

Study Guide Activities: The presentation and assessment of evidence

Study unit 1: Overview & Introduction SG1

Disclaimer: These activities were compiled by Pierre Louw from UNISA study material, the prescribed book and legislation. They in no way claim to be 100% correct and you are advised to compare your answers & notes to check for correctness before applying these answers.

State whether the following statements are true or false, and briefly motivate your choice:

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

False.

When written in capital letters, 'Law of Evidence' refers to the name of this module; in small letters, 'the law of evidence' refers to the name of the field of law.

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

True

When referring to 'the court' it 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.

(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.*

False.

As a student in the law of evidence, it is important to know and understand terms such as 'evidence' and 'evidential material'.

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

True.

Unless one knows where the law of evidence comes from, one will not know where to start looking for answers.

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

True.

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

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

True.

Study unit 2:

Witnesses - Competence & Compellability SG 10 TB 421-430

Activity 1:

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 public prosecutor be able to compel Mrs B to testify against her husband on the following charges...?**

(1) The charge of assaulting her? - Yes

Section 195 (1)(a) of the CPA determines that... The wife or husband of an accused shall be... competent and compellable to give evidence for the prosecution at such proceedings where the accused is charged with-

- (a) any offence committed against the person of either of them or of a child of either of them or of a child that is in the care of either of them;

The assault is an act against the person of Mrs B by her husband. Thus i.t.o sec 195 she is competent and compellable to testify against him.

(2) The charge of assaulting her father? - No

She is competent, but not compellable to testify against her husband. Re: Section 195(1) of the CPA.

(3) The charge of criminal defamation against her father? - No

She is competent, but not compellable to testify against her husband. Re: Section 195(1) of the CPA.

Co-accused as prosecution witness**Activity 2:**

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.

Study unit 3 :

Stages in the trial process & the presentation of oral evidence SG1 TB

(Read Schwikkard – 24 3 & 24 4)

Activity 1: Read *Schwikkard* § 24 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.

- (a) The witness must have **personal knowledge** of the events recorded.
- (b) The witness must be **unable to recollect** fully a matter on which she is being examined.
- (c) The witness must have **recorded the information personally**.
- (d) The **record must have been made** (or checked and verified) while the facts were still **fresh** in the memory of the witness.
- (e) The **original document must be used** where the witness has no independent recollection of the incident.
- (f) A **document used** to refresh the memory while the witness is in the witness box must be **made available to the court** & the opposing legal team so that they can inspect it.

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

To avoid the inadvertent admission of hearsay evidence.

(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.

Generally, the witness must have made the recording personally.

However, there are two exceptions:

- (1) where the witness gave instructions for the recording to take place, in which case the original recorder must also testify, and
- (2) where the witness read the record and accepted its accuracy, in which event the original recorder need not testify.

(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?

- The test is whether the written record was created, or was checked and verified at a time when the facts were still fresh in the memory of the witness.
 - The circumstances of each case play a decisive part in defining this requirement.
 - Whether the recording took place shortly after the event, or some time later, are factors which can assist the court in determining whether the facts were still fresh in the memory of the witness.
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(5) When is it not compulsory to use the original document? Stages in the trial process, and the presentation of oral evidence. It is not compulsory to use the original document where the opponent fails to object, or where it can be shown that the original has been lost or destroyed.

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

- A document used to refresh the memory while the witness is in the witness box must be produced to the opponent and to the court.
- The witness may not use a document which she refuses to produce.
- In view of the fact that the **blanket docket privilege has fallen away** in criminal cases (in terms of *Shabalala v Attorney-General* 1995 (2) SACR 761 (CC) the defence will usually be in possession of the relevant document already.

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

A privileged document gives the holder of that privilege two options. He or she may waive the privilege (and use the document), or he or she may claim the privilege (but then he or she cannot use that document).

Activity 2

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

Question 2

Explain the difference between examination in chief and cross examination.

	EXAMINATION-IN-CHIEF	CROSS-EXAMINATION
Purpose	To adduce relevant and admissible evidence	(1) To elicit evidence that supports the cross-examiner's case (2) To cast doubt on the credibility of the opposing party's witness
Party who undertakes this type of examination	Party calling the witness	Opponent of party calling the witness
Leading questions	Not admissible, unless the question deals with undisputed information or if it is in the interest of justice	Admissible
Attack on credibility of witness	Not permitted, unless the witness is declared a hostile witness	Permitted

Activity 3

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

Question 1

Explain the difference between cross-examination and re-examination.

