Department of Criminal and Procedural Law

Only Study Guide for

EVI102-4

Compilers:
Prof SS Terblanche
Prof DP van der Merwe
Prof BC Naudé
Ms K Moodley

University of South Africa
Pretoria

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

EVI102–4/1/2005–2007

97580309

3B2

EVD – Style

Contents

Introduction

1 GENERAL

We 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 is 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 as we suggest below, you should find it easy to pass the course and to remember what you studied in the 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 on the activities in the study guide will appear in tutorial letters. The same applies to any development that has

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.

- Cross R & Tapper C *Cross on Evidence* 8 ed (1995) Butterworths London
- Howard MN (ed) *Phipson on Evidence* 15 ed (2000) Sweet & Maxwell London
- Schmidt CWH *Workbook for the Law of Evidence* (1991) Digma Pretoria
- Schmidt CWH & Rademeyer *H Bewysreg* 4 ed (2000) Butterworths Durban
- Van der Merwe SE, Morkel DW, Paizes AP & Skeen AStQ *Evidence* (1983) Juta Cape Town
- Van Niekerk SJ, Van der Merwe SE & Van Wyk AJ *Privilegies in die Bewysreg* (1984) Butterworths Durban
- Zeffertt DT et al *The South African Law of Evidence* (2003) LexisNexis 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 14 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 that tutorial letter.

4.2 THE GENERAL SCHEME OF THE STUDY GUIDE

The study guide follows the following general scheme:

Part 1: The presentation of evidence

Part 2: The assesment of evidence

Part 3: Study assistance

In part 1 we teach you how (admissible) evidence is presented in court, and in part 2 you learn how the admissible evidence presented in court is evaluated by the court in order to reach a conclusion. 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.

4.3 WORKING THROUGH A STUDY UNIT

Each study unit starts with a list of the sources you will need in studying 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 THE STRUCTURE OF THE STUDY GUIDE

Each study unit follows a certain structure:

1 The list of sources is followed by an ORIENTATION. The information contained in this paragraph provides background to help 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, since 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 letter type 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 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.

These sections should not be memorised, since they are generally used only to explain something which has in the past presented students with particular problems. 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 this note.

4.5 LIST OF WORDS AND PHRASES

You will frequently find words underlined in grey. These are words which may need some explanation for a proper understanding thereof. 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 those which may present some difficulty. Note that we only underline a word the first time it is used.

4.6 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 information. In the examination the most you will be asked on the background material may be 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 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 can go on to study unit 1. Best of luck with your studies. We trust that you will enjoy this course and find it enriching.

Study UNIT one

Overview

ORIENTATION

This study unit is designed to give you an overview of the whole field of the law of evidence, in order to put the course in a proper perspective.

1 THE LAW OF EVIDENCE IS A COMPLETE 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 is because the law of evidence cannot be learnt as if it consisted of modules or separate entities. You will never understand it properly unless you see 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 law.)

Similarly, although the course is covered in 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 give rise to questions spanning the whole field of the law of evidence. At the same time, no case can ever escape the application of the law of evidence.

2 OVERVIEW OF THE LAW OF EVIDENCE IN ITS ENTIRETY

In Law of Evidence 101, students are taught certain base concepts, such as the definition of the law of evidence, evidence and evidential material. It is important to know and understand these terms. 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 101 is spent on the legal rules which govern the admissibility of evidence, whether in civil or in criminal matters. Since the law of evidence tells 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 have to make the factual findings). However, in many instances it is not 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 is not a simple task, and only becomes 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, may it be excluded. In the study units that follow, students learn about the reasons for the exclusion of evidence. The principles are that

- evidence may 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 to corroborate herself **(previous consistent statement)** is inadmissible
- the mere fact that a person has previously done something wrong does not mean that she has done so again, and 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 about her first-hand experiences, and not about what she learnt from others **(hearsay evidence)**
- a witness may not give evidence which amounts to taking over the court's function to reach a conclusion **(opinion evidence)**
- people who incriminate themselves (through **admissions** and **confessions**) have to do so absolutely **voluntarily**, otherwise their 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)**
- finally, evidence acquired in violation of the **Bill of Rights** in the Constitution may often have to be excluded

Of course, once it has prescribed what evidence is admissible and what is not, the role of the law of evidence is far from over. Its remaining functions are dealt with in Law of Evidence 102. This course deals with two broad issues, namely

- the ways in which (admissible) evidence is presented in court, and
- 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 claimed 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 is still not always clear on how to deal with these forms of evidence. Proceeding further, in certain cases the court will accept specific information without any evidence of it being presented; 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 the extent of this burden — 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 such questions as whether it presents **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 into one another, 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 get through all the difficult decisions that it has to make. At best, it is an inexact science, which attempts to govern thousands of different possibilities that are presented in every case. The answers provided by the law of evidence are often rather vague, and then 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, and arguments and decisions on the law of evidence will always have to be made.

SUMMARY

Activity 1

State whether the following statements are true or false:

(1) "Law of Evidence" is the name of the field of the 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) To know what is meant by terms such as "evidence" or "evidential material", is hardly of importance to the serious student of the law of evidence.

(4) The sources of the law of evidence are an important starting point for solving difficult evidential questions.

(5) Only admissible evidence can be used to prove one's case.

(6) Where there is any doubt, it is often almost impossible to forecast whether the court will find a particular piece admissible or not.

(7) The basic requirement for the admissibility of any evidence is that it must be relevant to the issue.

(8) Hearsay evidence is generally admissible.

(9) Evidence of an admission or a confession is usually incriminating, and therefore very valuable evidence. As a result, the police are taught to "encourage" the accused to make such statements.

(10) As long as evidence complies with the requirements of the law of evidence, it does not matter whether the Bill of Rights in the Constitution is violated in the process of collecting that evidence.

(Feedback in study guide)

Part 1

The presentation of evidence

Study UNIT 2

t w o

Witnesses

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

- Schwikkard
- The casebook
- The Criminal Procedure Act 51 of 1977: sections 192, 194, 195 and 196(1)
- The Civil Proceedings Evidence Act 25 of 1965: section 8
- The Constitution: section 35(3)

ORIENTATION

in preparation

- **Read Schwikkard §§ 22 1 and 22 2**

In the study units which follow, you are going to learn more about the means that are used in a trial to satisfy the standard of proof required in a specific case. In this study unit we look at two aspects of one way of presenting evidence, namely oral evidence. These two aspects are the competence of witnesses to testify and the extent to which witnesses may be compelled to testify.

You must understand the difference between the concepts of competence and compellability. Competence has to do with whether a particular person has the mental capacity to testify. As a general rule, all persons are considered to be competent to testify. The reason for this is that it is in the interests of justice that anyone who may have something to contribute to the resolution of a dispute should do so. There are, however, instances where a person will be incompetent to testify. It is equally important that those who are competent to testify, may be compelled or forced to do so. Again, subject to certain exceptions, all persons may be compelled to testify.

When you work through this study unit, you must also keep in mind the difference between competence and admissibility. Competence has to do with whether a certain person has the mental ability to testify in court. Persons who do not have this capacity are not competent to testify and as such the court cannot hear their evidence under any circumstances. Admissibility, on the other hand, has to do with the evidence of a person who is already a competent witness. Competence focuses on the person and admissibility focuses on the evidence of such a person.

A competent and compellable witness who wishes to rely on a privilege, for example the privilege against self-incrimination, may not refuse to enter the witness box. He may claim his privilege only as each relevant question is put to him.

OUTCOMES

After you have finished studying this study unit, you should

- be able to explain the general rule as to the competence and the compellability of a witness to testify and the exceptions to the general rule
- be able to solve practical problems in this regard

1 PROCEDURE

- **Study Schwikkard § 22 3.**

Parties cannot consent to the admission of an incompetent witness's evidence.

2 COMPETENCE

2.1 GENERAL RULE

in preparation

- **Read section 192 of the Criminal Procedure Act 51 of 1977**
- **Read section 8 of the Civil Proceedings Evidence Act 25 of 1965**

You will notice that section 192 refers to section 206 of the same Act. Section 206 states that the law which was in force in respect of criminal proceedings on 30 May 1961 with regard to the competence and compellability of witnesses to testify, shall be applicable in any case not expressly provided for by the Criminal Procedure Act or any other law. This means that English law (as it was on the 30 May

1961) is applicable. Section 206 is an example of a residuary clause which is discussed in greater detail in Law of Evidence 101.

2.2 EXCEPTIONS TO THE GENERAL RULE

We have mentioned that there are instances where a person is not competent to testify, but that these instances are exceptions to the general rule. We will now discuss these exceptions.

2.2.1 Children

in preparation

- Read Schwikkard § 22 4

There is no statutory provision barring children under a certain age from testifying and also no particular age above which a child is competent to testify. Children are therefore subject to the same general rule of presumed competency as all other persons, provided that they understand what it means to tell the truth, have sufficient intelligence, and can communicate effectively. Evidence will usually be led in this regard and the child will be questioned by the parties to the issue.

2.2.2 Mentally disordered or intoxicated witnesses

in preparation

- Read Schwikkard § 22 5
- Read section 194 of the Criminal Procedure Act 51 of 1977

Note that a person should only be withheld from giving evidence when his ability is of such a nature that he cannot make a contribution to the matter before court. Schmidt and Rademeyer *Bewysreg* (2000) 218–219 are of the opinion that the following aspects are important in this regard: a person's ability to observe, to remember his observations and to communicate them to the court. In other words, he must be able to understand the necessity to speak the truth. A court will usually give a ruling as to the competence of such a person after questioning the witness and having heard evidence as to his mental condition. According to Schmidt and Rademeyer, the words "and who is thereby deprived of the proper use of his reason" indicate that only a certain degree of mental illness or imbecility of mind will make a person an incompetent witness. An imbecile, for example, will be allowed to give evidence if he has not been deprived of the proper use of his reason. The part of section 194 which states that "while so affected or disabled" indicates that such a person will only be incompetent for the duration of the affliction or disability. In the case of, for instance, a drunk person, this means that he will indeed be competent to testify after having sobered up.

2.2.3 Officers of the court

in preparation

- Read Schwikkard §§ 22 7 and 22 8

It is in the interests of justice that presiding officers should remain objective with respect to the cases over which they preside. For this reason, judges and magistrates are considered to be incompetent witnesses with respect to those cases over which they preside. Where, however, a presiding officer perceives a certain fact in the court over which he is presiding, he will be considered competent to testify on such a fact in another court.

Example

Magistrate A presides in court A. He hears the admission, as well as the plea of the accused. The matter is subsequently postponed. The magistrate recuses himself (withdraws from the case) and the matter is continued under Magistrate B. Magistrate A is now a competent witness regarding the admission and the plea of the accused, and as such he can testify on this evidence.

The general rule applies with regard to the question whether a party's legal representative or the prosecutor is competent to testify. The legal representative and prosecutor are therefore presumed to be competent and compellable witnesses. It is, however, undesirable that a party's legal representative or the prosecutor testify in that case. Legal professional privilege will in any event restrict the capability of a legal representative to testify against his client. (This privilege is discussed in Law of Evidence 101.)

3 COMPELLABILITY

in preparation

- Read section 192 of the Criminal Procedure Act 51 of 1977
- Read Schwikkard § 22 2 again

It should by now be clear to you that only a competent witness may be a compellable witness. As mentioned earlier, there are cases where a competent witness may not be a compellable witness. These cases can be divided into the following three main categories: spouses, the accused and co-accused.

3.1 SPOUSES

in preparation

- Read Schwikkard § 22 11

The general rule at common law was that the spouse of an accused person could not testify for or

against such an accused. This rule does not apply to civil proceedings any more. The spouse of a party is therefore a competent and compellable witness for and against the party concerned, although the rules regarding privilege may prevent a spouse from mentioning certain facts while giving evidence. With regard to criminal proceedings, specific rules are in force, depending upon whether the spouse is a state witness, a defence witness or a witness for a co-accused.

3.1.1 Spouse as a state witness

in preparation

- Read section 195 of the Criminal Procedure Act 51 of 1977

Section 195 clearly states that a spouse is competent to give evidence on behalf of the prosecution, but that he can be compelled to testify only in certain circumstances. In general, these exceptions apply to proceedings which deal with the well-being of, and relationship between, the married couple, as well as the well-being of their children. Note that section 195 is applicable not only to people who are married when the giving of evidence is at stake, but also to people who were married when the relevant crime was committed, even though the marriage has been dissolved in the meantime.

Mrs B and her father, Mr X, each lay a charge of assault against Mr B, Mrs B's husband. Mrs B alleges that her husband came home from a bar one night and stabbed her with a knife. Mr X alleges that his son-in-law also punched him in the face and called him a "lazy old busybody". Will the state prosecutor be able to compel Mrs B to testify against her husband on the following charges:

(1) The charge of assaulting her?
(2) The charge of assaulting her father?
(3) The charge of criminal defamation against her father?

(Feedback in tutorial letter)

3.1.2 The spouse as a defence witness

in preparation

- Study section 196(1) of the Criminal Procedure Act 51 of 1977

In terms of section 196, the spouse of an accused is a competent as well as a compellable witness in defence of that accused, whether such an accused is jointly charged with someone else or not.

If the accused is jointly charged with someone else, the spouse of such accused will be competent to give evidence on behalf of that co-accused, but cannot be compelled to do so.

Example

Mr Brawn and Mr Brains are co-accused. Mr Brawn wants to call Mrs Brains as a witness. Mrs Brains is competent to testify in defence of Mr Brawn, but she cannot be compelled to do so. She can, however, be compelled to testify in defence of Mr Brains.

3.2 ACCUSED PERSONS

in preparation

- Read section 196(1) of the Criminal Procedure Act 51 of 1977
- Read sections 35(3)(h) and (j) of the Constitution
- Read Schwikkard § 22 9

An accused person is a competent witness in his own defence, but not a compellable witness. This principle is found in section 196(1)(a) of the Criminal Procedure Act 51 of 1977 and confirmed by sections 35(3)(h) and (j) of the Constitution. This means that neither the state, nor the court, nor a co-accused may compel the accused to testify — the choice whether to testify or not rests solely with the accused.

3.3 CO-ACCUSED

in preparation

- Read Schwikkard § 22 10

Where accused persons are tried jointly, they are referred to as "co-accused". (Please note that they are not called "accomplices").

3.3.1 Co-accused as defence witness

Where A and B are charged jointly and are thus co-accused, A may testify in defence of B and vice versa. The general rule applies with regard to competence. As far as compellability is concerned, A may not be compelled by B to testify in B's defence, because A is also an accused. (See 3.2 above.)

3.3.2 Co-accused as prosecution witness

A co-accused is not a competent witness for the state, whether to prove the case against himself or against the accused, because he is also an accused. You will remember from what has been said

earlier that the question of compellability does not even arise where the witness is not competent to testify.

There may, however, be circumstances where the state may call someone, who had *previously* been a co-accused, to testify. This happens when this person is no longer a co-accused in that case. It can happen in one of the following four ways:

(1) By *withdrawing the charge* against the co-accused. Note that such a step does not amount to an acquittal and the former accused may be prosecuted again. However, if certain requirements are met, he may be indemnified from prosecution.
(2) By *finding the co-accused not guilty*. In such a case, he will be discharged and may be called as a state witness.
(3) By *the co-accused entering a plea of guilty*. In such a case, the trials of the accused and his co-accused can be separated.
(4) *If the trials of the accused and his co-accused are separated for some other valid reason.*

Section 157(2) of the Criminal Procedure Act 51 of 1977 provides that at any point during a trial, the court may order a separation of trials so that the one accused is no longer a co-accused in the trial of the other. Upon such a separation, the co-accused may then give evidence against one another, but it is advisable that the accused which the state intends calling on to give evidence, should first be sentenced.

/raster = "rg2"

A and B are jointly charged with the murder of A's stepson, C, and the theft of C's car. A and B are married to Mrs A and Mrs B respectively. Complete the following table by filling in "yes" or "no" in the space provided.

Witness	Party on behalf of whom testimony is given	Competent?	Compellable?
Mrs A	B		No
B	State	No	
Mrs B	A		
Mrs A	A		Yes
Mrs A	State	Yes	
Mrs B	State		No
A	State		

(Feedback in study guide)

/raster = "rg3"

SUMMARY

The competence of witnesses has to do with whether a particular person has the mental capacity to testify. Compellability, on the other hand, has to do with whether such a person can be forced to testify. It is presumed that all persons are competent to testify and compellable, since it is in the interests of justice that every person who may have something to contribute to the resolution of a dispute should do so. There may, however, be circumstances where a person will not be competent to testify, for example in the case of children, mentally disordered persons and officers of the court. There may also be circumstances under which a person cannot be compelled to testify. In such cases (spouses, the accused and the co-accused), it is important to determine whether such a person is a witness for the defence or a witness for the prosecution.

Study UNIT three 3

Stages in the trial process, and the presentation of oral evidence

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

- Schwikkard
- The casebook

ORIENTATION

In this study unit we look at the procedures followed in a trial and specifically the presentation of oral evidence. Strictly speaking, the stages followed in a trial fall under the law of procedure and are covered in greater detail in the Criminal and Civil Procedure courses. Here we give only a brief sketch of some of the aspects of the procedure and then move on to a more detailed discussion of the actual examination of witnesses.

