given by the witnesses shall be taken down. Every answer which may have a material bearing on the merits of the case shall be taken down word for word.
- The notes taken down shall be read over to the witness and after being signed by the registrar, shall be filed in original in the record of the cause. This shall be recorded at the foot of these notes.
- The notes of the evidence shall be clearly and legibly typewritten or written in ink. Any alteration, correction or addition required to be made before or after the reading over of such notes to the witness, shall be made by means of a postil in the margin or at the foot of the notes, to be countersigned by the registrar and any cancellation shall be made in such manner as to leave the words cancelled distinctly legible.
- The witness (or interpreter) may, at any time before the hearing of the case is concluded, make any addition or correction to his testimony.



Employment of an Interpreter

- If the court does not understand the language in which the evidence is given, it shall appoint a qualified interpreter at the provisional expense of the party producing the witness.
- The official interpreter shall, on entering upon the duties of his office, and prior to the examination of the witness in question, swear before the court that he will faithfully report the words of the witnesses.
- An interpreter may be objected to on good cause shown.



Hearsay Evidence

- Hearsay evidence is *ditto del detto* – when the witness is testifying about something which he has been told by third parties, not something which he heard or knows of personally.
- As a general rule, hearsay evidence is not allowed (inadmissible). This goes hand in hand with the best evidence rule i.e. the third party himself should be brought to testify.



Hearsay Evidence

- It is disallowed primarily because:
 - The third party might have wrongly perceived the event in question
 - The third party's memory may be inaccurate or he may have lied or distorted the event
 - The third party may have been misunderstood by the witness
- Moreover, having someone testify about the events told to him by someone else is a limitation on questions in cross-examination since he was not the one who witnessed the facts being testified about.



Hearsay Evidence

- The Court shall not consider any testimony representing facts the knowledge of which the witness states to have obtained from the relation or information of third persons who can be produced to give evidence of such facts.
- The court may, either *ex officio* or upon the objection of any party, rule out or disallow any question tending to elicit any such testimony.
- The court may however require the witness to mention the person from whom he obtained knowledge of the facts to which such question refers



Exceptions when Hearsay Evidence may be allowed by the Court

- If it has a material bearing on the subject-matter in issue or forms part thereof
- The third party cannot be produced to give evidence and the facts cannot otherwise be fully proven

Dying Declarations

- It is lawful to produce a declaration made in writing in any place before a magistrate or other person, in the presence or in the absence of the parties, with or without oath, provided it is shown that such declaration was made deliberately and in such circumstances as lead to the belief that there was no intention to depart from the truth, and that the party who made such declaration would have been a competent witness if he could be called to give his evidence at the trial.

Perjury

- If it appears to the court that a witness is guilty of false testimony, it shall order that he be arrested and, shall send a copy of the acts to the Court of Magistrates so that they may take the necessary proceedings.
- In such case, it is lawful for the court, upon the oral demand of either of the parties, to stay the civil proceedings until the criminal proceedings against the witness have been terminated. This is only done if it does not prejudice the other party and if the testimony of this witness is likely to substantially effect the merits of the case.





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Judicial Assistants

- Judicial Assistants are appointed by the President of Malta from amongst persons who hold the warrant of advocate. Their functions include:
 - Assist in the judicial process and at the request of the court, to participate in the proceedings pending before a court, including any research or other work required therefor, and for the purpose of carrying out such duties and exercise such powers as they may be required or authorised to perform by the court
 - Administer oaths
 - Take testimony of any person that is produced as a witness in any proceedings
 - Take any affidavit on any matter, including a matter connected with any proceedings taken or intended to be taken before any court or any court or tribunal of civil jurisdiction established by law
 - Receive documents produced with any testimony, affidavit or declaration
 - Hold such sittings as may be directed by the court, to meet with the advocates and legal procurators of the parties for the purpose of planning the management of the lawsuit, and to issue deadlines for the submission of evidence, pleadings or other judicial acts by the parties

Judicial Assistants

- In the performance of their functions, judicial assistants shall be assigned to a court and shall act under the direction and control of the court before which the case is pending and shall, in addition to any power assigned to them by the court, have the power to order the attendance of any person for the purpose of giving evidence or to make an affidavit or a declaration, or to produce documents, at such place and time as they may specify in the order.



Referees

- The court may also direct and empower a referee to examine witnesses and administer oaths.
- Any witness examined by the referee may, by leave of court, be again produced before the court and it shall be lawful for the court to order the production of any such witness of its own motion.



Decisions by the Judicial Assistants

- Where in proceedings before a judicial assistant a question arises relating to or connected with the same proceedings, that question shall in the first place be decided by the judicial assistant who shall without delay and in any case not later than three days from the date of the said decision, inform the court of the decision, and the decision of the judicial assistant shall be binding unless the court shall by decree, decide otherwise.



