Diploma in Law

Lecture 7: Judicial Procedure

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21 ACADEMY

Diploma in Law (Malta)

Introduction: The Law of Evidence

- The importance of evidence is that before a court of law, the mere assertion of a fact does not necessarily constitute truth in the eyes of the law
- Therefore, such evidence must be provided in support of the claim in order to illustrate the truth thereof
- The Maltese law of evidence subscribes to the **principle of reasonable freedom of proof**, according to which the court may admit and evaluate evidence freely without being unduly conditioned by legal requisites as to what kind of evidence is to be admitted and the probative weight it is given

Evidence vs. Proof

- It is common for the terms ‘evidence’ and ‘proof’ to be used interchangeably, but these two terms are definitely not the same in nature
- As defined by William Safire, evidence is ‘a means of determining whether an assertion is truthful or an allegation is a fact’
- On the other hand, Safire continues to say that proof is ‘the conclusion that experienced minds draw from a weighing of all the evidence’

- Similarly, Osborn's Concise Law Dictionary defines evidence and proof as 'all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the proof of which is submitted to judicial investigation'
- Hence it can be determined that something is not deemed to be proof unless the judge or magistrate accepts the said evidence as such.
- The role of the court, in this regard, is that of a moderator super partes, and should hence leave the initiative to the parties and not take an active, inquisitorial role in the proceedings

The Cardinal Rule of Evidence

- The first provisions relating to evidence, in the COCP, regard the fundamental rules of evidence, which are generally known as the cardinal rules.
- These rules define the nature and character of the civil process since they regulate the means by which the court must decide the issues of fact.
- There are three main cardinal rules of evidence, all of which are interrelated

Rule 1: Relevance

- Article 558 states that all evidence must be relevant to the matter in issue between the parties
- The implication of this is that all evidence that is relevant to the issue at hand is admissible as evidence before a court of law, while that that is irrelevant or superfluous to the issue shall be duly excluded (as seen in Article 560(1))
- The court may require the party tendering evidence to state the object of the evidence so that the court may assess whether the said evidence is relevant or not
- Where evidence tendered by any party is disallowed, the party has a right to insist that such refusal is done by means of a decree of the court, making it necessary for the court to give its reasons of refusal.
- Such decree may also be impugned by means of an appeal, before the definitive judgement is pronounced

- However, when only a question to a witness is disallowed, the party may only demand that a record thereof be made in the proceedings

- Therefore, at the very least, one should always ensure that any objection or disallowance of evidence be recorded in the proceedings

Rule 2: Best Evidence Rule

- Article 559 states that the court, in all cases, shall require the best evidence that the party may be able to produce.
- The implication of this is that the parties should not bring second-rate evidence if better quality evidence is, of course, available; and indeed, if there was better evidence available, then the court will strike out the said evidence produced
- Indeed, Article 560(1) states that the court shall disallow any evidence which it does not consider to be the best which the party can produce

- In practice, this rule is mainly of importance in connection with documentary evidence, i.e. if an original transcript is available, then a copy of such transcript will not suffice
- If the best evidence or primary evidence cannot be brought forward, then it is possible to bring forth secondary evidence
- Mamo describes this as “evidence which on the face of it suggests that other and better evidence exists”
- Secondary evidence is only admissible when the party tendering it has proved, to the satisfaction of the court, that primary evidence is not obtainable

Rule 3: Onus of Proof

- Article 562 states that the burden of proving a fact shall, in all cases, rest on the party alleging it, i.e. onus probandi incumbit ei qui dicit, non ei qui negat
- This is necessary for two main reasons:

  (a) The court can be faced with two credible facts or stories, and therefore the burden of proof combined with the moral conviction of the court is needed in this regard;

  (b) A judge cannot make any assumptions on facts if no evidence is duly presented

The Burden of Standard Proof Required

- The burden of proof, in civil proceedings, is one which satisfies a balance of probabilities coupled with the moral conviction of the Court/Judge
- This therefore means that there need not be proof beyond reasonable doubt, as in criminal proceedings, i.e. the balance of probabilities does not, on its own, create certainty, something which is nonetheless required
- Indeed, there can exist situations where both parties produce equally compelling versions and evidence
- In such case, the principle of actore non probabte reus absolvitur applies, i.e. the defendant must be discharged not only ab observantia judicii but also from the demand itself if the plaintiff, who brings the action and must overcome the burden of proof, fails to do so

