

Diploma in Law

Lecture 7: Judicial Procedure - Evidence

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**Diploma in Law
(Malta)**

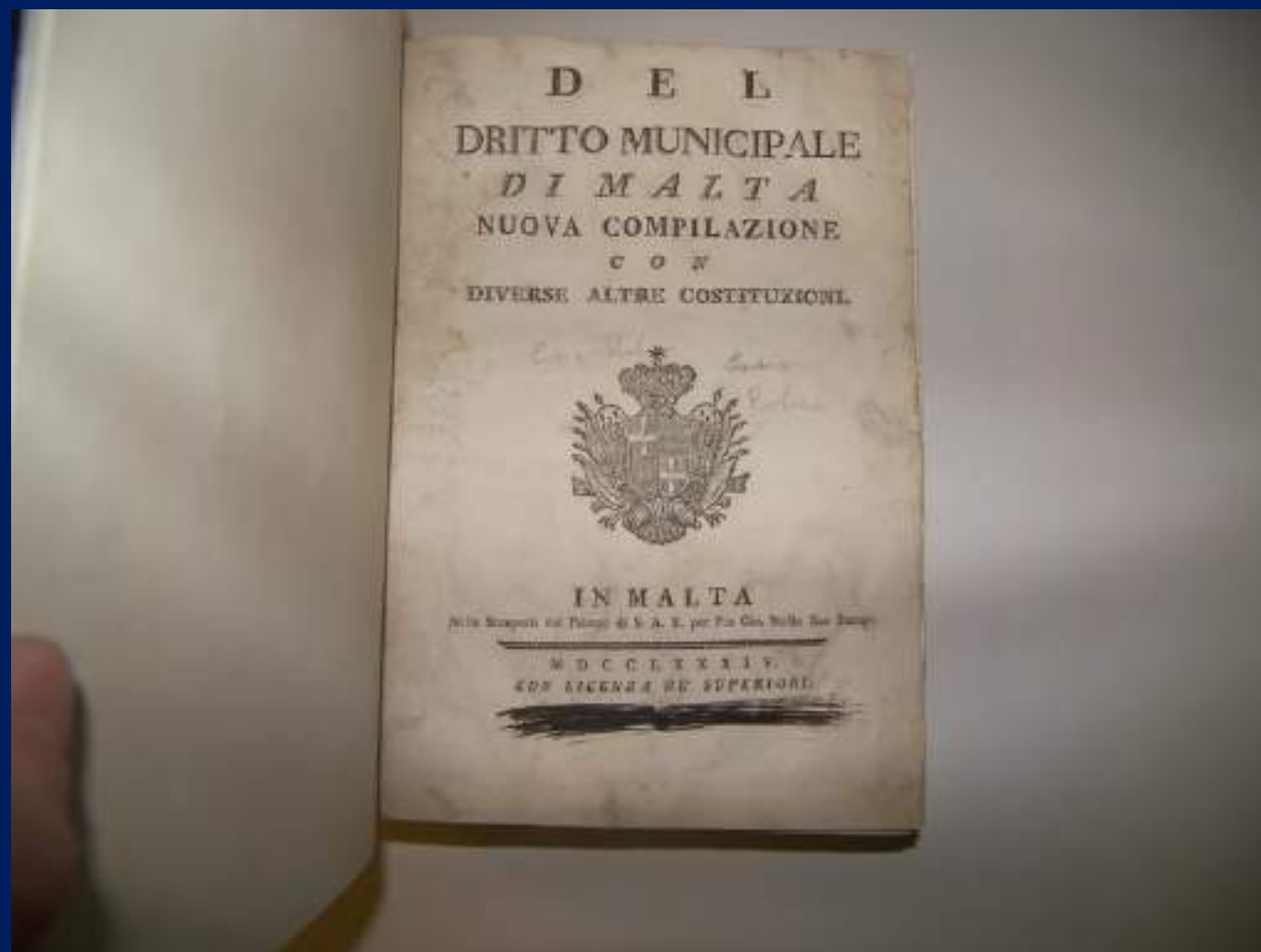
Today's lecture:

- The cardinal rules of evidence
- Rules relating to witnesses
- Admissibility of witnesses
- Expert and non-expert witnesses
- Summoning witnesses
- Examining witnesses
- Documentary evidence
- Presenting a document
- Admissibility of documents
- Proof of handwriting and signatures
- Demanding a document



Historical background

- Some principles of civil procedure date as far back as Roman Law
- The main historical sources date back to the Knights - **the 1776 Code de Rohan (Del Diritto Municipale di Malta)**



- Later, the French **Code de Procedure Civile** also heavily influenced what was the first COCP - the **1854 Ordinance**
- The Third Book in the COCP - **Of Certain Matters Relating to Judicial Procedure** - is derived from Anglo-Saxon sources
- Later, in the 1990s, amendments were influenced by the Italian law of procedure.

