

**18:**

**CIVIL:  
EVIDENCE**



# 1 Introduction

Evidence refers to the information used to prove or disprove the facts in issue in a hearing.

Generally, most of the rules of evidence that apply to criminal cases apply to civil cases as well. The difference between criminal and civil cases is the burden of proof. In civil cases, the evidential burden is on the claimant to prove the case and the evidence on the balance of probabilities. This means you must find it is more probable than not that a contested fact exists.

This chapter deals with issues relating to evidence in civil hearings. For more information on the rules of evidence, see Chapter 7 Criminal: Evidence.

## 2 Summoning Witnesses

In most civil cases, witnesses will attend Court voluntarily. However, you may order that a summons be issued requiring a person to attend Court to give evidence or to produce documents: *Rule 11.15(1) Civil Procedure Rules*.

### 2.1 Making the Summons

You may make the order at a conference:

- at a party's request; or
- on your own initiative: *Rule 11.15(3) Civil Procedure Rules*.

The summons must:

- give the full name of the witness;
- clearly identify the documents to be produced;
- state the time and place the witness is to attend Court; and
- be in Form 20: *Rule 11.15(4) Civil Procedure Rules*.

### 2.2 Service

The summons must be served personally on the person, unless you order otherwise: *Rule 11.16 Civil Procedure Rules*.

At the time of service, the person must be given enough money to meet the reasonable costs of travelling to comply with the order: *Rule 11.17(1) Civil Procedure Rules*.

If the summons is not served personally, the person must be reimbursed the reasonable costs of travelling when he or she attends Court in answer to the summons: *Rule 11.17(2) Civil Procedure Rules*.

A person not summoned to attend must also be reimbursed the reasonable costs of travelling when he or she attends Court as if he or she had been summoned: *Rule 11.17(3) Civil Procedure Rules*.

### **2.3 Summons to Produce Documents**

A person who is summoned to produce documents may do so by giving the documents to the Court office at the place stated in the summons: *Rule 11.18(1) Civil Procedure Rules*.

For the purposes of the *Rules*, “document” includes any object: *Rule 11.1 Civil Procedure Rules*.

The Court officer must then give the person a receipt for the documents: *Rule 11.18(2) Civil Procedure Rules*.

If the person summoned to produce documents is not a party to the proceeding, he or she is entitled to be paid or reimbursed the reasonable costs of producing the documents: *Rule 11.18(3) Civil Procedure Rules*.

### **2.4 Failure to Comply with Summons**

A person who fails to attend Court when summoned, or fails to give evidence, or produce documents without a lawful excuse may be found in contempt of Court: *Rule 11.19 Civil Procedure Rules*.

## **3 Oral Evidence**

Normally, evidence in the Magistrate’s Court is given orally: *Rule 11.2(1) Civil Procedure Rules*.

However, you may order that evidence in a particular case, or particular evidence be given by sworn statement: *Rule 11.2(2) Civil Procedure Rules*.

### **3.1 Evidence on Oath**

Oral evidence can be given under oath or affirmation: *Evidence Act 1893 (UK)*, *Civil Evidence Act 1968 (UK)*.

### **3.2 Giving Evidence Before Trial**

A party may apply to have a witness give evidence before trial: *Rule 11.9(1) Civil Procedure Rules*.

You may order the witness give evidence before trial, if you are satisfied that:

- the evidence the witness will give is relevant to the person's case;
- the witness' evidence is admissible; and
- the witness will be unable to give evidence at trial because of health or because he or she is leaving Vanuatu either permanently or for an extended period of time: *Rule 11.9(2) Civil Procedure Rules*.

#### **Giving Evidence Before Trial**

The witness must give his or her evidence to the Court, in the presence of lawyers for each party, if any; and may be cross-examined and re-examined: *Rule 11.9(3) Civil Procedure Rules*.

Any evidence given before trial has the same value as evidence given during trial: *Rule 11.9(4) Civil Procedure Rules*.

## **4 Sworn Statements**

### **4.1 Content of Sworn Statement**

A sworn statement may only contain:

- material required to prove a party's case, and references to documents in support of that material; and
- material required to rebut the other party's case and references to documents in support of that material: *Rule 11.4(1) Civil Procedure Rules*.

A sworn statement must not contain material or refer to documents that would not be admitted in evidence: *Rule 11.4(2) Civil Procedure Rules*.

