

THE EVIDENCE BETWEEN ORALITY AND WRITING*

(ABRIDGED VERSION)

JORGE W. PEYRANO

Professor at Pontificia Universidad Católica Argentina,
Faculty of Law, Rosario (Argentina)

“The only true thinkers are those who, faced with a problem, instead of looking straight at what habit, tradition, cliché and mental inertia would lead them to presume, are prepared to accept that the solution may leap at them from the most unexpected point on the grand expanse of the horizon”

JOSÉ ORTEGA Y GASSET

I. FOREWARNINGS

Before beginning, I should like to offer some cautionary notes for the reader of the following lines.

I must point out that the title of the paper I have been asked to prepare allows for manifold approaches. I have chosen that which to me seems most appropriate.

To begin with, I should like to alert the reader to the fact that, as far as the material is concerned, I will adhere to the area of civil procedure, without precluding the possibility that many of the statements I make may also be applicable to other jurisdictions. Narrowing a little more the very wide possibilities of the task I have been charged with, I should also like to state that I will focus my attention on the evidence to be produced in the first instance – the jurisdictional level that currently arouses the greatest interest – and at the heart of a plenary hearing (a plenary suit, for example) with the production of evidence. What is described is the field of Agramante, in which the subject of the preference of one or other of the choices proposed in the heading is most fiercely debated, in so far as such an argument does not arise with respect to other types of lawsuit, which would, for example, be summary proceedings of all sorts, small claims proceedings, those that due to their nature cause a marked prevalence of the written form, and those that protect certain new rights. Likewise, I should like to inform the reader that I do not believe that it is possible to offer a complete overview of what happens in all latitudes with respect to the subject I have been charged with analysing. I thus prefer to provide – from my point of view – substantial information and to design proposals that I hope will be invested with some originality and which are mostly applicable and operative, as the times we live in are not conducive to mere theoretical speculations. Finally, I should like to stress that I have tried not to enter into the territory of matters entrusted to other speakers. However, the fact that they are all highly interrelated has meant that I have been unable to completely avoid such unwanted interference.

* Translated from Spanish into English by Paul Turner. Revised by Esther Monzó (Universitat Jaume I, Spain).

By way of introduction, I will now say – repeating what was said in Brussels – that “the question of evidence should be the subject of continual reflection”. I believe the following lines will contribute certain new motives for reflection which, obviously, will not constitute a new arrival point, but rather a stimulus for continued reflection.

Concluding this introduction, I should like to place on record that what follows is a series of reflections focusing on the conduct of discovery in civil procedures, understanding this as “all the acts carried out by the judge, the parties and any other procedural agents through which the means of proof admitted are disclosed or discovered” and without losing sight of the fact that it also includes the record of its results.

II. INTRODUCTION

The above having been said, I should like to emphasise that the current concept of civil evidence has reached a steep slope on the axiological procedural scale. With reason it is said that “the evidence is the soul of the procedure”, recognising the existence of a “right to discovery” completed by a right to a due and explicit evaluation of the evidence produced. Furthermore, it is now considered acceptable to prepare new definitions of civil procedure from an evidential perspective. Thus, it is considered a democratic space of reconstruction of the preterite. There is renewed interest –adopting ideas firmly defended by Taruffo– in favouring a just solution to the dispute and for this to occur it is necessary to resolve it by suitably evaluating the elements of persuasion adduced in the lawsuit, attempting to avoid, as far as possible, *in extremis* solutions (which would be, for example, the application of the burden of proof rule) that clearly distance themselves from the search for the truth. I repeat that in this day and age the idea that the court is merely a dispute solver, at whatever cost and rejecting the unravelling of the truth of the facts, is unwelcome. It is possible that the prestige attained by the concept of access to justice has conspired to great effect in this.

III. IMMEDIATE CONTACT WITH THE SOURCES OF EVIDENCE: THE KEY TO A MORE PRODUCTIVE DISCOVERY

1. Generalities

Whenever we speak, and speak well, of immediacy in conducting discovery – direct contact without intermediaries between the judge and the evidence, as the discovery is conducted, we are sometimes inadvertently speaking of the following framework: a hearing in which the subjects (parties, witnesses, expert witnesses, etc.) involved in the evidential material come together before the *physical presence* of the judge in the case, who will basically observe them, hear what they have to say, explain, clarify or the opinion they give. The classical approach to the matter has favoured the importance of a personal and direct perception “for future memory”, since it may assist the judge in evaluating what she has witnessed in the respective hearing, without prejudice to the record.

