Evidence

The presentation and assessment of evidence

Witnesses

Competence and Compellability

Competent witness

- A person whom the law allows a party to ask but not compel to give evidence
- Concerned with whether the individual has the mental capacity to testify

Compellable witness

- A person whom the law allows a party to compel to give evidence
- Concerned with whether a person can be forced to give evidence

General Rule

- Every person is competent and compellable to give evidence (S192)
- Limited by statutory provisions and constitutional rights (S206)

Privilege

- Concerned with whether the person in the box is obliged to answer
- For example, privilege against self-incrimination can only be claimed when relevant question is put to him

S192 of the CPA provides that everyone is deemed competent and compellable subject to the residual clause of S206

Admissibility is different since it has to do with the evidence of an already competent witness

General and Exceptions

General Procedural issues

- Parties cannot consent to the admission of an incompetent witness' evidence
- The court must decide any question on competence / compellability which is normally decided during a trial within a trial
- Court can also decide based on its own observations
- A competent / compellable witness can be brought to court by means of a warrant of arrest and may be punished accordingly

Exceptions: Children

- No statutory provision governing child's capacity to give evidence – at common law there is no age limit
- Children can testify provided that they
  - Appreciate the duty of telling the truth
  - Have sufficient intelligence
  - Can communicate effectively
- Evidence may be provided without taking the oath but if the child understands the nature and religious sanction of the oath he can take it
- Children are competent and compellable to testify against their parents but in principle should not be compelled to do so (*R v Zulu)*

Exceptions

Exceptions: Mentally Disorders and intoxicants

- S 194 of the CPA – no person with a mental illness (proven) or under the influence of drugs or the like and hence is deprived of own reason is a competent witness.
  - An intoxicated person retaining sobriety will regain competence and compellability
- This section aimed at a certain degree of mental illness depriving the witness of the ability to communicate properly with regards the subject matter in question
- Important issues are; a persons ability to observe incidents, to remember and then communicate them to a court
- The question of competence to testify is again determined by a trial within a trial
  - The court can at times determine for itself the competency of a witness
  - *S v Zanile* - the witness was incompetent since she could not understand simple questions and therefore convey her observations to the court
  - *S v Katoo* in terms of S 194 decided that the witness must be (1) shown to be suffering from a mental illness or be under the influence and (2) the direct result of that was that the witness was deprived of reason – both of these must be satisfied before pronouncing on competency
- The evidence of mental normality or otherwise is interlocutory and can be altered if the evidence so indicates

Exceptions

Exceptions: Officers of the Court

- Attorneys, advocates and prosecutors are competent witnesses in cases in which they are professionally involved
  - But undesirable that they testify in such cases
  - Legal professional competence also restricts the capability to testify against a client
- Judges and Magistrates are considered incompetent
  - Where an officer perceives a certain fact he will become competent e.g. if he recuses himself from a case he then becomes competent

Compellability

There are cases where a competent witness may not be a compellable witness

Spouses

- Common law had that spouses could not testify against one another, however this no longer applies in civil proceedings and they are competent and compelling
- In criminal cases there are specific rules as follows
  - Witness for the defence: The spouse is a competent and compellable witness for the accused but not compellable for a co-accused S 196(1) CPA
  - Witness for the prosecution: the spouse of an accused is a competent witness for the prosecution but cannot be compelled. However she becomes compellable when the accused is charged for the following crimes (instances affecting the well being of the spouse and children):
    - Offences against the person of either of them
    - Any offence under chapter 8 of the Child Care Act in respect of a child
    - Any contravention of the maintenance act
    - Bigamy / Incest / Abduction / Perjury
    - Contravention of certain sections of the Sexual Offences Act
- In terms of the common law a former spouse is in the same position as a current spouse and hence in terms of the law this should be seen to be the case

Compellability

Accused Persons

- An accused is competent to testify in his own defence
- But he is not compellable since he may not be called as a witness unless it is on his own application – S 196(1) of CPA
- A co-accused cannot compel another accused to testify on his behalf
- An accused may incriminate a co-accused while giving evidence but he cannot be called for the prosecution since he is confined as a witness in his own defence. Only by terminating his status as an accused in the same proceedings as the co-accused can the former become a witness against the latter. Change of status occurs if;
  - The charge against the accused is withdrawn – note this is not an acquittal since the accused can be recharged
  - The accused is found not guilty and discharged
  - The accused pleads guilty and separation of trials takes place
  - The trials are separated for another valid reason

