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Evidence in Civil Law - Ireland

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Evidence in Civil Law – Ireland

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ABSTRACT Ireland as a common law jurisdiction operates an adversarial system. Ireland has a written Constitution, Bunreacht na h-Éireann. Other sources of law include legislation and European Union Law and a doctrine of precedent operates. This paper comprises a discussion of the law of evidence in Irish Civil Procedure. It follows the structure of a questionnaire circulated for the purposes of a comparative study as part of an EU wide project and is repetitive in parts. It was completed between November 2013 and August 2014 and in the interim there have been significant developments in the Irish legal system, most notably the establishment of the Court of Appeal and the Supreme Court decision in *D.P.P. v. J.C.* [2015] IESC 31, which modified the exclusionary rule concerning unconstitutionally obtained evidence. The primary form of proof in Irish courts is oral evidence. Competent witnesses are generally compellable. Usually testimony, on oath or affirmation, is given *viva voce* in open court before the Judge and where necessary a jury, and in the presence of the parties. The right to cross-examine is constitutionally guaranteed. In civil cases, the standard of proof is the balance of probabilities. The burden of proof rests on the party which asserts. The principle of *audi alteram partem* applies. A distinction is drawn between unconstitutionally obtained evidence and illegally obtained evidence. There is pre-trial discovery. Evidence taking by and for foreign courts is discussed.

KEYWORDS: • procedural law • civil procedure • evidence • witnesses • cross-examination • unconstitutionally obtained evidence • discovery • foreign evidence

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Contents

Part I

1 Normative Overview of the Law of Evidence

1.1.1 Principle of Free Disposition of the Parties and Officiality Principle

The "principle of free disposition of the parties" as a term of art does not exist in the Irish legal system. The term is understood to mean that in civil and administrative proceedings the parties are free to control the course of litigation, in that a party has a right to file a suit but also to modify, limit, renounce or withdraw his claim.

In the Irish legal system[2], parties have considerable autonomy. There are constitutional rights to litigate and to have access to the Courts.[3] The Irish courts have recognised these rights as unenumerated constitutional rights in Article 40.3 of the Constitution.[4]

Article 34.3.1° Bunreacht na hÉireann (the Constitution of Ireland) provides:

> "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."

Hogan and Whyte explain that the High Court has full unlimited jurisdiction in civil and criminal matters and thus "no cause of action known to the law is constitutionally excluded from the jurisdiction of the High Court."[5]

Hogan and White state that "*the full jurisdiction of the High Court has been seen as entailing its general capacity to afford a statutory remedy where a right is breached,*

[2] The court system comprises The Supreme Court, The Court of Criminal Appeal, the High Court, the Circuit Court and the District Court. In a referendum in 2013 (Thirty-Third Amendment of the Constitution Act, 2013), it was determined to establish a Court of Appeal in civil cases between the High Court and the Supreme Court. This court will be established in 2014. Article 34.1 of Bunreacht na hÉireann (the Constitution of Ireland) provides that justice shall be administered in courts established by law. Article 34.2 of the Constitution provides that the Courts shall comprise Courts of First Instance and a Court of Final Instance. The Court of Final Instance in Ireland is the Supreme Court.

[3] Protected by Article 40.3 of the Constitution. Discussed in Gerard Hogan and Gerry Whyte, *J.M. Kelly – The Irish Constitution*, (4th ed, Lexis-Nexis Butterworths, 2003, page 1446 *et seq.*).

[4] For discussion see Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 1446 *et seq.*

[5] *Ibid*, page 754.

even though no action, or other remedy in statutory vesture, appropriate to the assertion of the right is immediately obvious".[6]

In *Murphy v. Green* [1990] 2 IR 566 McCarty J. said "*the right of access to the courts was an unenumerated right deriving from the interaction of Article 40.3.1° and Article 34.3.1°.* It was accepted in that case that a statutory restriction on the right of access to the High Court would not be unconstitutional where there were objective reasons for the restriction and the restriction was not unduly oppressive.

Article 34.3.4° provides for the establishment of other courts of first instance with a local and limited jurisdiction.[7] In Ireland these courts of first instance comprise the Circuit Court and the District Court.

In the High Court in civil actions matters are usually determined by a Judge sitting alone but there is a jury in certain cases such as defamation and assault, false imprisonment or malicious prosecution. There is provision for a High Court to sit in a panel of two or more Judges (usually three Judges) to hear certain cases.[8]

In civil claims the question as to which court is designated to hear a claim in the first instance may be decided either by value of the claim or by reference to the subject matter of the claim. In the area of personal injuries recent legislation provides that prior to going to court litigants are in the first instance obliged to apply to a Personal Injuries Assessment Board which assesses the damages of personal injuries without the need to have recourse to the courts. The legislation provides that in certain circumstances the Board will issue an authorisation an in those circumstances the claimant may proceed to court.

Thus in principle and subject to a number of qualifications parties have a right to litigate. The jurisdiction in which they commence their proceedings may be determined by the monetary jurisdiction limits set down in legislation or by the type of proceedings on which they wish to embark but other than these restrictions the parties have considerable autonomy in choosing which courts in which to bring their application and the type of proceedings which they might choose to bring. For example the Rules of the Superior Courts provide for the possibility of commencing a claim for a liquidated sum by which of Summary Summons but a party may also choose to ground their claim on a Plenary Summons and a Statement of Claim.

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[6] *Ibid*, page 754.

[7] Article 34.3.4° provides "*the courts of first instance shall also include courts of local and limited jurisdiction with a right of appeal as determined by law. The courts of local and limited jurisdiction comprise the Circuit Court and the District Court and there is a geographical limitation on the jurisdiction of these courts and a limitation on the nature of the cases which can be determined by those courts.*"

[8] Order 49 rule 1 Rules of the Superior Courts (RSC) provides that the President of the High Court may direct a case be heard before two or more Judges.

In Ireland, the system of defining a dispute that is to be decided by a court, is in the common law tradition, determined by the "pleadings" of an action. "Pleadings is a generic term to describe the formalised process by which each party states its case prior to trial."[9] Pleadings have been defined as "[f]ormal written or printed statements in a civil action, usually drafted by counsel, delivered, alternatively by the parties to each other. Stating the allegations of fact upon which the parties to the action base their case."[10] The purpose of pleadings is to ensure that the opposing party knows the case which he has to meet and that he will not be taken by disadvantage by matters not set out in the pleadings. In *Mahon v. Cellbridge Spinning Co. Ltd.* [1967] IR 1, the purpose of a pleading was explained:

> "The whole purpose of a pleading, be it a statement of claim, a defence or a reply, is to define the issues between the parties, to confine the evidence at trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment, without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words, a party should know in advance in broad outline, the case he will have to meet at the trial."

Thus in *Wrenn v. Bus Átha Cliath,* Supreme Court, Unreported, 31 March 1995, the trial judge was not entitled to make a finding of contributory negligence where it had not been pleaded in the defence. The form of pleadings to be used in a particular case in the superior courts, is set out in the Rules Of the Superior Courts (RSC). Material facts and not evidence should be pleaded.[11]

Delaney and McGrath emphasise that "[i]t is important that a claim or defence be pleaded properly because if an allegation of fact is not pleaded, no evidence can be adduced in relation to it and no finding in relation to it can be made by the court of trial."[12] Further if there is a defect in the originating procedure used, for example if proceedings are commenced by a type of summons not available in that particular case, the proceedings may be dismissed on the basis of a fundamental flaw.[13] The courts retain a discretion, in circumstances where the defect can be rectified by amendment of pleadings. Here the court will examine whether the other party will be prejudiced by the amendment.

In certain circumstances, it is permissible to amend pleadings either without the leave of the court or by leave of the Court.[14]

Parties are also free to withdraw a claim but this may have cost implications, depending on the stage of the proceedings.

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[9] Lord Brennan and William Blair (eds.), *Bullen & Leake & Jacob's Precedents of Pleadings* (14th ed., Sweet & Maxwell, 2001), page 1.
[10] Brian Hunt, *Murdoch's Dictionary of Irish Law* (5th ed., Tottel Publishing, 2009), page 914.
[11] Order 19, r.3 RSC.
[12] Hilary Delaney and Declan McGrath, *Civil Procedure in the Superior Courts* (2nd ed, Thomson Roundhall, 2005), page 233.
[13] *Bank of Ireland v Lady Lisa (Ireland) Ltd* [1992] 1 IR 404.
[14] Order 28, RSC.

The "officiality principle" as a term of art does not exist in Irish law. It is understood to mean that public interest in having the issue of a provision's constitutionality resolved outweighs the private interests of the petitioners who initiated the proceedings, or other considerations.[15]

Some guidance may however be gleaned from the Supreme Court's case law on the issue of mootness. Where for example, issues between the parties to litigation have been rendered moot by the time an appeal comes on for hearing the Supreme Court made decide that it will not proceed to hear and determine the matter.[16] In *Murphy v. Roche* [1987] IR 106 the Supreme Court made it clear that it must decline to decide any question which is in the form of moot and in respect of which a decision is not necessary for the determination of the rights of the parties before it. In *Irwin v. Deasy* [2010] IESC 34 the Supreme Court stated that it was general practice to decline to decide moot cases but that in exceptional circumstances where one or both parties had material interest in a decision on a point of law of exceptional public importance the court may determine such a question in the interests of proper administration of justice. This jurisdiction to hear an appeal where there is no longer a live controversy between the parties should be exercised with caution. In that case having regard to exceptional circumstances which existed the court proceeded to hear the appeal.

1.1.2 Extra et Ultra Petitum

The principle of "*extra et ultra petitum*" as a term of art does not exist in the Irish legal system. As discussed above a party initiating litigation has considerable autonomy in respect of how he chooses to plead his case. The pleadings will include a section entitled "reliefs" where the plaintiff sets out the reliefs that he seeks from the Court. Generally, it is open to the plaintiff to seek reliefs in the alternative and one of the reliefs normally included is "further or other orders as the Court may deem meet", meaning that the party asks the Court for any relief that the Court considers appropriate. Further as discussed above, a party may be permitted to amend pleadings. Further the Superior Courts have inherent jurisdiction.

In civil cases the most common relief sought is damages.[17] In the Irish courts damages may be awarded for non-pecuniary losses such as personal injuries suffered by an individual in an accident. The plaintiff brings his case in the court of the appropriate monetary jurisdiction. Most recently the monetary jurisdiction of the District Court has been set at €15,000.00, the jurisdiction of the Circuit Court at €75,000.00 except in the

[15] This definition is taken from Conference of European Constitutional Courts XIIth Congress, The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts "Report of the Constitutional Court of Czech Republic".

[16] Discussed in Hillary Delaney and Declan McGrath, *Civil Procedure in the Superior Courts* (3rd ed Roundhall Thomson Reuters 2012), page 691.

[17] Damages are discussed in McMahon and Binchy, *The Law of Torts* (4th ed Bloomsbury Professional 2013).

case of personal injuries where the jurisdiction is in the amount of €60,000.00.[18] Cases above the Circuit Court monetary jurisdiction are commenced in the High Court. In such cases, it is the Court which determines the amount to be awarded to the plaintiff.

In choosing to plead a case in a particular way, a plaintiff may limit the potential reliefs sought. For example the Rules of the Superior Courts provide for the possibility of commencing a claim for a liquidated sum by which of Summary Summons.[19] If a plaintiff chooses to institute an action in this manner he will preclude himself from seeking alternative reliefs such as general damages.

In principle the parties would be expected to adduce all of their evidence in the course of the hearing. However, exceptionally evidence may be adduced at a late stage.[20] Means of proof and types of evidence are discussed below.[21]

1.2 The Adversarial and Inquisitorial Principle

Ireland as a common law jurisdiction operates an adversarial system. It has been explained as "[a]n adversarial system is one where the adjudication of a dispute is seen as a contest between the two (or more) sides to a dispute. The contest is fought out in front of a neutral adjudicator – the judge and/or jury. The judge does not become an investigator but rather ensures that both sides are obeying the procedural and evidential rules while presenting their case. It is up to the parties in the case, not the judge, to gather their evidence, call whichever witnesses they require and cross-examine witnesses presented by the other party to the dispute."[22]

There are occasions where a more quasi-inquisitorial procedure is adopted, such as in the case of child care proceedings.[23]

Ordinarily the parties have autonomy, subject to the rules of evidence, in respect of the evidence adduced. There exist statutory provisions where a court may procure expert witness testimony. In family law proceedings, Section 47 of the Family Law Act 1995 provides that the court may procure a report from such person as it may nominate on any question affecting the family law proceedings in question. There is a specific provision in respect of nullity cases.[24] Section 20(1) of the Civil Liability and Courts Act, 2004 provides: "In a personal injuries action, the court may appoint such approved persons as it considers appropriate to carry out investigations into, and give expert

[18] Courts and Civil Law (Miscellaneous Provisions) Act, 2013 and SI 566 of 2013 Courts and Civil Law (Miscellaneous Provisions) Act, 2013 (Jurisdiction of District Court and Circuit Court) (Commencement) Order, 2013.
[19] Order 2, RSC.
[20] See 4.10 *infra.*
[21] See 3.4 *infra.*
[22] Allison Kenneally and John Tully, *The Irish Legal System* (Clarus Press, 2013), pages 16-17.
[23] *Eastern Health Board v. MK* [1999] 2 IR 99. For discussion see John Healy, *Irish Laws of Evidence* (Thomson Roundhall, 2004), page 29, footnote 65.
[24] Order 70 Rule 32 of the Rules of the Superior Courts 1986.

evidence in relation to, such matters as the court directs."[25] There is also provisions in respect of competition law where the court may appoint an expert.[26]

In civil courts the role of the judge is to decide matters of law and fact. There are limited circumstances in civil cases where there are juries. In those circumstances the judge is the arbiter of law and the jury is the arbiter of fact. The court decides on the admissibility of evidence and the weight to be attached to evidence.

In the High Court, case management is expressly provided for in Family Law[27] the Commercial List[28], the Competition List[29] and in respect of applications pursuant to the Personal Insolvency Act 2012[30]. Taking the commercial court proceedings as an example Order 63A, rule 5 RSC provides:

> "A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings."

Order 63A, rule 6 RSC provides more detail and states:

> "(1) Without prejudice to the generality of rule 5 of this Order, a Judge may, at the initial directions hearing:
>
> (a) of his own motion and after hearing the parties, or
>
> (b) on the application of a party by motion on notice to the other party or parties returnable to the initial directions hearing,
>
> give any of the following directions to facilitate the determination of the proceedings in the manner mentioned in that rule:
>
> (i) as to whether the proceedings shall continue:
>
> (I) with pleadings and hearing on oral evidence,
>
> (II) without formal pleadings and by means of a statement of issues of law or fact, or of both law and fact,
>
> (III) without formal pleadings and to be heard on affidavit with oral evidence, or
>
> (IV) without formal pleadings and to be heard on affidavit without oral evidence;
>
> (ii) fixing any issues of fact or law to be determined in the proceedings;

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[25] Section 20(4).

[26] Part IV of Order 63B of the Rules of the Superior Courts 1986 (inserted by the Rules of the Superior Courts (Competition Proceedings), 2004.

[27] High Court Practice Direction (HC 51) Family Law Proceedings, 16th July 2009. Available on www.courts.ie.

[28] Order 63A RSC, inserted by SI 2 of 2004, Rules of the Superior Courts (Commercial Proceedings), 2004.

[29] Order 63B of the Rules of the Superior Courts 1986 (inserted by the Rules of the Superior Courts (Competition Proceedings), 2004.

[30] Order 76A RSC, inserted by SI 316 of 2013.

(iii) for the consolidation of the proceedings with another cause or matter pending in the High Court;

(iv) for the defining of issues by the parties, or any of them, including the exchange between the parties of memoranda for the purpose of clarifying issues;

(v) allowing any party to alter or amend his indorsement or pleadings, or allowing amendment of a statement of issues;

(vi) requiring delivery of interrogatories, or discovery or inspection of documents;

(vii) requiring the making of inquiries or taking of accounts;

(viii) requiring the filing of lists of documents, either generally or with respect to specific matters;

(ix) directing any expert witnesses to consult with each other for the purposes of:

(a) identifying the issues in respect of which they intend to give evidence,

(b) where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and

(c) considering any matter which the Judge may direct them to consider,

and requiring that such witnesses record in a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, particulars of the outcome of their consultations:

provided that any such outcome shall not be in any way binding on the parties;

(x) providing for the exchange of documents or information between the parties, or for the transmission by the parties to the Registrar of documents or information electronically on such terms and subject to such conditions and exceptions as a Judge may direct;

(xi) for the examination upon oath before a Judge, Registrar or other officer of the Court, or any other person, and at any place, of any witness, in accordance with Part II of Order 39;

(xii) as to whether or not the proceedings should, by virtue of their complexity, the number of issues or parties, the volume of evidence, or for other special reason, be subject to case management in accordance with Rules 14 and 15 of this Order;

(xiii) on the application of any of the parties or of his own motion, that the proceedings or any issue therein be adjourned for such time, not exceeding twenty-eight days, as he considers appropriate to allow the parties time to consider whether such proceedings or issue ought to be referred to a process of mediation, conciliation or arbitration, and where the parties decide so to refer the proceedings or issue, to extend the time for compliance by any party with any provision of these Rules or any order of the Court.

(2) Without prejudice to any enactment or rule of law by virtue of which documents or evidence are privileged from disclosure, to assist him in deciding whether or not to make any order or give any direction in accordance with sub rule 1 of this rule, a Judge may direct the parties, or any of them, to provide information in respect of the proceedings, including:

a) a list of the persons expected to give evidence;

b) particulars of any matter of a technical or scientific nature which may be at issue or may be the subject of evidence;

c) a reasoned estimate of the time likely to be spent in:
(i) preparation of the proceedings for trial, and
(ii) the trial of the proceedings;
d) particulars of any mediation, conciliation or arbitration arrangements which may be available to the parties.

(3) A Judge may, where he deems fit, at the initial directions hearing, hear any application for relief of an interlocutory nature, whether in the nature of an injunction or otherwise."

At interlocutory stage a court may order or refuse or narrow discovery or other applications for evidence such as inspection. At trial a court will rule on the admissibility or inadmissibility of evidence, usually on an objection from the opposing party. In reaching its decision a court will weigh the admissibility of evidence.

1.3 Hearing of Both Parties Principle (audiatur et alter pars) – Contradictory Principle: The Principle of audi alteram partem[31]

The principle of *audi alteram partem* exists in the Irish legal system. The principle requires a court to hear both sides fairly and impartially. Hunt explains it to mean "no judicial or quasi-judicial decision may be taken without giving the party affected an opportunity of stating his case and being heard in his defence."[32]

This rule existed at common law and now has constitutional status. In *McDonald v. Bord na gCon* [1965] IR 217, the Supreme Court stated:

> "in the context of the Constitution natural justice might be appropriately termed constitutional justice and must be understood to import more than the two well establsihed principles that no man shall be a judge in his own case and *audi alteram partem.*"

Hogan and Whyte explain that "the basic principle underlying *audi alteram partem* remains that a person affected by, or with an interest in the outcome of, an administrative decision has the right to have adequate notice of this decision and to be given an opportunity to make his case before that administrative body. What the courts will regard as an adequate opportunity will very much depend on the circumstances..."[33]

One requirement is that a party be given adequate notice. In *The State (Irish Pharmaceutical Union) v. Employment Appeals Tribunal* [1987] ILRM 36, the Tribunal had ordered re-engagement of an employee in a case concerning unfair dismissal. However, the proceedings had been directed at the circumstances of dismissal and potential damages for the employee. The employer had not been given any indication

[31] Discussed in Hogan and Whyte, J.M. Kelly – The Irish Constitution, page 640 et seq. and Raymond Byrne and Paul McCutcheon, The Irish Legal System (5th ed., Bloomsbury Professional, 2009), page 156.
[32] Hunt, *Murdoch's Dictionary of Irish Law*, page 82.
[33] Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 640.

that re-engagement was being considered or given an opportunity of making a submission as to its appropriateness. Per McCarthy J.

> "Whether it be identified as the principle of natural justice derived from the common law and known as *audi alteram partem* or preferably as the right to fair procedures under the Constitution in all judicial or quasi-judicial proceedings, it is a fundamental requirement of justice that person or property should not be at risk without the party charged being given an adequate opportunity of meeting the claim, as identified and pursued."

In *Ó Ceallaigh v. An Bord Altranais* [2000] 4 IR 54, the Supreme Court held that failure by a Fitness to Practise Committee to inform the applicant mid-wife of three complaints against her, in the context of the Committee determining whether there was a *prima facie* case against her was a breach of fair procedures. An inquiry into the alleged misconduct of a professional person is so serious that the person ought to be put on notice of any preliminary inquiry to determine whether there was a *prima facie* case against that person.

Hogan and Whyte state that "[a] corollary of the right to notice is that the decision-making body must generally speaking at least, rely only on information disclosed to both parties at the hearing."[34]

The courts have recognised that in special circumstances strict observance of the *audi alteram partem* may be excused. For example, in *O'Callaghan v. Commissioners of Public Works* [1985] ILRM 364, the Commissioners placed a preservation order on a prehistoric fort, which was threatened with destruction by a ploughing on behalf of a farmer, but could not serve the order on the farmer in circumstances where he had absented himself. The Court accepted that an emergency had been created by the farmer's own actions and where it was not possible to contact him as his address was unknown to the Commissioners. However, the courts have also indicated that any limitation on the principle must be proportionate.[35]

1.3.1 Preparatory Acts Before a Hearing

Ireland as a common law jurisdiction operates an adversarial system. "It is up to the parties in the case, not the judge, to gather their evidence, call whichever witnesses they require and cross-examine witnesses presented by the other party to the dispute."[36] Ordinarily the parties have autonomy, subject to the rules of evidence, in respect of the evidence adduced. [37]

Discovery in Irish Law generally refers to document production.[38] It is the process whereby a party in civil proceedings may, in advance of the hearing of the proceedings

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[34] *Ibid*, page 644.
[35] *DK v. Crowley* [2002] 2 IR 744.
[36] Kenneally and Tully, *The Irish Legal System*, pages 16-17.
[37] See 1.2, 7.3 and 7.6 *infra*.
[38] Discovery is discussed in more detail at 1.7 *infra*.

acquire documentation in the power, possession or procurement of another party or a non-party.

1.3.1.1 The Right to Present Evidence

Parties are free to call any witnesses and to tender witnesses in the order of their choice. In civil cases the parties have discretion regarding which evidence will be adduced and the sequence of the evidence. The right to public hearings (subject to exceptions provided for by law) is constitutionally protected in Ireland. Even in *in camera* hearings the parties have a right to be present. During cross-examination of a witness, there is an obligation to put the evidence of the party doing the cross-examination to the witness on behalf of the other party who is being cross-examined. To succeed in proving an issue at a civil trial, a party bearing the burden of proof will need to discharge the burden by proving the issue on the balance of probabilities.

1.3.1.2 Ex parte Applications

An *ex parte* application is an application made in the absence of and without notice to the other party or parties in an action. Interlocutory applications are required to be on notice unless otherwise provided by way of the courts rules or exisiting practice.[39] Exceptionally, if the High Court is satisfied that the delay caused by proceeding by motion on notice would or might entail irreparable or serious mischief, it may make an order *ex parte*. Applications for leave to apply for judicial review are typically made *ex parte*.[40] The leave stage acts as a filtering process. Interim injunctions can be sought on an *ex parte* basis in proceedings of great urgency.

The High Court has inherent jurisdiction to set aside any order made *ex parte* on the application of any party affected by the Order.[41] The rationale is that any order made *ex parte* must be viewed as an order of a provisional nature only, where a party may be affected by the *ex parte* order without notice and without having an opportunity to be heard and this may constitute a grave injustice. Interim injunctions, if granted, will usually only be granted for a very short period and the Court will fix a date for the return of an interlocutory application which will on notice.

1.3.2 Consequences of the Breach of the Right to be Heard

Decisions of administrative bodies and lower courts may be judicially reviewed. In the event that fair procedures, including the right to be heard, have not been complied with, a decision will be quashed.[42]

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[39] Order 52, r.2 RSC.

[40] Order 84, r.20(2). This is not a universal rule as there are a number of specific statutory regimes which require applications for leave to apply for judicial review to be made on notice.

[41] *Adams v. Director of Public Prosecutions* [2001] 2 ILRM 401.

[42] For a discussion of judicial review see Delaney and McGrath, *Civil Procedure in the Superior Courts* (2012), Chapter 30 and Byrne and McCutcheon, *The Irish Legal System* (5th ed., Bloomsbury Professional, 2014), page 326 *et seq*.

In *Balkanbank v. Taher*, Unreported, Supreme Court, 19 January 1995, the Supreme Court allowed an appeal against a decision of the High Court permitting a belated amendment of the pleadings which amounted to a breach of fair procedures since it required the other side to meet a case of which they had inadequate notice.

Decisions of a court made on an *ex parte* basis are regarded as provisional.

1.3.3 Precedent and Stare Decisis

The Irish Legal system as a common law system operates the doctrine of precedent. This means that to ensure consistency, courts follow previous relevant decisions. Byrne and McCutcheon explain "[t]his feature is shared by civil law and common law systems alike but in the case of common law system, precedent, encapsulated in the principle of *stare decisis* (let the decision stand), has a greater significance. Since common law systems, unlike their civilian equivalents lack authoritative codes, their rules are to be found in the decisions of courts which are charged with the task of applying them. As a result judicial decisions are a source of law, loosely called "caselaw" to which lawyers have recourse- they enjoy the force of law and not are simply examples to be imitated. The practice of following earlier decisions has become so prevalent that its correctness is now beyond dispute and can be considered to be the principal rule of judicial decision-making in common law systems."[43]

The system presumes a hierarchy of decisions, that decisions are reasoned, that the force of precedent is accepted and the general premise that certainty and predictability are worth pursuing. Distinctions are drawn between binding authorities and persuasive authorities. The general rules include that lower courts must follow decisions of higher courts and that a court of co-ordinate or equal jurisdiction is generally expected to follow earlier decisions of that court although this latter aspect is not an absolute rule.[44]

1.3.4 Sanctions for Passivity or Absence

If a party fails to deliver pleadings within the time prescribed by the rules, it is open to the opposing party to seek judgment in default of the pleading. For example, a defendant may apply to have a plaintiff's case struck out for failure to deliver a Statement of Claim.[45] A plaintiff may seek judgment in default of appearance or in default of a defence. It is also possible to have proceedings struck out on the basis of delay.

Order 36, rule 28 RSC provides that if, when the trial is called on the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim in so far as the burden of proof rests on him. If the defendant appears but not the plaintiff, the

[43] Byrne and McCutcheon, *The Irish Legal System (*2009), pages 403-404. For dicscussion see Chapter 12 of that text.
[44] For discussion, see Byrne and McCutcheon, *The Irish Legal System* (5th ed Bloomsbury Professional, 2014).
[45] Order 27 RSC.

defendant is entitled to judgment dismissing the action save that in the event that he has a counterclaim then he proves the counterclaim so far as the burden of proof is on him.[46] There are special provisions for actions involving recovery of land.[47] Order 36, rule 33 provides that any verdict or judgment obtained where a party does not appear at trial may be set aside by the court on such terms as may seem fit, upon application made within six days of the trial.[48] Order 36, rule 34 provides that a Judge may if he thinks it expedient in the interest of justice postpone or adjourn a trial for such time and upon such terms as he may see fit.

Often, a litigant will need to give his own evidence in support of his case and a failure to do so would result in a failure to discharge the burden of proof on him.

1.4 Principle of Orality – Right to Oral Stage of Procedure, Principle of Written Form

Delaney and McGrath state "[o]ne if the cardinal principles of our system of justice is that of orality, whereby the primary form of proof is the oral testimony of witnesses given in open court before the trier of fact who is thereby afforded an opportunity of observing his demeanour first hand."[49]

Under the adversarial model operating in Ireland, the primary means by which a party proves his case is by oral evidence. "The adversarial system… relies heavily on oral evidence and there is still an assumption that providing oral evidence directly to the court is the best way of determining the facts of the case."[50] Generally evidence is required to be oral. As a general rule in civil trials, witnesses are examined *viva voce* in open court.[51] The right to cross-examine has a constitutional basis in both civil and criminal cases.[52]

1.4.1 Affidavit Evidence

Affidavits are regarded as testimony and not documentary evidence as such.

The Rules of the Superior Courts provide that specified proceedings commenced by summary summons[53] or special summons[54] may be heard an affidavit evidence. These types of proceedings are very much the exception. Interlocutory matters are often

[46] Order 36, rule 32 RSC.
[47] Order 36, rules 29-31 RSC.
[48] This time period may be enlarged.
[49] Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), page 479.
[50] Kenneally and Tully, *The Irish Legal System*, pages 16-17.
[51] Order 39, rule 1(1) Rules of the Superior Courts. These issues are discussed in further detail in Part 6 *infra*. See also *Mapp v. Gilhooley* [1991] 1 IR 253.
[52] In criminal cases its basis is Article 38.1 and in civil cases its basis is Article 40.3.
[53] Order 2 RSC. The proceedings specified are claims for a liquidated sum.
[54] Order 3 RSC.

disposed of on affidavit evidence also.[55] Judicial review proceedings are dealt with by way affidavit evidence. Delaney and McGrath state [i]n certain categories of proceedings, which are suitable for summary disposal and/or where there are unlikely to be serious disputes of fact such as proceedings brought by way of summary summons, special summons, originating notice of motion or petition, evidence is generally adduced by way of affidavit evidence… However…, where a dispute arises in relation to the evidence given on affidavit, cross-examination may be permitted."[56]

Order 40, r.1 RSC empowers the court, on application of a party, to order the attendance for cross-examination of a deponent who has sworn an affidavit in any petition, motion or other application. The extent of the entitlement to cross-examine depends on the nature of the application or proceedings. For example in cases proceeding by way of summary summons or special summons, a party wishing to cross-examine a deponent can issue a Notice to cross-examine and unless the deponent is available for cross-examination at trial his affidavit may not be used without the leave of the court. In proceedings commenced by petition or originating notice of motion, including judicial review and in interlocutory applications, leave of court is required.

A court is not obliged to accept affidavit evidence, even if a deponent is not cross-examined if the court accepts conflicting evidence given on affidavit or orally.[57] Where there is a conflict of evidence on affidavit and the deponents are not cross-examined, the court may resolve the issues of fact against the party bearing the onus of proof.[58]

1.4.2 Documentary Evidence

Heffernan, Ryan and Imwinkelreid state that Irish "rules of evidence embody the traditional preference of the common law for oral evidence with its attendant safeguards of the oath or affirmation, the delivery of testimony directly before the finder of fact and the testing of the witness's credibility and account by cross-examination. There are many instances, however, where a party may be permitted to offer proof in documentary form."[59] The broad definition of what constitutes documentary evidence in Irish law is discussed below.[60] The same authors state that "[t]he typical basis for admitting documentary evidence is that it constitutes the best available evidence in the circumstances."[61] The cogency of the documentary evidence depends on the nature of the dispute. Heffernan, Ryan and Imwinkelreid give examples of a contract constituting

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[55] Discovery for example is applied for by notice of motion grounded on affidavit.
[56] Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), page 495.
[57] *Koulibaly v. Minister for Justice Equality and Law Reform*, Unreported, Supreme Court, 29 July 2004.
[58] *Molloy v. Director of Public Prosecutions*, Unreported, High Court (Ó Caoimh, J.), 1 December 2000.
[59] Liz Heffernan, Ray Ryan and Edward J. Imwinkelreid, *Evidentiary Foundations Irish* Edition (Tottel Publishing, 2008), page 49.
[60] See Part 5 *infra*.
[61] Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition*, page 49.

best evidence of what was agreed by the parties or a letter written shortly before a persons death may shed light on the person's state of mind.[62]

A procedural requirement is that the party presenting an item of evidence must lay a foundation for its introduction into evidence.[63] This is a general rule but is used here to explain the relationship between oral and documentary evidence.

Heffernan, Ryan and Imwinkelreid explain that "[w]henever the law of evidence makes proof of a fact or event a condition precedent to the admission of an item of evidence, the fact or event is part of the foundation for the admission of the evidence."[64] Here they give the example that a condition precedent of seeking to introduce a letter into evidence is to present proof of the authenticity of the letter. Proof of the authenticity of the letter is thus part of the foundation. Proof of foundation of the evidence is the more logical approach but a trial judge has discretion to deviate from this procedural order.[65] Laying a foundation for introducing evidence may require satisfying a number of conditions precedent. Here Heffernan, Ryan and Imwinkelreid give the example of where in laying a foundation for a document, the party adducing it will be required to show that it is relevant and authentic but may also have to show that the document satisfies the best evidence rule and the rule against hearsay.[66]

In respect of authenticating a document, they give examples of a party claims that a deceased person signed a letter they must prove that the document is a genuine letter signed by the deceased or a party offering a photograph of a road traffic junction must show that the photograph accurately depicts the junction.[67] As is discussed below[68], there are many instances where parties are required to adduce the original of a document and therefore to prove that it is the original. Heffernan, Ryan and Imwinkelreid state "[c]onsequently, the admission of documentary evidence is premised on accompanying testimony from a witness who can introduce and contextualise the evidence for a finder of fact."

Further, documentary evidence will not be admissible if it caught by the exclusionary rules of evidence such as the rules against hearsay or the rule against opinion evidence. Documentary evidence may also be excluded on the basis that privilege from disclosure is claimed.[69]

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[62] *Ibid*, page 49.
[63] *Ibid*, page 3.
[64] *Ibid*, page 3.
[65] *Ibid*, page 3.
[66] *Ibid*, page 3.
[67] *Ibid*, page 50.
[68] Part 5 *infra*.
[69] Privilege is discussed in Part 6 *infra*.

1.5 Principle of Directness

The principle of directness is understood to mean that witness evidence has to be presented before the trial court.

As previously discussed, under the adversarial model operating in Ireland, the primary means by which a party proves his case is by oral evidence. This evidence is heard in open court before the trier of fact(the judge or jury). Nowadays juries are unusual in civil cases in Ireland.

In Ireland, in civil cases the norm is that testimony is given *viva voce* in open court, before the trier of fact and in the presence of the parties.[70]

Exceptions are provided for. First, as discussed above under the principle of orality, there are specific types of proceedings which may be determined on affidavit evidence. If evidence is given on affidavit, it is open to the opposing party to to require (or at least to apply to court to have) the deponent to appear in court for the purposes of cross-examination. There has also been a recent trend for legislation to provide for evidence in certain circumstances to be taken *via* live television link.[71] Thirdly, there is a possibility of evidence being taken on commission.[72] Fourthly, in recent times, there has been some movement from absolute reliance on oral evidence.[73] This is apparent for example, from the court rules in respect of commercial and competition law proceedings.

