Department of Criminal and Procedural Law

Law of evidence:

Admissibility of evidence

Only study guide for EVI301A

Compilers:

Prof BC Naudé
Prof DP van der Merwe
Ms K Moodley

University of South Africa, Pretoria

Printed and published by the
University of South Africa
Muckleneuk, Pretoria

EVI301A/1/2009-2011

98298267

3B2

EVD Style

Contents

Introduction

1 GENERAL

We want to welcome you most heartily as a student in the Law of Evidence. This course is undoubtedly one of the most interesting you will encounter in your legal studies. In our new constitutional order the law of evidence is dynamic and challenging, and in many instances nobody is as yet certain where it may be going!

For any lawyer intending to practise law through litigation in our courts one day, the law of evidence is an indispensable tool. The same goes for police officials. The better you are at using this tool, the better lawyer, or investigating official, you will be.

Unfortunately, the law of evidence is not always logical with one principle building on another. It is noted for its **casuistic** development, which simply means that its principles developed in a rather random fashion as and when the need arose. The law of evidence does not, therefore, form a single, logical whole, but consists of a number of rather loosely related legal rules.

2 THE AIMS OF THIS STUDY GUIDE

This study guide is aimed at providing you with a concise explanation of all the basic concepts of the law of evidence. It contains many practical examples of these concepts. It also allows you to test your grasp of the tutorial material on a regular basis. In fact, you will be responsible for putting together much of the material yourself. It therefore requires you to do a lot of work yourself. You will find the course impossible to pass if you do a crash course in it just before the examination. However, if you work through this study guide in the way we outline below, you should find it easy to pass the course, and to remember it for years to come.

3 LITERATURE

3.1 PRESCRIBED MATERIAL

The prescribed material is set out in Tutorial Letter 101. It consists mainly of prescribed textbooks and tutorial letters. Do not underestimate the importance of tutorial letters. Most of the feedback from the activities in the study guide will appear in tutorial letters. The same applies to any developments that have taken place in the law of evidence since the writing of the study guide. Tutorial letters also contain additional information about matters such as group discussions (lectures to students), feedback on assignments and your preparation for the examination.

3.2 ADDITIONAL BOOKS

The following books are the standard works for the law of evidence. Some are internationally recognised. However, they are not prescribed books for this course:

- Schmidt CWH & Rademeyer H *Bewysreg* 4 ed (2000) Butterworths Durban
- Zeffertt DT et al *The South African law of evidence* (2003) LexisNexis Butterworths Durban
- Cross R & Tapper C *Cross on evidence* 11 ed (2007) Oxford University Press
- Malek HM (ed) *Phipson on evidence* 16 ed (20050) Sweet & Maxwell London
- Van Niekerk SJ, Van der Merwe SE & Van Wyk AJ *Privilegies in die bewysreg* (1984) Butterworths Durban

Students who are really enthusiastic about the law of evidence may want to have a look at Wigmore's monumental work *A treatise on the Anglo-American system of evidence in trials at common law*. It consists of 10 parts of 800–900 pages each.

Books on the law of criminal procedure are also useful for the law of evidence in criminal cases. They include the following:

- Du Toit E et al *Commentary on the Criminal Procedure Act* (1987) Juta Cape Town
- Kriegler J *Hiemstra*: *Suid-Afrikaanse strafproses* 6 ed (2001) Butterworths Durban

4 METHOD OF STUDY

4.1 GENERAL

This study guide consists of 16 study units. These study units have been developed in such a way that one unit should keep you busy for about a week. That leaves you enough time to complete the various activities which are included in the study units, do your assignments (in addition to the activities) and prepare for the examination.

The assignments which have been set for this course are included in Tutorial Letter 101. Whether the assignments are compulsory or not will be made clear in this tutorial letter.

4.2 THE STRUCTURE OF THE STUDY GUIDE

The study guide follows the following general scheme:

Part 1: General concepts and sources of the law of evidence
Part 2: Admissibility of evidence
Part 3: Tutorial assistance

Part 1 briefly informs you about what the law of evidence is, what some of the basic concepts mean and where it comes from. Part 2 discusses whether certain kinds of evidence are admissible or not. The general approach here is that evidence is admissible unless it is excluded (inadmissible) for some reason or another. Part 3 contains tutorial assistance in the form of a glossary (list of technical terms) and feedback on some of the activities which you are expected to do.

Each study unit is based on the following format:

(1) The list of sources is followed by an ORIENTATION. The information contained in this paragraph provides background helping you to fit that particular study unit into the larger picture of the law of evidence as a whole. You do not have to study this section, although you should understand it.
(2) Practically all the study units contain one or more ACTIVITIES. This may involve some reading, or filling in a few words, or even writing a whole essay. Through these activities you will be able to test your understanding of the subject matter on an ongoing basis. Very often you will actually be compiling your own tutorial material by following these activities. Feedback on your answers will either be given at the back of the study guide or in a number of tutorial letters which you will receive during the course of the semester. In cases where you need to test your insight, the feedback will be in the study guide, as you need to know immediately if you are on the wrong track. Otherwise it will appear in tutorial letters. All the activities are numbered so that you can easily find the correct feedback. The end of an activity is indicated by the following:

(3) Some practical examples will be provided. They are always indicated as follows:

Example

The accused is charged with shoplifting. The fact that the accused has previously been convicted of shoplifting is a similar fact.

They are included as explanatory material and should never be memorised.

(4) An indented section printed in a different type face is an explanatory note. The following is an example of such a note:

The meaning of "freely and voluntarily" is really not complicated. Very often the difficulty lies in making a finding on the facts of the case. This is a major problem in the case of most of the decisions which a court has to make — it is not so much the law that has to be applied which presents the difficulty, but finding out what really happened at the time of making the statement.

These sections should not be memorised, as they are generally used only to explain something which students previously found problematic. If you understand the material well, you will often find that the explanatory note simply repeats what you already understand. This is fine and means that you may skip the note.

4.3 WORKING THROUGH A STUDY UNIT

Each study unit starts with a list of the sources you will need to study the particular study unit. This will help you to prepare yourself and to get hold of all the books and other materials that you may need. Any reference in the study guide to **the Constitution** refers to the Constitution of the Republic of South Africa of 1996 (Act 108 of 1996). Whenever we have referred to the **interim Constitution**, this means the Constitution of the Republic of South Africa of 1993 (Act 200 of 1993). Any reference to **Schwikkard** refers to the prescribed textbook, *Principles of evidence*. Consult Tutorial Letter 101 for the full particulars of this textbook.

You should work through the study unit at a pace which suits your own style of studying and the time that you have available. Your **aim** in working through every study unit should be to develop a complete understanding of the material contained in the study unit, so that you will not only be in a position to understand the theory, but also to apply that knowledge and understanding in practice.

4.4 LIST OF WORDS AND PHRASES

You will frequently find words underlined in grey. These are words which may need some explanation

for you to understand them properly. They can all be found at the back of the study guide in the GLOSSARY. If you feel unsure about the meaning of a word or phrase in the study guide, turn to the GLOSSARY for an explanation. We have not underlined all of these words, but only where they may be difficult to understand. Note that a particular word is not underlined over and over again if it is used repeatedly in one section of the guide.

4.5 USING YOUR TEXTBOOK AND CASEBOOK

You are frequently referred to these two sources. If you are told to **read** from the textbook or from a case, you need to do so in order to get some background. In the examination you will be asked nothing more on that material than a few short questions here and there. However, if you are told to **study** a specific case or section in the textbook, you must do so because any number of questions may be set on that material. In this case, you should also keep your own notes in addition to those contained in the study guide. You will find that you cannot follow only one set way of studying the law of evidence, but that you will have to adapt your study methods according to the requirements of the particular study unit.

5 CONCLUSION

If you have not yet done so, you should now read Tutorial Letter 101. Once you have read it, you will be ready to begin study unit 1. Best of luck with your studies. We trust that you will enjoy this course and find it enriching.

Study UNIT 1

one

Overview

ORIENTATION

The aim of this study unit is to give you an overview of the entire field of the law of evidence, in order to put the course in a proper perspective.

1 THE LAW OF EVIDENCE IS A WHOLE FIELD OF LAW

In order to understand the law of evidence, it is essential to view the subject as a whole. Even though this course, the Law of Evidence, is presented in two separate modules, students of one module will find frequent references to material presented in the other module. This shows that the law of evidence cannot be covered as if it consists of different modules or entities, and for you to understand it properly, you will have to view it as a whole. (When written in capital letters, "Law of Evidence" refers to the name of this course; when written in small letters, the "law of evidence" refers to the name of the field of the law.)

Similarly, although the course is divided into different study units, this does not mean that one should think of the law of evidence as consisting of a number of different compartments. Every case that appears in court may raise questions spanning the whole field of the law of evidence. At the same time, no case can escape the application of the law of evidence.

2 OVERVIEW OF THE LAW OF EVIDENCE

In Law of Evidence 301 you will be taught certain basic concepts, such as the definition of the law of

evidence, of evidence and of evidential material. You should not attempt to go any further without knowing these terms and their meanings. This section is followed by a brief reference to the sources of the law of evidence, because unless one knows where it comes from, one will not know where to start looking for answers.

The rest of Law of Evidence 301 covers the legal rules which govern the admissibility of evidence, whether in civil or in criminal matters. Since the law of evidence teaches one how to go about proving one's case in court, it is essential to know what evidence will be admissible, and what will not. Admissible evidence can be used to prove one's case, whereas inadmissible evidence cannot. It serves no purpose to attempt to offer clearly inadmissible evidence in court, as it will simply be thrown out by the court (referring to "the court" in this manner is another way of referring to the presiding judicial officer [the magistrate or judge, plus assessors where applicable] who has to make the factual findings). However, in many instances it may not be clear whether the evidence will be admissible or inadmissible. It is then for the court to make a decision whether or not to allow the evidence, and in order to do so, it has to apply the existing legal rules and principles to the questions before it. This task is not an easy one, and only becomes somewhat easier with lots of experience.

The basic principle is that all available evidence should be used in proving the case. Only if there is some reason for excluding (or disallowing) evidence, can it be excluded. In the study units that follow, you will learn about the reasons for excluding evidence. You will learn that

- evidence can be admissible only if it deals with the problem in question (if it is **relevant**)
- evidence concerning a prior statement by a witness that merely serves as corroboration for herself is inadmissible
- the mere fact that a person has previously done something wrong does not mean that she has once again done so, and that such evidence is therefore inadmissible **(similar fact evidence)**
- evidence that merely deals with the **character** of a witness or a party rarely has any bearing on the question at hand, and is usually inadmissible
- a witness should generally tell of her first-hand experiences, and not of what she learnt from others **(hearsay evidence)**
- a witness may not give evidence which amounts to taking over the court's function of having to reach a conclusion **(opinion evidence)**
- people who incriminate themselves (through **admissions** and **confessions**) have to do so absolutely **voluntarily**, otherwise those incriminating statements cannot be used against them
- some evidence may be excluded simply because some higher value is believed to be protected by such exclusion **(privilege)**
- evidence acquired in violation of the **Bill of Rights** in the Constitution may often have to be excluded.

Of course, the law of evidence covers far more than what evidence is admissible and what is not. Its remaining functions are dealt with in Law of Evidence 201. That course deals with two broad issues, namely

- the ways in which (admissible) evidence is presented in court
- the evaluation of this evidence by the court, in order to reach its decision

The way in which the evidence is presented, depends on the nature of the evidence. **Oral evidence** is given by a witness, delivering her testimony from the witness box. Certain questions may be asked by the various parties, and others may not. **Real things** may also be presented to the court as evidence. Often, the information that is contained in some kind of **document** may be required, but documents cannot simply be handed to the court — many requirements need to be met before a document can be used. For one thing, the court generally needs to know that the document is what it is claiming to be. With modern technology, evidence might be available in forms that do not fit into any one of the traditional categories. The law of evidence still does not know quite how to deal with these forms of evidence, even though new legislation in this regard has recently been passed. Finally, in certain cases the court will accept certain information without any evidence being presented on it; the court will simply take **notice** of well-known or easily determined facts, or some legal rule may provide for the **presumption** of a fact.

Once all the (admissible) evidence has been presented, it is the task of the court to evaluate this evidence, in order to reach its findings. It has to consider the **weight** of the evidence. In this process it has to determine which party has the **burden of proof**, and what the extent of this burden is — the amount **(measure)** of proof required in criminal cases is much greater than in civil cases. In the evaluation of evidence, the weight of the evidence is often determined by questions such as whether it is **direct evidence** of the questions in issue, or merely **circumstantial evidence**, whether there are reasons to be **cautious** about the evidence, and the extent to which the various bits and pieces of the puzzle fit together, and support and strengthen **(corroborate)** one another.

3 THE INEXACTNESS OF THE LAW OF EVIDENCE

The law of evidence provides only the basic tools to enable the court to deal with all the difficult decisions it has to make. At best, it is an inexact science which has to attempt to govern thousands of different possibilities that come up in every case. The answers provided by the law of evidence are often rather vague, in which case a student of the law of evidence should not try to find exact answers.

4 THE IMPORTANCE OF THE LAW OF EVIDENCE

The importance of the law of evidence is beyond argument. It does not matter whether the case is a criminal or a civil case, whether it deals with the interpretation of a deceased person's will, the terms of a contract, an application for an interdict to prevent someone from doing something, or a claim for damages of whatever nature: the law of evidence is always applicable.

SUMMARY

Activity 1

State whether the following statements are true or false:

(1) The Law of Evidence is the name of the field of law that you are currently studying.

(2) When it is said that "the court" makes a finding, this actually means that the judicial officer presiding in the case (plus assessors where applicable) is making the finding.

(3) Oral evidence refers to evidence given by a witness from the witness box.

(4) If evidence is contained in a document, the party who wants to present this evidence will simply hand the document to the court.

(5) Evidence that is provided by modern technology, such as computers and video tapes, presents the law of evidence with difficulties that have not yet all been resolved.

(6) In the case of judicial notice and presumptions, evidential material is provided without the presentation of evidence.

(7) Decisions on the admissibility of evidence are made during the trial — decisions on the weight of the evidence are made only at the end of the trial.

(8) The burden of proof plays an important role during the evaluation of evidence at the end of the trial.

(9) It is sometimes necessary for the court to approach certain evidence with caution.

(10) The law of evidence plays an important role in every single court case conducted in our courts.

(Feedback in study guide)

part 1

General concepts and sources of the law of evidence

Study UNIT 2

two

Concepts in the law of evidence

You will need to consult the following source for this study unit:

- Schwikkard

ORIENTATION

The main purpose of this study unit is to enable you to place the law of evidence in its proper context in the legal world and to understand the concepts and definitions which are central to this field. In this regard, the glossary at the back of this study guide might also prove useful.

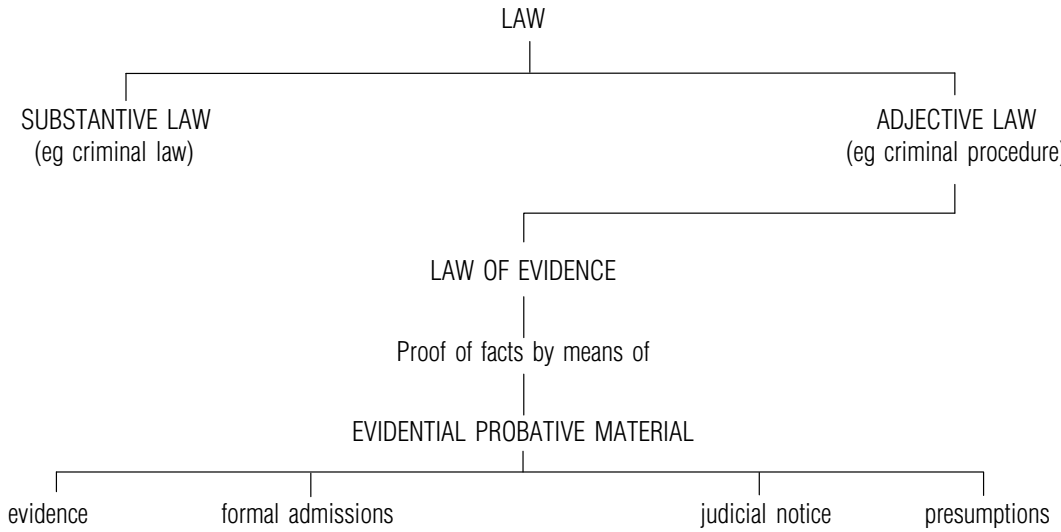
OUTCOMES

Once you have completed this study unit, you should be able to

- distinguish between such concepts as evidence, evidential material and proof, and between substantive and adjective law
- explain the difference between, and cite examples of, the different forms of probative (evidential) material
- explain why the concept of proof lies at the heart of the law of evidence

1 SUBSTANTIVE AND ADJECTIVE LAW

In the following diagram you will see exactly how the law of evidence fits into the general structure of the law.



In studying law, you will discover that there are two main branches of law. The first, which we shall call **substantive law**, covers one's legal rights and obligations. It tells one what one may or may not do. A subdivision of substantive law is, for instance, criminal law, which prohibits certain actions upon pain of punishment. Hence: "The general speed limit in respect of every public road or section thereof, other than a freeway, situated within an urban area, shall be 60 kilometres per hour." The second branch, which we call **adjective law** (sometimes known as **procedural law**) prescribes the general procedure to be followed in court and legal transactions. A subdivision of adjective law is criminal procedure, which prescribes, for instance, how a person should be brought before the court by way of arrest, summons, or warning to appear, and how his rights are to be protected in court with regard to plea, the giving of evidence, proof, etc. The law of evidence is part of **adjective law** and governs the manner in which something is legally proven before the court, as is expressed in the phrase: "The guilt of an accused person shall be proven beyond reasonable doubt".

2 PROOF AND THE LAW OF EVIDENCE

in preparation

- Read Schwikkard §§ 2 4–2 5
- **Study the following terms in the Glossary: "proof", "evidence", "evidentiary material"**

The **law of evidence** may be defined as follows:

That field of law which generally regulates the proof of facts in a court of law.

From the above definition it is clear that "**proof**" is central to the entire field of the law of evidence. "Proof" is explained by Schwikkard § 2 5 as follows:

> "Proof of a fact means that the court has received probative material with regard to such fact *and* has accepted such fact as being the truth for purposes of the specific case. Evidence of a fact is not yet proof of such fact: the court must still decide whether or not such fact has been *proved*. This involves a process of evaluation."

The process of evaluation is discussed in the other semester course on the law of evidence (Law of Evidence 201).

The above explanation further requires clarity on the concepts "**evidence**" and "**evidentiary material**". In Schwikkard § 2 4 a distinction is made between evidence and the other constituent parts (parts making up a whole) of the concept "probative (evidentiary) material". "Evidence" is explained as follows:

> "'Evidence' essentially consists of oral statements made in court under oath or affirmation or warning *(oral evidence).* But it also includes documents *(documentary evidence)* and objects *(real evidence)* produced and received in court."

Please note, however, that evidence is only one form of evidentiary material. We will leave it to you to find and write down the other forms of evidentiary material that Schwikkard mentions.

Besides evidence, what other forms of evidentiary material are there? Try to give an example of each. Where possible, write down the references to decided cases in which these other kinds of evidentiary material were at issue.

.....

.....

.....

.....

.....

(Feedback in study guide.)

In R v V 1958 (3) SA 474 (GW) [at 479B-E] Wessels J explains the distinction between "evidence" and "proof", and inadvertently "evidentiary material" succinctly:

> In all criminal cases the Crown must prove the facts which are required to be established beyond a reasonable doubt. Facts in issue are proved or established by means of admissible evidence (i.e. testimony, either on oath or after affirmation, or by means of affidavit), formal admissions tendered as such during the hearing of the matter and by presumptions. In my view it is not correct to state that an admission of a fact made during the hearing is evidence thereof, unless one disregards the distinction between evidence of a fact and proof thereof and uses the former word as a synonym for the latter An admission of a fact in issue results in that fact being considered proved or established without receiving evidence in regard thereto. In appropriate circumstances a presumption has the same effect.

The concepts that you have been working with, are the basic building blocks that you will use in the rest of this course. It will be worth your while to make quite sure that you understand all the types of evidentiary material and that you are able to distinguish between them and relate them to each other. Each different form of evidence (such as oral or documentary evidence) will be dealt with in Law of Evidence 201.

SUMMARY

From the above, it appears that regulating the proof of facts is the main goal of the law of evidence. Evidence is only one type of evidentiary material that may be used in order to furnish proof in a case before a court of law. Evidentiary material has to be evaluated before the court can find whether it amounts to proof in the circumstances of a particular case. Evidence itself may be given in the form of oral evidence, documentary evidence and real evidence.

Study UNIT 3

three

Sources of the law of evidence

You will need to consult the following sources for this study unit:

- Schwikkard
- The Constitution: section 35
- The Criminal Procedure Act 51 of 1977: sections 206 and 252
- The Civil Proceedings Evidence Act 25 of 1965: section 42
- The casebook

ORIENTATION

In this study unit we will teach you how to distinguish between the historical and knowledge sources *(kenbronne)* of the law of evidence and will explain what are known as "residuary sections" (also called "residuary clauses") in South African legislation.

OUTCOMES

After completion of this study unit, you should be able to

- distinguish between the historical and the knowledge sources and between the different knowledge sources themselves
- give content to the concept "residuary sections"

1 HISTORICAL SOURCES

Historically, the substantive law of South Africa was mostly drawn from the principles of Roman-Dutch law. The latter system is therefore seen as the common law for that part of our criminal law which has not yet been legislated into statutory law. On the other hand, the procedural law of South Africa is mostly drawn from principles of English law. English law is therefore seen as the common law for our law of evidence, which means that if there is any uncertainty about an aspect of the South African law of evidence, the South African courts may have recourse to English law on that point. English law is therefore the historical source of our law of evidence.

2 KNOWLEDGE SOURCES

Please do not confuse the historical sources of our law of evidence with its knowledge sources. The last-mentioned is a wider concept, covering not only the historical sources, but also relevant court cases and applicable South African legislation. The court cases create binding law and some of the most important ones are contained in the prescribed casebook. Legislation which applies particularly to the law of evidence are the Criminal Procedure Act 51 of 1977 and the Civil Proceedings Evidence Act 25 of 1965.

Last, but not least, the Constitution of the Republic of South Africa, Act 108 of 1996 applies. This Act has given the Constitutional Court a testing right to declare existing (or new) legislation and common law unconstitutional. Many references to sections of the Constitution and the way in which these might affect the law of evidence will be made throughout the study guide. An example of a piece of ordinary legislation is the Criminal Procedure Act 51 of 1977, to which copious reference will be made during the rest of this course. An example of a court case is Rusmarc SA v Hemdon Enterprises 1975 (4) SA 239 (A), which is relevant to the question of what further role English law may play in South Africa.