The aforementioned direct perception by the judge that allows immediacy in discovering the evidence before the judge’s eyes and ears also permits the judge present to observe, for example, so-called body or non-verbal language that combines with verbal language to make up the communication. The fact is that all personal communication uses two methods, one verbal and the other gestural. That is why it is said to be almost as important to see the examination as to hear it.

On this point, it is traditional to remember Ayrault's caution that "when the mouth becomes silent, the gestures speak".

Direct contact with the sources of evidence contrasts with indirect contact. With this prevailing, the personal perception by the judge of the evidential material as it comes up is not permitted, as it is thought that this could prejudice judicial impartiality. That direct perception is then mediated by intermediaries (clerks, court officials) who inform the judge about the results of the discovery.

The hearing in which, in principle, all the evidence should be disclosed in the presence of the presiding judge deserves a paragraph all to itself.

Firstly, I have to point out that this, shall we say, "scenification", is not devoid of consequences. This is not the matter we are dealing with, however, so we will deal with it in passing. It is a proven fact that the placing of the agents in an evidential hearing has an influence on the system of communication between them and improves the possibility of investigating the facts. In this respect, preference is given to the so-called circular-system setting that favours interactivity, since all the participants can observe each other leading to a clear and fluent communication. Other systems, reminiscent of the Inquisition, do not enjoy such prestige. In these, the court faces the witness, who has his back to the other participants in the hearing.

Secondly, we should not lose sight of the fact that the principle of adversity also abounds without reservation in the heart of the evidential hearing.

Finally, I reject the suggestion that an active judge presiding over the respective hearing will lead to an improved result in the evidential hearing, although without assuming absolute prominence. Thus, for example, direct and cross-examination by the parties tends to be more productive than that undertaken by the judge.

2. What to do when the declaration of one of the parties or witnesses appears to show signs of lacking credibility

It may occur that while hearing the evidence of a witness, the judge may experience perceptions that lead him or her to doubt the credibility of the deponent's version. It has been said by some that certain types of behaviour on the part of witnesses (gestures, hesitations, contradictions, blushing, paleness, difficulty in expressing themselves, etc.) are indications that may reflect on the veracity of their declarations.

In truth, the classical doctrine has always referred to the aforementioned signs that hint at a lack of credibility in the witness's version and deals with them at length. The subject has been written on by Caravantes, Bentham (who enumerates and analyses the symptoms of fear in a deponent's face), Döhring (who confines himself more to the facial expressions), Gorphe (who provides us with a very wide range of symptoms to help verify the credibility of the deponent), and Mario Pagano (always remembered thanks to a Chiovendian quotation).

What has not been written about at such great length is what the judge has to do when faced with the aforementioned hints of mendacity.

We need to be particularly careful in this matter, as there may be any number of reasons for such behaviour, for example, a hesitant or fearful attitude

on the part of the witness, including a reduced narrative capability. Moreover, a witness's emotional behaviour may give rise to an incorrect interpretation, depending on his or her degree of sensitiveness (they may experience reverential fear in the presence of the judge). This requires an unusually refined understanding of psychology to separate the "wheat from the chaff", in other words, to distinguish the conduct of the mendacious from that of the particularly sensitive, on the basis of their appearance before the court of law.

I believe that judges have to show great prudence in this matter. This is important to avoid an abundance of judgements in which the courts expressly reject the evidential value of a testimony based on the aforementioned signs of a witness's lack of credibility. We have no evidence, for example, that a witness' blushing or stammering have conspired against the consideration of their declarations. Beyond treating them as equivocal indications, as has already been said, we should not ignore the fact that the reasonableness of such a condemnation would not in any way be controllable by a possible appeal, even if, as some would wish, such hints had been recorded in the written record of the hearing in question. In addition, we can discern that the actuarial allocation of such indications in the court record would give rise to difficult questions and multiple approaches when trying to incorporate them into the court records.

Thus, as a rule, it is my interpretation that if the court perceives such signs while hearing the evidence, it should limit itself during the respective hearing to requesting immediate clarification or a more detailed explanation from the deponent, or carry out a cross-examination or a confrontation, all specifically aimed at confirming (or denying) the credibility of the version of the facts disclosed.