Order 63A, rule 22[74] provides:

> 22. (1) Unless a Judge shall otherwise order, a party intending to rely upon the oral evidence of a witness as to fact or of an expert at trial shall, not later than one month prior to the date of such trial in the case of the plaintiff, applicant or other party prosecuting the proceedings and not later than seven days prior to that date in the case of the defendant, respondent or other party defending the proceedings, serve upon the other party or parties a written statement outlining the essential elements of that evidence signed and dated by the witness or expert, as the case may be.
>
> (2) A Judge may, in exceptional circumstances to be recited in the order and after hearing all of the parties, make an order directing that the written statement referred to in sub rule 1 of this rule or any part thereof shall be treated as the evidence in chief of the witness or expert concerned but only after it has been verified on oath by such witness or expert.

In competition law proceedings, Order 63B, r.27 is in similar terms.[75]

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[70] This is discussed more fully in Part 6 *infra*.
[71] Discussed in Part 6 *infra*.
[72] Discussed in more detail in Part 6 *infra*. The relevant rule is Order 39, r.4 RSC.
[73] In the criminal context see the Criminal Justice Act, 2006.
[74] SI 2 of 2004, Rules of the Superior Courts (Commercial Proceedings).
[75] SI 130 of 2005, Rules of the Superior Courts (Competition Proceedings).

1.5.1 Evidence via Television Link

In criminal proceedings, the Criminal Evidence Act of 1992 Part III permits television link evidence in respect of specified violent and sexual offences. Section 13 provides that a person other than the accused may give evidence whether from within or outside the state through a live television link (a) if the person is under 17 years of age unless the Court sees a good reason to the contrary and (b) in any other case with the leave of the court. Section 14 provides that where a person under 17 is to give evidence via live television link, the court may, on the application of the prosecution or accused, if satisfied having regard to the age or the mental condition of the witness, the interests of justice require that questions be put through an intermediary, direct that any such questions be so put. Section 18 permits that where the witness, giving evidence via live television link, knew the accused prior to the date of the offence, that the witness shall not be required to identify the accused at trial unless the interests of justice so require. The constitutionality of the provision for evidence to be given via television link was unsuccessfully challenged.[76] Hogan and Whyte state "[t]he right to cross-examine does not necessarily embrace the right to confront the witnesses in person." In *Donnelly v. Ireland* [1998] 1 IR 321, in considering whether s.13 was unfair to the accused, Hamilton CJ stated:

> "The Court is satisfied, however, that the assessment of such credibility does not require that the witness should be required to give evidence in the physical presence of the accused person and that the requirements of fair procedures are adequately fulfilled by requiring that the witness give evidence on oath and be subjected to cross-examination and that the judge and jury have ample opportunity to observe the demeanour of the witness while giving evidence and being subjected to cross-examination."

Section 39 of the Criminal Justice Act 1999, provides that in any proceedings in indictment, a person, other than the accused, may give evidence via live television link where the court is satisfied that the person is likely to be in fear or subject to intimidation in giving evidence. Such evidence must be video-recorded.

There is also provision for live television link evidence in the context of extradition proceedings.[77]

The Children Act 1997 provides that in civil proceedings concerning the welfare of a child or a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently, the child may with the leave of the Court give evidence via live television link. This evidence may be given from within or from outside the State. S.22 provides that on the application of the parties or the court of its own motion may request that any questions be put through an intermediary.

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[76] *White v. Ireland* [1995] 2 IR 268. *Donnelly v. Ireland* [1998] 1 IR 321.

[77] S.29 (1) of the Criminal Evidence Act, 1992 as substituted by s.24 of the Extradition (European Union) conventions) Act, 2001.

Order 63A, r.23 RSC,[78] provides that a Judge may in commercial proceedings allow a witness to give evidence *via* a live video link or by other means whether the witness is within or outside the State. This appears to confer a broad discretion.

> "23. (1) A Judge may allow a witness to give evidence, whether from within or outside the State, through a live video link or by other means.
> (2) Evidence given in accordance with sub rule 1 of this rule shall be recorded by video or otherwise as the Judge may direct."

There exists a similar provision in respect of competition law proceedings in Order 63B, r.28 RSC.[79] There is a High Court Practice Direction regarding the use of video-conferencing link for taking evidence in civil cases[80] which is discussed further below.[81]

1.5.2 Taking of Evidence by Appellate Courts

Two forms of appeal are known in the Irish legal system.[82] First a hearing *de novo* which involves a higher court rehearing of the case in the higher court as it there had been no hearing in the lower court. Secondly, there exists an appeal on a point of law. In an appeal on a point of law an appellate court does not generally hear witnesses but relies on a transcript of the evidence before the lower court. Once there is a foundation in the evidence for the trial judge's findings of fact, the appellate court will be slow to interfere with the findings of fact of the trial court. The rationale is that the trial court will have had an opportunity to see the witnesses give evidence and to have witnessed the demeanour of the witness under examination and cross-examination. Such demeanour is not readily apparent from a transcript of evidence. An appellate court will be more likely to interfere with findings of secondary fact.[83]

For civil claims initiated in the High Court, it is possible to appeal to the Supreme Court. Order 58, rule 14 RSC provides that when any question of fact is involved in an appeal, the evidence taken in the High Court bearing on such question shall, subject to any special order, be brought before the Supreme Court in the following manner. Where the evidence has been taken by affidavit, copies of the affidavits shall be produced, and where evidence has been given orally, copies of the judge's notes or such other materials as the Supreme Court shall deem expedient. Transcripts of oral testimony and the trial are regularly used.

Not ever decision of the High Court may be appealed to the Supreme Court.

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[78] SI 2 of 2004, Rules of the Superior Courts (Commercial Proceedings).
[79] SI 130 of 2005, Rules of the Superior Courts (Competition Proceedings).
[80] HC45, dated 3 May 2007.
[81] See 7.5 *infra.*
[82] For discussion see Byrne and McCutcheon, *The Irish Legal System* (2009), Chapter 7; Kenneally and Tully, *The Irish Legal System*, Chapter 13; Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, Part 6; Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), Chapter 20.
[83] *Hanrahan v. Merck Sharp & Dohme Ltd.* [1988] ILRM 629.

In a referendum in 2013 it was determined to establish a Court of Appeal between the High Court and the Supreme Court.[84] The Supreme Court is the "Court of Final Appeal", under Article 34.4.1° of the Constitution. The Supreme Court is primarily an appellate court but there are very limited circumstances provided for in the Constitution where the Supreme Court acts as court of first instance. These exceptions comprise the capacity of the President and reference of Bills by the President to ascertain whether the Bill is repugnant to the Constitution.[85]

The Supreme Court does not hear generally hear additional evidence. However, Order 58, r.8 provides that the Supreme Court has full discretionary power to hear further evidence on questions of fact to be taken either by oral examination or by affidavit or deposition. Order 58, r.8 RSC requires that such evidence will only be admitted on "special grounds" and "not without the special leave" of the Supreme Court as regards evidence which was available at the time of the trial. If further evidence relates to matters which occurred after the date of the decision from which the appeal is brought, no special leave of the court is required to adduce such evidence.[86] Further the requirement for special leave is dispensed with in the context of interlocutory matters.[87] Additional evidence is generally received on affidavit.

The Supreme Court has an inherent jurisdiction to assess damages rather than ordering a re-trial.[88] Order 58, r.9 provides that on hearing an appeal, the Supreme Court may direct a re-trial.

In *Dalton v. Minister for Finance* [1989] ILRM 519, evidence of a deterioration in the plaintiff's health following the High Court assessment of damages was not relevant to the appeal. Exceptionally, new evidence is permitted. In *B v. B.* [1975] IR 34 it was determined that the constitutional nature of the Supreme Court's appellate function did not prevent that court from hearing new evidence in the course of an appeal and in that case leave was granted to allow both parties to give additional oral evidence.

1.6 Principle of Public Hearing[89]

Article 34.1 of the Irish Constitution, Bunreacht na h-Éireann, provides that justice shall be administered in public "save in such special and limited cases prescribed by law." The rationale for administering justice in public is that justice must be seem to be done. In Ireland, it is regarded as a fundamental aspect of the rule of law in a democratic society.

In *Irish Times v. Ireland* [1998] 1 IR 359, the then Chief Justice, Hamilton CJ stated:

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[84] Thirty-Third Amendment of the Constitution Act, 2013.
[85] Article 12.3.1° and Article 26 of the Constitution.
[86] Order 58, rule 8 RSC.
[87] Order 58, rule 8 RSC.
[88] *Holohan v. Donohoe* [1986] IR 45.
[89] Discussed in Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 731 et seq. and Byrne and McCutcheon, *The Irish Legal System* (2009), pages 116-121.

> "Justice is best served in an open court where the judicial process can be scrutinised. In a democratic society, justice must not only be done, but be seen to be done. Only in this way, can respect for the rule of law and public confidence in the administration of justice, so essential to the workings of a democratic state, be maintained."

In the same case, Keane J. stated:

> "Justice must be administered in public, not in order to satisfy the merely prurient or mindlessly inquisitive, but because, if it were not, an essential feature of a truly democratic society would be missing. Such a society could not tolerate the huge void that would be left if the public had to rely on what might be seen or heard by casual observers, rather than on a detailed daily commentary by press, radio and television. The most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or members of the legal profession, is one of secrecy."

The norm is that members of the public and the media are permitted to attend court. Generally, photographers and television crews are not permitted in court.[90] There does not appear to be a statutory basis for this prohibition[91] and on rare occasions permission has been given to film court proceedings.

Exceptionally, in limited cases specified by law proceedings are heard *in camera* and in such cases members of the public and the media are excluded from the courtroom. In *in camera* proceedings attendance is restricted to the Judge, the Jury (if applicable), the parties, their legal representatives and the court registrar or clerk. The Constitution requires these exceptions to be prescribed by law, i.e. by legislation. The Courts retain an inherent discretion to direct that a case or part of it be heard in camera where this is considered necessary to protect the constitutional rights of an accused in a criminal trial, litigants and third parties in civil trials and indirect circumvention of the in camera rule.[92] *Irish Times v. Ireland* [1998] 1 IR 359 suggests the possibility of creating non-statutory exceptions if the judiciary considered such exceptions necessary to safeguard constitutional rights.

As regards the legislative exceptions they are sometimes mandatory provisions and sometimes at the discretion of the judge. For example section 45 (1)of the Courts (Supplemental Provisions) Act, 1961 provides:

> "*Justice may be administered otherwise than in public in any of the following cases:*
> *(a) applications of an urgent nature for relief by way of habeas corpus, bail, prohibition or injunction;*
> *(b) matrimonial causes and matters;*
> *(c) lunacy and minor matters;*
> *(d) proceedings involving the disclosure of a secret manufacturing process;...*"

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[90] Maire McGonagle, *A Textbook on Media Law*, 2nd ed, 2003, page 260, and McCutcheon, *The Irish Legal System* (2009), page 121.
[91] Byrne and McCutcheon, *The Irish Legal System* (2009), page 121.
[92] Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 733 *et seq.*

This section is described by Hogan and Whyte as "the principal exception" in civil matters.[93] There are many statutory provisions concerning family law where the courts are empowered to sit otherwise than in public. The general practice in all family law cases was that they were heard in private. In recent years it is noted below, that there has been some changes in this regard but it is still the case that family courts are not open to the public.

High Court proceedings pursuant to s.205 of the Companies Act, 1963 which proceedings are concerned with a company shareholder alleging oppression by majority shareholders may be held *in camera* where the High Court is of the opinion that a public hearing would "involves the disclosure of information, the publication of which would be seriously prejudicial to the legitimate interests of the company."[94] There are a number of other specific statutory provisions concerning commercial or financial services which permit of proceedings being held otherwsie than in public.[95]

There are a number of provisions in the area of professional discipline, for example s.44(2) of the Nurses Act 1985 provides that any application by An Bord Altranais to the High Court seeking to suspend the registration of a nurse shall be heard otherwise than in public. This therefore is an example of a mandatory statutory provision. There are similar provisions in respect of a number of other professions.

Section 8(3) of the Proceeds of Crime Act 1996 that applications for interim orders shall be heard otherwise than in public.

Byrne and McCutcheon state "[i]t is clear that the main justification for excluding the public from such hearings are either the urgency of the case or the sensitivity of the material being discussed in court.[96] Any publication of information which would identify parties to *in camera* proceedings or reveal sensitive information revealed in such proceedings amounts to contempt of courts.

There was concern about transparency in family law proceedings owing to the *in camera* rule.[97] Section 40(3) of the Civil Liability and Courts Act, 2004 amended the *in camera* rule regarding family cases and permits a barrister, a solicitor, researcher or specialist working in a particular area to prepare and publish a report of family law proceedings.[98] Section 40 was applied to the Civil Partnership Legislation.[99] The Courts Service engaged a number of barrister as researchers and publishes a periodical entitled *Family Law Matters.* Parties are not identified. S.40(6) of the Civil Liability and Courts

[93] *Ibid*, page 737.
[94] S.205(7).
[95] Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, pages 745-746.
[96] Byrne and McCutcheon, *The Irish Legal System* (2009), page 121.
[97] See *inter alia*, the Law Reform Commission, Consultation Paper on Family Law (LRC CP-78 1994).
[98] See also Civil Liability and Courts Act 2004 (Section 40(3)) Regulations 2005, SI 337 of 2005.
[99] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, s.145

Act 2004 allows for orders made and evidence given in *in camera* proceedings to be used in other specified hearings.

In early 2014, a major change was enacted in respect of the *in camera* rule in family proceedings when Section 40 of the Civil Liability and Courts Act, 2004 was amended by s.5 of the Courts and Civil Law (Miscellaneous Provisions) Act, 2013[100] which permits *bona fide* members of the press to attend but is subject to the discretion of the court in prescribed instances to exclude the members of the press. In addition a new offence is created in the event that members of the press publish information which would tend to identify the parties or a child.[101] This new offence is expressly without prejudice to the law as to contempt of court.

In addition to these number of limited circumstances in which proceedings can be held otherwise than in public there also exist restrictions in the context of the criminal law.[102]

The requirement that justice be administered in public has been interpreted to mean that litigants in civil proceedings use their own names.[103] Section 27 of the Civil Law (Miscellaneous Provisions) Act 2008 provides that in any civil law proceedings in relation to a medical condition of a person, an application may be made to court prohibiting the publication of any details which would identify the person as having that condition where the identification of the person with the condition would be likely to cause distress.

Article 38.6 of the Constitution provides that the provisions of Article 34 do not apply to Special Courts or Military Tribunals.

1.7 Principle of Pre-Trial Discovery[104]

Discovery in Irish Law generally refers to document production. It is the process whereby a party in civil proceedings may, in advance of the hearing of the proceedings acquire documentation in the power, possession or procurement of another party or a non-party.

Discovery is required to be made on oath. Discovery involves two stages. First an affidavit of discovery is sworn setting out the list of relevant documents. Secondly,

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[100] Commenced as of 11 January 2014 by Courts and Civil Law (Miscellaneous Provisions) Act 2013 (Sections 3-12) Commencement Order, SI 5 of 2014.

[101] S.40A of the Civil Liability and Courts Act 2004 as inserted by s.6 Courts and Civil Law (Miscellaneous Provisions) Act 2013. Commenced by SI 5 of 2014.

[102] Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 735 *et seq*.

[103] *Doe v. Armour Pharmaceutical Co Inc* [1994] 1 ILRM 416, *Roe v. Blood Transfusion Service* [1996] 3 IR 67.

[104] William Abrahamson, James Dwyer and Andrew Fitzpatrick, *Discovery and Disclosure* (2nd ed, Thomson Roundhall 2013); Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), page 265 *et seq*.

inspection of the documents disclosed except those which are exempt from disclosure by reason of privilege.

Rules of Court in respect of each jurisdiction provide for discovery and set out the procedures and obligations.[105] The rules provide for inter-partes discovery and non-party discovery[106] (referred to as third party discovery). There also exists extensive case-law on discovery. Discovery can be made on a voluntary basis or pursuant to court order. Agreement to make discovery has the same effect as a court order and the same obligations apply as if the discovery was ordered by court.

The test for discovery is relevance[107] and necessity[108]. The burden of proving the necessity of discovery rests on the party seeking discovery.[109] The courts aslo apply a proportionality test.[110]

Discovery will not be ordered on a purely speculative basis, what is often referred to as "a fishing expedition". By virtue of a rule change in 1999, parties in superior court proceedings are required to stipulate the exact categories of documents they are seeking.[111] The discovery rules were also amended more recently in 2009, to provide for discovery of electronically stored information (ESI).[112] Document is not defined in Order 31, RSC save that since 2009, the Order 31 rules provide that the terms documents and business documents include all electronically stored information. As is discussed below[113] the term document is broadly defined in caselaw meaning anything that contains information.[114] The rules require discovery of documents in the "possession, power or procurement"[115] of the party making discovery.

A party may refuse to disclose the contents of documents which are privileged. Privilege is discussed in more detail below.[116] Privilege does not exempt a party from disclosing the existence of a document. The rules require privileged documents to be listed or described in a specific schedule of the affidavit of discovery. In *Bula Ltd. v. Tara Mines Ltd. (No. 4)* [1991] 1 IR 217, the Supreme Court stated that where privilege is claimed, the affidavit must list each document and provide a description of the

[105] For example in the superior courts, discovery is provided for in Order 31, RSC as amended.
[106] Order 31, r.12 (29). Non-party discovery is not available against a person resident outside the jurisdiction; *Fusco v. O'Dea* [1994] 2 IR 93. The party seeking discovery from a non-party is responsible for the non-party's reasonable costs.
[107] Order 31, r.12 and *The Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company* (1882) QBD 55.
[108] Order 31, r.12 Order 31, r.12 and *Cooper Flynn v. RTE* [2000] I.R. 344.
[109] *Ryanair p.l.c. v. Aer Rianta c.p.t.* [2003] 4 I.R. 264.
[110] *Framus Ltd. v. CRH plc* [2004] 2 I.R. 20.
[111] Order 31, r.12 RSC as amended by SI 233 of 1999 Rules of the Superior Courts (No. 2) (Discovery), 1999.
[112] SI 93 of 2009 Rules of the Superior Courts (Discovery) 2009.
[113] Part 5 *infra*.
[114] *McCarthy v. O'Flynn* [1979] IR 127.
[115] Order 31, rule 12(1) RSC as amended.
[116] See Part 6 *infra*.

privilege claimed in respect of that document. This is so that the basis of the claim for privilege can be evaluated. A claim that documents are privileged can be challenged in court by the other party to the proceedings. The court retains discretion to determine whether a document is privileged.[117] The court may inspect the documents in order to make this determination.

Ordinarily discovery occurs after pleadings in a case have closed. Relevance is tested by reference to the pleadings.[118] Exceptionally discovery may be ordered at an earlier stage of proceedings.[119]

Once the affidavit of discovery has been sworn, the documents may be inspected. In practice often a copy of documents is provided rather than inspection.

A party will be prevented from adducing into evidence a document which ought to have been but which was not discovered.

There is an implied undertaking by the party receiving or having sight of documents disclosed in discovery that the documents will only be used for the purposes of the proceedings and not for any other purposes.[120] To use the documents for another purpose would render the person liable to contempt of court. A party cannot rely on documents which he has refused or failed to discover.[121]

A *Norwich Pharmacal* order is a particular type of discovery where the only cause of action is discovery.[122]

1.7.1 Interrogatories

Order 31, RSC also provides for interrogatories. This is a series of questions addressed to the other side which must be answered on oath. Interrogatories should take the form of questions which are capable of a yes/no answer. The purpose of interrogatories is to avoid injustice where one party has knowledge and the ability to prove facts which would aid his opponent's case and his opponent does not have the knowledge or ability to prove facts at all or without undue difficulty.[123] Ordinarily leave of the Court is required to deliver interrogatories and in practice they are only permitted in exceptional circumstances. Leave is not needed in the case of fraud or in commercial court proceedings.

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[117] *Murphy v. Dublin Corporation* [1972] IR 215.
[118] *Murphy (a minor) v. Donohoe Ltd.* [1996] 1 I.R. 123 at 129, *per* Johnson J.
[119] *Law Society of Ireland v. Rawlinson & Hunter* [1997] 3 IR 592.
[120] *Greencore Group Plc v. Murphy* [1995] 3 IR 520.
[121] *Bula Ltd (in receivership) v. Crowley*, High Court, Unreported, Murphy J., 19 December 1989.
[122] *Norwich Pharmacal Co. v. Customs and Excise Commissioners* 1974] AC 133 which jurisdiction was confirmed by the Irish Supreme Court in *Megaleasing UK Ltd. v. Barrett* [1993] ILRM 497.
[123] Ben O'Floinn, *Practice and Procedure in the Superior Courts* (2nd ed, Tottel Publishing), page 283 *et seq.*

1.8 Other General Principles in the Irish Legal System

The principle of *audi alteram partem*, discussed above is one of the two principle rules of natural and constitutional justice in the Irish legal system. The other is *Nemo Iudex in Causa Sua*, meaning that no-one shall be the judge in his own case or the rule against bias.[124]

1.8.1 Relevance[125]

The primary test that evidence has to satisfy in order to be admitted in one of relevance. McGrath states "*the corollary is that all relevant evidence is admissible unless specifically excluded by one of the exclusionary rules.*"[126] Exclusionary rules include hearsay and opinion evidence and these are discussed in more detail later. It is for a Trial Judge to decide on the admissibility of evidence. But as McGrath points out "*if an item of evidence falls foul of the exclusionary rule, then it is absolutely inadmissible and a Trial Judge has no discretion to admit it.*"[127] The onus of establishing relevance rests on the party who wishes to adduce the evidence. The issue of relevance can be very contextual and sometimes it can be difficult to determine whether evidence is relevant at the point where a party seeks to adduce it. In such circumstances a Trial Judge may decide to admit the evidence *de bene esse* and as such on a conditional basis. Relevant evidence may be inadmissible by virtue of one of the exclusionary rules for example the hearsay rule which is discussed further below under the heading Part 6 – Witnesses. Evidence may also be excluded on the basis that it is privileged and again privilege is discussed further below under the heading Part 6 – Witnesses. A Trial Judge has discretion to exclude relevant evidence. Irrelevant evidence is never admissible.[128]

2 General Principles of Evidence Taking

2.1 Free Assessment of Evidence

"Free assessment of the evidence" is understood to mean that the arbiter of fact decides the evidentiary weight to be given to factual evidence. As a term of art "the free assessment of evidence" does not exist in the Irish Legal System. As noted above, Article 34.3.1° of the Irish Constitution provides:

> "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."

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[124] Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 647 *et seq.* and Byrne and McCutcheon, *The Irish Legal System* (2009), page 156 *et seq.*

[125] Declan McGrath, *Evidence* (Thomson Roundhall, 2005), Chapter 1; Healy, *Irish Laws of Evidence*, Chapter 1; Caroline Fennell, *The Law of Evidence in Ireland* (3rd ed, Bloomsbury Professional, 2009), Chapter 3; Ruth Cannon and Niall Neligan, *Evidence* (Roundhall, Sweet & Maxwell, 2002), Chapter 1.

[126] McGrath, *Evidence*, page 8.

[127] McGrath, *Evidence*, page 8.

[128] *People (DPP) v O'Callaghan,* Unreported, Court of Criminal Appeal 18 December 2000.

The Trial Judge is the arbiter of law and determines all points of law. In cases where there is a jury the jury is the arbiter of fact but in most civil cases in the Irish Legal System, they are determined by a Judge sitting alone and therefore the Judge is the sole arbiter of fact as well as of law. The issue of admissibility of evidence is one of law and therefore falls to be determined by the Judge. As noted by McGrath the admissibility of evidence is a matter of law for the trial judge to decide.[129]

Healy notes "*the weight of evidence by contrast, refers to the factual cogency or probative force of the evidence in light of the facts at issue in the trial. This is ultimately a question of degree to be assessed having regard to all the evidence, inferences and submissions in the case. The weight is not scientifically assessed and much depends upon the credibility of witnesses, and the accumulation and combination of evidence finally generated in the trial.*"[130] Healy also makes the distinction that "*whereas the weight of evidence is a question of fact to be determined by the jury, where they sit admissibility is a question of law reserved to the trial judge*".[131]

In civil cases as noted there are rarely juries and in such circumstances the Judge becomes the sole arbiter of fact including the assessment of the weight of evidence. Parties to the proceedings are not free to determine the weight to be attributed to a particular piece of evidence although they may make submissions regarding the weight and/or or the relative weights which should be attached to evidence. "*Concerns over the relevant strength and merits of relevant admissible evidence are instead voiced in the context of persuasive submissions upon the weight properly to be attached to the various pieces of evidence in the case*."[132]

To succeed in proving an issue at a civil trial, a party bearing the burden of proof will need to discharge the burden by proving the issue on the balance of probabilities.

2.2 Relevance of Material Truth

As a term of art, "the principle of material truth" does not exist in the Irish legal system. The administration of justice is concerned with reaching truth. Cannon and Neligan state "[t]he primary objective of the law of evidence is to assist in the ascertainment of truth in legal proceedings."[133] The machinery which exists in the adversarial system to achieve this is oral evidence and in particular cross-examination which has been described by Wigmore as "the greatest legal engine ever invented for the discovery of truth."[134] The right to cross-examine is constitutionally guaranteed in the Irish legal system.[135] As is discussed below, the standard of proof which applies in civil cases is *on*

[129] McGrath, *Evidence*, page 8.
[130] Healy, *Irish Laws of Evidence*, page 12.
[131] *Ibid*, page 12.
[132] *Ibid*, pages 9-10.
[133] Cannon and Neligan, *Evidence*, page 1 citing Wright, *The Law of Evidence: Present and Future*, (1942) 20 Can. Bar. Rev. 714.
[134] Wigmore, *Evidence* (3rd ed., Little Brown and Company, Boston, 1940), Vol. § 1367, page 29.
[135] See Parts 1 and 6 *infra*.

the balance of probabilities. This a party will succeed in discharging the legal burden of proof in respect of an issue where the party convinces the trier of fact that its version is "more probable than not"[136].

Where evidence is given on affidavit, it is open to the opposing party to to require (or at least to apply to court to have) the deponent to appear in court for the purposes of cross-examination.[137]

As discussed earlier the basic rules for admissibility of evidence in Irish courts are that the evidence is relevant, subject to the exclusionary rules such as the rule against hearsay and the rule against opinion evidence.

The rules regarding what evidence is admissible and what evidence is excluded is discussed above in Part 1 and below in this specific chapter heading. The issue of pre-trial discovery is discussed in Part 1 the obligation to testify is discussed in Part VI. The circumstances in which expert reports are required to be disclosed are discussed below.[138]

As a term of art "*ius novorum"* does not exist in the Irish Legal System. As discussed in Part 1, two forms of appeal are known in the Irish legal system, a hearing *de novo* and an appeal on a point of law. On a hearing *de novo* in the appeal court, all questions of law and fact are open to review and either party may call fresh evidence. On a rehearing on a point of law generally no new facts are admissible but there are exceptions.

3 Evidence in General

3.1 Methods of Proof

The adversarial model operating in Ireland means that the primary method of proving a case is by oral evidence. "The adversarial system … relies heavily on oral evidence and there is still an assumption that provide oral evidence directly to the court is the best way of determining the facts of the case."[139] Healy states "there has been no attempt to establish hierarchy of evidence that would favour, for instance, direct evidence over circumstantial evidence, real evidence over testimonial evidence, and so forth, although such a principle may be taken to be implicit in distinct rules such as the rule against hearsay."[140]

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.

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[136] *Miller v Minister of Pensions* [1947] 2 All ER 372.
[137] See Part 6 *infra.*
[138] See Parts 6 and 7 *infra*.
[139] Kenneally and Tully, *The Irish Legal System*, page 17.
[140] Part 1 *infra*.

Certain documents and records are accepted as authentic. For example, public documents are accepted as authentic. This issue is discussed in more detail in Part 5.

3.2 Formal Rule of Evidence

The general rules of evidence are discussed in Parts I and 2 above.

3.3 The Minimum Standard of Proof

The standard of proof in civil cases is on the balance of probabilities and the balance of probabilities is discussed in Part 4 below.

3.4 Means of Proof

There is no specific list of the means of evidence permitted set out in the Irish legal system. It is for the court to determine the admissibility of evidence. The types of evidence which may be admissible include oral testimony, physical records, expert opinion, real evidence, documentary evidence but this is not an exhaustive list. Therefore a *numerous clauses* principle does not apply. Types of acceptable evidence include oral testimony, sworn written testimony in the form of an affidavit, an expert opinion, documentary evidence, real evidence.[141] Further, a party may in certain circumstances to view an object or a location outside of a courtroom. This is known as "a view". Heffernan, Ryan and Imwinkelreid state that "The purpose of the view is to assist the finder of fact in assessing the credibility of the evidence offered by the witnesses in the case."[142]

Evidence requires an evidentiary foundation. The general principle as discussed above is that relevant evidence is admissible subject to the exclusionary rules of evidence.

Parties are free to testify in proceedings. It will be seen in the discussion of expert witnesses that a person can not act as an expert when he is a party to proceedings.

Unconstitutionally obtained evidence is generally inadmissible.[143]

There is a rule against a narrative which prevents a witness in examination in chief being asked about former statements consistent with his evidence.[144] Healy notes:

> "*Irish law has not so far provided for the general admissibility of pre-trial or pre-hearing statements, and has opted instead to focus on alternative means of securing the traditional forms of testimonial evidence from certain classes of vulnerable witnesses, such as children and intimidated witnesses – during the trial by television*

[141] For discussion see McGrath, *Evidence*, Chapter 3 and Chapter 12; Healy, *Irish Laws of Evidence*, Chapter 1; Cannon and Neligan, *Evidence*, Chapter 1, and Fennell, *The Law of Evidence in Ireland* (2009), page 3.
[142] Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition*, page 224.
[143] See part 9 *infra*.
[144] Discussed for example in Healy, *Irish Laws of Evidence*, Chapter 2.

link, or prior to the trial by means of deposition or videotaped link evidence in the presence of the accused and subject to a right to cross examine. "[145]

In Commercial Court proceedings, Order 63A, Rule 22[146] provides that witness statements (including those of expert witnesses) verified on oath may in exceptional circumstances, to be recited in the Court Order, be treated as the evidence in chief of a witness. In competition law proceedings, Order 63B, r.27 is in similar terms.[147]

3.4.1 Witness Testimony

It is permissible for parties to civil proceedings to testify. Witness testimony is discussed further below under Part 6. It is apparent therefrom, that there are special rules for children and for persons with a mental disability who are permitted in specified circumstances to give unsworn testimony. Further in certain circumstances children and persons with a mental disability may give evidence *via* live television link.

As is discussed in more detail in Part 6, generally in civil trials it is for parties to ensure the presence of any witnesses on whom the party intends to rely. This can be done, if necessary, by the issuing of witness submissions known as a *subpoena*. The types of *subpoenas* are discussed further below under heading 6.2.

There is a rule against hearsay evidence.[148] Hearsay evidence is evidence of statement other than one made by a person giving oral evidence in the proceedings and it is inadmissible as evidence of any facts stated and is generally excluded. As noted below, there are number of exceptions to this exclusionary rule.[149] Another exclusionary rule is that opinion evidence is generally inadmissible.[150]

A party under *subpoena* is obliged to attend court and again in general a witness is bound to answer a relevant questions put to him and will be guilty of contempt of court if he refuses to answer.[151] However a party may refuse to answer certain questions by reason of privilege. There exist situations where an individual may enjoy a privilege from being compelled to answer questions or produce documents.[152] The issue of privilege and the different types of privilege are discussed further below in Part 6 – Witnesses.

It is for the courts to evaluate a claim of privilege. In *Smurfit Paribans Bank Ltd v. AAB Expert Finance LTD.* [1990] 1 IR 22, 32 Finlay C.J. states "*the question as to whether*

[145] Healy, *Irish Laws of Evidence*, page 68. In respect of the television link evidence of children in civil proceedings he cites the Criminal Evidence Act, 1997. See Part 1 above.
[146] SI 2 of 2004, Rules of the Superior Courts (Commercial Proceedings). See Part 1 above.
[147] SI 130 of 2005, Rules of the Superior Courts (Competition Proceedings). See Part 1 above.
[148] Discussed further below under heading 6.4.21 *infra*.
[149] 6.4.21 *infra*.
[150] Again this is discussed below under 6.4.21 *infra*.
[151] This is discussed further below under the heading 6.3 *infra*.
[152] See 6.4 *infra* under the sub-heading, privilege.

or not a party to litigation will be privileged to produce particular evidence is a matter within the sole competence of the courts." A party may claim that a document or information is privileged, this claim can be contested by the other party and ultimately it is a matter for the court to decide[153]. The burden of establishing privilege rests on the party asserting privilege.[154]

A refusal to testify amounts to contempt of court. The general rule in civil trials is that evidence much be given on oath or affirmation.[155]

"*Perjury is an office at common law and is triable summarily or on indictment. The maximum penalty is 7 years*."[156]

It is for the courts to evaluate the weight of witness testimony.[157] The arbiter of fact determines the weight to be attributed to witness testimony. As Healy notes, "[w]hen determining the facts proven by a witness' testimony the court is influenced by the credibility and demeanour of the witness, by how persuasive or truthful he appeared."[158]

3.5 Proving Facts by Formally Prescribed Types of Evidence

In Ireland it is necessary to prove the sale of land in a prescribed way. The sale of land is governed by the Statute of Frauds (Ireland) Act, 1695[159], which requires the sale of land to be governed in writing. To prove a contract for the sale of land requires evidence in writing of the agreement.