The Constitution is the highest source of law in South Africa and therefore an important source of the law of evidence. The principal provisions of the Constitution affecting the law of evidence are the fundamental rights described in chapter 2 thereof. This is also known as the "Bill of Rights". For our purposes, the most important of the rights are those described in section 35. These rights are mentioned below. It is important to remember, however, that until our courts decide otherwise, you may assume that the provisions of the Constitution apply **only to criminal cases or civil matters where the state is involved**, and not to civil cases in general.

2.1 THE RIGHTS OF ARRESTED PEOPLE

Section 35(1) of the Constitution provides that every **arrested person** shall have the right

(1) to be informed, in an understandable language, that he or she has the right to remain silent, and about the consequences of making a statement (sec 35(1)(a) and (b))
(2) not to be compelled to make a confession or admission which could be used in evidence against him or her (sec 35(1)(c))

Note that these rights pertain only to arrested persons. Somebody who has not been arrested, does not have these rights.

2.2 THE RIGHTS OF A DETAINED PERSON

Section 35(2) provides for the rights of a detained person including the right

- to be informed promptly of the reason for being detained (s 35(2)(a))
- to choose, and to consult with a legal practitioner, and to be informed of this right promptly (s 35 (2)(b)) to have a legal practitioner assigned to the detained person by the state and at state expense if substantial injustice would otherwise result, and to be informed of this right promptly (s 35(2)(c))

2.3 THE RIGHTS OF ANY ACCUSED PERSON

Section 35(3) provides that every accused person shall have the right to a fair trial, which includes the right

(1) to be informed of the charge with sufficient details to answer it (sec 35(3)(a))
(2) to be presumed innocent, to remain silent during the plea proceedings as well as during the trial, and not to testify during the trial (sec 35(3)(h)) and
(3) to adduce and challenge evidence and not to be a compellable witness against himself or herself (sec 35(3)(I) and (j))

Keep in mind that only accused people have these rights, and therefore they arise only once the arrested person is accused of (charged with) committing an offence.

Section 35(5) provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. This subject is dealt with in detail in study unit 16.

2.4 THE LIMITATION CLAUSE

Section 36(1) contains a provision which has become known as the "limitation clause". In terms of this provision, the rights which are granted by chapter 2 of the Constitution may be limited by statute or common law, but only if such limitation is reasonable and justifiable in an open and democratic society based on freedom and equality.

With regard to the above section the following factors should be taken into account

(1) the nature of the right
(2) the importance of the purpose of the limitation
(3) the nature and extent of the limitation
(4) the relationship between the limitation and its purpose
(5) the least restrictive means to achieve the purpose

Section 36(2) provides that no law may limit any right which is protected in the Bill of Rights, except as provided in subsection (1) or any other provision of the Constitution.

2.5 INTERPRETATION

The manner in which the Constitution is to be interpreted is an issue which is best left to the subjects Interpretation of Statutes and Constitutional Law. Nevertheless, what we can say here is that section 39(1) of the Constitution provides that, among other things, in interpreting chapter 2, the courts must consider international law and may have regard to comparable foreign law. As a result, decisions on the law of evidence in countries which may be considered as open and democratic, and which have human rights charters, have become very important to any student of the law of evidence. In S v Zuma 1995 (1) SACR 568 (CC) at 582, the Constitutional Court gave some useful guidance on how such decisions may be approached. The Canadian Charter of Rights is similar to the South African Bill of Rights because it also provides for rights which are limited by a limitation clause. This type of constitution requires a two-phased interpretation by the court. First, it must determine whether a right has been infringed. If so, in the second phase it is determined whether the infringement can be justified by the limitation clause. The similarity to the Canadian Charter is one reason why decisions by the Canadian Supreme Court are of particular importance when there are any questions about the interpretation of our Constitution. Other constitutions, such as that of the USA, have no limitation clause, with the result that, from the outset, the rights they provide for have to be interpreted in such a way that their content will be in balance with other rights.

Example

Let us say you would like to know what your rights are in the event of being arrested by the police. In the first place, you should consult the text of the relevant section of the Criminal Procedure Act. You should check whether this section is compatible with the Constitution. It may well have been struck out completely for being unconstitutional, as has happened with quite a few sections of the Act. If the section is constitutionally valid, you should still check to see how its provisions have been interpreted by the South African courts.

3 RESIDUARY SECTIONS

in preparation

- **Read Schwikkard §§ 3 3–3 6**

According to the *Shorter Oxford Dictionary,* "residuary" means "remainder, rest, that which is left". The residuary sections in the Criminal Procedure Act 51 of 1977 and the Civil Proceedings Evidence Act 25 of 1965 provide that parts of the English law of evidence will remain part of the South African law of evidence. The definition of a residuary section is therefore a section in a South African statute which incorporates a part of foreign law into our law, and thereby preserves something of the foreign law.

Example

Section 206 of the Criminal Procedure Act provides:

> The law as to the competency, compellability, or privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May 1961, shall apply in any case not expressly provided for by this Act or any other law.

In this regard, Schwikkard § 3 2 distinguishes between "the direct incorporation" of foreign law by, for instance, South African statutes using the exact wording of foreign legislation, and "indirect incorporation" as in the case of residuary clauses, which simply determine that foreign law has to be followed "on topics for which no express local statutory had been made". It was felt that residuary clauses which have indirectly incorporated English law should be changed before South Africa became a republic outside of the British Commonwealth (as happened on the 31 May 1961), as is proper for a totally independent country. Thus provisions such as the following in the Criminal Procedure Act 51 of 1977 now refer to the law as it was "on the thirtieth day of May, 1961":

- section 190 (1), which deals with the credibility of witnesses
- section 201, which deals with legal professional privilege
- section 202, which deals with state privilege
- section 203, which deals with the privilege against self-incrimination
- section 206, which deals with the competence, compellability or privilege of witnesses
- section 227, the character of an accused
- section 252, the general admissibility of evidence

On the civil side, section 42 of the Civil Proceedings Evidence Act 25 of 1965 provides that the law on the competence and compellability of witnesses, as well as the examination and cross-examination of witnesses, which would have been applicable on the 30 May 1961, will apply in any case where no provision had been made in terms of the Civil Proceedings Evidence Act or in terms of any other South African legislation.

(1) Write down the wording of section 252 of the Criminal Procedure Act 51 of 1977.

.....

.....

(2) Explain what is meant by a "residuary clause" in South African law.

.....

.....

.....

(Feedback in tutorial letter)

SUMMARY

Having distinguished between the historical sources and the knowledge sources of the South African law of evidence, we spent some time on the knowledge sources, especially the Constitution. We also looked at the factors relevant in the interpretation of the Constitution. The concept of residuary sections was also explained. These are those sections in South African statutes which incorporate foreign law into South African law and thereby preserve that part of foreign law.

part 2

Admissibility of evidence

Study UNIT four 4

Relevance and admissibility of evidence

You will need to consult the following sources for this study unit:

- Schwikkard
- The Criminal Procedure Act 51 of 1977: section 210
- The Civil Proceedings Evidence Act 25 of 1965: section 2
- The casebook

ORIENTATION

In the second study unit we explained that evidence was one of the ways in which proof could be provided. In the present unit we explore the concept of relevance. Evidence cannot be admissible unless it is relevant to the case at hand. If evidence is irrelevant it will be inadmissible. But the mere fact that evidence is relevant does not mean that it will necessarily be admissible. Other considerations also affect admissibility. Nevertheless, relevance remains one of the cornerstones of admissibility, and a good understanding of relevance is an essential starting point for an understanding of admissibility in general.

OUTCOMES

After completion of this study unit you should be able to

- explain the meaning of relevance and its relationship with the admissibility of evidence
- list the "facts in issue" in any given case
- relate the admissibility of evidence to questions such as the reasonableness of inferences drawn from certain evidence and the prejudicial effect of admitting any evidence

1 INTRODUCTION

in preparation

- Read Schwikkard § 5 1
- **Read section 210 of the Criminal Procedure Act 51 of 1977**
- **Read section 2 of the Civil Proceedings Evidence Act 25 of 1965**
- Read S v Shabalala **1986 (4) SA 734 (A) in accordance with the guidance given in the casebook**

The principles regarding the admissibility of evidence, as set out in the next four study units, are all based in relevance. If you properly understand what relevance is all about, you should have little difficulty applying it in these study units.

Both the Criminal Procedure Act 51 of 1977 and the Civil Proceedings Evidence Act 25 of 1965 provide that irrelevant evidence will be inadmissible. Our courts generally state the principle more positively, namely that evidence needs to be relevant in order to be admissible. This makes little or no difference as far as the principle is concerned. However, relevance is not the only requirement for admissibility and some evidence, though highly relevant, might still be inadmissible.

From your reading material, give at least two examples that show that evidence may be inadmissible, despite being relevant.

.....

.....

.....

.....

(Feedback in tutorial letter)

2 WHAT IS MEANT BY "RELEVANCE"?

in preparation

- Read Schwikkard § 5 3

Generally, there needs to be a logical connection between the issues of the case before the court and the evidence in order for it to be relevant. This logical relevance is a matter of common sense, and is

easily complicated by any attempt to define it in greater detail. We will give you two examples, one involving facts that are clearly highly relevant and the other referring to facts that are clearly irrelevant.

Example 1

The accused is charged with shoplifting. The facts that the owner of the shop saw her taking an item from a shelf, hiding it under her sweater, walking out of the shop without paying for the item and being caught outside the shop in possession of an item with the shop's price tag on it, are all clearly relevant to the question whether the accused stole that particular item.

Example 2

The accused is charged with shoplifting. The fact that she has blond hair, or that she is a good netball player, or that her brother plays lock for the school's second rugby team, definitely has nothing to do with the question whether she stole the particular item. Evidence about these facts would clearly be irrelevant.

The problem, of course, lies somewhere between the extremes of being clearly relevant and clearly irrelevant. As the logical relevance of the evidence diminishes, its irrelevance grows. This is why one can say that relevance is a matter of degree. The question that the court has to settle is the point at which the evidence should not be admitted. It is important to understand that this point is not going to be the same every time the decision is made. However, some principles have developed over time to assist courts in making this decision. In what follows we will consider a few definitions of "relevance", and flowing from these definitions, consider the following:

- the importance of "the issues" (or facts or points in issue)
- the potential weight of the evidence
- avoiding a proliferation of "collateral" issues
- the prejudicial effect of evidence
- the doctrine of precedent

2.1 DEFINITION OF RELEVANCE

Read the following two definitions in Schwikkard § 5 3 repeatedly, until you are sure that you understand them (use a dictionary to clear up any words that you do not understand), and then write the essence of each definition in the space provided:

(1) Stephen:

.....

.....

.....

.....

(2) The US Federal Rules of Evidence:

.....

.....

.....

.....

(Feedback in tutorial letter)

Note that evidence is not only logically relevant when it can prove something, but also when it can **disprove** something; in other words, when it can prove that any particular allegation is untrue.

2.2 THE IMPORTANCE OF "THE ISSUES"

in preparation

- **Read Schwikkard § 5 3 1**

Every court case basically revolves around certain facts or issues over which the different parties are not in agreement. In other words, these facts or issues are in dispute. As a result, they are often referred to as the "facts in issue" or "the facts in dispute" or, simply, "the issues". The issues are basically determined by the charge sheet (in criminal matters) or the pleadings (in civil matters), which are heavily influenced by the substantive law applicable to the particular field of the law involved in the proceedings.

Example 1

The accused is charged with murder. In terms of the substantive law (in this case criminal law), murder consists of the "unlawful and intentional causing of the death of another human being" (cf Snyman *Criminal law* 4 ed (2002) 421). Consequently, the facts in issue would be

(1) unlawfulness
(2) intent
(3) causing the death
(4) of another human being

These issues are often referred to as the "elements" of the crime. In addition to these elements, the charge sheet might contain further allegations related to, for example, the date of the crime, the place or area where it was committed, the name of the deceased and the manner in which the death was caused. Each of these allegations has the potential to be a further fact in issue. Therefore, there may be numerous facts in issue in a particular case.

Example 2

The plaintiff institutes an action against the defendant for failure to comply with the terms of a contract of sale entered into between them. In terms of the substantive law, a contract requires consensus on matters such as the item of sale, the sale price and the date of delivery. In addition to these elements, the summons through which the civil action is instituted might contain further allegations related to, for example, the date of the contract and the place or area where it was agreed upon. Each of these allegations has the potential to be a further fact in issue.

The potential causes of action in civil procedure are much more varied than in criminal procedure. This will be clear from your studies of private and mercantile law.

Each one of the facts in issue has to be proved by the party who bears the burden of proof (see 3 of study unit 1). However, each one of these facts can also be admitted by the opponent. Such an admission would place the fact beyond dispute. In other words, it is no longer in issue, and therefore not an issue. Admissions of facts in issue are dealt with in study unit 10.

Note that facts relevant to the facts in issue *(facta probantia)* can become in issue themselves. An example would be the reliability of a witness.

2.3 THE POTENTIAL WEIGHT OF THE EVIDENCE

in preparation

- **Read Schwikkard § 5 3 2**

An important consideration in determining the admissibility of evidence is the question of its weight, or probative value (or cogency). The principle is that the evidence must be such that a **reasonable** inference can be drawn from the evidence with regard to a fact in issue. Furthermore, evidence can only allow a reasonable inference to be drawn if it carries sufficient evidential weight.

Read S v Shabalala 1986 (4) SA 734 (A) in the casebook again, this time focusing on 740F–743G, and answer the following questions:

(1) What is the main reason why the evidence about the behaviour of the police dog was not admitted in R v Trupedo 1920 AD 58?

.....

.....

(2) A number of writers have suggested that the decision in R v Trupedo does not mean that evidence about tracking dogs will always be inadmissible. In what way do they argue should the judgment be viewed?

.....

.....

.....

.....

(3) What role did the untrustworthiness of the evidence play in the court's decision?

.....

.....

(4) Finally, the court warned that the distinction between weight and admissibility should not be blurred. What principle did the court establish in this connection?

.....

.....

(Feedback in tutorial letter)

When it has to consider whether evidence should be admitted or not, the court is not concerned with a determination of the **final** weight of the evidence. This is only done at the end of the case, when all the evidence has been presented (the assessment of evidence is dealt with in Law of Evidence 201 — see 3 in study unit 1 of this study guide). What the court needs to do now is to make an initial assessment of the potential weight of the evidence, and whether it is sufficiently substantial to justify admission — in other words, whether it is not "too inconsequential". This determination will often be affected by the facts of the particular case. Of course it might eventually happen that the evidence, although admitted, proves to be of little probative value, given the totality of all the other evidence.

Activity 4

Read S v Mavuso 1987 (3) SA 499 (A) with the assistance of the casebook and focus on 505B–G. Answer the following questions:

(1) Write down the "test" for relevance as stated in R v Mpanza 1915 AD 348 at 352.

.....

.....

.....

(2) Why was the assumption that the accused knew dagga because of his previous conviction for possession of dagga, a false one?

.....

.....

.....

(Feedback in tutorial letter)

Note that the Mavuso case is an example of a situation where the evidence appears to be logically relevant to an issue, namely the intent involved in the offence (since the accused stated in his evidence that he did not know dagga at all). However, since this evidence did not allow a **proper** (reasonable) inference to be drawn regarding the fact in issue, it was ruled inadmissible.

2.4 AVOIDING A PROLIFERATION OF "COLLATERAL" ISSUES

Collateral issues are side issues. One of the considerations in determining whether evidence should be admitted because of its relevance, is the question whether the admission of the evidence would not simply be a waste of time. A lot of time might be wasted on a proper investigation of the side issues and then, even when admitted, they may prove to be of little value when it comes to the real issues. Read Schwikkard § 5 3 3 for an example related to lie detectors (polygraphs).

As stated by Zeffertt et al *The South African law of evidence* (2003) 220:

> "If judges had to examine all the facts which might in the slightest degree have some relevance to an issue, cases would go on for ever. The law must draw a line between those facts which it regards as sufficiently relevant to be admissible and those it considers to be too remote. Where the line is drawn is bound to be a decision which the law makes on grounds of fairness and convenience."

2.5 THE PREJUDICIAL EFFECT OF EVIDENCE

in preparation

- **Read Schwikkard § 5 3 5**

Evidence that is logically relevant may be excluded because of its prejudicial effect on the party against whom it is presented. Prejudice, in this sense, must be correctly understood. If a strong case can be made by presenting evidence with a high probative value against a party, it will be damaging (prejudicial) because it is likely to lead to the court's finding against that party. The law of evidence has no problem with this kind of prejudice. In the current instance, however, it is concerned with **procedural**

prejudice, or prejudice that prejudices the party (usually the accused) in the conduct of her defence (S v Coetzer 1976 (2) SA 769 (A) 773G–774B). For example, hearsay evidence is likely to give rise to procedural prejudice because of the difficulty that the opponent will have in disputing or disproving this evidence (S v Ndhlovu 2002 (2) SACR 325 (SCA) par 49; hearsay is dealt with in study unit 8).

2.6 THE DOCTRINE OF PRECEDENT

in preparation

- **Read Schwikkard § 5 3 6**
- **Read S v Shabalala 1986 (4) SA 734 (A) 742C–743C, in the casebook**

The gist of the discussion in Shabalala regarding this matter is as follows. Although the principle on the admissibility of evidence regarding the behaviour of tracking dogs was set in R v Trupedo 1920 AD 58, the trial court in Shabalala departed from this principle. The question is whether the court was justified in doing so? First, the appeal court stated another principle, namely that a decision on the relevance of evidence should not normally be elevated to a general principle (since relevance would normally be affected by the facts of the case). However, when a court decides that certain legal consequences should follow from certain facts, it will bind subsequent cases in terms of the normal principles of the doctrine of precedent. Trupedo contains such a decision. (Remember, the decision in *Trupedo* was a finding by the then Appellate Division, whose findings on the law have to be followed by all subordinate courts, such as the Supreme Court dealing with the trial in Shabalala.)

However, it is not the final pronouncement on the matter. If the unreliability of the evidence could be sufficiently reduced through evidence that can authoritatively prove that dogs have the ability to follow the scent of one person only, rejecting all others, it will become relevant and, therefore, admissible.

SUMMARY

It should be clear that relevance is really a concept based on logic and common sense. Relevance forms the basis for many inferences that are drawn in the law of evidence, but the mere fact that evidence is distantly related to the issues of a case does not mean that it should be admitted. For this to happen, it must be shown that the evidence will permit the court to draw reasonable inferences about the fact in issue, that it will not improperly prejudice any party, and that judgments about legal consequences that flow from certain facts are adhered to, unless the reason for the irrelevance of the evidence is excluded.

Study UNIT five 5

Similar fact evidence

You will need to consult the following sources for this study unit:

- Schwikkard
- The Criminal Procedure Act 51 of 1977: section 210
- The casebook

ORIENTATION

You have already learnt that one of the main requirements for the admissibility of any evidence is that it must be logically relevant to the facts in issue. You also know that evidence may sometimes be logically relevant, but nevertheless undesirable. This will be the case when the potential for prejudice outweighs the evidentiary value of the evidence. Facts which are similar to the facts in issue will often seem to be logically relevant, but will usually (especially in criminal cases) be disallowed. The reason for this is that, in most instances, the potential for prejudice outweighs the probative value of this evidence. The presentation of similar fact evidence is therefore one of the purest applications of the relevancy principle (you studied this principle in study unit 4). In this study unit you will learn more about this legal phenomenon and its application in the law of evidence.

OUTCOMES

Once you have completed this study unit, you should

- be able to explain what is meant by similar fact evidence, in order to identify it in a set of facts
- be able to explain when similar fact evidence should be admissible, in other words, understand the practical application of the requirements for admissibility

1 DEFINITION OF SIMILAR FACT EVIDENCE

in preparation

- Read Schwikkard § 7 1–7 2

We can do no better than to say that similar fact evidence is **evidence about a fact which is similar to a fact in issue**. Note that there are two separate sets of facts. Firstly, the facts in issue before court, and secondly, a separate set of facts which is very similar to the facts in issue before court, but which is not in issue.

Example 1

The accused is charged with shoplifting. The fact that the accused has previously been convicted of shoplifting is a similar fact.

Example 2

The state alleges that the accused has committed a number of murders in a similar fashion (a typical serial killer). The facts of any one of these murders will be similar to those related to all the other charges of murder.

Example 3

The accused, in trying to dispute the admissibility of a confession made while he was in detention, wants to tender evidence that, on other occasions, the police have used improper means of investigation.

The purpose of similar fact evidence is to show that, on other occasions, a party to the proceedings acted in a similar manner to that presently being considered by the court. You can therefore understand why similar fact evidence can be potentially prejudicial. If such evidence is allowed, the conclusion may be drawn that the accused is the type of person who will commit a specific crime. A person should not, however, be found guilty because of his criminal propensity or bad character, but because a crime committed by him was properly proved. It is here that the problem arises, since a person's propensity to do something or his bad character can sometimes be the key to proving a particular crime.

2 THE ADMISSIBILITY OF SIMILAR FACT EVIDENCE

in preparation

- **Study section 210 of the Criminal Procedure Act 51 of 1977**
- **Read Schwikkard § 7 3**

2.1 GENERAL

Although similar fact evidence may be relevant in civil matters, it is mostly in criminal matters that it can be a very useful tool to proving a case against an accused person if direct evidence is lacking. However, nothing prevents the accused from utilising similar fact evidence to his advantage — see example 3 above.

The first requirement for the admissibility of all evidence, similar fact evidence included, is that there must be a logical connection between the similar fact evidence and the facts in issue. Secondly, the similar fact evidence must have sufficient probative value to warrant its reception. Van der Merwe et al *Evidence* (1983) 71 explain this requirement by stating that similar fact evidence "must have probative value in the sense that it can give rise to reasonable inferences in deciding the facts in issue". Another way of putting this requirement is to say that there must be a *nexus* between the fact in issue and the similar facts. This requirement is merely a restatement of the test for relevancy as explained in study unit 4 above.

When you have to decide on the admissibility of similar fact evidence, start off by pinpointing the facts in issue, since it is the relevance of similar fact evidence to the facts in issue that determines its admissibility. You should therefore find a reason why there is an adequate *nexus* between the facts in issue and the similar facts.

2.2 PRACTICAL APPLICATION

To help you understand the principle of relevancy and its application when similar fact evidence is in issue, you should note the following well-known *dictum* from Makin v Attorney-General for New South Wales 1894 AC 57 (PC) 65:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the

indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

2.2.1 Two important aspects of this *dictum*

This *dictum* is important for two reasons. Firstly, it states that one may not reason that because the accused committed a similar crime in the past, he has a criminal character and has therefore indeed committed the offence for which he is being tried. It the evidence is tendered for this purpose, it will not be sufficiently relevant and will therefore be inadmissible. In R v Davies 1925 AD 30, for example, it was found that evidence of the fact that the accused had indecent photographs in his possession was inadmissible on a charge that he had committed indecent acts with another man since the only purpose of this evidence was to establish that the accused had a sexually deviant character.