Stages in the trial process and the presentation of oral evidence

Conduct of trial

Three significant stages in trial during presentation of oral evidence:

- examination in chief – conducted by the party who calls the witness. Purpose is to put relevant information before the court by means of question and answer
  - Credibility – the party who undertakes the examination in chief should not attack the witness' credibility
  - Leading questions – leading questions (that which suggest an answer or assumes the existence of a disputed fact) should not be asked. However presiding officer could allow in interests of justice
  - Unfavourable or hostile witnesses – a party calling a witness will be entitled to attack the credibility of their witness if he give evidence unfavourable to their case. Evidence may be led to contradict the evidence of the unfavourable witness. If witness provides evidence that could prejudice the case, the party calling the witness can request the court to declare him a hostile witness – once declared such he may be cross –examined by the party who called him
  - The witness may refresh his memory – principles differ according to;
    - Refreshing memory during an adjournment – no general rule preventing this

Conduct of trial (contd.)

- The witness may refresh his memory – principles differ according to (contd.);
  - Refreshing memory in the box – certain requirements that need to be proved must be met;
    - Personal knowledge of the event and a finding to this effect must be made. This is required to avoid inadvertent admission of hearsay evidence
    - Inability to recollect
    - Verification of the document used to refresh memory – the witness must have made a recording but it can be accepted if the recording was made by someone else on the instruction of the witness
    - Fresh in memory - that is whether the recording was made at a time when the facts were still fresh in the memory of the witness. The presence or absence of substantial contemporaneity is a factor to assist the court in determining whether the facts were fresh in the mind.
    - Use of the original document – where the witness has no independent recollection - copy may be used if original shown destroyed / lost
    - Production of the document – the document used to refresh memory must be made available to the court and opponent for inspection. Where the document is privileged, the holder can either waive this and the witness may then use this or claim privilege and hence the witness may not use it.

Conduct of trial (contd.)

Three significant stages in trial during presentation of oral evidence (contd.):

- Cross examination – after chief examination the person is cross examined the purpose of which is to;
  - Elicit evidence supporting the cross examiners case
  - Cast doubt upon the credibility of the opposing party's witness

  Cross examination scope is wider but still limited to the issue at stake and the credibility of the witness. Leading questions may also be asked but previous convictions and character are beyond scope.
- Re- examination – purpose to clear up any misleading evidence that was provided during cross examination. Again leading questions are not permissible and questions are only confined to matters arising from cross examination.

Witnesses and Argument

Witnesses called by court

- Governed by S 186 of the CPA
- May be done at any stage of the proceedings by subpoena
- It is an irregularity if the court fails to call a witness whose evidence is essential for a just decision
- Both the prosecutor and the defence may, with leave of the court examine and cross examine
- Only done in criminal proceedings but rarely. In civil proceedings it must have agreement of both parties

Argument

- Once all evidence present but before the court gives a finding both sides allowed to "present the court in argument."
- Parties provide their assessment of the evidence and argue the applicable law including precedent, statutes etc
- Refer to their strong points and emphasise weak points of the others

Real evidence

Real evidence - definition

Definition of real evidence

- An Object which upon proper identification, becomes, of itself, evidence e.g. knife, photograph, letter etc
- The part wishing to produce real evidence must, in the absence of admission by an opponent, call a witness to identify it as such
- Real evidence usually owes its efficacy to a witness who explains how it was found or used or why he is the owner
- There are no formal requirements for the handing in of real evidence
- A court should not attempt to make observations that require expert knowledge – however it may draw its own conclusions here expert knowledge is superfluous (footprints)
- An expert called in to explain how an object operates is in fact opinion evidence even though the object itself remains real evidence
- Oral evidence describing relevant real evidence not produced is not rendered inadmissible. This deals with reported real evidence (the description) as opposed to immediate real evidence (the thing)