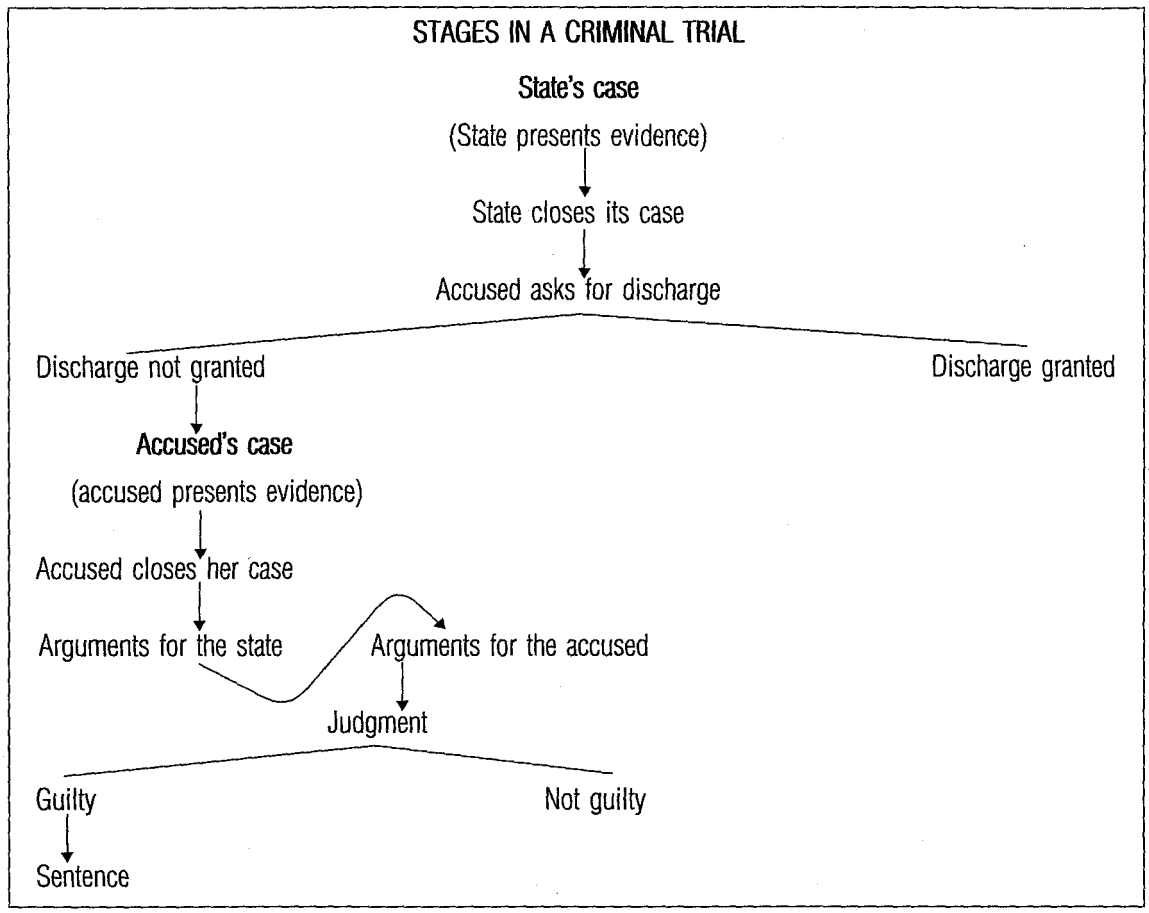
OUTCOMES

After you have finished studying this study unit, you should be able to

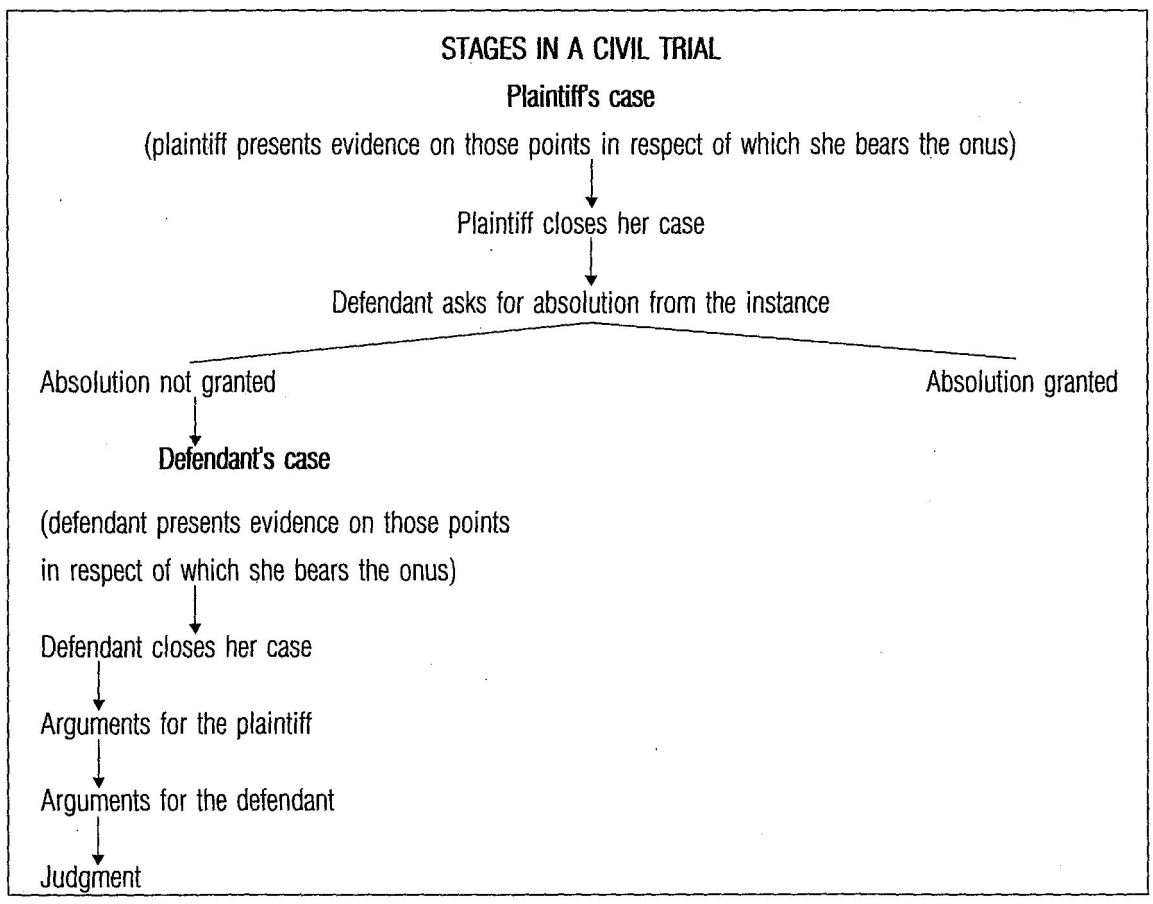
- distinguish between the various stages in the questioning of a witness
- explain in the correct order of occurrence, the different stages in the trial process

1 OVERVIEW OF EVENTS IN CRIMINAL AND CIVIL TRIALS

The course of events in criminal and civil trials is very similar in the sense that opposing parties take turns to lead evidence. However, owing to the fundamental differences between civil and criminal trials, there are also certain differences in procedure. The following diagram illustrates the stages followed in a criminal trial:



In a civil trial, this diagram looks as follows:



2 THE PRESENTATION OF ORAL EVIDENCE

Oral evidence is the most common means of adducing evidence. This is particularly true in criminal cases. The kind of case may, nevertheless, require that other evidence should be used. Many fraud cases, for example, require a lot of documentary evidence.

The cause of action in a civil case will also determine the nature of the evidence required. If the cause of action is breach of contract, there will usually be more documentary than oral evidence, although some oral evidence may be presented (documentary evidence is dealt with in study unit 5).

As a general rule, oral evidence must be given under oath.

The three significant stages in a trial in which oral evidence is presented are examination-in-chief, cross-examination and re-examination.

2.1 EXAMINATION-IN-CHIEF

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. If the state calls W as a witness, then W will be questioned by the prosecutor, and so on. The purpose of examination-in-chief is to put relevant and admissible evidence before the court by making use of the question-and-answer method.

2.1.1 Credibility

It should be kept in mind that the party who undertakes the examination-in-chief is not allowed to attack the credibility of the witness. The reason for this should be obvious – the party calling a witness does so for the purpose of proving its case by relying on, among other things, the testimony of that witness. Impeaching the credibility of its own witness will certainly not further this purpose. The one exception to this rule is dealt with at 2.1.3 below. Questions about the witness's previous convictions and bad character may not be asked. (This is dealt with in Law of Evidence 101.)

2.1.2 Leading questions

Generally, leading questions may not be asked during examination-in-chief. A leading question is a question which suggests the answer, or which assumes the existence of a disputed fact. A leading question may, however, be asked on undisputed facts. It should be kept in mind that the trial judge or magistrate always has a discretion to allow leading questions if she considers it necessary to serve the interests of justice or to expedite the proceedings.

Example

Nervous is called as a defence witness in the case against Sleazy, who is accused of rape. Sleazy's legal representative asks Nervous the following questions:

(1) Is your name Nervous?
(2) Did you visit Sleazy's house on the afternoon of the alleged crime?

Question 1 is a leading question but it is admissible because the fact assumed by this question is undisputed. Question 2 is a leading question. It is inadmissible because the answer may be a simple "yes" or "no".

2.1.3 Unfavourable and hostile witnesses

In 2.1.1 we mentioned that the party who undertakes the examination-in-chief may not ask any questions which might raise doubts about the credibility of its own witness. The party calling a particular witness will, however, be entitled to challenge the credibility of its own witness if the witness gives evidence which is unfavourable to the party who called her.

An **unfavourable** witness is someone who merely gives unfavourable evidence. To counter this evidence the party calling this witness may lead other evidence which may contradict her evidence. However, if it becomes clear that the witness intends to **prejudice** the case of the party who has called her, that party may apply to court to have the witness declared a **hostile** witness. Once such a witness has been declared a hostile witness, she may be cross-examined by the party who called her.

2.1.4 The witness may refresh her memory

in preparation

- Read R v O'Linn 1960 (1) SA 545 (N) from 548A-H with the aid of the guidelines you will find in the casebook (you need read only the stipulated page).

As a general rule, witnesses are required to give independent oral testimony and are not permitted to rely on, or refer to, an earlier record. However, owing to the fallibility of human memory and the complexity of some issues, a witness may be given the time to refresh her memory as a necessary exception.

The legal principles determining whether a witness may refresh her memory depend on whether (1) the witness wants to refresh her memory before her testimony or during an adjournment, or whether (2) the witness wants to refresh her memory by referring to a document while in the witness box.

The legal position in the case of (1) is quite simple: there is no general rule that prevents a witness from reading her witness statement, or some other statement that was drawn up soon after the event, before testifying or during an adjournment. In fact, there are many reasons why this practice should be encouraged (see Schwikkard § 4 3 and § 4 4 if you are interested). Also, there are no particular legal principles which should be complied with before this can happen.

The position is somewhat more complicated in the case of (2) above. In this regard you should complete the following activity:

Activity 1

Read Schwikkard § 4 5, and answer the following questions based on what you have read:

(1) List the six requirements that should be met before a witness will be allowed to refresh her memory while in the witness box.

(2) Why would a witness need to have personal knowledge of the recorded event?

(3) Write a short note explaining the requirements related to the origins of a document which a witness wishes to consult to refresh her memory.

(4) What does it mean when it is said that the facts were still fresh in the mind of the witness when they were recorded?

(5) When is it not compulsory to use the original document?

(6) What are the legal principles regarding production of the document, and how is this influenced by the Constitution?

_____

_____

_____

_____

_____

_____

(7) How should a witness deal with any privilege that she may have on information in the document?

_____

_____

_____

_____

_____

_____

(Feedback in tutorial letter)

2.2 CROSS-EXAMINATION

After a witness has given evidence-in-chief, she is cross-examined by the opponent of the party who called her.

Where persons are tried jointly, they are referred to as "co-accused". The practice is for the defence witness to be cross-examined first by the co-accused's legal representative and then by the prosecution.

The purpose of cross-examination is

(1) to elicit evidence which supports the cross-examiner's case
(2) to cast doubt upon the credibility of the opposing party's witness

A witness may also be asked leading questions during cross-examination.

It should be clear that the scope of cross-examination is wider than that of examination-in-chief, but its boundaries are not without limit. Questions asked during cross-examination must be relevant either to

the issue or to the credibility of the witness. Questions about the accused's previous convictions or bad character are beyond the scope of cross-examination, and such questions may not be asked (this is dealt with in Law of Evidence 101).

Complete the following table by setting out the differences between examination-chief and cross-examination:

	EXAMINATION-IN-CHIEF	CROSS-EXAMINATION
Purpose		
Party who undertakes this type of examination		
Leading questions		
Attack on credibility of witness		

(Feedback in tutorial letter)

2.3 RE-EXAMINATION

After having been cross-examined by the opponent, a witness may be re-examined by the party who originally called her. The purpose of re-examination is to enable the witness to clear up any misleading impressions which may have resulted from the answers she gave in cross-examination. Re-examination is similar to examination-in-chief in mainly the following two ways:

(1) It is undertaken by the party who had called the witness.
(2) Leading questions are not permissible.

An important facet of re-examination is that it is confined to matters arising from cross-examination. A witness may be re-examined on new matter only with leave of the court, and in this event the opposing party will, of course, have the right to cross-examine the witness on any such new matter.

Activity 3

Complete the following table by setting out the differences between examination-chief and re-examination:

	EXAMINATION-IN-CHIEF	CROSS-EXAMINATION
Purpose		
Party who undertakes this type of examination		
Leading questions		
Attack on credibility of witness		

(Feedback in tutorial letter)

3 WITNESSES CALLED BY THE COURT

In terms of section 186 of the Criminal Procedure Act 51 of 1977, the court may call witnesses of its own accord, and must do so if the evidence of these witnesses appears to be essential in order to make a just decision (see also Schwikkard § 3 4 3). However, our courts rarely rely on this provision, owing to concern about becoming too involved in the issue.

There is no similar provision in civil cases, and there the court may only call a witness with the consent of the parties (Schwikkard § 3 5 4).

4 WITNESSES CALLED BY THE COURT

Once all the evidence by both parties has been adduced, but before the court evaluates all the evidence and comes to its decision, both parties will be given the opportunity to "address the court in argument". The parties will give the court their assessment of the evidence, and will also argue the law that may be applicable, in the process referring the court to various sources of the law, including case law, statute, textbooks and so on. They will refer to the strong points in their own case, and the weak points in the case of their opponents, and in this manner attempt finally to persuade the court to find in their favour.

SUMMARY

Various forms of evidence may be adduced, including documentary evidence, real evidence and oral evidence. The nature of a case determines which means of adducing evidence will play the most important role in the case. Examination-in-chief is conducted by the party who calls the witness, who should not ask leading questions and should not attack the credibility of the witness, unless the witness has been declared a hostile witness. A witness may refresh her memory using a document which was drawn up at the time when the facts about which she is to testify were still fresh in her memory, subject to certain requirements. Cross-examination is conducted by the opponent of the party who called that witness. Its purpose is primarily to cast doubt upon the credibility of the witness. Re-examination is conducted by the party who calls the witness and its purpose is to enable the witness to clear up any misleading impressions which may have resulted from cross-examination. The court may also call witnesses, but mainly in criminal cases. Before the court makes a judgment on the matter, both parties will be given the opportunity to address the court in argument.

Study UNIT four

Real evidence

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

- Schwikkard
- The casebook

ORIENTATION

Most of the remarks thus far have dealt with oral evidence, namely the evidence a witness relates to the court. Real evidence (the word comes from the Latin word **res**, meaning "a thing") refers to a physical object, or thing, which is brought before the court so that it can view it for itself. Examples of real evidence could include a knife, a garment, a fingerprint, or even a person. As with oral evidence, the rule is that if the evidence is not relevant, it will not be admissible.

OUTCOMES

After you have finished studying this study unit, you should be able to

- recognise from any set of facts, the different forms of real evidence, as well as how it is linked to expert opinion evidence (in the case of fingerprints, for instance)
- appreciate the value of real evidence as way of strengthening oral evidence
- explain the formal requirements for admissibility of real evidence

1 INTRODUCTION

in preparation

- Read Schwikkard § 19 1
- Read the case of S v Msane 1977 (4) SA 758 (N) with the aid of the guidelines you will find in the casebook

You should note the different sub-divisions in Schwikkard. Even though Hoffmann and Zeffertt **The South African Law of Evidence** (1988) 406 classified photographs, cinematographic film, videotapes and tape recordings under a separate category of real evidence, Schmidt *Bewysreg* (1989) 338 preferred to deal with them under "appliances" or "devices". You will note that Schwikkard follows the latter route yet still deals with certain appliances and devices in this chapter. We prefer to deal with these things as a third category of evidence (see study unit 6 below), but only because their classification as either documentary or real evidence is so difficult. No court has yet approved Schmidt's viewpoint, although it is by no means impossible that this view will be accepted.