	EXAMINATION-IN-CHIEF	RE-EXAMINATION
Purpose	To adduce relevant and admissible evidence	To clear up any misleading impression which may have resulted from the cross-examination
Party who undertakes this type of examination	Party calling the witness	Party calling the witness
Leading questions	Not admissible, unless the question deals with undisputed information or if it is in the interest of justice	Not admissible, unless the question deals with undisputed information
Attack on credibility of witness	Not permitted, unless the witness is declared a hostile witness	Not permitted. (It is highly unlikely that the witness will be declared hostile at this point)

SELF-EVALUATION

Question 3: List the six requirements that should be met before a witness will be allowed to refresh his or her memory while in the witness box.

The witness may refresh his memory - **principles** differ according to;

- Refreshing memory during an adjournment – no general rule preventing this
- Refreshing memory in the box – certain **requirements** that need to be proved must be met;
 - Personal knowledge of the event and a finding to this effect must be made. This is required to avoid inadvertent admission of hearsay evidence
 - Inability to recollect
 - Verification of the document used to refresh memory - the witness must have made a recording but it can be accepted if the recording was made by someone else on the instruction of the witness
 - Fresh in memory - that is whether the recording was made at a time when the facts were still fresh in the memory of the witness.
 - The presence or absence of substantial contemporaneity is a factor to assist the court in determining whether the facts were fresh in the mind.
 - Use of the original document - where the witness has no independent recollection - copy may be used if original shown destroyed / lost

- Production of the document - the document used to refresh memory must be made available to the court and opponent for inspection.
- Precluded by privileged documents - Where the document is privileged, the holder can either waive this & the witness may then use this or claim privilege and hence the witness may not use it.

Question 4: Explain the practical significance of the phrase: "Both parties will be given the opportunity to address the court in argument".

The Law

(Read Schwikkard – 27 6 & 27

6 1)

- Courts must take judicial notice of the law – no evidence may therefore be led with regard to the nature and scope of a legal rule
- Judicial notice is taken of Acts of Parliament and of the provincial legislatures
- Colonial laws, provincial ordinances are judicially noticed in terms of common law
- Public international law that has acquired the status of custom is judicially noticed
- Judicial notice may now be taken of foreign law in order to determine some legal aspect of our law for purposes of comparison
- The courts may take judicial notice of indigenous law only if it is consistent with the Bill of Rights and if they are not in conflict with public policy and natural justice
- Presiding officer supposed to be legally trained
- No evidence may be led with regard to nature / scope of any SA legal rule.
- But parties have to be given opportunity to address court with respect to legal position that may be applicable in any given case.

Question 5: Fully explain the difference between an "unfavourable" witness and a "hostile" witness.

- *Unfavourable or hostile witnesses*
- An unfavourable or hostile witnesses is a witness whom gives evidence which contradicts or damages the case of the party which called him in the first place.
- A party calling a witness will be entitled to attack the credibility of their witness if he gives evidence unfavourable to their case.
- Evidence may be led to contradict the evidence of the unfavourable witness.
- But if becomes clear that witness intends to **prejudice** case of party who has called her, that party may apply to court to have witness declared **hostile** witness.
- Once declared such he may be cross-examined by the party who called him.

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.

The utilisation of Real Evidence

Activity 1

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?

This failure may materially reduce the cogency of the evidence of a state witness.

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

In a criminal case it is the duty of a trial court to treat the evidence of a single witness with caution. This implies that the veracity of the witness, and the consistency of the witness' story should be tested (eg. by requiring the witness to produce, for inspection by the court, the dagga alleged to have been sold).

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

There are two possible consequences where the court requires the production of real evidence:

- (a) If the witness purchased the dagga (real evidence) from X but identifies Y (the accused) as the seller, then the production of the real evidence will not of itself prevent the wrongful conviction of Y.
 - (b) If the witness did not buy the dagga from anybody at all, but nevertheless alleges that Y sold him the dagga, then the production of the real evidence may effectively expose the witness's dishonesty.
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Activity 2

Which methods are available to the state to

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

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

- An inspection *in loco* may be used to inspect the scene of an accident, and a demonstration may be used to give an idea of what really happened.
 - Photographs may be produced as real evidence of accident damage to a vehicle.
 - Expert evidence will normally not be required, except in computer generated simulations
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(2) prove paternity in a maintenance case?

- Red blood cell tests, DNA tests and HLA tissue typing tests may be used to prove paternity.

- Expert oral evidence will be required to prove the circumstances surrounding the testing procedure, accompanied by an analysis of the results.

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

- Normally an expert will have to be used to testify in the case, but the court itself may decide the matter, or may hear a lay witness in this regard.

SELF-EVALUATION

Question 1

Discuss whether there are any formal requirements for the handing in of objects such as weapons or prohibited substances such as dagga?

