Taking of evidence - Ireland

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1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The burden of proving that a particular claim generally rests on the party who makes the assertion or claim in question. For example, in a negligence action, the onus of proving negligence rests on the plaintiff and the burden of proving contributory negligence rests on the defendant. Generally, proof of the facts necessary to establish a cause of action will rest on the plaintiff

whilst proof of a defence to the action will lie on the defendant and if the defendant makes a counterclaim, then the defendant will bear the burden of proof in respect of that claim. However, certain statutory requirement sometimes put the onus of proof on a defendant. For example, in unfair dismissal claims, the burden of proof falls on the defendant employer i.e. the employer must show that there were substantial grounds justifying the dismissal. [See the **Unfair Dismissals Act 1977** as amended].

1.2 Are there rules which exempt certain facts from the burden of proof? In which cases? Is it possible to produce evidence in order to prove that a specific legal presumption is not valid?

It is not necessary to prove facts which are admitted. Judges may rely on their general knowledge or take judicial notice of facts which are clearly established or well known or part of common knowledge, and therefore evidence of such facts is unnecessary. The law makes certain presumptions which may be rebutted by evidence. These include presumptions as to the legitimacy of children, the validity of marriages, the mental capacity of adults and the presumption of death where a person has not been seen or heard from in over 7 years despite all appropriate enquiries having been made. The rule of *res ipsa loquitur* applies where a presumption of negligence is made in circumstances where the cause of the accident is shown to have been under the control of the defendant or his servants or agents at the time of the accident and the accident was such that in the ordinary course of events would not have happened if those in control had used proper care. When the maxim of *res ipsa loquitur* is invoked, it shifts or moves the burden of proof onto the defendant and he or she must then show that he or she was not negligent. However, the burden of proving causation still rests with the plaintiff. Of note is the fact that the doctrine *res ipsa loquitur* does not have to be pleaded or set out in the plaintiff's claim in order for a plaintiff to be able to rely on it at the hearing of the case if the facts show that the doctrine is clearly applicable.

1.3 To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?

In a civil case, a party will succeed on an issue if he or she satisfies the court in relation to that issue on the balance of probabilities. Thus, if a party fails to satisfy the court that his or her version of events is more probable than his or her opponent's version, then he or she will lose the case. It is a flexible standard and the courts will generally require more proof in certain cases, such as cases involving a claim of fraud, because of the seriousness of the allegation.

2 The taking of evidence

2.1 Does the taking of evidence always require the application by a party, or can the judge in certain cases also take evidence on his/her own initiative?

Evidence is obtained in civil proceedings through discovery of documents, disclosure and through the testimony of witnesses.

Discovery: In High Court actions, discovery is obtained by application by one party to the other in writing requesting that discovery be made voluntarily. The court will only order discovery where the other party has failed or refused to make the discovery voluntarily or has ignored the request for discovery. [See Rules of the Superior Courts, Ord. 31, r. 12 as amended]. Any discovery sought must be relevant and necessary to the facts in issue in the action. It is also possible to seek discovery of documents from a non-party to the action.

Disclosure: Any party to a personal injuries action must disclose to the other party, without the necessity for any court application, any medical reports prepared by experts who will be called as witnesses to give evidence at the trial. [See Rules of the Superior Courts, Ord. 39, r. 46 as amended]. Both parties must also exchange lists of the names and addresses of all witnesses intended to be called and the plaintiff must furnish a full statement of all items of special damages or out of pocket expenses associated with the loss or injury the subject matter of the claim.

Witnesses of Fact: Parties do not need the permission of the court to adduce witness evidence in support of their cases, with the exception of proceedings in the Commercial List of the High Court, where a party who wishes to rely on the evidence of a witness must serve a witness statement signed by the witness setting out the witness's evidence and must call the witness to give oral evidence at the trial. If a party fails to provide a witness statement before the trial in the High Court Commercial List, that party may not call the witness without the permission of the court. The court also has wide powers to control the evidence which is admitted and may exclude evidence which would otherwise be admissible or limit the cross-examination of a witness. In certain circumstances, a party may also apply for a court order to allow a witness's evidence to be given in a sworn deposition taken by a court-appointed examiner prior to the hearing of the action. In general, the judge's function is to hear all of the evidence adduced by the parties and not to engage in a fact-finding mission. Generally, a judge has no right to call a witness without the consent of the parties, although he or she may do so in cases of civil contempt or in certain child care proceedings. A judge also has the power to recall a witness previously called by a party.

