

Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009

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Introduction

Until 2011, the principal law governing evidence which can be admitted in civil proceedings in Guernsey was almost a century and a half old. Surprisingly, the Loi Relative aux Preuves, 1865 (the “1865 Law”), despite its antiquity, is relatively flexible to allow the Guernsey courts to develop well respected and comprehensive provisions as to the admissibility of evidence in civil proceedings.

However, Guernsey (and Alderney) focussed on the development and drafting of an additional law and supporting rules aimed at bringing the Guernsey law on evidence more closely comparable with the law of England and Wales and to cater for the needs of modern day civil litigation. As a result of years of consultation, the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 (the “Law”) and the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011 (the “Rules”) came into force on 28 April 2011 by Ordinance of the States of Guernsey. The Law and Rules do not apply in Sark.

In accordance with the transitional provisions contained in the Law, the Law applies to cases already before the Court at the time of the commencement of the Law, save for those already at the trial stage in the proceedings. Having said this, an interesting judgment has just been released by the Guernsey Royal Court in which has granted the postponement of a pending trial in which hearsay evidence would have a significant impact until such time as the Law is in force.

What does the Law cover?

The Law develops the provisions of Guernsey law which deal with the admissibility of evidence in civil proceedings in Guernsey and Alderney and focuses primarily on the admission of hearsay evidence, and privilege, but also deals with key forms of evidence such as expert evidence and

the admissibility of evidence as to foreign law.

The Law does not repeal and replace the entire 1865 Law, or even the majority of it, but the Law does repeal and amend certain sections as regards the admission of hearsay evidence and the admission of evidence by a wife or husband as to conversations during the marriage. In addition, the Interpretation (Guernsey) Law, 1948 continues to apply to the interpretation of the Law as it does to the 1865 Law.

| So why is it important?

Whilst the Law does not entirely repeal the previous law governing the admissibility of evidence in civil proceedings, it codifies areas of Guernsey civil litigation procedure that have long required clarification and consistency and most importantly, deals with the modern day issues that have arisen over the decades in respect of civil evidence.

| Is new always better?

However, despite the introduction of this new, modern Law, that is not to say that the Guernsey Courts are turning their backs on tradition and customary law. Far from it. The Law provides that evidence formerly admissible under customary law shall continue to be admissible and particularly refers to statements regarding admissions adverse to a party to the proceedings, published words dealing with matters of a public nature, public documents, records, i.e. Court records and reputation or family tradition (for the purpose of establishing good or bad character or proving or disproving the existence of a marriage or of any public or general right or identifying any person or thing).

| So what is new?

Whilst customary law will always have a place in Guernsey legislation, and whilst the 1865 Law continues to be one of the principal laws governing this area of Guernsey litigation procedure, the Law does provide for a number of important points, primarily in respect of hearsay evidence, but also in respect of other forms of evidence and proof, each of which are discussed in more details below.

| Say what? Hearsay!

The 1865 Law provided that “les oui-dires ne sont pas recevables en preuve excepté dans les cas spéciaux reconnus par la loi” which means “hearsay is not admissible in evidence except in special cases recognised by the law.” This principle included the inadmissibility of written witness statements as evidence-in-chief. Witnesses actually had to come to Court in non-interlocutory matters to orally provide evidence-in-chief.

The Law now provides that hearsay evidence is admissible where provided by a competent witness, which is likely to be the case in most circumstances. Where a witness is incompetent (defined as “suffering from such mental or physical infirmity, or lack of understanding, as would render a person incompetent as a witness in civil proceedings”), hearsay is not be admissible. The admissibility of hearsay is therefore far wider than previously, when hearsay evidence was only admissible in certain very limited circumstances (for example, where the witness was gravely ill and needed to give evidence prior to his death). Hearsay evidence is defined as “a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated” and includes hearsay of whatever degree. Hearsay can therefore be as simple as Mark saying that Jane said something or more complicated such as Mark saying that Jane heard Tony say something that Christopher said (i.e. multiple hearsay).