- While there is no formal requirement for the handing in of objects, it is however often accompanied by oral evidence, provided that someone has to identify object & place it in context.
- Court takes it into possession, marks it, & reference made to it as part of court record as an 'Exhibit #'
- An expert witness often is called to determine the efficacy of the object and possibly explain the utility and operation thereof.
- *An object* which upon proper identification, becomes, of itself, evidence e.g. knife, photograph, letter etc
- The party wishing to produce real evidence must, *in the absence of admission* by an opponent, *call a witness to identify it as such*
- *Real evidence usually owes its efficacy to a witness* who explains how it was found or used or why he is the owner
- *There are no formal requirements for the handing in of real evidence*
- *A court should not* attempt to make observations that require expert knowledge – however it may draw its own conclusions here expert knowledge is superfluous (footprints)
- An expert called in to explain how an object operates is in fact opinion evidence even though the object itself remains real evidence
- Oral evidence describing relevant real evidence not produced is not rendered inadmissible. *This deals with reported real evidence (the description) as opposed to immediate real evidence (the thing)*

Question 2

Explain the evidential value of DNA "fingerprinting" in establishing identity?

- Great advances have been made with sophisticated technology used to prove identity.

- Whilst blood tests play an important role in litigation e.g. affluence of alcohol - DNA fingerprinting has greatly advanced positive proof pertaining to the identity of victims / perpetrators etc.
- This technology heralds a vast improvement on old blood tests – which could only establish prove negative proof – excluding a person as any of the above...
- DNA fingerprinting can be used to establish parentage, identify the deceased, link a suspect to a crime – rendering positive proof that a person is or isn't a person as any of the above...
- It can thus be used to establish both guilt or innocence.
- All the above-mentioned is 'real evidence' & needs to be explained & corroborated by expert evidence.

Bodily Samples – DNA Sampling

In ***Van Der Harst v Viljoen 1977 (1) SA 795 (K)***

- DNA Tissue tests were used for the 1st time to in order to prove paternity – improving on the use of blood tests that only render negative proof, namely that a certain person cannot be the father of a child.

Question 3

Assume that a murder has taken place and that a firearm is found in a suspect's possession. Explain the importance of real- and circumstantial evidence with reference to a possible trial and give a full discussion of these concepts in your answer. (Part of the answer to this question can be found in su 12)

Definition of real evidence

(Read Schwikkard

– 19 1)

- While there is no formal requirement for the handing in of objects, it is however often accompanied by oral evidence, provided that someone has to identify object & place it in context.
- Court takes it into possession, marks it, & reference made to it as part of court record as an 'Exhibit #'
- An expert witness often is called to determine the efficacy of the object an possibly explain the utility and operation thereof.
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- The party wishing to produce real evidence must, *in the absence of admission* by an opponent, *call a witness to identify it as such*

- *Real evidence usually owes its efficacy to a witness* who explains how it was found or used or why he is the owner
- *There are no formal requirements for the handing in of real evidence*
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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.

The Evaluation of Circumstantial Evidence

(Read Schwikkard – 30 5; 30 5

1; 30 5 2; & 30 5 3)

In a criminal matter:

- 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.

The Evaluation of Circumstantial evidence

R v Blom 1939 AD 288 *is the locus classicus (most famous case) on the question of circumstantial evidence.*

- Blom had made the deceased pregnant.

The premises that led to the final conclusion, namely that Blom murdered his girlfriend:

- 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.

The test laid down in this case concerning the drawing of valid inferences from the circumstances

- 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.

The court formulated two rules pertaining to the assessment of circumstantial evidence

In criminal proceedings two rules need to apply:

1. The inference drawn must be consistent with the proved facts – if not no inference can be drawn
 2. The proved facts should be such that they exclude every reasonable inference save for the one drawn – if not there must be doubt as to whether the inference is correct.
 - In the first case reasonable doubt can be created (if other inferences drawn) and in the second takes account of standard of proof (beyond reasonable doubt)
 - In civil proceedings the inference must be consistent with the proved facts but need not be the only inference. It is sufficient that it is a probable inference (proof on a balance of probabilities)
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Assessing an alibi : 5 factors are involved

1. No burden of proof on the accused to prove his alibi
 2. If there is a reasonable possibility that the accused's alibi is true, then the prosecution has failed to discharge its burden of proof
 3. If there are identifying witnesses the court should be satisfied that they are honest and their identification of the accused is reliable
 4. The alibi must be assessed in the totality of the evidence
 5. The ultimate test is whether the prosecution has furnished proof beyond reasonable doubt
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Study unit 5 :

Documentary Evidence SG31 TB

Definition of Documentary evidence**Activity 1**

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.

Books, maps, plans, drawings, photographs, pamphlets, placards, posters, etc.