- However, if the plaintiff makes a case against a defendant, and the latter does not challenge such allegations, the court would still be bound to analyse the case at hand with conviction, although the probability is that the plaintiff would prevail
- It is also acknowledged that the burden of proof can shift
- An example would be when the plaintiff brings compelling evidence, so it would be on the defendant to disprove such evidence accordingly
- The opposite scenario could also be true, i.e. if the defendant brings evidence to support his claim and rebut that of the plaintiff, then the burden of proof would shift once again
- The burden of proof is shifted in **the doctrine of contributory negligence**, because whereas the plaintiff must prove that the cause of damages was the conduct of the defendant, the defendant would have to prove that there was such contributory negligence so as to be exculpated at least in part

The Burden and Standard of Proof in Civil Actions for Damages Arising from Criminal Offences

- This is when the plaintiff claims civil damages as arising from a criminal offence
- Examples where actions such as these can be brought include:

1. Involuntary Homicides
2. Armed Robberies

- However, the main question that arises in such cases is whether the burden of proof should continue to be on the balance of probabilities – such as in a pure civil action – or whether this should now be beyond reasonable doubt
- The general consensus is that the former should be applied, because one cannot shift the burden of proof in a criminal action to a civil action, despite the 'criminal' element that is involved in such action

Zammit Tabona v. Saliba (Court of Appeal, 2009)

This case rested on identification in a civil action. The plaintiff had called in the defendant to do random jobs for him. An armed robbery subsequently took place within the plaintiff's house, where all the men involved were hooded. However, the plaintiff recognised the defendant from a set of words that he allegedly told him and the defendant repeated throughout the course of the robbery to those who were with him, as well as from the defendant's stature. On the basis of a balance of probabilities, the court found the defendant guilty.

- While the court, in the above case, ruled that the test of balance of probabilities is sufficient for obtaining damages, the Constitutional Court, in Saliba v. Attorney General et said that an ‘intermediate’ standard of proof should be applied
- Such standard of proof would lie somewhere in between that of the balance of probabilities and that of beyond reasonable doubt
- Such an ‘intermediate’ standard would therefore involve the adoption of a more rigorous criterion in this regard vis-à-vis the onus of proof
- However, the court actually stopped short of applying such an ‘intermediate’ standard of proof in the aforementioned case, and then, with a degree of finality, stated that the balance of probabilities is to be applied in all civil actions, without any exceptions whatsoever
- Something that is determinate in determining whether the balance of probabilities is indeed applied is the quality of the testimony produced, i.e. whether it seems to be reliable and authentic, or otherwise
- This, however, is very subjective in nature and therefore it ultimately lies at the discretion of the judge as to whether one should be found civilly liable or not

The Production of Forensic Evidence

- The word ‘forensic’ means ‘for the courts’, and forensic identification is the application of such forensics and technology to identify specific objects from the trace evidence they leave, often at a crime scene/scene of the accident
- While forensic evidence is obviously only one type of evidence, it can be argued – especially through case law of the European Court of Human Rights – that this is one of the most conclusive forms of evidence
- As seen in Shofman v. Russia, legal presumptions cannot override biological realities – and forensic evidence, such as DNA testing, gives rise to the proof of such a biological reality or otherwise
- Of course, forensic evidence is not only restricted to DNA testing, but also incorporates things such as fingerprints, writing etc

Zarb v. Zarb (First Hall Civil Court, 1992)

The plaintiff, in this case, found an empty notepad next to the telephone but since she had suspicions that her husband (defendant) was seeing another woman, she decided to investigate this notepad, of which she believed that the first page was missing. Using an ESDA (electronic image detection processor) microscope, it was determined that the defendant had written a love letter because the full text was duly lifted, along with the signature and fingerprints of the person who wrote the said letter. The court hence held that such forensic evidence was not an opinion but a finding of fact, with proof of this kind being able to prove adultery or an illicit relationship, in such a case.

Diploma in Law (Malta)

Introduction: Witnesses

- Witnesses constitute the most elementary form of evidence as they are those people who attest of having seen or witnessed a fact
- Therefore, evidence given by such people is a narration of events as seen by the person giving evidence
- The law does not really restrict who can or cannot be a witness, as long as such person is of sound mind, and unless there are objections against the person's competency as a witness (these are known as competent witnesses)
- Furthermore, any person of any age can be witness, so long as he understands that it is wrong to give false testimony and therefore, a contrario sensu, understands the obligation of telling the truth

- Witnesses may also be bound by law to give evidence, although this is subject to certain exceptions, such as confidentiality (these are known as compellable witnesses)
- While not all competent witnesses are compellable, all compellable witnesses are, of course, competent

Ex-Parte Expert and Non-Expert Witnesses

- This deals with witnesses that are produced by the parties to the case, and not those that are compelled by the court ex officio
- Such people must be duly distinguished from referees or ‘periti’
- While both ex-parte expert witnesses and referees cover similar areas, i.e. they both give evidence, the latter category of people are nominated by the court, are representatives of the court within their term, are bound by rules of procedure and bound to report to the court
- Article 563A(1) states that where a person is called as a witness, his opinion on any relevant matter to which he is qualified to give expert evidence shall be admissible as evidence only if, in the court’s opinion, he is suitably qualified.
- Where a person is called as a witness, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceive

Valle del Miele Ltd v. Aloisio et (Court of Appeal, 2009)

Two main principles emerge from this case, mainly based on the fact that the defendants were pleading that a report submitted by a certain John B. Zarb could not be admissible as evidence, especially because the report was made with respect to the liquidation of Price Club, and not with respect to the case at hand.