There are no formal requirements for the handing in of objects such as weapons or prohibited substances such as dagga, but the handing in of such objects is often accompanied by oral evidence (testimony). In the first place, someone often has to identify the object and place it in context — for instance the investigating officer in a criminal case, who selects the exhibit from among a number of exhibits intended for other cases. His testimony might run as follows: "I found this knife in the possession of the accused, immediately after the murder had been committed." The court then takes it into possession, marks it and reference is made to it as part of the court record as "Exhibit One".

In the second place, an expert witness is often called to **explain** an object, or its operation. This in fact constitutes opinion evidence although the object itself remains real evidence (opinion evidence is dealt with in Law of Evidence 101).

Read S v Msane 1977 (4) SA 758 (N) and answer the following questions:

(1) What was the main result of the state's failure to use the available real evidence?

_____

_____

(2) What is the duty of a trial court in this regard?

_____

_____

(3) To what extent does real evidence eliminate the possibility of false evidence being given against the accused?

_____

_____

(Feedback in tutorial letter)

2 PERSONAL APPEARANCE

in preparation

■ Read Schwikkard § 19 2

The court may look at a person in order to determine, for instance, his age, gender, race or to observe his performance as a witness. In the last-mentioned case, the behaviour (or demeanour) of the witness is real evidence concerning a relevant fact, namely the credibility of the witness. This is the reason why an appellate or review court is not in the same position to judge the credibility of witnesses as a trial court would be. The last-mentioned sees the witnesses during the court case, their body language, signs of stress, et cetera. Appeal courts have to judge the case purely on the written record. For an excellent example in this regard, read S v Webber 1971 (3) SA 758 (A), 759G to H only, in the casebook.

Formerly people were classified into race groups and the court, as so-called expert, sometimes observed them as a form of real evidence, as in S v Vilbro 1957 (3) SA 223 (A). In the same way the physical appearance of an accused may serve as real evidence with regard to his estimated age, as in S v Mavundla 1976 (2) SA 162 (N).

3 INSPECTIONS IN LOCO, DEMONSTRATIONS AND BODILY SAMPLES

in preparation

■ Read Schwikkard §§ 19 6 and 19 8

An inspection *in loco* furnishes real evidence of what is inspected on site. The court adjourns in order to accompany the parties in an inspection of the scene of an accident or crime, while witnesses are sometimes asked to point out specific places. If the court draws any conclusions which are unfavourable to any of the parties, it should mention these in order to give the relevant party an opportunity to convince the court that its conclusions are incorrect.

An inspection *in loco* may enable the court to

(1) follow the oral evidence more clearly, or
(2) observe some real evidence which is additional to the oral evidence

In the United States of America, where the jury system still operates, sophisticated simulations (demonstrations) are sometimes used in order give the jury an idea of what had really happened. Thus, computer-generated simulations may illustrate a chemical reaction or the effects of a road accident. By varying the "input variables" (eg the car firstly moves at 90 km/h and then at 60 km/h), different scenarios may be put to the witness. The court should, of course, always guard against the danger of accepting a certain course of events simply because it has been demonstrated in a dramatic fashion.

As you may have noted in Schwikkard § 19 8, sophisticated technology is used nowadays in order to prove identity. In Van der Harst v Viljoen 1977 (1) SA 795 (C) tissue tests were used for the first time in order to prove paternity, and were a great improvement on the old blood tests. The last-mentioned could only provide negative proof, in other words, that a certain person could **not** have been the father of the child. An even more modern (and more accurate) method is so-called "DNA fingerprinting". Everyone's DNA contains a unique genetic code and this can be determined from very small samples of, for instance, blood, semen, hair roots or scrapings of skin. The last-mentioned are sometimes found under the fingernails of the victim of a rape who tried to defend herself. Blood and tissue, as well as DNA, are examples of real evidence which definitely need to be explained by means of expert evidence. In the case of blood tests, a written affidavit is used, but because tissue tests and DNA tests are so complex, it is probably more useful to hear the oral evidence of an expert.

DNA fingerprinting has been used both to establish guilt and to prove innocence. The chance of error is very remote and a properly conducted test is said to render proof of identity beyond any doubt. It has been used, for example, in rape cases.

The taking of blood samples (a common practice in cases involving someone driving under the influence of alcohol or driving with an blood-alcohol level which is over the legal limit) and fingerprints is permitted by section 37 of the Criminal Procedure Act 51 of 1977. Blood and other bodily samples may be taken against the will of the accused.

4 FINGERPRINTS AND HANDWRITING

in preparation

- Read Schwikkard §§ 19 4 and 19 7

Because the very fine detail in fingerprints is generally not visible to the lay person, an expert witness usually has to be called and his opinion is then accepted as admissible evidence (this matter is dealt with more comprehensively in the study unit on opinion evidence in Law of Evidence 101).

When fingerprints are used, an enlargement of the accused's fingerprint is compared in court with that of a fingerprint found on the scene of the crime. If seven points of similarity are found, this will usually amount to proof beyond reasonable doubt that the same person has made the two sets of prints.

The same procedure is followed with regard to handwriting but the court is not as bound to the opinion of an expert and may also hear lay evidence in this regard or draw its own comparisons.

With regard to footprints, expert evidence is not required and the court may draw its own conclusions, chiefly because the detail is not as fine as with the previous two types of evidence.

Which methods are available to the state to

(1) demonstrate the background and circumstances of a car accident?

(2) prove paternity in a maintenance case?

(3) prove the true author where the genuineness of handwriting is disputed?

Indicate in all these cases whether expert oral evidence will be required.

(Feedback in tutorial letter)

SUMMARY

In this study unit we have showed how evidence in the shape of a physical object like a knife, or a quantity of dagga, may be brought before the court. Even a person, small samples of body tissue or the scene of the crime itself may constitute real evidence. In certain instances, as with fingerprints, expert evidence may be required to assist the court to draw inferences from the real evidence.

You should not have too many problems with this study unit if you simply remember that real evidence may be any object which may serve as evidence to help a court decide a case. The precise boundaries of documentary evidence will be explored in the next study unit.

Study UNIT five

Documentary evidence

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

- Schwikkard
- The Civil Proceedings Evidence Act 25 of 1965: sections 19 and 33
- The Criminal Procedure Act 51 of 1977: sections 221(5), 234, 246 and 247
- The casebook

ORIENTATION

The previous study units dealt with oral evidence and real evidence. This unit deals with a third method of bringing evidence before court, namely by way of documents. Documentary evidence plays an important role in the law of evidence. A document may provide evidence of a high probative value, since its contents are fixed and can be considered by the court itself. A written contract would, for example, provide stronger evidence on the provisions of an agreement than oral evidence by the parties involved. However, documents can be forged (falsified), and their authors might not be before the court to confirm that they are original. It is because documents may provide such strong evidence that the law has developed principles peculiar to them. All kinds of special considerations and requirements come into play, some of which are discussed here. You will learn how to define "document", and find out what requirements govern the tendering of a document as evidence. Documentary evidence is often specifically governed by legislation, and the scope of this legislation is so broad that we can only touch on it, which we will do hereunder.

OUTCOMES

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

- explain the concept of documentary evidence and define it
- describe the particular problems that might arise with respect to the admissibility of a document
- determine whether a particular document would be admissible in a court of law

1 ADMISSION OF DOCUMENTARY EVIDENCE

The main requirements that should be met before a document can be used as evidence are, are generally speaking (there are many exceptions to all these rules), that a document will be admissible only if

(1) the **original** document is produced in court
(2) the document is proved to be **authentic**

Other requirements may be prescribed in particular instances, usually by legislation (see, for example, the Stamp Duties Act 77 of 1968 in 6 below).

It must be stressed that the principles and rules that are discussed here deal only with the circumstances in which the court will receive a document as evidence. Whether the information that is contained in the document will be admissible evidence is a different matter, which is determined by the general principles regarding the admissibility of evidence (see 3 of study unit 1). For example, if the contents are irrelevant, or hearsay, to name just two kinds of inadmissible evidence, the document will not be permitted in evidence. In fact, the presentation of documentary evidence often amounts to hearsay evidence.

2 THE DEFINITION OF DOCUMENTARY EVIDENCE

in preparation

- Read section 33 of the Civil Proceedings Evidence Act 25 of 1965
- Read sections 221(5) and 247 of the Criminal Procedure Act 51 of 1977
- Read Schwikkard § 20 2

The first element of documentary evidence is an obvious one, namely that it refers to evidence that is presented by way of a document. What is often less obvious, is exactly what should be understood by the term "document". A good way of dealing with this question would be first to consider the primary sources of the law — legislation and case law. It is clear, when one reads the above-mentioned legislation, that the ordinary meaning of the word "document" is of considerable importance. Beyond this, the legislation also refers to specific things that should, for purposes of that particular statute, be

considered documents. These things may be included in the ordinary meaning of "document", or may not.

For the ordinary meaning of the word "document" one needs to refer to case law. One of most widely accepted definitions can be found in Seccombe v Attorney-General 1919 TPD 270 at 277:

> "The word 'document' is a very wide term and includes everything that contains the written or pictorial proof of something".

Two ideas appear to be central to this definition. The first is that writing (or drawing) seems to be an integral part of any document. The second is that a document should be able to provide proof of something.

In terms of this definition, examples of documents would include contracts, letters, pictures, photographs, birth certificates and wills (testaments), et cetera.

Consider the legislation that you had to read in preparation for this section, and answer the following questions:

(1) Add further examples of documents (those not already included in the examples of the preceding paragraph) in the space below.

_____

_____

(2) Considering the definition in section 221 of the Criminal Procedure Act 51 of 1977, is a computer printout a document? Explain your answer.

_____

_____

(Feedback in tutorial letter)

It is now necessary to consider the general requirements related to documentary evidence in greater detail.

PRODUCING THE ORIGINAL DOCUMENT

3.1 GENERAL

The general rule is that no evidence may be used to prove the contents of a document except the

original document itself (Zeffertt et al *The South African Law of Evidence* (2003) 686). It is often said that "primary evidence" or "the best evidence" of the document has to be provided.

Generally, determining whether a document is the "original document" will simply be a factual matter. In the past, our courts mainly experienced difficulty with respect to older technology, such as what the original of a telegram was, or whether a carbon copy represented an original (the answer being in the affirmative). Today, the ease with which documents can be created, duplicated and amended on computers has created all kinds of problems for the law of evidence, particularly with respect to the question whether a document treated in this way would be an original. This problem is dealt with in study unit 6.

Our law does not require the existence of a status or relationship created by a document to be proved with the original document. Oral or other evidence can be accepted as to these facts. Examples of such a relationship would be the creation of a partnership, or tenancy. The exact extent of this exception is uncertain, and it can be difficult to establish whether a dispute revolves around the matter of status, or is focussed on the terms of the document. Zeffertt et al 689 can be consulted for more detail in connection with this exception.

3.2 EXCEPTIONS (OR THE ADMISSIBILITY OF SECONDARY EVIDENCE)

3.2.1 General

in preparation

- Read Schwikkard § 20 5

There are many exceptions to the basic rule that the original document has to be adduced in court. We look at some of these below.

It was mentioned above that the production of the original of a document is sometimes referred to as providing primary evidence of the document. There are some exceptions to the basic rule that permit **secondary** evidence of the document to be adduced. Secondary evidence can be any kind of admissible evidence — no one form of secondary evidence is more or less secondary than any other. This means that a document might be proved by producing copies of any kind or by oral evidence of someone who can remember its contents (Zeffertt et al 686).

3.2.2 The exception in the case of official documents

in preparation

- Read section 19 of the Civil Proceedings Evidence Act 25 of 1965
- Read section 234(1) and (2) of the Criminal Procedure Act 51 of 1977

Activity 2

(1) Based on the above-mentioned statutory provisions, how would you define an "official document"?

(2) What requirements should be complied with before a copy of an official document can be produced in court?

(3) If an original official document has to be produced in criminal proceedings, what requirement should be complied with before this may be possible?

(Feedback in tutorial letter)

3.2.3 Other exceptions

Activity 3

Read Schwikkard § 20 5 and write down a further four circumstances in which secondary evidence of a document will be permitted.

(No feedback)

4 PROOF OF AUTHENTICITY

4.1 GENERAL

As is the case with real evidence, a document cannot simply be handed in from the bar, but has to be handed in by a witness who can identify the document and prove that it is authentic. "Authenticity" means that the document is what it appears or is alleged to be. For example, if the document appears to be a contract between A and B, the witness will have to be able to prove that it is such a contract. Or if the document is alleged to be the will of C, the witness will have to be able to prove this. Even if the document has been authenticated, this does not mean that its contents will be admissible (see 1 above).

If the authenticity of a document is not proved, or admitted, it will not only be inadmissible, but may also not be used for purposes of cross-examination. However, a document may be admitted temporarily, pending a finding as to its authenticity. In contrast to a dispute on the admissibility of evidence, which is normally dealt with by way of a trial within a trial (this is dealt with in Law of Evidence 101), a dispute as to authenticity is determined by the finder of fact (the court) at the end of the case.

Therefore, it is important to differentiate between authenticity and admissibility.

4.2 PROVING AUTHENTICITY

According to Schmidt and Rademeyer *Bewysreg* 4 ed (2000) 339–341, a document may be authenticated by the following persons:

(1) **The author, executor or signatory of the document.** These people would normally be the best people to authenticate a document, as they are best placed to identify and authenticate it.

(2) **A witness**. A person who saw the author drawing up the document, or a signatory signing the document, may also authenticate the document. (The position is slightly more complicated in the case of wills — see Schmidt and Rademeyer 340.)

(3) **A person who can identify the handwriting or signature**. Such evidence is permitted only if the author or signatory is not available.

(4) **A person who found a document in the possession or control of an opponent**. This exception applies owing to the principle that such a document is admissible evidence against the opponent.

(5) **A person who has lawful control and custody of a document**. In isolated instances it is permissible for such a person to authenticate the document. This principle applies in the case of official documents (dealt with in 3.2.2 above). It also affects the position of documents older than 20 years, which are presumed to be authentic. Such a document must be produced from the control of the person (and from the place) where one would normally expect such a document to be kept, if authentic.

4.3 EXCEPTIONS TO THE RULE REGARDING AUTHENTICITY

in preparation

■ Read section 246(1) of the Criminal Procedure Act 51 of 1977

In a number of instances a document need not be identified or authenticated by a witness. Some of these instances are the following:

(1) When the opposing party has discovered a document (see 7 below) and has been asked to bring it before the court.
(2) When the court takes judicial notice of the document.
(3) When the opponent admits the authenticity of the document.
(4) When a statute provides for an exception.

There are so many statutes with provisions related to the proof of documents that it is impossible to give the student of the law of evidence an accurate sense of what it really involves. Chapter 24 of the Criminal Procedure Act 51 of 1977 contains many such provisions. An example is section 246, which you had to read at the beginning of this section. The operation of section 246*(a)* may be explained by means of the following example:

Example 1

Assume that the issue is whether Mr X was the chairperson of the ANC at a particular time. Any document, such as the minutes of a meeting held at that time, found on the party's premises occupied by the ANC, that indicate that "on the face of it" Mr X was indeed the chairman of the organisation, would comply with the requirements of this section. In terms of section 246*(a)*, these minutes can then be handed in without proof of authenticity.

Section 246 contains language typical of statutory exceptions. In terms of this section, the document becomes evidence on its "mere production", which means that it need not be identified and authenticated by a witness. This wording explains only how the document becomes evidence, but says nothing about the admissibility of its contents or its evidential value. But these issues are dealt with when the statute also provides that such evidence will be *prima facie* proof of the particular fact.

It is important to understand that a particular provision, such as section 212 of the Criminal Procedure Act 51 of 1977, which provides for evidence to be presented in a written form (eg an affidavit or certificate) is not to be considered as documentary evidence for current purposes. Such evidence is known as written evidence. It is invariably created specifically for purposes of the litigation, and serves no purpose other than as evidence for the specific proceedings. Requirements specifically pertaining to documentary evidence are not applicable to written evidence.

5 PUBLIC DOCUMENTS

Public documents are by their nature more reliable than most other documents, with the result that different principles have developed regarding their production in court.

According to Northern Mounted Rifles v O'Callaghan 1909 TS 174, a public document is a document that

> "must have been made by a public officer in the execution of a public duty, it must have been intended for public use and the public must have had a right of access of it".

A baptismal certificate, however, has been held not to be a public document, since it is not drawn up by public officials. Some documents have been rejected since they were only temporary records, or since the public had no right to inspect them. It is for this reason that a passport is not a public document. A title deed clearly qualifies as a public document, as does a birth certificate. The admissibility of birth certificates is, however, governed by statute. The same applies to many other public documents.

At common law, public documents are admissible to prove the truth of what they contain. This means that they are treated as an exception to the hearsay rule. Although the admissibility of all hearsay should be governed by the provisions of the Law of Evidence Amendment Act 45 of 1988, our courts appear still to be guided by the common law in this regard.

Section 18(1) of the Civil Proceedings Evidence Act 25 of 1965 allows for the admissibility of certified copies of public documents in civil proceedings, under certain conditions. Section 233 of the Criminal Procedure Act 51 of 1977 has the same effect. You should be aware of these provisions. In addition, please note that there is some overlapping between public documents and official documents (see 3.2.2 above). A document that complies with both definitions should probably be treated as a public document by the party wanting to use it, since such an approach would ease the proof of the document slightly.