The second important aspect of the *dictum*, is that it answers the question of when similar fact evidence will have sufficient probative value to warrant its reception. The *dictum* clearly states that similar fact evidence will be sufficiently relevant when it answers the question of whether the acts alleged to constitute the crime were designed or accidental, or if the similar fact evidence could rebut a defence which would otherwise be open to the accused.

2.2.2 Relevance as the true criterion for admissibility

The second part of the *dictum* from the Makin case does not cover all the aspects related to similar fact evidence — there are other grounds for admissibility. What is important, however, is that Makin stresses relevance as the true criterion for the admissibility of similar fact evidence. In Harris v DPP 1952 AC 694 (HL) 705, the court points out that it would be a mistake to categorise instances in which the principle will be applicable:

> "... such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried."

In DPP v Boardman 1975 AC 421 the court stresses that, when one deals with similar fact evidence, the most important aspect is the application of the general principle: similar fact evidence will be admissible when the evidentiary value thereof outweighs the potential for prejudice. (This formulation is accepted by our Supreme Court of Appeal in S v D 1991 (2) SACR 543 (A) 543.)

Stating the general principle in respect of similar fact evidence is a simple exercise. The problem is that this exercise does not really bring one closer to deciding whether a particular piece of similar fact evidence is admissible (you will see a practical example of this in R v Solomons 1959 (2) SA 352 (A)). Most of the thought processes through which the trial court will work in order to reach an answer, require the making of decisions which are based on value judgments rather than objectively determinable facts. Deciding whether the evidence is sufficiently closely related to the facts in issue for

it to be allowed, is always a controversial matter. Although, in most cases, the evidential value of similar fact evidence will be determined by the degree of similarity between the accused's previous conduct and the instance which is the object of the court's investigation, similarity should not be over emphasised.

Read R v Solomons 1959 (2) SA 352 (A) in accordance with the guidelines in the casebook. Note that one of the more important additional aspects of the admissibility of evidence to come out of this judgment is that a piece of evidence may be inadmissible at one point in a trial, and become admissible at a later stage (or *vice versa*) — see 362D.

Explain why the court eventually allowed the similar fact evidence. Identify the following in your answer: the facts in issue, the similar facts and the *nexus* between the similar facts and the facts in issue.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

SUMMARY

One of the purest applications of the relevancy principle can be found in the case of similar facts. If the general principles of relevance are applied to similar facts, the answer should be the same had those similar facts been any other evidence of questionable relevance. Perhaps, in the case of similar facts, the probative value of the evidence is even more important than it would otherwise have been. And, of course, if the similar fact evidence has no relevance other than to show that the accused may have an inclination to commit crime, it **will** be inadmissible. In the end, however, finding the law is rarely problematic, but applying it to the facts is. As a result, there is plenty of case law on the subject, but not a lot to be learnt on how a court will apply the facts to the law in future.

Study UNIT 6

six

Character evidence

You will need to consult the following sources for this study unit:

- Schwikkard
- The Criminal Procedure Act 51 of 1977: sections 197, 211, 227 and 252
- The casebook

ORIENTATION

Schmidt and Rademeyer *Bewysreg* (2000) 439 point out that the character of a party to proceedings is, logically, relevant. If the character of a witness is known, the accuracy of his testimony can be determined with more certainty. The probative value of character evidence will not, however, normally be very strong and it is therefore usually excluded. This rule is again based on the relevancy principle. Character evidence is often closely linked to similar fact evidence and previous convictions. If you do not understand the last statement, review study unit 5 on similar fact evidence. In this study unit you will learn more about the admissibility of character evidence with regard to the accused and witnesses.

OUTCOMES

Once you have completed this study unit, you should be able to

- explain whether an accused may present evidence of his good character
- explain when the state may present evidence of an accused's bad character
- indicate to what extent an accused may be cross-examined on his character
- explain to what extent evidence of an accused's previous convictions is admissible

- explain when, in a case of an indecent nature, evidence of the character of a complainant will be admissible

1 THE MEANING OF "CHARACTER"

Note that "character" mainly refers to two things, namely disposition (or personality) and reputation. In short, disposition can be described as the real character of a person, or the way that person really is, while reputation is what other people think of that particular person. It stands to reason that what other people may think of you is not necessarily a true reflection of who you really are, but in terms of common law, only evidence of general reputation is allowed for purposes of the law of evidence.

2 CHARACTER OF THE PARTIES TO A CIVIL MATTER

in preparation

- **Read Schwikkard § 6 3**

The characters of the plaintiff and the defendant in a civil matter are usually irrelevant and therefore inadmissible. Obvious exceptions are where the claim is for damages resulting from things such as defamation, breach of promise, seduction, divorce and fraud.

3 THE CHARACTER OF PARTIES TO A CRIMINAL MATTER

3.1 CHARACTER OF THE ACCUSED

3.1.1 General

in preparation

- **Read section 227(1) of the Criminal Procedure Act 51 of 1977**

In terms of section 227(1), evidence on the character of an accused will be admissible or inadmissible if such evidence would have been admissible or inadmissible on the thirtieth day of May, 1961. Section 227(1) therefore incorporates English common law, but there are also other statutory provisions which specifically deal with **cross-examination** as to character and previous convictions.

3.1.2 The accused's good character

in preparation

- **Read Schwikkard § 6 2 1**

The accused is always entitled to adduce (present) evidence of his good character, either by testifying himself, or by calling witnesses to testify on his behalf. The fact that such evidence given by the accused himself may be of doubtful evidential value (weight) does not influence its admissibility.

3.1.3 The accused's bad character

in preparation

- **Read Schwikkard § 6 2 2**

The state will always want to show the court that the accused is of bad character and has criminal tendencies. However, evidence which proves only that the accused has a bad character will normally be inadmissible (can you see the connection with evidence of similar facts here?). The only real exception to this rule is where the accused has presented evidence of his good character. In such a case, the state is entitled to call a witness to testify about the accused's bad character, although this is most unusual. In terms of common law, such a witness will be restricted to evidence about the accused's general reputation.

Where the accused has called witnesses to testify about his good character, the state may of course cross-examine such witnesses, to test the accuracy of their evidence. If the accused has given evidence about his own good character, the state may cross-examine him on this evidence. Section 197 of the Criminal Procedure Act places certain limits on the questions which may be asked in this regard. This section will now be dealt with in more detail.

3.1.4 Cross-examining the accused

in preparation

- **Read section 197 of the Criminal Procedure Act 51 of 1977**
- **Read Schwikkard § 6 2 3**

(1) The initial part of section 197 protects an accused against answering certain questions (mostly questions asked by the prosecutor in cross-examination). Name the four categories of questions for which protection is granted.

.....

.....

.....

.....

(2) This protection falls away under the circumstances mentioned in section 197(a)–(d). Briefly discuss these circumstances in your own words.

.....

.....

.....

.....

(Feedback in tutorial letter)

Note that section 197 does not provide for the presentation of evidence on the accused's bad character. It only provides for cross-examination of the accused.

Read S v Mavuso 1987 (3) SA 499 (A) 504E–505B in accordance with the guidelines in the casebook. You will find an example of the practical application of section 197(d) there.

3.1.5 The accused's previous convictions

in preparation

- **Read section 211 of the Criminal Procedure Act 51 of 1977**
- **Read Schwikkard § 6 2 4**

Answer the following questions after studying section 211:

(1) What is the general rule regarding evidence of an accused's previous convictions?

.....

.....

(2) What are the two exceptions to the general rule?

.....

.....

.....

.....

(3) Try to think of an example of the second exception mentioned in section 211 and write it down.

.....

.....

(4) What does section 211 state about the cross-examination of the accused?

.....

.....

(Feedback in tutorial letter)

Activity 3

What is the relationship between section 211 and the rule against the admissibility of similar fact evidence?

.....

.....

.....

.....

(Feedback in tutorial letter)

3.2 THE CHARACTER OF WITNESSES OTHER THAN THE ACCUSED

- **Read Schwikkard § 6 2 5 carefully.**

3.3 THE CHARACTER OF THE COMPLAINANT

in preparation

- **Read section 227 of the Criminal Procedure Act 51 of 1977**

The complainant is the aggrieved party in a criminal case.

Example

- The complainant in a rape case is the person who was raped.
- The complainant in an assault case is the person who was assaulted.
- In a *crimen iniuria* case the complainant is the person whose dignity has been infringed.

Normally, the complainant is an ordinary witness, and the character of an ordinary witness is rarely relevant to the issue. An important exception to this principle can be found in section 227 of the Criminal Procedure Act 51 of 1977.

Activity 4

Answer the following questions after studying section 227:

(1) What does section 227(2) state about the court's function when evidence of the character of a female complainant is to be led in cases of an indecent nature?

.....

.....

.....

.....

(2) Does the principle in question 1 also operate with regard to the crime for which the accused is being tried?

.....

.....

(3) What does section 227(3) provide for?

.....

.....

.....

.....

(4) Are the stipulations of section 227 applicable to both male and female complainants?

.....

.....

(Feedback in tutorial letter)

In S v M 2003 (1) SA 341 (SCA) at 354 the court identified the following factors which it will have regard to in a section 227(2) enquiry. It held that these factors will be proper for our courts to consider when judging whether or not evidence of the complainant's sexual history will be admissible and relevant

(1) the interests of justice, including the right of the accused to make a full answer and defence
(2) society's interest in encouraging the reporting of sexual assault offences

(3) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination of the case
(4) the need to remove any discriminatory belief or bias from the fact-finding process
(5) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility
(6) the potential prejudice to the complainant's personal dignity and right of privacy
(7) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law
(8) any other factor that the presiding officer considers relevant

SUMMARY

An accused may not generally be questioned on his bad character, nor may evidence be presented in this regard. Exceptions relate to fairly obvious situations. Normally the previous convictions of an accused are irrelevant and therefore inadmissible. The characters of other parties to a case will also usually be inadmissible, unless relevant for a particular reason.

Study UNIT 7

seven

Previous consistent statements

You will need to consult the following sources for this study unit:

- Schwikkard
- The casebook

ORIENTATION

We are currently looking at evidence that may be inadmissible because it is irrelevant (ie it does not provide a solution to the facts in issue in a particular case). In this study unit we look at what previous consistent statements are, why they are normally inadmissible, and in which exceptional circumstances they may nevertheless be admitted.

OUTCOMES

Once you have completed this study unit, you should be able to

- explain what a previous consistent statement is, and identify this kind of statement in any given set of facts
- determine whether evidence of a previous consistent statement is admissible or inadmissible in any given case

in preparation

- **Read Schwikkard §§ 9 1–9 3**
- **Read S v Bergh 1976 (4) SA 857 (A) using the guidelines in the casebook.** For present purposes you need only read the summary of facts at 867G to 868A. Follow this with the exposition of the law at 865G to 867F.

1 DEFINITION OF A PREVIOUS CONSISTENT STATEMENT

A previous consistent statement is

- a statement made by a person
- which is consistent with (ie more or less the same as)
- a statement made by the same person during testimony in court (or sometimes by another witness)
- offered in an attempt to corroborate this person's testimony.

Example

Mr Witness states in court: "The defendant drove his car through the red robot, as I told the traffic officer when he appeared on the scene." Here, during his testimony in court, Mr Witness is referring to his **previous consistent statement**.

Let us look at some of the components of the definition in greater detail.

Statement

The statement may be made orally or in writing. The previous consistent statement is **not** the statement that the witness makes in court, while giving evidence, but the statement made **previously**.

Another witness

It does not matter whether the witness testifying in court (W) is somebody other than the maker of the previous statement (M) — if W gives evidence about the previous consistent statement, in order to corroborate M's evidence, it will still comply with the definition. Of course, if W testifies about the previous consistent statement, his evidence can be affected by the hearsay rule (see study unit 8).

Corroboration

Generally the only reason why evidence of a previous consistent statement is offered in court is to corroborate (support and strengthen) the testimony of the maker of the statement. As you will learn in Law of Evidence 201, corroboration may come only from a source independent of the witness. In other words, self-corroboration is not allowed (see Schwikkard § 30 3 1).

2 THE RULE IN RESPECT OF ADMISSIBILITY

The rule of the law of evidence is that it is inadmissible for a witness to testify that he made a statement consistent with his evidence in court (or to be questioned to this effect). This is because evidence about a previous consistent statement is irrelevant.

If you do not understand this last sentence, turn back to part 2 in Study unit 4 and attempt, once again, to understand what **relevance** is all about.

(No feedback)

Read Schwikkard § 9 2 to understand why this evidence is irrelevant. Write down the reasons below (not more than one line per reason).

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

3 THE EXCEPTIONS TO THE RULE

3.1 GENERAL

It is generally accepted that there is a set number of exceptions to the basic rule (as stated in 2 above). Evidence of a previous consistent statement will be admissible if it falls within one of these exceptions. If not, it cannot be admissible. We will deal in some detail with the three most important exceptions.

3.2 COMPLAINTS IN SEXUAL CASES

Two pieces of evidence about a complaint made soon after an alleged offence of a sexual nature are admissible even if this evidence is about a previous consistent statement. These are

(1) evidence that such a complaint was made
(2) evidence about the **contents** of the complaint

Activity 3

Why are these two pieces of evidence of any importance in cases dealing with a sexual offence (see Schwikkard § 9 6 5)?

.....

.....

.....

.....

(Feedback in study guide)

In S v Hammond 2004 (2) SACR 303 (SCA) the Supreme Court of Appeal stressed that evidence of a complaint in a sexual case is admitted only in exceptional cases as evidence of consistency in the account given by the complainant. It is therefore admitted as a matter going to the complainant's credibility. It is not corroborative evidence. Where the accused, for example, alleges that no rape took place because the complainant consented, evidence of the complainant does not amount to evidence of lack of consent, nor its absence to evidence of consent. The complainant's testimony in court is evidence of lack of consent, and evidence of the complaint does no more than support the credibility of the complainant so testifying.

The following requirements have to be satisfied for this exception to apply:

(1) The exception applies to cases of a sexual nature if there has been some degree of **assault** involved, or if the complainant was the victim of a sexual offence which involved **physical contact**. In the case of **young children**, however, no such physical contact is required. Examples of offences where this exception is clearly applicable are rape, indecent assault and incest. It does not matter whether the complainant is male or female.

(2) The complaint must have been made at the **first reasonable opportunity**. What this reasonable opportunity would be depends on the circumstances of each individual case, and factors such as the age and understanding of the complainant and whether contact was made with a person in whom the complainant could confide. The trial court has to exercise a discretion in this regard. An example of this is to be found in R v Gow 1940 (2) PH H 148 (C) where the court found it reasonable that a girl who was assaulted on a train did not complain to the ticket inspector, but only later to her mother. Complaints have been admitted even though they may have been made as long as six weeks after the offence.

(3) The complaint need not have been made totally spontaneously, but may not have been made after questioning which can be considered **intimidating or leading** (ie putting the words in the

complainant's mouth). The court has to decide how much intimidation it will allow before the evidence will become inadmissible. In S v T 1963 (1) SA 484 (A) the complainant's mother threatened to hit her with a stick if she did not tell her who had sexually assaulted her. The daughter then identified her stepfather. This evidence was excluded by the court.

(4) The complainant has to give evidence. In the absence of any evidence by the complainant, the evidence will be inadmissible as hearsay, **unless** it is found to be relevant for some purpose other than proving the content of the complaint (see study unit 8 for the law regarding hearsay). One such example can be found in S v R 1965 (2) SA 463 (W). There, the complainant, whilst distressed and crying and under the influence of alcohol, complained about having been raped almost immediately after the incident. At the time of the trial, however, she could not remember anything about the incident. The court allowed evidence (by another witness) of her complaint and the contents thereof, since it found such evidence relevant to indicate the complainant's state of mind at the time of the incident, and to counter the defence of consent (to sexual intercourse).

3.3 TO REBUT AN ALLEGATION OF FABRICATION

If it is suggested or alleged (mostly during cross-examination) that the witness has recently fabricated a part of his evidence, evidence may be led to show that the same thing was said at an earlier opportunity. This evidence is only tendered to show that the witness did not recently fabricate the evidence, in order to support the credibility of the witness. The evidence is therefore relevant for this purpose (to support the witness's credibility), but not to corroborate the witness's evidence.

S v Bergh 1976 (4) SA 857 (A) contains an example of this exception. **Study this decision from 866A to 867F with the aid of the guidelines in the casebook.**

Summarise the legal position regarding the admissibility of previous consistent statements in order to rebut a charge of recent fabrication.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

3.4 PRIOR IDENTIFICATION

Study Schwikkard § 9 7. Summarise the legal position in the space below.

.....

.....

.....

.....

.....

.....

(No feedback)

Identification of offenders

The identification of the criminal is often one of the most difficult aspects of a criminal case. In the course of time many measures have evolved to assist witnesses and the investigating teams to get hold of reliable evidence regarding the identification of offenders. One of these measures is an identification parade, where a number of people are lined up and the witness is requested to determine whether the guilty party is present and, if so, to point him out. However, the necessary identification does not have to take place under such formal circumstances in order to be admissible. Of course, the probative value of identification evidence depends strongly on factors such as the credibility of the witness and the conditions under which the identification was made. As a result, the courts have to assess evidence about identification with extra caution (this is covered in The Law of Evidence 201). Identification

evidence may have such low probative value that its admission becomes undesirable — it will therefore be inadmissible (see study unit 4). To allow for such evidence will be unfair to the accused.

The dangers of an **identification parade** are that the suspect may be lined up in such a way that he stands out from the other people present, or the witness may believe that the perpetrator is in the line-up and then point out the person who most resembles the perpetrator. Consequently, a number of principles have evolved over time to ensure the fairness of an identification parade. These include the following:

- It should be explained to the witness that the perpetrator may not necessarily be present.
- The witness ought to have given a description of the perpetrator before seeing the people in the line-up.
- At least eight people should participate in the line-up and they should all resemble the perpetrator to some extent.
- All the people should wear similar clothing.
- If more than one witness is present, they should be kept separate and have no opportunity of discussing the identity of the suspect.
- Nothing should be done that could influence the witness to point out any specific person.

Non-compliance with any of these principles does not immediately affect the admissibility of the identification evidence. This can only happen if the probative value of the evidence is so low that it becomes "too consequential".

Read S v Moti 1998 (2) SACR 245 (SCA) with the aid of the guidelines in the textbook and answer the following question: The court found that, in principle, the evidence of the photo identification was admissible. On which two grounds could the evidence have been inadmissible? Why was it nevertheless admissible in this instance?

.....

.....

.....

.....

.....

.....

(Feedback in study guide)

3.5 OTHER EXCEPTIONS

Read Schwikkard § 9 8–9 12 in order to get an idea of the other exceptions to the basic rule. Note that these exceptions permit the evidence for one reason only, namely as an indication of the witness' consistency and, therefore, reliability.

SUMMARY

Evidence about previous consistent statements does not regularly feature in our law of evidence. The rule against its admissibility applies in very specific situations only, namely

(1) when, during testimony in court, a witness repeats a statement consistent with one made on a previous occasion, in order to corroborate his evidence, and
(2) when a witness repeats a consistent statement made by another witness on a previous occasion, which serves as self-corroboration for that other witness.

There are at least three exceptions to the basic rule that previous inconsistent statements are inadmissible.

Study UNIT 8

eight

Hearsay

You will need to consult the following sources for this study unit:

- Schwikkard
- The casebook
- The Law of Evidence Amendment Act 45 of 1988: section 3
- The Criminal Procedure Act 51 of 1977: section 212
- The Civil Proceedings Evidence Act 25 of 1965: section 34

ORIENTATION

So far, we have shown that relevance is the main criterion for admissibility of evidence. In study unit 4 we indicated that even though irrelevant evidence will never be admissible, one cannot assume the converse, namely that all relevant evidence will always be admissible. Hearsay evidence is an example of evidence that might be logically quite relevant but which is generally inadmissible. It is inadmissible because it is unreliable, since the witness who gives the hearsay evidence cannot vouch for its reliability. In this study unit we look at the definition of hearsay, and consider the basic rule regarding its inadmissibility, as well as the exceptions to the basic rule. We will also distinguish hearsay from other parts of the law of evidence that may be confusingly similar.

OUTCOMES

Once you have completed this study unit, you should be able to

- indicate what hearsay is and be able to identify evidence that amounts to hearsay from any given set of facts
- judge whether hearsay evidence will be admissible or inadmissible in a particular case

1 INTRODUCTION

in preparation

- **Read section 3 of the Law of Evidence Amendment Act 45 of 1988 (see the casebook)**
- **Read Schwikkard §§ 13 1–13 3**

Initially, our law on hearsay and its admissibility was governed by English common law. At least two factors prompted our legislature to replace the common law with statutory provisions. First, the common-law definition of hearsay proved to be inadequate, and secondly, no further exceptions to the rule that hearsay is inadmissible could be made, which was unacceptably inflexible. As a result, the Law of Evidence Amendment Act 45 of 1988 was passed, which contains both a new definition of hearsay, and new exceptions to the basic rule that hearsay is inadmissible. (It seldom makes a difference whether you refer to "hearsay" or to "hearsay evidence" — both terms are generally acceptable.)

2 DEFINITION OF HEARSAY

Write down the definition of hearsay evidence, as contained in section 3(4) of the Law of Evidence Amendment Act 45 of 1988.

.....

.....

.....

(No feedback)

2.1 EVIDENCE, ORAL OR IN WRITING

To begin with, hearsay evidence is evidence given in court. It can either be oral or written evidence. Written evidence will invariably be contained in a document, which means that the principles relating to documentary evidence also come into play (these principles are dealt with in Law of Evidence 201 and you need not concern yourself with them for the time being).

2.2 PROBATIVE VALUE

In S v Ndhlovu 2002 (2) SACR 325 (SCA) par 45 the court explained:

> " 'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?' "

It is basically the same as the weight of the evidence.

Evidence is always given for a reason — if it has no purpose in a particular case it will be irrelevant. Therefore evidence must always provide proof of some fact in issue. When one has to determine the probative value of a certain piece of evidence in a given case, one first has to establish what the **reason** for that evidence is (in other words, which fact in issue it is supposed to provide proof of). The second question is the extent to which the evidence actually provides proof of the particular fact in issue. If the piece of evidence only provides a little proof it will have little probative value; if it provides a lot of proof it will have a lot of probative value. The credibility of the witness who is testifying will often be an important factor in determining how much or how little probative value the particular piece of evidence has.

2.3 CREDIBILITY OF A NON-WITNESS

The credibility of a person is determined by a combination of factors, such as her truthfulness and trustworthiness, her powers of observation and her memory. Credibility can be described as the extent to which a person can be believed.

The credibility of a witness is normally tested by cross-examination (which is dealt with in Law of Evidence 201). If the credibility of a person cannot be tested because that person is not in court, then it is uncertain whether that evidence can be trusted, and it should be excluded. This is the main reason for the inadmissibility of hearsay, namely that the witness who gives the hearsay evidence cannot guarantee its reliability.