The first principle stated by the Court of Appeal is a correction of what was outlined by the First Hall. It rejected the report as presented by the witness because it said that a witness “bhala tali” (i.e. non-expert witness) cannot express an opinion.

The Court of Appeal said that it showed that the first court did not examine the report that it requested before its decree was pronounced. It went on to say that if a report is filed for a particular purpose, this does not mean that it cannot be used for different purpose, as long as this is relevant in the context. Furthermore, if a report is filed for a particular case, this does not mean that it cannot be used in another case. Pieces of evidence can be used in different contexts. Therefore, there cannot be any exclusionary rules of evidence, so long as the law itself does not prohibit the evidence in question.

- In the second instance, the court said that Article 563A stipulates that the opinion of a witness is admissible if such person has the requisite qualifications about the facts in question. Indeed, even the opinion of a witness who does not have the requisite qualifications is admissible, so long as this is made as a way of conveying relevant facts personally perceived by him. The First Hall was therefore wrong to reject the report due to the fact that it contained an opinion, despite the fact that the witness in question stated explicitly that he reported both facts and opinions within the said report. The First Hall had to duly examine the qualifications of the witness (Zarb) in question, and if it felt that the said witness was duly qualified, then admit his report both on the basis of fact and opinion – of course, only if such facts and opinions are relevant to the case.

- The Court of Appeal examined Zarb's report and saw that in the context of the 'brief' that he was given, he also examined the question of how Price Club was keeping its accounts. He examined in detail Price Club's accounting system and duly opined that it was not based on solid foundations. The Court of Appeal felt that Zarb's opinion could not have been deemed irrelevant or casted aside, especially in light of the explanation that he gave. The Court of Appeal therefore ruled that prima facie, Zarb's report contained facts and opinions that were relevant to the case, and therefore, the First Hall, after examining the qualifications of the witness in question, had to see how this report would be admissible as evidence, as per Articles 563A(1) and (2) of the COCP.

- Article 563A(3) states nonetheless, despite the appointment of ex-parte witnesses, the court may, ex officio, appoint an expert witness of its own (referee)
- It is pertinent to note that there need not be conflicting opinions between the experts as appointed by the parties for the court to appoint a referee
- However, having said this, when the court appoints a referee, it normally does not divert from the opinion of the said referee
- A person who is suitably qualified on account of his knowledge or experience is competent to give expert evidence as to the law of any foreign state, irrespective of whether he has acted or is entitled to act as an advocate, or in any judicial or legal capacity in that state
- Therefore, the law simply requires knowledge or experience for one to be suitably qualified to give expert evidence as regards to foreign law
- What usually happens is that an affidavit confirmed on oath is drawn up in that foreign state, and such affidavit is accompanied by a translation

Admissibility of Evidence of Certain Witnesses and Privileged Communication

- Admissibility must be distinguished from that of relevance, i.e. just because evidence is considered relevant, it does not mean that it is admissible in court
- The requirements for admissibility under Maltese Law are therefore relevance and the fact that such evidence must not be excluded by law
- An example of this is that hearsay evidence may be relevant but is duly excluded by law
- Article 565(1) states that any of the parties to a suit shall be competent to give evidence, either at his own request, or at the request of any of the other parties to the suit, or at the request of the court ex officio
- The husband or wife of a party to a suit shall be competent and compellable to give evidence in such suit at the request of the any of the parties, provided that:

(a) The husband may not be compelled to disclose any communication made to him by his wife during the marriage or vice-versa, for this is privileged communication; so long as this was not made in the presence of third parties;

(b) The husband or wife may not be compelled to answer any question tending to incriminate the other spouse

Other Privileged Communications

- Privileged communication involves professional communication, and this in turn gives rise to a class of witnesses that are deemed to be not compellable
- Two cases emerge from the COCP and seem to be absolute – that of communication with legal procurators or advocates, and communication with clergymen, in their professional capacity
- Such witnesses would be, of course, non-compellable, unless the client or confessor duly gives consent for such evidence to be used in court
- Unless by order of the court, no accountant, medical practitioner, social worker, psychologist or marriage counsellor may be questioned on circumstances as may have been stated by the client to the said person in professional confidence
  - It could also be argued that this provision also encapsulates the profession of the undertaker too