6 STAMP DUTIES ACT 77 OF 1968

in preparation

- Read Schwikkard § 20 10

In terms of the Stamp Duties Act 77 of 1968, certain documents are required to be stamped with revenue stamps. Should these provisions not be complied with, the relevant document is not supposed to be used as documentary evidence at all. However, as can be seen from the reading material, documents will be admitted even if the stamping is late.

Schmidt and Rademeyer 344 object to the use of an evidentiary sanction to ensure payment of monies to the state, even if this legislation does not really hamper court proceedings in South Africa.

7 DISCOVERY OF DOCUMENTS

- **Study Schwikkard § 20 12.**

SUMMARY

When revising this study unit it is important to know what constitutes documentary evidence and to grasp its application both to civil and criminal matters. Generally it is essential to produce the original document in court, and for the witness who is doing so to be able both to identify the document and authenticate it. There are many exceptions to the basic rules, especially contained in legislation. This means that a lawyer should consider any legislation that might be applicable to the case at hand, to ensure that he picks up any statutory exceptions. It is also important to have a basic knowledge of how documents are to be discovered and produced in civil proceedings.

Study UNIT 6

six

Evidence of uncertain classification

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

- Schwikkard
- The Electronic Communications and Transactions Act 2 of 2002
- The casebook

ORIENTATION

Even though we have tried to draw a clear-cut distinction between real and documentary evidence in the previous two study units, in some areas the borders between them have become very fuzzy. This is especially so in the case of new areas of technology such as videotapes and computers. This unit will endeavour to guide you through the arguments in favour of classifying such evidence either as real or documentary evidence, or even as belonging to a third category of evidence.

OUTCOMES

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

- advise someone on how to prove the contents of the modern substitutes for paper documentation (eg computer files and video tapes)
- explain the importance of the Electronic Communications and Transactions Act 2 of 2002 for the law of evidence

1 PRODUCTS OF MODERN TECHNOLOGY AS EVIDENCE

in preparation

- Read Schwikkard § 19 3, § 19 5 and chapter 21 for a general background to this type of evidence
- Read sections 1 and 11 to 17 of the Electronic Communications and Transactions Act (the "ECT" Act) 2 of 2002
- Read S v De Villiers 1993 (1) SACR 574 (Nm) concerning the admissibility of computer printouts in general, according to the guidance in the casebook

Schmidt *Bewysreg* (1989) 338 was the first to raise the argument that the law of evidence should no longer try to force the products of modern technology into the limited categories of either real or documentary evidence. In support of his argument, he mentioned that the present rules related to discovery, reliability and authenticity were originally all based on paper documentation, but on occasion have been extended by additions to cater for photography, cinematography, magnetic audio- and videotapes, mechanical data capture by, for instance, a radar apparatus, and finally, of course, the computer itself. Although Schmidt made a strong argument for the unique classification of this type of evidence, and Schwikkard also uses the same classification, the courts have not yet accepted it as such. In 2002, the ECT Act finally brought together, into one category, the electronic products of modern technology (see section 5 below).

Zeffertt et al 704-709 argue that videotapes should really be treated as documentary evidence. However, S v Mpumlo 1986 (3) SA 485 (E) favoured the counter-argument that videotapes should actually constitute real evidence. Even though there has been an *obiter dictum* in favour of the latter viewpoint in the Appellate Division case of S v Nieuwoudt 1990 (4) SA 217 (A), the matter has not yet been settled either way. The Mpumlo case was supported in S v Baleka (1) 1986 (4) SA 192 (T), but opposed in S v Ramgobin 1986 (4) SA 117 (N), where it was decided that videotapes should be treated as documentary evidence (as Zeffertt et al have also argued).

2 PHOTOGRAPHS AS EVIDENCE

Photographs may sometimes constitute real evidence, particularly where the physical photograph itself is central to a case, either because, for example, it has fingerprints on its surface (the subject of the photograph being immaterial), or because it is a very rare historical photograph which was stolen from a museum, or because it has been adjudged to be pornographic and in the possession of someone in contravention of a statutory measure.

The situation is arguably quite different when the photograph is simply used to represent something that is the subject matter of the particular court case. It then serves a documentary function and both

the dictionary and judicial definitions of "document" are wide enough to cover it (see study unit 5 on documentary evidence). The wording of Rules 35(1) and 36(4) of the Supreme Court Rules also seems to imply that a photograph may be considered to be a document.

The fact that the subject matter of a photograph is subject to the interpretation of the photographer because it is he who uses telephoto lenses, lighting, etc should go to weight rather than to admissibility.

3 CINEMATOGRAPHIC FILM AS EVIDENCE

One may well be forced to agree with the *obiter* judgment in S v Mpumlo 1986 (3) SA 485 (E) at 489 that a cinematographic film is similar to a photograph:

> "A cine film is a series of images which can be visually observed by the naked eye, although the detail thereon would normally require enlarged reproduction, either as prints of individual frames or as a moving picture on a screen."

Although the learned judge finds this type of medium "difficult to categorize", it is submitted that, like photographs, it should be considered to be documentary evidence, if the subject matter is what is really in issue. In practice, its importance is likely to diminish with the increasing use of magnetic videotape over developed film.

4 VIDEO- AND AUDIOTAPES AS EVIDENCE

in preparation

- **Read S v Mpumlo 1986 (3) SA 485 (E) using the guidance in the case book**

These tapes differ from the previous categories in that they are not decipherable by the human eye in their native state and have to be "translated" by a tape player which converts the magnetic particles into sound or light impulses. They differ from computer magnetic media in that the last-mentioned stores the data in a digital form, which is even more susceptible to manipulation than analogue data. Evidence in the form of tapes therefore have to be scrutinised with great care.

Schmidt and Rademeyer 365-6 remark upon the fact that a more liberal attitude was taken towards videotapes in S v Mpumlo 1986 (3) SA 485 (E) and S v Baleka (1) 1986 (4) SA 192 (T) than in S v Singh 1975 (1) SA 330 (N) and S v Ramgobin 1986 (4) SA 117 (N). In the former two cases, videotapes were considered to constitute real evidence and not documentary evidence, and therefore it was decided that the tapes did not have to comply with the (stricter) requirements for documentary

evidence. At any rate it was felt that any possible deficiencies should go to weight rather than admissibility.

Activity 1

You are a judge in the Mpumlo case. Write a short judgment in which you set out the reason why you received or rejected the videotapes as evidence.

(Feedback in tutorial letter)

5 COMPUTER OUTPUT AS EVIDENCE

in preparation

- Read Schwikkard § 21 4
- Study section 15 of the ECT Act
- Read sections 11-14 and 16-17 of the ECT Act

5.1 BACKGROUND TO THE ECT ACT

Before looking at some of the specific clauses in the ECT Act itself, it is important to understand something of its background. Firstly, it was enacted to give effect to "electronic commerce" ("e-commerce", for short), as the name of the Act indicates. In the second place, its evidential provisions (dealt with in 5.2 below) were designed to cope with evidence in a "digital" format. The two concepts of "e-commerce" and "digital" will be explained hereunder.

Basically, "e-commerce" refers to buying and selling by electronic means. One of the consequences of this new way of trading is that certain aspects of an electronic transaction might later have to be proved in court. As has been shown above, the traditional categorisation of evidence into real evidence and documentary evidence is inadequate to cope with electronic transactions. The evidential provisions of the ECT Act provide a third way, as will be explained below. In addition, e-commerce may be transacted internationally and it is thus of the utmost importance that any legislation in this regard be in keeping with international norms in this regard. Therefore, the evidential norms laid down by the ECT Act are based on those laid down by the European Union.

What is meant by a "digital" format? Once a photograph, a letter, a picture or even a video has been

stored in a computer, the format changes from analogue (much the same format as the original) to digital. In order to be stored in digital format, the entire content of the file or document is broken up into electronic bits and bytes (eight bits being a byte) and the content is then said to be stored "digitally". The digital format is very advantageous in terms of storage space and speed of communication but the traditional rules of evidence have struggled to keep up with and classify this evidence. That is why the present study unit is entitled "Evidence of uncertain classification".

5.2 APPLICATION OF THE ECT ACT

Fortunately the legislature finally tackled this problem head-on with the ECT Act . Although the Act also covers electronic contracting, privacy and computer crime (to mention but a few topics), we shall be concentrating on the evidential aspects, contained in sections 11-20 of this Act, as well as the concept of a "data message", as defined in section 1. The concept of a "data message" is quite central to the Act because a data message is the digital alternative to the traditional evidential concepts of statement, object or document. The Act also covers problems such as the "best evidence rule" and electronic signatures (traditionally part of documentary evidence), as well the admissibility and weight of evidence in digital format. Electronic signatures are also quite important because they replace those made in analogue format by means of pen and paper, but make use of an electronic apparatus connected to the computer. Note that in section 1 of the Act, the definitions of "electronic signature" and "data message" both refer to "data" as the basic component. "Data" itself is defined as "electronic representations of information in any form" and constitutes the basic "currency" in which computers deal.

(1) What is the definition of a "data message"?

_____

(2) Write a brief summary on the manner in which the ECT Act deals with electronic signatures in sections 1 and 13 of the Act (you do not have to cover "advanced" electronic signatures.)

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(Feedback in tutorial letter)

SUMMARY

After the century-old secure and seemingly foolproof division of most non-oral evidence into either real or documentary evidence, the products of new technology have thrown these traditional classifications into disarray. Photographs, cine film, videotape and computer output have either to be classified into real, documentary or a third category of evidence. Courts and academic writers have not yet been able to agree on this contentious issue, but recent legislation, such as the ECT Act has tackled the problem head-on.

Study UNIT seven

Judicial notice

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

- Schwikkard
- The Criminal Procedure Act 51 of 1977: section 224
- The Civil Proceedings Evidence Act 25 of 1965: section 5
- The Constitution: section 39
- The Law of Evidence Amendment Act 45 of 1988: sections 1(1) and (2)

RIENTATION

In the last few study units you learnt more about the ways in which (admissible) evidence is presented in court. In study unit 1, you learnt that some facts may be proved without the need for any evidence on them. One way in which facts can be taken as proved without any evidence being presented on them, is for the court to take "judicial notice" of them.

UTCOMES

After you have finished studying this study unit, you should

- have a clear understanding of the meaning, purpose and scope of the judicial notice
- be able to apply the rules relating to judicial notice to any given set of facts

1 THE MEANING OF JUDICIAL NOTICE

in preparation

- Read Schwikkard § 27 1

Schwikkard § 27 1 describes judicial notice as the process through which the judicial officer presiding in the case accepts the truth of certain facts even though no evidence has been led about such facts. Generally, only facts which are particularly well-known, or which can be established without difficulty, may be judicially noticed (this aspect is dealt with in more detail in 3 below).

The "judicial" part of "judicial notice" refers to the fact that this action is taken by a judicial officer, such as a judge or magistrate. When this judicial officer takes notice of a fact, then **judicial notice** has been taken of that fact.

2 PRACTICAL WORKING OF JUDICIAL NOTICE

in preparation

- Read Schwikkard § 27 2 and 27 3

Generally, when a court takes judicial notice of a particular fact, it receives no evidence regarding that fact. The whole purpose of judicial notice is to prevent a waste of time, and this purpose will be defeated if evidence of a particular fact still has to be provided. This also means, of course, that no evidence may be put forward to rebut such a fact.

In view of this position, and because the parties are deprived of the opportunity to cross-examine, courts apply judicial notice with caution and they should, where possible, advise the parties beforehand if they intend to take judicial notice of a particular fact.

3 FACTS OF WHICH JUDICIAL NOTICE MAY BE TAKEN

3.1 NOTORIOUS FACTS

A notorious fact is a well-known fact.

3.1.1 Matters of general knowledge

Read Schwikkard § 27 4 1 and § 27 5 1.

Activity 1

(1) Make a list of at least eight facts of general knowledge of which our courts have taken judicial notice.

(2) Make a list of at least three facts of general knowledge of which our courts have not, or should not have, taken judicial notice.

(No feedback)

$/raster = "rg3"$

3.1.2 Matters of local notoriety

A court may take judicial notice of a fact which is not a fact of general knowledge, only if that fact is "notorious among all reasonably well-informed people in the area where the court sits" (Schwikkard § 27 4 2). Courts are rather reluctant to take judicial notice of locally well-known facts, but they have, for instance, taken judicial notice of the fact that a road that passes within 50 metres of the court is a public road; that Franschhoek is not a small place and that it contains a number of streets; or of the location of the local city hall. However, courts have declined to take judicial notice of the distance between certain cities (such as Bloemfontein and Cape Town). A presiding officer should also not take judicial notice of local conditions of which she may be aware simply because she is aware of them from personal observation or out of interest (Schmidt *Bewysreg* (1989) 182–183 in general).

3.2 FACTS WHICH ARE READILY ASCERTAINABLE

in preparation

- Read Schwikkard § 27 4 3, and §§ 27 5 3 to 27 5 7

The basic principle is that the court can take judicial notice of facts that are readily ascertainable, if they are readily ascertainable from a source of indisputable authority.

3.2.1 Calendars

In S v Sibuyi 1988 (4) SA 879 (T) the court found that courts may take judicial notice of the accuracy of calendars and diaries in so far as they refer to days and months, but that they cannot be accepted as indisputably accurate as far as the phases of the moon, or the state of tides, etc are concerned.

3.2.2 Political and constitutional matters

Answer the following questions, based on your reading of Schwikkard:

(1) Of which political and/or constitutional matter may a court take judicial notice?

_____

_____

_____

(2) What should a court's approach be if it is in any doubt about a political matter?

_____

_____

_____

(Feedback in tutorial letter)

Note that Schwikkard § 27 5 3 states that certain political circumstances in a specific area of a country may be judicially noticed if they are sufficiently notorious (see 3.1.1 above). This should make it clear that it is not always easy, or important, to fit all facts which can be judicially noticed into watertight compartments.

3.2.3 Science and scientific instruments

Only those scientific matters that have become common knowledge to non-specialists may be judicially noticed on the basis of their general notoriety. An example of this would be the fact that no two fingerprints are exactly the same. Measurement by a scientific instrument, on the other hand, requires testimony as to accuracy of method of measurement and instrument used.

3.2.4 Financial matters and commercial practice

Judicial notice has been taken of the fact that

(1) the value of money has declined over the years
(2) the purpose of most public companies is to make a profit from income
(3) the practice of making payment by cheque

However, courts have declined to take judicial notice of the rate of exchange between South African rands and a foreign currency.

3.2.5 Textbooks

Judicial notice may not be taken of facts contained in technical or medical textbooks. However, our courts do use standard dictionaries to establish the meaning of words, and history textbooks have been used to establish historical facts (Schwikkard § 27 5 7).

3.2.6 The functioning of traffic lights

In a number of cases, our courts have found that they can take judicial notice of the fact that, if the traffic lights in an intersection facing in one direction are green, the lights facing at right angles will be red. Contrary to the general position with regard to judicial notice (see 2 above), it has also been held that evidence may be accepted in order to rebut such judicial notice. This is probably an incorrect labelling of the operation of a presumption of fact (see study unit 9) as judicial notice.

3.2.7 Crime

Our courts have taken notice of the frequency with which people in positions of trust commit theft and fraud. This has been regarded as sufficiently notorious to be judicially noticed for sentencing purposes. Our courts have also taken judicial notice of the fact that South Africa has an unacceptably high crime rate.

3.3 THE LAW

in preparation

- Read Schwikkard §§ 27 6 and 27 6 1

The courts **must** take judicial notice of the law. The presiding officer is supposed to be legally trained, and it would be absurd for expert testimony to be led in every case in order to testify as to the relevant legal rules. No evidence may therefore be led with regard to the nature or scope of any South African legal rule, whether it be common law or statutory law. However, the parties have to be given the

opportunity, by way of argument, to address the court with respect to the legal position that may be applicable in any given case.

3.3.1 Statutory law

in preparation

- Read section 224 of the Criminal Procedure Act 51 of 1977
- Read section 5 of the Civil Proceedings Evidence Act 25 of 1965

In terms of the abovementioned provisions, the courts have to take judicial notice of any "law or any matter" published in a *Gazette* by the Government Printer. In practice, all laws, whether by Parliament, or the provincial legislatures, or in the form of regulations by a Minister, or at municipal level, have to be published in such official publications, and are therefore included in these provisions.

Section 161(1) of the Criminal Procedure Act 51 of 1977 provides as follows:

> "A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*".

Assume that the presiding magistrate does not understand what *viva* voce means.

(1) May she call an expert witness to testify as to the meaning of this phrase? Explain your answer.

_____

_____

_____

(2) Assume that the answer in (1) is that no expert witness may be called. What may the magistrate do in order to get the necessary information?

_____

_____

_____

(Feedback in study guide)

3.3.2 Common law

The courts also have to take notice of common law. It does not matter how vague or obscure a particular rule may be — there are no exceptions.

3.3.3 Foreign law

in preparation

- Read section 39(1) of the Constitution
- Read section 1(1) and (2) of the Law of Evidence Amendment Act 45 of 1988
- Read Schwikkard § 27 6 3

When the law of a foreign state is relevant in a South African court case in order to determine some legal aspect of **our law,** our courts may take judicial notice of that foreign law for purposes of comparison. This used to be the position, and it has now been confirmed by the Constitution for purposes of interpreting the Constitution.