2.4 DEPENDS UPON

Carefully read Schwikkard § 13 4 regarding the extent to which the evidence should **depend** upon the credibility of someone other than the witness in order to be hearsay.

2.5 A PERSON OTHER THAN THE WITNESS

Since a witness, standing in the witness box, can be cross-examined and her reliability tested, and since she can vouch for her own observations, it is only when the credibility of a person other than the witness is involved that the evidence can be hearsay. It makes no difference if the other person will testify at a later stage, or has testified already — the evidence remains hearsay (see 4.3 below).

2.6 SUMMARY

In order to determine whether a specific piece of evidence is hearsay, one should determine whether the probative value of the evidence depends upon the credibility of a person other than the witness giving that evidence.

Consider each of the following factual situations. State whether the particular piece of evidence amounts to hearsay or not, and briefly explain your answer in the available space.

(1) A is charged with theft. It is alleged that she took a radio belonging to C from C's house. While giving evidence C testifies that, although she did not see A taking the radio, her friend F did see A walking from C's house carrying a radio similar to C's. Is C's evidence hearsay? ..... Yes/No

.....

.....

(2) Would your answer in (1) have differed had the prosecutor intended to call F as a witness (and F was eventually called as a witness)? Would the evidence given by C be hearsay? ..... Yes/No

.....

.....

(Feedback in study guide)

3 THE RULE IN RESPECT OF ADMISSIBILITY

in preparation

- **Read Schwikkard § 13 7 6 carefully**

Hearsay evidence is inadmissible, unless it falls within one of the exceptions to this rule (s 3(1) of Act 45 of 1988). Hearsay is inadmissible, because it is not reliable.

According to the case of S v Ndhlovu 2002 (2) SACR 325 (SCA) [at 13] the reason for this lack of reliability is twofold. Firstly, hearsay testimony is not subject to the same reliability checks applied to direct testimony (of which the main guarantor would obviously be the right to cross-examine). In the second place, the party opposed to the admission of the hearsay evidence would be procedurally disadvantaged by not being able to "counter effectively inferences that may be drawn from it".

According to Cameron JA [at 17] these factors might even give rise to constitutional concerns and he spells out the duties of a presiding officer in this regard.

Firstly the latter has to guard against the inadvertent disclosure of such evidence, and, secondly, unrepresented accused have to be properly briefed as to the implications of hearsay to their case and finally, the person who stands to be affected by such evidence has to be protected against the "late or unheralded admission of hearsay evidence".

4 THE EXCEPTIONS TO THE RULE

4.1 GENERAL

Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 contains three exceptions to the basic rule. Write down the essence of each of these exceptions in the space below:

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

Note that the evidence remains hearsay, even when permitted in terms of any of the exceptions. It merely becomes admissible hearsay.

4.2 CONSENT

in preparation

- **Read Schwikkard § 13 5 carefully**

It is important to remember that the consent must be informed consent. However, the consent need not

be expressly given — implied consent by a legal representative has been accepted (S v Aspeling 1998 (1) SACR 561 (C) 568).

4.3 THE OTHER PERSON TESTIFIES

In terms of section 3(1)*(b)*, if the person on whose credibility the probative value of the evidence depends, testifies at a later stage, the hearsay evidence becomes admissible. However, it was decided in S v Ndhlovu 2002 (2) SACR 325 (SCA) par 34 that section 3(1)*(b)* cannot be read literally. In other words, the mere fact that the person testifies at a later stage cannot always result in the hearsay evidence being admissible, since this person might not confirm the hearsay evidence. If this person **affirms** the hearsay evidence during subsequent testimony, the hearsay evidence will be admissible in terms of section 3(1)*(b)*. Otherwise, the court found, this exception should be read with section 3(1)*(c)*, which permits the admission of hearsay evidence in the interest of justice (see 4.4 below). In summary, the law is stated as follows:

> "The admissibility of all hearsay evidence not affirmed under oath at the proceedings in questions therefore depends on whether the interests of justice require it."

The court may provisionally allow hearsay evidence on the understanding that the person who made the statement will testify at a later stage (s 3(3) of Act 45 of 1988). This provision allows a party to lead evidence in a particular order without having to call the maker of a statement as an earlier witness. Of course, if the maker of the statement does not testify, the court will have to ignore the hearsay evidence, unless it can be admitted under one of the other exceptions.

4.4 THE DISCRETION OF THE COURT

Read Schwikkard §§ 13 7–13 7 7. Thereafter make a list of the factors on which the court should base its discretion, and briefly summarise what each of these factors is about. Include examples, where relevant. Pay particular attention to the case law as discussed in the textbook.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

Regarding section 3(1)*(c)*(vii) the court should also take into consideration that section 35(3)*(i)* of the Constitution provides that every accused has the right to present and to challenge evidence. This provides a guarantee that one may confront one's accuser. An accused who is deprived of seeing her accuser face to face may argue that, because the state relied on hearsay evidence instead of calling as a witness the person who made the statement in the first place, she (the accused) has been deprived of this constitutional right.

4.5 COMMON-LAW EXCEPTIONS

in preparation

- **Read Schwikkard chapter 14**

It is important that you have an idea of the common-law exceptions because the general principle is that the court should allow hearsay evidence if it would have been admissible under the common law (Mnyama v Gxalaba 1990 (1) SA 650 (C)).

One of the common-law exceptions that have been troubling South African courts is the problem of a co-accused or an accomplice, not being tried at the same trial as the accused, making hearsay statements that incriminate such accused.

In Makhatini v Road Accident Fund 2002 (1) SA 511 (SCA) the facts were that the driver of the car involved in an accident (with a young pedestrian) made certain admissions which prejudiced the defendant's insurance company. The court found that admissions by a party to a civil action, which are relevant to an issue raised in the action, would generally be admissible against such party. At common law, however, such declarations or admissions by a third party (not before the court) were generally inadmissible against the litigant on the ground that these constituted hearsay. However, one of three exceptions to this rule was in cases where, by reason of "the identity or privity of their interests", the statement of the third party could be regarded as equivalent to the litigant's own statement, and would therefore be admissible. Applying this general rule to the specific facts in the present case, Navsa JA found that even though the admission of the driver of an insured vehicle had not previously been admissible against the registered insurer of the vehicle (because they did not have a sufficient identity of interests), the Evidence Amendment Act 45 of 1988 has now changed all that. The courts now had to test the statements against the statutory definition, and if these fell under that definition, the court had to exercise its discretion in terms of sections 3(1)(c)(i) – (iv) of the Act to decide whether statements were admissible, despite being hearsay. In the present case, the court found a statement by the driver (who had since passed away) in the police docket to be admissible in this fashion, and the appeal by the relatives of the injured pedestrian succeeded.

In S v Shaik 2007 (1) SACR 247 (SCA) the matter turned on the contents of a fax, the French author of which could not be persuaded to come to South Africa to give evidence. The appellants had objected to the admission of the fax but the trial Court had admitted it on the grounds that it constituted an executive statement in furtherance of a common purpose admissible against other *socii criminis* (this phrase is a Latin term for accomplices or associates in the crime charged). The hearsay evidence contained in the fax was admitted on the abovementioned basis because the trial court considered this to be a common-law exception to the rule against hearsay.

However, the court of appeal did not find it necessary to decide whether or not the common law did recognise such an exception, since the reception of hearsay evidence was now regulated by section 3 of the Evidence Amendment Act 45 of 1988. Section 3 provided that hearsay evidence was admissible if it was in the interests of justice to do so, and the Appeal Court found this to be the case.

This was, amongst other reasons, because all the indications were that cross-examination of the (absent French) witness would merely have reinforced the impression that he was dishonest and unreliable. Under these circumstances, the risk of prejudice flowing from the appellants' inability to cross-examine appeared to be very slim.

A further relevant factor as far as prejudice was concerned, was that this was not a case where the appellants were faced with evidence of which they had no prior knowledge and which they could not contradict. The first appellant had been at the meetings concerned (which the fax had made reference to) and knew exactly what had been said at such meetings.

4.6 STATUTORY EXCEPTIONS

in preparation

- **Read Schwikkard § 15 1**
- **Read section 212 of the Criminal Procedure Act 51 of 1977**
- **Read section 34 of the Civil Proceedings Evidence Act 25 of 1965**

It is important to note that many of the statutory exceptions (apart from Act 45 of 1988) relate to evidence of a more formal nature, such as business records, or a certificate relating to forensic investigations of some sort, where it will be a waste of time to call a witness. We do not expect you to know the detail of any of these exceptions, but you must know that they exist, and where to look for them if you need to. Section 212 of the Criminal Procedure Act 51 of 1977 is probably the most important for purposes of criminal cases, and section 34 of the Civil Proceedings Evidence Act 25 of 1965 the most important for the purposes of civil cases. However, both are merely examples of numerous similar provisions.

5 PRACTICAL APPLICATION OF ACT 45 OF 1988

As a practical example of how a court applied the considerations on which it based its discretion, read Hlongwane v Rector, St Francis College 1989 (3) SA 318 (D) in accordance with the guidelines in the casebook. Answer the following questions:

(1) Name the considerations which favoured the **exclusion** of the hearsay evidence.

.....

.....

.....

(2) Name the considerations which favoured the **acceptance** of the hearsay evidence, and briefly discuss why this was the case in each instance.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(3) Seeing that some considerations favoured the exclusion and other the acceptance of the hearsay evidence, how did the court come to a decision in this case?

.....

.....

.....

(Feedback in tutorial letter)

Activity 6

The case of McDonald's Corp v Joburgers Drive-Inn Restaurant 1997 (1) SA 1 (A) provides a good example of the application of the statutory hearsay provisions. Read this case in accordance with the guidelines in the casebook, and make a summary of the most important principles on hearsay that are to be found in the case:

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

6 DISTINGUISHING HEARSAY FROM CONFUSINGLY SIMILAR CONCEPTS

Many students have difficulty, at some time or another, to distinguish between hearsay, previous consistent statements and admissions (or confessions). We suggest the following approach:

(1) First determine whether the witness is solely testifying about her own experiences. If the witness is not relating what another person showed or told her, or what she read or saw of another's observations or experiences, the only possible concept that can be involved is that of previous consistent statements — but this is only the case if the witness is testifying about the fact that she made a consistent statement prior to testifying in court (see study unit 7).

(2) If the witness in a **criminal case** tells the court that something was **admitted** or **confessed** by another person (see study unit 10 for the exact meaning of these terms), the admissibility of that evidence should only be determined with reference to the law on admissions (or confessions depending on the nature of the other person's statement). Although evidence about such statements is strictly speaking hearsay evidence, their admissibility is only determined in terms of the law on admissions and confessions. This is because the Law of Evidence Amendment Act 45 of 1988 gives section 217 and section 219 of the Criminal Procedure Act preference when the admissibility of such statements is determined in **criminal proceedings**.

    If the witness in a **civil case** tells the court that something was admitted by another person, such evidence will constitute hearsay and the court will therefore have to decide whether if should admit the hearsay in the interest of justice after exercising its judicial discretion in this regard.

(3) Generally, in all other situations that comply with the definition of hearsay, the law of hearsay will determine the admissibility (or otherwise) of the evidence. Only in rare instances, when the witness testifies about a previous consistent statement made by another person (see study unit 7 part 1) will the admissibility of that evidence be governed by the law relating to both hearsay and previous consistent statements.

SUMMARY

Whether a piece of evidence is hearsay depends on an accurate application of the hearsay definition, which is contained in Law of Evidence Amendment Act 45 of 1988. If the evidence amounts to hearsay it will normally be inadmissible, unless it falls within one of the exceptions. Hearsay should be carefully distinguished from previous consistent statements and admissions (or confessions).

Study UNIT 9

nine

Opinion evidence

You will need to consult the following sources for this study unit:

- Schwikkard
- The casebook

ORIENTATION

This study unit deals with the admissibility of opinion evidence given by a witness who may be a layperson or an expert. When working through the study unit, you will notice that the general rule for the admissibility of all evidence, namely the **relevancy** principle, also determines the admissibility of opinion evidence.

OUTCOMES

Once you have completed this study unit, you should be able to explain

- when opinion evidence will be admissible
- the principles applicable when a court considers the opinion of an expert
- the practical application of the rule in Hollington v Hewthorn

1 THE MEANING OF "OPINION"

in preparation

- **Read Schwikkard § 8 2**

For purposes of the law of evidence, "opinion" can be described as an inference of fact which is based on other facts. Note the following explanation by Nicholas (quoted by Schwikkard § 8 2):

> "The word 'opinion' can be used in various senses. When one says, to take one meaning, 'That is a matter of opinion', one is saying that the point is open to question: it is a matter on which doubt can reasonably exist. When one prefaces an assertion with, 'In my opinion', one is indicating that it is a personal belief. Used in this sense, opinion is contrasted with fact — facts simply are, opinions are variable in that differing opinions on the same matter may without absurdity be held by different people ... Opinion, in this sense, is inadmissible in evidence, not because of any exclusionary rule, but because it is irrelevant. Legal proceedings are concerned with facts, not with the beliefs of witnesses as to the existence of facts ... In the opinion rule, 'opinion' carries another, special meaning. A fact in issue may be proved by the direct evidence of a witness with personal knowledge, or it may be proved by way of inference from other facts which tend logically to prove the fact in issue. As used in the law of evidence, 'opinion' has the meaning of an inference or conclusion of fact drawn from other facts."

2 ADMISSIBILITY OF OPINION EVIDENCE: GENERAL RULE

in preparation

- **Read Schwikkard § 8 1 and 8 3**

As with the instances covered in most of the previous study units, the relevancy principle also governs the admissibility of opinion evidence. It is therefore important to determine the issues which are in dispute. Briefly stated, if the opinion of an expert, or even a knowledgeable layperson would be of great assistance to the court, his opinion will be relevant and the court should admit his evidence.

A court need not rely on opinion evidence in respect of matters which require only ordinary knowledge and skill. If the opinion is related to a situation on which the court can deliberate on its own (without requiring the opinion of an expert or a knowledgeable layperson), opinion evidence will be irrelevant and therefore inadmissible. Therefore, the opinion evidence will have no probative value. In other words, if the court is as competent as a witness to draw inferences from the evidence, an inference made by a witness (eg regarding the guilt of the accused) will be superfluous and hence irrelevant. On the other hand, it is obvious that, for example, the opinion of a ballistic expert in a case involving a firearm would not be superfluous nor irrelevant.

The above approach is followed in England (see Hollington v Hewthorn [1943] 2 All ER 35) and in South Africa (see R v Vilbro 1957 (3) SA 223 (A)).

Activity 1

Read R v Vilbro 1957 (3) SA 223 (A) in conjunction with the guidelines in your casebook and make sure you understand the way in which the general principles on the admissibility of opinion evidence were applied in the case.

(No feedback)

3 OPINION EVIDENCE GIVEN BY A LAYPERSON

in preparation

- **Read Schwikkard § 8 4 and 8 5**

Activity 2

Answer the following questions after you have read Schwikkard:

(1) Cite six examples of instances where a court may allow for the evidence of a layperson.

.....

.....

.....

.....

.....

.....

(2) Should a court allow for unchallenged opinion evidence given by a layperson?

.....

.....

.....

.....

.....

.....

(3) Fill in the missing words:

The inability to provide reasons for the opinion of a layperson shall, in principle, affect the.....and not the.....of the opinion evidence.

(Feedback in tutorial letter)

4 THE ADMISSIBILITY AND EVALUATION OF EXPERT EVIDENCE

in preparation

- **Read Schwikkard § 8 6**

Prima facie the test laid down in the previous paragraphs accords well with the admissibility of expert evidence in general. Expert evidence is almost invariably led in order to assist the court with regard to facts which can only be properly evaluated by an expert with particular qualifications. Since the court then has to draw inferences from these facts, experts are usually involved when considering circumstantial evidence. Because the expert's evidence obviously assists the court, it would seem that expert evidence is an excellent example of the application of the Vilbro rule. Note that, for procedural purposes, it is necessary to draw a distinction between the opinion of an expert and that of a layperson. In civil cases, parties must give notice of their intention to rely on expert evidence and in criminal cases, the prosecution is required, on constitutional grounds, to disclose expert evidence before the trial starts.

Generally, the following three requirements have to be met when opinion evidence is at issue:

(1) The court should be satisfied that the expert is capable of giving evidence about the specific issue. In other words, a foundation for the expert's expertise must be established. It is therefore very important to test her expertise by asking searching questions on her qualifications (even the date when they were obtained), practical experience in her field, as well as her previous track record as an expert witness.

(2) Secondly, the court must be generally informed on the reasons and grounds upon which the opinion is based. This will enable the court to compare the expert's findings with other findings of fact in the particular case to see whether the expert's findings are corroborated by them. In the Appellate Division case of S v September 1996 (1) SACR 325 (A), for instance, the court *a quo's* finding on the very point on which the expert witnesses were testifying, was set aside. The reason for this was that the evidence by one of the state witnesses, Dr George, that the accused had lacked criminal capacity with regard to the crime with which he was charged, was preferred by the court *a quo* over the evidence by Dr Jedaar, who testified that he did, in fact, have criminal capacity. A third doctor, Dr Quail, could not choose between either of the two views. Hefer JA used his common sense and deduced that from the accused's calculated behaviour before and after the alleged crimes had been committed, that he had not lacked criminal capacity.

(3) Thirdly, the court need not rely on the opinion of an expert witness. If, however, the evidence is of such a technical nature that the court cannot make a reliable inference, the court must rely fully on the evidence given by the expert.

When an expert uses textbooks, she must not merely convey the textbook's opinion to the court, since that will constitute **hearsay evidence**. The expert should have personal knowledge of the subject in question and should only use a textbook to refresh her memory or to explain or support her opinion.

Activity 3

(1) Give five examples from Schwikkard § 8 6 of instances where expert evidence will play a role.

.....

.....

.....

(No feedback)

5 THE RULE IN HOLLINGTON V HEWTHORN

The basis for what Zeffertt et al 316 call "this almost unbelievable rule" is that a finding on an issue in a criminal trial cannot serve as proof of that issue in an ensuing civil trial, since the finding of the criminal court is mere opinion. As may be gathered from the heading, the authority for this rule is the English case of Hollington v Hewthorn & Co Ltd [1943] 2 All ER 35. After a tremendous amount of criticism in England, the Law Reform Commission recommended abolishing it, since it was "contrary to common sense". This was done by means of the Civil Evidence Act of 1968.

Activity 4

(1) Despite the fact that this rule has been abolished in England for quite a while, theoretically it still applies in South Africa. Why is this so?

Hint: You may find some clues to the answer in study unit 3.

.....

.....

.....

.....

.....

.....

.....

.....

(2) W gives evidence on behalf of the state and as a consequence someone is convicted of negligent driving. In a subsequent civil case, W is not there to give evidence since she has passed away. The plaintiff now tries to tender the **record** of W's evidence (not the criminal court's **finding**) given at the criminal trial in order to prove negligence. Will she succeed?

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

SUMMARY

An opinion is a factual inference based on other facts. In this study unit we looked at opinion evidence given by laypersons and experts. The admissibility of opinion evidence is once again based on the relevancy principle. Briefly stated, the opinion of an expert or even a knowledgeable layperson will be relevant and therefore admissible if the opinion will greatly assist the court. We also took a look at the strange rule in Hollington v Hewthorn, namely that a finding on an issue in a criminal trial cannot also serve as proof of that issue in an ensuing civil trial, since the finding of the criminal court is mere opinion.

Study UNIT 10

ten

Admissions and confessions: definition and types

You will need to consult the following sources for this study unit:

- Schwikkard
- The Criminal Procedure Act 51 of 1977: sections 219A and 217(1)
- The casebook

ORIENTATION

In the following three study units we consider the admissibility and proof of relevant statements that are to the detriment of the person from whom it emanates. This type of evidence emanates from a party to the issue and is of major practical importance. A thorough knowledge of it is essential for any practitioner.

As you have probably realised, the relevant statements are admissions and confessions. From the outset, you should make sure that you understand the distinction between these two types of statements, since that is the starting point for solving any practical problem regarding admissions and confessions. The reason for this is that it is often difficult to distinguish between an admission and a confession. A confession can indeed be described as a specific type of admission, but with its own requirements for admissibility. While working through the study units, you should come to understand the following explanation more clearly: an admission is simply an admission of **one or more** of the facts in issue (but not all the facts in issue), while a confession is an admission of all the facts in issue. All the elements of a specific crime are therefore admitted (sometimes by silence). Strictly speaking, a confession can be described as a guilty plea and therefore does not contain any exculpatory part (considered objectively).

OUTCOMES

Once you have completed this study unit, you should be able to

- explain the difference between admissions and confessions and identify them in a set of facts
- be able to identify and distinguish the various types of admissions

1 DEFINITION OF AN ADMISSION

in preparation

- **Read Schwikkard § 16 1**

An admission can be defined as

- "a statement
- or conduct
- adverse to the person from whom it emanates."

Example 1

Immediately after a car accident, Mr Wagen admits to Mr Benz: "Yes, the robot was red for me, but I noticed it too late and could not stop in time."

Example 2

Mrs Meek tells the police officer investigating a murder complaint: "I stabbed the deceased."

To be of any use in a subsequent trial, the admission must be an admission of a fact in issue. This means it has to be relevant to the facts in issue.

To ensure that you fully understand the definition of an admission, we will break it down into its various components.

1.1 "A STATEMENT"

An admission is normally contained in a statement (made verbally or in writing). In this statement, a person states something that will be to her disadvantage in any subsequent legal proceedings. Typically, one or more of the facts in issue will be admitted by an admission (but not all the facts in issue).

1.2 "OR CONDUCT"

in preparation

- **Read Schwikkard §§ 16 3 and 16 3 1**

Mere conduct by a person may amount to an admission. However, Schmidt and Rademeyer *Bewysreg* 4 ed (2000) 508 point out that an admission should be a communication, either by the person making the admission or, in the case of a vicarious admission (see 2.3 below), by a third party, and that the admission should confirm an unfavourable fact. This communication can be made verbally or through certain conduct. Conduct which does not amount to a communication, but from which an unfavourable fact can be inferred, is not an admission, but circumstantial evidence. Evidence of an attempt by the accused to commit suicide after she has been charged, is an example of this.

In certain circumstances, a person's silence may amount to an admission, such as when someone is accused of fatherhood and he simply keeps quiet and lowers his head. (This was what happened in Jacobs v Henning 1927 TDP 324). In this case, the foundation of a logical inference against the accused was his silence. However, in criminal cases the courts may be more unwilling to draw a negative inference from conduct than in civil matters. Whereas parties to a civil matter compete on an equal footing, this is not the case in criminal matters and the accused may feel that it will be an act in futility to say anything. The Constitution contains and protects the right to remain silent and the right to be presumed innocent (see study unit 13). The courts are thereby probably precluded from drawing an adverse inference from the silence of the accused.

1.3 "ADVERSE TO THE PERSON MAKING IT"

Usually when a person makes a statement, it is not difficult to decide whether it will be to her disadvantage in subsequent legal proceedings. Nevertheless it often happens that part of the statement is incriminating, and part of it is exculpatory. This may influence the admissibility of this statement, and may affect the evidential value of the statement.