Real Evidence

Appearance of Persons

- Physical appearance and characteristics constitute real evidence and demeanour of witness in the stand lends credence, or not, to credibility.
  - Resemblance of child to reputed parent: this may afford some evidence of parentage but the value is marginal
  - Physical appearance as real evidence of approximate age – this may serve as real evidence. However S337(b) of the CPA provides an estimation of age based on appearance is not permitted where the precise age is an element of the crime
  - Courts observation of witness for purpose of determining competency to testify: e.g. court may express own opinion on competency with regards the mentally ill

Fingerprints

- Evidence of fingerprints found at the scene is often of strong probative value
- An expert examining a folien from the scene will look for at least 7 points of similarity on enlarged photographs of the accused's and crime scene fingerprints.
- 7 similarities provide proof beyond all reasonable doubt that they are from the same person
- The evidence thereof may be provided orally or by affidavit
- Footprints do not require explanation of an expert

Real Evidence

Inspections in loco

- A decision to observe the scene of an incident lies solely with the court's discretion which is conferred by S169 of the CPA.
- An inspection in loco may achieve two main purposes;
  - It may enable the court to follow the oral evidence more closely.
  - It may enable the court to observe some real evidence in addition to oral evidence.
- Undesirable that these inspections take place after arguments have been completed since parties should be allowed the opportunity of correcting observations that appear incorrect.
- The inspection should be in the presence of both parties although the presiding officer can make the inspection on his own.
- If witnesses point out items and places they should be subsequently (re)called to provide such evidence in court on what was indicated.
- If a court draws any conclusions from such inspections that are unfavourable to a party it must mention these to allow that party the opportunity to prove otherwise

Real Evidence

Bodily Samples

- The results of blood tests may be used in litigation e.g. afluence of incohol
- DNA fingerprinting can be used to establish parentage, identify the deceased, link a suspect to a crime. It can thus be used to establish both guilt or innocence.

Demonstrations

- The use of simulations may be allowed to show the effects of an incident. Locally the court should guard against accepting a particular course of events purely because it has been demonstrated in a dramatic fashion.

Handwriting

- Comparisons of disputed handwriting with that proved to be genuine may be made by a witness
- This is normally done by an expert indicating points of similarity or differences
- The court is not bound by the expert's opinion and a layman may give evidence concerning writing he knows
- The SCA has found a court may draw its own conclusions from its own comparisons.

Documentary Evidence

Documentary Evidence

Admission of documentary evidence

- Main requirements – document admissible in following circumstances;
  - Original document produced in court
  - Document is proved authentic
  - Where applicable the document must be stamped in accordance with the Stamp duties act
- Whether information is admissible is another matter dependent on admissibility of evidence

Definition of documentary evidence

- No common law definition, but CPEA says it is any "book, map, plan, drawing or photograph"
- But in *Seccombe v Attorney General* it "includes everything that contains the written or pictorial proof of something" – note two points 'written' and be able to provide proof of something
- Now also includes "data message" which is data generated, sent, received or stored by electronic means and includes voice and stored records

Documentary Evidence

Producing the original document

- Not always clear how to identify the original but it appears to correspond to the original source of recording
- Secondary evidence may not be used to prove the contents but if it is the only means it can be admitted and used in the following circumstances;
  - Original document lost or destroyed
  - Document in the possession of the opposing party or a third party
  - Impossible or inconvenient to product the original
  - Permitted by statute
- Extracts of official documents, i.e. those under the control of a state official by virtue of his office, duly signed and authorised may be produced as evidence
- In criminal matters these official documents may only be produced if authorised by the Attorney General

Proof of authenticity

- For a document to be authenticated means no more than tendering evidence of authorship or possession
- If a document is not authenticated it will be inadmissible and cannot be used for cross examination

Documentary Evidence

Proof of authenticity

- A document may be authenticated by the following persons;
  - The author, executor or signatory of the document
  - A witness to the drawing up of the document
  - A person who can identify the handwriting or signature
  - A person who found a document in the possession or control of an opponent
  - A person who has lawful custody and control of the document
- A document need not be authenticated by a witness in the case of
  - An opposing party discovery of the document
  - When the court takes judicial notice
  - When the opponent admits the authenticity
  - When a statute provides an exception

Public documents

- By their very nature are more reliable than most other documents
- Public document - produced by a public officer in the execution of his duties, intended for public use for which the public has a right of access
- Examples include title deeds, birth certificates but not baptismal certificates
- At common law public documents are admissible to prove the truth of what they contain and are treated as an exception to the hearsay rule