3. Current types of immediate contact

A type of immediate contact limited to the presence of the judge when the evidence is being heard still prevails. This is, therefore, an immediacy in which the judge is physically present. However, it is becoming more and more common to hold a *virtual immediacy* that allows the judge to attend the hearing of the evidence, and even to interact with its agents, in real time, despite not being physically present at the place it is being held. I am referring to the use of videoconferencing to ensure immediacy if there is a physical distance between the court and one or more of the agents in the evidential hearing. For example, the videoconference provides a less expensive way for a witness to cooperate with the judiciary. The technology has been accepted under European Community regulations and in recent procedural reforms. Particularly surprising is the amendment made in 2000 to the Spanish legislation, unlike the case of Germany, where no express provision has been articulated. Obviously, the videoconference has many other advantageous procedural uses apart from that I have referred to. Thus, the videoconference can be used to avoid the costly and depressing spectacle of transferring prisoners from the gaols in which they are incarcerated to the court at which they have to appear.

However, today there is even a movement of opinion toward allowing appearance at a *sensorial distance immediacy*. I am referring to the filming of evidential hearings, which is allowed under various procedural codes. This means that they may and should be recorded by audiovisual and/or electronic means; in other words, the respective evidential hearings should be documented by means of

sound and vision recording and reproduction systems, although there is no shortage of opinions that consider, with good reason, that such terminology is outdated.

The reproduction of the sound and vision of the proceedings of an evidential hearing allows for a sensorial immediacy (the judge observes and listens to what happened) which may be non-presential (the judge was not physically present during the evidential hearing). This type of immediacy (sensorial, non-presential) preserves most of the attributes of physical immediacy. I will return to this latter subject later.

4. How to incorporate the new audiovisual technologies in order to make it possible to have a non-presential virtual and sensorial immediacy when this has not been expressly provided for in legislation

In the aims expounded in the heading, there can be no doubt that it is necessary to specify a kind of procedural re-engineering. One of the pillars of such a procedure is the concession of validity to the procedural agreements held between the parties disposed towards accepting the advantages of the new audiovisual and digital technologies, despite the fact that the applicable procedural code has failed to take them into consideration.

The so-called litigation agreements or bargaining have been known for a long time and in the proceduralist period they were considered with leniency. Today however, the advent of proceduralism and the resulting more public view of civil procedure has caused a reticent and almost opposing attitude to be adopted toward *contractual* procedures, which are those that recognise, up to a point, that the parties may create certain procedural rules in the exercise of their autonomous will.

Fortunately, a sector of the contemporary authorial doctrine began to discriminate cases, thus preserving the above mentioned reticence only when the case concerned matters relating to public procedural order.

Of course, it is not a matter of stating that the validity of litigation agreements should prevail and be imposed, in all circumstances, on the judge. The litigation agreements of the case should be approved, either expressly or tacitly, by the court. Unlike that which occurs in legal agreements in general, litigation agreements do not directly generate the desired effects, as, in a certain way, they are held *ad referendum* to that established by the judge.

France has recently registered a re-evaluation of litigation agreements, thus confirming a tendency to return to the old times.

As far as specific litigation agreements regarding discovery are concerned, I believe that an adverse reference by Chiovenda has contributed greatly to a loss of their prestige and validity, at least as far as the not-very-recent authorial doctrine is concerned. If we look at it closely, we cannot be surprised at the repulsion felt by Chiovenda and others at the validity of the litigation agreements that are imposed on the court so that, for example, it evaluates evidence in a certain sense and dispenses with certain essential formalities of a specific method of confirmation. Faced with such a hypothesis, it is obvious that the court will not approve it. On the other hand, if it were, for example, a litigation agreement that took advantage of the benefits of telematics, in which a person living some

distance away would be able to give evidence in a videoconference, I believe that this should not be included in the vetoed litigation agreements.

IV. RECORD OF THE EVIDENCE PRODUCED

1. Written record. Record or registry of a hearing

In Roman-Canonical and common procedure, evidence was not accepted by judges, but by secretaries and/or interviewers. The appearance of these intermediaries was greatly influenced by the fact that the evidence evaluated as prevailing (which meant an *a priori* calculation with respect to the evaluation of each piece of evidence) meant that the personal observation of the judge was of little interest. This explains the constant delegation by judges to clerks or officers of the court. Another factor that favoured this delegation was the existence of pre-formulated examinations that made the presence of the judge dispensable. It is easy to deduce that such a state of affairs made it necessary to record the proceedings of evidential hearings in written documents (records or registers) for future reference, particularly when the appeal court was located far from where the evidential session had taken place.