2 VARIOUS FORMS OF ADMISSIONS

2.1 UNINTENTIONAL ADMISSIONS

An admission need not be made in the knowledge that it is adverse to the maker thereof. Even a statement which is intended to be exculpatory will constitute an admission if it is ultimately to the disadvantage of the maker. Therefore the criterion employed is objective rather than subjective.

Activity 1

What is meant by "the criterion employed is objective rather than subjective"?

.....

.....

.....

(Feedback in study guide)

2.2 FORMAL AND INFORMAL ADMISSIONS

in preparation

- **Read section 15 of the Civil Proceedings Evidence Act 25 of 1965**
- **Read section 220 of the Criminal Procedure Act 51 of 1977**
- **Read Schwikkard §§ 26 2, 26 2 1, 26 4 and 26 5 3**

2.2.1 The distinction

It is important to distinguish between formal and informal admissions, for the following two reasons:

(1) they are proven in different ways, and
(2) The evidential value of formal admissions differs from that of informal admissions.

A **formal admission** places the fact admitted beyond dispute. It can be made in the pleadings, or during the trial. Since it places the admitted fact beyond dispute, that fact is not in dispute and no evidence need to be adduced about it. Formal admissions may therefore be classed together with presumptions and judicial notice as pertaining to "facts of which evidence is unnecessary" (Hoffmann & Zeffertt *The South African law of evidence* (1988) chapter 18).

An **informal admission** does not place the admitted fact beyond dispute. Such an admission has to be proven by adducing evidence about the admission, and its evidential value will be considered at the end of the trial, together with all the other evidence. Although informal admissions are normally made out of court (ie extra-judicially or extra-curially), they may also be made in court.

The following activity will highlight the practical effect of this distinction:

Activity 2

Indicate whether the following situations relate to a formal or an informal admission, or neither:

(1) X's mother confronts him: "Martha tells me that you are the father of her baby girl!" X wishes the earth would swallow him up, but eventually answers: "Well, I suppose I did sleep with her." (formal/informal/neither)

(2) X's mother confronts him: "Martha tells me that you are the father of her baby girl!" X who wishes the earth would swallow him up, hangs his head in shame, but can find no answer. (formal/informal/neither)

(3) Immediately after a car accident, Mr Wagen admits to Mr Benz: "Yes, the robot was red for me, but I noticed it too late and could not stop in time." (formal/informal/neither)

(4) Makgolelo pleads not guilty to a charge of rape. During the plea proceedings in terms of section 115 of the Criminal Procedure Act 51 of 1977, he claims that although he did have sexual intercourse with the complainant, she had consented to it. The magistrate asks Makgolelo whether the statement that he had intercourse with the complainant may be recorded in terms of section 220 of the Criminal Procedure Act. Makgolelo agrees. (See S v Makgolelo 1995 (1) SACR 386 (T).) (formal/informal/neither)

(5) Makgolelo pleads not guilty to a charge of rape. During the plea proceedings in terms of section 115 of the Criminal Procedure Act 51 of 1977, he claims that although he did have sexual intercourse with the complainant, she had consented to it. The magistrate asks Makgolelo whether the statement that he had intercourse with the complainant may be recorded in terms of section 220 of the Criminal Procedure Act. Makgolelo is concerned that it will be to his disadvantage to agree, and refuses the magistrate's request. (formal/informal/neither)

(6) The suspect in a murder case takes the investigating officer to a spot in the bush where he points out a pistol. "That is the pistol", he says. Ballistic testing proves that the particular pistol was used to kill the deceased. (Note: both the conduct of the suspect and his statement may or may not amount to an admission.) (formal/informal/neither)

(7) Cocky is arrested for stabbing his wife with a knife. As the arresting police official is explaining the reasons for the arrest to Cocky, he exclaims: "But I was defending myself!" (formal/informal/neither)

(8) Cocky receives a summons in which his wife institutes a civil action against him. She is claiming damages for the stab wound inflicted by Cocky. Cocky consults his lawyer, who draws up the plea, which includes the following statement: "Cocky stabbed the plaintiff in self-defence." (formal/informal/neither)

(Feedback in study guide)

2.2.2 Proving a formal admission

2.2.2.1 In civil proceedings

in preparation

- **Study section 15 of the Civil Proceedings Evidence Act 25 of 1965**
- **Read Schwikkard § 26 4**

Answer the following questions:

(1) How is a formal admission proved in a civil matter?

.....

.....

.....

(2) What is the evidential value of such a formal admission?

.....

.....

(3) Can a formal admission be disproved by other evidence?

.....

.....

.....

.....

(4) Can a formal admission be withdrawn or amended?

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

2.2.2.2 In criminal proceedings

- **Study section 220 of the Criminal Procedure Act 51 of 1977**
- **Study S v Cloete 1994 (1) SACR 420 (A) — see the casebook**
- **Read Schwikkard § 16 7 2**

Such admissions made during criminal proceedings are normally made as part of the plea process. Some knowledge of criminal procedure is essential in order to understand this aspect of the law properly.

Section 112 of the Criminal Procedure Act 51 of 1977 allows an accused to plead guilty to a charge. After a plea of guilty, the court will normally question the accused to ensure that the accused is legally guilty. If she is, the court may convict and sentence her.

If the court is not satisfied that the accused is legally guilty, it will enter a plea of not guilty on behalf of the accused. In terms of section 113, any admission made by the accused during the questioning in terms of section 112 "stands as proof ... of such allegation". Jurists differ on whether such an admission is formal or informal. In our opinion it is formal because such an admission stands as proof of the allegation (or the fact in issue) and the fact is therefore placed beyond dispute.

When an accused pleads not guilty to a charge that is put to her, section 115 of the Criminal Procedure Act 51 of 1977 allows the accused to explain why she is pleading not guilty. Normally this explanation will be exculpatory, but it may show that the accused does not dispute every allegation in the charge sheet and thus, in essence, admits them. The court must then ascertain from the accused whether she is prepared to consent to such admission being recorded. If the accused consents, this recorded admission is "deemed to be an admission under section 220" (s 115(2)(b)). This means that this admission is taken as **sufficient** proof of the particular fact in issue. Therefore it is a formal admission.

An important question which has long been disputed concerns the evidential value of an admission made by the accused during the explanation of the plea of not guilty, where the accused **does not** consent to it being recorded as an admission. Hopefully, the law has now been settled by the decision in S v Cloete 1994 (1) SACR 420 (A). You must **read** this decision using the guidelines in the casebook and the information supplied below.

How to read S v Cloete 1994 (1) SACR 420 (A):

- For purposes of the present discussion, the facts of the case (421f–422d) are of no importance and you may skip them.
- At 424a to 424c the court gives a brief exposition of the onus of proof in criminal proceedings (see Law of Evidence 201). This provides a good example of how many aspects of the law of evidence may be applicable to one case.

- Please study the discussion from 424g up to the end of the quotation from *Valachia* (at 425e). The court then discusses various other decisions on the matter, with which you need not concern yourself too much. However, you should study the summary at 428a–c.

As is the case in civil proceedings, a formal admission does not have to be proved. As soon as it is recorded in the record of the proceedings, it forms part of that record and is considered as proof of the particular fact that actually was, or might have been in issue.

2.3 VICARIOUS ADMISSIONS

in preparation

- **Read Schwikkard § 16 4**

A vicarious admission is basically an admission made by someone other than the person whom it prejudices or disadvantages. Since an admission may normally only be admissible in respect of its maker, someone's vicarious admission will not be admissible as evidence against the person whom it prejudices. However, there are a number of exceptions which relate mostly to such an admission being made by a person who had express or implied authorisation to make it, or to the situation where the two persons share some "privity of interest or obligation". The last-mentioned expression refers to a relationship between persons which is of such a nature that what is done by the one person can be held against the other. (See Schwikkard § 16 5 for examples of such relationships.)

Note that a third party's statement, which is presented as an admission in a civil case, is hearsay in terms of section 3(4) of the Law of Evidence Amendment Act 45 of 1988 and that the stipulations of this Act therefore have to be taken into account. (See study unit 8.) The exceptions to the general rule against the admissibility of vicarious admissions are, however, still applicable, since a court will take them into account when it exercises its discretion in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

2.4 STATEMENTS MADE WITHOUT PREJUDICE

in preparation

Read Schwikkard § 16 6

(1) Why is an admission by a person involved in a dispute protected from disclosure if the admission is made in order to achieve a compromise?

.....

.....

.....

(2) What is the effect of the words "without prejudice" in such a statement?

.....

.....

.....

(3) What is the most important prerequisite for a statement made without prejudice to be protected from disclosure?

.....

.....

(4) State whether the following statements are true or false:
(a) Statements made without prejudice occur only in civil matters.
(b) If such a statement is accompanied by a threat of litigation, the statement will no longer be privileged.

(Feedback in tutorial letter)

3 DEFINITION OF A CONFESSION

in preparation

- **Read R v Becker 1929 AD 167 — see casebook**
- **Read Schwikkard § 17 3**

Answer the following questions after reading the Becker case:

(1) What is a confession, according to R v Becker?

.....

.....

(2) What is the nature of a statement if the court may infer guilt on the part of the accused only if that statement is "carefully scrutinised and laboriously put together"?

.....

.....

.....

.....

(3) What is meant by the term "extra-judicial" as far as extra-judicial confessions are concerned?

.....

.....

(4) What test has the legislature devised to be applied to confessions?

.....

.....

(Feedback in tutorial letter)

The difference between a confession and an admission is one of degree rather than of nature. By this we mean that the nature of a confession is fairly similar to that of an admission — a confession is simply an admission of every fact in issue. However, because the rules governing their admissibility are different, it is essential to determine whether a statement amounts to one or more admissions, or whether it amounts to a confession. As you will see in the following study unit, the admissibility of a confession can be determined only with regard to the rules governing the admissibility of confessions; and the admissibility of admissions can be determined only with regard to the rules governing the admissibility of admissions.

Even though the definition of a confession is fairly simple, people do not, of course, normally make confessions in legal terms, with the result that it is usually not that simple to determine whether a particular statement complies with the definition of a confession. For example, where the accused states "I took the stuff", it will not usually be considered to be a confession to theft but where the accused says "I stole the stuff", it might well be considered to be a confession.

Another possible complication relates to whether the declarant must have intended to make a confession before the statement can be accepted as a confession (ie should it be judged subjectively?). In order to answer these questions, study or read the following cases in your casebook (you should know the cases well enough to be able to answer a question based on them in the examination):

- **Study** S v Yende 1987 (3) SA 367 (A) 374C–375E. You must read the various points of view which are mentioned at 372H–374C, but you need not study them.
- **Read** S v Grove-Mitchell 1975 (3) SA 417 (A). Read the case as described in the casebook. The last section of the decision, which starts at 419H, is of no importance here.

- **Read** S v Nyembe 1982 (1) SA 835 (A) 839H–840C. You need read only the section 839G–840C. Read the case as described in the casebook. You will be given the opportunity to assess whether the confession was found to be admissible in the next study unit.
- **Read** S v Latha 1994 (1) SACR 447 (A) 453h–454i. You need read only section 453h–454i. Read the case as described in the casebook.

Draw up some guidelines to facilitate determining whether a statement amounts to a confession. Take note of the following aspects: the definition of a confession and the guidelines in S v Yende. Make sure that you read the prescribed cases and apply the guidelines you devised to them.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

SUMMARY

Both admissions and confessions put a party to a dispute at a disadvantage. Confessions are complete admissions of all the facts in dispute. Admissions come in various forms, but it is particularly important to understand the distinction between formal and informal admissions, since the way in which they are proven and their respective evidential value differs markedly. On the facts of a case, it is often difficult to determine whether a statement is a confession or merely an admission. This determination is essential, however, before a court can establish the admissibility of such a statement.

Study UNIT 11

eleven

The admissibility of admissions and confessions

You will need to consult the following sources for this study unit:

- Schwikkard
- The Constitution: section 35(1), (2), (3)
- The Criminal Procedure Act 51 of 1977: sections 219A and 217(1)
- The casebook

ORIENTATION

In study unit 10 you learnt what admissions and confessions are. This knowledge is essential to determine the admissibility of these self-incriminating statements, which will vary depending on the true nature of these statements. In this study unit you will learn more about the requirements for the admissibility of admissions and confessions both in criminal cases and civil matters. We will also touch on the procedure to be followed in determining the admissibility of these statements.

OUTCOMES

Once you have completed this study unit, you should be able to

- apply the requirements for the admissibility of admissions and confessions
- explain when an otherwise inadmissible confession will become admissible
- explain how the Constitution affects the requirements for the admissibility of admissions and confessions

1 THE ADMISSIBILITY OF AN ADMISSION IN CIVIL MATTERS

in preparation

- Read Schwikkard § 16 2

Relevance is the only requirement for the admissibility of admissions in civil matters.

2 THE ADMISSIBILITY OF AN ADMISSION IN CRIMINAL MATTERS

in preparation

- Study the first part of section 219A(1) of the Criminal Procedure Act up to "Provided that ..." (the proviso)

2.1 SECTION 219A

A number of important aspects of the admissibility of an admission is referred to in section 219A of the Criminal Procedure Act.

Complete the following sentences and, where necessary, choose the correct option:

(1) The section refers to admissions made .....; in other words, outside the judicial process. This means that it refers to (formal/ informal/both formal and informal) admissions.

(2) The section emphasises that it relates only to admissions, if they do not amount to .....

(3) Such an admission will be admissible if it is proved that it was made .....

(Feedback in study guide)

2.2 "MADE VOLUNTARILY"

in preparation

- Read Schwikkard § 16 7 1
- Read R v Barlin **1926 AD 459 in accordance with the guidelines in the casebook**

It is accepted that the requirement of voluntariness in the Criminal Procedure Act is the same as that of

the common law. R v Barlin 1926 AD 459 still provides an authoritative discussion on the common-law position.

How to read R v Barlin 1926 AD 459:

- Briefly read through the facts of the case, and note the reasons why the accused's statement was not considered to be a confession (461–462).
- The last paragraph on page 462 contains the most important part of the decision. **Study** this.
- You may totally disregard the rest of the decision.

What does "freely and voluntarily" mean, according to R v Barlin?

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

Answer the following questions after you have read Schwikkard § 16 7 1:

(1) When will a court find that a promise or threat has been made?

.....

.....

.....

.....

.....

.....

.....

.....

.....

(2) Who is a "person in authority"?

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

The meaning of "freely and voluntarily" is really not complicated. Very often the difficulty lies in making a finding about the facts of the case. This is a major problem in the case of most of the decisions which a court has to make — it is not so much the law that has to be applied which presents the difficulty, but finding out what really happened at the time of making the statement.

2.3 PROCEDURE

The rest of section 219A deals with the procedure by which a written admission may simply be handed in from the bar by the state prosecutor without the need for any evidence to be led. We do not consider this to be part of law of evidence, but rather of criminal procedure. You will learn more about the nature of this evidence in Law of Evidence 201.

3 THE ADMISSIBILITY OF A CONFESSION

in preparation

- **Study sections 217(1) and 217(1)(a) of the Criminal Procedure Act (you need not concern yourself with s 217(1)(b) or 217(2))**

Section 217(1) contains three basic requirements for the admissibility of all confessions. They have to be made

(1) freely and voluntarily
(2) by a person in his sound and sober senses

(3) without being unduly influenced thereto

All confessions have to conform with these three requirements. Note that a confession need not be in writing and that it can be made to private individuals. However, there is an additional requirement **in the case of a confession made to a peace officer**, namely that

(4) if the confession is made to a peace officer who is not a justice of the peace or a magistrate, it has to be confirmed and reduced to writing in the presence of a magistrate or justice of the peace.

When the requirements for the admissibility of a confession have not been met, this does not mean that the statement is no longer a confession. It remains a confession, but in such a case is an inadmissible confession. Nor can it suddenly become an admission, the admissibility of which is determined according to the principles of admissions.

It is important that you understand why there are certain requirements for the admissibility of confessions. This will not only help you to understand the requirements better, but you will also understand the relationship between the requirements for admissibility and the Constitution. According to S v Khan 1997 (2) SACR 611 (SCA), the requirements for admissibility in terms of section 217 are aimed at ensuring fairness. They are there to ensure reliable confessions, to protect the privilege against self-incrimination and to prevent improper behaviour by the police towards those in custody.

3.1 THE FIRST THREE REQUIREMENTS

in preparation

- **Read Schwikkard §§ 17 4 2–17 4 4 1**

Answer the following questions from Schwikkard:

(1) What is the meaning of "freely and voluntarily" as used in section 217?

.....

.....

(2) What is the meaning of the requirement that the person must have been "in his sound and sober senses"?

.....

.....

.....

.....

.....

(3) What does "without having been unduly influenced thereto" basically mean?

.....

.....

.....

Read S v Mpetha (2) 1983 (1) SA 576 (C) from 578H–585H in accordance with the guidelines in the casebook and then answer the following question:

(4) Explain the test which is used to determine whether there was undue influence in a specific instance.

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

3.2 THE FOURTH REQUIREMENT

In order to understand the implications of the fourth requirement, one has to know the meaning of "peace officer" and "justice".

In terms of section 1 of the Criminal Procedure Act 51 of 1977, the term "justice" refers to "a person who is a justice of the peace under the provisions of the Justices of the Peace and Commissioners of Oaths Act, 1963". For present purposes this may be accepted to refer to an **officer in the SA Police Service (SAPS)**, including someone with the rank of captain, superintendent, senior superintendent, director and assistant commissioner. Those in the lower ranks of constable, sergeant and inspector are not officers, and therefore not justices.

In terms of section 1, the term "peace officer" includes "any magistrate, justice, police official, member of the prisons service ... and ... any person who is a peace officer under [section 334(1)]". All justices of the peace are therefore peace officers, but the opposite does not apply. The lower ranks of the SAPS are peace officers. Some examples of peace officers under section 334(1) include immigration officers, nature conservation officers, traffic officers and messengers of the court. However, the powers of these officers are generally substantially restricted.

With this knowledge, read section 217(1)(a) again. You should now have a better grasp of what it means.

(No feedback)

3.3 PRACTICAL EXAMPLES OF THE APPLICATION OF THE REQUIREMENTS

See the following cases which illustrate how the various requirements are applied in practice:

- **Study** S v Latha 1994 (1) SACR 447 (A) 447–451 as set out in the casebook. This case deals mainly with the advisability of police officers ("justices", therefore) taking down confessions for purposes of section 217(1). You will see that this practice is not generally supported. In Latha the court referred to S v Khoza 1984 (1) SA 57 (A). You may read this case as well.
- **Read** S v Nyembe 1982 (1) SA 835 (A) 841E to the bottom of the page, for an example of how these factors are determined by the court.

Always remember that determining whether a statement is a confession or an admission is a separate enquiry from determining the admissibility of such a statement. As soon as it is established that a statement is an admission or a confession, that part of the investigation is complete and the nature of the statement determined. The only thing left is to determine its admissibility.

3.4 THE ADMITTANCE OF AN OTHERWISE INADMISSIBLE CONFESSION

in preparation

- **Read section 217(3) of the Criminal Procedure Act**
- **Read S v Nieuwoudt 1990 (4) SA 217 (A) 243G–248G according to the guidelines in the casebook**

In terms of section 217(3), the prosecution may prove an otherwise inadmissible confession if the accused adduces evidence of any statement made by him as part of or in connection with this confession and if this evidence is, in the opinion of the judicial officer presiding at the proceedings, favourable to that person. Note that section 217(3) is normally applicable to situations where the defence presents part of a statement which is favourable to the accused and the state reacts by presenting the unfavourable part of the statement.

Activity 6

Answer the following questions after reading S v Nieuwoudt:

(1) What are the requirements for the admissibility of an otherwise inadmissible confession?

.....

.....

.....

.....

.....

.....

(2) According to the court, what meaning should be given to the words "in connection with" in section 217(3)?

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

4 DETERMINING THE ADMISSIBILITY OF ADMISSIONS AND CONFESSIONS

in preparation

- **Read Schwikkard §§ 16 7 4 and 17 6**
- **Read S v Thwala 1991 (1) SACR 494 (N) from 495h to 497b**

Whenever a dispute arises over the admissibility of an admission or confession, this dispute is determined by way of "a trial within a trial". This procedure involves a separate trial, during which the main trial is suspended, and the admissibility of the particular statement becomes the main fact in issue. Both the prosecution and the defence will adduce evidence as to the circumstances during which the statement was made. Note that a trial within a trial is also held to determine whether a statement is an admission or confession.

How to read S v Thwala 1991 (1) SACR 494 (N):

You need only read this case from 495h to 497b. It gives a typical explanation of the problems which courts experience in assessing the evidence in a trial within a trial, in order to determine whether a confession was made freely and voluntarily.

Answer the following questions after reading Schwikkard:

(1) Why is a trial within a trial normally held?

.....

.....

(2) May evidence heard at a trial within a trial be taken into account when evaluating the evidence at the end of the main trial?

.....

.....

(3) If, at the end of a trial within a trial, the court is satisfied that the requirements for the admissibility of admissions or confessions have been met, the relevant statement will be admitted as evidence. Can a court amend such a decision at a later stage?

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

5 REQUIREMENTS FOR ADMISSIBILITY OF ADMISSIONS AND CONFESSIONS AND THE CONSTITUTION

in preparation

- **Read section 35(5) of the Constitution**
- **Read sections 35(1) and (2) of the Constitution**

In the previous section you learnt what the statutory (technical) requirements for the admissibility of admissions and confessions are. What happens when an admission or a confession is technically admissible since the requirements for admissibility have been met, but the admission or confession was obtained in violation of the Constitution?

Example 1

A suspect is arrested by a police official (who is also a justice of the peace) for an alleged murder. During the arrest, the suspect makes a confession to the police official. This confession was made freely and voluntary, while the suspect was in his sound and sober senses without being unduly influenced thereto. All the requirements for the admissibility of a confession were therefore met, but the suspect was never warned in terms of section 35(1)(b) of the Constitution that he had the right to remain silent and that if he said anything, it could later be used against him as evidence.

The stipulations in section 35(1)(b) were previously contained in the so-called "judge's rules". The object of these rules was to show the police what conduct would be regarded as proper when they questioned a suspect. When you come across a reference to these rules in the law reports, remember that they have now been incorporated into the Constitution.

Example 2

A suspect is arrested by a police sergeant for an alleged rape. During arrest, it is explained to him that he has the right to remain silent and that if he says anything, it could later be used as evidence against him. The suspect refuses to say anything and is detained in the police cells. After a day in the cells, he calls the investigating officer and indicates that he wants to make a confession. The investigating officer once again warns him in terms of section 35(1)(b) of the Constitution and then takes him to a magistrate to take down the confession. Before taking down the confession, the magistrate also warns the suspect in terms of section 35(1)(b) and thereafter takes down the confession. During the subsequent trial, the accused alleges that, although the statutory requirements for the admissibility of

confessions were met, he was never told about his right to a legal representative in terms of section 35(2)(b) of the Constitution.