Documentary Evidence

Stamp Duties Act

- Some documents are required to be stamped with revenue stamps and if not done then it is not supposed to be used as documentary evidence – however they can be admitted even if stamped later

Discovery, Inspection and Production of documents

- If a party fails to discover relevant documents, these may not be used in subsequent litigation without the express permission of the court
- Rules for discovery also allow the inspection of selected documents by the opposing party
- If a relevant document is in the hands of a third party, such party may be required to come to court with the document

Evidence of uncertain classification

Evidence of uncertain classification

Photographs as evidence

- These may constitute real evidence especially where the physical photo itself is central to the case because of e.g. fingerprints on its surface
- Situation is different when it is used to represent something that is the subject matter – then it serves a documentary function
- The subject matter of the photo go to its weight rather than admissibility

Cinematographic film

- Like photos it should also be considered documentary evidence

Video and audio tapes

- These differ from the above since they need to be deciphered by a device unlike film which is by eye
- Differ from computer magnetic data since these store data in digital form

Computer output

- Now covered by the ECT Act but some provisions have poor consequences for the right to privacy and may be in conflict with the constitution

Evidence of uncertain classification

ECT Act

- S1 - Data message in the Act means any data generated, sent received or stored by electronic means and includes voice and records
- S12 - A requirement in law that a document is in writing will be met if it is in the form of a data message and accessible for future use
- S13 – where a signature is required this can only be by an advanced electronic signature. A signature can also be met by a message indicating that the person approves of a transaction
- S14 – where the law requires information in its original form, this is met by a data message but the integrity thereof must be assessed by considering whether it is unaltered
- S16 – where the law requires information to be retained that requirements is met by a data message if it is accessible , in a format in which it was generated, the origin and time of a message when sent can be determined
- S17 – where a law requires a person to produce a document or information that is met if it is a data message if the method of generation was reliable, the maintenance of the integrity of the information is reliable and all information therein can be readily accessed

Judicial Notice

Judicial Notice

Nature of judicial notice

- Judicial officer should play a passive role and should withdraw from a case if he has personal knowledge thereof
- But a JO is to a limited extent allowed to accept the truth of certain facts known to him even when no evidence is led to prove such facts
- This doctrine is allowed since it can expedite hearings and produces uniformity of decision on matters of fact where one could get a diversity of findings
- However since it does not allow cross examination it is applied with caution

Practical workings of judicial notice

- Some facts are judicially noticed without any inquiry whereas other with reference to a source of indisputable authority
- In the former instance evidence may not be led to refute facts but in the latter, evidence may be led to dispute the source in question
- The question as to whether a fact should be judicially noticed is one of law and decided by the court which should inform the parties in advance
- Facts which are judicially noticed can be well known to all reasonable persons or to a reasonable court in a specific locality

Judicial Notice

Facts of which judicial notice may be taken

- Notorious facts – these can be facts of general knowledge and specific facts notorious within the locality of the court
- Animals - the nature of domesticated and wild animals but not specific characteristics such as specific type, market value, age
- Facts that are readily ascertainable from a source of indisputable authority
- Political and constitutional matters such as sovereignty of states, recognition of governments, existence of a specific political system that is sufficiently notorious. However an appropriate certificate may be obtained from the executive if the court has insufficient knowledge to take judicial notice of certain political or state affairs
- Science and scientific instruments- only those that have become common knowledge may be judicially noticed e.g. different fingerprints
- Financial matters and commercial practice – may be taken on the value of money, purpose of companies to make a profit and the practice of payment by cheque, interest charged on overdue accounts but not on exchange rates
- Textbooks – may be taken of facts contained in technical or medical textbooks
- Functioning of traffic lights – may be taken from assumption if lights one way are green then the others are red in civil but not in criminal cases
- Crime –may be taken that SA has a high crime rate

Judicial Notice

Law

- Courts must take judicial notice of the law – no evidence may therefore be led with regard to the nature and scope of a legal rule
- Judicial notice is taken of Acts of Parliament and of the provincial legislatures
- Colonial laws, provincial ordinances are judicially noticed in terms of common law
- Public international law that has acquired the status of custom is judicially noticed
- Judicial notice may now be taken of foreign law in order to determine some legal aspect of our law for purposes of comparison
- The courts may take judicial notice of indigenous law only if it is consistent with the Bill of Rights and if they are not in conflict with public policy and natural justice