When the law of a foreign state itself is **in issue**, then in terms of section 1(1) of the Law of Evidence Amendment Act 45 of 1988, the court may take judicial notice of it as far as it can be readily ascertained with sufficient certainty. This does not preclude any of the parties from presenting evidence if they should prefer to do so (s 1(2)).

3.3.4 Indigenous law

in preparation

- Read section 39(2) and (3) of the Constitution
- Read section 1 of the Law of Evidence Amendment Act 45 of 1988

A court can take judicial notice of indigenous law only if it is consistent with the Bill of Rights in the Constitution (s 39(2)). Beyond this, a court may take judicial notice of indigenous laws (including custom) if they can be readily established with sufficient certainty, and if they are not in conflict with "public policy and natural justice" (see s 1(1) of Act 45 of 1988). This is probably the same as "consistent with the Bill of Rights".

SUMMARY

By taking judicial notice of certain facts, the courts allow them to become part of the evidential material without any evidence being led. Courts may take judicial notice of facts which are generally notorious, of some facts which are locally well-known and of facts which can easily be ascertained. In general, courts also have to take notice of the law of the country. The main purpose of judicial notice is to prevent the presentation of unnecessary and superfluous evidence.

Study UNIT 8

eight

Presumptions

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

- Schwikkard

ORIENTATION

Another way in which proof of a fact can be furnished without providing evidence is by applying a presumption. A presumption is a legal rule according to which the existence of a certain fact is presumed, based on the existence of another fact. Since it is only a presumed fact, it may not be true. Nevertheless, the presumed fact is considered (presumed) to be a fact until the contrary is proved. A presumption is a legal rule: as soon as certain facts are proved, the application of a presumption will lead to the acceptance of another fact. However, the contrary may be proved. In this regard it is important to understand the effect of the burden of proof on the functioning of presumptions. There are quite a few different kinds of presumptions, and the term has not always been used accurately.

OUTCOMES

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

- distinguish the three different kinds of presumptions
- explain the working of a typical presumption

1 THE MEANING OF PRESUMPTION

As said above, a true presumption is a legal rule in terms of which the existence of a certain fact is presumed, based on the existence of another fact. Since it is only a presumed fact, the "fact" may not be true. Nevertheless, the presumed fact is considered to be a fact until this can be disproved.

Example

If it is proved that a man and a woman went through what appeared to be a marriage ceremony, the marriage is presumed to be formally valid.

Let us use the above example to demonstrate the following things about the operation of a presumption:

(1) Something has to be proved before any presumption can come into operation. This is called **laying the basis** for the presumption. In the above example it has to be proved that the parties went through an apparent marriage ceremony, before the presumption can come into operation.

(2) As soon as the basis has been laid, the presumption will come into operation. Therefore, in the example, as soon as the basis has been laid the parties will be **presumed** to be formally married. This may not be true, but it does not matter.

(3) A presumption can be **rebutted**, however. This means that the presumption can be proved not to be the truth in a specific instance. If, in the example, it is proven that the parties were in actual fact not legally married, the presumption will fall away. Therefore, a presumption will always yield to the truth.

Now read Schwikkard § 28 1 for further background.

2 THE PRESUMPTION OF INNOCENCE

In terms of section 35(3)(h) of the Constitution, every accused person has the right to be presumed innocent, as part of the right to a fair trial. This right is widely referred to as the "presumption of innocence". As you will have seen in Schwikkard § 28 1, however, this is not a true presumption. It is not "in itself an item of evidence"; in other words, it is not evidential material. It is basically only a principle which places the onus of proving the accused person's guilt squarely on the prosecution. The onus of proof is discussed in more detail in study unit 10.

3 CLASSIFICATION OF PRESUMPTIONS

3.1 GENERAL

Presumptions are traditionally classified into three categories, namely irrebuttable presumptions of law, rebuttable presumptions of law and presumptions of fact.

3.2 IRREBUTTABLE PRESUMPTIONS OF LAW

An irrebuttable presumption of law is simply an ordinary rule of substantive law formulated to look like a presumption. It is therefore not really a presumption at all, and it does not operate like a presumption as described in 1 above. We call it a presumption only because it was described as such in our common law.

An example of such a "presumption" is that a child under seven years of age is "irrebuttably presumed" not to be able to commit a crime.

3.3 REBUTTABLE PRESUMPTIONS OF LAW

in preparation

- Read Schwikkard § 28 3 2

3.3.1 The true presumption

According to Schwikkard § 28 3 2, rebuttable presumptions of law "are rules of law ... compelling the provisional assumption of a fact. They are provisional in the sense that the assumption will stand unless it is destroyed by countervailing evidence". These presumptions are, therefore, the true presumptions in our law. There are many examples of such presumptions, emanating both from our common law and from statute. Some common-law examples are dealt with below, and statutory presumptions are discussed in study unit 9.

3.3.2 Examples of rebuttable presumptions of law

The following are examples of true presumptions of law. Based on the way in which presumptions operate, as discussed in 1 above, state in each case what the **basis** of the presumption is, what the **presumed fact** is and how it can be **rebutted**.

(1) The presumption that a marriage is valid (Schwikkard § 28 5 1).

(2) The presumption that a man and a woman living together as husband and wife do so in consequence of a valid marriage (Schwikkard § 28 5 1).

(3) The presumption that a child conceived or born during a lawful marriage is legitimate (Schwikkard § 28 5 3).

(4) The presumption that a man admitting to having had intercourse with a woman is the father of her illegitimate child (Schwikkard § 28 5 4).

(5) The presumption that a registered letter that was posted was delivered (Schwikkard § 28 5 6 1).

Basis	Presumed fact	Rebuttal
(1)	(1)	(1)
(2)	(2)	(2)
(3)	(3)	(3)
(4)	(4)	(4)
(5)	(5)	(5)

(Feedback in study guide)

$/raster = "rg3"$

3.4 PRESUMPTIONS OF FACT

3.4.1 Definition

As in the case of an irrebuttable presumption, a presumption of fact is not really a presumption, but merely an inference which a court may draw, representing the most logical outcome of a given situation. Presumptions of fact have also been described as "frequently recurring examples of circumstantial evidence" (see Schwikkard § 28 3 3).

Read Schwikkard § 28 3 3 and § 30 5 4 and answer the following questions:

(1) What are the differences between presumptions of law and presumptions of fact?

_____

_____

_____

_____

(2) Should presumptions of fact really be referred to as "presumptions"?

_____

_____

(Feedback in tutorial letter)

3.4.2 Examples of presumptions of fact

Although there are many examples of factual presumptions, we will limit this discussion to the inferences of regularity and *res ipsa loquitur*.

3.4.2.1 Regularity

in preparation

- Read Schwikkard §§ 28 5 6 and 28 5 6 1

A party who alleges that a **letter** has been posted may lead evidence to the effect that a routine for the posting of letters was followed, and that the letter in question was dealt with in this routine matter. Once this has been established it will provide circumstantial evidence that, owing to the "presumption of regularity", the letter was posted. Such a routine will be easier to establish in the case of public officials than in the case of people working in the private sector because in the case of public officials, the court will take judicial notice of the existence of an office routine.

The inference that owing to an office routine, the letter in question was actually posted, does not entitle the court to infer that the letter was also **received.**

3.4.2.2 Res ipsa loquitur

The maxim *res ipsa loquitur* means "the matter speaks for itself". In our law it is used if the cause of a certain occurrence (often an accident) is unknown, and the court is asked to draw an inference as to the cause of the event from the picture painted by the provided evidence.

Example

Innocent parks her car on an incline, pulls up the handbrake and gets out. After a while the car rolls down the incline and hits another car. The logical inference is that Innocent probably did not apply the handbrake with sufficient firmness to stop the car from rolling down the hill, and therefore negligently caused the damage to the other car. This reasoning will generally simply be common sense.

Although there is no specific reason for it, *res ipsa loquitur* has come to be almost exclusively applied to infer negligence from circumstantial evidence in respect of the conduct of the defendant, such as in the case of the causes of a motor-vehicle accident or other accident. However, negligence may be

inferred in this way only if the true cause of the mishap is unknown (Administrator, Natal v Stanley Motors 1960 (1) SA 690 (A)).

Example

If there is evidence that, after Innocent had left her car, Grudge came along with his buddies and pushed Innocent's car until it started rolling down the incline, the maxim of *res ipsa loquitur* cannot be applied to infer negligence on Innocent's part. Once again, this is plain common sense.

There are many more presumptions of fact. If you are interested, you can read more about them in Zeffertt et al The *South African Law of Evidence* (2003) 134–140 and 168–170. Of course, no questions will be asked about this in the examination.

4 THE RELATIONSHIP BETWEEN PRESUMPTIONS AND THE ONUS OF PROOF

in preparation

■ Read Schwikkard § 28 4

It is mentioned in 1 above that a fact will be presumed in terms of a presumption, unless the contrary is proved. The question is, how much proof is required before the presumed fact will not be accepted any longer? The answer is closely related to the principles surrounding the burden of proof, which are discussed in study units 10 and 11.

In S v Zuma 1995 (1) SACR 568 (CC) the following analysis was found to be useful:

(1) If the presumption is a true presumption of law, proof on a balance of probabilities has to be provided in order to upset the presumption.
(2) If the presumption prevails in the absence of evidence to the contrary, it merely places an evidential burden on the party wanting to disprove it. If any evidence to the contrary is provided, the presumption will no longer prevail.
(3) If the court is merely permitted to draw a particular inference from the proof of a basic fact, but not obliged to, there is no burden of proof on the other party — at most, such an inference amounts to a so-called presumption of fact.

SUMMARY

In the case of presumptions, the court is sometimes required to apply a legal principle, while at other times it simply provides an inference which can be logically drawn from certain facts. In the case of a

legal principle, a presumption comes into operation once its basis has been laid, but it merely provides a fiction which may be rebutted by the actual facts. Factual presumptions are simply based on the application of common sense to the normal outcome of certain human activities.

Study UNIT 9

nine

Statutory presumptions

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

- The Constitution: section 35
- The casebook

ORIENTATION

You now know what a presumption is and how it operates at common law. A great many presumptions have been included in our statute books mainly in order to assist the state in proving its case against accused persons. However, owing to the fundamental right to be presumed innocent, which is contained in the Constitution, many of these presumptions are unconstitutional. In this study unit you will learn how to approach the constitutionality of statutory presumptions.

OUTCOMES

After you have finished studying this study unit, you should

- be able to explain whether a presumption that is contained in a statutory provision is constitutional or not

1 STATUTORY PRESUMPTIONS: AN OVERVIEW

The legislature has created a very large number of statutory presumptions. These presumptions are often created in order to assist the state with some evidential difficulty. One statute which contains many statutory presumptions is the Drugs and Drug Trafficking Act 140 of 1992. A typical example of a presumption was contained in section 21(1)(a)(i) of this Act, which read as follows:

"If in the prosecution of any person ... it is proved that the accused was found in possession of dagga exceeding 115 grams ... it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance".

Such a provision leaves the accused with a legal burden of proof. This situation is discussed in some detail in S v Zuma 1995 (1) SACR 568 (CC), which you will read about below.

2 THE CONSTITUTIONAL PROVISIONS

in preparation

- **Read section 35(3)(h) of the Constitution**

Activity 1

Write down the three rights which are contained in section 35(3)(h).

_____

_____

_____

(Feedback in tutorial letter)

3 THE APPROACH OF THE CONSTITUTIONAL COURT

- **Read paragraphs [3], [4], [12], [19]–[21], [25], [33], [36]–[39] and [41]–[42] of S v Zuma 1995 (1) SACR 568 (CC) in accordance with the guidelines in the casebook.**

Activity 2

Answer the following questions based on the Zuma decision:

(1) In paragraph [19] the court referred to the fact that section 217(1) of the Criminal Procedure Act 51 of 1977 contains a "reverse onus". What is the full implication of this phrase?

_____

_____

_____

_____

_____

(2) What effect does a statutory presumption, which leaves the accused with a legal burden of proof, have on the "presumption of innocence"?

_____

_____

(3) In the end, the most important consideration for the court in S v Zuma was that a statutory presumption is unconstitutional if it allows a conviction despite the existence of reasonable doubt about the guilt of the accused. Therefore, a presumption can survive only if it survives the limitations clause. How did the court deal with this part of its enquiry?

(4) What did the judgment in Zuma not decide (par [41])?

(Feedback in study guide)

4 SUBSEQUENT JUDGMENTS ON STATUTORY PRESUMPTIONS

Many statutory presumptions that placed a reverse onus on the accused have been declared unconstitutional since S v Zuma. In fact, it has been exceptional for a reverse onus presumption to survive. Particularly those presumptions that assisted the prosecution in drug cases (in terms of the Drugs and Drug Trafficking Act 140 of 1992) have fallen by the wayside, one by one. The decisions in all of these cases were based on the most important consideration from S v Zuma, namely that a

presumption that allows for a conviction despite reasonable doubt as to the guilt of the offender is unconstitutional.

One exception to this trend was S v Meaker 1998 (2) SACR 73 (W). There, the appellant was convicted of a contravention of section 85(4)(a) of the Road Traffic Act 29 of 1989. The conviction was dependent on the application of the presumption contained in section 130(1), which provides that if "it is material to prove who was the driver of a vehicle, it shall be presumed, until the contrary is proved" that it was the owner of the vehicle. This a clearly a reverse onus presumption and the court found that it was in violation of the presumption of innocence contained in the Constitution. However, the presumption nevertheless survived owing to the application of the limitations clause (s 36). In applying the principles set out in S v Zuma, the court found that the provision is designed to achieve effective prosecution of traffic offenders and therefore the efficient regulation of road traffic. The presumption furthermore targets a specific group of people, namely vehicle owners. The rights of this group of people are always influenced when their vehicles are involved in offences on a public road. Furthermore, it must be proved that an offence was committed by the driver of the vehicle before the presumption finds any application. The presumption also operates logically, because most owners buy a vehicle with the aim of using it. Owing to the value of these vehicles it can also be expected that even if the owner was not himself the driver, he will invariably know where the vehicle is, and who is driving it. On the other hand, it is frequently impossible for the prosecution to prove the identity of the driver. All these factors distinguish this presumption from those which have been found not to comply with the requirement of the limitations clause.

SUMMARY

The legislature has provided for many presumptions in order to ease the burden of the state and to overcome evidential difficulties. Many of these presumptions will have to be repealed or amended, because any presumption which allows for the conviction of an accused person despite the existence of reasonable doubt, is likely to be unconstitutional since it violates the right to be presumed innocent.

part 2

The assessment of evidence

Study UNIT ten

The onus of proof in criminal matters

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

- Schwikkard
- The casebook
- The Criminal Procedure Act 51 of 1977: section 78(1A) and (1B)

ORIENTATION

The preceding portion of this study guide explained how evidence may be presented and admitted to the court. The whole purpose of all the presentation and admission of evidence was to try and prove a certain fact to the court. The following study units are going to deal with the tricky question of "when is there enough proof?" In the law of evidence, this question is often expressed by asking whether the onus of proof (Latin for "burden" of proof) has been lifted by the party bearing that burden. When the courts say that a party has "discharged its onus of proof" they mean that it has lifted its burden of proof and has presented sufficient evidence to prove its case.

In the present study unit, the onus of proof in criminal cases will be discussed. In the following unit the the onus of proof in civil matters will be dealt with. Study unit 12 will deal with the weight of evidence and how the court decides whether specific evidence was of sufficient value to comply with the standard of proof required.

In studying the present unit you will learn to distinguish between the "proper" onus of proof and the so-called "evidentiary burden" — even the courts still sometimes confuse them! You will see that the onus of proof is different in civil and criminal cases. You will also note that an onus of proof that is applied at the "half-way" stage of a trial is different from that which applied at the end of the trial.

OUTCOMES

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

- explain the difference in the operation of the onus of proof and the evidentiary burden
- determine what type of onus will rest on an accused in a criminal matter where insanity becomes relevant

1 THE DISTINCTION BETWEEN THE ONUS OF PROOF AND THE EVIDENTIARY BURDEN

in preparation

- **Read Schwikkard § 31 1 and § 31 2**
- **Read S v Bhulwana; S v Gwadiso 1995 (2) SACR 748 (CC), especially on 752 (paragraph 7)**

Zeffertt et al *The South African Law of Evidence* (2003) 45 use the phrase "the risk of non-persuasion" to describe the onus of proof and that is precisely what the onus of proof comes down to. If the court is still in doubt about any issue at the end of the trial, it will find against the person who bore the onus of proof with regard to that particular issue because she did not persuade the court, as she had to do in terms of the onus of proof. In other words, the party not bearing the onus of proof always gets the benefit of the doubt in cases where the court is in any doubt. As the following section will indicate, the state usually bears the burden in criminal matters and therefore the accused should always get the benefit of the doubt at the end of a criminal trial.

The distinction between onus of proof and evidentiary burden, is (with respect) neatly made by O'Regan J in the case of S v Bhulwana; S v Gwadiso 1995 (2) SACR 748 (CC), which you had to read in preparation.

With the aid of the Bhulwana case, distinguish exactly what kind of onus would rest upon an accused as the result of a reverse onus, and an evidentiary burden, respectively. Which onus was relevant in this case and which constitutional right was endangered?

