Taking of evidence

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1 The burden of proof

To have a right recognised before a court, evidence must be provided of the facts being alleged. This involves recourse to a procedural activity, the steps and timing of which are regulated.

The parties taking part in the proceedings must prove the facts that they are alleging and on which their claims are based. Therefore, the plaintiff must provide evidence of the facts in his or her application, while the defendant must be able to prove facts preventing, cancelling or weakening the legal effectiveness of the facts in the application.

The party with the burden of proof suffers the prejudicial consequences of a lack of proof. Thus, if when it comes to issuing the judgment or similar decision, the party has not proven the facts he or she is alleging, the court will dismiss the claims. In order to attribute lack of proof of a certain fact to either party, the court will take into account the ease with which each party can prove that fact.

It is essential for all persons wishing to resort to the courts to analyse beforehand their chances of being able to prove what they are alleging in order to avoid wasting time and money (legal costs) if they are unable to do so. To this end, it is necessary to have some knowledge, even if very general and basic, of the rules governing the evidential stage of proceedings.

1.1 What are the rules concerning the burden of proof?

The evidential stage in Spanish law is regulated by Chapters V and VI of Title I, Volume II (Articles 281 to 386) of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) (Law 1/2000 of 7 January 2000). The Code of Civil Procedure contains general comments on evidence in Section XI of the introduction (technically known as the preamble) which may be of interest to anyone wishing to find out how the Spanish legislator views the evidential stage of proceedings.

Some proceedings have special rules on the taking of evidence which alter the general rules, such as proceedings involving minors or families. Evidence can also be taken in the Court of Second Instance (*Juzgado de Segunda Instancia*). This is normally evidence that could not be taken in the Court of First Instance (*Juzgado de Primera Instancia*) for reasons that are not attributable to the applicant.

1.2 Are there rules which exempt certain facts from the burden of proof? In which cases? Is it possible to produce evidence in order to prove that a specific legal presumption is not valid?

Traditionally, a distinction has been made at the theoretical level between proof of facts and proof of law, although in reality the law is not a matter to be proved since it must be known by the judge. An exception is foreign law, which may need to be proved. Proof of foreign law is regulated by the Law on international legal cooperation in civil matters (*Ley de cooperación jurídica internacional en materia civil*), according to which the judge may request reports on a foreign law matter, normally through the Spanish central authority. If foreign law is not proven, Spanish law may be applied, although the judge will make use of this power only under exceptional circumstances.

It is not necessary to prove facts that are completely and generally known or facts on which the parties are agreed, except in cases in which the subject matter of the proceedings is beyond the control of the parties; in other words, proceedings on the legal capacity of persons, parentage, marriage and minors. The presumptions laid down by the law exempt the party benefiting from the presumption from providing proof of the presumed fact. In the case of such presumptions, evidence to the contrary is admitted unless expressly prohibited by law. Presumptions laid down by the law include the joint ownership of property and money acquired by either or both spouses after marriage, except where it can be proven that they belong exclusively to either one of the spouses, the presumption that spouses live together, and the presumption that a missing person was alive until the time when his or her death was declared. As a general rule, the defending party's lack of a response to the application and failure to appear do not exempt the applicant from the burden of proving the facts that support his or her claims. However, there are exceptions where a lack of objections from the defendant results in the judge issuing a judgment supporting the claims of the plaintiff. This is the case, for example, in small claims proceedings and in proceedings for eviction due to non-payment.

1.3 To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?

The facts alleged by the parties in their statements of claim and defence must be proven, and the court must carry out its evaluation on the basis of the circumstances of the case, bearing in mind all of the evidence taken and its nature (for instance, a public document does not have the same value as a statement by one of the parties). The evaluation of the evidence and the reasons why the judge reaches certain conclusions must be set down in the judgment. In addition to direct evidence, there is also indirect evidence, which means that once a fact has been admitted or fully proven, the court may presume that another fact is true provided that there is a precise and direct link between the two facts. The court must set down in the decision the reasoning which led it from the proven fact to the presumed fact.

2 The taking of evidence

2.1 Does the taking of evidence always require the application by a party, or can the judge in certain cases also take evidence on his/her own initiative?