Expert Witnesses: Parties do not generally need the permission of the court to adduce expert evidence in support of their cases. Where expert evidence is to be adduced the parties should exchange any expert reports in advance of the trial. In proceedings in the Commercial List of the High Court, a judge may, as part of the pre-trial procedure, direct any expert witnesses to consult with

each other for the purposes of identifying the issues in respect of which they intend to give evidence, reaching agreement on the evidence that they intend to give in respect of those issues and considering any matter which the judge may direct them to consider. Such expert witnesses may be directed by the court to prepare a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, which will contain the outcome of their meetings and consultations. Any such outcome of expert witness consultations shall not be binding on the parties. [See Rules of the Superior Courts, Ord. 63A, r. 6(1)(ix)].

The court may, of its own motion, appoint an expert as an assessor to assist the court in relation to the issue to be tried. The court may direct the assessor to prepare a report, copies of which are provided to the parties, and to attend the trial to advise or assist the court.

2.2 If the application by a party concerning the taking of evidence is approved, what steps follow?

Discovery: An order for discovery will only be made by a court where the party from whom discovery is sought has failed, refused or neglected to make the discovery sought on a voluntary basis. Therefore, if the court orders discovery, the party who sought the discovery will usually be awarded the costs of having made the application. If a party to an action is ordered to make discovery of certain documents in their power or possession, they must make copies of those documents available to the other side. An order for discovery is complied with by the swearing of an affidavit of discovery setting out the relevant documents by way of exhibits to the affidavit. Failure to comply with an order for discovery may lead to the action being dismissed or the defence being struck out so as to ensure that parties to litigation comply with orders for discovery.

Witnesses of fact: Parties do not need the permission of the court to adduce witness evidence in support of their cases. In circumstances where the court orders that a witness's evidence is to be taken in a deposition, the witness will give evidence orally before a court-appointed examiner. The examination will be conducted as if it were a trial, with a full opportunity to cross-examine the witness and with a transcript of the evidence being produced.

Expert Witnesses: Parties do not generally need the permission of the court to adduce expert evidence in support of their cases. Experts may prepare written reports where they set out their findings and give their impartial, expert opinion. Where expert reports are prepared they should be exchanged in advance of the trial. The expert's overriding duty is to the court and not to either of the parties to the proceedings, although the expert will be paid by the party instructing him or her.

2.3 In which cases can the court reject an application by a party to obtain evidence?

The court may reject an application of a party seeking to obtain or adduce certain evidence if the court is of the view that that evidence is irrelevant, unnecessary or inadmissible. According to the "best evidence rule", the best and most direct evidence of a fact must be adduced or if the best evidence is not available, its absence must be accounted for. For example, the best evidence as to the contents of a particular letter is the production of the letter itself, rather than the giving of oral evidence as to its contents. In general, all evidence relevant to any of the facts in issue is admissible. However, certain evidence is inadmissible such as privileged communication (for example evidence of confidential communication between a client and solicitor). Therefore, the admissibility of evidence will be decided in each case by the judge.

2.4 What different means of proof are there?

Facts may be proved by evidence, by presumptions and inferences which arise from evidence, and by the court taking judicial notice of certain known facts. The types of evidence which may be relied upon in civil proceedings are witness testimony, documents and real evidence. Documents can include paper documents, computer records, photographs, and video and sound recordings.

2.5 What are the methods of obtaining evidence from witnesses and do these differ from the means employed to obtain evidence from expert witnesses? What are the rules in relation to the submission of written evidence and expert reports/opinions?

In principle, witnesses of fact give their evidence orally at trial where they are asked to confirm the truth and accuracy of their statements.

Expert witnesses give their evidence in written reports unless the court orders otherwise. An expert report must set out its conclusions, the facts and assumptions upon which it is based, and the substance of the expert's instructions. The court will decide whether it is also necessary for an expert to attend trial to give oral evidence.