Presumptions

Presumptions

Meaning

- A presumption is a legal rule according to which the existence of a certain fact is presumed based on another fact – since presumed it may not be true
- But presumed fact is considered true unless the contrary is proved
- Generally classified as those with and without basic facts – the latter is a conclusion drawn unless the contrary proved, the former a conclusion on proof of a basic fact
- The presumption of innocence only means the prosecution needs to prove guilt

Classification of Presumptions

- 3 categories: irrebutable / rebuttable presumptions of law and presumption of fact
- Irrebutable presumptions of law – an ordinary rule of substantive law formulated to look like a presumption
  - Provides conclusive proof of the fact presumed and cannot be rebutted
  - Example child u7 presumable incapable of discerning good from evil
- Rebuttable presumptions of law – rules of law compelling the provisional assumption of fact
  - Assumption will stand unless destroyed by countervailing evidence
- Presumptions of fact – merely an inference representing a logical outcome of a given situation

Examples of Presumptions

Rebuttable presumptions of law

- **Marriage**
  - Validity presumed once evidence is adduced showing that a marriage ceremony was performed
  - Onus is on challenger to show the marriage is invalid which is done on a balance of probabilities
  - Where couple lived together as man and wife, the law will presume unless the contrary is proved that this was a consequence of marriage
  - Every marriage is presumed in community of property
- **Bigamy**
  - S237 of the CPA – where an accused is charged with bigamy, when it is proved that a marriage ceremony took place it will be presumed the marriage was on the date of solemnisation
- **Legitimacy**
  - Once a party has proved that the child was conceived by a woman whilst married, the child will be presumed legitimate
  - The party contesting this must prove on a balance of probabilities that the child was not conceived between the spouses – this creates a legal burden

Examples of Presumptions

Rebuttable presumptions of law

- **Paternity of children born out of wedlock**
  - If it is proved that a person had intercourse with the mother at the time the child could have been conceived, the person is, in the absence of other evidence presumed to be the biological father – S36 of the Children's Act
  - This clause places an evidential burden on the alleged father in contrast to common law which created a legal burden
- **Regularity**
  - What happens regularly is likely to have happened again
  - Letters: circumstantial evidence can prove a letter was posted – party alleging posting may lead evidence establishing the existence of a routine. An unregistered letter that was posted will not be presumed to have received but this is not the case with registered letters. For the latter the presumption places an evidentiary burden that the person did not receive the registered letter
  - Validity of official acts: public officials are rebuttably presumed to have been properly appointed – i.e. legal burden to prove the contrary.

Examples of Presumptions

Rebuttable presumptions of law

- **Res Ipsa loquitar – the matter speaks for itself**
  - Almost exclusively applied where the cause of the accident is unknown
  - If it is the type of accident that does not normally occur in the absence of negligence, an inference of negligence may be drawn
  - Where an inference of negligence is drawn, an evidential burden is cast on the defendant – he must then show the facts are consistent with an inference not involving negligence or adduce evidence to raise reasonable doubt

Relationship between presumptions and the onus of proof

- If the presumption is a true presumption of law (legal burden), proof on a balance of probabilities has to be provided to counter this
- If the presumption prevails in the absence of evidence to the contrary, this place an evidential burden on the party wishing to disprove it
- If the court draws an inference from a basic fact, there is no burden of proof on the other party - at most it amounts to a presumption of fact.