According to the principle that the court must rule only on the issues submitted to it (*principio dispositvo*) which governs civil proceedings, the parties must propose to the court the evidence they intend to put forward during the proceedings. However, the court may decide on its own motion that certain evidence can only be taken in the cases laid down by the law. Thus, during the preliminary hearing in ordinary civil proceedings, if the judge considers that the evidence proposed by the parties is insufficient to clarify the disputed facts, he or she may inform the parties of the fact which could be affected by the insufficiency of the evidence, and also indicate the evidence the parties may propose.

In proceedings concerning the legal capacity of persons, parentage, marriage and minors, the judge may, regardless of the evidence that the parties or the prosecution service request, take whatever evidence he or she deems necessary to decide the proceedings depending on the type of proceedings in question.

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

In oral proceedings (claims up to €6 000), following the proposal and admission of evidence during the hearing, the judge proceeds to take evidence in the actual proceedings.

In ordinary proceedings (claims exceeding €6 000), following the admission of evidence in the preliminary hearing (in which procedural issues are also settled), a date is set for the proceedings and the taking of evidence is postponed until then. The parties are summonsed to make statements, the witnesses that the parties themselves were unable to bring to court are summonsed, experts are summonsed when the parties wish to obtain clarification or explanations concerning the opinions expressed, and institutions holding documents that the parties were unable to enclose with the claim and defence are approached, provided that the parties have indicated the archives where the documents are located. Any evidence that does not need to be taken during the proceedings (such as visits to certain places) is taken prior to the proceedings. In the event that the only evidence admitted in the preliminary hearing is documents, and they have not been challenged, or when an expert's report is produced and no party has asked for the presence of the expert in the preliminary hearing, the court will issue a judgment following the preliminary hearing, without having to set a date for proceedings.

The general rule is that evidence is taken by the same judge or court hearing the case, even when the witness does not reside in the district and must travel to the seat of the court on the day summonsed (although with the right to claim the corresponding compensation from the party who proposed him or her as established by the court clerk and without prejudice to the subsequent right of that party to claim it from the other party if he or she wins legal costs). Only in exceptional cases, such as the considerable distance involved, can judicial assistance be requested in order to receive the statement in the court of the place of residence of the witness. In this case, a letter of request is addressed to the other court (at the national level) or a mechanism set up by the rules on international judicial cooperation is used, depending on where the statement is to be received. In the latter case, the parties must hand over the questions to be asked in writing. Videoconferencing is being increasingly used and in such cases, it is not necessary to formulate questions in advance. It is enough to request a videoconference from the court of the place where it is to be carried out.

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

Evidence of indisputable facts or evidence that is not relevant to the subject of the proceedings will not be admitted, nor evidence that, according to reasonable and certain rules and criteria, will not contribute to clarifying the disputed facts. In no case will the court admit any evidence which is obtained illegally, which is contrary to fundamental rights or which seeks the court's assistance to obtain documents available to the parties.

In general, the evidence must be proposed in the oral proceedings or in the preliminary hearing. Evidence proposed out of time will not be admitted.

In proceedings involving legal capacity, family and minors, new facts may be introduced after the claim and defence, and particularly in the Court of Second Instance when an appeal is lodged against the judgment or the appeal is contested. New evidence may be proposed in such cases, provided that the period for issuing the judgment has not commenced. In other proceedings, when the period for submitting arguments has ended and a significant new fact arises, the parties may make it known to the court in writing and also request the taking of evidence if the other party does not recognise the fact as true.

2.4 What different means of proof are there?

The means of proof that may be used in proceedings are: examination of the parties; public documents; private documents; expert opinions; judicial examination; examination of witnesses; and means of reproduction of words, sounds and images, as well as instruments that permit the storage, retrieval and reproduction of words, data, figures and mathematical operations carried out for accounting purposes or other purposes that are relevant to the proceedings.

2.5 What are the methods of obtaining evidence from witnesses and do these differ from the means employed to obtain evidence from expert witnesses? What are the rules in relation to the submission of written evidence and expert reports/opinions?