Example 3

A suspect is arrested for reckless and negligent driving. On the way to the police station, he makes certain admissions to the arresting officer. The police official does not warn him in terms of section 35(1)(b) of the Constitution before he makes the admissions.

The fact that the technical requirements for admissibility have been met, does not therefore mean that an admission or confession will automatically be admissible. However, any violation of the Constitution does not mean that an admission or confession will automatically be inadmissible.

The answer is found in section 35(5) of the Constitution which states that any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. This provision is discussed in study unit 16. When you study it, keep in mind that the principles discussed can be just as well applied to admissions and confessions.

SUMMARY

In this study unit you learnt why it is important to distinguish between an admission and a confession: there is a considerable difference between their respective requirements for admissibility. Where an admission will be admissible in a criminal case if it was made voluntarily, more is required of a confession.

A confession can be made to any person and need not be in writing. In such a case, there are three basic requirements for admissibility. However, when a confession is made to a peace officer who is not a justice of the peace, a further requirement for admissibility must be met.

You also learnt that even if the technical requirements have been met, the stipulations in the Constitution still have to be taken into account when deciding on the admissibility of admissions and confessions.

Study UNIT 12

twelve

Admissions and confessions: remaining matters

You will need to consult the following sources for this study unit:

- Schwikkard
- The Criminal Procedure Act 51 of 1977: section 218
- The casebook

ORIENTATION

Now that you know what admissions and confessions are, and when they are admissible, we still need to cover a few related matters. The first deals with the situation where the accused has pointed out something (any fact) which is relevant to the facts in issue. The question is whether it is admissible to use evidence of such a pointing out against the accused, even if the pointing out was performed under duress, or even if it forms part of a statement (usually a confession or admission) which is inadmissible for some reason. The second related matter deals with the situation where the accused can be convicted of more than one crime. It may happen that the statement by the accused amounts to a confession in respect of the one crime, but it may only be an admission in respect of the other. The question here is whether, for purposes of determining its admissibility, such a statement should be judged as a confession, an admission, or both.

OUTCOMES

Once you have completed this study unit, you should be able to

- explain the difference between evidence as to the existence of facts and evidence that the accused pointed out certain facts

- inidicate when these types of evidence will be admissible, and when they form part of an inadmissible admission or confession
- explain the relationship between the technical requirements for admissibility of evidence of pointing out and the Constitution
- substantiate, in your opinion, whether a statement which is an inadmissible confession on a lesser charge may still be accepted as an admission on the main charge

1 POINTING OUT OF FACTS IN CONSEQUENCE OF AN INADMISSIBLE ADMISSION OR CONFESSION

in preparation

- **Read sections 218(1) and (2) of the Criminal Procedure Act 51 of 1977**

Before continuing your reading on this subject, it is essential that you understand exactly what section 218(1) and (2) really provide for. The following example may help.

Example 1

A suspect is questioned, usually by the police. In the course of the interrogation, the suspect makes an admission or confession which is, for some reason, inadmissible. This inadmissibility may result from the fact that force or undue influence was exerted on the suspect, or it may be purely technical (eg, it was not confirmed and reduced to writing in front of a magistrate or justice of the peace). Often, part of this admission or confession consists of the suspect's informing the police that she is able to point out something or some place relevant to the case. It may also consist of information which will enable the police to discover these facts themselves. This may lead to the discovery of, for instance, the murder victim, murder weapon or stolen property. The obvious inference to be drawn is that the suspect could not have known about these "facts" unless she was in some way involved in the commission of the crime. This, in turn, gives rise to two issues. The first relates to how the discovered evidence may be presented in the case without stating that the accused pointed it out. The second relates to whether evidence may be presented about the fact that the accused pointed out something relevant to the case.

The first question can be answered with reference to section 218(1). Essentially it states that evidence of any fact may be admitted at criminal proceedings, notwithstanding that the witness discovered such fact only in consequence of information given by an accused in a confession or statement which is not admissible. Typical examples of such facts are the murder weapon, the whereabouts of the murder victim or the place where stolen goods are kept. Please note that although section 218(1) therefore allows the admissibility of such evidence in the the above mentioned circumstances, it does not allow for evidence of the fact that the accused pointed them out. However, this fact can be affected by section 218(2).

Section 218(2) essentially states that evidence of any pointing out by an accused may be admitted at criminal proceedings, notwithstanding that such pointing out forms part of a confession or statement which is not admissible. This allows for evidence that the accused pointed out the particular facts.

2 THE ADMISSIBILITY OF EVIDENCE OF A POINTING OUT

The admissibility of evidence discovered in consequence of information given by an accused in any confession or statement which is not admissible (s 218(1)) and of evidence of a pointing out by an accused that forms part of a confession or statement which is not admissible (s 218(2)) is further qualified by decided cases and the Constitution.

2.1 DECIDED CASES

in preparation

- **Read S v Sheehama 1991 (2) SA 860 (A) from 877 and S v January; Prokureur-generaal, Natal v Khumalo 1994 (2) SACR 801 (A) in accordance with the guidelines in the casebook**
- **Read Schwikkard § 17 8**

Case law on the topic of pointing out has mostly dealt with the situation covered in section 218(2). It was decided in the Sheehama case and confirmed in the January case that a pointing out is essentially a communication by means of conduct and therefore a declaration by the person performing the pointing out that she knows something about the facts in issue. If this statement is to the disadvantage of the person doing the pointing out, it will constitute an extrajudicial admission (by conduct). The rule for the admissibility of a pointing out made by the accused is the same as in the case of any admission, namely that it will be admissible only if the pointing out was done freely and voluntarily.

(1) As far as pointing out is concerned, what did the exception that was accepted in R v Samhando 1943 AD 608 involve?

.....

.....

.....

(2) Why does the exception that was accepted in R v Samhando 1943 AD 608 no longer apply?

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

2.2 THE CONSTITUTION

in preparation

Read § 5 "REQUIREMENTS FOR ADMISSIBILITY OF ADMISSIONS AND CONFESSIONS AND THE CONSTITUTION" in study unit 11

A suspect is arrested for her involvement in an alleged cash in transit heist. During her arrest, she is warned in terms of section 35(1)(b) of the Constitution, and decides to keep quiet. After spending some time in the cells, she decides to point out the stolen money. She takes the investigating officer to a hiding place and points out containers filled with money. During her trial, the accused alleges that evidence of the fact that she pointed out the containers (a s 218(2) situation) is inadmissible since at no stage during her detention was she informed of her right to a legal representative. How will the court establish whether to allow the evidence to be admitted?

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

An accused is forced to point out a murder weapon and consequently, her fingerprints are found on the weapon. Evidence of the fact that the accused pointed out the weapon will be inadmissible in terms of section 218(2) (the pointing out was not done voluntarily), whereas evidence that the accused's fingerprints were found on the weapon will be admissible in terms of section 218(1). Nevertheless, at her trial, the accused argues that the fingerprints should be excluded in terms of section 35(5) of

the Constitution because this evidence was obtained as a consequence of a breach of the accused's constitutional right not to be compelled to make an admission or confession. Such evidence should therefore be seen as derivative real evidence which connects her to the crime independently of an inadmissible communication. Reflect on this argument. (You will find the answer to this activity in study unit 16.)

(No feedback)

3 CONFESSIONS TO ANOTHER OFFENCE

in preparation

- **Read Schwikkard § 17 3 3**

  Some typical situations related to confessions of another offence will best be explained by means of the following examples:

Example 1

The accused, Big Bully, is charged with murder. At one stage he admits to the investigating officer: "I only wanted to knock him out, not to kill him." This statement is an admission in respect of murder, but a confession in respect of assault. Were the statement made voluntarily, it would be admissible on the murder charge, but inadmissible on the charge of assault (because it would amount to a confession made to a police official who was not an officer).

Example 2

John Long Chance reacts to a charge of raping a girl of 14: "She consented to the intercourse." In this example, the statement will be an admission of rape, but a confession to having intercourse with a girl of under the age of 16 (this crime is sometimes informally referred to as "statutory rape").

In terms of the provisions of the Criminal Procedure Act 51 of 1977, convictions on the lesser crimes mentioned in the above two examples are possible on charges regarding the more serious crimes. The question now is whether these statements should be treated as admissions or as confessions in order to determine their admissibility.

We agree with Schmidt and Rademeyer *Bewysreg* (2000) 536 that, for purposes of determining its admissibility, a confession of another offence should be regarded as a confession to the main charge as well. However, this will be the case only if, objectively speaking, the accused's statement amounts to an unequivocal admission of guilt on the lesser charge.

SUMMARY

A pointing out is an admission by conduct. As such, it has to be made voluntarily before the court will allow evidence about it to be used against the accused.

It is, as yet, uncertain whether a statement which is an inadmissible confession on a lesser charge may be accepted as an admission on the main charge.

Study UNIT thirteen 13

Privilege

You will need to consult the following sources for this study unit:

- Schwikkard
- The Constitution: section 35
- The Criminal Procedure Act 51 of 1977: sections 200, 203 and 204
- The casebook

ORIENTATION

We have now dealt with the various forms of evidence which may be inadmissible for some reason or another. **Privilege** is a legal term for the situation where certain evidence may be excluded from or included in the evidence presented in court, as a "privilege" (in the ordinary sense of the word) to a particular party or person. Put very simply: a witness is **protected by privilege** when he is not obliged to answer a question which would have been relevant to the facts in issue.

In this study unit we will explain some features common to the various privileges, as well as the privilege against self-incrimination and the marital privilege. In the following study units we will deal with the other forms of privilege, such as legal-professional privilege, police-docket privilege and the various forms of state privilege.

OUTCOMES

Once you have finished this study unit, you should be able to

- identify situations in which the privilege against self-incrimination may affect the course of a case, and explain how and why
- discuss the legal position related to marital privilege

1 GENERAL OVERVIEW

in preparation

- Read Schwikkard § 10 1

Privilege can be divided primarily into two categories, depending on the interests to be protected. It may be the interests of individuals or of the public at large that need to be protected. Privileges falling into the first category can be classed as **private privileges**, and those falling into the second as **state privileges**. These various privileges are discussed below and in the following study unit, and are illustrated by means of examples.

It should be understood that evidence which is protected from disclosure by privilege will generally be both relevant and reliable, but is afforded protection because a higher value, which depends on the particular privilege, needs to be protected.

1.1 PRIVATE PRIVILEGE

Please take note of the following important points related to private privilege:

(1) Normally the persons whose interests are protected by privilege should raise it themselves (or their legal representatives should do so).
(2) It is always possible for such a person to waive the privilege. This means that he chooses to testify on this privileged information. Once the witness has waived a privilege, it falls away and cannot be raised again.
(3) Private privilege exists not only during the trial, but also during all pre-trial procedures.
(4) Privilege does not affect the witness's competence or compellability to testify. The witness cannot refuse to testify, but has to take the stand and only then may he claim the privilege.

1.2 STATE PRIVILEGE

State privilege is discussed in study unit 15.

2 PRIVILEGE AGAINST SELF-INCRIMINATION

2.1 INTRODUCTION

in preparation

- Read Schwikkard § 10 2 1

- **Study sections 35(1)(a), (b) and (c), sections 35(2)(b) and (c), as well as sections 35(3)(f), (g), (h) and (j) of the Constitution**

From your reading it should be clear that application of the privilege depends on the party and type of proceedings involved. We will now consider these differences with reference to the accused, witnesses in criminal proceedings and witnesses in civil proceedings.

2.2 THE ACCUSED

in preparation

- **Read Schwikkard § 10 2 3**

In 2.1 you were instructed to study certain provisions of the Constitution. In particular, the provisions which guarantee the accused the right to a fair trial include protection against self-incrimination. These include the right not to be a compellable witness against oneself. The accused's right against self-incrimination finds application at different stages of the criminal process, and the accused must be informed of this right at all these stages in both pre-trial and trial proceedings.

2.2.1 Trial proceedings

A presiding officer must inform an unrepresented accused of his right against self-incrimination and other related rights. A failure to do so will generally lead to the exclusion of evidence obtained as a result thereof. Furthermore, an accused should not be penalised for exercising his right to remain silent. A court should therefore not draw an adverse inference from an accused's decision not to testify at trial (this matter is discussed in Law of Evidence 201).

2.2.2 Pre-trial proceedings

in preparation

- **Read S v Dlamini 1999 (2) SACR 51 (CC) in accordance with the guidelines in the casebook. Read only paragraphs [86] to [100]**

Although the privilege against self-incrimination is only specified in relation to the accused's right to a fair trial, Schwikkard § 10 2 3 1 points out that this distinction has little significance since there is authority for the view that the right to a fair trial does not begin in the court but already exists during the pre-trial stages of the criminal process. A detained person's privilege against self-incrimination should therefore also be respected. Schwikkard goes further and argues that not only should detained persons be entitled to the relevant rights, but also persons who feel obliged to speak when merely questioned, though not detained or even suspected of wrongdoing. The work continues:

> "Consequently, a person who is questioned by the police, and who does not know that he or she

is not obliged to answer the questions, and feels compelled to speak, will be detained for the purposes of the Constitution."

This point of view may be too wide and it might be better to restrict the above-mentioned entitlement to someone who is at least a suspect although not detained. In S v Sebejan and Others 1997 (1) SACR 626 (W) [at 631h-632d] Satchwell J is of the opinion that the word "suspect" refers to someone "about whom there is some apprehension that she may be implicated in the offence under investigation and, it may further be, whose version of events is mistrusted or disbelieved."

If, therefore, someone is not advised of his right against self-incrimination during the pre-trial stages of the criminal process, including bail proceedings, and evidence was obtained because of this violation, the evidence will generally be excluded in terms of section 35(5) of the Constitution. However, before this happens the test contained in section 35(5) will have to be applied, taking the facts of the case into account. (See study unit 16 for a discussion of the exclusionary rule contained in s 35(5) of the Constitution.)

Write a note in which you discuss the following statement, based on the judgment in S v Dlamini 1999 (2) SACR 51 (CC): "The privilege against self-incrimination is closely related to various rights of an accused, and these rights can only be exercised if the accused is properly advised of them. Self-incriminating evidence will generally be inadmissible if it was gathered without the accused having full knowledge of her rights."

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

2.3 THE WITNESS IN CRIMINAL PROCEEDINGS

in preparation

- **Study section 200 of the Criminal Procedure Act 51 of 1977**
- **Study section 203 of the Criminal Procedure Act 51 of 1977**
- **Read Schwikkard § 10 2 2**
- **Study Magmoed v Janse van Rensburg 1993 (1) SACR 67 (A) in accordance with the following guidelines and the guidance in the casebook**

How to read Magmoed v Janse van Rensburg 1993 (1) SACR 67 (A):

- Having read the summary of facts and the judicial processes involved (87j–89a), you may immediately proceed to page 103 of the judgment.
- **Study** the decision from 104b–g. However, with the exception of the quotation from S v Heyman, you need not be too concerned about the numerous decisions referred to.
- Continue **studying** the decision from 104h. Take particular note of S v Lwane 1966 (2) SA 433 (A) and what was decided there (104j–105d).
- Read the case from 105e–107h, with the aid of the casebook.
- Also read the case from 107i–109c, with the aid of the casebook.
- **Study** the sections on pages 109 and 110 that are highlighted in the casebook.

Note that there is no provision in the Constitution which expressly provides for the privilege **of a witness** against self-incrimination. The Constitution does not therefore protect witnesses in this regard. This is not a problem, however, as the privilege against self-incrimination already does so.

Section 203 contains a residuary clause. If you do not remember what this is, have a look in study unit 3.

(No feedback)

Answer the following questions from the above material:

(1) In terms of section 203 of the Criminal Procedure Act, which questions can no witness be compelled to answer?

.....

.....

.....

(2) At present, what is the purpose of this privilege?

.....

.....

.....

(3) Summarise the legal principles relating to the privilege against self-incrimination, as they appear from Magmoed v Janse van Rensburg (ie from those sections that you had to study).

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

Activity 4

A and W (a former advocate) rob a bank. During the robbery, W shoots and kills a security guard, and A injures a bank official. Later an argument over the loot ensues between A and W, and A shoots W in the stomach. A is charged with attempted murder, and W is the state witness in this case. Obviously, the bank robbery comes up in this case, and during cross-examination, W makes a number of statements in which he implicates himself in the murder of the security guard. At no time does the presiding magistrate warn W of his right in terms of section 203 of the Criminal Procedure Act 51 of 1977. Some months later W is charged with the murder of the security guard. Can the state in this murder case use the statements that were made by W during his testimony in the other case, as evidential material against W? Explain your answer fully.

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

Note that the extent of the privilege as set out in section 203 is modified by section 204 of the Criminal Procedure Act 51 of 1977 which provides that the court may indemnify a witness against prosecution, if the witness frankly and honestly answers any questions which may incriminate him. In these circumstances, the court shall inform the witness that she is obliged to give evidence and answer incriminating questions in respect of the offence charged.

2.4 THE WITNESS IN CIVIL PROCEEDINGS

Theoretically, the privilege is wider **in civil matters**. Not only does it cover a witness against criminal charges but, under the common law, also against penalties and forfeitures. However, the latter two figures are obsolete and of little, if any, practical significance. Read Schwikkard § 10 2 5 for further background.

3 MARITAL PRIVILEGE

in preparation

- **Read sections 198 and 199 of the Criminal Procedure Act 51 of 1977**
- **Read Schwikkard § 10 5**

Activity 5

Answer the following questions:

(1) What right does marital privilege give a spouse?

.....

.....

(2) By whom may this privilege be claimed?

.....

.....

(3) What is the probable reason for the existence of this privilege?

.....

.....

(4) What are the requirements for the existence of this privilege?

.....

.....

.....

.....

(5) What is the position regarding this privilege when a conversation between two spouses is overheard by a third party?

.....

.....

(Feedback in tutorial letter)

SUMMARY

Privilege is a legal term for certain evidence which, despite being relevant and reliable, may be excluded from the evidence presented in court as a "privilege" to a particular person. This protection is afforded as some higher value, such as the right not to incriminate oneself or the sanctity of marriage, needs to be protected.

Privilege is mostly divided into private privilege and state privilege. With respect to private privilege, the witness may refuse to testify about the privileged information, but may also waive the protection afforded by the privilege (and testify about the privileged material).

Witnesses may refuse to answer questions put to them if their answers may incriminate them. This is the privilege against self-incrimination. The Constitution also affords an accused person the right to remain silent and not to testify against himself. These rights are part of the right to a fair trial and have the same origin as the privilege against self-incrimination. A witness may, however, be indemnified against prosecution under certain conditions.

Parties to a marriage are sometimes also privileged from having to disclose the content of communications between them.

Study UNIT fourteen 14

Privilege (continued)

You will need to consult the following sources for this study unit:

- Schwikkard
- The Criminal Procedure Act 51 of 1977: section 201
- The casebook

ORIENTATION

Having dealt with some of the forms of privilege in the previous study unit, the last remaining form of private privilege requires our attention, namely legal professional privilege. We will also touch on police docket privilege, which is neither a private privilege nor a public privilege.

OUTCOMES

When you have finished this study unit, you should be able to

- identify situations in which legal professional privilege can affect the course of a case, and explain how and why it may be affected
- discuss the extent to which police docket privilege is still applicable today

1 LEGAL PROFESSIONAL PRIVILEGE

in preparation

- **Read Schwikkard § 10 3 1**
- **Read section 201 of the Criminal Procedure Act 51 of 1977**

1.1 GENERAL

According to the common-law, all "communications" between a legal adviser and her client are protected from disclosure by this privilege, subject to certain requirements to which we will return shortly. The privilege applies both to criminal and civil matters.

The privilege of the client involves the following two things:

(1) The client may refuse to answer any question which requires her to disclose any of the information she has shared with the legal adviser.
(2) The client may prevent the legal adviser from disclosing any such information.

The result of this is that the client has the assurance that she may speak freely to her legal adviser, without fear that the legal adviser will (or can) inform the police or the court or anybody else of anything that she (the legal adviser) learnt in the process.

This does not mean that the legal adviser has to accept whatever the client tells her. If the legal adviser finds herself unable to defend the client for some reason, for example on the ground of the seriousness of a crime that the client may have confessed to her, the legal adviser may withdraw from the case on moral grounds.

1.2 STATUTORY PROVISION

Section 201 of the Criminal Procedure Act 51 of 1977 restricts the scope of the privilege to a greater extent than the common law does, but it does not replace the common law. The Act basically repeats that, without the consent of the client (the accused), a legal adviser may not give evidence on what was discussed between them in connection with the case. As such, it embodies the right mentioned in the second point of 1.1 above. No similar provision is found in the Civil Proceedings Evidence Act 25 of 1965, with the result that the civil-law position is determined by the common law only.

1.3 PURPOSE OF LEGAL PROFESSIONAL PRIVILEGE

The purpose (or rationale) of legal professional privilege is set out clearly in Schwikkard § 10 3 1, which you should read again. It is basically to improve the effectiveness of legal representation. Legal advisers can only fulfil their function properly if their clients are able to discuss every aspect of their cases in confidence and without fear of their advisers being compelled to disclose what was said during these discussions in evidence against them.

1.4 LEGAL PROFESSIONAL PRIVILEGE AND THE CLIENT

It should be noted that the four points mentioned in 1.1 of the previous study unit apply equally to legal professional privilege. This means, *inter alia*, the following:

(1) It is the privilege of the client. In practice, the legal adviser will usually claim it on behalf of the client. However, if the client and the adviser have a difference of opinion on whether or not to claim this privilege, the court will accede to the client's choice. The court may not force the client to claim the privilege, although it may advise the client of the existence of this right.

(2) The client may waive the privilege expressly or implicitly. It may be difficult to determine whether waiver has taken place by implication, but examples include situations where the client reveals the content of a statement, or cross-examines on it. A mere reference to a particular statement is not enough — the content must have been revealed.

In S v Safatsa 1988 (1) SA 868 (A) the court was not prepared to accept that the privilege would fall away, even if the statement might prove the innocence of the accused.

1.5 THE REQUIREMENTS

Below you will find a list of the requirements for the operation of this privilege. We have left a space beneath each requirement in which you should write a brief note on the important aspects thereof. Use the relevant material from Schwikkard as the basis for your notes.

(1) The legal adviser must act in a professional capacity (Schwikkard § 10 3 2 1).

.....

.....

.....

.....

.....

(2) The communication must be made in confidence (Schwikkard § 10 3 2 2).

.....

.....

.....

.....

.....

(3) The communication must be aimed at obtaining legal advice (Schwikkard § 10 3 2 3).

.....

.....

.....

.....

.....

(4) The communication must not be made with the intention of furthering a crime (Schwikkard § 10 3 2 3).

.....

.....

(Feedback in tutorial letter)

1.6 INVOLVEMENT OF THIRD PARTIES

You have just been taught that a requirement for legal professional privilege is that the communication between a client and legal adviser must be made in confidence. As soon as a third party becomes involved, this requirement would seem to be impossible to achieve. However, this is not necessarily the case, as we will explain below.