The explanations afforded so far must not make us lose sight of the extremely important role, in terms of dissemination of the practice of making records of hearings, played by the Pope Innocence III's famous Decretal of 1216, which ordered that all hearings, including those at which no judge was present, should be documented in writing and that the judgment would be based exclusively on those records. The possible existence of "vile judges" also justifies the practice because it allowed, and allows, judicial and social control over the correctness (or lack of it) of the jurisdictional task. The written record of the proceedings of an evidential hearing at that time offered truly indisputable advantages, as described by Bentham: it preserved the statements of the witnesses and gave them the chance to defend themselves against accusations of bearing false testimony, and it allowed the evidence to be served and reviewed at appeal, among other benefits. However, there were also disadvantages arising from the fact that the person charged with making the record could be influenced by subjectivities and, to cap it all, evils, and on occasions failed to use language that faithfully reflected the proceedings. In order to eliminate, to a certain extent, the effect of such practices, it was proposed, although without success (and today the idea has been abandoned), to record the hearings in shorthand.

Where there is no doubt is to whether orality should always prevail in the hearings where discovery is conducted. As to whether they may be recorded in any way other than "in writing", there are still controversies and interventions to be overcome.

2. Audiovisual documentation of evidential hearings in civil courts

There is no doubt that the first method tried for recording evidential hearings with technological methods was analogical phonographic recording. The use of analogical phonomagnetic tape was far surpassed by incrustated digital methods, i.e. appliances that include the digital recording format and the medium on which it is stored (for example, the ZIP disk, CDs, and subsequently pen drives and flash cards, that provided improved copies).

Argentina, timidly, and only as an alternative chosen by the court, established the possibility of phonographically recording the proceedings of evidential hearings.

Today, on the other hand, the preferred method is that of audiovisual documentation of the proceedings in evidential hearings, as this gives the judge the chance to observe as well as hear what happened.

Video filming, either with a single video camera or in courtrooms specially fitted out for improved filming, is able to record and later replay sounds and pictures that will allow the judge to relive all the aspects that remain hidden in the traditional written records. All that needs to be done is to connect the corresponding player to a TV set or personal computer.

There are further advantages to filming. Let's look at them: a) they do away with the possibility of consistent pretences in which the absence of the judge at the evidential hearing is not recorded and, on the other hand, if he or she is present, this is recorded. The video film does not lie and the judge's absence is easily verifiable when a hearing is filmed; b) it eliminates the majority of reasons invoked to defend, at any cost, a necessary physical identification between the judge who hears the evidence and the judge who tries the dispute; c) the audiovisual replay allows the appeal court to review the evidential session, settling a large part of the obstacles placed in the way of allowing an appeal court to enter into the evaluation of the facts of the case; d) it gives the judge the chance to reflect on the content of the sentence on which judgement has to be passed, without being driven by a treacherous memory of what had happened during the hearing; e) filming means significant time-saving, as it is no longer necessary to employ a person to type out the court records.

Obviously, the participating clerk of the court should, if the evidential hearing is to be filmed, make a short statement confirming that on such a day and in such proceedings, an evidential hearing is being held. He or she will then keep a copy on the court premises and provide copies to the parties, in order to protect their rights.

I believe the analysis of audiovisual documentation will be more successful if we legally and expressly forbid the transcription of what happens in the film to a traditional written record. This will, to a certain extent, oblige the judge to watch the film in order to reach his decision.

It would also be useful to emphasise that the use of such audiovisual technology could change the allegatory forensic practices that tend to refer to such and such a page or such and such a file.

3. Digitalised documentation of the evidential hearing

The audiovisual film of an evidential hearing can be stored electronically (thus digitalising the evidence obtained) so that it can later be replayed and/or transmitted. There is even the possibility of digitalising original analogue films using a low-cost accessory designed for that purpose.

Currently, the most commonly used electronic media are the optical disks known as CDs and DVDs. Both can store and replay text, sound and pictures (both still and moving), the only difference between them being that DVDs have a larger storage capacity and better quality pictures. Today, that technology has

been superseded by the latest generation of optical disks known as Blu-ray. This medium has a much larger storage capacity, as well as the ability to reproduce high definition pictures. It is likely to replace the DVD, which is currently used today to record evidential sessions.

At this point I should remind you that digital documentation refers to the storage of the respective information on an electronic medium (CD, DVD, Blu-ray, pen drives, etc.) that is suitable for receiving and encoding electronic impulses (bistable circuits) or bits. The digitalised evidence can be seen and heard thanks to a process that translates the digital signal code into a filmed version of the hearing.