Statutory Presumptions

Statutory Presumptions

- Many presumption on the statue books are now unconstitutional owing to the presumption of innocence
- The statutory presumption often leaves the accused with a legal burden of proof – i.e. on the balance of probabilities instead of the mere raising of evidence to the contrary – this is a reverse onus provision which is unconstitutional
- S 35(3)(h) of the Constitution provides for the following rights;
  - Presumed innocent
  - Remain silent
  - Not to testify during proceedings
- In S v Zuma it found a statutory presumption is unconstitutional if it allows a conviction despite the existence of reasonable doubt. A presumption can survive only if it survives the limitation clause

The onus of proof in criminal matters

Introduction / Onus

- Principle of finality requires presiding officers to make an affirmative finding in every case irrespective of the deficiencies in the evidence
- Burden of proof (or true onus);
  - Functions to assist decision makers in conditions of uncertainty
  - Allocates the risk of non-persuasion – the person who bears the onus will lose if they do not satisfy the court that they are entitled to succeed in their claim
  - Refers to the obligation of a party to persuade the trier of facts by the end of the case of the truth of certain propositions
  - Rests on the prosecution to prove the accused's guilt beyond a reasonable doubt in a criminal trial – fundamental principle
  - Party not bearing this onus gets the benefit of the doubt
- Evidentiary burden;
  - Refers to a party's duty to produce sufficient evidence for a judge to call on the other party to answer – i.e. to call upon a litigant to adduce evidence to combat a prima facie case made by his opponent
  - At the outset the state must discharge this burden by establishing a prima facie case against the accused – once established this shifts to the accused to adduce evidence to escape conviction
- Under the constitution the accused can remain silent and not adduce this evidence

Onus - general

- In *S v Bhulwana, S v Gwadiso* the court found that an evidentiary burden requires the accused to create reasonable doubt whereas the true burden of proof relies on a preponderance of probabilities
- Note in court the onus does not shift during the course of a criminal trial – it always rests with the state.
- The constitution and common law presumption of innocence and the principle that the burden of proof rests on a party seeking to change the status quo casts on the state the burden of proving everything necessary to establish liability
- The statutory exceptions are an infringement on the presumption of innocence and will be tolerated only if they meet the limitation clause
- The evidentiary burden shifts during the trial – it first rests with the state in presenting evidence then after the state has closed its case it shifts to the accused to rebut the evidence.
- There is a duty for an accused to introduce his defence but this does not mean that there is an onus of proof on the accused

Ambit of the state's onus of proof in criminal cases

- **Mental illness or mental defect** – an accused is criminally non-responsible if at the time of the offence he was, as account of this defect, unable to appreciate the wrongfulness of the act
- S78(1) of the CPA provides that every person is presumed sane unless the contrary is proved on a balance of probabilities = codification of the M'Naghten rule
- The burden of proof will be on the accused should he raise the issue by relying on this defence of mental illness / defect – will be successful if he can do it on a balance of probabilities (civil standard)
- In *S v Eadie* the court provided;
  - A sane person who engages in conduct giving rise to criminal liability does so consciously and voluntarily
  - An accused who raises such a defence is required to lay a foundation sufficient to provide reasonable doubt
  - Evidence in support of this must be scrutinized
  - The court must decide on the question of criminal capacity taking into account the evidence and nature of accused's action during this period

Other issues

Right to silence and onus of proof

- The Constitution has changed the notion that the silence of the accused was a form of circumstantial evidence used to bolster a weak case
- In *S v Hena* the Court emphasised a lack of evidence on the part of the defence in order to rebut the state's case did not mean automatic conviction – silence on the part of the accused could not make up for deficiencies in the state's case.

- **Standard of proof in criminal matters** – In *S v Van der Meyden* – the onus of proof in a criminal case is discharged by the State if the evidence establishes guilt beyond all reasonable doubt.
- Alternatively he is entitled to an acquittal if it is reasonably possible that he is innocent
- In criminal cases where the onus rests on the defence, the burden requires proof upon a preponderance of probabilities just like in civil matters (i.e. less exacting proof)
- If a statute merely places an evidentiary burden on the accused, the state will still have to prove beyond all reasonable doubt

The onus of proof in civil matters

The incidence of onus or proof – substantive or formal law?

- Important to determine whether incidence of the onus of proof is substantive or formal since it determines whether English or Roman Dutch law is used (*Tregea v Godart)*
- RD is the common law for the formal law whereas English is common law for substantive law
- Onus has now been decided as a matter of substantive law
- The burden of proof, once established never shifts – the test for determining who bears the burden is that the person who makes a positive assertion is called upon to prove it (*Pillay v Krishna*) - i.e. the person who seeks to change the status quo - often the plaintiff
- The true onus of proof is usually established during the pleadings and the evidentiary burden comprises the duty cast upon a litigant to begin adducing evidence and the duty to adduce evidence to combat a prima facie case made by the opponent.

