Taking of evidence

L-Ingilterra u Wales

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The general rule about discharging the burden of proof is that in civil cases, the party asserting the fact has to do so; so that the judge (or jury) is satisfied that on the balance of probabilities the fact being asserted is correct. The burden applies to both parties save where it is so obvious that the claimant has not discharged the burden; here the judge is entitled to proceed without troubling the other side.

In practical terms this means that the court is satisfied on the balance of probabilities that the event occurred. This standard is modified by the fact that the rarer the occurrence, the higher the burden of proof as explained by Lord Hoffman in *Secretary of State for the Home Department vs Rehman**[1].*

[1] [2001] UKHL 47.

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, or obvious or irrelevant to the case.

The law makes various presumptions which may be rebutted by evidence to the contrary. These include presumptions as to the legitimacy of children, validity of marriages, sanity of individuals, and death of people who have disappeared. Innocence of crime is presumed, but a criminal conviction is admissible in civil proceedings as evidence that a party committed an offence (and means that the party bears the burden of proving innocence).

There is a presumption of negligence where a claimant proves that he or she has suffered harm from a source which was under the defendant's exclusive control, and that the accident was of a kind which normally arises through negligence[1]. A similar presumption arises where a person has been entrusted with goods and they have been lost or destroyed. In both instances, the presumption can be rebutted by the defendant.

One area where the burden is reversed is in the field of employment discrimination law. Once a *primae facie* case of discrimination is made out, the burden shift to the other side to show that there was no discrimination. This phenomena arose out of European discrimination legislation and is now in the Equality Act 2010.

Finally there are several civil matters, generally around Health and Safety legislation, where it is a case of strict liability. That is, if the accident happened, it is by virtue of the employer's strict duty of care that the employer is liable.

[1] [2001] UKHL 47.

[2] The doctrine of *res ipsa Loquitor* or the thing speaks for itself.

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?

The standard of proof in civil cases is the "balance of probabilities". In other words, the court will find that a fact is established if satisfied that the fact is more likely to have occurred than not. As noted above the standard operates flexibly: more convincing evidence is required to establish serious allegations, such as fraud on the balance of probabilities- as such allegations are generally regarded to be likely to be true.

This test is modified in two circumstances. In cases where in the absence of a compelling cause there are none the less competing causes the judge is entitled to find that the cause was not proven[1]. Additionally in applications for summary judgment[2] the bar is quite low, the court will make a decision without the benefit of full disclosure or cross examination.

[1] This phenomena was explored in *Rhesa Shipping* [1985] 1WLR.

[2] Often used in the TCC to enforce an arbitration award to pay a sum of money.

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[1] is obtained in civil proceedings through the disclosure of relevant documents by the parties, and the testimony of witnesses and experts, the evidence must be before the court

Different rules apply in each case.

Disclosure

Parties to civil proceedings are required to disclose[2] the existence of documents in their control or possession, to the extent that the court orders them to do so, and to allow the other parties to inspect those documents. The court will normally order "standard disclosure," which requires the parties to make a reasonable search for documents which either support or adversely affect the case of any party, without the parties needing to apply to the court. For any other types of disclosure a party must apply for permission from the court. The court may also make orders for the preservation of evidence and property.

Witnesses of fact

Parties do not require the permission of the court to adduce witness evidence in support of their cases. However, 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 trial. If the party does not provide a witness statement or summary for a witness before trial, the party may not call that witness without the court's permission. Furthermore, the court has wide powers to control the evidence which is allowed, such as excluding evidence which would otherwise be admissible and limiting the cross-examination of witnesses.

A party may also apply for a court order that a witness's evidence shall be given in a sworn deposition taken by a court-appointed examiner[3] prior to the hearing of the action.

The judge's role is essentially to assess the evidence adduced by the parties, and does not include an independent fact-finding function.

Expert witnesses

A party may not rely on expert evidence[4] unless the court gives permission. The court can control the issues upon which expert evidence is to be given, the form in which the evidence is given, and the fees payable to the expert.
Where more than one party wishes to submit expert evidence on an issue, the court may direct that the evidence shall be given by a single expert instructed jointly by the parties, rather than by a separate expert instructed by each party. The court may make such a direction on its own initiative, without the agreement of the parties.
The court will not require the parties to adduce expert evidence on its own initiative. However, the court may itself appoint an expert as an "assessor" to assist the court in relation to an issue. The court may direct the assessor to prepare a report (copies of which must be provided to the parties) and to attend the trial to advise the court.
Part 35 of the CPR allows for expert evidence to be given concurrently by experts in like disciplines. Generally in these circumstances the parties will cross examine and then the judge will summarise the position to which the experts are invited to agree.

[1] See CPR Part 32
[2] See Part 31 CPR
[3] Part 34.8 CPR
[4] See part 35 CPR

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

Disclosure

Following an order for disclosure, each party must serve on the other parties a list of the relevant documents which are, or have been, in its possession or control. The other parties are then entitled to inspect and have copies of the documents. Charges may be made for photocopying.

Witnesses of fact

The court will order the parties to serve signed witness statements from each witness on whose evidence they intend to rely before the trial. The statement may be drafted by the witness, but will often be prepared by the lawyer for the party on whose behalf the witness is giving evidence. The statement should set out the witness's evidence in full, in the witness's own words if practicable.
If a party has been ordered to serve a witness statement from a witness but is unable to obtain one, the party may seek the court's permission to provide a witness summary, setting out the evidence which the witness is expected to give or the matters on which the party intends to question the witness.
If the court orders that a witness's evidence should 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 for cross-examination of the witness, and a transcript of the evidence will be produced.