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

Yes. The definition has been held to include "computer outputs", that is printouts, in **S v Harper** 1981 (1) SA 88 (D).

Activity 2**The exception in the case of official documents**

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

An original document in the custody or under the control of a state official, because of the position he holds.

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

- The copy has to be certified a true copy or extract by the head of the Department in control or custody of the document, or any officer authorised to do so.
- The copy can then be handed in to the court by anybody (s 234(1) of the Criminal Procedure Act and s 20 of the Civil Proceedings Evidence Act).

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

- An original official document may only be produced upon an order by the "attorney-general".
 - [Note: In terms of s 45 of the National Prosecuting Authority Act 32 of 1998 all references to "attorney-general" in any legislation must be read as "director of public prosecutions".
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Activity 3

Other exceptions

Read Schwikkard § 20 3 1 and write down a further four circumstances in which secondary evidence of a document will be permitted.

Secondary evidence will be permitted if

1. there is evidence that the original is destroyed or cannot be located after a diligent search
2. the production of the original would be illegal
3. production of the original is impossible
4. the original is in the possession of the opposing party or a third party, who refuses to produce it or who cannot be compelled to produce it

Activity 4

Analyse the following set of facts and then give a considered answer to the question that follows:

A famous person, L, is involved in a very messy divorce from his very rich wife, M. The matter is widely publicised in all the magazines and newspapers. M, the wife, wishes to rely on the antenuptial agreement in which it is stated that L will lose some financial benefit accruing from the marriage if one of the reasons for the divorce is adultery. Discuss how M's legal representative can prove that the antenuptial agreement is what it purports to be, and whether any exceptions applicable to the case obviate the need for such proof in this case.

- The main requirements that should be met before a document can be used as evidence are, generally speaking, that a document will be admissible only if:
 - *the original is produced in court*
 - *the document is proved to be authentic.*
- The first requirement means that no evidence may be used to prove the content of a document except the original document itself.
- It is often said that "primary evidence" or the "best evidence" of the document has to be proved. Generally, determining whether a document is the "original document" will simply be a factual matter.
- Of more importance is the requirement that the document must be proved to be authentic.
- A document 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. If the document appears to be an ante-nuptial agreement, a witness will have to be able to prove that it is such a contract.

A document may be authenticated by following persons:-

- Author, executor / signatory of document
- Witness – person who say author draw up document / signatory signing document.
- Person who can identify handwriting / signature – permitted if author/signatory not available
- Person who found document in possession / control of an opponent – Exception applies owing to principle that such document is admissible evidence against opponent.
- Person who has lawful control & custody of document – Principle applies in case of official document's. Also affects position of document's older than 20 years, which are presumed to be authentic.

Exceptions to rule regarding Authenticity

Sec 246(1) of Crim Proc Act

Number of instances where document doesn't need to be identified / authenticated by witness:-

- When opposing party has discovered document & has been asked to bring it before court
- When court takes judicial notice of document
- When opponent admits the authenticity of document
- When statute provides for exception
- A possible exception that will apply here is the instance where a statute provides for an exception.
- In terms of Supreme Court Rule 35(9) a party to civil proceedings may not be required to prove authenticity if he serves a notice on his opponent calling him to admit authenticity.
- If consent is unnecessarily refused, the opponent may be required to bear the costs of proof.
- Also, in terms of section 37 of the Civil Proceedings Evidence Act, documents which are proved or purported to be not less than twenty years old, and come from proper custody, are presumed to have been duly executed if there is nothing to suggest the contrary.

SELF-EVALUATION

Question 1

Explain the process that is used to determine what documents might be relevant to proposed litigation in civil matters?

Discovery, inspection & production of documents - all are relevant to civil litigation

- **'Discovery'** = means it may be expected from one of litigants to discover all possibly relevant documents in their possession, (making them available to opposing party)
- This is done by means of written affidavit listing all possible relevant documents in possession of declaring / their lawyer (except those they may lawfully refuse)
- If party fails to discover possibly relevant documents – documents may not be used in subsequent litigation without express permission by court.
- **'Inspection'** - Once discovery affidavit has been analysed by opposing side – rules also provide for inspection of selected documents by such opposing party.
- **'Production'** - If documents are in hands of 3rd party, such [party may be ordered to come to court & bring document with them. (*subpoena duces tecum* – 'a summons to bring with you')
- Main requirements – document admissible in following circumstances;
- Original document produced in court & the document is proved authentic
- Where applicable the document must be stamped in accordance with the Stamp duties act
- Whether information is admissible is another matter dependent on admissibility of evidence

Question 2

Explain the significance and meaning of "authenticity". Refer in your answer to the parties who can authenticate a document and to relevant exceptions?