Civil standard of proof

- In civil issues, different issues may generate different onuses.
- For example in a case of assault
  - First issue – plaintiff claims damages for assault (plaintiff to prove)
  - Second issue – defendant may admit assault but claim it was in self-defence (defendant to prove)
  - Third issue – plaintiff believes assault exceeded limits of self defence (plaintiff to prove)
- In civil cases the burden of proof is discharged as a matter of probability – balance of probabilities – i.e. on a preponderance if it is probable that the particular state of affairs existed
- The civil standard is a comparative or relative standard rather than a quantitative test (beyond reasonable doubt), the latter determines how much evidence is required to comply with the standard.

The assessment of evidence

Assessment of evidence

- Correct approach is to weigh up elements pointing to the guilt of the accused against the elements that are indicative of innocence
  - Must take into account inherent strengths and weaknesses and probabilities of both sides
  - Absence of interest or bias
  - Intrinsic merits / demerits
- Two basic principles
  - The evidence must be weighed In its totality
  - Probabilities and inferences must be distinguished from conjecture or speculation – these must be considered in the light of proved facts
- Evidence needs to be weighed as a whole, not piecemeal:
- The principles must be used in conjunction with the legal issues that apply when specific issues are involved, which include circumstantial evidence, corroboration and the cautionary rule.

Circumstantial evidence

- Direct evidence is an eye witness account of the act taking place
- Circumstantial evidence is indirect evidence and inferences have to be drawn – in some cases it is stronger than direct evidence
- In assessing this evidence, certain rules of logic follow
  - Cumulative effect of all the circumstantial evidence must always be considered by the court
  - In criminal proceedings two rules (from *R v Blom*):
    - The inference drawn must be consistent with the proved facts – if not no inference can be drawn
    - The proved facts should be such that they exclude every reasonable inference save for the one drawn – if not there must be doubt as to whether the inference is correct.
    - In the first case reasonable doubt can be created (if other inferences drawn) and in the second takes account of standard of proof (beyond reasonable doubt)
  - In civil proceedings the inference must be consistent with the proved facts but need not be the only inference. It is sufficient that it is a probable inference (proof on a balance of probabilities)

Corroboration

Corroboration

- Rules are derived from English common law – corroboration is required by statute in only one case, when the state relies for a conviction on a single confession by an accused that she committed the offence in question
- Whenever corroboration is present the required standard of proof has been satisfied
- Corroboration is meant other information which supports the evidence of the complainant and which renders the evidence of the accused less probable on the issues in dispute (*S v Gentle*)
- There is a rule against self corroboration which is confined to oral or written confirmation of the witness concerned
- Corroborative evidence must meet the following requirements;
  - It has to be admissible
  - It can take a variety of forms, including oral, documentary etc.
  - Should consist of independent evidence
  - It should confirm other evidence
- The standard of proof does not change in a particular case

Corroboration

- A confession is an unequivocal admission of all the elements of a crime and an accused can be convicted without any further evidence led. But a problem is the confession may not have been made voluntarily
- Evidence attempts to exclude untrustworthy confessions by applying strict rules in respect of the admissibility of confessions and applying the statutory requirement of corroboration
- For corroboration S209 provides in one of two requirements; the confession itself (corroboration thereof) and the crime in respect of which it is made is satisfied;
  - Corroboration is satisfied if other material is produced which confirms the confession in a material respect
  - Evidence that that an offence had actually been committed is satisfied by adducing evidence. This may also be evidence outside the confession
  - But even if either of the above two requirements have been met, it does not mean a conviction follows since guilt beyond reasonable doubt must be proved

Cautionary Rule

Cautionary Rule

- The cautionary rule is a rule of practice bearing the mandatory character of a legal rule that prescribes a specific approach to be adopted by the court when evaluating certain evidence
- The rule requires
  - That the court should be cautious when assessing evidence that experience has shown should be viewed with suspicion
  - The court should seek some other safeguard reducing the risk of a wrong finding based on the suspect evidence
- The exercise of caution should not displace that of common sense and the application of the cautionary rule does not affect the standard of proof
- To this end this rule only guides the court in answering a bigger question as to whether the party carrying the burden of proof has satisfied this burden
- The judge should indicate the application of this rule in his judgement but it must be shown it was actually applied
- Most common safeguard is found in the corroboration of suspect evidence