- Nonetheless, Azzopardi criticises the latter provision of the law, because the court almost invariably exempts such people from professional secrecy, especially in annulment or separation (or divorce) cases
- The implication of this is that if one requires medical attention, for example, the person in question might refrain from seeking medical help if the obligation of professional secrecy is waived
- This privilege also extends to interpreters who may have been employed in connection with confidential communications
- No objection to the competency of any witness shall be admitted on the ground that he is interested in the issue in regard to which his evidence is required, or in the event of the suit, saving any objection touching his credibility

Byrne, McFadden and Others v. United Kingdom

The Campbell and Fell case had referred to the fact that communications between a lawyer and his client were indeed privileged in nature. Therefore, the imposition of a prohibition on privileged lawyer/client communications when the latter is in prison could not be seen as compatible with Article 6(1) ECHR. It was considered that the refusal of the prison authorities to allow the applicants to have consultations with their solicitors, out of hearing of any prison officer, constituted an unjustified interference with the applicant's right of access to court, as protected by Article 6(1) ECHR. Therefore, the prevention of the applicants' confidential consultations with their solicitors was deemed to be in breach of the Convention.

The Summoning of Witnesses

- Witnesses shall be summoned to appear by means of a subpoena issued on the application of the party interest
- Such subpoena shall contain an order to appear at a stated place and time, for the purpose of giving evidence; this is known as a subpoena ad testificandum
- The witness is bound to appear on the date and time prescribed in the subpoena, provided that he is served with the said subpoena four days before the date of the hearing
- The court may, however, in urgent cases, reduce this timeframe and ask witnesses to appear from one day to the next
- The writ of subpoena shall be in the prescribed form, known as the ‘mandat ta’ ingunzjoni’ or ‘tahrika ta’ xhieda’
- It is pertinent to note that such writ may be given orally before the Court of Magistrates (Malta) and the Court of Magistrates (Gozo) in its inferior jurisdiction
- Before the superior courts, generally speaking, the production of a witness is not allowed unless his name has been submitted with the writ of summons or the statement of defence

- The writ in question may require the witness to produce any book, document or other thing which belongs to the contending parties or to any of them, or which is under the charge or custody of such witness, or which he is bound to produce
- Witnesses residing in Malta shall not be bound to attend to give evidence in Gozo, and vice-versa, unless the party requesting evidence shall confirm that the evidence is material to the subject-matter, and that he deposits an allowance due to the witness with the registrar of the courts
- If a witness fails to appear when called upon, he shall be guilty of contempt of court and shall be punished accordingly
- It shall also be lawful for the court to issue a warrant of arrest or escort so as to compel the witness to attend for the purpose of giving evidence
- The court can also remit the said punishment, upon good cause being shown to its satisfaction

The Examination of Witnesses Living Abroad

- This may be ordered by any of the superior courts upon them being satisfied that such testimony cannot be disposed of and is hence indispensible for the determination of the cause
- In such a case, a stay of proceedings may be ordered and a cause adjourned until a time when such evidence is to be obtained
- In such a case, letters of request (ittri rogatorjali) are generally filed, and here, questions are duly put forward to a witness in a foreign jurisdiction through the court
- The judicial authority in Malta transmits such questions to the Foreign Affairs office in Malta, which then passes on such questions to the Foreign Affairs office in the jurisdiction required, before this goes to the said court

- If the appointment of letters of request is made by the court of first instance but the case has continued to be heard and duly decided by the said court, and there is a case before appeal, and the records arrive after the said two and a half years before the appeal can be heard, the production of evidence is allowed at the appeal stage
- Therefore, the production of fresh evidence would come in here, and could therefore give rise to an opportunity for the defendant to insert fresh evidence which would give rise to the possibility of a rebuttal
- The adversary would here have a right to cross-examine on the evidence and also the possibility to bring evidence in rebuttal

- The second method of examining such witnesses is by bringing them to Malta to give evidence, but such evidence will be disregarded if such person were to leave Malta before cross-examination
- The final method is to give evidence by affidavit. Where the witness has made an affidavit about facts within his knowledge before an authority or other person who is, by the law of his country, where the witness resides, empowered to administer oaths, or before a consular officer of Malta, such affidavit duly authenticated may be produced before the Maltese courts
- Although this is not mentioned in the law, it is also possible for testimony to be accepted by means of Skype in this day and age, this as opposed to audio recording and video recording, which is mentioned in Article 622B

Pulizija v. Joseph Borg

The prosecution had requested the testimony of certain officers of the guardia finanzia in Italy. The Magistrates' Court ordered the prosecution to notify the accused's representatives of the date of the hearing in Italy, which was duly ignored. The witnesses were heard in Italy without the accused being present. The court of constitutional jurisdiction said that this was contrary to the court's own decree and a serious irregularity, and it would hence annul those proceedings and that the witnesses be heard in Italy a second time.