The meaning of authenticity:

- The judges in *S v Singh* held "Originality is a requirement flowing from the so-called best evidence rule and is considered when admissibility is decided upon. Authenticity is not a question of admissibility, but of cogency and weight."
- 'Authenticity' = Document is what it appears / is alleged to be.
- For a document to be authenticated means no more than tendering evidence of authorship or possession.
- Even if document is authenticated - doesn't mean contents will be admissible.
- If a document is not authenticated it will be inadmissible and cannot be used for cross examination
- Document may be admitted temporarily pending a finding in its authenticity.

A document may be authenticated by the following persons;

- The author, executor or signatory of the document
- A witness to the drawing up of the document
- A person who can identify the handwriting or signature

- A person who found a document in the possession or control of an opponent
 - A person who has lawful custody and control of the document
 - A document need not be authenticated by a witness in the case of
 - An opposing party discovery of the document
 - When the court takes judicial notice
 - When the opponent admits the authenticity
 - When a statute provides an exception
-

Question 3

Describe what is meant by the phrase "an original document". Also fully refer to secondary evidence in your answer?

An original document includes:

- a. A written or printed paper that bears the original, official, or legal form of something and can be used to furnish decisive evidence or information.
 - b. Something, such as a recording or a photograph, that can be used to furnish evidence or information.
 - c. A writing that contains information.
 - d. *Computer Science* A piece of work created with an application, as by a word processor.
 - e. A computer file that is not an executable file and contains data for use by applications
- Secondary evidence may not be used to prove the contents, but if it is the only means it can be admitted and used in the following circumstances;
 - *Original document lost or destroyed*
 - *Document in the possession of the opposing party or a third party*
 - *Impossible or inconvenient to produce the original*
 - *Permitted by statute*
 - *Extracts of official documents, i.e. those under the control of a state official by virtue of his office, duly signed and authorised may be produced as evidence*
-

Question 4

In a number of instances, a document need not be identified or authenticated by a witness. Mention these instances?

A document need not be authenticated by a witness in the case of

- An opposing party discovery of the document
- When the court takes judicial notice
- When the opponent admits the authenticity
- When a statute provides an exception

Question 5

Explain the significance of "official documents" and write notes on the circumstances in which such documents may be used in court?

official document - (law) a document that states some contractual relationship or grants some right which in this context is normally an original document in custody / under control of any State department or official

Production of official documents:-

- (1) No original document in custody / under control of any State official shall be produced in evidence in any civil proceedings except upon order of head of department in whose custody such document is.
 - (2) Any such document may be produced in evidence of any person authorized by person ordering production thereof.
 - *Extracts of official documents, i.e. those under the control of a state official by virtue of his office, duly signed and authorised may be produced as evidence*
- In criminal matters these official documents may only be produced if authorised by the Attorney.

Proof of official documents:-

- (1) Shall at criminal procedure be sufficient to prove original official document in custody / under control of any State official by virtue of office, if copy thereof / extract there from, certified as true copy / extract by head of department concerned / any State official authorized thereto by such head, is produced in evidence at such proceeding.
- (2)
 - (a) Original official document referred to in sub sec 1, other then record of official procedure, may be produced at criminal procedure only upon order of attorney-general
 - (b) It shall not be necessary for head of department concerned to appear in person to produce document under paragraph (a) – but such document may be produced by any person authorized to do so by such head.

Question 6

When will secondary evidence be an acceptable alternative to the handing in of the original document? Mention four instances and exclude any reference to official documents.

- Instances where secondary evidence can be accepted:-
 - Evidence that original is destroyed / cannot be located after diligent search
 - Where production of original would be illegal. (*R vs Zungu*)

- Where production of original is impossible (where writing is fixed into immovable object)
- Where original is in possession of opposing party / 3rd party who refuses to produce it / cannot be compelled to produce it.

Question 7

Are public documents by their nature more reliable than most other documents?

Discuss.

Public Documents

- Public document - produced by a public officer in the execution of his duties, intended for public use for which the public has a right of access
- Examples include title deeds, birth certificates but not baptismal certificates or passports.
- By their very nature are more reliable than most other documents
- At common law public documents are admissible to prove the truth of what they contain and are treated as an exception to the hearsay rule
- Although admissibility of hearsay should be governed by provisions of Law of Evidence Act 45
- of 1988 – our courts still guided by common law.
- Sec 18(1) of Civil Procedure Act – allows admissibility of certified copies of public documents in civil procedure, under certain conditions. (Sec 233 of Crim Proc Act has same effect)
- There is some overlapping between public & official documents - Document that complies with both definitions - to be treated as public document by party wanting to use it.