_____

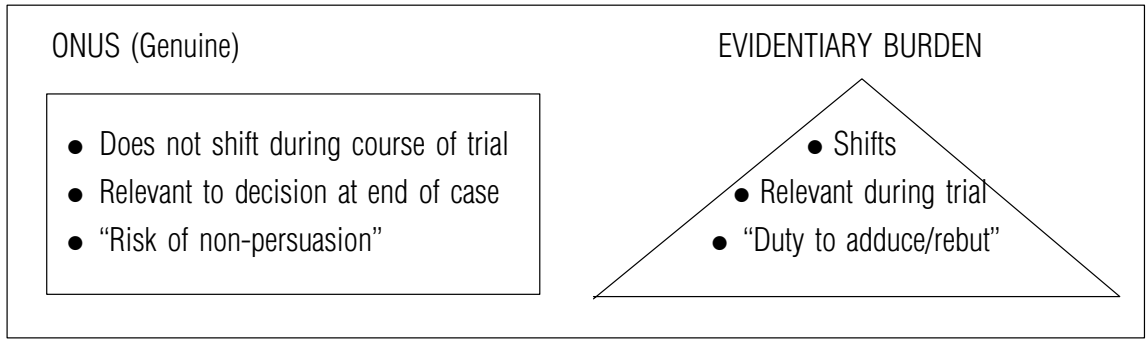
_____

_____

_____

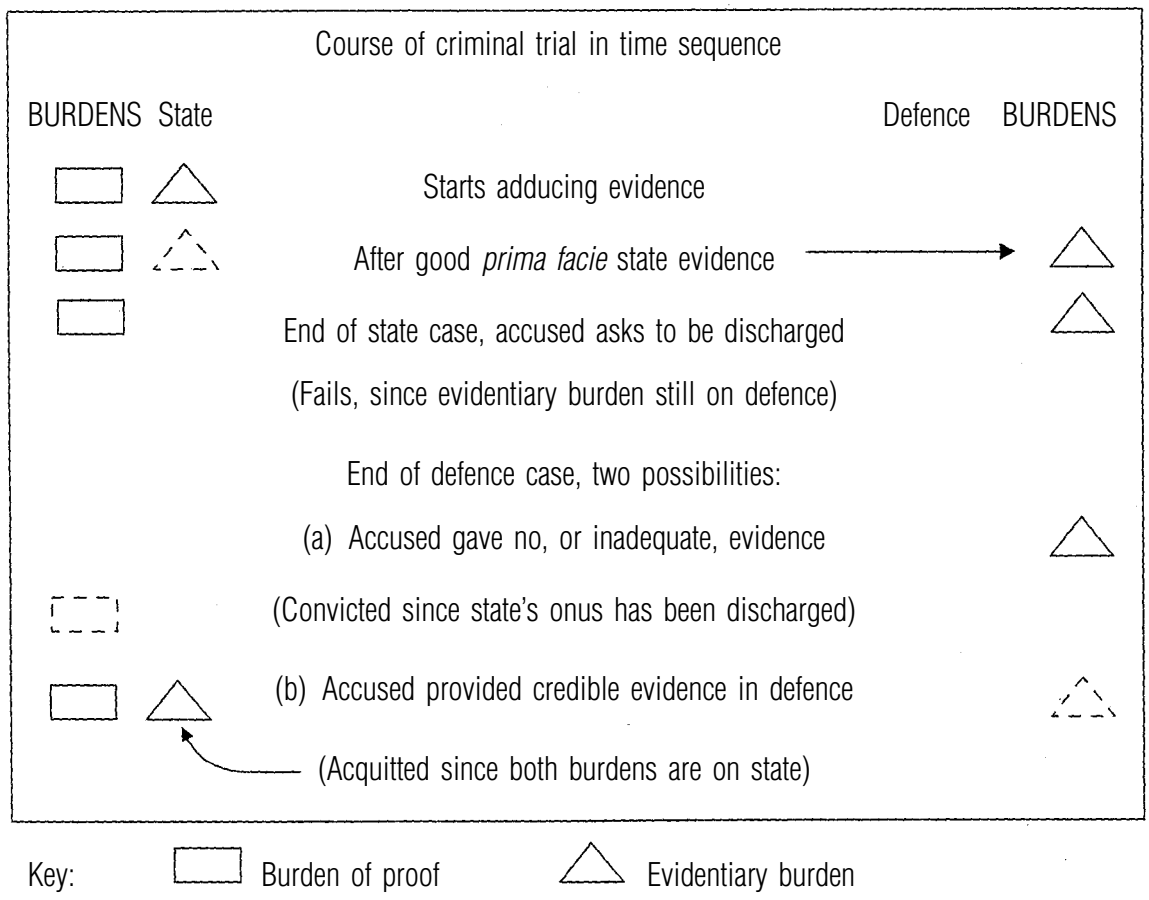
(Feedback in tutorial letter)

The distinction between onus of proof and evidentiary burden may also be explained by means of the following diagram:



2 THE OPERATION OF THE EVIDENTIARY BURDEN AND THE ONUS OF PROOF IN CRIMINAL MATTERS

This operation can probably be best illustrated by means of a diagram.



As you can see from the above diagram, there is an interaction between the onus of proof and the evidentiary burden. The onus of proof rests on the state throughout, but the evidentiary burden sometimes shifts onto the accused, for instance when good *prima facie* evidence has been given. If the accused does not then acquit herself of the evidentiary burden by giving satisfactory evidence herself, the court will no longer have any reasonable doubt concerning her guilt, and the state will have acquitted itself of the onus of proof. If the accused, on the other hand, provides satisfactory evidence and persuades the court, or even creates a reasonable doubt in the mind of the court, the court will have to find against the state because the onus of proof has not been discharged.

Prepare a short written lecture in which you explain to students of the law of evidence how to distinguish between the real onus of proof and the evidentiary burden. (Use simple terminology and make use of diagrams where possible.)

(Feedback in tutorial letter)

3 THE INCIDENCE OF THE ONUS OF PROOF IN CRIMINAL CASES

in preparation

- Read Schwikkard §§ 31 3 and 31 4
- Read section 78(1A) and (1B) of the Criminal Procedure Act 51 of 1977

The matter of the incidence of the onus of proof is not really contentious in criminal matters. The state always bears the onus of proof with regard to all issues, even with regard to defences which the accused may raise. Traditionally, there has been an exception to this rule, namely in the case of a lack of criminal capacity as a result of mental illness or defect (the so-called M'Naghten rule). The question

used to be whether this rule should simply be seen as a constitutional limitation which leaves the true onus of proof to the accused, or whether a better option might not simply be to leave her with an evidentiary burden.

This question has now been dealt with by the legislature in the shape of sections 78(1A) and (1B) of the Criminal Procedure Act 51 of 1977. These two sections have been inserted into the Act by the Criminal Matters Amendment Act 68 of 1998 and came into operation on the 28 of February 2002. Section 78(1A) codifies the M'Naghten position in that every accused person is presumed to be sane and criminally responsible until the contrary is proved. This piece of legislation might, however, be open to constitutional challenge in the light of section 35(3)(h) of the Constitution which provides that all accused persons have the right to be presumed innocent. Section 78(1B) has been interpreted by S v Eadie 2002 (1) SACR 663 (SCA) to mean that a defence of sane automatism now imposes an evidential burden on the accused and not merely an obligation to raise the defence.

Consult Schwikkard § 31 4 and write a short note on the present status of the onus of proof with regard to insanity and sane automatism in the light of recent cases, legislation and the opinions of local jurists.

(Feedback in tutorial letter)

4 THE RIGHT TO SILENCE AND THE ONUS OF PROOF

How may the constitutional right to silence be reconciled with the fact that the accused can be convicted if she keeps quiet while the evidentiary burden still rests upon her? The following argument might be useful.

In the past, the mere silence of the accused was seen as a sure sign of a guilty conscience — why should a person who is innocent not use the opportunity to protest her innocence? Silence was used as a form of circumstantial evidence to bolster a weak case on the part of the state. Now the Constitution has changed everything. This type of inference may no longer be made, since a person has the constitutional right to remain silent if she wishes to. This does not mean that she cannot be convicted,

however. If the state case is in no way contested by the accused or her legal team, the court will have no other option but to convict, provided that the other prerequisites for conviction have been complied with. This is then done objectively, and the evidentiary burden rests upon her because of the good evidence the state was able to produce, which she did nothing to rebut (consult the second diagram above again.)

5 THE STANDARD OF PROOF IN CRIMINAL MATTERS

in preparation

- Read Schwikkard § 31 6

You will note that a different standard of proof applies to civil and criminal proceedings. In criminal cases where the burden rests on the prosecution, the court requires proof **beyond a reasonable doubt**. In criminal cases where the onus rests on the defence, as well as in civil cases, the burden requires proof **upon a preponderance of probabilities**. Although an evidentiary burden might sometimes rest upon the accused (see again the second diagram above), in the final instance, the state still carries the onus of proof to prove her guilt beyond a reasonable doubt.

The discussion in Schwikkard shows that the criterion of proof beyond a reasonable doubt should never be extended to require proof beyond the slightest doubt, since such an unreachable standard might lead to the administration of justice falling into disrepute.

SUMMARY

In this study unit you learnt to distinguish between the so-called true onus of proof and the evidentiary burden. You also looked at the interaction between the two. The implications of the Constitution for the incidence of the onus of proof, especially in cases of insanity, was also considered. Finally, we dealt with the question of what the standard of proof really comprises in criminal cases.

Study UNIT 11

eleven

The onus of proof in civil cases

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

- Schwikkard
- The casebook

ORIENTATION

In study unit 10 we dealt with the onus and standard of proof in criminal matters. In this study unit you will find that matters related to the onus of proof in civil matters are slightly more complicated. The basic principles which you mastered in the previous study unit, still apply however.

OUTCOMES

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

- decide whether the incidence of the onus of proof is determined by substantive or by formal law and explain why this question might be important
- solve the question of the difference between the onus of proof in criminal matters and the onus of proof in civil matters with reference to different issues, using practical examples
- explain the role legislation plays in determining the incidence of the onus of proof
- determine where the onus of proof will lie in a given case

1 IS THE QUESTION OF THE INCIDENCE OF THE ONUS OF PROOF ONE OF SUBSTANTIVE OR FORMAL LAW?

Firstly, the question whether the above is a matter of substantive or of formal law is important because it will determine whether English or Roman-Dutch law will have to be consulted in a particular case. This question was critical to the outcome of Tregea v Godart 1939 AD 16. Here the facts were that a testator (the person who makes a will) had made a new will about two hours before he died, in which he left half of his estate and his home to his nurse. The other heirs, all family members who would have inherited the whole estate under the former will, contested the later will on the grounds that the testator had not had sufficient mental capacity to make a will at the time. At the end of the case, the majority of the appellate judges were not sure whether, in fact, he had had this capacity.

In study unit 10, we explained that if there is any doubt at the end of a case, the party who bears the onus of proof will lose the case. The actual question in Tregea concerned the incidence of the burden of proof. The court had to determine which party bore the onus of proof because this would determine who stood to lose the case. The problem was made worse by the presumption in Roman-Dutch law in favour of the validity of the will, which would have placed the onus of proving the invalidity of the will on the family members. In terms of Roman-Dutch law, therefore, the family would lose the case. In terms of English law, however, a person alleging that a will is valid also bears the onus of proving its validity, and thus the nurse would lose the case.

In Law of Evidence 101 we explained that the Roman-Dutch law is the common law for the branches of substantive law in South Africa, while the English law is the common law for the formal law of South Africa. The central issue was therefore whether the incidence of the onus of proof was a question of substantive law or formal law. The court decided that it was a matter of substantive law and therefore applied the Roman-Dutch law, which meant that the onus of proof rested on the family members, who therefore lost the case.

Even though this finding has been criticised by academics like Schmidt and Rademeyer *Bewysreg* (2000) 9–10 in cases like Neethling v Du Preez; Neethling v The Weekly Mail 1994 (1) SA 708 (A) and Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A), the Appellate Division has confirmed that onus is a matter of substantive law.

2 THE INCIDENCE OF THE ONUS OF PROOF IN CIVIL CASES

in preparation

- Read Schwikkard § 32 2

In civil cases, the basic rule as far as onus of proof is concerned is that he who alleges must prove.

This rule is derived from the decision in Pillay v Krishna 1946 AD 946 951–3. This decision illustrates the fact that the true onus of proof is usually established by the pleadings.

On page 121 of Zeffertt et al they distinguish between the "true" onus of proof and the so-called "evidentiary burden". According to them, the evidentiary burden comprises:

(1) the duty cast upon a litigant to begin adducing evidence
(2) the duty to adduce evidence to combat a *prima facie* case made by an opponent (in Afrikaans this is known as the *weerleggingslas*.)

Refer back to study unit 10 if you still have any trouble distinguishing between the true onus and the evidentiary burden, and the interaction between the two. Basically the onus boils down to the fact that if there is still any doubt at the end of a case, the decision will go against the person who bears the onus.

When legislation is involved, the actual wording of the statute might give an indication of who should bear the onus.

Read the case of Eskom v First National Bank 1995 (2) SA 386 (A) 390–394 in the casebook. Note especially the role that legislation may play with regard to the incidence of proof, as the well as the fact that one of the parties may have specific knowledge of the matter to be proven. Explain how the judge in the Eskom case interpreted the relevant statute to establish where the onus lay in that particular case.

_____

_____

_____

_____

_____

(Feedback in study guide).

3 DIFFERENT ISSUES MAY GENERATE DIFFERENT ONUSES OF PROOF

From the above, you should be aware of the basic rule in this regard, namely that he who alleges must prove. In civil cases different issues may generate different onuses of proof. Another rule which you learnt in study unit 10, is that the true onus of proof never shifts from the one party to the other. However, because in civil cases there is the possibility that in one case different parties may bear the onus of proof regarding different issues, one may get the impression that the onus does indeed shift from the one party to the other.

In Pillay v Krishna 1946 AD 946 (at 952) Davis AJA strove to explain the question of multiple onuses:

> "... where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged."

In Klaasen v Benjamin 1941 TPD 80, Schreiner JA illustrated the principle that the real onus never shifts:

> "In some cases the impression of shifting may be derived from the fact that there are different issues in the pleadings. For instance, the plaintiff has to prove the publication of a defamatory statement concerning him, the defendant has to prove that it was published on a privileged occasion, and the plaintiff has to prove that the occasion was abused. In such a case an impression of shifting may be created although the onus on the different issues is fixed initially by the pleadings and does not change".

This problem may be compared with a situation where the defendant admits the basic facts as pleaded by the complainant, but claim the existence of an exceptional fact, such as a ground of justification, and the complainant alleges, in turn, that the ground of justification has been exceeded. The following factual situation might help to explain this.

In a civil case, the plaintiff claims damages from the defendant, since he claims that the defendant assaulted him. This is the first issue and obviously the onus of proving the assault rests on the plaintiff because of the rule "he who alleges must prove". However, it may turn out that the question of an assault by defendant upon plaintiff is not even in dispute since the defendant admits the assault, but claims that it was done in self defence against an attack launched by the plaintiff. This is the second issue, and the onus to prove that the prerequisites for self-defence existed rests upon the **defendant**. Again, this might not even be in dispute since the plaintiff might acknowledge the primary attack from his side, acknowledge also that the defendant might have started off acting in lawful self-defence, but then claim that the defendant exceeded the bounds of his self-defence, that he went much further in the counter-attack than was necessary to ward off the primary attack, and that he was therefore no longer acting in lawful self-defence and should therefore be held liable. This becomes the third issue, where the onus of proof will be on the plaintiff to prove that the defendant exceeded the bounds of self-defence.

Example

The above situation is based roughly on the facts of the case of Bernhard Goetz, who was attacked on the New York subway by youths armed with screwdrivers. He then shot and injured the plaintiff in the back while the plaintiff was already running away.

4 THE STANDARD OF PROOF IN CIVIL CASES

in preparation

- Read Schwikkard § 32 7

You should note that the standard of proof that applies in civil proceedings is different from that which applies in criminal proceedings — in civil proceedings proof **on a balance of probabilities** is required.

According to Zeffertt et al 55–57, it is easier to describe the civil standard than the criminal standard since the civil standard consists of a **comparative** or **relative** standard (on a balance of probabilities) rather than a **quantitative** test (beyond reasonable doubt). The quantitative test determines how much evidence is required to comply with the standard. This test does not provide much help with regard to the determination of the ideal quantity. A comparative test is easier to understand because it is not so difficult to say that one thing is more probable than another. In this way one has also determined on whose side the balance of probabilities lies.

CONCLUSION

We have seen that in civil cases, the onus of proof is more complex than in criminal cases. For this reason there has been much more litigation in civil cases pertaining to matters such as the incidence of the onus of proof, particularly when several issues result in different onuses of proof.

Study UNIT 12

twelve

The assessment of evidence

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

- Schwikkard
- The casebook

ORIENTATION

In study units 10 and 11 we dealt with the onus of proof, the incidence of that onus and the standard of proof required to answer that onus in criminal as well as in civil cases. In the following study units we will look at some of the main principles and rules that apply when the presiding officer evaluates the weight of evidential material in order to decide whether this standard has been met. A great deal of the study material for Law of Evidence 101 deals with the question of admissibility. You will see that at the end of the trial the weight of the admitted evidential material becomes of cardinal importance. In this study unit, we also look at how the court should go about evaluating circumstantial evidence.