Specific instances

- **An accomplice** – their evidence should always be treated with caution since they could have intimate knowledge of a crime and downplay their involvement
- Basic principles from *S v Masuku* are;
  1. Caution in dealing with the evidence of an accomplice
  2. An accomplice has a motive to lie in order to obtain immunity
  3. Corroboration is not conclusive of the truthfulness of an accomplice
  4. If corroboration sought it must directly implicate the accused
  5. This corroboration from 4 may be found in another reliable witness
  6. Where there is no corroboration, there must be some other assurance to show the evidence of the accomplice is reliable
  7. This may be found where the accused is a lying witness or where he does not give evidence
  8. The risk of false incrimination will be reduced where the accomplice is a friend of the accused
  9. If none of the above is present, it is insufficient for a court to convict on the evidence of an accomplice
  10. Where corroboration is obtained from another accomplice, the evidence still needs to be treated with caution.

Specific instances

- **Evidence of identification** – evidence of the identity of the accused should be treated with caution
- Factors to be considered from *S v Mthetwa* are;
  1. The reliability of his observation needs to be tested
  2. This depends on numerous factors: lighting, visibility, eyesight, proximity, time and situation, prior knowledge of the accused, mobility, corroboration, the accused's face, voice, build and gait, the result of ID parades etc.
  3. The factors must be weighed one against the other in the light of the totality of the evidence and its probabilities
- Dock identification has little probative value
- Evidence of identification at a formal ID parade – a court will more readily accept this where such has been confirmed by a properly constituted ID parade i.e. no material irregularities
- Identification based on a photographic ID parade – creates the problem that the witness will identify the person whose photograph he saw rather than the one committing the offence

Specific instances

- **Assessing an alibi** : 5 factors are involved
  1. No burden of proof on the accused to prove his alibi
  2. If there is a reasonable possibility that the accused's alibi is true, then the prosecution has failed to discharge its burden of proof
  3. If there are identifying witnesses the court should be satisfied that they are honest and their identification of the accused is reliable
  4. The alibi must be assessed in the totality of the evidence
  5. The ultimate test is whether the prosecution has furnished proof beyond reasonable doubt
- **Voice identification** – must be treated with caution and in the absence of prior acquaintance and is considered extremely poor evidence

Specific instances

- **Children** – evidence of young children should be treated with caution due to their imaginativeness and suggestibility
- There is no statutory requirement that a child's evidence be corroborated
- The court has to be sure that the child understands the importance of telling the truth
- Trustworthiness depends on the child's ability to observe, to remember the observations and to recall the events
- Current position is that the cautionary approach be applied to child evidence even though it has been suggested that it should not be
- **The Single Witness –** statutory provisions make it possible for a court to convict a person based in single evidence
- If the court is satisfied that the evidence is satisfactory it may but need not regard it as sufficient to convict
- Note a single witness may be for only one aspect of a case and numerous single witnesses may be required to prove each aspect
- In S v Webber it was decided that the evidence of a single witness should be approached with caution but need not be rejected merely because of bias - the bias needs to be assessed in the light of the evidence as a whole

Specific instances

- **Cases of a sexual nature** – cautionary rule abolished in *S v Jackson* since the cautionary rule had no factual justification - the court confirmed the burden is on the state to prove the guilt beyond reasonable doubt
- This court also confirmed the strength and terms of the cautionary approach will depend on the content and manner of the witness' evidence – thus there needs to be an evidential basis for suggesting the evidence may be unreliable
- Statutory confirmation about the abolition of the cautionary rule is found in S60 of the Criminal Law (Sexual offences and related matters) Amendment Act of 2007
- **Police traps and private detectives** - the cautionary rule is applied since there are reasons for suspecting the validity of the evidence since the trap receives payment for rendering services and this could colour the evidence to falsely incriminate an accused
- A private detective is the same as a police trap in the sense he is also paid to secure evidence – the difference is that in the former it takes part in committing a crime whereas the private detective does not

- More than one cautionary rule can apply in a certain case and the witness' evidence must be approached with caution in respect of each element which is suspect

END