Decisions by Judicial Assistants

- The answers given by the witness shall be taken down and the deposition is signed or marked by the witness and countersigned by the judicial assistant who shall transmit it to the Registrar.
- Questions on competency or relevance of a witness or on the admissibility or relevance of a question put to a witness – judicial assistant will decide and record his decision, saving the right of the aggrieved party, in the case of rejection of the witness or the question, to apply to the court.



Witnesses About to Leave Malta

- Where any person whose evidence is required in a cause which is pending, is about to leave Malta, or is so infirm or advanced in years that he might die or become unable to give his evidence before the time when such cause will come up for trial, or is unable to attend the trial, it shall be lawful for the court, to commit the examination of such person to a judicial assistant; and in any such case, the questions put to the witness, together with his answers thereto, shall be taken down in writing, and the deposition shall be signed or marked by the witness himself.
- In such cases, the judicial assistant will administer the oath.
- Such testimonies are signed by the judicial assistant, sealed by the Registrar and then filed in the record of the proceedings.



Witnesses About to Leave Malta

- Where the witness is required to give evidence before the inferior courts (CoM), the witness shall be examined by the Magistrate himself, and the Magistrate shall reduce the evidence to writing and cause it to be signed or marked by the witness.
- Where the Magistrate cannot attend to his duties, the registrar of the court may be authorised by the State Advocate to take the evidence of this period and administer the oath.

Evidence of Persons Residing Abroad

- It is lawful for the court to make an order declaring the testimony of such witness residing abroad as necessary and adjourn the case to a time within which such evidence is to be obtained.
- The evidence of such witness can be obtained in the following ways:
 - Letters of request
 - Bringing him to Malta to testify
 - Affidavit



Letters of Request

- A request for an examination of this type may be made by application (before the hearing of the cause) or orally (during the hearing)
- The party demanding the examination shall produce interrogatories reduced into writing (questions for the witness) and state the name and address of the person who is to represent him during the examination.
- The interrogatories must be accompanied by a translation in the language of the place where the witness is to be examined (confirmed on oath by the translator)



Letters of Request

- A copy of the interrogatories in writing shall be served on the opposite party or on his advocate.
- On the examination of the person residing abroad, the registrar, upon court decree, shall draw up a letter of request addressed to one of the judges or magistrates in the place in which the request is to be executed, or to any other person/s stated in the decree, requesting such judge, magistrate or other person/s to examine on oath the witness; a copy of the decree and the interrogatories shall be annexed to the letter of request which shall contain the name and description of the persons appointed by the parties as their agents.

Letters of Request

- The letter of request shall (together with accompanying documents) be transmitted by the registrar to the Minister responsible for justice, who shall forward it to the proper authorities with a request that it may be executed.
- The party demanding the examination shall solicit the authority or person requested to take the examination, to carry out such examination in accordance with the terms of the letter of request.



Letters of Request

- The questions shall be put to the witness according to the interrogatories transmitted with the letter of request
- The agent of the opposite party may put questions in cross-examination and these will also be transmitted using the same procedure.
- The examiner may put any other questions which, as a result of answers given, he may deem or the agent of the party demanding the examination may show to be necessary.



Letters of Request

- The agents of the contending parties duly informed by the authority or person requested to take the examination shall attend on the day and at the place appointed for the examination; and it shall be the duty of the agent of the party producing the evidence to bring with him the witness to be examined; the examination shall be reduced into writing, signed or marked by the witness and signed by the examiner



Affidavit

- The person residing abroad can present as evidence, an affidavit about facts within his knowledge, provided that this is made before an authority or other person who is by the law of that country, empowered to administer oaths, or before the consular officer of Malta in that country and, is duly authenticated.
- The affidavit is served on the opposite party and any party wishing to cross-examine this witness, shall apply to the court for the examination of such witness by letters of request not later than 20 days from the service of the affidavit and the provisions on letters of request shall apply.



Affidavit

- If no request is made for cross-examination, no cross-examination of the witness shall be allowed unless the court for a good reason directs otherwise
- With that said, if the parties agree and the court deems it proper so to act, the court may make such other provisions concerning the conduct of the cross-examination as may be appropriate according to the circumstances.



Evidence by Video Conferencing

- The court may allow for the audio-recording or for the video-recording of any evidence required from a witness residing abroad.
- The court may also allow the testimony of any witness (even if present in Malta) to be given by video conference or teleconference from such place as the court may order and subject to the conditions and directions as the court may deem necessary.



Documentary Evidence

- Distinction between authenticity and veracity of a document.
- A document is authentic if it is a faithful reproduction of the original. The authenticity of a document refers to the fact that it is a true copy (ties in with the best evidence rule).
- Veracity refers to the truth of a document's contents.
- Just because a document is authentic, does not mean its contents are truthful.