Historical background

- The diversity of sources gives the procedural system **flexibility** and allows more access to parties to furnish evidence directly to court.
- Today our main sources are the **COCP (Cap.12)** and the **Civil Code (Cap.16)**
- The **constitution** has also had a fundamental influence: **Article 39 & Article 6 ECHR** maintain that everyone is entitled to a:
 - **fair and public hearing;**
 - **within a reasonable time;**
 - **by an independent and impartial tribunal;**
 - **established by law.**



BOOK THIRD OF CERTAIN MATTERS RELATING TO JUDICIAL PROCEDURE

TITLE I OF EVIDENCE



The Basic Rules of the Law of Evidence

Why is evidence crucial? *Because the mere assertion of fact (e.g. in a judicial act) does not necessarily constitute the truth in the eyes of the law.*

So evidence is needed to support the assertion and illustrate its truth.

Reasonable Freedom of Proof: Court may admit and evaluate evidence freely without being unduly conditioned by legal requisites on the form of evidence and probative weight it is to be given.



The Basic Rules of the Law of Evidence

EVIDENCE vs PROOF

Evidence: a means of determining whether an assertion is truthful, or an allegation is a fact

Proof: the conclusion that experienced minds draw from weighing all evidence presented

Therefore we can conclude that something is not proof **until** the court accepts the evidence as such.

Role of the court: to act as **moderator *super partes*** assessing what is presented before it, and not taking an active role in the proceedings.



The Cardinal Rules of the Law of Evidence

1. RELEVANCE

2. BEST EVIDENCE RULE

3. ONUS OF PROOF

Define the nature of the civil process as they regulate how the court will decide on the factual issues



The Cardinal Rules of the Law of Evidence

Relevance

558. All evidence must be relevant to the matter in issue between the parties.

This provision implies that all relevant evidence will be admissible, and that anything else will be excluded.

The court may ask the party presenting the evidence to state the aim of that evidence, so that its relevance can be determined.

Where evidence is disallowed, the party can insist to have that refusal made by means of a decree, so that they can have the reasons for refusal (and possibly appeal)



The Cardinal Rules of the Law of Evidence

Best Evidence Rule

559. In all cases the court shall require the best evidence that the party may be able to produce.

This provision implies that the parties should not bring second rate evidence if higher quality evidence is accessible to them. If this is the case, that evidence can be struck off (*sfilzat*).

This is mostly important when it comes to documentary evidence - e.g. if an original document can be presented, then a copy of the document should not be allowed.

Secondary evidence is only admissible when the party presenting it proves to the court's satisfaction that the original cannot be obtained.



The Cardinal Rules of the Law of Evidence

Burden and Standard of Proof

562. Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it.

Burden & standard of proof in civil proceedings must satisfy a **balance of probabilities AND the moral conviction of the court.**

This differs from the criminal standard of proof, where it has to be **beyond reasonable doubt.**

When both parties present equally compelling evidence: the principle of *actore non probante, reus absolvitur* applies, i.e. the defendant is discharged from the claim, as the plaintiff has not overcome the burden of proof required.

When the defendant presents no evidence: this is a probable but NOT automatic win for the plaintiff, who must still prove his case.



The Cardinal Rules of the Law of Evidence

Burden and Standard of Proof

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This is the general principle - it is accepted however that the burden of proof can **shift**. Examples include EU directives on employment & discrimination, shifting that burden on the basis of an unequal balance of power and inaccessibility of documents to the plaintiff.



The Cardinal Rules of the Law of Evidence

Burden and Standard of Proof - Case Study

Zammit Tabona v Saliba (CoA, 2009)

Facts: The plaintiff had employed the defendant to take care of random jobs around his home. An armed robbery took place where all men were hooded, but the plaintiff recognised the defendant from a string of words he had said when working in the home, which were repeated during the robbery.

The court here decided to apply the balance of probabilities (over the beyond reasonable doubt) standard of proof, as it held that this should suffice in a civil case for damages.