The Orality of Witnesses

- Witnesses are to be examined in open court at the trial, and viva voce
- The judge is hence free to form his own moral conviction regarding the credibility or otherwise of witnesses
- However, in this day and age, there have been exceptions that derogate from this, i.e. the hearing of witnesses through judicial assistants; and affidavits
- This has however been criticised because it has been argued that such procedures are reducing the contact of the court with the witnesses
- Nonetheless, the right to cross-examine a witness in open court has not been affected, as well as the right for the opposing party to produce its own witnesses
- Article 577(2), states that a witness may not be assisted or advised by any person, i.e. he should be 'put on the spot', but a witness may nonetheless be duly prepared for what he is going to be asked, how to reply etc

The Hearing of Witnesses by Supplementary Judges or Magistrates

- This is one of the main exceptions to the orality of proceedings because all questions put forth to the witness in question, as well as the answers given, are placed in writing
- Such a procedure may also take place in the First Hall Civil Court if a demand to this effect is made by the parties, or the court duly orders this to happen

This essentially can take place in five different circumstances:

(1) When the witness is about to leave Malta before the hearing of the suit, and hence cannot be present to be heard viva voce;

(2) When, for any other reason, the witness cannot attend the suit;

(3) When the witness is infirm or so advanced in age that he might pass away or be unable to give evidence at the time of the suit;

(4) When the court of first instance declares a witness as incompetent or inadmissible
and it is feared by the party forwarding a new witness that such new witness will not be able to give evidence at the second instance for any of the above reasons;

(5) When evidence by the Archbishop of Malta or Bishop of Gozo is tendered

Affidavits

- The providing of affidavits is seen in Article 160, which states that any party intending to produce a witness before the court may, together with the writ of summons or the statement of defence, file, in the registry of the court, an affidavit taken by such witness before a judicial assistant or anyone authorised by law
- A copy of such affidavit shall be served onto the other party, who, within seven days, may file a note reserving the right to cross-examine
- Written declarations can only be given in when the witness cannot be called to give evidence in court
- Such declaration must be made deliberately and under such circumstances so as to convince the judge that no attempt has been made to alter the truth
- Azzopardi has been very critical about this, because there is practically no means of guaranteeing that there has been some sort of fabrication in this regard, and indeed, such affidavits are often 'tampered' with by lawyers who draft them up, even though it should be the party producing it
- The author of the declaration must always satisfy the requirements of a competent witness

The Examination-in-Chief and the Cross-Examination

- The procedure relating to the examination of witnesses involves the examination- in-chief, cross-examination, re-examination and re-cross-examination
- The examination-in-chief is carried out by the party calling the witness
- Leading or suggestive questions may not, without special permission of the court, be put forward during the examination-in-chief
- The cross-examination, on the other hand, is carried out by the opposing party, with such party posing questions to a witness who would have just undergone the examination-in-chief
- Leading or suggestive questions may be put forward during the said cross-examination, for this entails the confrontation of a witness with facts which (try to) contradict what that witness had previously said
- During a cross-examination, a witness may only be questioned on the facts deposed in his examination, or on matters calculated to impeach his credibility
- A criticism, that is common belief, is that cross-examination should touch any point at issue, even if this has not been mentioned in the examination-in-chief, because if one is allowed to mention unrelated matters in order to impeach the credibility of the witness, then this should be allowed too
- The most important thing is that one should stick to the subject-matter of the lawsuit

- If the cross-examining party wishes to prove by the same witness a circumstance not connected with the facts deposed in the examination, he must produce such witness in due time and examine him as his own witness
- It shall be lawful for the court, upon the oral demand of such party, to order the witness not to leave the court in order that he may be again called and questioned
- However, this provision of the law is somewhat of a dead letter
- When both the examination-in-chief and the cross-examination are concluded, no further questions may be put by either of the parties, but it shall be lawful for the court, or the party with the court's permission, to ask such questions as arise out of the answers given in the examination-in-chief or cross-examination
- Furthermore, the court may put to the witness questions as it may deem necessary or expedient, meaning that the court is not bound by any of the aforementioned
  rules

Procedures that May Occur During Examination or Cross-Examination

- Witnesses may refresh their memories by referring to their own written notes or notes that the witness may have dictated
- Even notes pro memoria are admissible, but the nearer they are written to the date of the event, the better it is
- In such cases, the writing must be produced and may be seen by the opposite party
- A party producing a witness shall not be allowed to impeach the credit of the witness by evidence of bad character, but may contradict him by other evidence and may also show that he has made previous inconsistent statements
- This is allowed in both a civil and criminal context, but while it works well in civil proceedings, it is replete with problems in criminal proceedings