3.6 Proving the Existence of Rights Arising Out of a Cheque or Bill of Exchange

Adducing documentary evidence is discussed below.[160] It is noted that the Irish courts traditionally applied the best evidence rule which meant that in the case of documentary evidence production of an original document is preferred. There existed exceptions to the best evidence rule whereby if a document had been lost or destroyed it could be proved be secondary evidence. In an English textbook, *Byles on Bills of Exchange and Cheques*, it is noted in the context of "lost bills" that "[i]t is not strictly necessary to

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[153] See for example, in the context of discovery of documents – Order 31, Rule 20, Rules of the Superior Courts which provides: whereon an application for an order for inspection privilege is claimed for any document, the court may inspect the document for the purpose of deciding as to the validity of the claim for privilege.
[154] *Murphy v. Dublin Corporation* [1972] IR 215.
[155] This issued is discussed further below under heading 6 – Witnesses and exceptions to the rule are discussed therein.
[156] T.J. McIntyre, Sinéad McMullen and Sean O'Toghda, *Criminal Law* (Roundhall, 2006), Chapter 8.
[157] See 3.1, 2.1, 3.7 and 6.4 *infra*.
[158] Healy, *Irish Laws of Evidence*, page 9.
[159] Retained in force by the Statute Law Revision Act, 2007.
[160] At 5.4 *infra*.

produce the bill at trial since it may be proved by secondary evidence."[161] A document may be proved through secondary evidence, usually through a copy of a document or by means of oral evidence.[162] Further recently in *Hussey v Twomey* [2009] 1 ILRM 321, the Supreme Court has indicated that the best evidence rule can no longer be regarded as part of Irish law in civil proceedings.[163]

3.7 Weight Attaching to Specific Pieces of Evidence

The issue of the weight to be attached to different types of evidence is discussed above at 3.1.[164]

As Healy notes *"the weight of evidence, by contrast refers to the factual cogency or probative force of the evidence in light of the facts at issue in the trial. This is ultimately a question of degree to be assessed having regard to all the evidence, inferences, and submissions in the case. The weight is not scientifically assessed and much depends upon the credibility of witness and the accumulation and combination of evidence finally generated in the trial".*[165]

There are exceptions to the rules of evidence which permit, for example, a child witness to give unsworn evidence. As discussed above in principle evidence given in the adversarial system by oral testimony and in open court. There are exceptions which permit of evidence to be given by way of live television link. There are also exceptional circumstances where evidence is given by way of affidavit rather than oral testimony. There are exceptions where proceedings are heard *in camera*.

As is discussed below under heading 5.5.1, video and audio recordings are admissible as items of real evidence. A similar rule applies in respect of photographs. Such evidence must be authenticated. As mentioned above contracts for the sale of land must be evidenced in writing and therefore written evidence is necessary.

The rules concerning proof of documentary evidence are discussed in Part 5.

3.8 Duty for Parties to Produce or Deliver Evidence and Consequences

As is discussed in Part 6, generally a court may only make a finding of fact if evidence in relation to the existence or non-existence of that fact has been adduced by the parties to the proceedings before it. In Part 6 a number of exceptions to that rule are discussed; (i) presumptions of law, (ii) facts which may be judicially noticed or (iii) facts which are formally admitted by the other party to the proceedings. Leaving aside those exceptional

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[161] Nicholas Elliot, John Odgers, and Jonathan Mark Phillips *Byles on Bills of Exchange and Cheques* (29th ed, Sweet & Maxwell Thomson Reuters, 2013), page 437 citing *Shearn v. Burnard* (1839) 10 A & E 593.
[162] See 5.4 and 5.4.1 *infra*.
[163] See 5.4 *infra*.
[164] See also 2.1 *infra*.
[165] Healy, *Irish Laws of Evidence*, page 12.

circumstances where facts may be proved although no evidence in respect of them has been adduced, the general requirement is for a party on whom the burden of proof rests to adduce evidence to meet that burden. Failure to discharge the burden of proof means that a part will lose on this particular issue. As noted by McGrath "*the general principle applied in civil cases is that he who asserts must prove*".[166] The civil courts have recognised a broad jurisdiction to reverse the onus of proof in circumstances where it would be fundamentally unfair to require a party to prove something that is not within his means of knowledge. In *Hanrahan v. Merck, Sharpe and Dohme* [1998] ILRM 629, the Supreme Court *per* Henchy J. said:

> *"The ordinary rule is that a person who alleges a particular tort must in order to succeed, prove… all the necessary ingredients of that tort and it is not for the Defendant to disprove anything. Such exceptions as have been allowed to that general rule seem to be confined to cases where a particular element of tort lies or is deemed to lie, pre-eminently within the Defendants knowledge, in which case the onus of proof as to that matter passes to the Defendant… The rationale behind the shifting of the onus of proof to the Defendant in such cases would appear to lie in the fact that it would palpably unfair to require a Plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the Defendants capacity of proof."*[167]

A party will succeed on an issue if he satisfies the trier of fact that his version of events is more probable then not, he will do this through producing evidence.[168]

It was also discussed in Part 1.7 that parties may avail of pre-trial discovery in the sense that may require the other party to provide documents to them. Failure to make discovery ordered or agreed can result in an application by the other party to have pleadings struck out. If there is failure to comply with the order for discovery and application can be brought to have proceedings struck out as against the Plaintiff if it is the Plaintiff who is in default or to have the defence struck out if it is the Defendant who is in default.[169] Alternatively the party can bring an application for further and better discovery or he can bring an application for attachment of the party.[170] It may also exceptionally be possible for a party to be granted leave to cross examine a deponent on the affidavit of discovery. Also a party would be prevented from adducing into evidence a document which ought to have been discovered but which was not discovered.[171]

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[166] Generally this means that the party bringing a case will need to prove the facts necessary to establish the cause of action.
[167] Pages 634-635.
[168] See Part 4 *infra*.
[169] Order 31, Rule 29.
[170] Order 31, Rule 29.
[171] For more detailed discussion see Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), page 305 *et seq.*

3.9 Duty for Third Persons to Deliver Evidence and Consequences

As was mentioned in Part 1, there exists a possibility of a party to seek discovery from what is known as third party discovery to seek discovery from a person who is not a party to the proceedings. Order 31, Rule 29 Rules of the Superior Courts provides that where it appears to the court that any person not a party to the action is likely to have or have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is likely to be in a position to give evidence relevant to any such issue may by leave of the court upon application of the parties to the said cause or matter be directed by order of the court to answer such interrogatories or to make such discovery of documents or to permit inspection of such documents. Order 29 provides that the discovery rules apply *mutatis mutandis* to non-parties. Order 31, Rule 29 stipulates that a party seeking non-party discovery must indemnify that person in respect of all costs reasonably incurred by such person and an order for discovery against a non-party will only be made on the basis of an undertaking from the party seeking discovery to pay the costs of the non-parties discovery. Delaney and McGrath note that *"while the utility of a provision such as Rule 29 is obvious, it is important to note that the courts have tended to interpret it in a rather restrictive fashion."*[172]

Further as set out below under heading 6.2, witnesses can be required to attend court by way of issue and service of *subpoena* and it is possible to *subpoena* a witness to bring documents specified in the subpoena to court and this is done by way of a particular type of subpoena, a *subpoena duces tecum*. Any witness properly served with this subpoena who fails to attend can be attached for contempt of court since the *subpoena* is an order from the court to attend the hearing for the purposes of giving evidence.

3.10 Judicial and Administrative Decisions as Evidence

As noted under heading 1.3.5, the Irish legal system as a common law system operates the doctrine of precedent, which means that to ensure consistency courts follow previous relevant decisions. Judicial decisions are a source of law generally law reports are obliged to follow the decisions of higher courts and courts of co-ordinate or equal jurisdiction are generally expected to follow earlier decision of courts of that level although this is not an absolute rule. Judicial notice is required to be taken of certain matters.

Healy states that "judicial notice may be taken of the relevant provisions of the substantive law, although naturally it is expected that counsel for the parties present complete and accurate accounts of the law to the court."[173] He also refers to specific statutory provisions such as section 6(1) of the Interpretation Act, 1937 which provides that every Act of the Oireachtas (i.e. every statute) shall be judicially noticed and

[172] Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), page 294 for general discussion of non-party discovery see pages 292 *et seq.* of that same text. For a detailed analysis of discovery see Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (2013).
[173] Healy, *Irish Laws of Evidence*, page 20.

Section 4 of the European Convention on Human Rights Act 2003 which obliges courts to take judicial notice of for example the provisions of the European Convention on Human Rights. In respect of secondary legislation (statutory instruments) however, Healy notes that "convictions have been overturned where the prosecution omitted to formally prove that relevant statutory orders were in force at the time of the offence."[174]

4 General Rule on the Burden of Proof

4.1 Doctrine Behind Burden of Proof Rules

A distinction may be drawn between the *legal burden* and the *evidential burden*. McGrath defines the legal burden as "the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact."[175] Failure to discharge this burden means a party will lose on this issue. The legal burden is issue specific and may rest on different parties in respect of different issues in a case. In civil cases the standard of proof required is on the balance of probabilities. McGrath defines the evidential burden "is the burden borne by a party of adducing sufficient evidence to satisfy the trial judge that an issue should be left to the tribunal of fact."[176] In civil proceedings the evidential burden is established when a party makes out a *prima facie* case i.e. the evidence adduced is sufficient that a trier of fact would be entitled but not obliged, to make a finding in favour of that party.

4.2 Standards of Proof

In non-criminal proceedings, as a general rule the legal standard of proof is *the balance of probabilities*.[177] In contempt of court proceedings leading to committal, the criminal standard of proof – *beyond a reasonable doubt* applies.[178] In *Miller v Minister of Pensions* [1947] 2 All ER 372, Denning LJ described the standard of proof for a civil case in the following words:

> "It must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not."

Denning LJ referred to civil cases in *Bater v Bater* [1950] 2 All ER 458 at p 459:

> "... in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a

[174] *Ibid*, page 20 (case reference omitted).
[175] McGrath, *Evidence*, page 15. See also Fennell, *The Law of Evidence in Ireland* (2009), Chapter 3.
[176] McGrath, *Evidence*, page 16.
[177] Healy, *Irish Laws of Evidence*, page 136.
[178] Cannon and Neligan, *Evidence*, page 38.

> criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

The rationale for the burden of proof in civil trials is "to resolve a deadlock and to keep the parties on even terms; which is why the standard of proof is less"[179] than the criminal standard.

The Irish Supreme Court in *Banco Ambrosiano S.P.A v. Ansbacher & Co* [1987] ILRM 669 rejected the argument that fraud in civil cases required a higher standard of proof than that of the balance of probabilities.

Healy concluded that "it appears settled in Ireland that the ordinary civil standard applies to all civil proceedings, even to cases of serious and weighty concern, but that for one reason or another, the courts may require particularly cogent evidence before it finds for the proponent. In other words, rather than formally raising the standard in specific cases, the court will instead insist upon stronger, more compelling evidence – a distinction criticised else where as 'academic' and 'one of expression only'."[180]

A subsequent case considered section 3(1) of the Mental Health Act, 2001, which provides for detention of persons *inter alia* where because of illness, disability or dementia there is *a serious likelihood* of the person causing serious harm to himself or others. In *M.R. v. Byrne* [2007] 3 IR 211, the High Court accepted that the phrase *a serious likelihood* to "be higher than the ordinary standard of proof in civil actions, namely balance of probability, but somewhat short of certainty."[181] Per O'Neill J:

> 29. In my view what the Act envisages here is a standard of proof of a high level of probability. This is beyond the normal standard of proof in civil actions of "more likely to be true", but it falls short of the standard of proof that is required in a criminal prosecution namely beyond a reasonable doubt and what is required is proof to a standard of a high level of likelihood as distinct from simply being more likely to be true.

4.3 Rules Which Exempt Facts from Proof

McGrath states "[i]n general a court can only make a finding of fact if evidence in relation to the existence or non-existence of that fact has been adduced by the parties to the proceedings before it. However, there are some circumstances... where facts may be taken as established even though no evidence in respect of them have been adduced."[182]

Cannon and Neligan state that "[t]here are three ways in which facts may be proved without evidence: they may be presumed in a party's favour under a presumption of law in the absence of any evidence rebutting that presumption; they may be judicially

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[179] *Ibid*, page 12.
[180] Healy, *Irish Laws of Evidence*, page 138 (citations omitted).
[181] At Paragraph 28.
[182] McGrath, *Evidence*, Chapter 12; Healy, *Irish Laws of Evidence*, page 701 and for discussion see Chapters 13 and 2.

noticed; and finally they may be proved by formal admission."[183] These three headings are also set out by McGrath after his statement above.[184]

Turning first to presumptions, there are four sub-categories "(1) rebuttable presumptions of law; (2) irrebuttable presumptions of law; (3) presumptions of fact and (4) presumptions without basic facts."[185]

Healy states "[p]resumptions of law require or enable certain inferences to be drawn by the court, usually upon proof of prescribed grounding facts. The resulting presumption constitutes evidence in the case, and prevails in the hearing or trial unless and until rebutted by the other party."[186] An example of a presumption which requires proof of grounding facts is the presumption of death where a person has been missing for seven years. To invoke the presumption it is necessary to show a lack of communication with persons likely to have heard from the individual and that due efforts have been made to to contact the person. Other rebuttable presumptions of law include a presumption of accidental death, a presumption of marriage, a presumption of intestacy, a presumption of legitimacy, a presumption of illegitimacy, *Omnia prasemunter rite esse acta* (presumption of validity of a purportedly official act) and *res ipsa loquitur* (a presumption in negligence actions that if damage suffered arises out of something in the control of the defendant, and the accident is such that it does not happen in the ordinary course of events if persons take proper care, that the accident was the responsibility of the defendant).[187]

The second sub-category of presumptions identified by Canon and Neligan is irrebutable presumptions of law. In this category they cite specific statutory provisions.[188] Healy discusses statutory reversals of the burden of proof distinguishing between statutory inferences which impose an evidential or provisional burden of proof on an accused or a defendant in which circumstances a failure to rebut the inference does not oblige a court to find against him and "when the effect of a statutory provision, or indeed a common law principle is to impose a legal burden of proof of a fact issue on an accused in criminal proceedings"[189] as this would interfere with the presumption of innocence.

The third sub-category of presumptions, presumptions of facts which shift "merely the tactical burden... they operate as follows: One party proves the basic fact. This raises a tactical presumption of the presumed fact. This allows the judge... to find in favour or against the presumed fact... The other party is not strictly obliged to adduce evidence to

[183] Cannon and Neligan, *Evidence*, page 48.
[184] McGrath, *Evidence*, Chapter 12; Healy, *Irish Laws of Evidence*, page 701.
[185] Cannon and Neligan, *Evidence*, page 40.
[186] Healy, *Irish Laws of Evidence*, page 103.
[187] Cannon and Neligan, *Evidence*, pages 34 and 41-46.
[188] *Ibid*, page 46.
[189] Healy, *Irish Laws of Evidence*, page 113. See pages 112-121.

rebut the presumed fact. He may still win on the point even though he does not adduce any evidence. However, it is usually advisable for him to adduce the evidence."[190]

The fourth sub-category of presumptions, presumptions with basic facts are rules of evidence such as the presumption of innocence in criminal trials and the presumption of sanity in criminal trials.[191]

Secondly, judicial notice may exempt facts from proof.[192] Judicial notice was discussed in *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* [1923] 1 AC 191, per Lord Sumner who stated:

> Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.[193]

Healy states that "[i]n some circumstances, judicial notice may, in the absence of formal proof, constitute sufficient proof of a fact that is well known or a matter of public knowledge or record."[194] Healy states that "[j]udicial notice may be and is routinely, taken of facts clearly and notoriously known – such as weights and measures, the meaning of common words used in statutes, the function of television and in one case the fact that a person's genetic make-up may affect his susceptibility to a particular illness."[195]

Thirdly, in civil cases a party may admit facts by formal admission either in the pleadings or in correspondence.[196] A notice to admit facts is provided for under Order 32, rule 4 RSC.

4.4 Specifying Evidence

Generally, in civil actions a party is not required to disclose the evidence he intends to rely on at trial, pre-trial. A number of recent developments provide exceptions to this generalisation.

A number of statutory amendments have resulted in the requirement to disclose expert reports pre-trial. This requirement exists in personal injury actions[197], commercial

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[190] Cannon and Neligan, *Evidence*, page 46.
[191] Cannon and Neligan, *Evidence*, pages 47. Healy, *Irish Laws of Evidence*, page 103.
[192] The European Communities (Judicial Notice and Documentary Evidence) Regulations, 1972 SI 341 of 1972).
[193] At page 212.
[194] Healy, *Irish Laws of Evidence*, page 19.
[195] *Ibid*, page 20 (case references omitted).
[196] Cannon and Neligan, *Evidence*, page 51.
[197] Section 45 of the Courts and Courts Officers Act, 1995. SI 391 of 1998, Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statement) adding new sub-rules to Order 39. See Law Society, Medico-Legal Recommendations, (Law Society, 2008).

proceedings[198] and competition law proceedings.[199] These disclosure rules are discussed below at Heading 7.7 – Expert Evidence.

In addition to the disclosure of expert reports from any expert witness intended to be called at trial, the disclosure rules in personal injury actions require parties to exchange:[200]

(i) Names and addresses of all witnesses intended to be called.
(ii) A statement of all special damages with vouchers or statements from witnesses by whose evidence such loss will be proved.
(iii) A written statement from the relevant government department regarding payments made to the plaintiff subsequent to the accident or an authority from the plaintiff to enable the defendant or his solicitor to obtain such information.

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 and Competition Lists 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.[201]

4.5 The Doctrine of iura novit curia

The principle of "*iuria novit curia*" does not exist as a term of art in the Irish legal system. The expectation in an adversarial system is that the parties will set out the law on which they rely. Irish courts are not precluded from raising a point of law which the parties have not raised.[202]

Healy states that "judicial notice may be taken of the relevant provisions of the substantive law, although naturally it is expected that counsel for the parties present complete and accurate accounts of the law to the court."[203] He also refers to specific statutory provisions such as section 6(1) of the Interpretation Act, 1937 which provides that every Act of the Oireachtas (i.e. every statute) shall be judicially noticed and Section 4 of the European Convention on Human Rights Act 2003 which obliges courts to take judicial notice of for example the provisions of the European Convention on Human Rights.

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[198] Rules of the Superior Courts (Commercial Proceedings) 2004 (SI No. 2 of 2004).
[199] Rules of the Superior Courts (Competition Proceedings) 2005 (SI 130 of 2005.)
[200] SI 391 of 1998, Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statement) adding new sub-rules to Order 39.
[201] Order 63A, rule 22 RSC inserted by SI 2 of 2004 and Order 63B, rule 27 RSC inserted by SI 130 of 2005. Discussed in more detail at 6.4.19 and at 1.5 where the text of the relevant rules in Order 63A, rule 22 in respect of Commercial Law proceedings is set out. Order 63B, r.27 in respect of competition proceedings is in similar terms.
[202] See the interesting discussion of the issue by Advocate General Jacobs in his Opinion in Joined cases C-430/93 and C-431/93 *van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* ECR [1995] I 04705 at Paragraph 33 *et seq*.
[203] Healy, *Irish Laws of Evidence*, page 20.

4.6 Incomplete Facts and Proposed Evidence

It may depend on the circumstances, if the facts claimed by a party and the proposed evidence are incomplete, that the court is obliged to advise the party of this fact. For example if pages were missing from a document exhibited to an affidavit, a court might point out that pages were missing.

A court will not, however, advise a party's proofs. It is the responsibility of the party to discharge the onus of proof in respect of the aspects of the case in respect of which he bears the burden of proof. The absence of evidence will be seized upon by an opponent.

4.7 Elaboration of Claims

A court is free to request legal submissions on specific issues or on which they require further elaboration. Such a direction might be but is not necessarily recorded in a court order. A court is free to ask questions of witnesses[204] and of legal advisors.[205] This will usually arise at trial or perhaps at interlocutory hearings preparing for trial.

In recent years there has been a trend towards case-management. In the High Court, case management is expressly provided for in Family Law[206] the Commercial List[207], the Competition List[208] and in respect of applications pursuant to the Personal Insolvency Act 2012[209]. Taking the commercial court proceedings as an example Order 63A, rule 5 RSC provides:

> "A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings."

Order 63A, rule 6 RSC provides more detail and states:

> "(1) Without prejudice to the generality of rule 5 of this Order, a Judge may, at the initial directions hearing –
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> (a) of his own motion and after hearing the parties, or
>
> (b) on the application of a party by motion on notice to the other party or parties returnable to the initial directions hearing,

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[204] Healy, *Irish Laws of Evidence*, page 29 notes that a judge's discretion to direct questions to witnesses is "sparingly exercised". See further 7.5 *infra*.

[205] See 7.5 *infra*.

[206] High Court Practice Direction (HC 51) Family Law Proceedings, 16th July 2009. Available on www.courts.ie. (accessed 14 August 2014).

[207] Order 63A RSC, inserted by SI 2 of 2004, Rules of the Superior Courts (Commercial Proceedings)

[208] Order 63B of the Rules of the Superior Courts 1986 (inserted by the Rules of the Superior Courts (Competition Proceedings) 2004.

[209] Order 76A RSC, inserted by SI 316 of 2013.

give any of the following directions to facilitate the determination of the proceedings in the manner mentioned in that rule:

(i) as to whether the proceedings shall continue –

(I) with pleadings and hearing on oral evidence,

(II) without formal pleadings and by means of a statement of issues of law or fact, or of both law and fact,

(III) without formal pleadings and to be heard on affidavit with oral evidence, or

(IV) without formal pleadings and to be heard on affidavit without oral evidence;

(ii) fixing any issues of fact or law to be determined in the proceedings;

(iii) for the consolidation of the proceedings with another cause or matter pending in the High Court;

(iv) for the defining of issues by the parties, or any of them, including the exchange between the parties of memoranda for the purpose of clarifying issues;

(v) allowing any party to alter or amend his indorsement or pleadings, or allowing amendment of a statement of issues;

(vi) requiring delivery of interrogatories, or discovery or inspection of documents;

(vii) requiring the making of inquiries or taking of accounts;

(viii) requiring the filing of lists of documents, either generally or with respect to specific matters;

(ix) directing any expert witnesses to consult with each other for the purposes of:

(a) identifying the issues in respect of which they intend to give evidence,

(b) where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and

(c) considering any matter which the Judge may direct them to consider,

and requiring that such witnesses record in a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, particulars of the outcome of their consultations:

provided that any such outcome shall not be in any way binding on the parties;

(x) providing for the exchange of documents or information between the parties, or for the transmission by the parties to the Registrar of documents or information electronically on such terms and subject to such conditions and exceptions as a Judge may direct;

(xi) for the examination upon oath before a Judge, Registrar or other officer of the Court, or any other person, and at any place, of any witness, in accordance with Part II of Order 39;

(xii) as to whether or not the proceedings should, by virtue of their complexity, the number of issues or parties, the volume of evidence, or for other special reason, be subject to case management in accordance with Rules 14 and 15 of this Order;

(xiii) on the application of any of the parties or of his own motion, that the proceedings or any issue therein be adjourned for such time, not exceeding twenty-eight days, as he considers appropriate to allow the parties time to consider whether such proceedings or issue ought to be referred to a process of

mediation, conciliation or arbitration, and where the parties decide so to refer the proceedings or issue, to extend the time for compliance by any party with any provision of these Rules or any order of the Court.

(2) Without prejudice to any enactment or rule of law by virtue of which documents or evidence are privileged from disclosure, to assist him in deciding whether or not to make any order or give any direction in accordance with sub rule 1 of this rule, a Judge may direct the parties, or any of them, to provide information in respect of the proceedings, including:

a) a list of the persons expected to give evidence;

b) particulars of any matter of a technical or scientific nature which may be at issue or may be the subject of evidence;

c) a reasoned estimate of the time likely to be spent in –

(i) preparation of the proceedings for trial, and

(ii) the trial of the proceedings;

d) particulars of any mediation, conciliation or arbitration arrangements which may be available to the parties.

(3) A Judge may, where he deems fit, at the initial directions hearing, hear any application for relief of an interlocutory nature, whether in the nature of an injunction or otherwise."

In some court lists there is a requirement that a case be certified as ready for hearing before it will be listed for hearing.[210]

4.8 Submitting Additional Evidence

Ireland as a common law jurisdiction operates an adversarial system. "It is up to the parties in the case, not the judge, to gather their evidence, call whichever witnesses they require and cross-examine witnesses presented by the other party to the dispute."[211] Ordinarily the parties have autonomy, subject to the rules of evidence, in respect of the evidence adduced. [212]

A court will not direct a party's proofs. It is the responsibility of the party to discharge the onus of proof in respect of the aspects of the case in respect of which he bears the burden of proof. The absence of evidence will be seized upon by an opponent.

If for example a Court ordered discovery of documents to be made by a defendant and a defendant did not comply with this order, it is open to the plaintiff to apply to court to have the defendant's defence struck out. Equally if the plaintiff was ordered to make discovery and failed, the defendant might apply to have the plaintiff's case struck out. Alternatively, a court might penalise a party which fails to comply with a court order on costs.

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[210] See for example the Practice Direction in the High Court, HC14 which requires certificates of readiness together with an estimated duration of the trial to be signed by counsel or solicitor in the Chancery and Non-Jury lists.

[211] Kenneally and Tully, *The Irish Legal System*, page 16-17.

[212] See 1.2, 7.3 and 7.6 *infra*.

4.9 Collecting Evidence in Civil Cases on the Court's Initiative

Ireland, has introduced provisions to the effect that in certain categories of cases, only one single expert will be appointed for the purposes of importing expert knowledge into the case. In some cases the expert is appointed by the court. Section 20(1) of the Civil Liability and Courts Act, 2004 provides: "In a personal injuries action, the court may appoint such approved persons as it considers appropriate to carry out investigations into, and give expert evidence in relation to, such matters as the court directs." Sub-section 2 requires the parties to co-operate with such experts. Parties are entitled cross-examine such experts.[213] There is also provisions in respect of competition law where the court may appoint an expert.[214] In family law proceedings, Section 47 of the Family Law Act 1995 provides that the court may procure a report from such person as it may nominate on any question affecting the family law proceedings in question. There is a specific provision in respect of nullity cases.[215]

4.10 New Facts Raised at a Late Stage of Proceedings

In principle the parties would be expected to adduce all of their evidence in the course of the hearing. However, exceptionally evidence may be adduced at a late stage.

Delaney and McGrath note that "[i]t has long been accepted that a judge has jurisdiction to reverse his decision at any time until his order is perfected."[216] The leading authority on when a judgment will be revisited prior to perfection of the order is the decision in *in re McInerney Homes Ltd.* [2011] IEHC 25 where the test was set out by Clarke J. as:

> "In order for the court to exercise its jursidiction to revisit a question after the delivery of either an oral or a written judgment, it is necessary that there be 'strong reasons' for doing so."

In that case, the High Court had delivered a judgment deciding not to confirm a scheme of arrangement proposed by an examiner. After delivery of judgment but before the Order in the case was finalised new information and evidence came to the attention of the company and the Court was asked to revisit its judgment. The High Court considered that it would lead to procedural chaos if parties were allowed to seek to introduce new evidence or arguments simply because the matters had not been advanced during the hearing. The High Court considered that it would be an abuse of process if a party did not put forward it's entire case at the first instance and then sought to litigate the point after the proceedings had finished and the court had reached a conclusion. The High Court accepted that different considerations might apply if a court had for example made a simple computational error. Where the reason that a court was asked to revisit a judgment was that a party wished to adduce additional evidence then the proper course

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[213] Section 20(4).
[214] Part IV of Order 63B of the Rules of the Superior Courts 1986 (inserted by the Rules of the Superior Courts (Competition Proceedings), 2004.
[215] Order 70 Rule 32 of the Rules of the Superior Courts 1986.
[216] Delaney and McGrath, *Civil Procedure in the Superior Courts* (2012), page 784 citing *Re Suffield and Watts* (1888) 20 QBD 693.

was to apply a test similar to that which an appellate court would apply in determining whether to allow a party to adduce new evidence on appeal.[217] In the specific circumstances of the case, the High Court put the matter back to allow the parties to adduce further evidence. In a subsequent judgment, *in re McInerney Homes Ltd.* [2011] IEHC 61, the High Court emphasised the exceptional nature of the jurisdiction to revisit evidence after a judgment had been delivered.

The Supreme Court accepted in *Abbeydrive Developments Ltd. v. Kildare County Council* [2010] 2 IR 397. that exceptionally, a matter may be revisited after a judgment has been delivered in the Supreme Court but prior to final orders being made. In that case an affected party with a point of substance to make only heard of the proceedings after the Supreme Court judgment was delivered. The Supreme Court exceptionally determined to remit the issue raised to the High Court.

In *in re Greendale Developments Ltd. (No. 3)* [2000] 2 IR 514, it was recognised that a court has jurisdiction to revisit a final order in exceptional circumstances. Owing to the importance of finality of litigation, final orders may only be set aside in very limited circumstances. Delaney and McGrath discuss five headings under which final judgments and orders may be set aside.[218] First, there is jurisdiction to correct mistakes under the Rules of the Superior Courts.[219] Secondly, there is at common law an inherent jurisdiction to amend or vary an order in circumstances where the order or judgment does not reflect what the court actually decided or intended.[220] Thirdly, there is exceptional jurisdiction of the court to set aside final orders to protect constitutional rights.[221] Fourthly, final orders may be set aside on the basis of bias. [222] Fifthly, final orders may be set aside where a judgment was obtained by fraud.[223]

Discovery of new evidence is not a basis for setting aside a final judgment or order.[224]

4.11 Seeking Evidence from Non-Parties

As was mentioned in Part 1 and in 3.9, there exists a possibility of a party to seek discovery from what is known as third party discovery to seek discovery from a person who is not a party to the proceedings. Order 31, Rule 29 Rules of the Superior Courts provides that where it appears to the court that any person not a party to the action is likely to have or have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is likely to be in a position to give evidence relevant to any such issue may by leave of the court upon

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[217] See Part 1 *infra*.
[218] Delaney and McGrath, *Civil Procedure in the Superior Courts* (2012), Chapter 24, Part F.
[219] Order 28, rule 11 RSC.
[220] *Limerick VEC v. Carr* [2001] 3 IR 493.
[221] *Re Greendale Developments Ltd. (No. 3)* [2000] 2 IR 514.
[222] *Kenny v. Trinity College, Dublin* [2008] 2 IR 40.
[223] *Tassan Din v. Banco Ambrosian SPA* [1991] 1 IR 569.
[224] *Tassan Din v. Banco Ambrosian SPA* [1991] 1 IR 569 and *Kenny v. Trinity College, Dublin* [2008] IESC 18.

application of the parties to the said cause or matter be directed by order of the court to answer such interrogatories or to make such discovery of documents or to permit inspection of such documents. Order 29 provides that the discovery rules apply *mutatis mutandis* to non-parties. Order 31, Rule 29 stipulates that a party seeking non-party discovery must indemnify that person in respect of all costs reasonably incurred by such person and an order for discovery against a non-party will only be made on the basis of an undertaking from the party seeking discovery to pay the costs of the non-parties discovery. Delaney and McGrath note that "*while the utility of a provision such as Rule 29 is obvious, it is important to note that the courts have tended to interpret it in a rather restrictive fashion."*[225]

Further as set out below under heading 6.2, witnesses can be required to attend court by way of issue and service of *subpoena* and it is possible to *subpoena* a witness to bring documents specified in the subpoena to court and this is done by way of a particular type of subpoena, a *subpoena duces tecum*. Any witness properly served with this subpoena who fails to attend can be attached for contempt of court since the *subpoena* is an order from the court to attend the hearing for the purposes of giving evidence.

5 Written Evidence

5.1 Documentary Evidence[226]

Under the adversarial model operating in Ireland, there is a preference for oral evidence, if available, over documentary evidence. A general rule of evidence is the best evidence rule and this has particular application in respect of documentary evidence. Documentary evidence is subject to the general rules of relevance and admissibility. The exclusionary rules concerning hearsay and opinion evidence also apply to documentary evidence.[227]

Healy states that documentary evidence "refers to the content of relevant documents, although it does not include affidavits or depositions, since these are sworn statements and therefore more akin to testimony."[228] Healy also states that "[d]ocumentary evidence encompasses all permanent legible information, including computer records, films, videotaped statements etc. where deemed admissible in all trials and hearings (typically by virtue of legislation.)"[229] In *R. v. Daye* [1908] 2 KB 333, 340, Darling J. stated:

> "any written thing capable of being evidence is properly described as a document and it is immaterial on what the writing may be inscribed. It might be inscribed on

[225] Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), page 294 for general discussion of non-party discovery, see pages 292 *et seq.* of that same text. For a detailed analysis of discovery see Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (2013).

[226] McGrath, *Evidence*, Chapter 12; Healy, *Irish Laws of Evidence*, Paragraph 1.33 and Paragraphs 9.36-9.42; Cannon and Neligan, *Evidence*, Chapter 5.

[227] These rules are discussed more fully below under heading 6 – Witnesses.

[228] Healy, *Irish Laws of Evidence*, paragarph 1.33.

[229] *Ibid*, Paragraph 1.33.

> paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, on clay, and it might be and often was, on metal."

McGrath refers to a series of cases in which the courts have applied an expansive approach to the meaning of a document as including "photographs, maps, X-rays, facsimile transmissions, audio tape recordings, film recordings, electronic information stored on a computer and microfiche."[230] This common law approach is confirmed in a number of statues concerned with evidence in criminal trials in the Criminal Evidence Act, 1992 and the Criminal Justice (Surveillance) Act 2009 which include an expansive defintitons of a documents.[231] The 1992 Act provides a statutory exception to the hearsay rule by permitting the admissibility of documentary information produced in the ordinary course of business in criminal trials.[232] The Law Reform Commission notes that "[s]tatutory definitions are broader than the common law definition, even as expanded to include X-rays …, but as discussed below they do not attempt to be exhaustive."[233] The statutory definitions are in the context of evidence in criminal trials.

Documents may also constitute real evidence if the purpose of tendering the document is to prove its existence or of for example its physical appearance is of relevance and not the contents of the document.

5.1.1 Video and Audio Recordings

Video[234] and audio[235] recordings are admissible as items of real evidence.[236] The rationale is that they are produced by mechanical devices or machines without human intervention. A similar rule applies to photographs.[237] Such evidence must be authenticated. In *R. v. Musqud Ali* [1966] 1 QB 688 it was held that a tape recording is admissible as evidence of the sounds or conversation recorded in it.

Heffernan, Ryan and Imwinkelreid state that "[l]ike other articles, still photographs are required to be authenticated or verified. Traditionally, some courts insisted that the photographer appear to provide the necessary testimony. However, the prevailing view today is that any person familiar with the scene or object depicted may verify the photograph."[238]

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[230] McGrath, *Evidence*, page 678 (footnotes omitted).
[231] Section 2 of the 1992 Act. Section 1 of the 2009 Act.
[232] Discussed further *infra*.
[233] Law Reform Commission, Consultation Paper, Documentary and Electronic Evidence (LRC CP 57-2009), page 9.
[234] *Kajala v. Noble* (1982) 75 Cr. App R. 149; *People (DPP) v. Maguire* [1995] 2 IR 286; *Braddish v DPP* [2002] 1 IR 151.
[235] *People v. Prunty* [1986] ILRM 716.
[236] Cannon and Neligan, *Evidence*, pages 54-58; McGrath, *Evidence*, pages 692-693.
[237] *R. v. Tolson* (1864) 4 F & F 103.
[238] Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition*, page 92.