The admissibility of hearsay evidence is not, of course, straightforward, given the potential for abuse of such ‘grapevine’ evidence. In order for a party to be able to rely on hearsay evidence, that party must give notice of such fact to the other parties in the proceedings and if requested, must give such particulars as to the hearsay evidence to be relied on as is reasonable and practicable, although parties can agree to waive the requirement for notice to be given.

Hearsay evidence is admissible unless the parties agree to exclude evidence, or the Court regards it as inadmissible.

It is envisaged that in the majority of trials, a party will usually call as a witness the individual whose hearsay evidence was adduced to the Court as Evidence in Chief. However, if for any reason they are not called by that party, the other parties may, with leave of the Court, call that person as a witness and cross-examine them on the statement. Parties should therefore be very careful to adduce hearsay evidence to ensure that it is sufficiently strong to withstand intense cross-examination from the opposition.

| Can I take your word for it?

The Guernsey Courts will need to ask themselves a number of questions before allowing any hearsay evidence to be admitted. First, the Guernsey Courts will need to decide whether the witness is competent in that they do not suffer from a mental or physical infirmity or be lacking in capacity. The question of competency may not always be clear, for example, subject to the relevant provisions of the Administration of Justice (Bailiwick of Guernsey) Law, 1991, children can be deemed competent to be witnesses in civil proceedings in certain circumstances, which is not the case in all countries.

Once the Court has deemed a witness competent, the Court will weigh up the hearsay evidence against a number of factors regarding the individual giving the evidence including their

motivations, the manner in which the hearsay evidence was obtained, whether the evidence involves multiple hearsay and when the hearsay statement was actually made. The Court is unlikely to attach as much importance to hearsay evidence as first hand evidence.

If you haven't got anything nice to say, don't say anything at all - or can I?

Whilst a witness may technically be competent, a witness can refuse to answer any question or produce any documentation which may self-incriminate themselves or their spouse as regards any criminal proceedings. However, in respect of civil proceedings, a witness can now be compelled to answer questions or produce documents which may expose them to a forfeiture (although they cannot in respect of criminal proceedings) or produce documents which relate solely to their own case and in no way impeach or support the other opposing party's case.

Further, the Law now provides that other potentially 'sticky' forms of evidence can be adduced, such as evidence which refers to the witness' convictions (in a number of circumstances including in actions for libel or slander), adultery (in matrimonial proceedings) and paternity (in relevant proceedings).

You know better than I do

In line with the aim to modernise the antiquated Guernsey law on evidence, the Law and Rules now specifically set out provisions regarding the admissibility of expert opinions and certain non-expert opinions and evidence as to foreign law. For the first time, Guernsey has rules regarding the manner in which experts should give evidence and their overriding duty to the Court, with which English lawyers reading CPR Part 35 will be familiar. These provisions are more and more relevant in the fast developing area of commercial litigation and provide the Guernsey Courts with useful tools to assist them in the conduct of complex civil and commercial litigation for which the Guernsey Courts have gained a respected international reputation.

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The 1865 Law did not entirely address the issue of what can actually be adduced to prove a statement. The Law provides in greater detail the manner in which statements can be proven and includes the production of documents to support any statements made, records (of whatever form) of business or public authority and Ogden Tables (actuarial tables for use in personal injury and fatal accident cases). This clarification will again assist the Court in complex civil proceedings which have developed over the past few decades.

Conclusion

The Courts of Guernsey are primarily concerned with exercising their powers in such a way as to ensure that the interests of justice are met. It is anticipated that the Courts will pay particular attention to the reliance on hearsay evidence, and ultimately such new rules can only serve to benefit the Courts, advocates and all parties to civil proceedings in Guernsey.

The Law is a welcome development in the procedural framework of Guernsey civil litigation and, together with Guernsey's modern Royal Court Civil Rules, 2007, is a clear demonstration of Guernsey's commitment to provide a modern and pragmatic system which will allow large, complex, commercial matters to be dealt with efficiently and competently.

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