

## 1 The burden of proof

### 1.1 What are the rules concerning the burden of proof?

The burden of proof is on the person making an allegation, as is clear from section 562 of the Code of Organisation and Civil Procedure: “the burden of proving a fact shall, in all cases, rest on the party alleging it”.

### 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?

Yes, these rules exist and are found in section 627 *et seq.* of the Code of Organisation and Civil Procedure. Section 627 mentions documents requiring no proof of authenticity other than that which they bear on the face of them, including:

the acts of the Government of Malta, signed by the Minister or by the head of the department from which they emanate, or in his absence, by the deputy, assistant, or other officer next in rank, authorised to sign such acts;

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 of the ecclesiastical courts, in Malta;

the certificates issued from the Public Registry Office and the Land Registry;

the sea-protest made under the authority of the Civil Court, First Hall;

other documents mentioned in the Merchant Shipping Act (including registration certificates signed by the registrar or other authorised official and any other thing written down on the registration certificate which appears signed by the registrar or other authorised official)

There are other documents that can be produced and their content is exempt from the burden of proof, however their authenticity must be proved and these include:

the acts and registers of any establishment, or public body, authorised or recognized by law or by the Government;

the parochial acts and registers relative to births, marriages and deaths, and the dispositions made according to law in the presence of a parish priest;

the acts and registers of notaries public in Malta;

the books of traders kept according to law, only with regard to any agreement or other transaction of a commercial nature;

the books of public brokers kept according to law, with regard to anything which may have taken place between contracting parties in commercial matters.

Evidence may be produced that runs counter to the contents of these types of documents.

Apart from these documents, there is another presumption regulated by Cap 16 of the Laws of Malta, the Civil Code, namely that a child born in wedlock is the issue of the wife's husband. This legal presumption may be proven to be no longer valid by means of a sworn application in the Civil Court (Family Section) and the production of evidence that such a presumption is not valid.

### 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 order to pass sentence in civil cases, a court must be satisfied that sufficient proof on a balance of probabilities has been produced.

## 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?

Every party in a court case, whatever his interest might be, may testify, either at his/her own request, at the request of another party in the case, or when summoned to do so *ex officio* by the court. When proceedings commence by means of a sworn application, a list of witnesses must be drawn up. The same applies to the sworn reply – it must include this list of witnesses. If a party needs to produce a witness who has not been so indicated, the relevant application must be filed.

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

Once an application for the taking of evidence has been accepted, the witnesses are summoned to appear by means of a subpoena issued after an application by the party wishing to produce them. Requests for the issue of this subpoena in the Court of Magistrates (Malta) and in the Courts of Magistrates (Gozo) in its inferior jurisdiction may be made verbally.

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

A court may reject an application by a party to obtain evidence when the person summoned is a lawyer, a legal procurator or a priest. Moreover, as a rule, no person present during a sitting can be produced as a witness in the same case. However, it is left to the court's discretion to dispense with this rule in particular cases if there are good reasons for doing so. There are also special laws which regulate official secrecy and do not permit the disclosure of secret and confidential information. Furthermore, the claim may be dismissed if the court believes that the witness is not relevant.

### 2.4 What different means of proof are there?

There are three means of proof that can be produced and these are: documents, *viva voce* and affidavits.

### 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?

The general rule is that the examination of witnesses in the hearing of cases is made in open court and *viva voce*. However, the law provides for other methods of taking of evidence that can be used:

Evidence may be produced by affidavit both for witnesses resident in Malta and those resident abroad.

In the case of a person who is going to leave Malta or is ill or elderly, or who is likely to die or become incapacitated before the hearing of the case, or cannot appear in a sitting, the court may engage a judicial assistant to hear that person. In that case, the questions directed at the witness, together with his answers, shall be put in writing, and the witness shall sign the evidence or put the mark of a cross instead of the signature.

The court may also nominate a Supplementary Judge to hear a particular witness in the case of witnesses who cannot leave their house because of their age.

If a witness resides abroad, a lawyer, by means of application, may request a hearing through letters of request (rogatory request) – the party requesting the hearing of this witness shall produce written questions, and submit the name and address of the person who shall appear on his behalf during the hearing of the witness;

If the court considers it appropriate, it may permit a tape or video recording to be made of the evidence required from the witness;

The court may engage legal referees giving them the power to hear witnesses and administer oaths.

When a legal referee is engaged to take evidence, he has the same means that courts have at their disposal.

#### **2.6 Are certain methods of proof stronger than others?**

All means of proof are considered of to be equal importance.

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

No, but the best proof must always be produced.

#### **2.8 Are witnesses obliged by law to testify?**

Yes, the law obliges all summoned witnesses to testify. However, a witness cannot be compelled to answer questions that may result in him being the subject of criminal prosecution.

#### **2.9 In which cases can they refuse to give evidence?**

The husband or wife of any party in a court case are competent witnesses and may be compelled to testify in a case at the request of any of the parties.

However, the husband cannot be compelled to reveal anything that his wife may have told him in confidence during their marriage, and vice versa, nor can one spouse be compelled to answer questions which may result in the other spouse being the subject of criminal prosecution.

Other exempt facts include those entrusted to lawyers, legal procurators or priests. However, if a lawyer or a legal procurator obtains his client's consent, or the priest obtains the consent of the person who confessed, they may be questioned about matters that came to their knowledge (subject to consent); the lawyer and the legal procurator regarding what has been entrusted to them by the client for the purposes of the case, and the priest for those facts he becomes aware of under the seal of the confessional or through a confession.

Except by court order, accountants, doctors, social workers, psychologists and marriage counsellors cannot be asked to reveal information given to them by their clients under professional secrecy or if they became aware of such information in their professional capacity. This privilege is also extended to the interpreter engaged to convey such secret information.

A witness bound by professional secrecy cannot reveal secret and confidential information, except in certain circumstances according to the particular law applicable to the case.

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

If a regularly summoned witness does not appear when called, he is guilty of contempt of court and is immediately condemned and fined. The court can also, through a warrant of escort or arrest, compel him to appear and testify in a subsequent sitting. However, the court may waive the fine imposed if good reasons are provided for the failure to appear.

#### **2.11 Are there persons from whom evidence cannot be obtained?**

Any person of sound mind, if there are no exceptions regarding his competence, may be produced as a witness. A witness of any age may be produced as long as he is aware of the fact that giving false evidence is wrong.

#### **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?**

During the examination or cross-examination, the court may ask the witness any question it deems necessary or expedient. On the other hand, each party in the case, whatever his interest, may testify at his/her own request, at the request of another party in the case, or when summoned to do so *ex officio* by the court.

In cases involving minors, the judge generally hears the minor *in camera* or a Children's Advocate is appointed to hear the minor.

Witnesses living outside Malta may be heard in video conference.

### **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?**

If evidence has not been obtained by illegal means, the court has no restrictions when delivering its judgement. The only exception is that, as a rule, the court does not take cognizance of evidence regarding facts that the witness says he became aware of from others, or of facts stated by other parties who can be produced to testify accordingly.

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

Yes, statements made by a party to a case are admissible.

Last update: 22/03/2017

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