OUTCOMES

After you have finished studying this study unit, you should be able to

- explain what considerations may be important in weighing up the evidence as a whole
- explain the nature and value of circumstantial evidence

1 INTRODUCTION

in preparation

- Read Schwikkard §§ 30 1 and 30 2 for a general background

The evaluation process is a very important stage of the proceedings, during which the court must weigh every piece of evidence, firstly by itself and secondly in the context of all other evidence. In doing this, a systematic and logical process is of the greatest importance. When the court evaluates probative material at the end of the case, it is faced with certain well-known issues. Generally speaking, the court has to determine the credibility of witnesses, draw inferences, and consider probabilities and improbabilities. There are also some specific legal rules that apply during this evaluation process, but it is to a large extent a question of common sense, logic and experience.

2 BASIC PRINCIPLES

in preparation

- Read Schwikkard §§ 30 2 1 and 30 2 2

Read the two paragraphs in Schwikkard referred to above and make a list of the tips which you would give prospective presiding officers concerning the evaluation of evidence.

(Feedback in tutorial letter)

The stated basic principles provide a good starting pointing in the evaluation process, but these principles must be used in conjunction with the legal rules that apply when specific issues are involved. Some of these issues, such as circumstantial evidence, corroboration and the cautionary

rules, will be discussed in the rest of the study guide (you will find an extensive list of other relevant issues in Schwikkard, chapter 30).

3 CIRCUMSTANTIAL EVIDENCE

3.1 WHAT IS CIRCUMSTANTIAL EVIDENCE?

Direct evidence is given when an eye witness testifies about actually seeing the prohibited act taking place. Circumstantial evidence can provide only indirect evidence and inferences then have to be drawn about the prohibited act. An eyewitness sees, for example, a suspect running from a house with a bloody knife in his hand. Upon further investigation the eye witness finds someone fatally stabbed inside the house. Other examples of circumstantial evidence are fingerprint evidence and DNA tests performed upon the tissue of the suspect in a rape case.

3.2 THE EVALUATION OF CIRCUMSTANTIAL EVIDENCE

in preparation

- **Read Schwikkard §§ 30 5, 30 5 1, 30 5 2 and 30 5 3**

As a starting point, it can be said that the evaluation of a case based on circumstantial evidence depends on the presiding officer's ability to think logically. When evaluating circumstantial evidence, the court should consider the cumulative effect of all the circumstantial evidence presented in the case. It would therefore be wrong to consider each piece of circumstantial evidence in isolation.

If inferences are to be drawn from circumstantial evidence in a criminal case, two cardinal rules of logic apply: First, the inferences sought to be drawn must be consistent with all the proven facts. If this is not the case, an inference cannot be sustained. Secondly, the proven facts should be such that they exclude every reasonable inference except the one sought to be drawn. If not, then there must be doubt about the inference sought to be drawn and the accused cannot be convicted. This is because the state must furnish proof beyond a reasonable doubt in a criminal case. Note that only reasonable inferences must be excluded. The state need not exclude every possibility, especially when it is far-fetched.

In a civil case the inference sought to be drawn must also be consistent with all the proven facts, but the inference need not be the only reasonable inference. It is sufficient if it is the most probable inference. This is because a litigant in a civil matter must furnish proof on a balance of probabilities (see the previous study unit).

Note that circumstantial evidence is not necessarily weaker than direct evidence and that the cumulative effect of pieces of circumstantial evidence could have even more value than direct evidence. Also,

recent strides in technology have greatly strengthened some classes of circumstantial evidence. Here one thinks of fingerprint and DNA evidence.

Read R v Blom 1939 AD 288 in the casebook. This is the *locus classicus* (most famous case) on the question of circumstantial evidence. See whether you can write down all the premises that led to the final conclusion, namely that Blom murdered his girlfriend. Also explain how the test laid down in this case concerning the drawing of valid inferences from the circumstances relates to the onus of proof in criminal and civil cases.

(Feedback in study guide)

CONCLUSION

In this study unit we have started discussing the weighing of evidence admitted by the court. In the case of circumstantial evidence, the court should be on its guard against drawing false inferences and applying faulty reasoning. In general, all the relevant evidence should be taken into consideration and weighed up against other evidence. When this is being done, certain rules of thought have to be borne in mind, such as the avoidance of piece-meal reasoning.

Study UNIT thirteen 13

Corroboration

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

- Schwikkard
- The casebook

ORIENTATION

In making its judgment, a court cannot rely on evidence which is not trustworthy. If evidence seems suspect for any reason (eg the witness testifies hesitantly, displays a bias or contradicts herself), it is imperative for the court to examine whether this evidence is supported or backed up by other evidence which could indicate whether this seemingly untrustworthy evidence is, indeed, trustworthy. In situations which are traditionally suspect, courts have developed the so-called "cautionary rule" (see study unit 14) and here corroboration should also be required. The principle that certain evidence should be backed up or corroborated, is the focus of this study unit.

The rules regarding corroboration are derived from English common law, and the present legal position in South Africa is that corroboration is required by statute in only one case. This is when, in terms of section 209 of the Criminal Procedure Act 51 of 1977, the state relies for a conviction on a single confession by an accused that she committed the offence in question.

OUTCOMES

After you have finished studying this study unit, you should be able to

- define corroboration and be able to apply it to a set of facts
- explain what the requirements of corroboration are in the case of confessions, and describe the relationship between these requirements

1 DEFINITION OF CORROBORATION

Corroboration is

- evidential material
- which independently
- confirms
- other (untrustworthy) evidential matter
- and which is admissible

1.1 REQUIREMENTS FOR CORROBORATION

in preparation

- Read Schwikkard §§ 30 3 1 to 30 3 2

Corroborative evidence must meet the following requirements:

(1) Corroborative evidence (evidence which confirms or supports) has to be **admissible.** Inadmissible evidence, such as inadmissible hearsay evidence, cannot be used in a court, and therefore may also not be used as corroborative evidence.

(2) Corroborative evidence may take on a **variety of forms** and does not consist solely of **oral evidence**. Documentary evidence or real evidence (eg fingerprints) may also serve as corroborative evidence. Likewise, a formal admission or even a question under cross-examination (see study unit 3 on cross-examination in general) may provide corroborative evidence.

(3) Corroboration should consist of **independent** evidence, that is, evidence which does not come from the same source as the (untrustworthy) evidence which the corroborative evidence seeks to back up. This principle is derived from the rule against self-corroboration. The original reason for requiring corroboration is the suspicion that the evidence may be untrustworthy and therefore it is obvious that the corroborative evidence should come from a source other than that which appears to be suspicious or untrustworthy.

(4) The corroborative evidence should **confirm** the other evidence. Section 209 of the Criminal Procedure Act 51 of 1977, which provides for the corroboration of a confession, requires that the confession be "confirmed in a material aspect". There are wide-ranging interpretations by our courts of the meaning of this phrase with respect to the nature of corroboration. The requirements for corroboration may vary depending upon how suspicious the evidence is. It is not possible to formulate general rules on the exact nature or quantity of evidence which will result in corroboration, except to say that the corroborating evidence should be shown to be trustworthy. This would be the case, for instance, where the accused confesses to the charge of murdering her victim by poisoning him with arsenic, and there is evidence of a quantity of arsenic in the body of

the deceased. The evidence of the post-mortem report would then confirm or corroborate this confession.

One final aspect of corroboration which requires our attention relates to the relationship between corroboration and the standard of proof in a particular case. When a party is required to provide corroboration of certain evidence upon which its case is built, this does not mean that the standard of proof changes. Corroboration and standard of proof are two distinct concepts. The result of this requirement with respect to corroboration is simply that the particular party has to find additional evidence in order to meet the existing standard of proof.

Liar is called by the prosecution in a case of fraud against Embezzle. The court finds that Liar frequently contradicts herself in the witness box and that she is an unsatisfactory witness. Liar's testimony is, however, corroborated by the evidence given by Trusty, whose testimony is satisfactory. After having considered the evidence presented by both parties, the court finds that the evidence presented by the prosecution does not prove the case against Embezzle beyond reasonable doubt.

(1) What should the finding of the court be in the case against Embezzle? Substantiate your answer.

_____

_____

(2) Would your answer have been different had Liar been found to be a satisfactory witness? Substantiate your answer.

_____

_____

_____

_____

(Feedback in tutorial letter)

2 CORROBORATION IN THE CASE OF A CONFESSION

in preparation

- Read section 209 of the Criminal Procedure Act
- Read Schwikkard § 30 3 3

By its very nature, a confession should be handled with care in our courts. The most important reason for this is the damning nature of a confession. A confession is an unequivocal admission of all the elements of the crime with which an accused is charged, and therefore an accused can be convicted on

the strength of a confession without any further evidence having to be led as to her guilt. Another potential problem in the case of a confession is the danger that it may not have been made voluntarily. Owing to the incriminating nature of a confession there is always the suspicion that it may have been made under coercion or undue influence, or as a result of a misunderstanding on the part of the person making the confession.

The law of evidence attempts to exclude the possibility of untrustworthy confessions in two ways: by applying strict rules in respect of the **admissibility** of confessions, and by applying the statutory requirement of **corroboration**.

Make sure that you understand that corroboration relates only to the weight of evidence.

2.1 REQUIREMENTS FOR THE CORROBORATION OF A CONFESSION

Section 209 states that a conviction may follow on the accused's confession if one of two requirements are met. The first requirement relates to the **confession itself** (corroboration of the confession) and the second relates to the **crime** in respect of which the confession is made (evidence that the crime was committed). We will now discuss these two requirements.

2.1.1 Corroboration of a confession

This requirement is satisfied if other (independent) evidential material is produced which **confirms the confession** in a material respect. We have already mentioned the case where the accused confesses to the charge of murdering her victim by poisoning him with arsenic, and where evidence is adduced that a quantity of arsenic was found in the body of the deceased. Confirmation may come from a variety of sources, such as the accused's fingerprints or answers given by the accused during proceedings in terms of section 115 of the Criminal Procedure Act.

When considering whether certain evidence confirms a confession in a material respect, we should ask ourselves primarily whether the confirmation provided by the evidence is of such a nature that it reduces the risk of an incorrect finding being made by the court.

2.1.2 Evidence that an offence had actually been committed

The Criminal Procedure Act 51 of 1977 specifically states that this requirement be satisfied by adducing **evidence**. This means that any other form of evidentiary matter, such as a presumption or an admission will not suffice.

2.2 RELATIONSHIP BETWEEN THE TWO REQUIREMENTS

in preparation

- Read**R v Mataung** 1949 (2) SA 414 (O) in accordance with the guidelines in the casebook

In 2.1 above we looked at the two requirements contained in section 209. We noted that the requirements are stated in the alternative (one **or** the other will suffice) and we also looked at the distinction between the two with regard to the evidential material required for each. Before concluding the discussion on corroboration in the case of a confession, one aspect of the relationship between these two requirements remains to be discussed. This aspect can best be illustrated by making use of a concrete example from case law.

In R v Mataung 1949 (2) SA 414 (O) the accused was charged with stock theft to which he confessed (ie he admitted all the elements of the crime). However, he could not be convicted before the prosecution had satisfied one of the requirements mentioned in the predecessor to section 209. The prosecution then adduced evidence that stock had disappeared from the fenced camp in which the stock was kept. The court found this evidence not to be sufficient to satisfy the second requirement (that the offence had actually been committed). It did, however, confirm the confession in a material respect and as such it was sufficient to found a conviction based upon the confession alone.

Read the case of R v Mataung 1949 (2) SA 414 (O). Explain what constituted the corroborative evidence and precisely why it did not fulfil the one statutory requirement for corroboration (**Tip**: you might go and have a look at study unit 12 which deals with circumstantial evidence.)

_____

_____

_____

_____

_____

(Feedback in tutorial letter)

SUMMARY

In some cases, evidence is not sufficiently trustworthy for a court to rely on it when making its judgment. Such evidence should then be backed up or corroborated by other evidence. Last mentioned evidence must be admissible and must confirm the unsatisfactory evidence. Corroborative evidence may take on a variety of forms, including oral evidence, real evidence and documentary evidence. The corroboration of a confession in terms of section 209 of the Criminal Procedure Act is the only instance in our law in which corroboration is required by statute. Corroboration and the standard of proof are two distinct concepts. The fact that evidence has to be corroborated does not have any effect on the requirement (in a criminal case) that the guilt of the accused must be proved beyond reasonable doubt or (in a civil case) that the plaintiff must prove her case on a balance of probabilities.

Study UNIT 14
fourteen

Cautionary rule

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

- Schwikkard
- The casebook
- The Criminal Procedure Act 51 of 1977: section 208
- The Civil Proceedings Evidence Act 25 of 1965: section 16

ORIENTATION

Before a court evaluates all the evidence that has been placed before it, it has to take into account that there are situations where evidence may be unsatisfactory and needs to be backed up by other (satisfactory) evidence. In this study unit we look at the rule that requires a court to approach certain types of evidence with caution. This rule is known as the "cautionary rule". It was developed through practice, which has taught us that certain types of evidence cannot be relied upon unless accompanied by some satisfactory indication that the evidence is trustworthy. This may be the case either because of the type of witness giving the evidence or because of the subject matter of the evidence.

OUTCOMES

After you have finished studying this study unit, you should be able to

- understand that the cautionary rule does not affect the admissibility of evidence, but only its probative value
- be in a position, where applicable, to apply the cautionary rule to a given set of facts

1 DEFINITION OF THE CAUTIONARY RULE

in preparation

- Read Schwikkard § 30 11

The cautionary rule is

- **a rule of practice** bearing the **mandatory character** of a legal rule and
- prescribing a **specific approach** to be adopted by the court
- to assist in the **evaluation** of certain evidence.

This rule has developed from practice and is independent of legislation. However, it may not be disregarded. Non-compliance with the cautionary rule will generally result in the finding of the court being set aside, as was done in R v Mbonambi 1957 (3) SA 232 (A). On the other hand, our courts tend not to apply this rule in such a formalistic manner that the exercise of caution is allowed to displace the exercise of common sense (R v J 1966 (1) SA 88 (SRA) 90). In the end, this rule really only guides the court in answering the bigger question: has the party carrying the burden of proof satisfied this burden? (Regarding the burden of proof, see study units 10 and 11.)

Although the cautionary rule was primarily intended to be applied in criminal cases, it sometimes also applies in civil cases. The rule requires that the judge or magistrate evaluating the facts

- must consciously remember to be on guard regarding certain types of evidence
- must seek a safeguard which will sufficiently dispel the suspicion and the dangers inherent in the suspect evidence

The requirement that the judge or magistrate evaluating the facts must consciously remember to apply the cautionary rule means that he must indeed indicate that he has applied these rules. Practically, this will mean that the judge or magistrate will mention the application of the rule in his judgment. However, it is not enough to mention the rule without showing that it has actually been applied (R v Mgwengwana 1964 (2) SA 149 (C)).

The ultimate purpose of the cautionary rule is to exclude the possibility of the court reaching an incorrect finding. The safeguard sought by the judge or magistrate who is evaluating the facts should have exactly this purpose. The most common safeguard can be found in the **corroboration** of the suspect evidence (corroboration is discussed in study unit 12). However, the safeguard can also take other forms (see Schwikkard § 30 11 for such other forms). The real test is whether the court is satisfied, upon rational grounds, that the witness or the evidence is reliable.

2 SPECIFIC INSTANCES

2.1 INTRODUCTION

Over the years, court decisions have established a number of recognised instances in which the cautionary rule applies. The following discussion will look at each of these in more detail. Keep in mind, however, that since the cautionary rule is not the product of legislation, the scope of this rule has not yet been determined with absolute finality. As a result, there may indeed be cases which do not belong in the category of the recognised instances mentioned here, but in which a court may nevertheless apply the rule to the evidence of a particular witness.

2.2 THE ACCOMPLICE

in preparation

- Read Schwikkard § 30 11 1
- Read S v Masuku 1969 (2) SA 375 (N) in accordance with the guidelines in the casebook

Our courts accept that an accomplice may often have a motive for falsely incriminating the accused. He may have an intimate knowledge of the crime and may easily incriminate the accused while at the same time underplaying his part in the crime. For these reasons the evidence of an accomplice should be treated with caution.

Make sure that you understand the difference between an accomplice and a co-accused. Consult the glossary at the back of the study guide if you are unsure.

Briefly summarise the ten principles related to the cautionary rule in respect of accomplices, as listed in S v Masuku 1969 (2) SA 375 (N):

(Feedback in tutorial letter)

2.3 EVIDENCE OF IDENTIFICATION

in preparation

- Read Schwikkard § 30 11 2
- Read S v Moti 1998 (2) SACR 245 (SCA) in accordance with the guidelines in the casebook. You need only read the following pages for current purposes: the summary of facts (247i–248e); the summary of the judgment (248e–249d).

Our sensory perceptions are not always reliable and it is possible that even the most honest and trustworthy witness may identify the wrong person as the one who committed the crime. For this reason, evidence of the identity of the accused must be treated with a good deal of caution. The following was held in R v Shekelele 1953 (1) SA 636 (T) 638G:

> "(G)ross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence".

Answer the following question with the aid of Schwikkard § 30 11 2.