Documentary Evidence

- The following documents are admissible without the need to prove their authenticity and shall, until the contrary is proven, be evidence of their contents:
 - Acts of the Government of Malta, signed by the Minister or Head of Dept.
 - The registers of any department of the Government of Malta
 - All public acts signed by the competent authorities and contained in the Government Gazette
 - The acts of the Government of Malta, printed under the authority of the Government and duly published
 - The acts and registers of the courts of justice and ecclesiastical courts (of Malta)
 - The certificates issued from the Public Registry Office and the Land Registry
 - The sea protest made under the authority of the Court
 - Specific documents under the Merchant Shipping Act



Acts of Foreign Governments

- Acts of foreign governments or of a foreign government department or foreign courts of justice, or foreign establishment, are admissible as evidence without the need to prove their authenticity, and, until the contrary is proven, are evidence of their contents, provided that:
 - They are authenticated by the diplomatic or consular representative of the Government of Malta in the foreign country; or
 - By a person serving in a diplomatic, consular or other foreign service of any country which by arrangement with the Government of Malta, has undertaken to represent this Government's interests in that country; or
 - By any other competent authority in the foreign country;



Acts that Require Proof of Authenticity

- The following documents are admissible as evidence and shall, until the contrary is proven, be evidence of their contents, but their authenticity needs to be proven:
 - Acts and registers of any establishment, or public body, authorised or recognised by law or by the Government;
 - Parochial acts and registers relative to births, marriages and deaths, and the dispositions made according to law in the presence of a parish priest;
 - Acts and registers of notaries public in Malta;
 - Books of traders kept according to law
 - The books of public brokers kept according to law
 - Certain documents of the Merchant Shipping Act



Acts and Registers of Foreign Notaries

- These shall be admissible and until proven contrary are evidence of their content, provided that:
 - They are authenticated by the diplomatic or consular representative of the Government of Malta in the foreign country; or
 - By a person serving in a diplomatic, consular or other foreign service of any country which by arrangement with the Government of Malta, has undertaken to represent this Government's interests in that country; or
 - By any other competent authority in the foreign country;



Other Documents which are Admissible

- Any declaration made by a party against his interest, or any other writing containing any admission, agreement, or obligation is admissible as evidence.
- Any writing, whether printed or not, and any inscription, seal, banner, instrument or tool of any art or trade, tally or score, map, sign or mark, which may furnish information, explanation or ground of inference in respect of the facts of the suit, are admissible as evidence
- Any defective public act is admissible as evidence as a private writing between the parties.



Attesting to Signatures or Marks

- A person against whom any paper apparently signed by him is produced, is bound to declare positively whether the writing or signature is his own or not, and in default of such declaration, such writing or signature shall, until the contrary is proved, be deemed to be his own.
- Any signature or mark attested by an advocate, a notary or a legal procurator shall, unless the contrary is proved, be deemed to be genuine if in the attestation it is declared by the advocate or notary or legal procurator that such signature or mark was subscribed or set in his presence and, where the person cannot sign his name, in the presence of two witnesses whose signature appears on the act, and that he has personally ascertained the identity of the persons setting such signature or mark.



How is Handwriting/Signature Proven?

- By the person who wrote or signed the document acknowledging his own handwriting
- By means of witnesses who saw him write or sign the document
- By means of witnesses who are acquainted with his handwriting
- By the comparison of handwritings
- By means of experts in handwriting



Authentic Copies

- One can present authentic copies of the admissible documents and these are still considered admissible as evidence
- Copies are deemed to be authentic when they are made in the form prescribed by law, by the officer by whom the original was received or is preserved, or by the person lawfully authorised for the purpose.
- Authentic copies shall be evidence to the same extent as the originals.



Demand for the Production of Documents

- Either party can demand the production of documents which are in the possession of other persons –
 - If such documents are the property of the party demanding the production
 - If the documents belong in common to the party demanding their production and the party against whom the demand is made
 - If the party demanding the production, although not the owner or co-owner, shows he has an interest that such documents be produced by the other party to the suit
 - If the person possessing the documents (not being a party to the suit), does not declare on oath that there are special reasons not to produce them
 - If the documents are public acts, or acts intended to constitute evidence in the interest of the public in general



Demand for the Production of Documents

- It is up to the court to decide as to the interest of the party demanding the production, taking into consideration the nature of the case and the nature of the document being requested
- The demand for the production of documents shall state the nature of the documents and all the particulars which may be known to the party making the demand
- Where the demand is made by one party against the other, it shall be made in the same manner as a reference to the oath and where it is made against a third party, it shall be made by application or in the subpoena.



Demand for the Production of Evidence

- In all cases, the party demanding the production must prove that the document is in the possession of the person from whom production is demanded.
- The demand for the production of documents may be made at any stage of the proceedings, as long as evidence may still be produced.
- The court may still consider the contents of a document if the opposite party, notwithstanding the order of the court, refuses to produce such document.





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