On this balance of probabilities, the CoA found the defendant guilty.



SUB-TITLE I OF WITNESSES



Witnesses

The most basic form of evidence as they are those who can attest to having seen - witnessed - a fact. Witness testimony is considered a narration of events

563. All persons of sound mind, unless there are objections to their competency, shall be admissible as witnesses

564. Whatever may be the age of a witness whom it is intended to produce, he is admissible as such, provided he understands that it is wrong to give false testimony.

Limitations to witnesses:

- sound mind
- that they understand that they are obliged to tell the truth
- competency

Some witnesses may be **compelled** by law to give evidence (barring exceptions such as confidentiality).



Witnesses

Admissibility of certain witnesses

565. (1) Any of the parties to a suit, whatever his interest therein, 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 if called by the court *ex officio*.

566. (1) The spouse, civil union partner, or cohabitant of a party to a suit shall be **competent and compellable** to give evidence.

BUT:

Such witness cannot be compelled to disclose communication made to them by their partner and they may not be compelled to answer any question tending to incriminate their partner.



Witnesses

Admissibility of certain witnesses

Admissibility is not impacted by relevance: relevance does not automatically mean evidence is admissible. **Evidence has to be relevant AND not excluded by law.**

E.g.: Hearsay evidence, while it can be relevant, is excluded by law.

Hearsay evidence is that evidence which is based on what others have told the witness, rather than what the witness perceived directly. As a rule this is not admissible evidence as testimony should be direct and first-hand.

It can be admissible if the court believes the relation between the witness and the third party has a material bearing on the issue, or where the third party cannot be produced.

Witnesses

Privileged Communications

This includes professional communication - so a class of witnesses can be deemed to **not** be compellable. This includes clergymen, legal procurators, lawyers, and by extension, interpreters.

These witnesses can be compellable if the client / confessor consents to disclosure.

Likewise, accountants, medical practitioners, social workers, psychologists, etc cannot be compelled to testify on matters told to them in professional confidence unless ordered by the court.



Witnesses

The Ex-Parte Expert Witness

Witnesses produced by any party (not by court). These are not **referees** or **periti** - so they are not nominated by, and representatives of, the court.

When so called to testify, such witness shall only be allowed if the court is suitably qualified in the relevant matter.

Non-expert (ordinary) Witness

Can give a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence if it is made as a way of conveying relevant facts personally perceived by him. This is also admissible evidence.



Summoning witnesses

No. 28
A Summons Order
given by a
Judicial Assistant.

REPUBLIC OF MALTA

In *(here insert name of Court)*

Summons No.
pending before Doctor of Laws
a Judicial Assistant, in the cause:
.....
.....

vs.
.....
.....

To the witness:
Address:

By virtue of the powers given to me by sub-article (4) of article 97A of the [Code of Organization and Civil Procedure](#), you are hereby being ordered to appear before me on the day and at the place and time hereunder mentioned to give evidence in the aforementioned cause:

Date and time:
Place where to attend:
Documents to be produced:

You are hereby warned that should you fail to appear on the day and at the time and place hereabove mentioned, you may be liable to the penalties established for contempt of court, and you may be compelled to appear before me by an order of escort or of arrest, and you shall be liable to all the other consequences to which, according to the [Code of Organization and Civil Procedure](#), you may be liable for such disobedience.

.....
Doctor of Laws
Judicial Assistant
of the said Court

Thisday of 20

0.23 cents

- Witnesses are summoned by means of a subpoena - taħrika
- The subpoena shall contain the place, time, and purpose for giving evidence, and before whom it is to be given, as well as any document which is being required from the witness
- The subpoena must be served at least 4 days before the date of the hearing
- Before the Court of Magistrates, this summons may be given orally if the witness is present
- If the witness fails to appear, they may be found guilty of contempt of court, and the court may issue a warrant of arrest to attend to the next sitting.



Summoning witnesses

Witnesses living abroad

- If such testimony is deemed indispensable, the court may order their summons. The case is then adjourned until the testimony can be obtained.
- Three means of summoning:

1. **Letters of request (ittri rogatorji).** The letter will include the questions to be asked.
Judicial authority → Foreign Affairs Office MT → Foreign Affairs Office in witness country → judicial authority of that country → notification to witness.
2. **Bringing the witness in Malta:** but this testimony will be discarded if the witness will not be available for cross-examination.
3. **Affidavit:** must be made before an authority or person who according to the law of that country, is empowered to administer oaths, or before a consular office of MT, then duly authenticated.