According to ***Northern Mounted Rifles v O'Callaghan 1909*** a public document:-

- must have been made by public officer in execution of public duty,
- must have been intended for public use &
- public must have had right of access to it'
- *A statute* provides an exception *Public documents* - by their very nature are more reliable than most other documents
- *Public document* - produced by a public officer in the execution of his duties, intended for public use for which the public has a right of access.
 - *Examples include title deeds, birth certificates but not baptismal certificates*
 - *At common law public documents are admissible to prove the truth of what they contain and are treated as an exception to the hearsay rule*
- At common law public documents are admissible to prove the truth of what they contain and are treated as an exception to the hearsay rule

Study unit 6 :

Evidence of uncertain classification SG43 TB

Application of the ECT Act...

Activity 1

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

A data message means data generated, sent, received or stored by electronic means and includes

- (a) voice, where the voice is used in an automated transaction
- (b) a stored record

(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.)

Firstly, s 1 of the ECT Act 25 of 2002 defines an electronic signature as follows:

- "[D]ata attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature."
- In addition section 13(2) of the same ECT Act determines that an electronic signature will not be without legal force and effect merely on the grounds that it is in electronic form.
- Furthermore, section 13(3) determines that when an electronic signature is required by the parties and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if
 - (a) a method is used to identify the person and to indicate the person's approval of the information communicated.
 - (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.
- This provision therefore leaves something to the discretion of the court and also leaves sufficient scope for business practice to determine that a specific type of electronic signature would be acceptable.

SELF-EVALUATION

Question 1

The accused is arrested in the early hours of the morning after a collision allegedly involving his vehicle and his neighbour's wall. The accused is charged with drunken driving and certain alternative charges thereto. The neighbour, Mr X, is called to come and testify, and in the course of his testimony, the state seeks to introduce into evidence photographs and voice recordings taken by Mr X with his cellphone on the morning in question. These images and recordings contain relevant evidence of the accused's condition and conduct

at the scene of the crime and were downloaded by Mr X from his cellphone to his personal laptop computer and later to a memory stick and eventually onto a compact disc. Prior to the commencement of the trial the cellphone was stolen.

1.1 Do the photographs constitute documentary evidence or real evidence? Briefly explain.

Photographs as evidence

- **Photographs may constitute real evidence especially where the physical photo itself is central to the case** because of e.g. fingerprints on its surface.
- Situation is different when it is used to represent something that is the subject matter of the case. (Then serves a documentary function & both dictionary & judicial definitions of 'document' are wide enough to cover it)
- Fact that subject matter of photo is subject to interpretation of a photographer should go to weight rather than to admissibility.

Motata v Nair & another 2009 (1) SACR 263 (T) *drunk-through-wall-video-clips*

- Applicant, *Nkola John Motata* a Judge of the High Court, was arrested consequent to a with collision boundary wall of Mr. Richard Baird's residence, whilst under-the-influence of alcohol.
- The State sought to introduce into evidence five video clips, recorded by Mr. Baird on his cellphone's SD card. Record was transferred to laptop, memory stick & CD prior to cellphone being broken & SD Card stolen.
- Council for the defence submitted that the applicant's constitutional rights and argued that a trial-within-a-trial should be held "to safeguard" applicant and to enable "the defence and the court to test the weight, trustworthiness, caution, reliability and originality" of the recordings and that presentation of the clips prior thereto would prejudice their client.
- The judges in *S v Singh* held "Originality is a requirement flowing from the so-called best evidence rule and is considered when admissibility is decided upon. Authenticity is not a question of admissibility, but of cogency and weight."
- The Court held the opinion that a serious injustice or denial of justice **will not occur** if the recordings in court played in a trial-within-a-trial and found no grounds by which the court may intervene at this stage of the process – the appellant's application was dismissed.

1.2 Accept for the moment that the photographs constitute documentary evidence. With reference to the facts of the question, fully discuss originality and authenticity as requirements for the admissibility of documentary evidence.

Definition of Documentary evidence

(Read Schwikkard – 20 2)

- There is no common law definition, but CPEA says it is any ‘book, map, plan, drawing or photograph’
- The most widely accepted definitions can be found in **Secombe v Attorney General 1919** TPD 270 BY 277 ‘*The word document is a very wide term that includes everything that contains the written or pictorial proof of something*’ - note two points ‘written’ and be able to provide proof of something.
- Currently it also includes ‘*data message*’ which is data generated, sent, received or stored by electronic means and includes voice and stored records.
- First element of Doc evidence – that it refers to evidence that is presented by way of document.
- Less obvious what is to be understood term ‘document’
- Ordinary consideration of word = important
- Legislation refers to specific things that should be considered documents
- For ordinary meaning of docs – to refer to case law:-
- Writing / drawing – integral part of any doc.
- Doc should be able to provide proof of something
- Examples = contracts, letters, pictures, photographs, birth certificates & wills etc.