Expert witnesses

If the court gives permission for expert evidence, the parties prepare instructions to the expert(s). Where there is a joint expert, the parties may instruct the expert separately if instructions cannot be agreed. The expert, whose overriding duty is to the court and not to the instructing party or parties, will prepare a written report. A party may then put written questions to an expert who was instructed jointly or by another party. Where there are separate experts, the court may also direct that there should be discussions between the experts to identify areas of agreement and disagreement. Expert witnesses are entitled to be paid for their services, normally by the party or parties instructing them.

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

Whenever parties apply for orders to enable them to obtain or adduce evidence, the court will need to be satisfied that the evidence in question is likely to be relevant and admissible. In considering how to exercise its powers, the court must also seek to deal with cases justly, which includes saving expense and dealing with cases in ways which are fair, expeditious and proportionate to the importance, complexity and value of the claim. These considerations may lead the court to reject applications or to make orders of its own initiative (e.g. requiring a single joint expert rather than separate experts appointed by each party).

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 facts (see above). 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. Real evidence consists of other material objects relevant to the issues in dispute which are produced to the court, such as the products which form the subject-matter of an intellectual property dispute. It may also include a judge visiting the scene of an accident or some other relevant location to go on a view.

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. However, as stated above, each party is required to serve a witness statement for each witness upon whose evidence the party intends to rely. At trial, the witness will be asked to confirm the truth and accuracy of his or her statement, which will then stand as the witness' evidence for the party who called him or her. Where only a witness summary has been served, the witness will have to give more detailed oral evidence.
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. A court-appointed assessor will not be required 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. There is no rule against adducing a statement made outside court as evidence of the facts contained in that statement ("hearsay" evidence)[1], so a party may rely on a letter as evidence of its contents, or on a witness's report of a statement made by another person. However, hearsay evidence will often carry less weight than direct testimony, particularly if the maker of the statement could have been called 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.
[1]See Part 33 CPR and the accompanying Practice Direction to it.

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

Certain transactions (e.g. wills and sales of land) must be effected in writing, and documentary evidence will therefore be required to prove them.

2.8 Are witnesses obliged by law to testify?

In general, witnesses who are competent to give evidence may be compelled to do so. A party who wishes to secure the attendance of a witness at trial prepares a witness summons requiring the witness to attend court to give evidence. Once issued by the court and properly served, the summons binds the witness until the end of the hearing.

If the court orders that a witness's evidence should be taken in a deposition but the witness fails to attend or refuses to answer lawful questions, the party requiring the deposition may apply for a further order that the witness attend or answer questions.

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 the Queen, 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.

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 (which applies to communications made for the purpose of giving or seeking legal advice, or for the purpose of obtaining evidence for litigation), "without prejudice" privilege (which applies to communications between the parties which are made in a genuine attempt to compromise the dispute, such as offers to settle a claim), and the privilege against self-incrimination (which means that a witness may not be required to give evidence if there is a real danger that it would expose the witness or witness' spouse to a criminal charge or penalty in the UK). Privilege may be waived.

Evidence may also be withheld on the ground 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.

Bank officers cannot be compelled to produce bank books or to give evidence of their contents unless there are special grounds for the court to order them to do so, but the court may order that a person shall be allowed to inspect or copy bank account entries.

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

A witness who, having been served with a witness summons, fails to attend court or refuses to testify may be committed for contempt of court and imprisoned (in the High Court) or required to pay a fine (in the County Court).

2.11 Are there persons from whom evidence cannot be obtained?

All adults are competent to give evidence in civil proceedings unless they are incapable of understanding the nature of the oath which witnesses must swear or incapable of giving rational testimony, for example due to mental illness. Where a child witness does not understand the nature of the oath, his or her evidence may still be admitted, but only if the court is satisfied that the child understands the duty to speak the truth and has "sufficient understanding to justify his evidence being heard".

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?

Role of the judge and the parties

Traditionally, witnesses have given "evidence-in-chief" at trial in response to non-leading questions put by counsel for the party who called them. However, a witness statement will now stand as the witness's evidence-in-chief unless the court directs otherwise. The witness may then be cross-examined by counsel for the opposing party, who may put leading questions to the witness. Expert witnesses who give oral evidence at trial may also be cross-examined, but a court-appointed assessor cannot be cross-examined by the parties. The judge may put questions to witnesses, usually to obtain clarification of their answers to questions from counsel.

Video link evidence

Evidence may only be provided by video link if the court gives permission. When considering whether to make an order allowing evidence to be given in this way, the court will take into account the convenience of using video conferencing (particularly if a witness is unwell or abroad), the costs or savings associated with using a video link, and the implications for the fairness of the proceedings (including the more limited degree to which the court can control and assess the witness).

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 communications sent through the post or a telecommunications system (which includes telephone calls, faxes and e-mails) are illegally intercepted, evidence of the contents of those communications may not be given in legal proceedings. Otherwise, evidence is generally admissible even if it was obtained improperly. However, the court has the power to exclude evidence which would otherwise be admissible. In deciding how to proceed, it will balance the importance of the evidence against the gravity of the improper conduct. If the circumstances do not justify excluding the evidence, the court may penalise the party which has acted improperly in other ways, such as by ordering it to pay costs.

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

Statements of case (i.e. the formal documents setting out each party's case) can be used as evidence at interim hearings, but will not stand as evidence at trial.

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

Related links:

Ministry of Justice

Civil Procedure Rules

Last update: 17/12/2018