1.6.1 Agents

1.6.1.1 Definition of "agent"

An agent of a client or legal adviser is someone who is appointed by the client or legal adviser to perform a specific function. In this sense, "agent" has a somewhat wider meaning than when it refers to the agent who represents a principal for purposes of private or mercantile law.

Examples of agents are

- the private investigator who is appointed by a client to investigate the movements of her husband
- the auditor who is appointed to go through the books of an adversary party
- the mechanic who is employed to keep the vehicles of a client in good working order

1.6.1.2 Legal position of an agent

If an agent communicates certain information to the client or the legal adviser

(1) with the purpose of enabling the legal adviser to advise the client, **and**
(2) after litigation has been contemplated,

this communication will be privileged. The privilege will still belong to the client, who is the only person able to waive it.

The situation envisaged here is that, once litigation is anticipated in a certain case, information may be required which for some reason is best obtained by a third party. If the third party is specifically directed to obtain the information for purposes of the litigation, that party is considered to be an agent of the client, and the client should be in a position to prevent the agent from disclosing the information which she has communicated to the client or legal adviser.

1.6.2 Independent third parties

If an independent third party communicates certain information to a client or legal adviser

(1) with the purpose of enabling the legal adviser to advise the client, **and**
(2) after litigation has been contemplated,

this communication will be privileged, **but** the independent third party cannot be prevented from disclosing this communication should she prefer to do so. This means that the third party may refuse to disclose the information, but may not be prevented from doing so.

(1) How does an agent differ from an "independent" third party?

.....

.....

.....

(2) What is the difference in legal effect between information supplied by an agent, and information supplied by an independent third party?

.....

.....

.....

(Feedback in study guide)

1.7 PROFESSIONAL PRIVILEGE FOR OTHER PROFESSIONS

in preparation

- **Read Schwikkard § 10 4**

Although the privilege extends to interpreters, articled clerks, secretaries and other employees of the legal adviser's law firm (see Schwikkard § 10 3 3), it does not extend to members of any other profession, such as journalists or clerics, except where a statutory exception has been specifically made. It is possible that, under our current constitutional dispensation, more leeway might develop based on issues such as privacy.

2 POLICE DOCKET PRIVILEGE

2.1 GENERAL

Police docket privilege originated with R v Steyn 1954 (1) SA 324 (A). It is closely related to professional privilege. In essence, it gives the prosecutor the privilege not to have to disclose any information contained in the police docket to the accused. It is mainly aimed at the protection of the witnesses. Because the privilege belongs to the prosecutor it is not, strictly speaking, a private privilege. Neither is it a public privilege. It is therefore unique, or *sui generis*.

The extent of the police docket privilege has been dramatically reduced by the provisions of the Constitution that allow for greater access to information held by the state, as interpreted by the Constitutional Court in Shabalala v Attorney-General of the Transvaal 1996 (1) SA 725 (CC).

2.2 THE PRIVILEGE TODAY

in preparation

Study Shabalala v Attorney-General of the Transvaal 1996 (1) SA 725 (CC) in accordance with the guidelines given below and in the casebook

How to read Shabalala v Attorney-General of the Transvaal 1996 (1) SA 725 (CC):

- The facts of the case are of no importance
- Read paragraphs [14] and [15] for a brief overview of the common-law position
- Know which provisions of the interim Constitution are of importance in dealing with this question (the counterparts of these sections in the interim Constitution are the following in the new Constitution: for s 23, s 32; for s 25(3), s 35(3); for s 33, s 36; remember that all these provisions are substantially different in the final Constitution, although these changes do not affect the decision in Shabalala)

- Read paragraph [30]
- Study paragraphs [37]–[41]
- If you are interested in following the arguments of the various parties to the issue, you will find these, and the court's answer to all of them in paragraphs [43]–[49]
- Study paragraph [50]
- Carefully read paragraphs [51]–[56]
- Read paragraphs [57]–[58]
- Study the six points in the summary of paragraph [72A] in conjunction with what you have already studied

Briefly write down the main principles related to police docket privilege which are evident from those paragraphs in the Shabalala case which you had to **study**.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

Please note that access to the police docket for purposes of a fair trial differs from access to the police docket for purposes of a bail hearing. In this regard section 60(14) of the Criminal Procedure Act 51 of 1977 states that

> [N]otwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in or forms part of a police docket ... unless the prosecutor otherwise directs ...

However, this should not be seen as an unfettered discretion available to the prosecution to refuse to disclose information in the docket, and there may be circumstances in which the accused should have access to the docket (see Schwikkard § 11 5 2 for a discussion in this regard). For current purposes it is enough that you know that different considerations come into play when access is considered during a bail application and when access is needed to ensure a fair trial.

SUMMARY

In order to ensure the maximum efficiency of legal representation, all communications between a client and her legal representative are privileged and may only be disclosed upon the determination of the client. Various requirements apply before the privilege will come into operation. Under certain circumstances, even third parties may be bound by this privilege.

The interim Constitution has resulted in another look being taken at police docket privilege. The right to a fair trial requires that an accused must normally have access to the statements of witnesses contained in the docket. If it is not required for a fair trial, the state may decline to grant such access. The court has to exercise its discretion in determining whether disclosure of documents is required where state security and similar considerations are at stake.

Study UNIT 15

fifteen

State privilege

You will need to consult the following sources for this study unit:

- Schwikkard
- The casebook
- The Constitution: section 32
- The Promotion of Access to Information Act 2 of 2000; section 1, 41-46

ORIENTATION

in preparation

- **Read Schwikkard § 11 1**

In this study unit we deal with evidence which is inadmissible because its reception would be contrary to an aspect of public policy. Such evidence is inadmissible despite its being relevant (and therefore having a high probative value). Schmidt *Bewysreg* (1989) 537 points out that when dealing with this type of evidence, it is all about the protection of the interests of persons or instances which are normally not directly involved, even if it complicates the adjudication of a case. It is therefore basically organs and officials of state which are protected by state privilege. State privileges can conveniently be categorised according to the type of state authority involved (either executive, legislative or judicial). For purposes of this course, only the first and last types of state authority will be dealt with.

OUTCOME

Once you have completed this study unit, you should be able to indicate

- how public policy and individual rights are weighed up in order to solve any problem in this regard

1 PUBLIC POLICY AND INDIVIDUAL RIGHTS

in preparation

- **Read section 32 of the Constitution**
- **Read Shabalala v Attorney-General of the Transvaal 1996 (1) SA 725 (CC) in accordance with the guidelines below and in the casebook**

After studying the section that follows, you should have an understanding of how the Constitutional Court tries to balance public policy and individual rights. Although Shabalala v Attorney-General of the Transvaal basically deals with the police docket privilege, the case yields certain important principles with regard to the general approach to be follow when one has to balance individual rights and public policy, specifically with regard to information. You must keep these principles in mind when studying the rest of the unit.

When studying the case, you must remember that section 32 is the equivalent of section 23 of the interim Constitution, but it has been simplified and broadened. It now simply provides that everyone has the right of access to any information held by the state. Section 32(1)(b) is of no importance for our purposes. Section 32(2) has been added to provide for legislation which gives effect to the right, but which also reduces the burden on the state (as has, in fact, happened in the shape of the Promotion of Access to Information Act 2 of 2000). The right to information may be limited by the application of section 36 of the Constitution.

How to read Shabalala v Attorney-General, Transvaal 1996 (1) SA 725 (CC):

You have already read this case in study unit 14, dealing with police docket privilege. In this study unit the most important aspect to get to grips with is the Constitutional Court's treatment of the balancing of individual rights and public interest. Therefore read

- paragraph 22
- paragraphs 31–33
- paragraph 40
- paragraph 42
- paragraphs 52–53
- paragraph 55

Activity 1

Based upon what you have read in Shabalala v Attorney-General of the Transvaal, make a summary of the general approach to be followed by a court regarding public policy, under the system of fundamental rights.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

2 PRIVILEGES BELONGING TO THE EXECUTIVE

2.1 GENERAL

in preparation

- **Read Schwikkard § 11 6**
- **Read section 1 (definition of "record") and sections 41–46 of the Promotion of Access to Information Act 2 of 2000**
- **Read section 32 of the Constitution**

As was explained earlier, the law with regard to privileges based upon public policy is still basically that which was in force on the 30 May 1961; in other words, the English common law. The authoritative case on privileges with regard to the executive is Van der Linde v Calitz 1967 (2) SA 239 (A). This case dealt with a confidential report about a warehouse caretaker who worked for the Orange Free State provincial administration. For present purposes the following aspects from the case are important: when making its decision, the court could have followed two English cases with different precedents. In the one case (Robinson), the Privy Council decided that a court may inspect the document with regard to which the privilege is claimed and decide for itself whether the privilege should be upheld. This case was all about the marketing and selling of wheat. In the other case (Duncan), the House of Lords decided that a minister's claim to privilege should be upheld if, according to him, it was necessary in the interests of the safety of the state, international relations or the proper functioning of the civil service. This case was about the revealing of information about the construction of submarines (state security was therefore at issue).

In Van der Linde v Calitz the court followed *Robinson*, not only because of the precedent system, but also because the facts that were more in line with those in Van der Linde v Calitz. Schmidt and Rademeyer 579 highlight the fact that the court has a discretion to decide whether the production of state documents would be harmful to the public interest and that this discretion has to be exercised with great care. They also point out an *obiter dictum* in the Van der Linde case which emphasised the fact that the present case did not deal with the safety of the state, international relations or documents at a high level of the executive.

After Van der Linde was decided, legislation was introduced which confirmed the court's point of view. This legislation took away the courts' power to decide whether the state's claim to privilege should be upheld where the claim is based upon state safety. This legislation was, however, subsequently scrapped, which returns the situation to the common-law position, as interpreted by Van der Linde, but importantly, also by the Constitution.

These rights and procedures are now comprehensively regulated by the Promotion of Access to

Information Act 2 of 2000. If the custodian refuses access to state or private information, reasons have to be given to the applicant. The latter may take the decision on appeal in terms of the Act. It is important to note that this legislation does not abolish existing privileges which exist in terms of South African law enacted prior to the Constitution.

Imagine that you are a legal officer, having to decide between the applicant (in terms of Act 2 of 2000) on the one hand and the government on the other, in a matter concerning access to government information. Briefly stipulate what rights and duties you should consider in coming to a reasoned conclusion. Which cases and statutes might be relevant?

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

2.2 STATE SAFETY, INTERNATIONAL RELATIONS AND DOCUMENTS AT THE HIGHEST LEVEL

Where issues of state safety are involved, we believe that in terms of section 32 of the Constitution, the courts will be competent to decide whether the privilege should be upheld. When a court has to decide whether to uphold a claim in such a case, it should follow the approach in Shabalala. The same approach should be followed when international relations and documents at the highest level are concerned.

2.3 OTHER PRIVILEGES BELONGING TO THE EXECUTIVE

The functioning of state privilege outside the spheres of the state safety, international relations and documents at the highest level is set out authoritatively in Van der Linde v Calitz.

The executive may object to the admissibility of evidence involving the public interest. However, any such objection must be properly raised; in other words, either personally by the departmental head or by way of affidavit. From the statement of the departmental head it must be evident that he himself has read and considered each item of evidence in question and the reasons for his opinion must be set out as fully as possible to enable the court to decide whether to exercise its residual power.

The court has a residual power to reject a properly raised objection where it is satisfied that the objection is unjustifiable or cannot be sustained on any reasonable grounds and that it is in a position to examine the relevant evidence and come to a decision.

3 PRIVILEGES RELATED TO THE ADMINISTRATION OF JUSTICE

3.1 POLICE INFORMERS

in preparation

- **Read Schwikkard §§ 11 4 2 and 11 4 4**

Informers' privilege protects the name of the informer as well as the content of his communication. The reason for affording an informer a privilege is to encourage him to reveal information in cases where the state is involved. Van Niekerk et al *Privilegies in die bewysreg* (1984) 259 identify the following main characteristics which should be present before someone can be regarded as an informer:

- The informer must give evidence which is to the detriment of someone else.
- This information must be given to legal officers.
- The information must be of such a nature that a criminal prosecution may follow.

They give the following reasons for the existence of this privilege:

- The informer and his family are protected against the persons on whom he is informing.
- It enables informers to feel safe enough to give further information in future.
- It encourages the public to give evidence of crimes.

According to Ex parte Minister of Justice: Re R v Pillay 1945 AD 653 at 665, a court should not uphold an informer's privilege where publication is material to the ends of justice, if the evidence can show the accused's innocence or where there is no longer any reason for secrecy. When considering whether to uphold the privilege, the court must continuously weigh up the interests involved. Therefore, the court has to determine what, in terms of the legal convictions of society, would be a fair decision under the circumstances (see Van Niekerk et al 262.).

We are of the opinion that these principles confirm the constitutional approach to what evidence the state should reveal. The informer's privilege is not therefore unconstitutional in itself, but an accused's constitutional rights should also be considered when deciding to uphold the privilege or not. In Els v Minister of Safety and Security 1998 (2) SASV 93 (NC) 98f the court in fact states that the first requirement mentioned in Ex Parte Minister of Justice: Re R v Pillay should be read in light of the considerations mentioned in Shabalala v Attorney-General of the Transvaal 1996 (1) SA 725 (CC) paragraph 55.

May informers' privilege be waived? In R v Van Schalkwyk 1938 AD 543 the following approach in R v Harris 1927 NPD 330, 245 was accepted by the Appellate Division:

> "The rule protecting an informer is based upon the theory that public policy requires his protection, because otherwise persons would be discouraged from giving information, but it is difficult to see how public policy is served by prohibiting him from himself disclosing the fact, indeed public interests would be ill-served in many cases if there were any such rule."

Note the following qualification to this principle. If public policy requires that the identity of an informer be kept secret, and the state proves this, such evidence should not be admitted, notwithstanding the informer's willingness to disclose his identity (R v Van Schalkwyk 1938 AD 543).

3.2 JUDICIAL OFFICERS

Judges may be compelled to give evidence in court on matters unrelated to their judicial functions. They do not therefore have a privilege not to testify. However, as a result of a rule of practice, they cannot be compelled to give evidence about matters which happened in proceedings before them. Magistrates likewise have no privilege not to testify. Nor is there a rule of practice which states that they should not be compelled to testify about proceedings before them, and it frequently happens that they may have to testify in higher courts, for example if the accused denies the plea proceedings, or if oral evidence is required on a confession or admission which was taken down by them.

Even though advocates and attorneys would be competent and compellable to testify on matters which have come to their notice as a result of their professional activities, it is desirable for someone else to provide that testimony. Legal professional privilege may, of course, prevent these practitioners from testifying on statements which their clients have made to them.

SUMMARY

In our current constitutional setup individual rights are regarded as more important than those of the state. A court therefore always has to determine whether revealing information would prejudice things like state security and the identity of informers. However, if something has to be kept secret in the

public interest, it will not be in the interest of individuals to reveal such information. A careful weighing up of different interests is necessary in every case.

The law as set out in Van der Linde v Calitz has not really been changed, despite all subsequent developments. A court will therefore have to decide whether the issues involved are serious enough to justify not admitting the evidence. The same approach applies to the identity of informers. Legal officers are normally not required to give evidence, although they are not really protected from having to do so by any privilege.

Study UNIT 16

sixteen

The exclusion of unconstitutionally obtained evidence

You will need to consult the following sources for this study unit:

- **Schwikkard**
- **The Constitution: section 35(5)**
- **The casebook**

ORIENTATION

In this study unit we take a look at the exclusion of relevant evidence obtained in violation of the Constitution. Although a specific piece of evidence might be admissible because all the requirements for admissibility have been met (the evidence is relevant and all the technical requirements for admissibility have been complied with), a court may still refuse to admit the evidence if it was obtained in violation of the Constitution. On the other hand, a contravention of the Constitution does not necessarily mean that a specific piece of evidence is inadmissible. The answer can be found in section 35(5) of the Constitution. Note that section 35(5) applies only to criminal proceedings and not to civil proceedings. It is, however, possible to exclude illegally or otherwise improperly obtained evidence in civil proceedings on similar grounds.

OUTCOME

Once you have completed this study unit, you

- should be able to identify the situations in which section 35(5) will be applicable and, with the aid of section 35(5), determine whether evidence should be excluded or included

in preparation

- **Study section 35(5) of the Constitution**
- **Read "3.5 REQUIREMENTS FOR ADMISSIBILITY AND THE CONSTITUTION" in study unit 11**

1 PROCEDURE

In the case of a factual dispute, an application for the exclusion of evidence in terms of section 35(5) is determined in the same manner as when determining the admissibility of an admission or a confession, namely by means of a trial within a trial (see study unit 11). First, an applicant has to provide *prima facie* proof that one of her rights was violated and that evidence was obtained as a result of that violation. Then a court will determine whether the evidence should be excluded after considering whether admittance of the evidence will render the trial unfair or otherwise bring the administration of justice into disrepute. In this regard the court is required to exercise its discretion and make a value judgment on the question whether admission of the evidence would have the above-mentioned consequences. If admitting certain evidence will have the effect referred to in section 35(5), the court must exclude it. The court has no discretion in this regard.

2 CAUSAL RELATIONSHIP

The first part of section 35(5) states: "Evidence obtained in a manner that violates any right in the Bill of Rights ...". This part of the section points to the fact that before evidence can be excluded in terms of section 35(5), the court must establish a causal relationship between the Bill of Rights violation and the obtaining of the evidence. This means that in any relevant case it should be proved that the evidence sought to be excluded is not too remote from the initial Bill of Rights violation. For this purpose the entire relationship between a Bill of Rights violation and the obtaining of evidence must be examined on a case by case basis in order to determine the strength of the causal relationship. It should, however, be remembered that the true test for exclusion of evidence is whether **admission** of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice. It is therefore possible to follow a fairly liberal approach in this regard and not require a strict causation test.

3 TEST TO DETERMINE EXCLUSION

3.1 GENERAL

Steytler *Constitutional criminal procedure* (1998) 36 has to say the following on the test for exclusion:

> "It should be noted that there is principally one test — whether the admission of evidence would

be detrimental to the administration of justice. The test relating to the fairness of the trial is a specific manifestation of this broader enquiry; to have an unfair trial is demonstrably detrimental to the administration of justice. Having said this, it should be emphasized that section 35(5) has created two tests which should be kept separate; rules applicable to one are not necessarily applicable to the other."

While you work through your study material you will notice some similarities between the two legs of the test. Note that where a court finds that the admission of unconstitutionally obtained evidence would render the trial unfair, the court must exclude the evidence. However, if admission would not render the trial unfair, exclusion might still be possible on the basis that admission would be detrimental to the administration of justice.

The limitations clause contained in section 36 of the Constitution does not apply to situations where the exclusion of unconstitutionally obtained evidence is considered. Section 36 applies to a situation where the police have gained evidence by acting in terms of statutory or common law and it is alleged that, in terms of the Constitution, this law has unlawfully limited one or more of the rights in the Bill of Rights. In most cases in which section 35(5) will be called upon, the police will not have acted on the authority of any law.

3.2 FACTORS AFFECTING THE FAIRNESS OF A TRIAL

Section 35(5) of the Constitution specifically refers to the fairness of a trial as a criterion in the test for the exclusion of unconstitutionally obtained evidence. This means that the accused's constitutional right to a fair trial is paramount and may not be sacrificed. In S v Dzukuda; S v Thilo 2000 (2) SACR 443 (CC) the Constitutional Court points out that the right to a fair trial is a comprehensive and integrated right and that the content thereof will be established on a case by case basis. Although it is possible to specify certain elements inherent to the right to a fair trial (see s 35(3)), it may also contain certain unspecified elements. As the court explains:

"An important aim of the right to a fair trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effects which a wrong conviction has on the liberty, and dignity (and possibly other) interests of the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality."

It is not therefore possible to draw up a fixed list of factors that must be considered when determining whether admission of evidence would deprive the accused of her constitutional right to a fair trial. The court has a discretion that must be exercised on the basis of the facts of each case and by taking into account considerations like the nature and extent of a constitutional breach, the presence or absence of

prejudice to the accused, the interests of society and, also, public policy. Because this right is so broad, it cannot be applied in the abstract, but must be interpreted and applied in a factual context. There are, however, certain important issues surrounding the right to a fair trial that you should know about.

3.2.1 The fairness of a trial and the privilege against self-incrimination

An important element of the right to a fair trial is an accused's right not to be compelled to give self-incriminating evidence (s 35(3)(j) of the Constitution). This right, and others relating to it, such as the right to be presumed innocent, to remain silent and not to testify during the proceedings, are protected from the outset of the criminal process. An arrested person must be informed of the right to remain silent and of the consequences of not remaining silent. An arrested person further has the right not to be compelled to make any confession or admission that could be used in evidence against her. She also has the right to be informed of her right to have a legal practitioner assigned to her. The fact that an arrested person was not warned of these rights does not automatically lead to the exclusion of the evidence. Also, the fact that an arrested person voluntarily provides evidence in the absence of warnings, does not mean that this evidence will automatically be included. Section 35(5) must first be applied.

3.2.2 The fairness of a trial and real evidence emanating from the accused

Another important consideration is the question whether the privilege against self-incrimination is confined to testimonial utterances or communications (statements or pointings out) or whether it also extends to real evidence emanating from an accused, such as hair and blood samples. We agree with Schwikkard § 12 9 that our courts should, when confronted with the admissibility of evidence of unconstitutionally obtained bodily samples, adopt the view that such evidence does not affect the privilege against self-incrimination since it not only pre-existed the Bill of Rights violation but also existed irrespective of the violation (see s 37 of the Criminal Procedure Act 51 of 1977 that provides for the admissibility of such evidence). However, incriminating non-communicative real evidence obtained unconstitutionally from the body of the accused could still be excluded after considering the other factors that are inherent in the right to a fair trial, or if the second leg of the test in section 35(5) is satisfied. This will be the case when the admission of this evidence would otherwise be detrimental to the administration of justice — see the discussion below.

3.2.3 Fairness of a trial and derivative evidence

The question whether the requirement of a fair trial applies in respect of the admissibility of real evidence (eg the murder weapon) discovered on the basis of information contained in a testimonial communication unconstitutionally obtained from the accused, is related to the abovementioned situation. Should such evidence be treated as self-incriminating derivative evidence which, if admitted,

would violate the privilege against self-incrimination and therefore render the trial unfair? Although unconstitutionally obtained testimonial communication would be inadmissible, it is submitted that this should not lead to the automatic exclusion of the derivative real evidence which, quite independently of the inadmissible communication, connects the accused to the crime. Such evidence should not therefore be treated as self-incriminatory. The court must view this evidence separately and exercise its discretion in terms of section 35(5). Schwikkard § 12 9 7 mentions the following examples of factors or considerations which may assist the court in exercising its discretion:

- The fact that the derivative real evidence existed prior to the violation and was not created as a result of the violation is a factor favouring admissibility.
- The fact that the evidence did, however, become available as a result of the violation of a constitutional right means that the court must still consider the other factors that constitute the right to a fair trial (such as the nature and extent of the breach which led to the discovery of the real evidence) or the factors that make up the second leg of the test in section 35(5).
- Police violence cannot be sanctioned and, in considering the exclusion of derivative evidence in such circumstances, a court should rely heavily on its disciplinary function as well as the need to protect judicial integrity and the integrity of the system as a whole.
- Where there is no police violence and the real evidence is discovered as a result of a non-coerced but nevertheless inadmissible testimonial communication, our courts must ask themselves whether the evidence would have been discovered by alternative means in the absence of the Bill of Rights violation.