Examining witnesses

577. (1) Save as otherwise provided in this Code, the witnesses shall be examined in open court at the trial of the action and viva voce.

This is important for the judge / magistrate to determine for themselves the credibility of the witness. Today this is derogated from in many ways:

- hearing witnesses through judicial assistants
- allowing persons to testify via affidavit

Criticised as this reduces direct contact with the court. However, cross-examination is always permissible.

Also derogated from to preserve the witness's safety: e.g. video-conferencing for victims of violence, which is still viva voce testimony but not necessarily in open court.

(2) Witnesses may not be assisted or advised by any person. - *but can be prepared beforehand*

(3) Witnesses shall be sworn previously to their examination.

Examining witnesses

Exception to the orality of witnesses:

- Questions may be put forth to the witness in writing, who may also reply in writing. This can be allowed as follows:
 1. Where the witness is about to leave MT
 2. Where for any reason the witness cannot attend the suit
 3. Where the witness is infirm / advanced in age so that he might pass or be unable to testify on summons
 4. Where evidence by the archbishop of MT or bishop of Gozo is requested
 5. Where supplementary information is requested from experts

This is only permitted at the court's discretion as it is the exception, not the rule.

Examining witnesses

The Affidavit

- Should only be resorted to when the witness cannot be called in to give evidence in court
- In practice, affidavits are being frequently resorted to to speed up proceedings
- Witness must still be competent and can be called in for cross-examination
- Should always be drafted by the witness - not always the case
- A contentious mode of producing evidence as it reduces direct contact with the court and there is no way of guaranteeing that the affidavit was not tampered with





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CAMILLERI PREZIOSI
ADVOCATES

Examining witnesses

Examination involves:

1. The examination-in-chief
2. Cross-examination
3. Re-examination
4. Re-cross-examination

Examinations & cross-examinations cannot be interrupted but sometimes due to logistical court pressures, they might have to be suspended.



Examining witnesses

The Examination-in-Chief

- Conducted by the party calling in the witness. You are obtaining evidence from your own witness.
- Unless permitted by the court, leading or suggestive questions **may not be made**.

Example:

Anything requiring a yes/no reply or containing a foundation not yet in evidence. *“Was the accused driving the car that hit you?”* instead ask: *“who was driving the red Peugeot 306?”*

- May be allowed if it is deemed necessary in the interests of justice, e.g. where necessary to direct the witness to a particular matter, or where the issue is complex.

Examining witnesses

The Cross-examination

579. The opposite party has the right to cross-examine a witness, and in such cross-examination leading or suggestive questions are allowed.

580. In cross-examination, a witness may only be questioned on facts deposed in his examination / matters calculated to impeach his credit.

- If other matters are required from the cross-examined witness, they must be summoned as the opposing party's own witness, so they cannot be asked during cross-examination. This can be even requested at the same time orally in court.



Examining witnesses

The re-examination & re-cross-examination

581. When both examination & cross-examination are concluded, no further questions may be put by either of the parties, BUT it shall be lawful for the court / party with the permission of the court, to ask questions as arising from the answers given.

582. It shall be lawful for the court, at any stage of the examination or cross-examination, to put to the witness such questions as it may deem necessary or expedient.



Examining witnesses

Examination procedures

- Witnesses cannot be present while other witnesses are testifying (unless they are parties to the case / being confronted).
- While being questioned, witnesses are allowed to refer to their own written notes, **but** these must then be presented in the acts of the case.
- Witnesses are bound to answer any question allowed by the court.
- Witnesses cannot be compelled to answer questions which may subject them to criminal prosecution - *the habeas corpus right to remain silent*
- The court has discretion to determine whether questions are degrading to the witness, or are prejudicial to the public interest.
- Deaf & dumb witnesses can be assisted by a court-appointed interpreter.



Examining witnesses

Confronting witnesses

- The court may allow 2 or more witnesses to be 'confronted' with each other - that is, they are questioned in each other's presence.
- This is usually requested when witnesses are giving conflicting testimony on the same incident / issue.
- The judge calls in the first witness, then the second witness is ordered to state his version before the first witness.
- This aids the judge in ascertaining credibility.

Examining witnesses

Impeaching witnesses

- The party who produced the witness cannot impeach them by evidence of bad character, but may contradict him by other evidence / demonstrate inconsistencies.
- To impeach a witness one must:
 - read out to them the problematic statements
 - ask them to confirm that they had made them
 - allow them to explain said statements
- The opposing party is allowed to impeach also on the basis of a generally bad reputation.