The primary evidence rule applicable to documents and discussed below does not apply to videotapes, photos or tape-recordings and they can be proved by way of secondary evidence (copies) or oral evidence by an individual who for example heard the tape. It is for this reason that Canon and Neligan prefer to categorise these items as real evidence rather than documents although as they point out these items fall within the definition of documents for section 30 of the Criminal Evidence Act, 1992.[239]

The Law Reform Commission provisionally recommended that the law of evidence as it applies to documentary evidence should adopt a technology neutral approach, in which the essential rules of admissibility should apply equally to traditional forms of manually created documents and to electronic and automated documents and records.[240]

5.1.2 Recognition of Electronic Documents

McGrath states that "[t]o date the Irish courts have not recognised electronic evidence as a distinct category of evidence requiring separate consideration or safeguards. Instead it is treated simply as a variety of documentary evidence or sometimes as real evidence and problems such as what constitutes the original of a document produced on a computer have been dealt with in that framework."[241]

The purpose of the Electronic Commerce Act, 2000 is to provide for the legal recognition of electronic contracts, electronic writing, electronic signatures and original information in electronic form in relation to commercial and non-commercial transactions and dealings and other matters, the admissibility of evidence in relation to such matters, the accreditation, supervision and liability of certification service providers and the registration of domain names, and to provide for related matters. A principle objective of the legislation was to accord electronic information and electronic signatures the same status in law as their traditional counterparts. Section 2(2) provides:

> "In the application of this Act, "writing", where used in any other Act or instrument under an Act (and whether or not qualified by reference to it being or being required to be under the hand of the writer or similar expression) shall be construed as including electronic modes of representing or reproducing words in visible form, and cognate words shall be similarly construed."

Part 2 of the Act deals with Legal Recognition of Electronic Communications and Information in Electronic Form. Section 9 provides:

> "Information (including information incorporated by reference) shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, whether as an electronic communication or otherwise."

Section 13 addresses electronic signatures and provides:

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[239] Cannon and Neligan, *Evidence*, pages 54-58 and 59-60.
[240] Law Reform Commission, Consultation Paper, Documentary and Electronic Evidence (LRC CP 57-2009), page 16.
[241] McGrath, *Evidence*, page 695.

"13.-(1) If by law or otherwise the signature of a person or public body is required (whether the requirement is in the form of an obligation or consequences flow from there being no signature) or permitted, then, subject to subsection (2), an electronic signature may be used

(2) An electronic signature may be used as provided in subsection (1) only –

(a) where the signature is required or permitted to be given to a public body or to a person acting on behalf of a public body and the public body consents to the use of an electronic signature but requires that it be in accordance with particular information technology and procedural requirements (including that it be an advanced electronic signature, that it be based on a qualified certificate, that it be issued by an accredited certification service provider or that it be created by a secure signature creation device) – if the public body's requirements have been met and those requirements have been made public and are objective, transparent, proportionate and non-discriminatory, and

(b) where the signature is required or permitted to be given to a person who is neither a public body nor acting on behalf of a public body – if the person to whom the signature is required or permitted to be given consents to the use of an electronic signature.

(3) Subsections (1) and (2) are without prejudice to any other provision of this Act or law requiring or permitting an electronic communication to contain an electronic signature, an advanced electronic signature, an electronic signature based on a qualified certificate, an electronic signature created by a secure signature creation device or other technological requirements relating to an electronic signature."

The Act also contains provisions relating to the storage and supply of electronic information as equivalent of writing. Section 12(1) provides:

"If by law or otherwise a person or public body is required (whether the requirement is in the form of an obligation or consequences flow from the information not being in writing) or permitted to give information in writing (whether or not in a form prescribed by law), then, subject to subsection (2), the person or public body may give the information in electronic form, whether as an electronic communication or otherwise."

Section 17 provides that if by law or otherwise a person is required or permitted to present or retain information in its original form, subject to safeguards provided for in subsection 2, the information may be presented or retained, as the case may be, in electronic form, whether as an electronic communication or otherwise. There are provisions dealing with situations which require signatures to be witnessed[242] and to documents required to be under seal.[243]

Section 10 provides that sections 10 to 23 are without prejudice to certain excluded laws. The excluded laws comprise:

"(a) the law governing the creation, execution, amendment, variation or revocation of –

[242] Section 14
[243] Section 16.

(i) a will, codicil or any other testamentary instrument to which the Succession Act, 1965, applies,
(ii) a trust, or
(iii) an enduring power of attorney,
(b) the law governing the manner in which an interest in real property (including a leasehold interest in such property) may be created, acquired, disposed of or registered, other than contracts (whether or not under seal) for the creation, acquisition or disposal of such interests,
(c) the law governing the making of an affidavit or a statutory or sworn declaration, or requiring or permitting the use of one for any purpose, or
(d) the rules, practices or procedures of a court or tribunal,
except to the extent that regulations under section 3 may from time to time prescribe."

Section 11 also provided that this Act was not to prejudice certain other legislation including the Criminal Evidence Act, 1992.

5.1.3 Admissibility of Electronic Information

Admisssibility of electronic information in legal proceedings is dealt with in s.22 of the Electronic Commerce Act, 2000:

"In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility in evidence of –
(a) an electronic communication, an electronic form of a document, an electronic contract, or writing in electronic form –
(i) on the sole ground that it is an electronic communication, an electronic form of a document, an electronic contract, or writing in electronic form, or
(ii) if it is the best evidence that the person or public body adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form, or
(b) an electronic signature –
(i) on the sole ground that the signature is in electronic form, or is not an advanced electronic signature, or is not based on a qualified certificate, or is not based on a qualified certificate issued by an accredited certification service provider, or is not created by a secure signature creation device, or
(ii) if it is the best evidence that the person or public body adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form."

McGrath states that "the importance and scope of s.22 is apparent from the breath of the definitions given in s.2 of the Act."[244] Legal proceedings is defined to include both criminal and civil proceedings. "Electronic' includes electrical, digital, magnetic, optical, electro-magnetic, biometric, photonic and any other form of related technology" and "information' includes data, all forms of writing and other text, images (including

[244] McGrath, *Evidence*, page 697.

maps and cartographic material), sound, codes, computer programmes, software, databases and speech".[245] McGrath considers that Section 22 is however "open to criticism on the basis that it does not include any safeguards with regard to the admission of electronic evidence."[246]

5.1.4 Discovery of Electronically Stored Information

The Irish rules on discovery were outlined in Part 1.[247] It was noted that the discovery rules were also amended more recently in 2009, to provide for discovery of electronically stored information (ESI).[248] Order 31(12)(2)(c) RSC provides that on an application for discovery:

> "where the discovery ordered includes electronically stored information and the Court is satisfied that such electronically stored information is held in searchable form and can be provided in the manner hereinafter referred to without significant cost to the party from whom discovery is requested:
> (i) further order that the documents or classes of documents specified in such order be provided electronically in the searchable form in which they are held by the party ordered to make discovery, or
> (ii) where the Court is satisfied that such documents or classes of documents, or any information within such documents, could not, if provided electronically, be subjected to a search by the party seeking discovery without incurring unreasonable expense, further order that the party ordered to make discovery make available inspection and searching facilities using its own information and communications technology system, so as to allow the party seeking discovery to avail of any search functionality available to the party ordered to make discovery."

Order 31, r.12(3) provides:

> "(3) (a) Any order made under sub-rule (2)(c) may include such provision or restriction and be subject to such undertakings from any party or person as the Court may consider necessary to ensure that documents discovery of which has not been ordered are not accessed or accessible, and otherwise to secure the information and communications technology system concerned.
> (b) Such order may in particular include a provision that the inspection and searching of documents shall be undertaken by an independent expert or person agreed between the parties, or appointed by the Court in default of agreement (instead of being undertaken by the party seeking discovery), who may conduct such inspections and searches as may be required and report the results to the party seeking discovery.
> (c) Where such order makes provision for inspection and searching of documents in the manner referred to in Paragraph (b), the party seeking the order shall indemnify such independent expert or person in respect of all fees and expenses reasonably

[245] Section 2.
[246] McGrath, *Evidence*, page 698.
[247] See 1.7 *infra*.
[248] Order 31 RSC as amended by SI 93 of 2009 Rules of the Superior Courts (Discovery), 2009.

incurred by him, and the fees and expenses so indemnified shall form part of the costs of that party for the purposes of Order 99."

5.2 Documents in Respect of Which a Presumption of Correctness Exists

Public documents in accordance with the common law and statutory provisions such as the Documentary Evidence Act, 1925 are generally admissible as evidence and proof of their contents subject to rebuttal evidence. In addition certain public documents may be admitted in evidence on the basis of judicial notice. Public documents will usually be taken as prima facia admissible evidence and do not require further authenticating testimony.

Public documents are one of the main exceptions to the exclusionary rules of evidence. Public documents are deemed to be *prima facie* admissible in evidence and do not therefore involve a breach of the rule against hearsay. There are a number of statutory provisions which provide for proof of the content of public documents by admission of examined copies, certified copies or stationery office issued copies[249]. These documents are discussed below under the heading "Proving Documents by Secondary Evidence".

The Law Reform Commission provisionally recommended that a public document should be presumed to be admissible as proof of its contents, subject to any contrary evidence as to its authenticity[250]. It is apparent therefore, that while there is a presumption of admissibility in respect of these types of public documents that they may still be challenged if there is contrary evidence as to their authenticity.

As regards private documents in civil law there is one category of documents which is treated differently and that is pursuant to the Banker's Book Evidence Act 1879 which is discussed further below. In criminal law there is a wider acceptance of documentary evidence. The Criminal Evidence Act, 1992 provides for the admission of business records. The Banker's Book Evidence Act provide that proof of bank and other business accounting records are presumptatively admissible without need to compel as witnesses employees of the bank to prove issues specific to particular accounts and without causing the bank the inconvenience of physically removing records from their premises.

The Criminal Evidence Act provisions on the admissibility of documentary evidence applied to all business records. The Law Reform Commission considered whether similar provisions should apply in civil proceedings. The Law Reform Commission acknowledged that while business records should be admissible based on the probability of trustworthiness, the Commission was also keenly aware of the need for legislatively

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[249] Documentary Evidence Act 1925 which states *"every copy of an Act of the Oireachtas, proclamation, order, rule, regulation, by-law or other official document which purports to be published by the Stationery Office or to be published by the authority of the Stationery Office shall, until the contrary is proved to be presumed to have been printed under the Superintendents an authority of and to have been published by the Stationery Office*."

[250] Law Reform Commission, Consultation Paper, Documentary and Electronic Evidence (LRC CP 57-2009), page 95.

entrenched safeguards. Safeguards would ensure the authenticity, and ultimate reliability of the evidence provided.[251] Indeed the Law Reform Commission considered that such statements might be more reliable than oral evidence where they were contemporaneous to the events recorded logging unexceptional daily occurrences where oral testimony can be expected to be patchy and inaccurate, informed by fallible human memory.[252]

However, the Law Reform Commission stated *"this should not be seen as promoting a supposition that the document should be prima facia evidence of proof of its contents, but merely that it be admissible as evidence. The documentary statement must still pass over evidential hurdles including that it be shown to be relevant and to have sufficient integrity. Such evidence is also amenable to challenge on the grounds that the person who presents it as open to challenge as to his credibility and his personal knowledge and the credibility of this person will also speak to the weight of the documentary evidence."*[253]

The Law Reform Commission provisionally recommended that the best evidence rule be abolished[254]. The Commission also provisionally recommended, in its place, the proposed statutory frame work on documentary evidence should contain a rule that documentary evidence is in general admissible in civil and criminal proceedings where the court is satisfied as to relevance and necessity.[255] The Commission also recommended that in general and as an exception to the exclusionary rule for hearsay evidence a public document defined in a manner recommended by the Commission should be presumed to be admissible as to proof of its contents subject to contrary evidence as to authenticity.[256] And the Commission recommended that the well-established distinction between private and public documents in which there is no presumption of the due execution of private documents should be maintained and that this should be put on a statutory footing.[257] The Commission also recommended that its proposed legislative frame work on the admission of documentary evidence should provide that "*business records*" should be presumed to be admissible in evidence. The Commission provisionally recommended that business documents be acceptable as admissible evidence if the document was created or received in the course of a business and where (a) the information in the statement is derived from a person who had, or may reasonably be supposed to have had direct personal knowledge of that information; (b) that the documentary statement has been produced for the purposes of a business; and (c) that the information as contained in a document kept by the business.[258]

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[251] *Ibid*, page 101.
[252] *Ibid*, page 101.
[253] *Ibid*, page 101.
[254] *Ibid*, Paragraph 2.152 and see also page 313.
[255] *Ibid*, Paragraph 2.153 and pages 313-314.
[256] *Ibid*, Paragraph 3.8.2 and page 314.
[257] *Ibid*, see Paragraph 3.9.4 and page 314.
[258] *Ibid*, see Paragraph 4.15 and page 314.

5.3 Distinction Between the Evidential (Probative) Value of Public and Private Documents

The Law Reform Commission states:

> "The traditional law of evidence has tended to treat oral evidence more favourably than documentary evidence especially where adduced without accompanying oral testimony. As documentary evidence has become more common, the traditional exclusionary approach of the law of evidence to documents gradually gave way to a category-by-category inclusionary approach. These categories of documents would then avoid the strict application of the exclusionary rules of evidence. The law as it currently stands has, therefore, developed a number of inclusionary exceptions to accommodate documentary evidence."[259]

Public documents in accordance with the common law and statutory provisions such as the Documentary Evidence Act, 1925 are generally admissible as evidence and proof of their contents subject to rebuttal evidence. In addition certain public documents may be admitted in evidence on the basis of judicial notice. Public documents will usually be taken as prima facie admissible evidence and do not require further authenticating testimony.

The standard will be met by simply showing that they are printed by official government printers and bear the stamp, seal or signature of certain officers or departments or private entity which has had the task delegated to it and therefore prints under the auspices of the stationery or a public procurement office.[260] Public documents are therefore admissible as proof of their content. The Law Reform Commission notes *"the position is very different as regards private documents, where proof of due execution is not presumed and the production of a copy would not suffice to have the document admitted in evidence. Therefore proof of due execution at testation, handwriting or signature will be required. This may be satisfied in a number of different ways, e.g. by oral evidence from the author, signatory or one who witnessed the signing or writing of the document. In the alternative an admissible hearsay statement of the author or witness may suffice to authenticate the evidence."*[261]

The Law Reform Commission states *"where it is intended to produce a private document in proceedings the court will require that evidence be advanced to show that the private document has been duly executed. Due execution will be established by showing that the document was signed by the person who purported to sign it in order to go towards establishing the reliability of such a document. This can be undertaken by showing proof of the handwriting or signature be it a manual signature or an electronic signature. These requirements will be dispense less where it can be established that the document in question is more than 20 years old and has come from a verifiable and properly maintained custody. From this the court will be entitled to infer formal validity. Property custody in these circumstances means custody which is reasonable*

[259] *Ibid*, page 1.
[260] *Ibid*, page 77.
[261] *Ibid*, page 95.

based on the circumstances arising in the case and does not necessarily imply the most appropriate custody which is available."[262]

The Law Reform Commission recommended that the well-established distinction between private and public documents in which there is no presumption of due execution of private documents should be maintained and that this should be placed on a statutory footing.[263]

5.4 Adducing Documentary Evidence[264]

The Law Reform Commission draws the following contrast between oral evidence and documentary evidence in the Irish Legal system:

> "A large amount of civil and criminal litigation in Ireland is conducted using oral evidence, with witnesses offering testimony, being examined by their representatives and in turn cross-examined by opposing counsel. Oral testimony is, therefore, presumptively admissible and the techniques of examination and cross-examination are primarily aimed at determining the weight, or reliability to be attached to the person's evidence. By contrast, documents are subject to a higher level of initial threshold scrutiny as to admissibility. They must, in general, be proven by witnesses in order to be deemed admissible as evidence of their contents, unless otherwise agreed to by the parties."[265]

The Law Reform Commission also notes that in the majority of cases, there will be no objection to documentary evidence.[266]

The Law Reform Commission discusses how the law of evidence approaches original documents and copies of documents:

> "In this respect, the law of evidence takes a common sense approach. If the original document, such as a written contract, is available, it should be produced: this is called the Best Evidence Rule. If, however, the original is unavoidably unavailable, a court will often accept alternative evidence, such as a certified copy or direct oral testimony by a witness who was present when the document was made: this is called Secondary Evidence. In practice, it is relatively rare for an objection to be taken to the introduction of a copy (in the context of electronic documents, often called a derivative) in place of an original document, in strict reliance on the secondary evidence rule. Where such an objection does arise it is usually an attempt to gain a tactical forensic advantage by, for example, causing the person who wishes to introduce the copy of the document to call a witness to explain the absence of the original, a person who will then be liable to cross-examination."[267]

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[262] *Ibid*, page 96.
[263] *Ibid*, page 98.
[264] Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition*, pages 64-67.
[265] Law Reform Commission, Consultation Paper, Documentary and Electronic Evidence (LRC CP 57-2009), page 22.
[266] *Ibid*, page 23.
[267] *Ibid*, page 23.

As noted above, the best evidence rule has particular application to documentary evidence. This rule was expressed in *Omychund v. Baker* (1744) 26 ER 15, per Lord Hardwicke who stated that "the judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit." The rule thus required a party to produce the best possible evidence. The rules survives in respect of documents where a party who seeks to adduce evidence of a document and rely upon the contents of the document is required to adduce, where possible the original document. The party must prove the contents of the document. In *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, it was stated:

> "The best evidence rule operates in this sphere to the extent that the party seeking to rely on the contents of the document must adduce primary evidence of those contents, i.e. the original document in question. The contents of a document may be proved by secondary evidence if the original has been destroyed or cannot be found after due search. Similarly such contents may be proved by secondary evidence if production of the original is physically or legally impossible."

The rule does not apply, i.e. does not require to be satisfied, where it is proof of the *existence* of the document which is at issue. As is apparent from the *dicta* in *Primor plc v. Stokes Kennedy Crowley*, exceptions to the rule exist, where documents can be proved through secondary evidence, often through copies of the documents. Section 30 of the Criminal Evidence Act, 1992 relaxes the common law rules in criminal trials, providing at subsection 1, that copies are admissible:

> Where information contained in a document is admissible in evidence in criminal proceedings, the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve.

There is a similar provision at section 26 of the Children Act, 1997 which apply to civil proceedings under that Act concerning the welfare of a child or a person with a disability. The best evidence rule was never applied to photographs, tapes or films.[268] In civil trials parties are free to agree to admit evidence of the contents of documents by secondary means, often photocopies.[269]

An original document is an example of "primary evidence" which is "evidence which by its nature, does not suggest the existence of better evidence of itself."[270]

The Law Reform Commission has recommended the abolition of the best evidence rule in civil evidence, noting that it has already been abolished in the context of criminal evidence.[271]

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[268] *Kajala v. Noble* (1982) 75 Cr. App R. 149.
[269] *Mapp v. Gilhooley* [1991] 1 IR 253.
[270] Colette Reid (Ed) *Civil Litigation* (3rd ed, OUP/Law Society of Ireland, 2012), page 212.
[271] Law Reform Commission, Consultation Paper, Documentary and Electronic Evidence (LRC CP 57-2009), Chapter 3.

Indeed in *Hussey v Twomey* [2009] 1 ILRM 321, the Supreme Court has indicated that the best evidence rule can no longer be regarded as part of Irish law in civil proceedings.

5.4.1 Proving Documents by Secondary Evidence[272]

There are a number of exceptions to the primary evidence rule where documents may be proved through secondary evidence, usually through a copy of a document but secondary evidence of the contents of a document may also be given by means of oral evidence. "Secondary evidence is evidence which suggests the existence of better evidence, for example, a copy of a document suggests the existence of an original."[273] The exceptions whereby documents may be proved by secondary evidence include:

(1) Where the original document has been lost or destroyed

In this instance the party seeking to adduce the secondary evidence must satisfy the Court that a thorough search has been conducted.[274]

(2) Where production of the original is legally or physically impossible

In *Owner v. Bee Hive Spinning Co. Ltd.* [1914] KB 105, a notice on a factory wall was required by law to remain fixed to the wall at all times. Where production of the original is highly inconvenient, secondary evidence is permissible.

(3) Where the original is in the possession or control of a party to the proceedings who has been served with a Notice to Produce and failed to comply

Service of the Notice to Produce is a pre-requisite.

(4) Where the original is in the possession of a third party not legally obliged to produce it

If the original is in the possession of a third party who is lawfully entitled to refuse to disclose it, because for example it is privileged or that party is outside the jurisdiction. If the refusal to produce the document on the part of the third party is unlawful, production of the document may be compelled by *subpoena duces tecum*[275] or contempt proceedings. Therefore it is only lawful withholding by the third party which permits of a party to the proceedings proving a document by secondary evidence.

(5) Public Documents

At common law, it was determined that it was permissible to adduce evidence of the contents of public documents by way of secondary evidence to prevent the inconvenience in producing the originals.[276] A series of statutory provisions provide for the proof of contents of public documents by means of secondary evidence. These include but are not limited to:

Section 14 of the Evidence Act, 1851 provides that certified or examined copies may be used to prove the contents of documents of such a public nature that they are admissible in evidence if produced from proper custody if no other statute provides for proof of the contents of such document by means of a copy.

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[272] McGrath, *Evidence*, pages 680-688, and Cannon and Neligan, *Evidence*, pages 60-64.
[273] Reid (Ed) *Civil Litigation* (2012), page 212.
[274] *Staples v. Young* [1908] 1 IR 135.
[275] Discussed *infra* under Heading 6 in the context of Witness Testimony.
[276] *Mortimer v. M'Callan* (1840) 6 M & W 58.

Section 7 of that Act provides for secondary evidence of proclamations, Treaties and Acts of State of foreign countries.

The Documentary Evidence Act, 1925, provides for proof of documents of the State by Stationery Office copies for example proceedings of the Houses of the Oireachtas or the passing of a resolution by either House of the Oireachtas. That Act also provides for proof of primary and secondary legislation by way of Stationery Office copies. McGrath states that "[a] failure by the prosecution to prove the contents of primary or delegated legislation in accordance with the provisions of the Documentary Evidence Act will generally prove fatal to a criminal prosecution... however where the courts are sufficiently familiar with the statutory provision in question, judicial notice may be taken of its contents."[277]

The European Communities (Judicial Notice and Documentary Evidence) Regulations, 1972[278] provides for secondary evidence to prove the treaties governing the EC, acts of the institutions and decisions and orders of the European Court of Justice.

Entries in the Register of Births, Deaths and Marriage.[279]

(6) Bankers' Books

The Banker's Book Evidence Act, 1879 as amended by the Banker's Book Evidence Act, 1959 provides that copies of entries in bankers' books are admissible as prima facie evidence of the original entries and of the matters and transactions recorded therein.

5.4.2 Business Records

The Criminal Evidence Act 1992 provides for the admissibility of business records in criminal proceedings as an exception to the hearsay rule.[280] The exclusionary hearsay rule operates to exclude statement other than one made by a person giving oral evidence in the proceedings as evidence of any fact stated. How the rule operates in respect of business records is apparent from the decision in *Myers v. DPP* [1965] AC 1001. The accused was charged with fraud involving passing off stolen cars as models rebuilt from wrecks. In order to pass the stolen car off it was necessary to have an identifying number removed and replaced with the identifying numbers of the wrecked cars. However, a number cast onto a cylinder block in the stolen cars could not be altered. The prosecution case relied on this discrepancy. The prosecution called the custodian of the manufacturer records. The original records, which consisted of record cars which passed along the production line and on which the relevant numbers were entered, had been transferred to micro-film and the original records had been destroyed. The custodian's evidence was inadmissible as hearsay as he sought to adduce the workmen's account of the numbers as truth of the contents of the records.

The difficulties resulting from cases such as *Myers* have been remedied in the criminal sphere by the Criminal Evidence Act, 1992.

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[277] McGrath, *Evidence*, page 685.
[278] SI 341 of 1972.
[279] Marriage (Ireland) Act 1844 and the Registration of Births and Deaths (Ireland) Act, 1863.
[280] Healy, *Irish Laws of Evidence*, page 254 *et seq.*

Heffernan, Ryan and Imwinkelreid explain the statutory exception in the Criminal Evidence Act that the "rationale for reliance on business records is that they constitute the best possible evidence of a disputed matter. If a business conducts hundreds or thousands of similar transactions during the course of any given year, it is doubtful whether any single employee will remember any particular transaction. Where the transaction has been recorded, the process whereby the record was created creates an inference of the reliability of the entry. It is the precise, routine manner in which the business compiles and maintains its records that safeguards their reliability."[281]

The statutory exception for admissibility of business records has not yet been extended to civil trials. This issue was discussed by the High Court in *Hughes v. Staunton*, High Court, Unreported, (Lynch J.) 16 February 1990 where medical records from an English hospital had been discovered. In the event that the doctors and nurses who had made the entries on the records were called to give evidence and were questioned about their entries, they would be likely to testify that they had no actual recollection of the entry but was confident that it was reliable. Further, if they were called as witnesses they would no doubt have to consult their contemporaneous notes to refresh their memories.

In civil proceedings parties may agree to waive an objection to hearsay evidence such as expert reports and documentary evidence. In *Hughes v. Staunton*, High Court, Unreported (Lynch J.), 16 February 1990, the parties consented to the admission of the documents discovered from the English hospital and the need to call the doctors and nurses was avoided. The High Court treated the records as a "reasonably accurate account of the events which they purport to record."

A court may not however accept documentary hearsay evidence where contradicted by oral evidence in the proceedings.[282]

The Law Reform Commission recommended that the exclusionary hearsay rule be replaced.[283]

5.4.3 Expert Evidence

Another exclusionary rule is that opinion evidence is generally inadmissible.[284] Again there are many exceptions to this rule the most notable being that expert witnesses are permitted to give opinion evidence. Experts give their opinion in the form of a report. In recent years a number of statutory amendments have resulted in the requirement to

[281] Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition*, pages 74-75.
[282] *Moloney v. Jury's Hotel plc.*, Unreported, Supreme Court, 12 November 1999.
[283] Law Reform Commission, Report on the Rule Against Hearsay in Civil Cases (LRC 25 1988). Part of the Report was implemented in the Children Act 1997. Section 23 has suspended the hearsay rule as it applies to children too young or too traumatised to give testimony.
[284] Discussed in McGrath, *Evidence*, Chapter 6; Healy, *Irish Laws of Evidence*, Chapter 12; Fennell, *The Law of Evidence in Ireland* (2009) Cannon and Neligan, *Evidence*, Chapter 8.

disclose expert reports pre-trial. This requirement exists in personal injury actions[285], commercial proceedings[286] and competition law proceedings.[287] Expert Evidence is discussed below.[288]

5.4.4 Proving a Document was Duly Executed

In some cases it is necessary for a party to prove that a document was duly executed.[289] Proof of due execution is required for its admission in civil and criminal trials. This requires proving it was written by or signed by the person whom it purports to have been written or signed by. There are however, many cases were proof of execution is presumed or excused. There is a presumption of due execution where a document is 30 years old and comes from proper custody. The requirement to prove public documents is dispensed with.

6 Witnesses

6.1 Obligation to Testify

Under the adversarial model operating in Ireland, the primary means by which a party proves his case is by oral evidence. As a general rule in civil trials, witnesses are examined *viva voce* in open court.[290] Admissibility of witness testimony is contingent on the witness' competence to testify. Competent witnesses are compellable.[291] McGrath states "that compellability is predicated upon competence and and a witness cannot be compelled if he or she is not competent."[292] "A witness is compellable if he may be required by law to testify at the behest of one party to a trial or hearing."[293] Cannon and Neligan state "[t]he effect of a person being regarded as compellable is that he can be imprisoned for contempt of court if he refuses to attend, or, if attending refuses to answer any questions put to him."[294] Witnesses may be permitted to refuse to answer questions on the grounds of privilege.[295]

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[285] SI 391 of 1998, Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statement) adding new sub-rules to Order 39. See Law Society, Medico-Legal Recommendations (Law Society, 2008).
[286] Rules of the Superior Courts (Commercial Proceedings), 2004 (SI No. 2 of 2004).
[287] Rules of the Superior Courts (Competition Proceedings), 2005 (SI 130 of 2005).
[288] See 7.7 *infra.*
[289] McGrath, *Evidence*, pages 678 and 688 *et seq.* Cannon and Neligan, *Evidence*, pages 54-58; McGrath, *Evidence*, page 64, and Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition*, page 67 *et seq.*
[290] Order 39, rule 1(1) Rules of the Superior Courts.
[291] *Ex parte Fernadez* (1861) 10 CBNS 3.
[292] McGrath, *Evidence*, page 62.
[293] Healy, *Irish Laws of Evidence*, page 43.
[294] Cannon and Neligan, *Evidence*, page 65.
[295] Healy, *Irish Laws of Evidence*, Chapter 13.

6.2 Summoning of Witnesses

Ordinarily in civil trials it is for the parties to ensure the presence of any witnesses on whom the party intends to rely. Where the attendance of a witness is required in civil proceedings the parties (usually through their solicitor) can issue a witness summons known as a *subpoena*. Any witness, properly served with a subpoena who fails to attend can be attached for contempt of court, since a subpoena is an order from the court to attend the hearing for the purpose of giving evidence.[296] A witness may be subpoenaed by a *subpoena ad testificandum* which requires an individual to attend court to give oral evidence or by a *subpoena duces tecum* which requires the witness both to attend court to give oral evidence but also to bring documents specified in the *subpoena*.[297]

6.3 Refusing a Role as a Witness

A witness under subpoena is obliged to attend court and in general a witness is bound to answer relevant questions put to him and will be guilty of contempt of court if he refuses to answer. Per O'Flaherty J. in *Heaney v. Ireland* [1996] 1 IR 580, 585 "the exercise of the judicial power carries with it the entitlement of a judge to compel the attendance of witnesses and *a fortiori*, the answering of questions by witnesses. There are circumstances in which witnesses may refuse to answer questions or to refuse to provide documents. Healy states that "[t]he competence and compellability of a witness is distinct from privilege, which operates in the ordinary way to modify the questions a witness must answer or the documents he may be required to produce."[298] Fennell distinguishes between competence and privilege stating "[i]n relation to competence, the incapacity of the witness is incomplete, and prevents that particular witness from testifying at all. Private privilege, on the other hand, may well be waived by its possessor.[299] Privilege is discussed further below.

As regards privilege by virtue, of the vocation or profession of the witness, Hogan and Whyte state "[t]he privilege to refuse to answer relevant questions is accorded only to three categories of witnesses, namely solicitors, religious pastors and members of the Oireachtas. It is not available to others, even where they belong to professions in which the disclosure of certain kinds of information is regarded as unethical."[300]

6.4 Witnesses, Competence, Compellability and Challenges

Healy states that "by practice witnesses are assumed to be competent... specific competence and compellability rules have been developed for certain classes of witness of more regular concern, for example: the accused, the spouse of the accused; children;

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[296] Order 39 RSC. Reid (Ed) *Civil Litigation* (2012), page 143. Equivalent provisions are found in the Circuit Court Rules (Order 23) and the District Court Rule (Order 8).
[297] Order 39 RSC.
[298] Healy, *Irish Laws of Evidence*, page 45.
[299] Fennell, *The Law of Evidence in Ireland* (2009), pages 319-320.
[300] Discussed in Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 714.

the mentally ill and with less contentiousness diplomats, bankers and judges."[301] In civil cases, challenges to competence of witnesses are most common in the case of children and mentally impaired persons. McGrath notes that a witness may be incompetent to give evidence because of intoxication or mental illness, stating that "the lack of competency will correspond with the period of intoxication or mental ilness and, thus the witness will be competent when sober or during a period of lucidity."[302]

Traditionally under the common law, only witnesses who understood the moral imperative of the oath were competent to give sworn evidence. The Oaths Act 1888 provided for a solemn affirmation in the alternative to the oath.

An exception to the rule that evidence must be given *viva voce* also exists where evidence may be taken on commission. Order 39, r.4 RSC provides:

> "The Court may, in any cause or matter where it shall appear necessary, make any order for the examination upon oath before the Court, or any officer of the Court, or any other person, and at any place, of any witness, and may allow the deposition of such witness to be adduced in evidence on such terms (if any) as the Court may direct."

While a broad discretion is afforded the court, the taking of evidence on commission most frequently occurs where a witness is resident abroad and unwilling to attend or unable to attend court as a result of illness.[303]

6.4.1 Determination of Competence

It is for the trial judge to determine whether a witness is competent to testify.[304] The onus of proving the competence of a witness rests on the party who called the witness.[305] If an issue of competence of a witness is raised the witness can be examined by the party calling him and cross-examined by the party taking objection.[306] The party taking objection may also adduce other evidence.[307] The final determination of competence is for the judge alone.[308]

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[301] Healy, *Irish Laws of Evidence*, page 44 (footnotes omitted).
[302] McGrath, *Evidence*, page 64. See also *R. V. Hill* (1851) 2 Den 254.
[303] For discussion see Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), page 489.
[304] *People (AG) v. Kehoe* [1951] IR 70.
[305] *Ibid.*
[306] *People (AG) v. Kehoe* [1951] IR 70. See also *R. V. Hill* (1851) 2 Den 254.
[307] *People (AG) v. Kehoe* [1951] IR 70.
[308] *Ibid.*

6.4.2 Privilege Against Self-Incrimination

Historically the privilege against self-incrimination emerged as a principle of the common law and had roots in the 17th century.[309] If the privilege was judge made law it could be abridged by sovereign parliament.

In *Re National Irish Bank Ltd.*(No. 1) [1999] 3 IR 145, the Supreme Court held that the privilege against self-incrimination has the status of a constitutional right.[310] The Supreme Court held that the right was not absolute and could in certain circumstances give way to the exigencies of the common good, provided that the means used to curtail the right were proportionate to the public object to be achieved.

McGrath considers that the right not to be compelled to incriminate oneself, encapsulated in the principle *nemo teneter se ipsum accare* encompasses a number of rights which can be grouped together under the term "the privilege against self-incrimination" or "the right to silence".[311] The privilege against self-incrimination is also protected under Article 6 ECHR.[312] The ECHR was given effect in Irish domestic law at sub-constitutional level by the European Convention on Human Rights Act, 2003.[313]

In *R. v. Director of Serious Fraud Office, Ex p. Smith* [1993] AC 1, 30-31 Lord Mustill discussed "the right to silence" as referring to "a disparate group of immunities" which included:

> "(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
>
> (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.