(1) Identify the factors highlighted by the court in S v Mthetwa 1972 (3) SA 766 (A) 768 when assessing the reliability of a witness's observation.

(Feedback in tutorial letter)

Activity 3

(1) Write a note explaining how the court in S v Moti 1998 (2) SACR 245 (SCA) applied the cautionary rule with respect to identification evidence.

(2) Write a note in which you explain how to distinguish between the admissibility of the evidence and the weight of the evidence.

(Feedback in tutorial letter)

2.4 CHILDREN

in preparation

- Read Schwikkard § 30 11 3

Make sure that you understand the difference between a child's competence to testify and the situations in which the cautionary rule will be applied to a child witness (see study unit 2 on the competence of children as witnesses).

In S v V 2000 (1) SACR 453 (SCA), the court stressed that whilst there is no statutory requirement that a child's evidence should be corroborated, it is accepted that, given the nature of the charges and the age of the complainant, the evidence of young children should be treated with caution. The South African Law Commission has recommended that the cautionary rule applicable to children be abolished.

The court has to be sure that the child understands the importance of telling the truth. Trustworthiness depends on a number of factors such as the child's ability to observe what happened, to remember

what he observed, and to tell the court about these observations (Woji v Santam Insurance Co Ltd 1981 (1) SA 1020 (A)).

One should guard against labelling all children as "imaginative and suggestible". In S v S 1995 (1) SACR 50 (ZS) the court followed a different approach, in which less scepticism regarding the child witness was evident.

The current position is that the Supreme Court of Appeal accepts that a cautionary approach be applied to children if the circumstances are appropriate, as seen in S v V above.

2.5 THE SINGLE WITNESS

in preparation

- **Read section 208 of the Criminal Procedure Act 51 of 1977**
- **Read section 16 of the Civil Proceedings Evidence Act 25 of 1965**
- **Read Schwikkard § 30 11 4**
- **Read S v Webber 1971 (3) SA 754 (A) in accordance with the guidance in the casebook**

The statutory provisions make it **possible** for a court to convict a person or to give judgment against a party on the evidence of a single witness alone. If the court is satisfied that the evidence given by the single witness is satisfactory, it **may**, but **need not**, regard that evidence as sufficient to convict the accused.

The application of the cautionary rule in the case of a single witness has been dealt with in numerous cases in South African law.

Answer the following questions from S v Webber 1971 (3) SA 754 (A):

(1) What did the court state about the evidence of single witnesses in R v Mokoena 1932 OPD 79?

_____

_____

(2) How did the court in R v T 1958 2 SA 676 (A) interpret this statement from the Mokoena case?

_____

_____

_____

_____

(3) In terms of S v Webber, what should the approach of a court be in the case of a single witness?

_____

_____

(Feedback in tutorial letter)

There is no rule-of-thumb test or formula to apply when considering the credibility of a single witness (see S v Sauls 1981 (3) SA 172 (A) 180).

The evidence of a single witness may be satisfactory even though it is susceptible to criticism. The degree of caution which should be applied to the testimony of a single witness may also be increased by other factors. Where, for instance, the state relies upon the evidence of a single witness and does not adduce other available evidence (such as real or documentary evidence), there is a greater need for caution.

2.5.1 Who are single witnesses?

The cautionary rule with respect to a single witness is not limited to a situation where only one person gives evidence for the prosecution. There is usually more than one point in issue in any particular case, and if only one witness is available to testify on a particular point in issue, that witness will be a single witness. Similarly, if there is more than one charge, the charges will be considered separately and if there is only one witness regarding a particular charge, this witness will be a single witness.

Example

A number of witnesses testify that a certain crime has been committed. Only one, however, is able to identify the accused as the person who committed this crime. For purposes of the identification of the accused, that particular witness is regarded as a single witness.

2.6 CASES OF A SEXUAL NATURE

in preparation

- **Read Schwikkard § 30 11 5 for background**

The cautionary rule that used to exist in cases of a sexual nature was effectively abolished in S v Jackson 1998 (1) SACR 470 (SCA). In this judgment, Olivier JA pointed out that the "collective wisdom and experience" of judges, upon which the cautionary rule regarding the testimony of a complainant in a case of a sexual nature was said to have been based, had no factual justification — the empirical research which had been done in this regard disproved the idea that women lie more frequently than men, or that they are by nature unreliable witnesses. Another important consideration

was that the cautionary rule has collapsed in a number of countries with a similar legal system to ours, such as Canada, England, Australia, New Zealand and Namibia (S v D 1992 (1) SA 513 (NmH)). The court reached the conclusion that this cautionary rule was based on outdated and irrational perceptions, and that it unjustly stereotyped complainants in sexual cases as unreliable witnesses. The court also confirmed the rule that the burden is on the state to prove the guilt of the accused beyond reasonable doubt. There needs to be a reason for suggesting that the evidence of the witness may be unreliable.

This does not mean that a cautionary approach should not be followed simply because a case is of a sexual nature. In S v Jackson, the court endorsed the statement that it is up to the judge's discretion to exercise caution. The strength and terms of the cautionary approach will depend upon the content and manner of the witness's evidence and the way in which it is given, the circumstances of the case and the issues raised. The position remains that **if there is another basis for considering the evidence to be unreliable** then caution is applicable. In this regard one can simply refer to the other recognised instances where caution should be applied, such as in the case of the witness being a single witness, or an accomplice, or where the evidence relates to identification.

2.7 POLICE TRAPS AND PRIVATE DETECTIVES

A police trap is someone whose credibility may be questioned because he receives remuneration in exchange for obtaining evidence for the state. A trap would, for example, offer diamonds or gold to someone with the purpose of soliciting that person to commit the crime of illicit buying of diamonds or gold. Our courts apply the cautionary rule to the evidence of such persons because there are valid reasons for suspecting the reliability of their evidence. Because the police trap receives payment for his services, he may be tempted to colour his evidence in such a way that the accused is falsely incriminated. The possibility of false incrimination is compounded by the fact that the police trap has intimate knowledge of the crime, and may also be motivated by the wish to secure a conviction.

A private detective is in the same situation as the police trap in the sense that he is also paid to secure evidence. The difference between these two types of witnesses is of course that the police trap takes part in committing the crime and the private detective does not. The evidence of a private detective will also be approached with caution to make sure that the accused is not falsely incriminated.

2.8 MORE THAN ONE CAUTIONARY RULE

Where more than one cautionary rule is applicable in a certain case (for instance where the witness is a single witness giving evidence related to the identification of the accused) the witness's evidence must be approached with caution in respect of each element which renders it suspect.

SUMMARY

The cautionary rule developed through practice, since certain types of evidence have proved to be potentially unreliable, unless accompanied by some satisfactory indication that the evidence is actually trustworthy. Although the judge or magistrate must consciously apply this rule, its application should not displace the exercise of common sense. Over the years, court rulings have recognised a number of instances with respect to which this rule applies. This rule has been applied to accomplices, single witnesses, children, and evidence related to identification. More than one cautionary rule may apply in a particular case. The cautionary rule that was accepted in cases of a sexual nature is now regarded as outmoded.

part 3

Study aids

Study AID one

Feedback on activities

STUDY UNIT 1

Activity 1

(1) False (When in capital letters, it refers to the name of the course.)
(2) True
(3) False
(4) True
(5) True
(6) True
(7) True
(8) False
(9) False (Although the first sentence is correct, the conclusion is not.)
(10) False

STUDY UNIT 2

Activity 3

Witness	Party on behalf of whom testimony is given	Competent?	Compellable?
Mrs A	B	Yes	No
B	State	No	Not applicable
Mrs B	A	Yes	No
Mrs A	A	Yes	Yes
Mrs A	State	Yes	Yes
Mrs B	State	Yes	No
A	State	No	Not applicable

STUDY UNIT 7

Activity 3

(1) No. The magistrate may not call any witness. Her problem lies in the legislation. She may not call any witness, or hear any evidence, in respect of legislation, but has to take judicial notice of the content of the statutory provision.

(2) The magistrate may consult a dictionary as part of easily ascertainable judicial notice (see 3.2.3), and she may hear argument from the parties as to the meaning of *viva voce* in this instance. If you do not know what *viva voce* means, you should do what the magistrate did.

STUDY UNIT 8

Activity 1

Basis	Presumed fact	Rebuttal
(1) The parties had gone through what appeared to be a marriage ceremony.	(1) The marriage is formally valid.	(1) Any evidence which proves that the ceremony had not been a legal ceremony.
(2) The parties had lived together as husband and wife and were generally regarded as married.	(2) A valid marriage ceremony had taken place.	(2) Evidence that, for example, the parties had simply lived together and had never gone through a marriage ceremony.
(3) The child was born or conceived during a lawful marriage.	(3) The child is a legitimate child.	(3) Evidence, for example, that a man other than the husband was the actual father (such as DNA evidence).
(4) The man admits having had intercourse with the mother of an illegitimate child.	(4) The man is the father of the child.	(4) Evidence that, for example, the man is sterile.
(5) A registered letter was posted.	(5) The letter was delivered.	(5) Evidence that, for example, the letter was never collected at the post office

STUDY UNIT 9

Activity 2

(1) A "reverse onus" is a legal onus of proof that is placed on the accused. It has to be discharged on a balance of probabilities. This onus is not discharged by the accused if he merely raises a doubt with respect to the applicability of the presumption. Therefore, if at the end of the trial (or trial-within-a-trial) the probabilities are evenly balanced, the presumption will apply.

(2) The presumption of innocence is a legal principle which has the result that, in criminal matters, the state is burdened with the onus of proving the guilt of the offender beyond reasonable doubt. This was so under common law, and was reinforced by the Constitutional rights to remain silent after arrest, and not to have to make a confession or testify against oneself. All these rights are seriously endangered and undermined when the burden is reversed and the accused has to prove his innocence.

(3) The presumption that a confession would be presumed to have complied with the requirements for an admissible confession, was instituted following the Report of the Botha Commission into Criminal Procedure and Evidence, in terms of which it was found that

(a) it should be made more difficult for a dishonest accused to make false allegations of duress
(b) trials need to be shortened by counteracting unduly long trials-within-trials on the admissibility of the confession

The court found that these grounds were insufficient to reverse the onus of proof to the accused. As a result, the presumption could not be saved by the limitations clause, and was declared unconstitutional.

(4) (a) All statutory provisions which create presumptions have not been declared invalid by this decision. It does not, for instance, influence "evidential presumptions" which simply require the accused to create doubt.
(b) It has not declared all reverse onuses invalid.
(c) Neither does it affect statutory provisions which have the appearance of a presumption, but which actually create new crimes.

STUDY UNIT 11

Activity 1

Here the judge, Grosskopf JA, had to determine on which of the two parties the onus of proof lay. He applied the principles of statutory interpretation and because the requirements for protection in terms of section 79 of the Banks Act were positive and conjunctive (together), he felt that the banker had to prove two things, namely good faith and a lack of negligence (391I–J). It was further held that the question whether the banker had been acting in good faith, was one which was particularly within the knowledge of the banker and that was why he had to bear the onus of proof.

STUDY UNIT 12

Activity 1

Blom had made the deceased pregnant, and he had bought chloroform shortly before the deceased died on the railway tracks outside of Graaff-Reinet. He was seen riding away from the scene of the crime shortly after it happened. He gave false explanations for everything and relied on a false alibi. All these premises could only lead to one final conclusion, namely that Blom had killed his girlfriend.

In criminal cases, guilt has to be proven beyond reasonable doubt and therefore the inference of guilt has to exclude all other reasonable inferences, beyond being consistent with all the facts. In civil cases, only the latter requirement applies.

Study AID two

Glossary

a quo

first court (judgment of the first or lower court); the trial court

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

administration of justice

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

admissible/admissibility

whether specific evidence will be admitted into that body of evidence which the court will consider in coming to a conclusion

affidavit

a written or oral statement made under oath

alternative charge

see charge

American Supreme Court

highest court in USA and comparable to our Constitutional Court; not comparable to our High Courts

beyond reasonable doubt

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

capacity (criminal capacity)

a person has criminal capacity when he

- can understand that his actions are illegal

■ can act in accordance to this understanding

cautionary rule

rule of practice bearing the peremptory character of legal rules and prescribing a specific approach to be adopted by the court in order to assist in the evaluation of certain evidence (see study unit 15)

charge (noun)

the crime for which the accused is charged (indicted) in court; it is contained in the charge sheet, which will, for example, read 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 could also 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 can 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 the blood can 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 high courts it is referred to as "an indictment"

circumstantial evidence

see study unit 12 par 2.1

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); the plaintiff's aim with this procedure, to name only two options, is rather to claim damages from the defendant, or to have the court make some kind of order against the defendant

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 co-accused

common law

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

communication

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

compellability/compel

to force, or the ability to force; most people can be forced by the law to testify in court (see study unit 2)

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 (see study unit 2)

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 (of complaining to the police) is generally considered to be the laying of a complaint

collateral facts

facts which are not relevant to the facts in issue but to side issues such as the credibility of a witness; the relevance (and admissibility) of such facts will often be doubtful

confession

total admission of guilt, leaving no defence

convicted

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

credibility

see study unit 12

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 sentence should also 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 this evidence should be supported or backed up by other evidence which could indicate whether this seemingly untrustworthy evidence is indeed trustworthy; this support is called corroboration (see study unit 13)

cross-examination

after a witness has given evidence-in-chief, this witness 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 study unit 3)

declarant

the person declaring something; the person making a statement (whether oral or in writing)

deduction

the process of reasoning from one or more given facts, which, if they are all true, enables a logical inference to 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 should not be followed by students of South African procedure, however

desirability

one of the requirements for admissibility, the other being logical relevance; admitting evidence will be desirable if it has high probative value and low detrimental value

detrimental to the administration of justice

see administration of justice

direct evidence

see study unit 12 par 3.1

discretion

the power to make a decision by choosing from a number of various 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, but 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 permit". The court can 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 all 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 of (4) the death of another human being — each of the numbered items is an **element** of murder

evidence

evidential material which is produced **in court**, whether oral, documentary or otherwise in this study guide; it does not include the information gathered by the police during the investigation of a case

evidential

by way of evidence

evidential/evidentiary material

material which goes to furnish proof

evidential value

see probative value

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 (see study unit 11)

examination-in-chief

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 (see also study unit 3)

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; these facts 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 (see also elements (of crime))

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 the substantive law, have to be proved to establish criminal or civil liability; in criminal cases it is closely related to the elements of the crime

fair trial

the constitutional requirement for all trials

formal 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

from the bar

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

guilty/found guilty

see convicted

hearsay (evidence)

evidence of which the probative value depends on the credibility of a person other than the witness

House of Lords

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

illegal/illegally

illegality is one of the facts in issue which is determined by substantive law in at least all criminal matters and civil matters of a delictual nature

implication/implicitly

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

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 took place

intent/intentionally

doing something on purpose, being subjectively aware of the consequences of one's actions; another fact in issue in many criminal cases

interests of justice

another vague term (see administration of justice), which should mean something such as "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, in order for him to investigate and to gather information which can be used by the prosecutor in evidence against the accused during the trial

irrelevant

the opposite of relevant

issue

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

judicial notice

the court accepting a fact of its own accord (see study unit 7)

jury system/trials

a trial conducted before nine (or more) lay members of the public who have to decide factual matters which are in dispute during that trial; it is not used in South Africa, but is used in most American states

leading question

question suggesting the answer (see study unit 3)

legal proceedings

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

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

logically relevant

the tendency to prove any material matter on the basis of common-sense, present-day standards

objective(ly)

existing outside the mind of an individual; the opposite of subjective; one could also say that objective knowledge is the general, average knowledge or wisdom which is not influenced by an individual's 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 about this matter after all the evidence has been led and argument has been heard, it will find against the party bearing the onus

oral evidence

oral evidence is evidence given by a witness by telling his story; as a general rule this should be done under oath; also called *viva voce* evidence

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 process

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

plea proceedings

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

pointing out

the indicating of relevant information by a suspect; the indicating can be through oral instruction, or the actual, physical indicating of the information

police trap

this is a person who receives remuneration for obtaining evidence for the state; an example of a police trap is someone who offers diamonds and gold to a particular person for the purpose of soliciting that person to commit the crime of buying diamonds and gold

potential for harm

the potential of evidence to harm someone (usually the accused); however, it is not "harm" resulting from the probative value of the evidence that is at stake here, but other factors such as the inferences and expectations which such evidence may hold

precedent

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

prejudicial potential

see potential for harm

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 particular fact without evidence being presented (see study unit 9)

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

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 not to have to divulge information

probative value

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

proof

having sufficient grounds for a finding on a point in issue

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)

having logical relevance and not being undesirable, for instance because of a potential prejudicial effect

residuary authority

authority beyond that statutory authority which the court is given

residuary clause (section)

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

self-corroboration

when corroborative evidence favours the party whose evidence must be corroborated, the corroborative evidence must 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 (see study unit 13)

self-incriminating

the act of saying or doing something by which the speaker or actor's own liability is indicated (see incriminating); usually an admission, but can also be a confession

settlement

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

statement

a written or spoken declaration, often (but not necessarily) of a formal kind

statute books

a popular term for the complete collection of statutes

statutory presumption

see study unit 9

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, for instance criminal law which 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

waive

to give up willingly

weight (of evidence)

see probative value

witness

the person giving oral evidence in court

wrongful

the same as illegal