Admission of documentary evidence

- The main requirement that has to be met before documents can be used as evidence is - that the document will be admissible only in following circumstances:-
 - *if original document is produced in court*
 - *if document is proved to be authentic.*
- Other requirements may be described in particular instances – usually by legislation.
- Electronic documents are subject to the statutory regime imposed by Electronic Communications & Transactions (ECT) Act 2 of 2002.

S v Ndiki & Others 2008 (2) SACR 252 (Ck)

The matter dealt with evidence contained in certain documentary evidence in the form of computer printouts which the State wished to present in the course of a criminal trial. The accused had protested which resulted in a hearing-within-a-hearing so that the court could determine:

- the true nature of the printouts,
- the classification of documents in which it falls and
- Whether the admission of documentary evidence regulated by any legislation that deals with the admission of documentary evidence.

Auhtenticity

- Original document cant simply just be handed in from the bar - has to be handed in by witness who can identify document & prove it's authentic.
- 'Authenticity' = Document is what it appears / is alleged to be.
- For a document to be authenticated means no more than tendering evidence of authorship or possession.
- Even if document is authenticated - doesn't mean contents will be admissible.
- If a document is not authenticated it will be inadmissible and cannot be used for cross examination
- Document may be admitted temporarily pending a finding in its authenticity.

1.3 Fully discuss the admissibility of the photographs and voice recordings as evidence in terms of section 15 of the Electronic Communications and Transactions Act 25 of 2002. Start your answer by explaining the meaning of a "data message".

S1 - **Data message** in the Act means any data generated, sent received or stored by electronic means and includes voice and records.

Admissibility and evidential weight of data messages – NB!

- 15. (1) In any legal proceedings** - the rules of evidence must not be applied so as to deny the admissibility of a data message. in evidence –
- (a) on the mere grounds that it is constituted by a data message; or
 - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) Information in the form of a data message must be given due evidential weight.
- (3) In assessing the evidential weight of a data message, regard must be had to -
- (a) the reliability of the manner in which the data message was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the data message was maintained:
 - (c) the manner in which its originator was identified; and
 - (d) any other relevant factor.
- (4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law,

admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

Photographs as evidence

- Photographs may constitute real evidence especially where the physical photo itself is central to the case because of e.g. fingerprints on its surface.
- Situation is different when it is used to represent something that is the subject matter of the case. (Then serves a documentary function & both dictionary & judicial definitions of 'document' are wide enough to cover it)
- Fact that subject matter of photo is subject to interpretation of a photographer should go to weight rather than to admissibility.

Video - & Audiotapes as evidence

- These tapes differ from previously mentioned as they can not be decipherable with naked eye & must be 'translated' by tape player - they need to be deciphered by a device unlike film which is by eye.
- Is more susceptible to manipulation than analogue data – therefore must be scrutinised with great care.
- More liberal attitude was taken towards videotapes in *S v Mpumlo* & *S v Bakela* then in *S v Singh* & *S v Ramgobin*.
- In previous 2 cases *S v Bakela* then in *S v Singh* & *S v Ramgobin*. – videotapes where considered 'real evidence' & not documentary evidence & therefore decided that tapes did not have to comply with stricter requirements for documentary evidence.
- At any rate it was felt that any possible deficiencies should go to weight rather than admissibility.

1.4 Accept that the photographs and voice recordings are found to be inadmissible by the court and that the other main evidence against the accused is an admissible confession that he had made to a magistrate on the day in question.

What must happen before a conviction may follow on the accused's confession?

Discuss with reference to section 209 of the Criminal Procedure Act 51 of 1977. (You will find the answer to this question in su 13.)

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.

Definition of Corroboration

- Evidential material
- which independently

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

Corroboration in case of a confession

(Read Schwikkard –

30 3 3)

- A confession is an unequivocal admission of all the elements of a crime and an accused can be convicted without any further evidence led – provided it has been made voluntarily.
- Evidence attempts to exclude untrustworthy confessions by applying strict rules in respect of the admissibility of confessions and applying the statutory requirement of corroboration
- For corroboration S209 provides in one of two requirements; the confession itself (corroboration thereof) and the crime in respect of which it is made is satisfied;

209 Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

Sec 209 – Confession may follow on accused's confession if 1 of 2 req are met.

