

LAWS OF EVIDENCE

General

The law of evidence deals with how a claim is proved and dealt with in a court hearing. English laws of evidence have been modernised in recent years. The traditional common law rules were quite onerous and generally required that the best evidence or proof be produced notwithstanding that this may be costly or inconvenient.

The parties to litigation could always agree to accept any particular matter as proved or accept documents as proof of their own contents. However, equally, a party could put his opponent to “proof” by requiring him to prove facts and the authenticity of documents notwithstanding that they were not seriously contested.

The famous “hearsay” rule at common law largely meant that utterances or documents made out of the Court hearing itself could not usually be offered as proof of their content. Generally facts and matters must be proved by parties with first hand actual knowledge of the matters concerned. Although such rules secure the best evidence they pay little regard to cost and convenience.

Court Control and Witness Statement

The Civil Procedure Rules allow the Court as part of its management powers, to control evidence by giving directions on the issues on which it requires evidence, the nature of evidence it requires and the way it is to be placed before the Court. The Court has power to exclude evidence that would otherwise be admitted and to limit cross examination. The purpose of all of these rules is to secure the overriding objective of doing justice in a cost efficient manner.

Witness statements must set out the evidence which the parties intend to rely on. Usually, exchange of witness statements must be simultaneous. The witness statements must set out the name and address of witnesses and their connection with the party.

Any document or matter referred to in the witness statement is attached. The witness signs the statement and verifies its truth. A false statement in a written statement is equivalent to contempt of Court and could be enforced by sanctions

The general rule is that facts and matters which need to be proved should be proved by oral evidence given in public at the trial which can be cross examined i.e. held up to examination or contradiction by the opposite side so as to cast doubt on it. If possible, the Court will usually order witness statements to be exchanged.

Generally, the witnesses will be called to give oral evidence in person at trial. However, the Court does have power to order that the witness statements will be admitted without the need for oral evidence. Generally, the witness statements will stand as the undisputed evidence of the witness who will then be subject to cross examination by the opponent. At trial, a party will be asked to confirm his witness statement is true. The Court will generally only allow evidence that is not in the witness statement if there is good reason.

Hearsay

Generally, parties must give evidence of facts within their actual knowledge. These would generally be matters which they have observed or have first hand knowledge of. Opinion evidence can not usually be given unless the witness is an expert in the particular field concerned. An opinion would be allowed if it is a means of conveying facts indirectly as they were perceived by the witness.

In Ireland, hearsay evidence is still generally not allowed as proof in Court proceedings unless the parties agree or certain limited exceptions apply. Hearsay evidence is a statement made out of Court which is offered as proof of its contents in Court. This would extend to documents, business records, photographs or any matter, the veracity or authenticity of which cannot be offered as self evident without being proved by a person who, say, produced the document or took the photograph.

Reforming legislation in England and Wales provides that evidence is not to be excluded, merely because it is hearsay. This changed the common law rule which is still substantially in force in Ireland.

Hearsay evidence is under certain circumstances in England and Wales. The proposal to bring hearsay evidence must be notified to the other party and on request, details must be given of the proposed evidence. The notice to the other party must inform the other party that the witness is not being called and that it is intended to rely on the witness statement. In other cases where the hearsay is not in the witness statement, it must be identified in the notice and stated that the party proposes to rely on it and does not propose to call the witness in Court.

The Courts are entitled to give proper weight and credibility to hearsay evidence, having regard to the circumstances, including whether it is reasonably practicable for the party producing it to have called the person who made it, as a witness. The Court can have regard to how credible and reasonable the reason for not calling the witness is. The Court can consider the contemporaneousness of the evidence and its reliability in assessing what weight it should be given. It can consider the motive of the parties and all common sense reasons which cast doubt on the credibility of the evidence.

Where a party proposes to use plans, photographs, models or records and the details are not contained in a witness statement or expert report, the party intending to use it must disclose this intention within the deadline for serving witness statements. The notice must be given at least 21 days before the hearing. The other party is to have an opportunity to inspect it in advance if he requires.

Generally parties will request each other to admit the truth of particular matters of fact which or document which are not really contested. A notice is usually served on the other requesting that certain matters should be admitted without being proved. If one party unreasonably refuses to admit such facts or documents this can be held against him in relation to award of costs. Where documents are disclosed before a trial, the other party is deemed to admit they are genuine unless he serves a notice requiring it to be specifically proved at trial.

Experts

Traditionally, both parties had unfettered rights to offer expert evidence. However, the Court as part of its case management powers will limit expert evidence to what is reasonably required to resolve the dispute. The Rules make it clear that although an expert may be hired by one party, his overriding obligation is to use his expertise to assist the Court. This duty is deemed to override any obligation to the party from whom he has received instructions or by whom he is paid. Experts are required to be completely objective and unbiased.

The Courts are entitled to restrict evidence to that which is reasonably required to resolve the dispute. This usually happens at the case management/direction stage. The Civil Procedure Rules provide that no party may call an expert and put forward an expert's report without the Court's permission. Permission will usually be granted at the direction stage. The person applying for permission must identify the field in which he intends to rely on the expert evidence and details of the expert in that field and on whose evidence he proposes to rely. The information is normally to be provided in the allocation questionnaire.

The Court may decide that no expert evidence is to be produced at all. Alternatively, it may limit the number of expert witnesses and may direct that evidence is to be given by one expert chosen by agreement or chosen in such manner as the Court decides.

A common feature of litigation was witnesses waiting for trials. Settlement commonly takes place at a late stage, after witnesses have been waiting, for a substantial period. The reformed rules try to avoid this. In fast track proceedings, the normal position would be that expert evidence would be given in the form of a written report rather than by way of oral evidence.

Generally, instructions given to witness and discussions between a legal representative and witness are privileged from being disclosed. However, in the case of expert evidence this is not case and the Court may order disclosure of any document.

Generally they require disclosure of any document or details of the instructions given to a witness.

The Civil Procedure Rules give detailed instructions on the contents of expert reports. They must be addressed to the Court and not to the party giving the instructions. They must detail the expert's qualifications and give details of the literature and material upon which he has based his report and set out any experiments or tests that have been carried out. Where there is a range of opinions on a particular matter, the expert must summarise the range of opinions and give reasons for his own opinion. It must contain summaries and conclusions for each. The expert must specifically state that he understands his duty to the Court. His statement must set out the substance of all instructions given that are relevant to the opinion. Where there is a qualification on an opinion, the qualification must be fully stated.

After the expert's written report has been disclosed, the party who did not instruct him may put written questions about his report. The written questions must be put within a certain time limit and must clarify the report. The answers are to be treated as part of the report.

Where there is more than one expert, the Court will usually direct a discussion after exchange of reports and require them to identify and discuss issues and where possible reach agreement on them. The Court usually directs that after discuss the experts must prepare a statement which shows the issues that are agreed and those which are disagreed. Their report must summarise the reason for disagreement. The content of discussions cannot be referred to unless the parties consent.

Where the parties cannot agree joint instructions they may give separate instructions. Where a party is dissatisfied with an expert's report he must first submit reasons to the expert. If this does not resolve the position, the dissatisfied party can apply to the Court to call another expert. This permission will only be granted if the Court is satisfied it would be unjust not to grant it.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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