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[309] Per Barrington J. in *Re National Irish Bank Ltd.*(No. 1) [1999] 3 IR 145, 178. *Lilburn's trial* (1637-1645) 3 How. St. Tr. 1315.

[310] Discussed in Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 1083, McGrath, *Evidence*, Chapter 11.

[311] McGrath, *Evidence*, page 622, and Healy, *Irish Laws of Evidence*, pages 411-427.

[312] *Murray v. United Kingdom* (1996) 22 EHRR 29.

[313] The ECHR was given effect Irish law by the European Convention on Human Rights Act, 2003, but in an indirect manner, which requires the courts to interpret and apply "any statutory provision or rule of law" in a manner compatible with the State's obligations under the ECHR but only "in so far as possible" and "subject to the rules of law relating to interpretation and application." (Section 2) That the ECHR was incorporated at sub-constitutional level is apparent from the long title of the Act. (An Act to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the the 4th day of November, 1950 and certain protocols thereto, to amend the Human Rights Commission Act, 2000 and to provide for related matters.) For discussion see Gráinne Mullan, *Incorporation of the European Convention on Human Rights in Irish Law* in Bríd Moriarty and Eva Massa (eds) *Human Rights Law* (4th ed, OUP/Law Society of Ireland, 2012), page 80 *et seq*.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
(6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial."

This analysis has been cited by the Irish courts.[314] From these immunities McGrath identifies three main sub-rights: "(1) the right of an accused person not to be required to give evidence at his trial" which he refers to as the "right not to give evidence"; "(2) the right of a criminal suspect not to give evidence" which he refers to as "the right to silence" and "(3) the privilege enjoyed by witnesses and other persons subject to questioning in any form of proceedings not to answer questions which may tend to incriminate them" which he refers to as "the privilege against self-incrimination".[315] It is only the third of these sub-rights which is of relevance in civil trials. McGrath concludes that "it is very important to distinguish between these discrete sub-rights because the constitutional basis and the degree of abridgement that is constitutionally permissible depends on which sub-right is involved. In general terms, there appears to be a sliding scale in the protection of the right depending on the proximity of a criminal trial with the right not to give evidence at one end of the scale and the privilege against self-incrimination at the other end of the scale."[316]

Re National Irish Bank Ltd.(No. 1) [1999] 3 IR 145 concerned the interpretation of Part II of the Companies Act, 1990, which provided a mechanism for the investigation of companies by inspectors appointed pursuant to the Act. The inspectors were given the power, **inter alia**, to compel answers and to compel the production of relevant documents from all officers and agents of a company whose affairs are under investigation. The relevant sections were first, section 10 which placed a duty on officers and agents of a company being investigated and other persons in possession of relevant information to co-operate with the inspectors and produce documents and answer questions and section 18 which provided that an answer given by a person could be used in evidence against him. The first issue to be considered by the Court was whether the statutory provision (section 10) abrogated the privilege of self-incrimination.

[314] *Heaney v. Ireland* [1994] 3 IR 593, pages 601-602.
[315] McGrath, *Evidence*, page 623, and discussed at pages 623-675.
[316] *Ibid*, page 623, and discussed at page 646.

It was argued that the privilege was not just a common law privilege but a constitutional right. Three constitutional provisions were invoked. Article 40.6.1 which protects freedom of expression; Article 40.3 which encompasses a guarantee of the personal rights of citizens and Article 38.1 which provides that "[n]o person shall be tried on any criminal charge save in sue course of law." The Supreme Court determined that Article 40.3 merely reinforces the other two constitutional guarantees.[317] The Supreme Court confirmed that Article 38 applied in the context of a criminal trial while the freedom of expression guarantee applied to the right to silence generally. Previously in *Heaney v. Ireland* [1996] 1 I.R. 580, the Court held that the constitutional right of freedom of expression carried with it, by necessary implication, the correlative right to remain silent. The Court then went on to consider whether there was an impermissible abridgement of the Article 40.6.1 right (as reinforced by Article 40.3). The Court considered that the investigation of criminal fraud was a matter of great importance in modern society. The Court referred to the European Court of Human Rights decision in *Saunders v. United Kingdom* (1997) 23 E.H.R.R. 313 which considered the powers of inspectors appointed by the Secretary of State under the British Companies Act, 1985, which powers were broadly similar to the powers of inspectors appointed by the Court under our Companies Act, 1990 and in which judgment such powers were considered to be investigative in nature and in respect of which the ECtHR refused to extend the guarantees in Article 6(1) ECHR. The Supreme Court, per Barrington J. (delivering the judgment of the Court) concluded that s.10 was a proportional restriction on the right to silence. The Supreme Court gave guidance on the future admissibility of answers compelled pursuant to s.10, while acknowledging that the admissibility of evidence in a criminal trial is primarily a matter for the trial judge. *Saunders* was referenced again, where it had been held that the use of compelled answers to questions put by inspectors at the subsequent criminal trial had violated the applicant's right to a fair trial pursuant to Article 6(1) ECHR:

> "The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings… Moreover the fact that statements were made by the applicant prior to his being charged does not prevent their later use in criminal proceedings from constituting an infringement of the right."[318]

Barrington J. stated that it is "[a] fundamental rule of Irish law is that a confession is not admissible at a criminal trial unless it is voluntary."[319]:

> "It appears to me that… that a trial in due course of law requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a voluntary confession were admitted in evidence against the accused person would not be a trial in due course of law within the meaning of Article 38 of the Constitution and that it is immaterial whether the compulsion or inducement used to extract the confession came from the executive or from the legislature."

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[317] At page 178.

[318] *Saunders v. United Kingdom* (1997) 23 E.H.R.R. 313, 340.

[319] At page 182, citing *The People (Attorney General) v. Cummins* [1972] I.R. 312 and *The People (Attorney General) v. Gilbert* [1973] I.R. 383.

In the view of the Supreme Court s.18 permission to use the answers obtained in evidence against the individual covered civil trials but that it was necessary to determine whether it was broad enough to cover the admission of involuntary confessions in criminal cases. The Supreme Court determined:

> "Accordingly the better interpretation of s.18 in the light of the Constitution is that it does not authorise the admission of forced or involuntary confessions against an accused person in a criminal trial, and it can be stated, as a general principle, that a confession, to be admissible at a criminal trial must be voluntary. Whether however a confession is voluntary or not must in every case in which the matter is disputed be a question to be decided, in the first instance, by the trial judge."

In a subsequent decision, in *Dunnes Stores Ireland Company v. Ryan* [2002] 2 IR 60, a different provision of the Companies Act 1990 was struck down as unconstitutional on the basis of a greater degree of compulsion. Failure to answer questions pursuant to section 19(6) automatically led to the commission of an offence.

McGrath concludes in respect of the sub-category, privilege against self-incrimination that "the constitutionality of any statutory provisions requiring persons to answer questions or furnish particular information will fall to be decided on whether they involve a proportionate restriction of the substantive constitutional rights of the persons affected including, in particular the right not to communicate, but also the rights to personal autonomy and privacy. It is apparent from decisions in *Heaney* and *Re National Irish Bank* that the test of proportionality will not be difficult to satisfy if a legitimate and substantial public interest can be identified. However, due to the constitutionalised voluntariness test, it will be much more difficult to have such answers admitted in evidence. Indeed Barrington J's judgment clearly suggests there is an *absolute* rule, grounded in Art. 38.1 against the admission of compelled statements."[320] It appears that statute may abridge the privilege against self-incrimination but that the admissibility of any evidence obtained in a subsequent criminal trial will be subject to a voluntariness test.

6.4.3 Privilege[321]

As noted above there exist situations where an individual may enjoy a privilege from being compelled to answer questions or produce documents[322] and indeed the privilege against self-incrimination has already been discussed. There are two principal types of privilege. First, private privilege which applies to individuals. Healy states that "[a] [private privilege operates so that the person to whom it attaches, whether or not party to the legal proceedings, may decline to answer certain questions or produce certain documents, howsoever relevant and admissible in the proceedings, and he may compel

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[320] McGrath, *Evidence*, page 623, and discussed at page 647.

[321] Discussed in McGrath, *Evidence*, Chapter 10; Healy, *Irish Laws of Evidence*, Chapter 13; Fennell, *The Law of Evidence in Ireland* (2009), Chapter 8; Cannon and Neligan, *Evidence*, Chapter 16.

[322] This is relevant to the discussion in Part 1, at Heading 1.7 *infra* The Principle of Pre-trial discovery.

others from doing so."[323] Through privilege, refusal to reveal information is protected. Secondly, public interest privilege which applies to the State. While private privilege and public interest privilege have been traditionally treated as distinct McGrath considers that "each is ultimately grounded on a determination that the balance of public interest favours the recognition and upholding of the privilege."[324] Healy states that "[i]n Ireland, as in other common law jurisdictions, private privilege has become a public law matter and it is now necessarily decided by reference to rights and public interests developed under the Constitution."[325] In McGrath's view the main difference between the two is that in respect of private privilege the balancing of conflicting policy objectives occurs in determining whether to recognise and setting the limits of a particular privilege while in respect of public interest privilege the balancing occurs on a case by case basis.[326] In *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd.* [1990] 1 IR 22, 32 Finlay C.J. stated "the question as to whether or not a party to litigation will be privileged to produce particular evidence is a matter within the sole competence of the courts." A party may claim that a document or information is privileged, this claim can be contested by the other party and ultimately it is a matter for the court to decide.[327] The burden of establishing privilege rests on the party asserting privilege.[328]

6.4.4 Categories of Privilege[329]

Private Privilege arises in the following situations:

(1) Legal Professional Privilege
(2) "Without Prejudice" Communications
(3) The Privilege Against Self-Incrimination
(4) Miscellaneous Privileges
   a. Marital Privacy
   b. Marriage Counsellors
   c. Sacerdotal Privilege
   d. Journalistic Privilege
   e. Informer Privilege

In addition there exists public interest privilege, which is discussed below. The privilege against self-incrimination was discussed above.

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[323] Healy, *Irish Laws of Evidence*, page 372.
[324] McGrath, *Evidence*, page 623, and discussed at page 522 citing *Skeffington v. Rooney* [1997] 1 IR 22.
[325] Healy, *Irish Laws of Evidence*, page 373.
[326] McGrath, *Evidence*, page 522.
[327] See for example, in the context of discovery of documents Order 31, rule 20(2) RSC provides: Where on an application for an order for inspection privilege is claimed for any document, the Court may inspect the document for the purpose of deciding as to the validity of the claim for privilege.
[328] *Murphy v. Dublin Corporation* [1972] IR 215.
[329] Some of the categories are discussed in McGrath, *Evidence*, Chapter 10; Healy, *Irish Laws of Evidence*, Chapter 13; Fennell, *The Law of Evidence in Ireland* (2009), Chapter 8; Cannon and Neligan, *Evidence*, Chapter 16.

Wigmore[330] suggested a series of four criteria to be used to establish whether privilege applies: (1) the communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedously fostered; and (4) the injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation. These criteria were favoured by the High Court in *Cook v. Carroll* [1945] IR 515 in the context of sacerdotal privilege. Healy also notes that "Wigmore's criteria have been endorsed on numerous occasions now by the Irish courts as appropriate to cases raising untested claims to private privilege."[331] He gives the example of the counselling privilege *ER v. JR* [1981] 1 ILRM 125 as an example of a new type of privilege or alternatively as an extension of an existing privilege to a new relationship.[332] Thus in principle it is possible for the superior courts to recognise new or extend existing private privileges. However this has to be balanced against the public policy which favours disclosure of evidence.

6.4.5 Marital Privacy

The family founded on marriage has a special place in the Irish Constitution.[333] Marital privacy is the privilege of a husband or wife in respect of communications, the disclosure of which would injure marital privacy. Previously, statute conferred the privilege with Section 3 of the Evidence (Amendment) Act, 1853 providing "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage." That statutory provision had no application to criminal proceedings[334], as at the time that it was enacted neither an accused nor the spouse of an accused was competent to give evidence in such criminal proceedings. The Criminal Evidence Act, 1992 rendered spouses competent in criminal proceedings and compellable in limited circumstances but section 26 of the Act contains a saver in respect of marital privacy providing that "nothing in this Part shall affect any right of a spouse or a former spouse in respect of marital privacy."

6.4.6 Marriage Counsellors

Privilege was found by the High Court to attach to communications with a marriage counsellor (who was a priest) in *ER v. JR* [1981] 1 ILRM 125. The privilege vested in the married couple and not the counsellor and therefore only the married couple could waive the privilege. in *Johnston v. Church of Scientology*, High Court, Unreported (Geoghegan J.) April 30, 1999 indicated that the counselling privilege could extend to secular counselling and he specifically referred to marital counselling.

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[330] Wigmore, *Evidence* (1940) VII §2285.
[331] Healy, *Irish Laws of Evidence*, page 396.
[332] *Ibid*, page 396.
[333] Article 41.3.1.
[334] See Sections 1 and 4 of the Criminal Justice (Evidence) Act, 1924.

6.4.7 Business Secrecy

It was noted earlier[335] the administration of justice in public is provided for in the Irish Constitution. It was also noted that the Constitution provides for exceptions where proceedings are heard otherwise than in public and that generally theses exceptions are created by statute. Cases concerning business secrets or disclosure of confidential information may be heard otherwise than in public.[336] Again following the basis rule of evidence such information is only admissible if it is relevant.[337] High Court proceedings pursuant to s.205 of the Companies Act, 1963 which proceedings are concerned with a company shareholder alleging oppression by majority shareholders may be held *in camera* where the High Court is of the opinion that a public hearing would "involves the disclosure of information, the publication of which would be seriously prejudicial to the legitimate interests of the company."[338]

Re R Ltd. [1989] IR 126 concerned proceedings pursuant to s.205 of the Companies Act, 1963, Walsh J. stated:

> "All evidence in proceedings before a court must be taken in public save where otherwise expressly permitted in accordance with the terms of Article 34 of the Constitution."

The petitioner's grounding affidavit was considered by the company to contain sensitive business information and the company sought and was granted an *in camera* hearing. This was acceded to by the High Court but a different view was taken by the Supreme Court who ordered the proceedings heard in public. First it was held that one of the requirements essential to the administration of justice was that it be in public unless that requirement, by itself, operated to deny justice in the particular case and this principle was enshrined in Article 34, s.1 of the Constitution. While Walsh J. was of the view that there might be cases where a public hearing would prevent justice being done, he did not consider this one. Secondly it was held that accordingly the specific exceptions to the administration of justice in public permitted by Article 34 were limited to those cases which were "prescribed by law" and where it was shown that the publicity, by itself, would deny justice as between the parties. Thirdly it was held that while the respondents had satisfied the condition precedent prescribed by s.205, sub-s.7 of the Act, which would empower the presiding judge to exercise his discretion, viz. that "the hearing of proceedings… would involve the disclosure of information the publication of which would be seriously prejudicial to the legitimate interests of the company," they had failed to show that a public hearing would, by itself, so impede the doing of justice as between the parties, that the judge ought, in the exercise of that discretion, order that the proceedings be heard in camera. Walsh J. also stated that "so much of the judgment as does not disclose the particular information which had been withheld from publication should be pronounced in public."

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[335] See 1.6 *infra*.
[336] Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 744.
[337] *Re R Ltd.* [1989] IR 126, per Walsh J. at 137.
[338] S.205(7).

In *Irish Press Plc v. Ingersoll Publications Ltd.* [1994] IR 176, Finlay C.J. considered that s.207(7) had to be construed strictly in view of Article 34.1 of the Constitution. If the s.205(7) requirement was met the court then had to consider the "fundamental constitutional right vested in the public, namely the administration of justice in public, and it cannot therefore make an order under s.205(7) merely on the consent of all the parties concerned in the petition before it."

6.4.8 Public Interest Privilege

This involves a claim of privilege by the State from disclosing information or documents in the public interest. It has its origins in Crown or Executive interest and the rationale for non-disclosure was to protect the State. In *Leen v. President of the Executive Council* [1925] IR 456 it was determined that the privilege survived the establishment of the Irish Free State. Initially in both the UK and Ireland a class approach was taken meaning that if a claim of privilege over a class of documents was appropriately certified there would be no inquiry by the courts. This approach is no longer favoured in Ireland (or the UK). In *Murphy v Dublin Corporation* [1972] IR 215, the Supreme Court stated once documents were relevant, that it was for the courts and not a Minister to decide if documents should be disclosed in the public interest. It was for the party asserting privilege to satisfy the burden of satisfying the court that documents should not be disclosed. No document could be withheld from production simply because it belonged to a class of documents. Each document had to be decided upon by reference to that document. Courts have power to examine documents over which a claim of privilege is made but there is no requirement on the court to examine the documents. It may uphold a claim of privilege on a description of the nature and contents of a document. It is possible for the documents to be edited and for the court to order partial disclosure.[339] On occasion inspection of documents has been restricted to lawyers on an undertaking not to reveal the contents without the leave of the court.[340] This practice has been criticised as interfering in the relationship between client and lawyer.[341]

The decision in *Murphy v Dublin Corporation* was affirmed by the Supreme Court in *Ambiorix v Minister for the Environment* [1981] ILRM 21 confirming that it is a decision for a court to resolve the competing public interests. McGrath states that the consequence of these judgments, *Murphy v Dublin Corporation* and *Ambiorix v Minister for the Environment* "has been to establish a balancing test. In each case where a claim for public interest privilege is made, the court is required to balance the public interest in the proper administration of justice against the public interest put forward for non-disclosure in order to decide which is the superior public interest in the circumstances of the case."[342] In his view the requirement of examination of individual

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[339] *Gormley v. Ireland* [1993] 2 IR 75, 79. *Bula Ltd. v. Tara Mines Ltd,* High Court, Unreported, Murphy J, 25 July 1991.
[340] *Ambiorix v Minister for the Environment* [1981] ILRM 21, *Gormley v. Ireland* [1993] 2 IR 75.
[341] *Burke v Central Independent Television plc* [1994] 2 IR 61.
[342] McGrath, *Evidence*, page 592 (footnotes omitted).

documents "has in practical terms weighted in favour of disclosure."[343] No absolute privilege attaches.

The categories of public interest non-disclosure are not closed.[344] Public interests which have been recognised by the court[345] as needing to be balanced include; national security,[346] international relations,[347] proper functioning of the public service,[348] cabinet discussions[349] and prevention and detection of crime.[350]

McGrath discusses the assertion and waiver of public interest privilege stating "… insofar as a holder of the privilege can be identified it is the public as a whole. For this reason, the view has been taken that it can be invoked by any party to the litigation or, if no objection is otherwise taken, the issue can and should be raised by the Court of its own motion in an appropriate case."[351] The Irish courts have taken the view in *Hannigan v DPP* [2001] 1 IR 378 and *McDonald v RTÉ* [2001] 1 IR 355 that public interest privilege may be waived.

6.4.9 Journalistic Privilege

It seemed from the Supreme Court decision in *Re Kevin O'Kelly* (1974) 108 ILTR 97, that journalists were not immune from disclosing information obtained in confidence. However, it seems the courts will only require a journalist to reveal his sources if it is necessary to do so.[352] In *People (DPP) v. Nevin* [2003] 3 IR 321, the Court of Criminal Appeal stated that although the concept of journalistic privilege is unknown to the law it was accepted that a trial judge will exercise discretion in ruling whether a journalist has to answer questions about his or her sources. A claim to journalistic privilege may succeed in certain circumstances; *Burke v Central Independent Television plc* [1994] 2 IR 61. In that case, a defamation case, the defendants refused to disclose documents likely to lead to the identification of sources where to do so would put their sources'

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[343] *Ibid*, page 592
[344] *Skeffington v. Rooney* [1997] I IR 22, 32
[345] These headings are taken from McGrath, *Evidence*, Chapter 10 and are discussed in detail therein.
[346] *Murphy v Dublin Corporation* [1972] IR 215, *Gormley v. Ireland* [1993] 2 IR 75.
[347] *W v. Ireland (No. 1)* [1997] 2 IR 132.
[348] *Skeffington v. Rooney* [1997] I IR 22.
[349] Article 28.4.3° of the Irish Constitution, inserted by referendum in 1997 provides: The confidentiality of discussions of meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter – (i) in the interests of the administration of justice by a Court, or (ii) by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by a Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance. Discussed by Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 459 *et seq.* See also the decision in *Irish Press Publications Ltd. v. Minister for Enterprise* [2002] 4 IR 110.
[350] *Breathnach v. Ireland (No. 3)* [1993] 2 IR 458 and *People (DPP) v. Nevin* [2003] 3 IR 321.
[351] McGrath, *Evidence*, page 606 citing *AG v. Simpson* [1959] IR 105 as regards the latter aspect.
[352] *People (DPP) v. Nevin* [2003] 3 IR 321.

lives at risk. The court refused to order disclosure holding that the constitutional rights to protection of life and bodily integrity ranked higher than the plaintiff's right to a good name.

More recently and in a case decided after Irish accession to the ECHR; *In the Matter of an Application Pursuant to section 4 of the Tribunal of Inquiry (Evidence) (Amendment) Act, 1997 as amended by section 3 of the Tribunal of Inquiry (Evidence) (Amendment) Act 2004* [2009] IESC 64, the Supreme Court considered decisions of the European Court of Human Rights on freedom of expression and the press' indispensable contribution to the functioning of a democratic society and referred to decisions of that court which upheld claims of journalistic privilege[353]. The Chief Justice emphasised that resolution of these issues lies properly in the courts stating:

> "At this point I raise the question as to whether it can truly be said to accord with the interests of a democratic society based on the rule of law that journalists as a unique class, have a right to decide for themselves to withhold information from any and every public institution or court regardles of the existence of a compelling need, for example, the production of evidence of the commission of a serious crime… Who would decide whether a journalist's source had to be protected? There can only be one answer. In the event of a conflict, whether in a civil or a criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law."

While in that case, the journalist's privilege was upheld, it was emphasised that it is within the courts to make the adjudication based on a balancing of the interests involved. It is not a decision for the journalist. Fennell argues that from this decision it is clear journalistic privilege is an aspect of public privilege rather than private privilege, where it is not one attaching to a particular relationship but arises because of an adjudication of the court on the basis of balancing the interests involved.[354]

6.4.10 Sacerdotal Privilege

After the Reformation in England it was determined that communications to a priest in a confessional were not privileged.[355] In Ireland a different approach was taken. In *Cook v. Carroll* [1945] IR 515 the High Court recognised an absolute privilege over communications by a parishioner to a priest. The priest refused to testify and the issue arose as to whether he was guilty of contempt of court. The Court referred to Wigmore's four conditions for the recognition of privileges and determined that the four conditions were satisfied and that communications to a priest in confidence and in private consultation between the priest and the parishioner were privileged. Further, such privilege could only be waived by the priest. Healy explains that the Court

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[353] *Fressoz & Roire v France* (1999) 31 EHRR 28; *Goodwin v. United Kingdom* (1996) EHRR 123.
[354] Fennell, *The Law of Evidence in Ireland* (2009), page 354.
[355] *Wheeler v. Le Marchant* (1881) 17 Ch D 675.

assumed that the sacerdotal privilege vesting in the parish priest was an absolute one in the sense that it did not entitle the court to weigh competing interests.[356]

The privilege was clarified in *Johnston v. Church of Scientology*, High Court, Unreported (Geoghegan J.) April 30, 1999. The plaintiff claimed she had been brainwashed. The defendants sought to claim privilege over the disclosure of counselling notes on the basis of sacerdotal privilege. The absolute sacerdotal privilege could not be invoked by the defendants in this case. No evidence was adduced that disclosure of what transpired during the sessions led to some eternal punishment and therefore the court rejected the attempted analogy with priest penitent confessional relationship. The High Court also recognised broader counselling privilege applicable to counselling by a priest of a parishioner which it is necessary to distinguish from sacredotal privilege. The rationale for sacerdotal privilege is the strong ethical obligation imposed on religious office holders not to reveal confessional communications. The privilege vests in the priest. Waiver by the confessor will not relieve the priest of the confidentiality communication. A different rationale underlies broader counselling privilege applicable to counselling by a priest of a parishioner. The counselling privilege belongs to the person being counselled.

6.4.11 Informer Privilege

The Irish courts have long accepted that privilege can be claimed in respect of the identites of informers and documents which would tend to identify informers.[357] There are two rationales. First to protect the safety of the informer and secondly, to ensure a flow of information and assist crime detection. Initially the privilege applied only to police or prison informers.[358] The privilege has been expanded and now appears to apply to communications between informers and bodies with law enforcement functions and powers.[359] In *Goodman International v. Hamilton (No. 3)* [1993] 3 IR 320 it was accepted that elected representatives could rely on informer privilege to protect the identity of their sources. The informer privilege is subject to the innocence at stake exception.[360]

6.4.12 Privilege for Doctors

There does not appear to be an express privilege for doctors in Irish law. The issue is discussed by Fennell in the context of the Irish courts adoption of the Wigmore principles but she states that the "the Irish courts have not taken the opportunity to

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[356] Healy, *Irish Laws of Evidence*, page 397.
[357] *R v. Smith O'Brien* (1848) & St. Tr. 199.
[358] *State (Comerford) v. Governor of Mountjoy Prison* [1981] ILRM 86.
[359] *D v. NSPCC* [978] AC 171 followed in Ireland in *Director of Consumer Affairs v. Sugar Distributors Ltd.* [1991] 1 IR 225 and *Goodman International v. Hamilton (No. 3)* [1993] 3 IR 320.
[360] *Marks v. Breyfus* (1890) 25 QBD 494 and *Ward v. Special Criminal Court* [1998] 2 ILRM 493.

attach private privilege to certain confidential relationships satisfying those criteria."[361] She refers to a report in England by the Criminal Law Revision Committee[362] considered attaching a privilege analogous to the sacerdotal privilege to certain confidential relationships such as doctor/patient or psychiatrist/patient and minister of religion/parishioner but that the Committee ultimately concluded this was not desirable.[363] The Committee did not recommend that privilege be extended to medical practitioners. Inferentially where the English report is referenced in an Irish text book and the issue is not otherwise addressed it appears that no such privilege exists in Irish law. In principle, it appears that it would be open to the courts or the Legislature to extend a privilege to such relationships if appropriate.

Indeed, in *McGrory v. Electricity Supply Board* [2003] 3 I.R. 407 the Supreme Court held that a plaintiff who sued for damages for personal injuries waived the right to privacy which he would otherwise enjoy in relation to his medical condition and the law must ensure that he did not unfairly or unreasonably impede the defendant in preparing his defence by refusing to consent to a medical examination and that the right of a defendant to have a plaintiff medically examined, to have access to his medical records and to interview his treating doctors was not dependent on the pleadings having closed and it was not open to a plaintiff to withhold relevant material which would become available at a later stage in the proceedings.

Further as is discussed below in the context of Legal Professional Privilege, the rules for the superior courts expressly provide for disclosure of expert reports in High Court personal injury matters.[364] Such reports include medical reports. Discovery of pre-accident medical records may be permitted if relevant.[365]

However the unenumerated right to individual privacy protected by Article 40.3 of the Constitution may impact. In *Barry v. Medical Council* [1998] 3 IR 387 it was determined that the in the context of a disciplinary hearing into the behaviour of a medical practitioner, the right to privacy of the patients outweighed any right to a public hearing before a professional disciplinary body a doctor might have.

6.4.13 Legal Professional Privilege

In *Miley v. Flood* [2001] 2 IR 50[366], the Irish High Court, per Kelly J. stated:

> "Legal professional privilege is more than a mere rule of evidence. It is a fundamental condition on which the administration of justice as a whole rests."

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[361] Fennell, *The Law of Evidence in Ireland* (2009), page 345.
[362] Criminal Law Revision Committee, Eleventh Report: Evidence (General) Cmnd 4991 (1972).
[363] Fennell, *The Law of Evidence in Ireland* (2009), page 345.
[364] SI 391 of 1998, Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statement) adding new sub-rules to Order 39. See Law Society, Medico-Legal Recommendations, (Law Society, 2008).
[365] *McGrory v. Electricity Supply Board* [2003] 3 I.R. 407 citing *Dunn v. British Coal Corporation* [1993] ICR 591.
[366] See also *Hanahoe v. Hussey HC* [1998] 3 IR 69.

It is a substantive right and not just a rule of evidence. It is not an absolute right. Healy notes that the implications of characterising legal professional privilege as a constitutional right are that "it does not absolutely defeat disclosure, but must be weighed against any competing constitutional rights or public interest"[367] which he notes is in contrast to the old common law view that a private privilege was absolute.[368] In cases such as *Gallagher v. Stanley* [1998] 2 IR 267 the Supreme Court discussed the competing value of candour, stating:

> "Both principles, full disclosure on the one hand and legal professional privilege on the other are there to advance the cause of justice. Sometimes they may be on a collision course."

McGrath notes that "[l]egal professional privilege began its life as privilege enjoyed by the lawyer based on consideration for his oath and honour.[369] The modern rationale is to encourage persons to seek legal advice and to encourage clients to disclose all facts to their lawyers to ensure full and proper advice without the fear that the information will subsequently be used against them in court. It is premised on the basis that it is desirable in the interests of justice that a client be legally represented. It is concerned with protecting the inviolability of the lawyer/client relationship. Legal professional privilege is recognised as fundamental to the right to a fair trial under Article 6 ECHR.[370]

There exist two sub-categories of legal professional privilege (1) Legal Advice Privilege and (2) Litigation Privilege. These were identified in *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644 per Mellish L.J. who recognised from earlier lines of authority:

> "… first, the privilege which protects a man from producing confidential communications between himself and his solicitor…, secondly, the privilege which entitles him to refuse to communicate evidence which he has obtained for the purpose of litigation."

Experts give their opinion in the form of a report. In recent years a number of statutory amendments have resulted in the requirement to disclose expert reports pre-trial. A statutory instrument provides for disclosure of expert reports in High Court personal injury matters.[371] Healy considers this "a significant exception to legal professional privilege."[372] Parties are required to schedule reports by witnesses intended to be called in evidence.[373] There are similar statutory instruments in respect of disclosure of expert

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[367] Healy, *Irish Laws of Evidence*, page 383.
[368] *Ibid*, page 383 and see also Paragraph 13.02 *et seq*. Cannon and Neligan, *Evidence*, page 257.
[369] McGrath, *Evidence*, page 524 citing *Berd v. Lovelace* (1577) Cary 62 and Paragraph 3.4 of the Code of Conduct for the Bar of Ireland where "a barrister is under a duty not to communicate to any third person information entrusted to him by or on behalf of his lay client."
[370] *Niemitz v. Germany* (1992) 16 EHRR 97.
[371] SI 391 of 1998, Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statement) adding new sub-rules to Order 39.
[372] Healy, *Irish Laws of Evidence*, page 386.
[373] *Kincaid v. Aer Lingus Teoranta* [2003] 2 IR 314.

reports in commercial proceedings[374] and competition law proceedings.[375] Expert Evidence is discussed in more detail below.[376] In *Kincaid v Aer Lingus Teoranta* [2003] IESC 31, it was determined that if a party changes its mind after scheduling a report of an expert and decides not to rely on the testimony of that witness, the report regains privileged status.

6.4.14 Legal Advice Privilege

Communications between a lawyer and a client for the purpose of giving or receiving of legal advice are privileged and do not have to de disclosed. Legal advice privilege may also be asserted by a third party with a common interest in the relevant matter.[377] There is authority, *Minter v. Priest* [1930] AC 588 which suggests that this privilege belongs to the client[378]. Privilege survives the death of the client. For information or documents to be covered by legal professional privilege they must satisfy a number of requirements. McGrath summarises the conditions stating "it is necessary to show that the document or information sought to be disclosed consists of a confidential[379] communication made in the course of a professional legal relationship[380] for the purpose of giving or receiving legal advice."[381] The definition of a lawyer for the purpose of advice during the course of the professional legal relationship includes solicitors, barristers, salaried in-house legal advisors,[382] foreign lawyers[383] and the Attorney General[384]. Pursuant to Article 30 of the Irish Constitution, Bunreacht na h-Éireann, the Attorney General is the legal advisor to the Government. Legal advice privilege extends to legal advice unconnected with litigation. Per Brougham L.C. in *Greenough v. Gaskell* (1883) I My. & K. 98, 102:

> "the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities, with no reference to any particular litigation, and without any reference to litigation generally, than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry."

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[374] Rules of the Superior Courts (Commercial Proceedings), 2004 (SI No. 2 of 2004).
[375] Rules of the Superior Courts (Competition Proceedings), 2005 (SI 130 of 2005).
[376] See 7.7 Expert Evidence.
[377] *Bula Ltd. v. Crowley* [1990] ILRM 756.
[378] See also the case of *Schneider v. Leigh* [1955] 2 QB 195.
[379] This requirement was discussed in *Bord na gCon* [1970] IR 301.
[380] Letters of complaint to the Law Society from clients of a particular solicitor were held not to be privileged as the defendant were not consulted as legal advisers by the complainants; *Buckley v. Incorporated Law Society* [1994] 2 IR 44.
[381] McGrath, *Evidence*, page 528. For a discussion of the conditions see McGrath, *Evidence*, pages 528-536; Healy, *Irish Laws of Evidence*, Paragraph 13.20 *et seq.*; Fennell, *The Law of Evidence in Ireland* (2009), Paragraph 8.08 et seq.; Cannon and Neligan, *Evidence*, pages 257-261.
[382] *Geraghty v. Minister for Local Government* [1975] IR 300.
[383] *Lawrence v. Campbell* (1859) 4 Drew 485.
[384] *Duncan v. Governor of Portlaoise Prison (No. 2)* [1998] IR 433.

However, not all communications between a lawyer and client are privileged. The seminal decision in *Smurfit Paribas Bank v. AAB Export Finance* [1990] 1 IR 469 distinguishes between *legal advice* and *legal assistance*. Communications seeking legal advice are privileged while communications seeking legal assistance are not privileged. The defendant had a floating charge and communicated with its solicitor concerning the charge. The defendant sought to claim privilege over correspondence dealing with the drafting of documents in respect of the charge. The High Court found that the documents in question did not request or contain any legal advice and considered that the documents were not privileged. This finding was confirmed on appeal by the Supreme Court. Finlay CJ referred to the fact the non-disclosure of lawyer client communications constitutes a potential restriction on full disclosure which was in the interest of justice and then stated:

> "Such privilege should, therefore, in my view only be granted in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts."[385]

Legal assistance was not protected from disclosure because it was not "closely and proximately linked to the conduct of litigation and the function of administering justice in the courts."[386] Per McCarthy J.:

> "[a] communication of fact leading to the drafting of legal documents and requests for the preparation of such of such, albeit made to a solicitor, unless and until the same results in the provision of legal advice, is not privileged from disclosure."