- In order to impeach the credit of a witness by evidence of a previous inconsistent statement, several requirements must be observed:

1. The alleged statements must be read to him;
2. He must be asked whether he made such statements, and having answered, that this was the case in the presence of people on a date and at a certain place;
3. He must be allowed to explain the said statements

- If the said statements are in writing, they must be shown to the witness before any questions concerning such statements are put forth accordingly

- On the other hand, a witness may be impeached by the party against whom he is called by contradictory evidence, or by evidence that his general reputation is bad

Obligations of the Witness During Examination and Cross-Examination

- Article 587 states that the witness shall answer any question that the court may allow 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
- A witness, however, cannot be compelled to answer any question which may subject him to a criminal prosecution, if he answers accordingly
- The habeas corpus right of that to remain silent, as well as the privilege against self-incrimination, emerges from this principle of the law
- The latter category involves the taking of fingerprints, DNA samples etc
- While the above is a principle of criminal law, it applies in both civil and criminal cases

- **Vella et v. Gatt (First Hall Civil Court, 2002)** – In a civil dispute between the plaintiff's family and the defendant, the plaintiffs managed to obtain a warrant of prohibitory injunction against the defendant so as to prevent the said defendant from continuing construction works on a neighbouring tenement. At first the defendant obeyed the order but eventually, water started to flood the said premises when the winter months came about. The defendants therefore proceeded with the construction works. The plaintiffs requested the court to issue contempt of court proceedings, which the court duly did. The defendant subsequently requested the court to allow him the right of not presenting a detailed sworn reply, for contempt of court proceedings were of a penal nature and hence he had the right to remain silent. The court duly acceded to the said request.

- A witness cannot be compelled to disclose information derived from, or relating to, any document belonging to or in possession of any civil, military, naval or air force department of the public service, and which is an exempt document
- It is however at the discretion of the court to determine when a witness is not bound to answer a particular question on the ground that the answer might tend to expose the witness' degradation, or when a witness will not be compelled to give evidence as it may go against the notion of public interest
- The court may determine this either by means of a request issued by the witness to the said court, or else ex officio
- Finally, the examination or cross-examination of witnesses cannot be interrupted, unless without leave of court
- Sometimes, however, the examination-in-chief or cross-examination taking place has to be suspended, and so the words 'despozizzjoni sospiza' (for the former) or 'kontro-ezami sospiz' (for the latter) are written here

Notes of Evidence

- The substance of the answers given by witnesses must be noted down, and every answer having a material bearing on the facts of the case shall be taken down word for word, provided that in the inferior courts, the notes of evidence of the witnesses may be taken down in brief
- Such notes shall be read over to the witness and, after being signed by the registrar, filed in original in the record of the cause
- Contrarily, this does not happen in criminal proceedings
- If amendments have to be done to the notes of evidence, these are done by means of postils in the margin, or at the foot of the notes, with these amendments being duly countersigned by the registrar
- The notes cancelled should remain distinctly legible
- The date of the correction, as well as the writing down of the words ‘korrezzjoni awtorizzata’

Techniques Used in Cross-Examination

- When one cross-examines a witness, if one is faced by a ‘no’ answer, one must always ask other questions before coming back to that question which elicited such a ‘no’ answer
- Speed is also very important in this regard so as to try and catch witnesses out in their answers
- When one has reached a point which cannot be considered as ‘established’, one must continue asking question so as to reach such an objective accordingly
- Following the attainment of the objective, one should not ask further questions and just stop, in case one obtains a damning, negative and prejudicial answer

Linking Cross-Examination with Other Tools

- One of the tools available to the lawyer that can be linked with cross-examination is that of a verbal, i.e. a minute in the records of the case
- Here, one must indicate how the verbal is formulated, such as in the case an important question is duly disallowed by the courts
- It is important in such a case for such a question to be registered for future reference, as otherwise there will be no records of the refusal in the court registry
- The verbal constitutes a formal request that a question be put to a witness, and therefore, once a lawyer has made such a verbal, the court should rule whether the question is admissible or otherwise
- If a question is disallowed, however, the court should always register this accordingly, as otherwise this will merely remain an allegation by the lawyer that the said question was not admitted by the court
- The verbal can also the form of a request, and the lawyer has the right to indicate the reasons why such a question or request is being posed or asked for