## **4.2 Attachments and Exhibits**

Documents referred to in a sworn statement must be attached to the statement and identified by the initials of the person making the statement and numbered in sequence: *Rule 11.5(2) Civil Procedure Rules.*

After disclosure, a document may only be attached to a sworn statement if the document has been disclosed: *Rule 11.5(1) Civil Procedure Rules.*

A sworn statement may refer to an exhibit. It must state where the exhibit may be inspected: *Rules 11.4(3) ,(4) Civil Procedure Rules.*

The party making the sworn statement must ensure the exhibit is available at reasonable times for inspection by the other parties: *Rule 11.5(5) Civil Procedure Rules.*

If a person makes more than one sworn statement, the numbering of attachments and exhibits must follow from the previous statement: *Rule 11.5(6) Civil Procedure Rules.*

## **4.3 Service of Sworn Statement**

A sworn statement must be filed and served on all parties:

- within the time you fix, if you fix a time;
- a minimum of 21 days before trial for a sworn statement being used at trial; or
- a minimum of 3 days before the application is to be heard for a sworn statement being used for an application: *Rule 11.6 Civil Procedure Rules.*

## **4.4 Using Sworn Statement in Proceeding**

A sworn statement filed and served is evidence in the proceeding unless you rule it inadmissible: *Rule 11.7(1) Civil Procedure Rules.*

The sworn statement need not be read during trial, unless you order otherwise: *Rule 11.7(2) Civil Procedure Rules.*

A witness making a sworn statement may be cross-examined and re-examined on the contents of the statement: *Rule 11.7(3) Civil Procedure Rules.*

A party wishing to cross-examine a witness on his or her sworn statement must give the other party notice, a minimum of 14 days before the trial or within another period you order: *Rule 11.7(4) Civil Procedure Rules.*

## **5 Taking Evidence in Special Ways**

### **5.1 Taking Evidence of Children**

If a child must give evidence, you must take whatever steps are necessary to enable the child to give evidence without intimidation, restraint or influence: *Rule 11.10(1) Civil Procedure Rules*.

You may:

- allow the child to give evidence while screened from the rest of the Court, and just facing you;
- choose to hear the evidence somewhere other than the Court room;
- allow only the parties' lawyers to be present while the child gives evidence;
- appoint a person to sit with the child while he or she gives evidence; and
- do anything else that may assist the child to give evidence: *Rule 11.10(2) Civil Procedure Rules*.

### **5.2 Taking Evidence of Vulnerable Person**

If you are satisfied that a witness other than a child may be unable to give evidence without intimidation, restraint or influence you may take any steps allowed as for taking the evidence of children for the witness: *Rule 11.11 Civil Procedure Rules*.

See paragraph 5.1, Taking Evidence of Children, above.

### **5.3 Taking Evidence by Link**

If you are satisfied that it is impracticable for a witness inside or outside Vanuatu to come to Court to give oral evidence or be cross-examined, you may allow the witness to give evidence by telephone, video or other form of communication: *Rules 11.8(1),(2) Civil Procedure Rules*. This is known as taking evidence by link.

#### **The Application to Give Evidence by Link**

The application to give evidence by link must:

- be in writing; and
- be accompanied by a sworn statement setting out:
  6. the name and address of the witness;
  7. the place where he or she will be giving evidence;
  8. the matters on which the witness will be giving evidence;

9. why the witness cannot or should not come to Court and any other reason for evidence by link;
10. the type of link to be used and the facility to be used; and
11. any other matter helpful in deciding whether or not you should grant the application: *Rule 11.8(3) Civil Procedure Rules*.

In deciding whether to grant the application, you must take account of:

- the public interest in the proper conduct of the trial and in establishing truth by clear and open means;
- the question of fairness to the parties and balancing their interests;
- any compelling reason why the witness should come to Court;
- the importance of the evidence to the proceeding;
- whether or not the reason for seeking the application is genuine and reasonable with regard to the inconvenience of the witness coming to Court, the cost and any other relevant matter;
- whether the link will be reliable and of good quality;
- whether or not an essential element in the proceeding can be decided before the evidence is given;
- whether the kind of link will make examination of the witness difficult;
- if given by telephone, how the witness will be identified visually; and
- any other relevant matter: *Rule 11.8(4) Civil Procedure Rules*.

### **Directions**

Evidence taken by link is taken to be evidence given in Court during the proceeding: *Rule 11.8(12) Civil Procedure Rules*.

You may give directions about giving evidence by link, including:

- which party must pay and arrange for the link;
- when and where the evidence will be given by the witness;
- the stage of the hearing when the evidence will be given: *Rule 11.8(11) Civil Procedure Rules*.