2.6 Are certain methods of proof stronger than others?

The court has a wide discretion as to the weight or credibility which should be attached to any piece of evidence. For example, hearsay evidence, while it may be admissible in civil proceedings, will often carry less weight than direct testimony, particularly if the maker of the statement could have been called himself or herself to give evidence.

Certain documents and records are accepted as authentic. For example, the records of businesses and public authorities are accepted as authentic if certified as such by an officer of the business or public authority and various types of official documents (such as legislation, by-laws, orders, treaties and court records) may be proved by printed or certified copies without any further proof.

2.7 In order to prove certain facts, are certain methods of proof obligatory?

Certain transactions must be effected in writing and documentary evidence is therefore required for proof of such transactions. Examples include contracts for the sale of land.

2.8 Are witnesses obliged by law to testify?

As a general rule, if a witness is competent he or she can be compelled to attend court and give evidence. A party who wishes to secure the attendance of a witness at trial prepares a witness summons requiring the witness to attend the court to give evidence. Once issued by the court and properly served, the summons binds the witness to attend the hearing. A person who disobeys a witness summons is guilty of contempt of court.

2.9 In which cases can they refuse to give evidence?

The general rule that competent witnesses may be compelled to testify does not apply to foreign sovereigns and their households, foreign diplomatic agents and consular officials, representatives of certain international organisations and judges and jurors, in relation to their activities in those capacities. Spouses and relatives of the parties may be compelled to give evidence in civil proceedings. A witness is obliged to answer a question except in circumstances where they would lose the privilege against self-incrimination. In other words, a witness is obliged to answer a question unless he or she can establish that there are reasonable grounds to fear that the answer will tend to incriminate him or her.

Witnesses who may generally be required to give evidence are nevertheless entitled to withhold certain documents from inspection and refuse to answer certain questions on the grounds of privilege. The main types of privilege are legal professional privilege, “without prejudice” communication, and, as mentioned above, the privilege against self-incrimination.

Evidence may also be withheld on the grounds of public interest immunity if its production would be contrary to the public interest. The evidence which may be covered by the immunity includes evidence relating to national security, diplomatic relations, the workings of central government, the welfare of children, the investigation of crime and protection of informants. In addition, journalists are not required to disclose their sources unless disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

2.10 Can a person who refuses to testify be sanctioned or forced to give evidence?

A witness who refuses to testify, having been served with a witness summons, may be committed to prison for contempt of court until such time as she or he purges his or her contempt, or may be required to pay a fine. A failure to comply with a witness summons is in effect a failure to comply with a court order and so any refusal to testify may be a contempt of court.

2.11 Are there persons from whom evidence cannot be obtained?

Adults are not competent to give evidence in civil proceedings if they are incapable of understanding the oath or incapable of giving rational testimony. A child witness may not be competent to give evidence if he or she does not understand the duty to speak the truth or have sufficient understanding to justify his or her evidence being heard and it is up to the particular trial judge to decide this issue.

2.12 What is the role of the judge and the parties in the hearing of a witness? Under what conditions can a witness be heard via videoconferencing or other technical means?

Witnesses initially give their evidence-in-chief and are then cross-examined by the opposing barrister. During cross-examination, leading questions may be put to the witness. Sometimes, the witness is again re-examined by the side that called them initially after cross-examination has ceased. The judge may also ask question of the witness, for example to receive clarification on certain matters.

Provision has been made to allow witnesses to give evidence by live television link in certain cases. In proceedings concerning the welfare of a child or a person with a mental disability, the court may hear evidence from a child though a live television link and questions to the child may be put through an intermediary. Live television link evidence may also be received where the witness in question lives outside the jurisdiction of Ireland.

3 The evaluation of the evidence

3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?

Illegally obtained evidence is not necessarily inadmissible. It is admissible if it is relevant but the trial judge has discretion to exclude it. If it appears to the trial judge that public policy requires the evidence to be excluded, then even if it is relevant to the facts in issue, the evidence will not be admitted.

3.2 As a party to the case, will my own statement count as evidence?

Witness statements given by the parties to the proceedings are admissible in evidence to the same extent as statements given by non-parties.

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