The Confrontation of Witnesses

- This is a tool that can be used in both civil and criminal cases, although invariably, it is more popular in trials by jury
- Article 592(1) states that witnesses are to be examined separately, although the court may allow two or more witnesses to be confronted with each other
- In such case, each of the witnesses may be questioned in the presence of the other witnesses
- Normally, confrontation is requested when one has a witness testifying to a particular state of affairs, while another witness relates a different state of events which is in conflict with that stated by the first witness
- During confrontation, the judge orders that the first witness is called into the court room, and the second witness is then duly instructed to repeat his version in the presence of the first witness
- At such a point in time, the judge will be in a position to determine which of the witnesses is saying the truth

- However, this system is not without criticism, because it could be completely possible for either witness to lie comprehensively; what, however, is critical in this regard is the experience of the judge in determining the matter at hand
- Both the lawyers and the judge can propose such confrontation of witnesses
- On the other hand, referees shall be examined in the presence of each other, unless the court deems it expedient to examine each referee separately

The Examination of Deaf and Dumb Witnesses

- If a witness is deaf and dumb but is able to write, questions shall be put to him in writing, and the questions and answers shall be publicly read out by the registrar and afterwards placed in the records of the case
- If a witness is deaf and dumb and unable to write, the court will duly appoint an interpreter that will understand him
- If a witness is dumb but not deaf, or vice versa, the court would conduct his examination in such a manner as may appear to it most conducive to ascertain the true testimony of the witness

False Testimonies

- Where false testimonies are given, the law, in Article 601, states that such witness must be arrested and a copy of the acts will be transmitted to the Court of Magistrates so that actual can be taken according to law
- However, this is not the procedure that is followed by the courts today, because what normally happens is that the court makes a decree or order, directing the Commissioner of Police to investigate accordingly to take action
- When this happens, the court may stay proceedings until the criminal proceedings against the witness have terminated, as long as this is not done to the prejudice of the other party, and provided that the testimony impeached would be likely to bear substantially on the merits of the cause

General Provisions

- No witness may leave the court unless duly dismissed by the court
- The court may, either of its own motion or upon the demand of the parties, prevent any witnesses who have been examined from holding any communication whatsoever with any other witness who is about to be examined

Hearsay Evidence

- Hearsay evidence can be described as a situation in which the person did not witness the facts directly but received information from third parties
- The rules in this regard are an extension of the best evidence rule
- The reasoning behind the general disallowance of hearsay evidence is that if the third party in question is available, then in terms of the best evidence rule, the third party himself should give evidence
- Hearsay evidence is therefore a form of secondary evidence
- Indeed, the court may, either ex officio or upon the objection of another party, rule out or disallow any question tending to elicit any such testimony
- Nevertheless, the court may require the witness to mention the person from whom he obtained knowledge of the facts to which any such question refers

- The principal factors vitiating hearsay statements have been indicated by doctrine:

- (1) The declarant, i.e. the person reporting the statement, might have wrongly perceived the event in question;

- (2) The declarant's memory may have been faulty or inaccurate upon making the said statement, or indeed he may have lied or distorted the event;

- (3) The declarant's statement may have been misunderstood by the witness now reporting it

- Nonetheless, the court may, according to circumstances, allow and take into consideration any testimony on the relation of third persons, where such relation itself has a material bearing on the subject-matter in issue or forms part thereof, or where such third persons cannot be produced to give evidence and the facts as such cannot otherwise be proved
- Therefore, the law, while prohibiting the production of hearsay evidence, does allow such a margin of admissibility, but only as per the situations as found under Article 599
- The list as found under this article seems to be exhaustive in nature, and includes situations such as births, marriages, deaths, absence and possession (of property)

Dying Declarations

- On the other hand, dying declarations, as well as any declaration made in writing in any place before a magistrate or any other person, whether in the presence of the parties, or with or without oath, are admissible as evidence

- However, it must be shown that:

(1) Such declaration was made deliberately and in such circumstances as lead to the belief that there was no intention to depart from the truth;

(2) The party who made such declaration would have been a competent witness if he could be called to give his evidence at the trial

Documentary Evidence

- In dealing with documentary evidence, a distinction must be made between the authenticity and veracity of a document
- A document is authentic if it is a faithful reproduction of the original, and hence is a true copy and does not refer to the veracity or otherwise of its contents
- The veracity of a document, on the other hand, refers to the truth of a document's contents
- Just because a document is authentic, it does not mean that its contents are truthful
- The law establishes that there is no general exclusionary rule as regards documents admissible as evidence
- However, unless the authenticity and veracity of a document has been confirmed on oath, it is not considered to have been exhibited and is therefore inadmissible as evidence

The Exceptions to the Rule of Confirmation on Oath

- Article 627 gives an exhaustive list vis-à-vis the documents that are admissible as evidence without the necessity of any proof of their authenticity, other than that which appears on the face of them, until the contrary is proved, which include:
- (a) Acts of the Government of Malta, as signed by the Minister or head of department from which they emanate;
- (b) Public acts signed by the competent authorities, and contained in the Government Gazette;
- (c) The acts and registers of the Maltese Courts of Justice and Ecclesiastical Courts;
- (d) Certificates from the Public Registry Office and the Land Registry