This decision was followed in *Miley v. Flood* [2001] 2 IR 50, where Kelly J. refused to accept that privilege could be claimed in respect of the identity of a client as he regarded this a a mere collateral fact unconnected with giving or receiving legal advice.

6.4.15 Litigation Privilege

The second aspect of legal professional privilege, litigation privilege protects from disclosure communications between clients and third parties and between lawyers and third parties which are made for the purpose of pending or contemplated litigation. McGrath states that the privilege extends to what may be described, in a phrase adopted in the US as a lawyer's "work product"[387] and by which he means documents and materials generated or compiled in preparation of litigation even though there is really no element of communication. The rationale for litigation privilege is to enable parties to prepare for trial without having to disclose preparations prior to the trial. This privilege is conditional on litigation being contemplated or pending in the sense of "apprehended or threatened"[388] and that the dominant purpose of the communication/creation of a document is pending or contemplated litigation.[389] The

[385] Page 594.
[386] Page 594.
[387] McGrath, *Evidence*, page 536 citing *Hickman v. Taylor* (1946) 329 US 495.
[388] *Silver Hill Duckling Ltd. v. Minister for Agriculture*[1987] IR 289.
[389] *Silver Hill Duckling Ltd. v. Minister for Agriculture*[1987] IR 289.

dominant purpose test has been endorsed by the Supreme Court.[390] Generally privilege will not attach to documents which came into existence before litigation was contemplated.[391] Communications with the other side in litigation do not attract this privilege.[392] There has been some confusion in the Irish case-law as to whether the Director of Public Prosecutions (DPP) benefits from legal advice privilege.[393] In one case the High Court took the view that communications between the DPP and his professional officers and solicitors and counsel were covered by the public interest privilege[394] but the Court of Criminal Appeal in another case upheld a claim of legal professional privilege in respect of a report furnished to the DPP for the purpose of seeking legal advice from a barrister.[395]

6.4.16 Exceptions to Legal Professional Privilege

It was noted earlier that protection of information from disclosure as a result of the operation of the legal professional privilege is not an absolute right. It is generally recognised that there are four situations where courts have been prepared to reject a claim of legal professional privilege. McGrath states the four categories: "(i) communications in furtherance of conduct which is criminal, fraudulent, or injurious in the interests of justice; (ii) proceedings involving the welfare of children; (iii) testamentary dispositions and (iv) where the innocence of an accused is at stake."[396]

6.4.17 "Without Prejudice" Communications

Communications which aim at settling a legal dispute and which are intended to be immune from disclosure if the negotiations fail are immune from disclosure.[397] The rationale is to encourage settlement and to reduce matters which have to be litigated. Merely because communications carry a "without prejudice" heading is not determinative of whether the correspondence is covered by the privilege.[398] Nor can the privilege be used as a cloak for illegality or impropriety.[399] The privilege is a joint privilege of the parties to the negotiations attempting to settle the case.[400] Communications in respect of failed negotiations may only be disclosed to court with the consent of each of the parties.[401]

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[390] *Gallagher v. Stanley* [1998] 2 IR 267.
[391] *Tromso Sparebank v. Beirne* [1989] ILRM 257.
[392] *McKay v. McKay* [1988] NI 611.
[393] *Breathnach v. Ireland (No. 3)* [1993] 2 IR 458.
[394] *Corbett v. DPP* [1999] 2 IR 179.
[395] *People (DPP) v. Nevin*, Unreported Court of Criminal Appeal, 13 December 2001.
[396] McGrath, *Evidence*, pages 528-536; Healy, *Irish Laws of Evidence*, Paragraph 13.20 *et seq.*; Fennell, *The Law of Evidence in Ireland* (2009), Paragraph 8.08 et seq.; Cannon and Neligan, *Evidence*, pages 257-261. McGrath, *Evidence*, pages 550 and for discussion of the categories see pages 550-561; Cannon and Neligan, *Evidence*, pages 265 *et seq*.
[397] See *O'Flanagan v. Ray-Ger Ltd.*, Unreported, High Court, Costello J. 28 April 1983.
[398] *Ryan v. Connolly* [2001] 2 ILRM 174.
[399] *Greenwood v. Fitts* (1961) 29 DLR 260.
[400] *Cutts v. Head* [1984] Ch. 290.
[401] *Marron v. Louth County Council* (1938) 72 ILTR 101.

6.4.18 Testifying on Oath or Affirmation

The general rule in civil trials is that evidence must be given on oath or affirmation. In *Mapp v. Gilhooley* [1991] 1 IR 253, 262, per Finlay CJ:

> "It is a fundamental principle of the common law that for the purpose of trials in either criminal or civil cases *viva voce* evidence must be given on oath or affirmation."

It is not necessary to have a religious belief to take the oath.[402] There exist statutory exceptions where unsworn evidence is permissible. Section 27(1) of the Criminal Evidence Act allows unsworn evidence from a child under 14 years in criminal proceedings where the court is satisfied that the he is capable of giving an intelligible account. A similar statutory provision exists in respect of civil trials; Section 28 of the Children Act, 1997. That section also applies to a person with a mental disability.

The consequence of relying upon unsworn *viva voce* evidence is a mistrial.[403]

6.4.19 Obtaining Evidence from Witnesses[404]

As noted above under the adversarial system operation in Ireland, in civil proceedings it is the responsibility of the party to call witnesses to prove his case. Byrne and McCutcheon state "[a] feature of many court proceedings in common law systems is that the testimony is given orally rather than in writing. The adversarial system has long regarded oral testimony as highly probative… The reason for this lies in the fact that oral testimony is tested in court- the judge (and where relevant the jury) will have an opportunity to see the reaction of witnesses and to test the veracity of the evidence given on that basis."[405]

Parties are free to call any witnesses and to tender witnesses in the order of their choice. Generally in civil cases a judge has no right to call a witness without the consent of the parties.[406] There are exceptions where judges may call witnesses in childcare proceedings which are quasi-inquisitorial[407] and cases of civil contempt.[408] Healy refers to the common law power of a judge in civil cases to call a witness only with the consent of the parties and then states "[t]he trial judge enjoys a more frequent (but sparingly) exercised discretion to direct a question to a witness, a facility exercised

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[402] *R. V. Hayes* [1997] 1 WLR 234.
[403] *Mapp v. Gilhooley* [1991] 1 IR 253.
[404] Discussed in McGrath, *Evidence*, page 72 *et seq.*; Fennell, *The Law of Evidence in Ireland* (2009), pages 192-195; Cannon and Neligan, *Evidence*, Chapter 7; Reid (Ed) *Civil Litigation* (2012), page 213 *et seq.* and page 223 *et seq.;* David Ross QC, Advocacy (Cambride University Press, 2005), Chapters 3 to 9; Byrne and McCutcheon, *The Irish Legal System* (2009), pages 281-282.
[405] Byrne and McCutcheon, *The Irish Legal System* (2009), page 281.
[406] *Shea v. Wilson & Co.* (1916) 50 ILTR 73.
[407] *Eastern Health Board v. Mooney*, High Court (Unreported) (Carney J.) 20 March 1983.
[408] *Yianni v. Yianni* [1966] 1 All ER 231.

more notably in family law proceedings affecting the welfare of children which the courts rightly regard to be less adversarial and more inquisitorial."[409]

The questioning of witnesses takes the following format. At common law, the plaintiff has the right to begin, subject to the judge's discretion to the contrary, unless the defendant bears the evidential burden in respect of every issue.[410] The party proposing the case opens the case to the court and then calls all of his witnesses. Each witness is examined in chief by counsel on behalf of the party who has called the witness. In examination-in-chief, leading questions are prohibited. The witness is then cross-examined by counsel for the opposing party, who is free to ask leading questions. The witness is then re-examined by the lawyer of the party calling the witness. Once all of the witnesses for the proposing side have given evidence, then the witnesses for the opposing side are called. While the parties are free to choose the sequence of witnesses it is often logical to call the witnesses as to fact prior to the expert witnesses.

Generally the law of evidence can be summed up in the principle that all relevant evidence is admissible. Thus there is a requirement in questioning witnesses that questions should be directed towards obtaining answers which are relevant and admissible.

The purpose of examination in chief is to elicit evidence in support of the version of the facts in issue advanced by that party. Counsel engaged in examination in chief may not ask leading questions. A common form of leading questions is a question which suggests the answer. The rationale behind the rule is to ensure a witness gives evidence in his own words. As a matter of practicality, leading questions are permitted in respect of issues which are not in dispute. Generally, counsel may not cross examine witnesses called on behalf of the party he represents. In certain limited circumstances, it is open to the party who called a witness to have the witness declared hostile and counsel for that party is then entitled to cross-examine and ask leading questions of the hostile witness.[411] The decision whether to treat a party as hostile is a decision for the trial judge on application by the party calling the witness. There is also a rule against narrative which prevents a witness in examination in chief being asked about former statements consistent with his evidence. There also exist exceptions to this rule.

McGrath describes the purpose of cross-examination: "[c]ross-examination of a witness is carried out by the other parties in the proceedings and has two main objectives: (i) to elicit evidence from the witness in relation to the facts in issue which is favourable to the cross-examining party; and (ii) to cast doubt upon the veracity, accuracy or reliability of the evidence given by the witness."[412] The right to cross-examine has a constitutional basis in both civil and criminal cases.[413] The principle difference between

[409] Healy, *Irish Laws of Evidence*, page 29.
[410] *Mercer v. Whall* (1845) QB 447.
[411] *O'Flynn v. Smithwick* [1993] 3 IR 589.
[412] McGrath, *Evidence*, pages 72 *et seq.*; Fennell, *The Law of Evidence in Ireland* (2009), page 81; Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), pages 485-488.
[413] In criminal cases its basis is Article 38.1 and in civil cases its basis is Article 40.3.

cross-examination and examination-in-chief is that on cross-examination it is permissible to ask leading questions. The trial judge exercises a supervisory role over cross-examination with for example Order 36, r.37 RSC providing: "The Judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter." A Judge may curtail a cross-examination of excessive duration.[414] A judge has discretion to ask questions during cross-examination but if the interventions are unfairly disruptive or give the impression of impartiality, this may result in a verdict being set aside.[415] On cross-examination it is possible to put a prior inconsistent statement to the witness. There exists a rule as to the finality of answers to collateral questions on cross-examination. Another important aspect of cross-examination is the requirement to put evidence to a witness where it is intended to call evidence to contradict the evidence given by the witness on cross-examination to allow the witness an opportunity to deal with the evidence. In general if matters are not put to a witness, the party which failed to out this evidence will be prevented from adducing it at a later stage. This however is subject to the discretion of the trial judge and may be remedied by recalling the witness so that the evidence can be put to him. McGrath notes that "[i]n general, any witness who gives evidence, even of a very limited nature, is liable to cross-examination."[416]

Counsel may re-examine his own witness after re-examination. In re-examination, questions should be confined to matters which have arisen on cross-examination. New matters may be raised only with the permission of the trial judge and would usually mean that the opposing party or parties will be afforded an opportunity to cross-examine on these new issues.

Healy refers to the common law power of a judge in civil cases to call a witness only with the consent of the parties and then states "[t]he trial judge enjoys a more frequent (but sparingly) exercised discretion to direct a question to a witness, a facility exercised more notably in family law proceedings affecting the welfare of children which the courts rightly regard to be less adversarial and more inquisitorial."[417]

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 and Competition Lists 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.[418] 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.

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[414] *O'Broin v. Ruane* [1989] IR 214.
[415] *Browne v. Tribune Newspapers plc* [2001] 1 IR 521.
[416] McGrath, *Evidence*, page 82.
[417] Healy, *Irish Laws of Evidence*, page 29.
[418] Order 63A, rule 22 RSC inserted by SI 2 of 2004 and Order 63B, rule 27 RSC inserted by SI 130 of 2005.

The provision regarding the commercial court is Order 63A, rule 22[419] and it provides:

> 22. (1) Unless a Judge shall otherwise order, a party intending to rely upon the oral evidence of a witness as to fact or of an expert at trial shall, not later than one month prior to the date of such trial in the case of the plaintiff, applicant or other party prosecuting the proceedings and not later than seven days prior to that date in the case of the defendant, respondent or other party defending the proceedings, serve upon the other party or parties a written statement outlining the essential elements of that evidence signed and dated by the witness or expert, as the case may be.
>
> (2) A Judge may, in exceptional circumstances to be recited in the order and after hearing all of the parties, make an order directing that the written statement referred to in sub rule 1 of this rule or any part thereof shall be treated as the evidence in chief of the witness or expert concerned but only after it has been verified on oath by such witness or expert.

There is a similar provision in Order 63B, r.27[420] in respect of competition law proceedings.[421] This evidences that recently, there has been some movement from absolute reliance on oral evidence.

There has also been a recent trend for legislation to provide for evidence in certain circumstances to be taken via live television link.[422] In criminal proceedings, the Criminal Evidence Act of 1992 Part III permits television link evidence in respect of specified violent and sexual offences. Section 13 provides that a person other than the accused may give evidence whether from within or outside the state through a live television link (a) if the person is under 17 years of age unless the Court sees a good reason to the contrary and (b) in any other case with the leave of the court. Section 14 provides that where a person under 17 is to give evidence via live television link, the court may, on the application of the prosecution or accused, if satisfied having regard to the age or the mental condition of the witness, the interests of justice require that questions be put through an intermediary, direct that any such questions be so put. Section 18 permits that where the witness, giving evidence via live television link, knew the accused prior to the date of the offence, that the witness shall not be required to identify the accused at trial unless the interests of justice so require. The constitutionality of the provision for evidence to be given via television link was unsuccessfully challenged.[423] Hogan and Whyte state "[t]he right to cross-examine does not necessarily embrace the right to confront the witnesses in person." In *Donnelly v.*

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[419] SI 2 of 2004, Rules of the Superior Courts (Commercial Proceedings).
[420] SI 130, 2005, Rules of the Superior Courts (Competition Proceedings).
[421] See Part 1 *infra.*
[422] Part III of the Criminal Evidence Act, 1992 in respect of specified violent and sexual offences. The Children Act 1997 provides that in civil proceedings concerning the welfare of a child or a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live indpendently, the child may with the leave of the Court give evidence via live television link. Order 63A, r.21(3) RSC, provides that a Judge may in commercial proceedings allow a witness to give evidence via a live television link.
[423] *White v. Ireland* [1995] 2 IR 268. *Donnelly v. Ireland* [1998] 1 IR 321.

Ireland [1998] 1 IR 321, in considering whether s.13 was unfair to the accused, Hamilton CJ stated:

> "The Court is satisfied, however, that the assessment of such credibility does not require that the witness should be required to give evidence in the physical presence of the accused person and that the requirements of fair procedures are adequately fulfilled by requiring that the witness give evidence on oath and be subjected to cross-examination and that the judge and jury have ample opportunity to observe the demeanour of the witness while giving evidence and being subjected to cross-examination."

Section 39 of the Criminal Justice Act 1999, provides that in any proceedings in indictment, a person, other than the accused, may give evidence via live television link where the court is satisfied that the person is likely to be in fear or subject to intimidation in giving evidence. Such evidence must be video-recorded.

There is also provision for live television link evidence in the context of extradition proceedings.[424]

The Children Act 1997 provides that in civil proceedings concerning the welfare of a child or a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live independently, the child may with the leave of the Court give evidence via live television link. This evidence may be given from within or from outside the State. S.22 provides that on the application of the parties or the court of its own motion may request that any questions be put through an intermediary.

Order 63A, r.23 RSC, provides that a Judge may in commercial proceedings allow a witness, whether from within or outside the State, to give evidence via a live video link or by other means. This appears to confer a broad discretion. Order 63A, r.23 RSC provides:

> "(1) A Judge may allow a witness to give evidence, whether from within or outside the State, through a live video link or by other means.
> (2) Evidence given in accordance with sub rule 1 of this rule shall be recorded by video or otherwise as the Judge may direct."

There exists a similar provision in respect of competition law proceedings in Order 63B, r.28 RSC.[425] There is a High Court Practice Direction regarding the use of video-conferencing link for taking evidence in civil cases[426] which is discussed further below.[427]

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[424] S.29(1) of the Criminal Evidence Act, 1992 as substituted by s.24 of the Extradition (European Union Conventions) Act, 2001.
[425] SI 130 of 2005, Rules of the Superior Courts (Competition Proceedings).
[426] HC45, dated 3 May 2007.
[427] See 7.5 *infra*.

Video-conferencing is used to allow witnesses from abroad to give evidence in Irish cases and in 2012 there were 14 cases where it was used.[428]

6.4.20 Witness Testimony

Generally evidence is required to be oral.[429] However, as noted earlier[430], the Rules of the Superior Courts provide that specified proceedings, for example, those commenced by summary summons or special summons may be heard an affidavit evidence. Evidence given on affidavit is a witness's sworn evidence in written form. There are specific rules governing the form and content of affidavits. Affidavits are documents in solemn form sworn by a witness before a Commissioner for Oaths. Untrue evidence in an affidavit is subject to the crime of perjury. If evidence is given on affidavit it is open to the opposing party to to require (or at least to apply to court to have) the deponent to appear in court for the purposes of cross-examination.[431] Also there are rules which exceptionally allow for the taking of evidence on commission and limited circumstances where video-link evidence is permitted.

6.4.21 Limits as to Facts in Testimony

In addition to the general rules about relevance and admissibility of evidence there are a number of exclusionary rules. There is a rule against hearsay evidence.[432] Hearsay evidence, that is evidence of a statement other than one made by a person giving oral evidence in the proceedings is inadmissible as evidence of any fact stated and is generally excluded. To qualify as hearsay it must involve an assertion other than one made by a person while giving evidence in the proceedings and be tendered to the court as proof of what it asserts. An example is *Teper v. R.* [1952] AC 480. Teper was charged with arson of his wife's shop and his defence was one of alibi. A policewoman gave evidence that an unidentified by stander had shouted to Teper "Your place is burning and you are going away from the fire". This evidence was inadmissible to establish Teper's presence at the crime scene at the relevant time. The rationale for exclusion is that it is not best evidence, it is not delivered on oath (by the bystander) and it cannot be tested by cross-examination or by reference to the demeanour (of the bystander). A number of exceptions to the exclusionary rule have been developed at common law or by legislation. These include; the *res gestae* exception, admissions, declarations against interest, public documents, declarations in the course of duty, business records, in proceedings concerning the welfare of children, dying declarations, testimony in previous proceedings, prior statements of witnesses and evidence of pre-

[428] Courts Service, Annual Report 2012, page 8. See the specific provisions in Orders 63A and 63 B, discussed above in respect of commercial and competition law proceedings.
[429] This issue is discussed in more detail in 1.4 *infra.*
[430] See Part 1 *infra.*
[431] See Part 1 *infra.*
[432] Discussed in McGrath, *Evidence*, Chapter 5; Healy, *Irish Laws of Evidence*, Chapter 9; Fennell, *The Law of Evidence in Ireland* (2009) Chapter 9; Cannon and Neligan, *Evidence*, Chapter 11.

trial identification. Statutory exceptions include business records in criminal trials.[433] Another exclusionary rule is that opinion evidence is generally inadmissible.[434] Again there are many exceptions to this rule the most notable being that expert witnesses are permitted to give opinion evidence. Additionally witnesses as to fact may give opinion evidence where for example, it is indivisible from the factual evidence.

6.4.22 Penalty for Perjury

Giving false testimony under oath constitutes the crime of perjury. Byrne and McCutcheon note that "prosecutions and convictions for perjury are relatively rare they still constitute as much as a deterrent as any other criminal sanction." "Perjury is an offence at common law and is triable summarily or on indictment. The maximum penalty is seven years. Subornation of perjury, the procuring of another to commit perjury, is also a crime at common law. There [is]… no legislation dealing with the offence of perjury itself."[435]

6.4.23 Evaluating Evidence Gathered Through Parties' Testimony

The arbiter of fact determines the weight to be attributed to witness testimony. As Healy notes, "[w]hen determining the facts proven by a witness' testimony the court is influenced by the credibility and demeanour of the witness, by how persuasive or truthful he appeared."[436]

6.5 Cross Examination

As discussed above the right to cross-examine is constitutionally protected in both criminal and civil cases, respectively by Article 38 and by Article 40.3. In *In re Haughey* [1971] IR 217, Ó Dálaigh CJ stated that Article 40.3 of the Constitution "is a guarantee to the citizen of the basic fairness of procedures" which included that a defendant "be allowed to cross-examine by counsel, his accuser or accusers." In *Borges v. The Medical Council* [2004] ILRM 81, the Court stated: "the right of a person to have the evidence against him given orally and tested by cross-examination before the tribunal in question may be of such importance in a particular case that to deprive the person concerned of that right would amount to a breach of the basic fairness of procedure to which he is entitled by virtue of Article 40.3 of the Constitution." In *Kiely v. Minister for Social Welfare (No. 2)* [1977] IR 267, Henchy J. stated it would be a breach of natural and constitutional justice "if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral-examination and cross-examination."

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[433] Criminal Evidence Act, 1992.
[434] Discussed in McGrath, *Evidence*,, Chapter 6; Healy, *Irish Laws of Evidence*, Chapter 12; Fennell, *The Law of Evidence in Ireland* (2009), Chapter 7; Cannon and Neligan, *Evidence*, Chapter 8.
[435] McIntyre, McMullan and Ó Toghda, *Criminal Law*, Chapter 8.
[436] Healy, *Irish Laws of Evidence*, page 9.

7 Taking of Evidence

7.1 Sequence in Which Evidence is Taken

In civil cases the parties have discretion regarding which evidence will be adduced and the sequence of the evidence. Often the sequence of evidence follows a logical progression from plaintiff to witnesses of fact to expert witnesses.[437]

7.2 Ensuring the Presence of Witnesses Including Expert Witnesses

Ordinarily in civil trials it is for the parties to ensure the presence of any witnesses on whom the party intends to rely. This is discussed more fully in part 6: Witnesses. Parties are free to adduce expert evidence subject to a number of rules which are discussed below under the heading Expert Witnesses. The courts retain a discretion to exclude expert evidence. There are a number of statutory provisions which allow courts to appoint experts.

7.3 Deadline for Taking the Evidence

When pleadings are closed, a notice of trial is served and the action is set down for hearing. In some court lists there is a requirement that a case be certified as ready before it will be listed for hearing.[438] Such a certificate certifies that a case is ready for hearing and that all procedural matters have been complied with. Once a case has been set down for hearing it will then either be assigned a hearing date or its place in a list to fix dates. When calling on a case for hearing, it is usual to tell the court the expected duration of the proceedings. It is expected that the proceedings would finish within the estimated time and that during this time the parties will each have an opportunity to adduce the evidence that party considers relevant. On occasion cases take longer than anticipated and proceedings may be adjourned to facilitate this.

Ordinarily the parties have autonomy, subject to the rules of evidence, in respect of the evidence adduced.[439] As noted by McGrath *"the general principle applied in civil cases is that he who asserts must prove".*[440] In principle the parties would be expected to adduce all of their evidence in the course of the hearing. Usually, it is the length of a hearing which is estimated rather than the time for taking a particular piece of evidence.

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[437] See 6.4.19 and 7.5 *infra.*

[438] See for example the Practice Direction in the High Court, HC14 which requires certificates of readiness together with an estimated duration of the trial to be signed by counsel or solicitor in the Chancery and Non-Jury lists.

[439] See 1.2. *infra.*

[440] Generally this means that the party bringing a case will need to prove the facts necessary to establish the cause of action.

It has been discussed above at *4.7 Elaboration of Claims*, that in the High Court, case management is expressly provided for in Family Law[441] the Commercial List[442], the Competition List[443] and in respect of applications pursuant to the Personal Insolvency Act 2012.[444] Case management includes a pre-trial conference. For example, Order 63A RSC, Rule 20 in respect of Commercial proceedings provides that when the Judge hearing the pre-trial conference is satisfied that the proceedings are ready to proceed to trial, he shall fix a trial date. Order 63A, Rule 5, again in the context of Commercial proceedings provides:

> A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.

Again, it can be seen that it is a time limit for the conduct of proceedings which is provided for in the rules rather than in respect of a particular piece of evidence. The case-management rules are designed to clarify the matters in issue between the parties with the further aim of reducing the length of the hearing.

A party has a responsibility to adduce the relevant evidence during the hearing. As discussed at 1.4, under the adversarial model operating in Ireland, the primary means by which a party proves his case is by oral evidence. As is discussed in more detail in Part 6, generally in civil trials it is for parties to ensure the presence of any witnesses on whom the party intends to rely. This can be done by the issuing of witness submissions known as a *subpoena*. The types of *subpoenas* are discussed under heading 6.2.

Pre-trial, in the event for example of anticipated witness or other evidential difficulties it is generally possible to apply to court to vacate a hearing date. Depending on the proximity of the hearing date and/or the reason for why a party seeks to vacate a date and/or whether any opposing party consents to the proposed adjournment, the court may grant or refuse such an application. If during a trial, a witness has only limited availability, that witness might be taken out of turn.

Generally the court has discretion to adjourn proceedings and to conclude a hearing at a later date. Exceptionally also evidence may be taken on commission.[445]

The consequences of a plaintiff or defendant failing to appear at trial where discussed above at 1.3.6 Sanctions for passivity or absence. As noted in that context, Order 36,

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[441] High Court Practice Direction (HC 51) Family Law Proceedings, 16th July 2009. Available on www.courts.ie. (accessed 14 August 2014).
[442] Order 63A RSC, inserted by SI 2 of 2004, Rules of the Superior Courts (Commercial Proceedings).
[443] Order 63B of the Rules of the Superior Courts 1986 (inserted by the Rules of the Superior Courts (Competition Proceedings) 2004.
[444] Order 76A RSC, inserted by SI 316 of 2013.
[445] Order 39, r.4 RSC discussed at 7.5 *infra.*

rule 34 provides that a Judge may if he thinks it expedient in the interest of justice postpone or adjourn a trial for such time and upon such terms as he may see fit.

In civil cases, the usual sequence is that the plaintiff adduces all of his evidence first and that the defendant then adduces his evidence.[446] The normal point beyond which a plaintiff will not adduce further evidence is at the close of the plaintiff's case.

Exceptionally evidence may be adduced at a late stage.[447] Ultimately if a case proceeds at a time when a party is unable to adduce relevant evidence this will impact on his ability to discharge the burden of proof on him.

7.4 Rejection of an Application to Obtain Evidence

It was discussed in Part 1.7 that parties may avail of pre-trial discovery in the sense that may require the other party to provide documents to them. Applications for discovery are analysed by the Court on the basis of relevance, necessity and proportionality and the Court may refuse to order discovery it considers irrelevant or unnecessary or disproportionate. A court might also refuse a discovery application on the basis that the request is made too close to a trial date.

Parties may also seek inspection of real or personal property.[448] Ordinarily such an application is made prior to a case being set down for trial and it is possible that a court might refuse an application which is made too close to a trial date.

As discussed earlier, ordinarily the parties have autonomy, subject to the rules of evidence, in respect of the evidence adduced.[449] The court decides on the admissibility of evidence and the weight to be attached to evidence.[450] Therefore a court will reject the adducing of evidence which is inadmissible. The primary test that evidence has to satisfy in order to be admitted in one of relevance.[451] Further evidence must not fall foul of the exclusionary rules.[452] Evidence which is irrelevant or falls foul of the exclusionary rules will not be permitted. The means of proof were also discussed earlier.[453]

As discussed earlier, generally, in civil actions a party is not required to disclose the evidence he intends to rely on at trial, pre-trial.[454] A number of recent developments

[446] Discussed at 6.4.19 and at 7.5 *infra.*
[447] Discussed in more detail at 4.10 *infra.*
[448] Order 63 rule 1(6) RSC.
[449] See 1.2, 4.8. and 7.3 *infra.*
[450] See 1.2 *infra.*
[451] See 1.8.1 *infra.*
[452] See 1.8.1 *infra.*
[453] See 3.4 *infra.*
[454] See 4.4 *infra.*

provide exceptions to this generalisation.[455] A party is generally free to call evidence up to the conclusion of his case at hearing.[456]

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 and Competition Lists 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.[457]

7.5 The Hearing

As previously discussed, under the adversarial model operating in Ireland, the primary means by which a party proves his case is by oral evidence in open court at the trial before the trier of fact, the judge or jury.[458]

Ordinarily, it is the lawyers for the parties who question witnesses.[459] The trial judge exercises a supervisory role over cross-examination with for example Order 36, r.37 RSC providing: "The Judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter." A Judge may curtail a cross-examination of excessive duration.[460]

Healy refers to the common law power of a judge in civil cases to call a witness only with the consent of the parties and then states "[t]he trial judge enjoys a more frequent (but sparingly) exercised discretion to direct a question to a witness, a facility exercised more notably in family law proceedings affecting the welfare of children which the courts rightly regard to be less adversarial and more inquisitorial."[461]

Exceptionally evidence may be taken on commission.[462] Order 39, r.4 RSC provides:

> "The Court may, in any cause or matter where it shall appear necessary, make any order for the examination upon oath before the Court, or any officer of the Court, or any other person, and at any place, of any witness, and may allow the deposition of

[455] These exceptions are set out at 4.4 *infra.* Discussed in more detail at 6.4.19 and at 1.5 *infra* where the text of the relevant rules in Order 63A, rule 22 in respect of Commercial Law proceedings is set out. Order 63B, r.27 in respect of competition proceedings is in similar terms.
[456] See 7.3 *infra.*
[457] Order 63A, rule 22 RSC inserted by SI 2 of 2004 and Order 63B, rule 27 RSC inserted by SI 130 of 2005. Discussed in more detail at 6.4.19 and at 1.5 where the text of the relevant rules in Order 63A, rule 22 in respect of Commercial Law proceedings is set out. Order 63B, r.27 in respect of competition proceedings is in similar terms.
[458] See Part 1 *infra.*
[459] This is discussed in more detail in Part 6 *infra.*
[460] *O'Broin v. Ruane* [1989] IR 214.
[461] Healy, *Irish Laws of Evidence*, page 29.
[462] For discussion see Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), pages 489-494.

such witness to be adduced in evidence on such terms (if any) as the Court may direct."

Application to have evidence taken on commission is by way of notice of motion grounded on affidavit. The onus of satisfying the court of the necessity of making an order to take evidence on commission rests on the party making the application. While a broad discretion is afforded the court, the taking of evidence on commission most frequently occurs where a witness is resident abroad and unwilling to attend or unable to attend court as a result of illness.[463] Usually it is a barrister who acts as a commissioner. The examination takes place in the presence of the parties and their legal advisers[464] but not members of the public.[465] The examination of the witness is supervised by the Commissioner who has an obligation to accurately record the evidence given by the witness. After the Commissioner administers the oath, the witness is examined, cross-examined, re-examined as if he were in court.[466] The commissioner does not have the power to decide upon the relevance of questions or the admissibility of any objection by the witness and the Commissioner notes the objections.[467] Nor does the Commissioner have the power to compel the witness to answer questions. When examination is complete the commissioner reads over the statement and it is signed by the witness.

Evidence taken on commission does not constitute evidence in proceedings until such time as it is admitted into evidence by the court.[468]

It appears the evidence on commission may be taken subsequent to the trial.[469]

Exceptionally it is possible for new evidence to be adduced after judgment has been delivered but before final orders are drawn up. This issue is discussed in more detail in Part 4 above.

There is a general rule that once a final order is made that a court has no jurisdiction in respect of those matters is spent.[470] There are a number of exceptions[471] whereby for example clerical errors can be corrected[472], whereby an order can be amended or varied where a judgment does not correctly reflect what was decided by the court[473], the setting aside of a final order in order to protect constitutional rights, where a party through no

[463] For discussion see *ibid*, page 489.
[464] Order 39, r.10 RSC.
[465] *Irish Times Ltd. v. Flood*, Unreported, High Court (Morris J.) 28 September 2009.
[466] Order 39, r.10 RSC.
[467] Order 39, r.11 RSC.
[468] *Irish Times Ltd. v. Flood*, Unreported, High Court (Morris J.) 28 September 2009. Order 39 rules 4 and 17 RCS.
[469] Order 39; rule 20 RSC.
[470] *Tassan Din v. Banco Ambrosian SPA* [1991] 1 IR 569.
[471] Discussed in Delaney and McGrath, *Civil Procedure in the Superior Courts* (2012), Chapter 24, Paragraph F.
[472] Order 28, r11 RSC.
[473] *Limerick VEC v. Carr* [2001] 3 IR 493.

fault of his own has been subject to a breach of constitutional rights[474] where a judgment was obtained on the basis of bias[475] and where a judgment was obtained by fraud.[476]

As discussed in Part 6, at common law, the plaintiff has the right to begin, subject to the judge's discretion to the contrary, unless the defendant bears the evidential burden in respect of every issue.[477] Ordinarily therefore the plaintiff opens his case, calls his witnesses and in the event that the defendant does not go into evidence, he may sum up and the defendant then replies. If the defendant goes into evidence, the plaintiff's summing up take place at a later stage. The defendant opens his case, calls his witnesses and sums up and the plaintiff then replies with his summing up. There are specific rules in the event of trial by jury which permit in the event that a the party going second does not go into evidence that the party who begins is entitled to address the jury a second time for the purposes of summing up.[478]

Order 36, rule 28 RSC provides that if, when the trial is called on the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim in so far as the burden of proof rests on him. If the defendant appears but not the plaintiff, the defendant is entitled to judgment dismissing the action save that in the event that he has a counterclaim then he proves the counterclaim so far as the burden of proof is on him.[479] There are special provisions for actions involving recovery of land.[480] Order 36, rule 33 provides that any verdict or judgment obtained where a party does not appear at trial may be set aside by the court on such terms as may seem fit, upon application made within six days of the trial.[481] Order 36, rule 34 provides that a Judge may if he thinks it expedient in the interest of justice postpone or adjourn a trial for such time and upon such terms as he may see fit. This does not however answer the question of whether the parties themselves may be present in court as opposed to for example their legal advisors. Often, a litigant will need to give his own evidence in support of his case and a failure to do so would result in a failure to discharge the burden of proof on him.

As noted in Part 1, Article 34.1 of the Irish Constitution, Bunreacht na h-Éireann, provides that justice shall be administered in public "save in such special and limited cases prescribed by law." Therefore the parties are free to attend. There are exceptions where the public are excluded but even in such *in camera* proceedings the parties are entitled to be present in court. The Irish courts have recognised the right to litigate and the right of access to court as unenumerated constitutional rights in Article 40.3 of the Constitution.[482]

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[474] *Re Greendale Developments Ltd. (No. 3)* [2000] 2 IR 514.
[475] *Kenny v. Trinity College, Dublin* [2008] 2 IR 40.
[476] *Tassan Din v. Banco Ambrosian SPA* [1991] 1 IR 569.
[477] *Mercer v. Whall* (1845) QB 447.
[478] Order 36, rule 5 RSC.
[479] Order 36, rule 32 RSC.
[480] Order 36, rules 29-31 RSC.
[481] This time period may be enlarged.
[482] For discussion see Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 1446 *et seq.*

As discussed in parts 1 and 6, the Irish legal system is an adversarial one and the general requirement, subject to exceptions, is that evidence is given *viva voce* in open court before the trier of fact.