A 19-year-old student is arrested on suspicion of raping and murdering a fellow student. During the incident, the victim was seriously assaulted and it was quite evident that she fought bravely against her assailant. Clear evidence of someone else's blood and flesh is found under her nails. The police fail to inform the suspect of his right to a legal representative or the right to remain silent, and start questioning him. The suspect voluntarily gives a statement implicating himself. This eventually leads the police to a place where the murder weapon (a knife) is discovered. The police also force the suspect to submit himself to the taking of blood samples for the purpose of DNA testing. During the trial, the accused objects to the admission of his statement, the knife and the outcome of the blood tests as evidence and asks the court to exclude it in terms of section 35(5) of the Constitution. Explain fully whether you would exclude the evidence concerned.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

3.3 THE SECOND LEG OF THE TEST IN SECTION 35(5): "IF ... ADMISSION ... WOULD OTHERWISE BE DETRIMENTAL TO THE ADMINISTRATION OF JUSTICE"

in preparation

- **Read S v Mphala 1998 (1) SACR 388 (W) in accordance with the guidelines below and in the casebook**

How to read S v Mphala:

- Read from 391i to 398b.
- **Study** from 398b up to the end of the case.

Schwikkard § 12 10 points out that the second leg of the test is the final filter when considering whether to exclude unconstitutionally obtained evidence. Where the admission of evidence would not render the trial unfair, it must nevertheless be excluded if the court is satisfied that admission would be detrimental to the administration of justice. In S v Mphala 1998 (1) SACR 388 (W) the court notes the following with reference to the second leg of the test in section 35(5):

> "So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by enforcement agencies) for the Bill of Rights and, on the other, respect (particularly by the man on the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated."

In trying to strike a balance, the court may take a variety of factors and considerations into account but must ultimately ensure that, on the facts of each case, the exclusion of unconstitutionally obtained evidence is not detrimental to the administration of justice. Hereunder we will cover some of the important factors or considerations that Schwikkard § 12 10 points out.

3.3.1 The nature and seriousness of a violation

Where evidence is obtained through a trivial or technical violation of a constitutional right, this evidence will more readily be admitted than evidence obtained through a gross, violent or deliberate violation. If evidence is obtained under the last-mentioned circumstances but the crime in question is of a trivial nature, the evidence should be excluded.

3.3.2 The presence or absence of good faith and reasonable police conduct

In principle, police conduct which is objectively reasonable in view of the specific circumstances of the case, should facilitate the admission of unconstitutionally obtained evidence. On the other hand, police conduct that is in deliberate defiance of investigative rules which are there to protect constitutional

rights, should lead to the exclusion of evidence. If the police, for example, make a reasonable mistake in interpreting a piece of legislation or inadvertently fail to comply with a technical provision of specific legislation, the exclusion of evidence would probably be detrimental to the administration of justice. However, the good faith and reasonable conduct of an individual officer will not be enough where an entity like the SAPS has issued directives which do not comply with clearly stated constitutional demands.

The exclusion of unconstitutionally obtained evidence must also be considered in the context of the realities that police officers face daily in the execution of their duties. They occasionally have to make snap decisions under difficult circumstances on "constitutional issues". In their subsequent judicial assessment of the conduct of a police officer, the courts should take into account that a specific failure to uphold a constitutional right was not necessarily a deliberate attempt to circumvent it. Where, for example, the police resort to unconstitutional conduct in order to prevent the imminent destruction of valuable evidence, the evidence should rather be included. It should also be remembered that not only public safety, but also the safety of the police, are factors pointing towards good faith and therefore to the admission of unconstitutionally obtained evidence.

The fact that alternative and lawful means or methods of securing specific evidence were available at the time the evidence was secured, should not necessarily mean that the evidence should be excluded. The court may still find that police conduct was objectively reasonable in view of the specific circumstances of the case.

Why did the court in S v Mphala 1998 (1) SASV 388 (W) exclude the evidence about the confessions which the two accused made? Discuss fully with reference to section 35(5) of the Constitution.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

(Feedback in tutorial letter)

SUMMARY

It is important to understand the practical application of the exclusionary rule contained in the Constitution, because it plays a very important role with regard to the admissibility of evidence. Evidence which is technically admissible because all the requirements for admissibility have been met, may still be excluded in terms of section 35(5). It is always important to look at **all** relevant matters when applying section 35(5) and considering the exclusion of evidence.

Part 3

Tutorial Assistance

Study ASSISTANCE 1

one

Feedback on activities

STUDY UNIT 1

Activity 1

(1) False (with capitals it refers to the course name)
(2) True
(3) True
(4) False
(5) True
(6) True
(7) True (although, as you will learn later in this course, the weight of evidence may also impact on its admissibility)
(8) True
(9) True
(10) True

STUDY UNIT 2

Activity 1

(1) Admissions — S v Mjoli 1981 (3) SA 1223 (A)
(2) Formal admissions — S v Mokgoledi 1966 (4) SA 335 (A)
(3) Judicial notice
(4) Presumptions — S v AR Wholesalers 1975 (1) SA 551 (NC)

STUDY UNIT 7

Activity 3

(1) Evidence that the complaint was made is important as it serves to support the credibility of the complainant.
(2) Evidence on the content of the complaint will also indicate that the evidence tendered in court has not been recently fabricated and will support the consistency, and therefore credibility of the complainant.

Activity 6

The most obvious ground on which the evidence could have been found inadmissible is that it amounts to a **previous consistent statement**. Such evidence is inadmissible unless it falls within one of the accepted exceptions. In this case, the exception of **prior identification** applies. The main reason for this exception is that a previous identification is usually much more valuable than an identification in court, when the mere fact that the accused is standing in the accused box suggests that he is the guilty party.

The second ground on which the evidence could have been found inadmissible, is that it does not have sufficient relevance to the facts in issue. The fact that the witness has identified the accused as the robber is, without doubt, **logically** relevant to the question who the perpetrator was, but for evidence to be admissible it should also have sufficient probative value (see study unit 4). It could be argued that the photo-identification took place under undesirable circumstances, where the investigating officer could have planted ideas in the mind of the witness, and where the accused and his legal representative had no control over the manner in which the identification was made (this is controlled during a formal identification parade). Corroborative evidence may increase the probative value (reliability) of evidence. In this case, there was substantial corroboration between the two witnesses and the reliability of the evidence was increased by a number of factors. The high level of logical relevance coupled with a fairly low level of undesirability made this evidence admissible.

As you can see, your answer should be very much to the point, otherwise it will not fit into the available space.

STUDY UNIT 8

Activity 2

(1) Yes. This is a typical form of hearsay, where the witness (C) tells the court what F had obviously told her.
(2) Yes. Although her hearsay now becomes admissible (see 4.3), it remains hearsay.

STUDY UNIT 10

Activity 1

"Objective" refers to an impersonal, general measure. One could say it represents the way a reasonable person would view the matter. "Subjective" is something more personal, namely what the person involved thinks of the matter. If an objective approach is followed, the result is that a statement will be an admission if, regardless of what the declarant thinks, an element of the crime is admitted in the statement. According to a subjective approach, the statement will be an admission only if the declarant intends to admit something, or is at least aware that something is admitted in the statement.

Activity 2

(1) Informal
(2) Informal (by conduct)
(3) Informal
(4) Formal
(5) Informal
(6) Informal (both statement and conduct)
(7) Informal
(8) Formal

STUDY UNIT 11

Activity 1

(1) The section refers to admissions made **extra-judicially**, in other words, outside the judicial process. This means that it refers to **informal** admissions.
(2) The section emphasises that it relates only to an admission, if that admission does not amount to a **confession**.
(3) Such an admission will be admissible if it is proved that it was made **voluntarily**.

STUDY UNIT 14

Activity 2

(1) An agent is employed for the specific purpose of getting hold of information, whereas an independent third party will usually be an expert from whom information can be obtained without having to do special research.
(2) If all the requirements are complied with, communication by an agent will be fully privileged. In the case of an independent third party, this information will be privileged only to the extent that the third party wishes it to be so.

Study ASSISTANCE 2

two

Glossary

accomplice

person who does not fall within the framework of the definition of the crime but who nevertheless furthers the commission of the crime by another person

accused

the person charged with the commission of a crime

adjective law

a branch of the law which prescribes the procedure to be followed in court and in legal transactions generally (also called procedural law); subdivisions include civil and criminal procedure, as well as the law of evidence

administration of justice

a vague term covering all the state machinery involved in both the criminal and civil processes of the law

admissible/admissibility

see study unit 4

affidavit

a written or oral statement made under oath

alternative charge

see charge

beyond reasonable doubt

the standard of proof which has to be achieved by the state in criminal matters

cautionary rules

rules of practice bearing the peremptory character of legal rules and prescribing a specific approach to be adopted by the court to assist in the evaluation of certain evidence

character (evidence)

see study unit 6

charge (noun)

the crime for which the accused is charged (indicted) in court; it is contained in the charge sheet, which will read, for example, that the accused is "charged with the crime of theft", followed by further particulars; there can be a main charge, which will usually be the most serious crime on which the prosecutor hopes to get a conviction, and an alternative charge or charges, which will be lesser crimes of which the accused may be convicted if the main charge fails

Example

If the accused is charged with dealing in drugs (as the main charge), possession of those drugs may be an alternative charge to that main charge; if the accused is charged with drunken driving (as the main charge), driving with too much alcohol in his blood may be a first alternative, and reckless or negligent driving a second alternative.

charge sheet

the document which is drawn up by the prosecutor, which contains the crime(s) (plus further details) for which the accused is charged; technically "charge sheet" refers only to such a document used in the lower courts — in the supreme courts it is referred to as "an indictment"

circumstantial evidence

in the case of circumstantial evidence the court is required to draw certain logical references from a set of facts. For example, evidence may be given that A had a motive to kill B and was seen running from B's home with a bloodstained knife. In contrast to direct evidence, circumstantial evidence furnishes indirect proof

civil case (action/matter)

a legal process in which one party (the plaintiff) sues another (the defendant) on an equal footing; no person is convicted of any crime and no sentence is imposed (see criminal case); in terms of this procedure, the plaintiff's aim is to claim damages from the defendant, or to have the court make some kind of order against the defendant, to name only two options

civil liability

legal liability towards another citizen, which flows from a contract or delict; as opposed to criminal liability, which flows from a criminal matter

co-accused

in some instances the state determines that more than one person should be tried in the same trial, often to save time or for the sake of convenience; accused persons who are tried in the same trial, are referred to as the "co-accused"

common law

that part of the law which has evolved by custom; not created by legislation

communication

whether in writing, by means of speech or any other form, the "communication" of information

compellability/compel

it is in the interests of justice that anyone who may have something to contribute to a dispute does so; the general rule is that all persons are considered to be competent as well as compellable witnesses and therefore anyone who is a competent witness will usually also be a compellable witness

competence

this is concerned with whether a person has the intellectual ability to stand in the witness box and testify in court; persons who do not have this ability are not competent to testify and the court may not hear their evidence

competent verdict

in terms of the Criminal Procedure Act 51 of 1977, lesser crimes of which the accused can be convicted when charged with a more serious crime; these lesser crimes are not specifically mentioned in the charge sheet, distinguishing them from alternative charges

complainant

see complaint

complaint

the complainant in any criminal case is the person against whom the crime has been committed, usually the person who has been injured or who has suffered a loss of some kind; the action by that person (to complain to the police) is generally considered to be the complaint

convicted

when an accused person has been found guilty of the crime for which he has been charged; sentencing will follow

credibility

the extent to which the court can believe what the witness is saying

criminal case (matter/action)

a legal process in which one party (the accused) is charged by another party (the prosecutor) with the commission of a crime; at the end of the trial the accused is either acquitted (found "not guilty") or convicted, in which case a sentence should be imposed

corroborate/corroboration

if evidence seems suspect for any reason (eg the witness testifies hesitantly, displays a bias or contradicts himself), it is imperative for the court to examine whether his evidence should be supported or backed up by other evidence which could indicate whether the seemingly untrustworthy evidence is, indeed, trustworthy; this support is called "corroboration"

cross-examination

after a witness has given evidence-in-chief, he is cross-examined by the opponent of the party who called the witness; the scope of cross-examination is wider than that of examination-in-chief (see Law of Evidence 201)

declarant

the person declaring something, the person making a statement (whether oral or written)

deduction

the process of reasoning from one or more given statements, which, if they are all true, enables a logical inference to be drawn which must necessarily also be true

defendant

the person against whom the plaintiff institutes a civil action; in American criminal procedure the accused in criminal matters is also addressed as the defendant — this practice should not be followed in South African procedure, however

direct evidence

evidence is direct when a fact in issue is proven directly by such evidence, for example, where witness W testifies that he saw A stabbing C in C's home. Compare with circumstantial evidence

discretion

a power to make a decision by choosing from a number of options; it should be distinguished from a "finding", where a person or body (such as a court) simply finds what has been proven before it; by applying a discretion the person or body adds to the facts which have been proven

Example 1

When a court imposes sentence, it has to exercise a discretion. Therefore, it not only makes a finding as to the factual matters which influence the appropriate sentence; it also has to make a choice from the sentencing options to decide which sentence will suit the particular case best.

Example 2

According to section 35(1)(f) of the Constitution, an arrested person should be released "if the interests of justice permits". The court may make factual findings about the living conditions of the accused, the criminal record of the accused, the strength of the state's case, etc, but in order to decide whether to release the accused it has to exercise a discretion — it has to choose between "yes" or "no".

element (of crime)

one of the constituent parts which have to be present before an accused can be convicted in a criminal matter; murder, for example, is the (1) illegal (2) intentional (3) causing (4) of the death of another human being — each of the numbered items is an element of murder

evidence

evidential material which is produced in court. In this study guide, therefore, it does not include the information gathered by the police during the investigation of a case

evidential

by way of evidence

evidential (matter)

relating to evidence

evidential value

see probative value

evidentiary material

material which goes to furnish **proof** (referred to by Schwikkard as "probative material")

evidentiary burden

the responsibility to combat a prima facie case made by an opponent; sometimes also used to express the duty to start leading evidence in a civil case

examination-in-chief

the three significant stages in a trial in which oral evidence is presented are examination-in-chief, cross-examination and re-examination; examination-in-chief is conducted by the party who calls the witness; if, for instance, the defence calls witness A, then A will be questioned by the defence and this questioning is known as "examination-in-chief"

exclusion/excluded (evidence)

inadmissible evidence

exculpatory

denying culpability

expert evidence

evidence given by someone who possesses special skills or qualifications in an area which is relevant to the case

fact relevant to a fact in issue

see *factum probans*

factum probandum

Latin for "the fact which has to be proven" or one of principal facts in issue; the fact usually being indicated by a branch of substantive law; for instance, criminal law indicates the principal facts which have to be proven in a prosecution for murder

factum probans

Latin for "the proving fact" or evidentiary fact; which is a fact from which an **inference** may be drawn with regard to the *factum probandum*

facts (in issue/in dispute)

those facts which, according to substantive law, have to be proven to establish criminal or civil liability

fair trial

the constitutional requirement for all trials (see study unit 3 section 2.2)

from the bar

without the intervention of a witness; if a legal adviser hands in a document from the bar, this document is directly given to the presiding official

guilty/found guilty

see convicted

hearsay (evidence)

see study unit 8

House of Lords

a part of the British parliamentary system which has appellate jurisdiction in the United Kingdom

illegal/illegally

the illegality of something is one of the facts in issue which has to be determined by substantive law in all criminal matters and in civil matters of a delictual nature

implication/implicitly

something is not done explicitly, but by implication if one has to interpret the actions of the person to find their true meaning

inadmissible/inadmissibility

see admissible

included

admissible evidence

incriminating (evidence)

indicating culpability (whether criminal or civil)

indemnify

to guarantee that no prosecution will follow

inference

a deduction drawn from certain facts or actions

inspection *in loco*

an inspection by the court of the scene where an event, relevant to the outcome of the matter, has taken place

intent/intentionally

doing something on purpose, being subjectively aware of the consequences of one's actions; another fact in issue in many cases; "intent" is an issue which receives much attention in criminal law, and other branches of substantive law

interests of justice

another vague term (see administration of justice), which should mean something like "the best for the legal system and justice in general"; it usually goes hand in hand with **discretion**

investigating police official

a complaint is usually assigned to a specific member of the South African Police Service to investigate and on which to gather information that can be used by the prosecutor in evidence against the accused during the trial

irrelevant

the opposite of relevant (see study unit 4)

issue

the case in question; or it may refer to a fact in issue

judicial notice

the process through which a court accepts a fact from own knowledge (see Law of Evidence 201)

jury system/trials

a trial conducted before nine lay members of the public who have to decide on factual matters which are in dispute during that trial

justice (of the peace)

see study unit 11, section 3.2

leading question

a question suggesting the answer (See Law of Evidence 201)

legal proceedings

any court case, whether criminal or civil, as well as the proceedings which precede such case

legal representative

the legally qualified person who may act on behalf of any party in a court case

legislature

normally Parliament, the body of government responsible for legislation

legitimate inference

an inference which complies with the requirements of logical deduction and may therefore be taken as logically correct

lesser crimes (offences)

less serious crimes for which a person who is charged with a more serious crime can also be **convicted**

logically relevant

see study unit 4

nexus

a strong, logical connection

objective(ly)

existing outside the mind of an individual; the opposite of subjective; one can also say this

is general, average knowledge or wisdom which is not influenced by an individual person's own personality, knowledge and other personal characteristics

onus of proof

the burden of providing proof to a court concerning any matter which may be in issue; if the court is left in doubt regarding this matter after all evidence has been led and argument has been heard, it will find against the party bearing the onus

oral evidence

the presentation of evidence in court is the most significant means of adducing evidence and also the means most often used; oral evidence is evidence given by a witness and, as a general rule, this should be done under oath, although there are exceptions

peace officer

see study unit 11 section 3.2

plaintiff

the party in a civil case instituting the action against the defendant

plea

in a civil case: the document in which the defendant explains why or to what extent the action is defended; in a criminal case: the accused saying whether or not he is guilty of the charge

pleadings

documents involved in the pre-trial processes of a civil action

plea proceedings

a preliminary stage in court proceedings in a criminal matter when the accused has to plea to the charge, and is given the opportunity to explain his plea

plea process

the procedure during which the accused pleads either guilty or not guilty, and the process which follows that

pointing out

the suspect's indication of relevant information; the suspect may make this indication orally, or actually physically indicate the information

police trap

a police trap is a person who receives remuneration for obtaining evidence for the state. For example a police trap may offer illegal diamonds and gold to someone for the purpose of soliciting him to commit the crime of buying them

potential for harm

the potential of evidence to harm someone (usually the accused); "harm" resulting from the probative value of the evidence is not at stake here, but it refers to other factors, such as the inferences and expectations which such evidence may hold (see study unit 4, section 2.5)

precedent

a court being bound by the findings of another court on the same point

prejudicial potential

the likelihood that a possible action (usually the admission of certain evidence) will harm one of the parties concerned

presenting evidence/presentation of evidence

the act of tendering evidence to the court; it should be distinguished from "giving" evidence, which is an act performed by a witness; evidence is "presented" by one of the parties involved in a trial

presumption

a legal rule prescribing the acceptance of a fact without any evidence; the presumed fact can be disproved

pre-trial proceedings

legal proceedings which occur before the trial, such as the plea proceedings, or a request to be released on bail, or, in civil matters, the documentation which changes hands before the trial commences

previous consistent statements

see study unit 7, section 1

previous convictions

the document on which an accused person's convictions which preceded the current crime are listed; in South Africa this information is gathered by the police

***prima facie* (case)**

Latin for "at first sight"; a preliminary conclusion with regard to a matter which has still not been finally decided

privilege

a right which entitles one not to disclose certain information (see study unit 13)

Privy Council

a part of the British parliamentary system which has appellate jurisdiction over the former British colonies and parts of the British Commonwealth

probative material

see evidentiary material

probative value

the amount of value **evidence** has to prove the facts in issue; weight of evidence

procedural law

see adjective law

proof

having sufficient grounds for a finding on a point in issue (see study unit 2 section 2)

prosecutor

the person who charges the accused on behalf of the state

proviso

a clause which is added to a statutory provision which limits the general application of that provision; it typically starts with "provided that ..."

public policy

a vague term denoting general policy which is supposed to be in the public interest

refuse (evidence)

inadmissible evidence

relevant/relevance (to a fact in issue)

see study unit 4, section 2

reputation

see study unit 6, section 1

residuary authority

authority beyond the statutory authority which the court is given

residuary clause (section)

a section in a South African statute which incorporates part of foreign law (usually English) into our law, and thereby preserves that part of foreign law as part of South African law

res ipsa loquitur

"the facts speak for themselves"

self-corroboration

when corroborative evidence favours the party whose evidence should be corroborated, the corroborative evidence is required to come from an independent source; this means that the corroborative evidence may not come from the party who presents the untrustworthy evidence; this rule is known as the "rule against self-corroboration"

self-incriminating

the action of saying or doing something through which the speaker or actor's own liability is indicated (see incriminating)

settlement

an agreement through which a civil action is ended prior to the conclusion of the trial (usually even before the commencement of the trial)

similar fact (evidence)

see study unit 5

statement

a written or spoken declaration, often of a formal kind

statute books

a popular term for the complete collection of statutes

subjective

existing in the mind of a particular person; opposite of objective

substantive law

in contrast to adjective law, substantive law sets out one's rights and obligations. Criminal law, for instance, prohibits certain actions

sui generis

Latin for "of its own kind", in other words it forms its own (new) category, it does not fit into any of the existing categories

testimony

the giving of oral evidence

third (party)

somebody other than the two parties normally directly involved in a court case

trial

the act of hearing and judging a case, person or a point of law in a court

trial court

the court in which the trial takes place; it is distinguished from the court of appeal, amongst others

unfair trial

see fair trial

value judgment

a judgment based on values rather than on facts; the exercise of a discretion often involves a value judgment

viva voce (evidence)

Latin for "with the living voice", in other words evidence which is given orally by the witness in court

voluntary/voluntarily

performing an act which is controlled by one's will, a reflex action would be involuntary since it is not controlled in this way

waive

to give up willingly

weight (of evidence)

see probative value

witness

the person giving oral evidence in court

wrongful

the same as illegal