WITNESS TESTIMONY: there is no need to mention witnesses in the claim or defence, since in oral proceedings, each party must appear on the date indicated for the hearing with the persons who are to testify in the proceedings. The parties must ask the court to summons the witnesses they were unable to bring themselves, ordering them to appear within the three days following receipt of the summons. In ordinary proceedings, witnesses are identified at the preliminary hearing, when in addition to procedural issues, the disputed facts of the case are determined and the evidence relating to them proposed and admitted.

Witness testimony is always oral and is taken on the day of the proceedings (as are the clarifications deemed necessary to be requested from experts). However, there is one exception to this rule of hearing witnesses: when it is necessary for legal persons or public entities to provide information on the significant facts of the proceedings, but it is not necessary to hear natural persons individually. In this case, instead of an oral statement, a list of questions which the parties wish to have answered and which the judge deems pertinent is submitted to the entity. The reply is made in writing.

EXPERT TESTIMONY: expert opinions are always given in writing. After having submitted them and read those of the other side, the parties must decide whether or not it is necessary for the expert to come to the proceedings to provide any clarifications or explanations that might be necessary.

If the parties wish to make use of expert testimony, the expert opinion on which their claims are based must be submitted with the claim or defence, except where this is not possible, in which case, they must indicate the opinions they intend to use. Furthermore, they must produce the opinions as soon as they are available, and in any case, five days before the preliminary hearing starts in ordinary proceedings, or five days before the hearing in oral proceedings. Notwithstanding this, the parties may ask that a court expert be appointed when submitting the claim or defence, in which case, the opinion is issued subsequently (usually in the period between the preliminary hearing and the proceedings, but sufficiently in advance so that the parties can study it before the hearing).

An intermediate figure between the witness and the expert is the expert witness, which is a witness that is capable of providing information on technical issues related to the proceedings. Normally, expert witnesses are authors of reports submitted with the claim or with the defence as documentary evidence, and not as expert testimony.

2.6 Are certain methods of proof stronger than others?

Yes. Public documents provide full proof of the fact, act or state of affairs they are describing, as well as the date on which the documentation was produced and the identity of the notaries and persons involved in producing it. If the authenticity of a public document is challenged, it is verified and compared with the original, wherever it may be. Notwithstanding this, the following provide full legal proof without any need to verify or compare, except if there is evidence to the contrary or a comparison of handwriting, where possible: old public documents which do not have a notary's protocol and any public document for which the original is missing or for which there is no record for the purpose of checking or comparing.

Private documents also provide full proof in proceedings when they are not challenged by the party for whom they are prejudicial. If a private document is challenged, the party who produced it can ask for a comparison of handwriting or any other means of proof that would verify its authenticity. If it is not

possible to prove the authenticity of the private document, it will be evaluated in accordance with the rules of sound criticism, which are also followed when evaluating the rest of the evidence being taken. If, following a challenge, it turns out that the document is authentic, the party who challenged it may be ordered to pay not only the costs involved, but also a fine.

Lastly, if the rest of the evidence does not demonstrate otherwise, the judgment will consider as true any facts that a party has recognised as such in the parties' statements if that party personally took part in them and their establishment as true is entirely prejudicial to him or her.

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

In principle, there is no rule indicating which evidence must be used to prove certain facts, but it is logical that, for instance, in the case of a claim for an amount of money arising from commercial relations between the parties, the existence or settlement of the debt will basically be determined by means of documentary evidence. Expert testimony will be required when scientific, artistic, technical or practical knowledge is needed to evaluate the facts or circumstances that are relevant to the matter or to gain greater certainty about them.

2.8 Are witnesses obliged by law to testify?

Witnesses who are summonsed are obliged to appear at the proceedings or hearing indicated. Should they fail to do so, they are liable for a fine of €180 to €600, subject to a five-day period during which they may be heard. If the witness does not appear when summonsed for the second time, the sanction is no longer simply a fine: the witness is then in contempt of court, something which witnesses are warned about at the outset.

2.9 In which cases can they refuse to give evidence?

The general principle that obliges witnesses to testify does not apply to witnesses who, because of their status or profession, have a duty to keep secret the facts they are being questioned about, in which case they must state this, giving reasons, and the court, taking into account the grounds for the refusal to testify, will decide what should happen as regards their examination, and may release them from the obligation of replying. If the witness is released from replying, this must be recorded.