You may end the giving of evidence by link if you consider the quality of the link unacceptable or to continue to take the evidence would cause unfairness to a party: *Rule 11.8(10) Civil Procedure Rules*.



### **Evidence by Telephone Link**

If the link is by telephone, if practicable a fax machine should be available at both ends of the link: *Rule 11.8(5) Civil Procedure Rules*.

When the evidence is given, you must be satisfied of the identity of the witness and that he or she is giving evidence freely: *Rule 11.8(5) Civil Procedure Rules*.

For this purpose, you may take into account a certificate from a Magistrate, Police officer or Police chief (Form 19) who was present when the evidence was given that:

- the person when the witness gave the evidence;
- the person knows the witness; and
- the witness seemed to give the evidence freely: *Rules 11.8(6),(8) Civil Procedure Rules*.

### **Evidence by Video Link**

Evidence given by a video link should show:

- the witness sitting at a plain table or desk, with only the required documents or exhibits;
- a reasonable part of the room but still allow the Court to see the witness clearly; and
- no other person is in the room with the witness except a technical person to run the link: *Rule 11.8(9) Civil Procedure Rules*.

## **5.4 Taking Evidence in Vanuatu for Foreign Proceeding**

If the Court receives a letter of request from a foreign Court asking that evidence be taken in Vanuatu for use in the foreign country, the evidence must be taken in accordance with *Rule 11.20 Civil Procedure Rules: Rule 11.20(2) Civil Procedure Rules*.

The letter of request from the foreign Court must be accompanied by a sworn statement by an officer of that Court, verifying the letter of request: *Rule 11.20(2) Civil Procedure Rules*.

You must give effect to the letter by:

- issuing a summons to the person named in the letter to appear and give evidence or produce documents;
- hearing the witness' evidence orally;
- making a written record of the evidence; and
- sending the record to the foreign Court: *Rule 11.20(3) Civil Procedure Rules*.

You must take the evidence as if it were a proceeding in the Supreme Court: *Rule 11.20(5) Civil Procedure Rules*. You must sign and seal the written record: *Rule 11.20(4) Civil Procedure Rules*.

## **5.5 Taking Evidence Abroad for Proceeding in Vanuatu**

A party to a proceeding in Vanuatu may apply to have evidence taken in a foreign Court: *Rule 11.21(1) Civil Procedure Rules*.

The application must be accompanied by a sworn statement that:

- the person's evidence will be relevant and admissible; and
- the evidence cannot be obtained from a person in Vanuatu: *Rule 11.21(2) Civil Procedure Rules*.

You may issue a letter of request asking the Court in the foreign country to take evidence, if you are satisfied that:

- the person's evidence is relevant and admissible;
- the evidence cannot be obtained from a person in Vanuatu; and
- there is an arrangement between the country and Vanuatu for the taking of evidence for use in civil proceedings in Vanuatu: *Rule 11.21(3) Civil Procedure Rules*.

## **6 Expert Evidence**

### **6.1 Expert Called by Party**

If a party intends to call a witness to give evidence as an expert, the party must:

- tell every other party; and
- give them each a copy of the witness' report a minimum of 21 days before trial, or if it is a response to an existing report within 14 days or some other date you approve: *Rules 11.12(1),(2) Civil Procedure Rules*.

A party may only call one expert witness in a field unless you order otherwise: *Rule 11.12(4) Civil Procedure Rules*.

### **6.2 Expert Appointed by Court**

If a question arises that requires an expert to decide it, you may:

- direct the expert to inquire into the question and report back to the Court within a specified time; and
- give instructions to the expert about the terms of reference and the report: *Rule 11.13(2) Civil Procedure Rules*.

The costs of such an expert are payable **equally** by the parties, unless you direct otherwise: *Rule 11.13(4) Civil Procedure Rules*.

If you appoint an expert, a party may not call another expert in that field unless you order otherwise: *Rule 11.13(4) Civil Procedure Rules*.

Remember that the expert is only there to assist the Court and as with any other witness, you may choose to accept or reject the evidence given. It is still up to you to make all decisions on fact and law, using the expert's help as to special scientific or technical matters.

### **6.3 Medical Evidence**

If there is a claim for damages arising from personal injury, the defendant may ask that the claimant be examined by a medical practitioner chosen by the defendant: *Rule 11.14(1) Civil Procedure Rules*.

If the claimant, without reasonable excuse, does not attend and allow such examination to take place, you may:

- order the proceedings to be stayed until the claimant is examined; or
- take the circumstances of the claimant's refusal into account when considering his or her evidence: *Rule 11.14(2) Civil Procedure Rules*.