7.5.1 Direct and Indirect Evidence

Healy notes "[t]here has been no attempt to establish a hierarchy of evidence that would favour, for instance direct evidence over circumstantial evidence, real evidence over testimonial evidence and so forth ,although such a rule may be taken to be implicit in distinct rules such as the rule against hearsay. Concerns over the relevant strength and merits of relevant admissible evidence are instead voiced in the context of persuasive submissions upon the weight properly to be attached to the various pieces of evidence in the case."[483]

Proof of a relevant fact may be direct or indirect and as Healy explains "where indirect it is proven by circumstantial evidence."[484]

Direct evidence "consists of sworn testimony by a witness concerning their perception of facts in issue. It is testimony relating to facts of which the witness has first hand knowledge."[485] Circumstantial evidence is "evidence of relevant facts from which the existence or non-existence of a fact in issue may be inferred and can be contrasted with direct evidence. It can be oral, documentary or real evidence."[486]

7.5.2 Evidence via Television Link[487]

In criminal proceedings, the Criminal Evidence Act of 1992 Part III permits television link evidence in respect of specified violent and sexual offences. Section 13 provides that a person other than the accused may give evidence whether from within or outside the state through a live television link (a) if the person is under 17 years of age unless the Court sees a good reason to the contrary and (b) in any other case with the leave of the court. Section 14 provides that where a person under 17 is to give evidence via live television link, the court may, on the application of the prosecution or accused, if satisfied having regard to the age or the mental condition of the witness, the interests of justice require that questions be put through an intermediary, direct that any such questions be so put. Section 18 permits that where the witness, giving evidence via live television link, knew the accused prior to the date of the offence, that the witness shall not be required to identify the accused at trial unless the interests of justice so require. The constitutionality of the provision for evidence to be given via television link was unsuccessfully challenged.[488] Hogan and Whyte state "[t]he right to cross-examine does not necessarily embrace the right to confront the witnesses in person." In *Donnelly v.*

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[483] Healy, *Irish Laws of Evidence*, pages 9-10.
[484] *Ibid*, page 10
[485] Reid (Ed) *Civil Litigation* (2012), page 212.
[486] *Ibid*, page 213.
[487] These issues are discussed in Parts 1 and 6 *infra*.
[488] *White v. Ireland* [1995] 2 IR 268. *Donnelly v. Ireland* [1998] 1 IR 321.

Ireland [1998] 1 IR 321, in considering whether s.13 was unfair to the accused, Hamilton CJ stated:

> "The Court is satisfied, however, that the assessment of such credibility does not require that the witness should be required to give evidence in the physical presence of the accused person and that the requirements of fair procedures are adequately fulfilled by requiring that the witness give evidence on oath and be subjected to cross-examination and that the judge and jury have ample opportunity to observe the demeanour of the witness while giving evidence and being subjected to cross-examination."

Section 39 of the Criminal Justice Act 1999, provides that in any proceedings on indictment, a person, other than the accused, may give evidence via live television link where the court is satisfied that the person is likely to be in fear or subject to intimidation in giving evidence. Such evidence must be video-recorded.

There is also provision for live television link evidence in the context of extradition proceedings.[489]

The Children Act 1997 provides that in civil proceedings concerning the welfare of a child or a person who is of full age but who has a mental disability to such an extent that it is not reasonably possible for the person to live indpendently, the child may with the leave of the Court give evidence via live television link. This evidence may be given from within or from outside the State. S.22 provides that on the applicatrion of the parties or the court of its own motion may request that any questions be put through an intermediary.

Order 63A, r.23 RSC, provides that a Judge may in commercial proceedings allow a witness to give evidence via a live video link.[490] This applies equally to witness within or outside the State. This appears to confer a broad discretion. There exists a similar provision in respect of competition law proceedings in Order 63B, r.28 RSC.[491]

A High Court Practice Direction regarding the use of video-conferencing link for taking evidence in civil cases[492] requires an application for liberty to take evidence via video link to be made at least three working days before the day on which it is intended to hear the evidence. The solicitor for the party calling the witness is required to provide a series of undertakings to the court, namely to undertake to the court to participate fully in all required test-calls to the remote location, to provide the court registrar with the necessary technical information in relation to the remote location and the case in which the application is being made (in a form specified in the Practice Direction), to ensure that the appropriate sacred text for taking the oath prior to giving evidence is available to the witness in the remote location and to ensure that the witness in the remote

[489] S.29(1) of the Criminal Evidence Act, 1992 as substituted by s.24 of the Extradition (European Union Conventions) Act, 2001.
[490] The text of rules is set out at 1.5.1 and 6.4.19 *infra*.
[491] SI 130 of 2005, Rules of the Superior Courts (Competition Proceedings).
[492] HC45, dated 3 May 2007.

location is provided with any documents (including pleadings) to which he/she may be referred while giving evidence.

7.6 Witnesses

As discussed in Part 6, ordinarily in civil trials it is for the parties to ensure the presence of any witnesses on whom the party intends to rely. Parties are free to call any witnesses and to tender witnesses in the order of their choice. Generally in civil cases a judge has no right to call a witness without the consent of the parties.[493] There are exceptions where judges may call witnesses in chilcare proceedings which are quasi-inquisitorial[494] and cases of civil contempt.[495] Witnesses regularly attend by agreement. Where the attendance of a witness is required in civil proceedings the parties (usually through their solicitor) can issue a witness summons known as a *subpoena*. Any witness, properly served with a subpoena who fails to attend can be attached for contempt of court, since a subpoena is an order from the court to attend the hearing for the purpose of giving evidence.[496] A witness may be subpoenaed by a *subpoena ad testificandum* which requires an individual to attend court to give oral evidence or by a *subpoena duces tecum* which requires the witness both to attend court to give oral evidence but also to bring documents specified in the *subpoena*.[497]

In general, it is not necessary for a witness to adduce a written statement before giving testimony in court. Exceptionally in commercial proceedings or competition law proceedings, the court may determine to treat a witness statement as evidence in chief of a witness or expert witness.[498]

The general rule is civil trials is that evidence must be given on oath or affirmation. Again there are exceptions including that the evidence of a person under fourteen or a person with a mental disability may be taken otherwise than on oath.

Ordinarily witnesses are present in court at the same time. However for example, pursuant to section 54 of the Civil Liability Act, 2004, the court in a personal injuries action may, upon the application of a party to the action, direct that a person (other than another party to the action or an expert witness) who it is intended will be called to give evidence at the trial of the action shall not attend that trial until he or she is called to give evidence.

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[493] *Shea v. Wilson & Co.* (1916) 50 ILTR 73.
[494] *Eastern Health Board v. Mooney,* High Court (Unreported) (Carney J.), 20 March 1983.
[495] *Yianni v. Yianni* [1966] 1 All ER 231.
[496] Order 39 RSC. Reid (Ed) *Civil Litigation* (2012), page 143. Equivalent provisions are found in the Circuit Court Rules (Order 23) and the District Court Rule (Order 8).
[497] Order 39 RSC.
[498] Order 63A RSC, r.22(2) inserted by SI 2 of 2004, Rules of the Superior Courts (Commercial Proceedings). Order 63B, r.27(2) inserted by SI 130 of 2005, Rules of the Superior Courts (Competition Law Proceedings).

Witnesses are permitted to refresh their memories using statements they made at a time closer to the events in question. A distinction is drawn between when a witness is entitled to refresh his memory from documents while giving evidence in court and refreshing memory prior to getting in the witness box.

A witness while giving evidence is entitled to refer to a document for the purposes of refreshing his memory provided that the document (or its original) was made or verified by the witness contemporaneously with the events to which it refers.[499] McGrath discusses how on some occasions the witness will have no recollection of the events, but if he can say from the document that he is sure of the facts stated therein it is admissible as to the fact. McGrath states "The witness, by swearing to the accuracy of the written document which he uses to refresh his or her memory, invests the out-of-court statement with sufficient reliability to justify its reception into evidence. The fact that it is oral testimony rather than the written document which constitutes evidence in the case is a matter of form only."[500] It is nevertheless the oral testimony which constitutes evidence in a case. Thus of a party only gives evidence of some parts of the contents of the document used to refresh memory the document does not constitute evidence of other issues in respect of which no testimony is given.[501]

In order to prepare for trial counsel will generally meet with witnesses in advance to review the witness's proposed testimony. It is not permissible for this preparation for trial to amount to the coaching a witness.[502]

It is common practice in both criminal and civil trials to allow witnesses to refresh their memories out of court. This facility must not be used as an opportunity to coach a witness.[503] If there are a number of witnesses they must not be afforded an opportunity to synchronise their evidence. The witness statement of one witness should not be read to another.[504] Nor would witnesses be afforded an opportunity to compare statements.[505]

There is also a general rule against prior consistent statements, known as the rule against narrative. Statements made by a witness prior to giving testimony which are consistent with his testimony are not admissible.

[499] See for example *Northern Bank Co. v. Carpenter* [1931] IR 268.
[500] McGrath, *Evidence*, page 95.
[501] *Northern Bank Co. v. Carpenter* [1931] IR 268.
[502] *DPP v. Donnelly*, Unreported, Court of Criminal Appeal, 22 February 1999.
[503] *R v. Skinner* (1993), 99 Cr. App. R. 212.
[504] *R v. Skinner* (1993), 99 Cr. App. R. 212.
[505] *R v. Richardson* [1971] 2 QB 484.

7.7 Expert Witnesses[506]

It was noted earlier that one of the exclusionary rules in the Irish legal system is that Opinion Evidence is generally excluded. The most notable exception to this exclusionary rule is that expert witnesses are permitted to give opinion evidence.[507]

The Law Reform Commission notes that the use of expert evidence to the courts greatly increased in the early 20th century.[508] Originally it was common for courts to appoint witnesses but with the development of the adversarial system parties began to engage experts directly to help advance their respective cases.[509] Regarding the 18th century, the Law Reform Commission states:

> "Expert witnesses became a distinct legal entity from other witnesses, as they were not required to observe the facts of the case personally in order to be permitted to give an opinion on them in court. In the absence of any other legal test, the opinion rule therefore provides the principal legal distinction between ordinary and expert witnesses."[510]

The Law Reform Commission considers that "over time stricter admissibility and procedural requirements have been applied to the system of expert testimony which has helped to reduce the potential for abuse" but that the key criticisms have existed as long as there has been expert testimony in the court system.[511] A key concern is the reliability of expert evidence. There are concerns about the usurpation of the role of the trier of fact and the possible admission of unreliable evidence such as 'junk science'.[512]

The rationale for the general exclusionary rule is that "[i]t is for the tribunal of fact – judge or jury as the case may be – to draw inferences of fact, from opinions and come to conclusions."[513] The purpose of expert evidence is "to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their own conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."[514] Expert evidence is permissible in respect of matters which fall outside the ordinary knowledge or expertise of the trier of fact. As the Law Reform Commission states "an opinion can be given by an expert in an area of expertise outside the scope of knowledge of the court, in particular the finder of

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[506] For discussion see the Law Reform Commission, Expert Witness, Consultation Paper, (LRC CP52-2008).
[507] McGrath, *Evidence*, Chapter 6; Healy, *Irish Laws of Evidence*, Chapter 12; Fennell, *The Law of Evidence in Ireland* (2009), Chapter 7; Cannon and Neligan, *Evidence*, Chapter 8; Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition*, Chapter 4.
[508] Law Reform Commission, Expert Witness, Consultation Paper, (LRC CP52-2008), page 26.
[509] *Ibid*, Chapter 1, Sections E, F and G.
[510] *Ibid*, page 30 (footnotes omitted).
[511] *Ibid*, page 37.
[512] *Ibid*, Chapter 2.
[513] Per Kingsmill Moore J. in *AG (Ruddy) v. Kenny* (1960) ILTR 185.
[514] Per Cooper LJ in *Davie v. Edinburgh Magistrates* [1953] SC 34 and approved in Ireland by O'Higgins CJ in the Court of Criminal Appeal in *People (DPP) v. Pringle* (1981), 2 Frewen 57, 87.

fact."[515] Heffernan, Ryan and Imwinkelreid state that there are two conditions precedent to the introduction of expert evidence. First it must be relevant and secondly the proponent must establish that the witness is qualified by reason of training or expertsie to testify as to the disputed matter.[516] The Law Reform Commission add the requirement that the issue be outside the range of knowledge of the trier of fact.[517] A person may become an expert by reason of training, experience or knowledge.[518] The evidentiary foundation of adducing expert knowledge is to demonstrate the expertise and knowledge of the purported witness. Section 2(2) of the Civil Liability and Courts Act, 2004 provides: "'expert evidence' means evidence of fact or opinion given by a person who would not be competent to give such evidence unless he or she had a special skill or expertise". The court retains discretion regarding the admissibility of expert evidence.[519] The Law Reform Commission notes:

> "In Ireland, to date no set definition of an expert, statutory or otherwise, has been adopted, and it can be seen that the courts have adopted a very broad and flexible approach to what constitutes an 'expert' for the purposes of giving expert evidence. The courts have continuously attempted to explain the parameters of what constitutes an expert witness, but have resisted setting out a formal definition."[520]

Some guidance may be gleaned from the Disclosure Rules in respect of personal injury actions, the Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998[521]. The 1998 Rules state that they apply to expert reports including:

> "… report or reports or statement from accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists, scientists, or any other expert whatsoever intended to be called to give evidence in relation to an issue in an action."

The 1998 amendment to the rules inserts rule 46(1) into Order 39 which provides in the case of personal injury actions that:

> "The Plaintiff in an action shall furnish to the other party or parties or their respective solicitors (as the case may be) a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the court.
>
> Within seven days of receipt of the plaintiff's schedule, the defendant or any other party or parties shall furnish to the plaintiff or any other party or parties a schedule listing all reports from expert witnesses intended to be called. Within seven days of the receipt of the schedule of the defendant or other party or parties, the parties shall exchange copies of the reports listed in the relevant schedule."

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[515] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 2.
[516] Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition*, pages 102-103.
[517] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 4 and Chapter 2. For discussion of these rules see Chapter 2.
[518] Per Kingsmill Moore J. in *AG (Ruddy) v. Kenny* (1960) ILTR 185.
[519] Discussed in Healy, *Irish Laws of Evidence*, page 363.
[520] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 134.
[521] SI 398 of 1998.

The Rules of the Superior Courts (Disclosure of Reports and Statements) 1998[522] require that in personal injury actions both parties must disclose all reports and statements of experts whom they intend to call as witnesses, and those containing the substance of the evidence to be adduced by them. This provision was interpreted by the Supreme Court in *Payne v Shovlin* [2006] IESC 5 to mean that means that all reports, including preliminary expert reports not adduced at trial, must be disclosed.

Similar disclosure requirements to those provided for in personal injuries cases by the 1998 Rules are also provided for in commercial proceedings by the Rules of the Superior Courts (Commercial Proceedings) 2004[523] and in competition proceedings by the Rules of the Superior Courts (Competition Proceedings) 2005.[524]

The rationale for these changes has been explained by the Law Reform Commission as:

> "Significant exceptions to the privilege rules have been made in the context of expert reports in civil proceedings, as it is considered necessary in the interests of a fair trial that neither party be able to 'ambush' the other so both party should be aware, prior to the trial, of the contents of all expert reports of the other party."[525]

It is clear from the decision in *Kincaid v Aer Lingus Teoranta* [2003] IESC 31, which decision interpreted the disclosure rules in personal injury actions that that only expert reports intended to be relied on in evidence were subject to the disclosure rules. In this case, a medical expert had been listed in the schedule of expert witnesses but the defendant subsequently decided not to rely on this expert and did not provide his report when the reports were exchanged. The defendant informed the plaintiff that it did not intend to call this expert witness at trial. The Supreme Court considered that once the defendant changed its mind about the witness the report regained privileged status and did not have to be disclosed.

"… because of the application of the hearsay rule,expert witnesses may be required to testify orally about the contents of the expert report in court in every case where expert evidence is sought to be adduced".[526] If experts are called to give oral evidence the series of questioning that they are examined-in-chief, cross-examined and re-examined is in the same sequence as witnesses as to fact. The questioning is done by lawyers representing the parties or in the case of a lay – litigant by the lay-litigant. However, as is evident from the discussion in the preceding Paragraph, the examination in chief will need to elicit answers which establish the basis for the expert's knowledge or experience. As Healy notes "the party calling the witness bears the burden of proving the witness' credentials as an expert in the relevant field, which is typically achieved by way of preliminary questions in-chief after the witness takes the oath."[527] Oral testimony of an expert as to his qualifications, experience and expertise is accepted as

[522] SI 398 of 1998.
[523] SI 2 of 2004.
[524] SI 130 of 2005.
[525] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 260.
[526] *Ibid*, page 277.
[527] Healy, *Irish Laws of Evidence*, page 361.

prima facie evidence and he need not adduce primary evidence of his qualifications unless there is rebuttal evidence.[528] As noted by the Law Reform Commission:

> "It is more common that the actual substance of the evidence given is challenged in terms of the weight to be attached to it, as opposed to its admissibility. In this respect, the main way in which a witness's expertise is determined in our adversarial system is through examination and (sometimes robust) cross examination in court. A witness may be subject to extensive questioning by the opposing party (and, on occasion, by the judge) about the extent of their expertise and their professional ability to express a valid expert opinion on the issue sought to be given in evidence."[529]

The Law Reform Commission summarise what is hoped to be achieved through this system but also its limitations in the following Paragraphs:

> "3.72 Our adversarial system assumes that if there is any shortfall in the witness' expertise, it will be exposed at examination in chief or cross examination stages and the witness may be prohibited from giving expert evidence or at least their opinion will be considerably undermined and limited weight will attach to such opinion.
>
> 3.73 However, although examination in chief and cross examination will be effective in weeding out potential charlatans in the majority of cases, it may prove difficult on occasion to determine or quantify the extent of the witness' purported expertise, particularly where specialist knowledge is be required in relation to an area which is not governed by some form of professional accreditation, study or training.
>
> 3.74 The potential difficulties with assessing expertise are clear when one considers that the judge is ultimately given the task of evaluating the skill and ability of the witness to give evidence on a subject, where the reason such evidence is being admitted is because the subject is outside the range of knowledge of the judge."[530]

In practice, in civil cases it is common for the parties to agree that expert reports can be admitted as evidence without the need to call the expert witnesses.

Ireland, has introduced provisions to the effect that in certain categories of cases, only one single expert will be appointed for the purposes of importing expert knowledge into the case. In some cases the expert is appointed by the court and in others by the joint agreement of the party. Section 20(1) of the Civil Liability and Courts Act, 2004 provides: "In a personal injuries action, the court may appoint such approved persons as it considers appropriate to carry out investigations into, and give expert evidence in relation to, such matters as the court directs." Sub-section 2 requires the parties to co-operate with such experts. Parties are entitled cross-examine such experts.[531] There is also provisions in respect of competition law where the court may appoint an expert.[532]

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[528] *Martin v. Quinn* [1980] IR 244.
[529] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 147.
[530] *Ibid*, page 149.
[531] Section 20(4).
[532] Part IV of Order 63B of the Rules of the Superior Courts 1986 (inserted by the Rules of the Superior Courts (Competition Proceedings), 2004.

In family law proceedings, Section 47 of the Family Law Act 1995 provides that the court may procure a report from such person as it may nominate on any question affecting the family law proceedings in question. There is a specific provision in respect of nullity cases.[533]

Hodgkinson and James[534] identified five different categories of evidence that can be given by expert witnesses, although there is some overlap between the categories.

i) Expert evidence of opinion, based on facts that have been adduced before the court.

ii) Expert evidence to explain technical or complex subject areas or the meaning of technical terminology.

iii) Expert evidence of fact, on an issue that requires expertise to fully comprehend, observe and describe.

iv) Expert evidence of fact, on an issue that does not require expertise in order to fully observe, comprehend and describe, but which is a necessary preliminary to the giving of evidence in the other four categories.

v) Admissible hearsay of a specialist nature.

The responsibility of an expert witness is to be independent and to fairly and objectively assist the court. In *National Justice Compania Naviera SA v Prudential Assurance Company Ltd (Ikarian Reefer)*, Times Law Reports, 5 March 1993, the Court held that expert witnesses in civil cases had several duties and responsibilities including the duty to give independent and unbiased evidence. If an expert witness did not have expertise in a certain area or had insufficient information to reach a properly researched conclusion then he should say so. The Court stated that:

> "The duties and responsibilities of expert witnesses in civil cases included the following:
>
> 1 Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation:[535]
>
> 2 Independent assistance should be provided to the court by way of objective unbiased opinion regarding matters within the expertise of the expert witness;[536] … An expert witness in the High Court should never assume the role of advocate.
>
> 3 Facts or assumptions upon which the opinion was based should be stated together with material facts which could detract from the concluded opinion.
>
> 4 An expert witness should make it clear when a question or issue fell outside his expertise.
>
> 5 If the opinion was not properly researched because it was considered that insufficient data was available then that had to be stated with an indication that the

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[533] Order 70 Rule 32 of the Rules of the Superior Courts, 1986.

[534] Hodgkinson and James, *Expert Evidence: Law and Practice* (2nd ed, Sweet & Maxwell, 2007), at 2-001 – 2-006.

[535] See *Whitehouse v Jordan* ([1981] 1 WLR 246, 256), per Lord Wilberforce.

[536] See *Polivitte Ltd v Commercial Union Assurance Co plc* [1987] 1 Lloyd's Rep 379, 386, per Mr Justice Garland, and *Re J* ([1990] FCR 193), per Mr Justice Cazalet.

> opinion was provisional.[537] If the witness could not assert that the report contained the truth, the whole truth and nothing but the truth then that qualification should be stated on the report:[538]
> 6 If, after exchange of reports, an expert witness changed his mind on a material matter then the change of view should be communicated to the other side through legal representatives without delay and, when appropriate, to the court.
> 7 Photographs, plans, survey reports and other documents referred to in the expert evidence had to be provided to the other side at the same time as the exchange of reports."[539]

I am not aware of any case expressly adopting these principles into Irish law but it seems likely that that the views on this issue expressed in the neighbouring jurisdiction are applicable. The Law Reform Commission put forward a suggestion:

> "… it is submitted that the introduction of an express, legally binding paramount duty to the court is very worthy of consideration, even if it goes no further than to clarify in the expert's mind the focus of their role to give independent, objective information to the court."[540]

Notwithstanding the independence requirement, as Healy notes "[t]he tendency of experts to be partisan, whether or not consciously, is stoke by the gladiatorial or adversarial nature of the common law trial.[541]

While a person cannot give expert evidence if he is a party to the proceedings[542] for the purposes of the disclosure rules in personal injury actions[543], it was pointed out that the Irish rules refer to 'expert evidence' and not to 'evidence given by independent experts'[544] and it was held that while the fact that the witness was employed or engaged by one of the parties may affect his independence, this should be taken into account when assessing the weight to be attached to his expert evidence, and should not affect his status as an expert. Experts who hve a relationship with a party, such as an employee is permitted to give expert evidence. Thus, while there is a requirement to give independent evidence, an expert is not required to be independent of the parties. The Expert Witness Directory of Ireland's Code of Practice: Expert Witnesses Engaged by Solicitors/Barristers outlines the requirement of independence, professional objectivity and impartiality, and the duty to disclose any circumstances which might influence the work of the expert.[545]

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[537] See *Re J*. ([1990] FCR 193).
[538] *Derby & Co Ltd and Others v Weldon and Others (No 9)* (The Times, November 9, 1990), per Lord Justice Staughton.
[539] Note the authorities referred to in the judgment have been moved to footnotes here.
[540] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 157.
[541] Healy, *Irish Laws of Evidence*, page 364.
[542] *Sheeran v Meehan*, Unreported, High Court (Herbert J), 6 February 2003.
[543] SI 398 of 1998.
[544] *Galvin v Murray* [2000] IESC 78 approving the English *Shell & Pensions v Fell Frischmann* [1986] 2 All ER 911.
[545] The Irish Bar and Witness Directory, 2013 (Roundhall Thomson Reuters, 2012), page 246.

In *McGrory v. Electricity Supply Board* [2003] 3 I.R. 407 the Supreme Court held that a plaintiff who sued for damages for personal injuries waived the right to privacy which he would otherwise enjoy in relation to his medical condition and the law must ensure that he did not unfairly or unreasonably impede the defendant in preparing his defence by *inter alia* refusing to consent to a medical examination by an expert retained by the defendant.

In civil cases. parties are free to call expert witnesses and to commission experts to prepare written reports. As the Law Reform Commission note "[i]n most litigation, both parties will advance experienced experts to present their own, often contradictory, arguments."[546] In principle, expert witnesses are remunerated by the party who calls the expert.

The Law Reform Commission notes:

> "… the permission of the court is necessary before a party will be allowed to adduce expert evidence. However, in practice, each party will enlist the aid of as many experts as they consider necessary and it will be only at the trial stage that the court will, if it considers necessary, rule that a particular expert should not be permitted to give evidence, either because the evidence sought to be given is outside that which expert evidence is permitted to be given, or because the witness put forward is not suitably qualified to be considered an expert… There is therefore, no requirement that a party seek formal court approval prior to appointing an expert witness to give evidence."[547]

The ultimate issue is for the court to decide. The opinion of an expert is not determinative of any issue. The sole and final arbiter is the court as the trier of fact.[548] The weight that a court gives to an expert's evidence will depend on a number of factors including the facts, the type of case and the experience of the expert. As the Law Reform Commission has stated:

> "It is important to note that the court is not obliged to accept or act on expert evidence and can refuse to admit it or reject it if they so wish. The decision making function of the court must not be usurped by the expert, and it remains at all times the duty of the court to determine the truth of the matter at hand. The evidence of an expert will therefore only be of persuasive, not binding effect, to be taken into account along with all of the other evidence in the case."[549]

In the Irish courts evidence of a non-expert may be preferred to expert evidence.[550]

Where there is conflicting witness testimony, in *Best v Wellcome Foundation Ltd*. [1993] 3 I.R. 421, Finlay CJ stated:

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[546] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 96.
[547] *Ibid.*
[548] *Aro Road v. Insurance Corporation of Ireland* [1986] IR 403. *People (AG) v. Fennell (No. 1)*, 1940 IR 445.
[549] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 93.
[550] *Poynton v Poynton* (1903) 37 ILTR 54.

> "The function which the court can and must perform is to apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories concerning a matter of this kind."

The decision to adduce expert evidence and the choice of expert are completely within the remit of a party to proceedings. Many experts will be recruited on the basis of a word of mouth recommendation, having previously given evidence in a similar case. Lists of available experts are also published in directories such as the commercial publication the Expert Witness Directory of Ireland.[551] Some persons advertise their availability as expert witnesses.

The Expert Witness Directory of Ireland[552] consists of a reference-checked list of expert witnesses in over 1,000 areas of expertise. In order to be permitted to use the Expert Witness Directory of Ireland Irish Checked' logo, an expert witness will have to prove that they have met with the requirements of the Expert Witness Directory of Ireland Code of Conduct".

This is a Code of Guidance which aims to assist experts to effectively provide reliable expert testimony. It is split into twelve sections and begins by stating in the introduction that its provisions are of general application and therefore there may be additional requirements relating to specialised areas. The Code is extremely detailed and does not merely outline the duties and ethical obligations owed by experts but also goes into great detail about the procedural requirements and obligations where a person has agreed to act as an expert witness. In addition a number of professional bodies have set out guidelines for their members. The Law Reform Commission states:

> "Overall, these guidelines explain the principal role and duties of an expert while at the same time not forgetting that those relying on the guidelines are likely to be inexperienced in relation to aspects of the legal system. These guidelines could therefore provide a good model on which to base any legally binding code or practice direction for experts."[553]

The Law Reform Commission provisionally recommended "that a formal guidance code for expert witnesses, based on the principles set down in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)* should be developed which would outline the duties owed by expert witnesses and which would be made available to all persons seeking to act as expert witnesses."[554]

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[551] The Irish Bar and Witness Directory, 2013 (Roundhall Thomson Reuters, 2012).
[552] *Ibid.*
[553] Law Reform Commission, Expert Witness, Consultation Paper, LRC CP52-2008, page 194.
[554] *Ibid*, page 195.

8 Costs and Language

8.1 Costs

8.1.1 Costs in Ireland: The Normal Rule

Order 99, rule 1 (1) and (3) RSC provide:
"1. Subject to the provisions of the Courts Acts and any other statutes relating to costs and except as otherwise provided by these Rules:
(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
...
(3) The costs of every action, question, or issue tried by a jury shall follow the event unless the Court, for special cause, to be mentioned in the order, shall otherwise direct."

It is clear that costs are always at the discretion of the Court. In *Fyffes v. DCC plc* [2009] 2 IR 417, 469, Laffoy J. explained the test for displacing the rule that costs follow the event unless the court otherwise orders as "whether the requirements of justice indicate that the general rule should be displaced."

8.1.2 Costs: Displacement of the General Rule

In *Dunne v. Minister for the Environment* [2007] IESC 60, [2008] 2 IR 775, at page 783-784, Murray CJ discussed circumstances where it would be appropriate to depart from the rule that costs follow the event.

> *"26. The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs.*
> *27. Where a court considers that it should exercise a discretion to depart from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue.*

> *28. Accordingly, any departure from the general rule is one which must be decided by a court in the circumstances of each case…"*

The party asserting a departure from the rule that costs follow the event bears the burden of satisfying the court, that there should be a departure. Delaney and McGrath say that "a more accurate summation of what is required would seem to be that of Clarke J. in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81, 85 who held that the general rule could be departed from 'by virtue of special or unusual circumstances.'"[555]

8.1.3 Costs: Non-Exhaustive List of Exceptions to General Rule

Delaney and McGrath set out a series of exceptions to the general rule but emphasise that the examples given are not exhaustive.[556] In this regard they cite the decision of Murray CJ in *Curtin v. Dáil Éireann* [2006] IESC 27, where he stated "[i]t would neither be possible or desirable to lay down one definitive rule according to which exceptions are made to the general rule. The discretionary function of the Court to be exercised in the context of each case militates against such a definitive rule of exception."

The non-exhaustive list discussed by Delaney and McGrath include improper conduct by a party, test cases, public interest challenges and cases where an order may cause hardship.[557]

With regard to test cases Delaney and McGrath state "[w]here a case is in the nature of a test case so that its outcome will potentially affect the position of parties other than the litigants, particularly if it raises issues as to the constitutionality of legislation, or proper interpretation of the Constitution or of legislation, this may be taken into account by the court in the exercise of its discretion as to costs if the plaintiff or applicant is unsuccessful.[558]

In *F. v. Ireland*, Unreported decision of the Supreme Court, 27 July 1995, the plaintiff failed to obtain a declaration that provisions of the Judicial Separation and Family Law Reform Act, 1989 were invalid having regard to the Constitution. In the Supreme Court, Hamilton CJ noted the importance of case not just to the parties but was also of significance to litigants in at least 3000 other cases. Hamilton CJ had no doubt that the appeal involved issues of considerable public interest. Further the Attorney General regarded it as a "test case" and was anxious that the matter be resolved. Hamilton CJ in the circumstances stated that the court should exercise its discretion with regard to the issue of costs by awarding the costs of the appeal to the plaintiff appellant against the Attorney General.

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[555] Delaney and McGrath, *Civil Procedure in the Superior Courts* (2012), page 725.
[556] At pages 725 *et seq.*
[557] At pages 725 *et seq.*
[558] Page 728.

In *O'Sheil v. Minister for Education*, Unreported, High Court, Laffoy J., 110 May 1999, unsuccessful plaintiffs were awarded costs of a challenge relating to State funding for free primary education because the issues extended beyond the sectional interests of the plaintiff.

More recently in *Cork County Council v. Shackleton* [2007] IEHC 334, [2011] 1 IR 443 Clarke J. in considered the circumstances when it will be appropriate to depart from the general rule that costs follow the event on the basis of a test case. The case concerned legislation in respect of obligations pertaining to social and affordable housing.

> *"[13] Test cases can arise in very many different circumstances. Where there is doubt about the proper interpretation of the common law, the Constitution, or statute law involving the private relations between parties, and where the circumstances giving rise to those doubts apply in very many cases, then it is almost inevitable, as a matter of practice, that one or a small number of cases which happen to be first tried will clarify the legal issues arising. Where the proceedings involve entirely private parties then there does not seem to me to be any proper basis for departing from the ordinary rule in relation to costs, notwithstanding the fact that the case may properly be described as a test case. There is no good reason for depriving a successful private party of its ordinary entitlement to costs simply because the case in which it succeeded happens to be a test case.*
>
> *[14] However it seems to me that different considerations may apply, at least in some cases, where one of the parties is a public authority. To take a case at the other end of the spectrum from the purely private litigation which I have just considered, one can envisage circumstances where a court was faced with difficult questions of construction in relation to legislation of widespread and general application which was introduced by a particular ministry and in circumstances where that ministry is a necessary and proper party to the proceedings under consideration. An analogous situation might arise where Ireland was a necessary party. In those circumstances it seems to me that it is open to the court to weigh in the balance in considering costs the fact (if it be so and to the extent that it is so) that the litigation may have been necessitated by the complexity or difficulty of legislation for which, of course, either the Minister concerned or Ireland was, in substance, responsible."*

In that case Clarke J. determined that the interests of justice would be served by making no order as to costs. He determined not to award the unsuccessful notice party its costs. Clarke J. also indicated that in his view the applicant should not be at any financial loss by virtue of failing to recover the costs to which it might, ordinarily, be said to be entitled. He considered that the reason why the proceedings were necessitated was because legislation which he found to be "ill worked out" was introduced, which in turn necessitated local authorities and parties such as the applicant and the notice party to grapple with the complexities imposed on them by it. The very fact that these proceedings ran in tandem with proceedings raising very similar issues made clear the widespread and far ranging consequences of the legislation and also emphasised the difficulties which all parties have had in having to deal with it. In his view, the principal reason why this litigation was necessary was because of the nature of the legislation

introduced and that the Minister who was responsible for the legislation should ensure that the applicant was at no loss by having played a very necessary role in the clarification of the legislation concerned.