If it is alleged by the witness that the facts on which he or she is being questioned relate to a matter that has been legally declared or classified as confidential, the court will, in the cases in which it considers this necessary in the interests of administering justice, ask the competent body on its own motion for an official document confirming this. Once the court has checked that the allegation of confidentiality is correct, it will order that the document be placed in the records, including the questions covered by official secrecy.

Moreover, before their statements, witnesses must be questioned by the court regarding their personal circumstances (family ties or friendship with or enmity towards the parties, personal interest in the matter, etc.), and in the light of their answers, the parties may submit comments to the court on their impartiality.

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

Witnesses are obliged to appear if summonsed by the court and they are obliged to take an oath or pledge to tell the truth, being warned of the sanctions laid down for the crime of perjury in civil proceedings. Witnesses are obliged to testify in the manner laid down in Article 366 of the Code of Civil Procedure. If a witness refuses to testify, he or she could be in contempt of court, which is subject to a fine, or, depending on its seriousness, the refusal could potentially constitute a crime.

2.11 Are there persons from whom evidence cannot be obtained?

Anyone may be a witness, except for those permanently deprived of reason or of the use of their senses (sight, hearing, etc.) with respect to facts which they could only know about by using these senses.

Minors under the age of fourteen may act as witnesses if, in the opinion of the court, they have the necessary level of maturity to know and to speak the truth.

Under Spanish law, the traditional concept of witness refers to natural persons, but this does not prevent legal representatives of legal persons from appearing as witnesses to provide information on facts with which they are familiar because of their position. In the case of legal persons and public entities, the possibility of informing the court in writing is expressly provided for, as already mentioned (Article 381 of the Code of Civil Procedure).

2.12 What is the role of the judge and the parties in the hearing of a witness? Under what conditions can a witness be heard via videoconferencing or other technical means?

The questions that have been admitted by the court are put directly by the parties' lawyers, starting with the party that proposed the witness. Once the questions put by the lawyer of the party who proposed the witness testimony have been answered, the lawyers of any of the other parties may ask the witness any new questions they consider useful to clarify the facts. The judge may also question the witness to obtain clarifications and additional information.

On its own motion or at the request of any of the parties, the court may allow a witness who has made a statement that seriously contradicts that of another witness or of any of the parties previously examined to be confronted with that witness or party.

The witness may be examined by videoconference if requested and if the court agrees. This will be the case when the statement via videoconference is the most appropriate and proportionate way to take evidence given the circumstances involved (basically, considerable distance between the residence of the witness and the seat of the court), always ensuring the adversarial system and the right of defence of the parties.

3 The evaluation of the evidence

This is the activity by which the judge determines the efficacy of the evidence taken overall, following the rules of sound criticism. However, as indicated above, there are some types of evidence whose evaluation is established by the law; for example, with regard to public and private documents and the examination of the parties, in some cases.

3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?

Evidence that has been obtained illegally cannot be admitted. Moreover, evidence obtained directly or indirectly by violating fundamental rights or freedoms has no effect. Such evidence will therefore be ignored by the court when deciding the case.

If one of the parties believes that fundamental rights were infringed in obtaining or discovering any evidence that has been admitted, he or she must state this immediately, notifying the other parties where appropriate. The judge will then decide on the legality of this evidence.

If the judge him- or herself believes that a fundamental right has been infringed when obtaining evidence, he or she will dismiss the evidence ex officio.

This matter, which may also be raised by the court of its own motion, will be settled in the proceedings or, in the case of oral proceedings, at the beginning of the hearing, before starting to take the evidence.

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

If a party is called to testify by the other party, the evaluation of his or her statement will depend on the content of the answers given. Thus, if the rest of the evidence does not demonstrate otherwise, the judgment will consider as true any facts that a party has recognised as such if that party personally took part in them and their establishment as true is entirely prejudicial to them. In all other regards, the court will evaluate the content of the statement according to the rules of sound criticism.

Likewise, the court may accept as true personal facts about the parties if they do not appear to testify or, having appeared, refuse to testify or provide evasive answers, provided that they are facts in which the party being examined has personally taken part and their establishment as true would be fully or partially prejudicial to them. In addition, any party who does not appear is liable to a fine of between €180 and €600.

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