The digitalisation of the evidence also allows it to be electronically transmitted via, for example, the MP4 format, which is ideal for transferring large amounts of information over the Internet with little difficulty.

While it is not the main subject we are concerned with, it is worth pointing out that the digitalisation process should be considered reliable and that the possibility of such manipulations as erasure, overwriting or tampering going unnoticed is remote.

In terms of the evidential hearing that concerns us, it is understood that the controversy between proponents of orality and writing has been overcome, thanks to the appearance of digital technology.

It should not therefore seem strange that in a not-too-distant future, all files will be in the digital format and that their processing will culminate with the passing of a multimedia judgment, the contents of which will include the digitalised version of its foundations, the tenor of the documents filed thanks to it having been scanned, and the audiovisual documentation of the filmed evidential hearing, the results of which justify the final decision.

While this is happening, we can perceive encouraging signs.

V. A POSSIBLE CIVIL PROCEDURE FROM THE PERSPECTIVE OF THE EVIDENTIAL HEARING, FACED WITH THE PREVAILING SITUATION

I add my vote to those who believe that the classical interpretation of the hearing process is the most desirable model for the best evidential hearing. However, we cannot ignore the fact that physical immediacy presupposes that it cannot function adequately when a court has to deal with three thousand or more cases, instead of the recommended maximum of four to six hundred.

The administrative authorities have never been generous with the justice system – not even in Europe. Thus we have the perennial and widespread lack of economic resources flowing into the judiciary's coffers and the fact that a spiralling increase in population is rarely accompanied by a proportionate increase in the number of courts. This gives rise to an overload in the jurisdictional workload, meaning that evidential hearings are set for dates ever further in the future.

I have already spoken at length about the multiple advantages derived from filming evidential hearings, but that will not be enough to achieve a better justice system if we do not accept that in certain cases, to be selected legally or left to prudent judicial criteria (e.g. cases concerning small claims, matters that do not involve public order, or have no particular social or institutional significance,

etc.), physical immediacy can be replaced by a non-presential sensorial immediacy. Thus, recognising that the judge in the case does not preside over the hearing and is replaced by a clerk (qualified in law, of course, specially trained in conducting hearings and with powers of authentication) who is present at the evidential hearing and its filming and later passes everything on to the judge. Of course, the judge must be given the power to recall to another hearing all those who appeared in the one that was filmed, for the purposes he considers necessary (to undertake cross-examinations, require explanations, etc.). In some regions of Brazil, the evidential hearings for certain trials can already be presided over by an officer of the court who is not the judge in the case and who will oversee the recording or filming of the proceedings.

Bear in mind that non-presential sensorial immediacy has a large number of the advantages of physical immediacy without the disadvantages of the latter.

VI. CONCLUSIONS

The preachings of Klein and Wach have borne fruit. There is no longer any controversy between those in favour of orality and those in favour of writing in the field of disclosure in civil proceedings and in courts of the highest instance. The thesis defending the advantages of oral expression in an evidential hearing, within the framework known as “procedure by hearing”, has prevailed. Its characteristic feature is the recognised excellence of the direct and physical contact between the judge and the conduct of discovery.

The shortage of courts in relation to the population has, in many places, lead to an overload of work and a consequent delay in the setting of dates for evidential hearings in the diaries of the courts and the judges who try to ensure their physical presence in them.

The physical direct contact of the judge with the sources of evidence is obviously always desirable, albeit sometimes rather impractical. Could it then, in certain selected cases, be replaced by non-presential court sensorial immediacy involving the viewing of the film made of the evidential hearings under the guidance of a qualified clerk (specially trained in conducting hearings and with powers of authentication)? This would allow the judge to relive, with sound and vision, exactly what happened.

Digitalisation of the hearing is simple with the technology now available to us. As such, we have a new element that contributes to an improved storage, recovery, reproduction and remote transmission of the audiovisual documentation obtained.

Reality rules. We should abandon dogmatism and vacuous speculation. Carpi’s words still ring in my ears “The great European systematic school of the first half of the twentieth century, particularly in Germany and Italy, culminated in dogmatism, abstraction and the creation of a pure theory of procedure. All were able to verify and witness the divorce between the science of the procedure and justice, as an organisational institution whose main aim should be to satisfy the needs of humankind”. Those requirements at the same time demand realism, pragmatism and sincerity. So be it.