Roche v. Roche [2010] IESC 10 involved a dispute between a husband and a wife. It was a case concerning important public law and constitutional issues as to whether the appellant was entitled to have frozen embryos implanted against the wishes of her husband from whom she was separated. The Attorney General participated in the proceedings. The wife was unsuccessful in her claim but the Supreme Court considered that it would be equitable and just to depart from the normal rule that costs follow the event. The Attorney General was required to bear the costs of both parties in the High Court and there was no order as to costs on appeal.

In respect of cases where an order may cause hardship Delaney and McGrath[559] cite the decision in *N.M. v. S.M. (Costs)* [2005] 4 IR 461 in which it was accepted by Geoghegan J that the courts may exercise discretion not to apply the normal rule that costs follow the event where this may be perceived as causing hardship. Geoghegan J. emphasised that the manner in which the court will exercise its discretion will vary from case to case. In that case no order was made in respect of the appeal to the Supreme Court where a defendant succeeded in substantially reducing the amount of damages he was liable to pay in relation to acts of sexual abuse committed over a number of years.

The general rule in the Irish Legal System is that costs are at the discretion of the court but further that costs generally follow the event. This means that costs are paid by the losing party. The key provision in the Superior Courts is Order 99 and that rule is expressly stated to be subject to the provisions of the Courts Acts and any other statutes relating to costs. In recent years there has been a trend to limit the discretion of the court, this is most evident in the Civil Liability and Courts Act, 2004 in the context of personal injury actions. The rationale for the general rule that costs follow the event is that the assets of a successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party.

8.1.4 Witness Attendance Costs

The cost of procuring evidence and attendance of witnesses are allowable pursuant to the provisions of Order 99, Rule 37 RSC.

Order 99, r.37(8) RSC provides:

> (8) Such reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed. In respect of any witness, or a group of witnesses travelling together, the Taxing Master may allow by way of travelling expenses the actual cost of transport by a hired motor car, or for the use by a witness of his private motor car at such rate per mile as to the Taxing Master shall seem reasonable, when it is demonstrated to him that such hire

[559] At page 732.

> or use did not exceed the cost of travel by available transport or otherwise resulted in a saving to the party chargeable. The reasonable expenses and allowances of witnesses to attend a consultation or conference properly held prior to the trial shall be chargeable on taxation as between party and party.

Therefore a successful party would be entitled to recover the expenses paid to a lay witness for a attendance at court but these are confined to loss of earnings reasonably incurred and property vouched and travelling and overnight expenses if appropriate. The costs of procuring attendance of expert witnesses to give evidence are also recoverable.[560] On some occasions expert fees are more properly recoverable under the head of special damages.[561]

8.1.5 Subpoena

In Part 6, concerning witnesses it was discussed how the attendance of the witness can be secured by serving a witness summons known as a *subpoena*. This subpoena must be served on the witness personally by handing a true copy of the subpoena to the witness in question and at the same time producing the original[562]. At the time of service of a subpoena a sum of money known as a *viaticum* must be also be given to the witness to ensure that service is valid. The viaticum should be a sum of money sufficient to cover the witnesses travelling expenses to court and a subsistence allowance for meals and overnight expenses. The *viaticum* is not intended to cover the full expenses of the witness. Expert witnesses may be considerably more expensive. In the event that a witness is duly served with a *subpoena* and a *viaticum* they are obliged to attend court under threat of attachment. Often however the attendance of witnesses is secured by way of agreement rather than by serving *subpoenas*. A witness who fails to attend cannot be attached for contempt in the event that they were not served with the *subpoena* or in the event that they were not given the appropriate *viaticum*.

It was noted above in Part 7.7 concerning expert witnesses that ordinarily it is for the parties to adduce the expert evidence which they intend to rely on. However it was also noted that there are a number of statutory or court rules based procedures which allow a court to appoint an expert.[563] For example the court may procure a report under Section 47 of the Family Law Act 1995. Section 47(4) provides that the fees and expenses incurred in the preparation of a report under s.47(1) shall be paid by such parties to the proceedings concerned and in such proportions or by such parties to the proceedings as the court may determine. Similarly in respect of the evidence which the court may require in personal injury actions under Section 20 of the Civil Liability and Courts Act, s.20(3) provides that the costs incurred in the appointment of, and carrying out of an

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[560] Order 99, Rule 37.
[561] *Best v. Wellcome Foundation Limited* [1996] 1 ILRM 34 in which Barron J. held that where the amount of special damages is assessed upon the basis of the opinions of experts the professional fees would be more properly attributable to special damages.
[562] Order 39, Rule 33, Rules of Superior Courts.
[563] See 1.2 and 7.7 *infra.*

investigation, by a person appointed under that section shall be paid by such party to the personal injuries action concerned as the court hearing the action shall direct.

8.2 Language and Translation

8.2.1 General Introduction

Hogan and White state that it is part of the concept of natural justice that a party affected by criminal (or other legal) proceedings should be told of the case against him in a language which he understands.[564] In *Attorney General v. Joyce and Walsh* [1929] Irish Reports 526 Kennedy C. J. said:

> *"It would seem to me to be a requisite of natural justice, particularly in a criminal trial, that a witness should be allowed to give evidence in the language which is his or her vernacular language, whether that language be Irish or England, or any foreign language; and it would follow that the language which used shall not be a language known to the members of court, that means of interpreting the language to the court (Judge and Jury), and also in the case of evidence against a prisoner, that means of interpreting it to the prisoner, should be provided."*[565]

Bacik notes that:

> *"There has been no statutory provision for the general right to an interpreter in Ireland for non-English or Irish speakers to date. There are some specific provisions for interpreters in particular types of cases such as those provided under the Refugee Act 1996, as amended (concerning the asylum process). ... Thus the common law position remains the case; that is, access to the services of an interpreter or translator is a matter for the discretion of the court."*[566]

The Courts Service Strategic Plan 2005 to 2008 provides:

> *"We ensure that all court users can do their business in the language of their choice. The growing ethnic diversity of our society means that there are many people interacting with the courts system from whom neither Irish nor English is the first language. We will continue to provide interpreters in court. We will also continue to publish information in Irish, England and arrange of other languages both in leaflet form and on our website."*[567]

Bacik states however,

> *"There is no policy interpreting or guidelines for interpreters; most interpreters have no training and there is no testing or independent quality control of interpreter."*[568]

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[564] Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 1080.
[565] *Attorney General v. Joyce and Walsh* [1929] Irish Reports 526, 531.
[566] Ivanna Bacik, *Breaking the Language Barrier: Access to Justice in the New Ireland* (2007), 2 Judicial Studies Institute Journal, pages 109 and 117.
[567] Available at www.courts.ie/courts.ie/library3.nsf/(webFiles) accessed on 4th March 2014.
[568] Bacik, *op cit*, page 119.

In 2006 an international company called Lionbridge were appointed by the Court Service to provide interpreting services.[569] Bacik also notes that private companies are used to provide interpretation and translation services for the Refugee Legal Service, the Refugee Applicants Commissioner and the Refugee Appeals Tribunal.

The Irish Translators and Interpreters Association provide ITIA certified translator's qualification. The main requirements are professional membership of that organisation, five years professional experience as a translator and a successful result in two translations. According to that organisation's website the aim of the ITIA in offering its members ITIA certified translator status is to achieve formal recognition for the profession and the status of a certified translator from the Irish legal system, Government Departments, State Institutions and the business community and to maintain the profession of professional excellence through continuing professional development programs.[570]

Ireland has two official languages, Irish and English and section 8 of the Official Languages Act 2003 provides at section 8(1) *"a person may use either of the official languages in, or in any pleading in or document issuing from, any court."* The Irish language is the first national language and the English language is recognised as the second official language.[571] Therefore it is apparent that courts have the use of professional interpreters and they do not rely on the parties or their Counsel. However there is no requirement for these professional interpreters to be specifically accredited in any way. As Delaney and McGrath note, evidence may, as a matter of course be given in Irish or English. However, if a witness does not have a sufficient grasp of either English of Irish he may give evidence in any language and an interpreter will be provided to facilitate this.[572] Order 120, Rule 1 of the Rules of the Superior Courts provides that there must such number of interpreters as the Chief Justice and the President of the High Court respectively may from time to time by requisition in writing address to the Minister of Justice request. Such interpreters must attend the courts and the Offices of the Superior Courts and be available to attend those courts as required for the hearing of any cause or matter.

[569] *Ibid*, page 121.
[570] www.translatorsassociate.ie (accessed on 4 March 2013).
[571] Article 8 of the Irish Constitution and the Official Languages 2003, Section 2(1).
[572] Delaney and McGrath, *Civil Procedure in the Superior Courts* (2005), page 520.

9 Unlawful Evidence

9.1 The Distinction Between Unconstitutionally Obtained Evidence and Illegally Obtained Evidence[573]

Unlawfully obtained evidence may be divided into two types, evidence obtained in breach of the constitution and ordinarily in Irish Law such evidence is inadmissible. Secondly, there is evidence obtained in breach of statute or the common law, known as illegally obtained evidence which is admissible at the discretion of the Trial Judge. In *People (Attorney General*) *v. O'Brien* [1965] IR 142 Walsh J. stated that his view of how the admissibility of evidence obtained in violation of constitutional rights should be determined:

> *"The courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of the deliberate and conscious violation of the constitutional rights of an accused person where no extraordinary excusing circumstances exists, such as the imminent destruction of vital evidence or the need to rescue a victim in peril."*[574]

In *DPP v. Kenny* [1990] 2 IR 110 Finlay CJ stated the rule in the following terms:

> *"I am satisfied that the correct principal is that evidence obtained by invasion of the constitutional personal rights of the citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its discretion."*[575, 576]

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[573] Discussed in McGrath, *Evidence*, Chapter 7. Healy, *Irish Laws of Evidence*, Chapter 11. Carol Fennell, The Law of Evidence in Ireland, (3rd Ed., Bloomsbury Professional, 2009) Chapter 4. Cannon and Neligan, *Evidence*, Chapter 15. Heffernan, Ryan and Imwinkelreid, *Evidentiary Foundations Irish Edition* Chapter 7. Hogan and Whyte, *J.M. Kelly – The Irish Constitution*, page 1101 *et. seq.*

[574] Page 170.

[575] Page 134.

[576] In a recent decision: *D.P.P. v. J.C.* [2015] IESC 31 (available at http://www.supremecourt.ie/), the Supreme Court applied a more nuanced exclusionary rule. The Supreme Court, *per* Clarke J. at Paragraph 5.10 determined that "deliberate and conscious" referred to knowledge of the unconstitutionality of the obtaining of the relevant evidence rather than applying to the acts concerned (i.e. the act of obtaining the evidence). The Supreme Court *per* Clarke J. at Paragraph 5.11 also determined that where evidence was obtained in circumstances of unconstitutionality, but where the prosecution established that obtaining the evidence was not deliberate and conscious in the sense identified, the evidence should be admissible if the prosecution can also establish that the uncontitutionality concerned arose out of circumstances of inadvertence or by reason of developments in the law which occurred after the time when the relevant evidence was gathered. This judgment post-dates the writing of this paper and the paper should be read in light of this judgment.

While the rule was originally formulated in the context of criminal cases, it later became apparent that it also applied in the context of civil law. Thus unconstitutionally obtained evidence is also generally excluded in civil cases. In *Universal City Studios v. Mulligan*, Unreported, High Court (Laffoy J.) 25th of March 1998, Laffoy J. recognised *obiter* the entitlement of a party in civil proceedings to the exclusion at trial of evidence obtained in breach of that party's constitutional right. The action involved a breach of copyright and video cassettes seized from the Defendant's vehicle were important evidence for the Plaintiff. The search warrant pursuant to which the evidence was obtained had been lost. In the circumstances the High Court found that the unlawfulness did not amount to breach of the accused's constitutional rights. However, the Court said that had there been such a breach the same rule would apply as applied in criminal proceedings and the evidence would have been automatically excluded.

Further, a similar discretionary rule in respect of illegally obtained evidence also applies and that can also be seen from *Universal Studios v. Mulligan*, where the search of his car did not violate a constitutional right. The evidence obtained on foot of the unauthorised search had been illegally obtained. In the circumstances of the case the High Court considered the evidence to be admissible against the Defendant.

In *PMcG v. AG* The High Court, Unreported, (Budd J.) 28 January 2000 the High Court excluded evidence in family law proceedings obtained after an unlawful search by one spouse of the other spouse's dwelling in violation of Article 40.5 of the Constitution, the medical inspector was not entitled to base his findings upon a diary seized by one party to the proceedings in violation of the other party's right to privacy.

Healy considers evidence to have been obtained illegally if the investigator acted without or beyond his lawful authority under Statute or the Common Law or if it was obtained by the commission of a crime, tort or breach of contract. Where evidence is obtained illegally as opposed to unconstitutionally, the Trial Judge has discretion whether to admit or exclude the evidence.[577] These rules apply to all types of evidence. Hunt notes in respect of illegally obtained evidence that,

> *"It has been held that it is admissible if it is relevant, the illegality being merely ignored though not condoned; however, the Trial Judge has discretion to exclude it, if it appears to him that public policy, based on a balancing of public interests, requires such exclusion."*[578]

Thus for example in *DPP v. McMahon, McMeel and Wright* [1998] 1 IR 62 evidence was obtained illegally where there was a search of a licensed premises without a warrant and without the guards identifying themselves as the Gardaí, the court balanced the public interest in the detection of crime against the undesirability of using improper police methods.

[577] Healy, *Irish Laws of Evidence*, page 329.
[578] Hunt, *Murdoch's Dictionary of Irish Law*, page 465.

10 Evidence by and for Foreign Courts

10.1 The Taking of Evidence for and by Foreign Courts

10.1.1 Evidence to be Taken Abroad for Irish Court Proceedings

In Ireland evidence from foreign tribunals may be obtained pursuant to:

i. Evidence on Commission
ii. Council Regulation (EC) 1206 of 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters
iii. Letters of Request
iv. Commercial and Competition Law Proceedings

Ireland has not ratified The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Law Reform Commission recommended that Ireland ratify the Convention in 1985.[579]

The Courts Service Report for 2012 states that "witnesses in other jurisdictions gave evidence via video to facilitate the hearing of cases in Ireland in 14 cases."[580]

As has been discussed above, it is ordinarily the responsibility of the parties in proceedings in Irish courts to adduce the evidence the party considers relevant to his case. Usually therefore it will be one of the parties to the proceedings which applies to court to secure evidence from abroad.

National

The normal method of securing the attendance of a witness at trial is the service of a *subpoena ad testificandum.* Where it is proposed to put documents in evidence a *subpoena duces tecum* is served on the person in possession of the documents and that person is required to bring them to court.[581] If the person on whom the subpoena is to served is out of the jurisdiction no subpoena may be served.[582] As the Law Reform Commission points out a witness who wishes to avoid giving evidence may do so by removing himself from the jurisdiction while the proceedings are pending.[583] The Law Reform Commission also considers that while there might be jurisdiction to compel a person in the jurisdiction to provide documents outside of the jurisdiction that Irish courts are reluctant to do so.[584]

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[579] The Law Reform Commission Report on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985).
[580] Courts Service, Annual Report 2012, page 8.
[581] The issue of summoning witnesses in domestic proceedings is discussed at 6.2 *infra.*
[582] *Ibid*, page 3.
[583] *Ibid*, page 3.
[584] *Ibid*, page 3 citing the case of *Chemical Ban v. Mac Cormack* [1983] ILRM 350.

Evidence on Commission

There are procedures for ordering evidence to be taken abroad where the witness is willing. The procedure whereby a court in Ireland may request evidence to be taken abroad in proceedings before the Irish court comprise the *Evidence on Commission* procedure set out at Order 39 r.4 RSC which was discussed in detail above.[585] Smith de Bruin considers that "evidence on commission may be inappropriate where the jurisdiction in which the witness is to be found may object to the administration of oaths by officers of a foreign court."[586] The Law Reform Commission considers that the Irish Courts have proved reluctant to order evidence on Commission when a witness is willing to travel to Ireland to give evidence.[587] Another difficulty might be that a country is unwilling to permit the taking of evidence on commission.[588]

When evidence is taken on Commission, the national judge is not present. The commissioner does not have the power to decide upon the relevance of questions or the admissibility of any objection by the witness and the Commissioner notes the objections.[589] Nor does the Commissioner have the power to compel the witness to answer questions. When examination is complete the commissioner reads over the statement and it is signed by the witness. There is no express provision for video-conferencing.

Council Regulation (EC) 1206 of 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters

The court procedures in respect of Council Regulation (EC) 1206 of 2001 are found at Order 39, r.5 RSC.

> 5.*(1) In this rule and in rule 5A:*
> *"the Regulation" means Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L174/1 of 27 June 2001);*
> *"Member State" means a Member State of the European Union with the exception of Denmark.*
> *(2) The Court may, in any case in which the Regulation applies, on the application of any party or of its own motion, order the issue of:*
> > *(a) a request, in Form A in the Annex to the Regulation, to the competent court of another Member State to take evidence; or*
> > *(b) a request, in Form I in the Annex to the Regulation, to a central body or competent authority, designated by the Member State concerned in accordance with Article 3(3) of the Regulation, to take evidence directly in that Member State.*

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[585] See 7.5, 6.4 *infra*.
[586] Michelle Smith de Bruin, "*Transnational Litigation: Jurisdiction and Procedure*", Thomson Round Hall, 2008, page 270.
[587] The Law Reform Commission Report on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985), page 8.
[588] *Ibid*, page 12.
[589] Order 39, r.11 RSC.

(3) Where an order under this rule is sought by a party, the Court may, before making such an order, require that party to file in the Central Office for consideration by the Court a completed draft of Form A or Form I (as appropriate) in the Annex to the Regulation (including any questions sought to be put to any witness, statement of facts about which any witness is sought to be examined, or documents or objects sought to be inspected by the opposing party), together with a certified translation thereof (where necessary) into the official language referred to in Article 5 of the Regulation, and an undertaking to reimburse without delay any fees or costs referred to in Article 18(2) of the Regulation, and to pay any advance or deposit referred to in Article 18(3) of the Regulation.
(4) Where an order under this rule is made of the Court's own motion, the Court may direct the parties or any of them to reimburse (subject to any order made in that regard by the requested court) any fees or costs referred to in Article 18(2) of the Regulation, and to pay any advance or deposit referred to in Article 18(3) of the Regulation in such shares as it shall direct.
(5) The Court may make such orders and give such directions as seem appropriate for the purposes of Article 12 or Article 17 of the Regulation.
(6) The trial judge may make such order as to fees or costs referred to in Article 18(2) of the Regulation, or as to any costs occasioned by the application of Article 12 or Article 17 of the Regulation as shall seem appropriate, notwithstanding any previous undertaking, order or direction in that regard.
7) An application under rule 5(2) shall, unless the Court otherwise directs or permits, be made by notice of motion grounded upon an affidavit sworn by or on behalf of the applicant."

There is provision for video-conferencing.

Letters of Request
There is also the long-standing Letters of Request procedure pursuant to which foreign courts may compel evidence required in Irish proceedings. Following the coming into force of Council Regulation (EC) 1206 of 2001, this procedure applies to States other than the EU States to which the Regulation applies. This procedure applies to Denmark.

A party seeking to examine a witness in another jurisdiction applies to Court by notice of motion grounded on affidavit.

The procedure where a witness is in a country to which the Regulation does not apply is

(a) the party obtaining such order shall file in the Central Office an undertaking in the Form No. 2 in Appendix D, Part II.
(b) such undertaking shall be accompanied by –
    (i) a request in the Form No. 3 in Appendix D, Part II, with such variations as may be directed in the order for the issue thereof, together with a translation of such request into the language of the country in which the same is to be executed;
    (ii) a copy of the interrogatories (if any) to accompany the request and a translation thereof;

(iii) a copy of the cross-interrogatories (if any) and a translation thereof.

Order 39, r.5A RSC provides for the issue of Letters of Request *in lieu* of Commission, to the competent judicial authority in another State requesting the examination of a witness *viva voce* before them or such other person as according to their procedures is competent to take the examination of witnesses.[590] The Letter of Request is addressed by the Master of the High Court to the competent judicial authority of the foreign state. The letter requests the examination of witnesses *viva voce* according to the procedures of the judicial authority of the foreign state. It requests that representatives of the parties be permitted to attend to examine and cross-examine the witnesses. It requests that the answers to the interrogatories, any questions *viva voce* and all such evidence to be reduced to writing and that all documents produced be duly identified and that the examination is authenticated by seal.

The national judge is not present when the evidence is taken. Evidence is taken according to the procedures of the foreign state. There is no express provision for video-conferencing.

Order 39, r.5A also makes provision, where the Regulation does not apply, for an order for examination of a witness or witnesses before the Irish Consular authority in any foreign country. A difficulty might be that a country is unwilling to permit the taking of evidence by Counsel.[591] The national judge is not present. There is no express provision for video-conferencing.

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[590] *"5A (1) If in any case in which the Regulation does not apply the Court orders that a request to examine witnesses shall issue in lieu of a commission, the forms Nos. 1 and 3 in Appendix D, Part II, shall be used for the order and request, respectively.*
(2) Where an order is made for the issue of a request to examine a witness or witnesses in any foreign country in which the Regulation does not apply, the following procedure shall be adopted:
(a) the party obtaining such order shall file in the Central Office an undertaking in the Form No. 2 in Appendix D, Part II.
(b) such undertaking shall be accompanied by –
(i) a request in the Form No. 3 in Appendix D, Part II, with such variations as may be directed in the order for the issue thereof, together with a translation of such request into the language of the country in which the same is to be executed;
(ii) a copy of the interrogatories (if any) to accompany the request and a translation thereof;
(iii) a copy of the cross-interrogatories (if any) and a translation thereof.
(3) Where, in any case in which the Regulation does not apply, an order is made for the examination of a witness or witnesses before the Irish Consular authority in any foreign country, such order shall be in the Form No. 4 in Appendix D, Part II.
(4) An application for an order under rule 5A(1) shall, unless the Court otherwise directs or permits, be made by notice of motion grounded upon an affidavit sworn by or on behalf of the applicant."

[591] The Law Reform Commission Report on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985), page 12.

Commercial and Competition Law Proceedings
Order 63A, r.23 RSC expressly permits evidence to be taken from witnesses within or outside the State through a live video-link or by any other means in Commercial Court proceedings.[592] Order 63B, r.28 RSC contains an identical provision in respect of Competition Law proceedings. There is a High Court Practice Direction regarding the use of video-conferencing link for taking evidence in civil cases.[593]

Mutual Assistance
There is legislation in respect of criminal proceedings, the Criminal Justice (Mutual Assistance) Act, 2008 pursuant to which a letter requesting evidence in respect of criminal proceedings or investigations may be sought.[594]

10.1.2 Evidence to be Taken in Ireland for Proceedings Abroad

In Ireland evidence for foreign tribunals may be obtained pursuant to:

i. Council Regulation (EC) 1206 of 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters
ii. The Foreign Tribunals Evidence Act, 1856

Ireland has not ratified The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

It appears that in 2012 the courts service provided assistance was o facilitate the hearing of a case in a foreign jurisdiction with evidence given via video before a judge of the District Court. [595] At that time the District Court was designated to take evidence pursuant to a request to which Article 1.1. (a) of Council Regulation 1206/2001 applies.[596]

Council Regulation (EC) 1206 of 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters

Where an EU Court requests an Irish Court to Take Evidence
The European Communities (Evidence in Civil or Commercial Matters) Regulations 2013 (SI 126 of 2013) at Regulation 3 designates the Circuit Court as competent to take evidence pursuant to a request to which Article 1.1. (a) of Council Regulation

[592] Order 63, r.23 provides: "(1) A Judge may allow a witness to give evidence, whether from within or outside the State, through a live video link or by other means.
(2) Evidence given in accordance with sub rule 1 of this rule shall be recorded by video or otherwise as the Judge may direct. The Commercial and Competition Law rules regarding video-link evidence are discussed at 1.5.1, 6.4.19 and 7.5.2 *infra.*
[593] HC45, dated 3 May 2007. See 7.5 *infra*.
[594] See in particular Criminal Justice (Mutual Assistance) Act 2008, sections 62-64.
[595] Courts Service, Annual Report 2012, page 8.
[596] Pursuant to The European Communities (Evidence in Civil or Commercial Matters) Regulations 2008 (SI 102 of 2008) which was revoked by The European Communities (Evidence in Civil or Commercial Matters) Regulations 2013 (SI 126 of 2013).

1206/2001 applies[597], i.e. when the Court of one of the EU Member States (except Denmark) requests an Irish Court to take evidence. The power is exercised by the County Registrar in the appropriate county. There are Circuit Courts throughout Ireland. County registrars perform a number of quasi-judicial functions which are conferred on them by statute – for example holding motions courts and case progression hearings, conducting arbitrations under the Landlord and Tenant (Ground Rents) Acts and the taxation of costs. They are independent in the exercise of these functions and appeals against their decisions are made directly to the circuit court judge. In addition, the county registrar has responsibility for the administration and management of the circuit court offices in each county.

The Circuit Court Rules were amended by Circuit Court Rules (Taking of Evidence for EU Courts), 2013 (SI 302 of 2013) inserting Order 23A. Order 23 A rule 6, *inter alia* empowers the County Registrar to make any order authorising the direct transmission of the evidence given by any witness on the taking of the evidence of such witness to the requesting court by video-conference, teleconference or other means specified in such order, and may make such arrangements as seem appropriate to facilitate such transmission. A County Registrar may make any order authorising the participation in the taking of the evidence of the parties to the proceedings pending before the requesting court and/or the legal representatives of such parties and/or any representatives of the requesting court identified in any such order, on such terms as shall seem appropriate. Where the parties to the proceedings pending before the requesting court and/or their legal representatives will not be present at the taking of the evidence, the County Registrar may request the requesting court to provide copies of any pleadings or other relevant documents submitted to it in connection with the proceedings so as to inform the person regulating the taking of the evidence of the questions or matters at issue between the parties.

Evidence is taken on oath[598] or a special procedure may be requested.[599] Order 23A, rule 7 CCR provides:

> *"Where the requesting court calls for the request to be executed in accordance with a special procedure under Article 10(3) of the Regulation, and the County Registrar is required to comply with that request by virtue of Article 10(3) of the Regulation,*

[597] *3. (1) The Circuit Court shall be competent to take evidence pursuant to a request to which Article 1.1(a) of the Council Regulation applies.*
(2) Subject to Paragraph (3), the power conferred on the Circuit Court by Paragraph (1) shall be exercised by the county registrar for the county or county borough in which the witness from whom evidence is to be taken resides, or carries on any profession, trade, business or other occupation.
(3) Where a request relates to more than one witness and Paragraph (2) would operate to require the taking of evidence from the witnesses concerned by county registrars for different counties or county boroughs, the power conferred on the Circuit Court by Paragraph (1) shall, in relation to the taking of evidence from each of those witnesses, be exercised by such county registrar as may be designated by the Chief Executive of the Courts Service or by such member of staff of the Courts Service as he or she may authorise in that behalf.
[598] Circuit Court Rules, Order 23 A, rule 6.
[599] Circuit Court Rules, Order 23 A, rule 7.

the County Registrar may include in any order for the attendance before him or her of any witness any special directions authorising the examination of such witness in accordance with such procedure."

The County Registrar is empowered to summon witnesses[600] and failure to comply with the summons may be certified by the Circuit Court as contempt of Court.[601] Save as provided for in any special directions and where the parties or legal representatives are present, a witness is examined by the party calling the witness, re-examined by the opposing party and re-examined by the party calling the witness.[602] The County Registrar may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of the examination, but the County Registrar shall not have power to decide upon the materiality or relevance of any question.[603] Order 23A, rule 10 CCR is concerned with the situation where a witness claims a right not to give any evidence, or being sworn a right not to answer any question or to be prohibited from giving any evidence. Order 23 A, rule 10 (2) & (3) provide:

"*(2) Where the witness claims that he or she has a right under the law of the requesting state not to give any evidence or, being sworn, claims a right not to answer any question or to be prohibited from giving any evidence or answering any question, the County Registrar may request the requesting court to confirm the existence of the right claimed under its law and/or direct that the claim be recorded in the record of the taking of the evidence.*

(3) The County Registrar may seek the direction of the Court on any issue arising on the taking of the evidence and the Court may, for that purpose, direct that any person or persons be put on notice by the County Registrar of any hearing before the Court."

Where an EU Court wishes to take evidence directly in Ireland

The European Communities (Evidence in Civil or Commercial Matters) Regulations 2013 (SI 126 of 2013) at Regulation 4 designates the Courts Service as the central body for the purposes of Articles 3 and 17. Evidence may only be taken in this way if it is obtained on a voluntary basis.[604] Information has been provided on the judicial atlas in respect of Council Regulation (EC) 1206 of 2001 in Ireland under the heading using video-conferencing.[605] According to this information, video-conferencing and recording of the video-conferencing is possible and a member of the Courts Service personnel will be present. There are facilities for oath-taking and interpretation.

[600] Circuit Court Rules, Order 23 A, rule 8.
[601] Circuit Court Rules, Order 23 A, rule 12.
[602] Circuit Court Rules, Order 23 A, rule 9(1).
[603] Circuit Court Rules, Order 23 A, rule 9(2).
[604] Article 17(2) of Council Regulation (EC) 1206 of 2001.
[605] http://ec.europa.eu/justice_home/judicialatlascivil/html/te_centralbody_en.htm (accessed on 15 August 2014).

Requests from Courts in Denmark and Outside the EU
The Foreign Tribunals Evidence Act, 1856

For courts in countries not governed by the EU Regulation a request for witness testimony, may be made pursuant to the Foreign Tribunals Evidence Act, 1856.[606] Section 1 permits courts or tribunals in foreign jurisdictions before which civil or commercial matters are pending to request Irish courts to take evidence on examination on oath or upon interrogatories or otherwise.[607] Section 1 permits witnesses to be summoned and to be summoned to produce documents. The procedure for seeking an Order to procure the taking of such evidence is set out in Order 39, rule 39 RSC. Order 39, r.39 RSC provides that an *ex parte* application for witness testimony may be made by a person authorised to make the application on behalf of the foreign court where the proceedings are pending. Where it appears to the Irish court by commission rogatoire, or letter of request or other evidence that the foreign court is desirous of obtaining testimony from a witness or witnesses within the jurisdiction, the Court may make an order in conformity with Section 1 of the Foreign Tribunals Evidence Act. Section 2 of the 1856 Act sets out the type of evidence which may satisfy the Court in order to secure a court order for witness testimony to assist a foreign court or tribunal.[608] The evidence may be taken before any fit and proper person nominated by the person applying, or before one of the officers of the Court, or such other qualified person, as to the Court may seem fit.[609] Unless otherwise provided in the order for examination, the person taking the examination will forward it to the Master who certifies it for use

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[606] Section 1 provides: *"Where, upon an Application for this Purpose, it is made to appear to any Court or Judge having Authority under this Act that any Court or Tribunal of competent Jurisdiction in a Foreign Country, before which any Civil or Commercial Matter is pending, is desirous of obtaining the Testimony in relation to such Matter of any Witness or Witnesses within the Jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the Examination upon Oath, upon Interrogatories or otherwise, before any Person or Persons named in such Order, of such Witness or Witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same Order, or for such Court or Judge or any other Judge having Authority under this Act, by any subsequent Order, to command the Attendance of any Person to be named in such Order, for the Purpose of being examined, or the Production of any Writings or other Documents to be mentioned in such Order, and to give all such Directions as to the Time, Place, and Manner of such Examination, and all other Matters connected therewith, as may appear reasonable and just; and any such Order may be enforced in like Manner as an Order made by such Court or Judge in a Cause depending in such Court or before such Judge."*

[607] See also Order 39, r.43 RSC.

[608] Section 2 provides: *"A Certificate under the Hand of the Ambassador, Minister, or other Diplomatic Agent of any Foreign Power, received as such by Her Majesty, or in case there be no such Diplomatic Agent, then of the Consul General or Consul of any such Foreign Power at London, received and admitted as such by Her Majesty, that any Matter in relation to which an Application is made under this Act is a Civil or Commercial Matter pending before a Court or Tribunal in the Country of which he is the Diplomatic Agent or Consul having Jurisdiction in the Matter so pending, and that such Court or Tribunal is desirous of obtaining the Testimony of the Witness or Witnesses to whom the Application relates, shall be Evidence of the Matters so certified; but where no such Certificate is produced other Evidence to that Effect shall be admissible."*

[609] Section 1 of the 1856 Act and Order 39, r.41 RSC.

outside the jurisdiction and then forwards it to the Minister for Foreign Affairs for transmission to the foreign court or tribunal.[610]

There is no express provision for teleconferencing or video-conferencing. Order 39 rule 43 RSC provides:

> *"An order made under rule 39 may direct the said examination to be taken in such manner as may be requested by the commission rogatoire or letter of request from the foreign court or tribunal, or therein signified to be in accordance with the practice or requirements of such court or tribunal, or which may, for the same reason, be requested by the applicant for such order. In the absence of any such special directions being given in the order for examination, the same shall be taken in the manner prescribed in Part II of this Order."*

Part II of Order 39 sets out the rules of evidence which apply in Irish courts such as for example the taking of evidence on oath.[611] Rule 43 appears to permit of a request by the foreign court or tribunal to take evidence in a different manner and that this may be permitted by the Irish Court. Perhaps this rule is wide enough to encompass an Irish court permitting evidence by teleconferencing or video-conferencing?

Irish courts have an inherent jurisdiction to set aside *ex parte* orders on application by a person affected by the order.[612] Smith de Bruin considers that the Irish courts tend to be cautious of requests for evidence straying into the realm of discovery.[613] In this regard she cites the High Court decision in *Re Valuejet Airlines*, High Court, Unreported, McCracken J., 1 July 1999 where the High Court set aside an ex parte order for production of documents by a person who had custody of the documents but no knowledge as to their truth or accuracy.

The Law Reform Commission considers that the 1856 legislation does not permit evidence to be obtained on behalf of a foreign court or tribunal "where proceedings have not commenced but are merely contemplated or where the evidence sought consists of unsworn testimony, the inspection or examination of property or the medical examination of persons none of which are provided for in the existing legislation."[614]

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[610] Order 39, r.42 RSC.
[611] Order 39, r.4 RSC.
[612] *In the Matter of the Foreign Tribunals Evidence Act, 1856 and in a civil matter now a District Court in the United States for Tarrant County, Texas, 141st Judicial District; Voluntary Purchasing Groups Inc v. Insurco International Ltd and Agrichem Ltd.* [1995] 2 ILRM 145.
[613] Smith de Bruin, *Transnational Litigation: Jurisdiction and Procedure*, page 271.
[614] The Law Reform Commission Report on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985), page 19.

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