Examining witnesses

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Notes of the evidence

False testimonies

594.(1) The substance of the answers given by the witnesses shall be taken down. Every answer which may have a material bearing on the merits of the case shall be taken down word for word:
Provided that in the inferior courts, it shall be sufficient that notes of the evidence of the witnesses be taken down in brief.

- Today these are transcribed by court-appointed transcribers
- Where amendments are needed, these are dated, made in the margins and countersigned by the registrar.
- Erased notes must remain legible (struck off only)



SUB-TITLE II OF DOCUMENTARY EVIDENCE



Presenting a document

- Article 156(2) COCP states that documents in support of the claim must be produced together with the application / sworn application.
- Likewise, Article 158(4) states that the defendants are also to produce the documents in support of their reply with the reply / sworn reply.
- Following this written stage, during the evidence stage the production of documents can take place at any time.
- Exceptions:
 - when the document cannot be obtained before filing of written proceedings
 - when the other party consents to any other later stage
 - when the party was not aware / could not produce documents in time for a legitimate reason and this reason is confirmed on oath



Documentary evidence

General rule is that all forms of documents are admissible

Admissible documents:

- any writing, printed or not, inscription, seal, banner, instrument or tool of art or trade, tally, score, map, sign, mark which may furnish information, explanation or inference in respect of the facts of the case
- Declarations made against one's interest
- Dying declarations made with or without oath if made deliberately and by a person who would have been a competent witness had he been summoned
- Acts with missing formalities (e.g. a private writing)



Basics of documentary evidence

Authentic v True documents:

- **Authentic:** a faithful reproduction of the original (a true copy), irrespective of content
- **True:** a document which contains truthful statements
- A document's authenticity and veracity must be confirmed on oath by who is presenting it for it to be admissible as evidence.



Basics of documentary evidence

Acts requiring authenticity (art. 629 COCP)

If authenticated, these documents are considered as evidence of their content:

- acts and registers of any establishment, public body, authorised or recognised by law or by govt
- parochial acts and registers and dispositions made in the presence of a parish priest
- acts and registers of notaries public in MT
- books of traders kept according to law
- books of public brokers kept according to law



Basics of documentary evidence

Exceptions (art. 627 COCP):

No proof of authenticity is required for:

- acts of government, signed by the Minister / head of department so authorised
- registers of any government department
- public acts signed by the authorities and in the Govt Gazette
- acts of government printed under govt's authority and published
- acts and registers of the courts and the ecclesiastical courts (in MT)
- certificates issued by the Public Registry and the Land Registry
- sea-protests made under the authority of the CCFH
- acts of foreign governments / departments / courts if authenticated by the diplomatic / consular representative of MT in that country (legalisation of documents)

Writing, signatures, and proof

- When a written/signed document is produced, the party must declare whether that writing/signature belongs to them.
- If they don't they will be deemed to be theirs until the contrary is proved.
- Signatures or marks attested by a lawyer, notary, or legal procurator are deemed genuine until the contrary is proved.
- Where the handwriting needs to be proved, this may be done:
 - by the person who wrote that document
 - by means of witnesses who were either present/are acquainted with the person's handwriting
 - by comparison of handwritings
 - by means of experts



Demanding a document

Actio ad exhibendum:

- The action obliging a person in possession of a document to produce it in court.
- Documents must be:
 - the property of the party demanding them, or
 - co-owned by the parties, or
 - relevant to the case
 - public acts / acts constituting evidence in the interest of the general public
- If demanded from a third party (not in the case), that party can declare on oath that they have special reasons to not produce them.



Demanding a document

Actio ad exhibendum:

- The court decides on relevance, regard being had to the nature of the case and the document demanded.
- The court can also order an extract rather than the full document (e.g. for sensitive commercial documents).
- Exempt or privileged documents which cannot otherwise be disclosed cannot be demanded

Exempt: if they are contrary to the public interest (as certified by the Prime Minister)

Privileged: communication between a professional and their client

Demanding a document

Actio ad exhibendum:

- The demand against the opposing party may be made at any time during the evidence stage.
- The demand is made by summoning them. The demand against a third party is made by means of an application or in the subpoena requesting their testimony.
- The demand must:
 - state the nature of the documents
 - give all particulars known to the person demanding them
 - prove that the document is in the possession of the other party





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