- Acts of foreign governments, departments of foreign governments, foreign courts of justice, or any foreign establishments, as authenticated by the diplomatic or consular representative of the Government of Malta in the country from which they emanate, as also admissible as evidence without needing to confirm on oath
- This process of authentication is known as legalisation
- Article 629 gives a list of acts requiring proof of authenticity, but once this is done, these are deemed to be evidence of their contents, i.e. their contents are presumed to be correct and true, until the contrary is proved, which include:
- (a) Acts or registers of any establishment, or public body, authorised or recognised by law or by the Government;
- (b) The acts and registers of notaries public in Malta;
- (c) Books of traders kept according to law, only with regard to any agreement or other transaction of a commercial nature

- The acts and registers of notaries public of other countries, authenticated in the manner relating to acts of foreign governments etc, are also admissible as evidence of their contents in the same manner as the acts mentioned in Article 627
- Authentic copies of such documents are admissible as evidence, and such 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
- Such copies are evidence to the same extent as the originals

Other Forms of Evidence

- These are the forms of documentary evidence that must be confirmed on oath
- A declaration made by a party against his interest, or any other writing containing an admission, agreement, or obligation is admissible as evidence
  o The law also extends the notion of admissibility as evidence to things such as inscriptions, banners, seals, instruments etc
- Any act which has some kind of formality missing and therefore is not a public act because it falls short of the requisites in question may nonetheless be admissible as evidence as a private writing between the parties
- This is only the case, however, if the parties have signed or marked the same, or if it is proved that the act has been drawn up or signed by some other person acting on their instructions

Writing, Signatures and their Proof

- A person, against whom any paper is apparently signed by him is produced, must declare positively whether the writing or signature is his own or not; and in default of such declaration, such writing or signature will be deemed t be his own until the contrary is proved
- There is therefore a shifting of the burden of proof if the person cannot prove that the document is not in his own handwriting
- Any signature or mark attested by an advocate, a notary or legal procurator shall, unless the contrary is proved, be deemed to be genuine if, in the attestation, it is duly declared that such signature or mark was subscribed or set in his presence

- Other than that, the COCP, in Article 635, gives various modes of proving handwriting:

- (1) By the person who wrote or signed the document acknowledging his own handwriting;

- (2) By means of witnesses who actually saw the person write or sign the document;

- (3) By means of witnesses who are acquainted with the person's handwriting, even though they did not see him write or sign the document;

- (4) By the comparison of handwritings, or by other circumstances or presumptions;

- (5) By means of expert calligraphers, in cases where the writing is hard to verify

The Demand for the Production of Documents

- This is also known as the *actio ad exhibendum*, and can be described as an action which obliges a person who is in possession of a document to produce such document
- This action is limited to documents in which the party bringing the action has an interest, i.e. relevance of the documents is required at all times
- Indeed, the court can decide as to interest of the party demanding the protection, regard being had to the nature of the cause and to the nature of the document, the production of which is demanded
- The court also has the power to order an extract of the full document to be produced, such as when a document contains sensitive commercial information or is, for instance, unica charta wills
- Exempt or privileged documents, however, cannot be produced in court

- Documents become exempt only if they are contrary to public interest, and indeed, in such case, the Prime Minister must sign a certificate in order to make the document in question exempt, and as a consequence, the court shall have no jurisdiction to enquire about such document
- Examples include such documents contrary to public interest, Cabinet documents, etc
- Where the demand for the production of documents is made by contending party against another, it shall be made in the same manner as the demand for a reference to the oath of the opposite party (subizzjoni)
- Where the demand for the production of documents is made against third parties, it shall be made by application or in the subpoena to give evidence as a witness

The Time When the Documentary Evidence has to be Produced

- Articles 156(2) and 158(4) COCP state that all necessary documents in support of the pleas are to be filed together with the writ of summons or the statement of defence

- However, the demand for the production of evidence by the opposite party or a third party may take place at any stage of the proceedings, so long as evidence may still be adduced

- The general rule, however, is subject to a few exceptions:
- (a) When the document could not be obtained before the filing of written pleadings, and the filing of such pleadings could not be delayed without prejudice;
- (b) When it is shown to the satisfaction of the court that it is necessary or useful to keep an eye on the document in question;
- (c) Where the other party consents to the filing of the documents at a later stage;
- (d) Where the party wanting to produce the documents was not aware or could not produce the documents in time, provided that there is a legitimate reason, and provided that this can be proven by the oath of the party

21 ACADEMY

Diploma in Law (Malta)