1st = Relates to **confession itself**

2nd = Relates to **crime** i.r.o which confession is made

- 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).
- Corroboration is satisfied if other material is produced which confirms the confession in a material respect
- Evidence that that an offence had actually been committed is satisfied by adducing evidence. This may also be evidence outside the confession
- But even if either of the above two requirements have been met, it does not mean a conviction follows since guilt beyond reasonable doubt must be proved
- By nature, a confession should be handled with care in court (because of damning nature of confession)

- Confession is admission of all charges against accused & can be convicted by strength of confession alone.
- Another danger – confession may not have been made voluntarily.
- Law of evidence attempts to exclude possibility of untrustworthy confessions in 2 ways:-
 - # Applying strict rules of admissibility of confession
 - # Applying statutory req of corroboration

Question 2

Explain the significance of the following phrases in the Electronic Communications and Transactions Act 25 of 2002:

- ***“data message”.***
- ***“electronic signature”.***

data message

A data message means data generated, sent, received or stored by electronic means and includes

- (a) voice, where the voice is used in an automated transaction
- (b) a stored record

Section 15(3) of the Electronic Communications and Transactions Act 25 Of 2002, gives guidelines for assessing the evidential weight of data messages:

- (3) In assessing the evidential weight of a data message, regard must be had to -
 - (a) the reliability of the manner in which the data message was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the data message was maintained;
 - (c) the manner in which its originator was identified; and
 - (d) any other relevant factor.

Application of the Electronic Communications and Transactions Act, 2002.

- 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*

Facts of which judicial notice may be taken:

Notorious facts:

Activity 1

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

- The fact that there is a national road network in South Africa and that these roads are public roads
- The fact that chess, billiards and table-tennis are games of skill
- The fact that there are seven days in a week
- The instinctive behaviour of domesticated animals
- The fact that scab is a well-known sheep disease
- The fact that dangerous wild animals remain potentially dangerous even after docile behaviour has come about as a result of semi-domesticity
- The fact that brand marks on cattle do not fade completely
- The fact that rhinoceros are rarer than elephants

(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.

- The local market value of animals
- The manner of estimating the age of animals
- That a particular skin (which was handed in as real evidence) was that of a particular species of buck
- That ordinary fowls (chickens) do not wander off like other stock
- That certain duikers (a species of buck) were blue duikers and as such protected game

Activity 2

Facts which are readily ascertainable

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?

A court may take judicial notice of the sovereignty of sovereign states and the existence of a state of war.

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

It should seek the information from the relevant Minister or another appropriate government official, whose certificate on that point will be conclusive.

Statutory law

Activity 3

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.

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) 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?

The magistrate may consult a dictionary as part of easily ascertainable judicial notice 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.

Indigenous law

Activity 4

Michael Schumacher is arrested for speeding and ignoring a red traffic light on the evening of 1 January 2009 in St George's Street, Cape Town. You are the magistrate presiding over the trial in which Schumacher is charged with reckless driving, with an alternative charge of disobeying the South African Road Traffic Act 29 of 1989.

Schumacher's defence is that his blonde South African girlfriend was driving at the time. His attorney argues that because there was no moon that night and Schumacher had long hair at the time it had been a case of mistaken identity.

The prosecutor however argues that it was full moon that evening (which made it easier to identify the driver) and wishes to lead evidence in this regard.

The prosecutor also argues that everyone knows that St George's Street is a particularly dangerous street as far as traffic is concerned and that it should be used with care. Schumacher's attorney then points out that the charge sheet simply mentions “St George's Street”, without mentioning what municipality it is in.

He also argues in the alternative that even if it were to be found that Schumacher was driving the car at the time he (Schumacher), as a foreigner, could not be expected to be acquainted with local legislation.

In fact, Schumacher's attorney argues that the prosecution should have proved the existence and contents of such laws. Schumacher's attorney further argues that the prosecutor must in any event prove that the traffic lights in St George's Street were functioning properly on the evening in question.

The prosecutor also relies on a statutory presumption that the registered owner of a car (in this case Schumacher) is presumed to be the driver. The defence argues that that would be against the Constitution of the Republic of South Africa, 1996.

How would you untangle this muddle of arguments? Give reasons for everything you say and refer to relevant cases. When a court takes judicial notice of a fact... that fact becomes part of the evidential material without any evidence being led.

The phases of the moon...

- The first issue is whether the court can take judicial notice of the phases of the moon.
- The phases of the moon is a fact that is readily ascertainable.
- The basic principle is that the court can take judicial notice of facts that are readily ascertainable, if they are from a source of indisputable authority. Calendars usually show the phases of the moon.
- 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, are concerned.
- The prosecutor will therefore be given the opportunity to lead evidence about the phases of the moon on the night in question.

The safety of St Georges Street... local notoriety

- The next issue is whether the court can take judicial notice of the fact that St George's Street is a particularly dangerous street as far as traffic is concerned.
- A court may take judicial notice of a matter of local notoriety if that fact is "notorious among all reasonably well-informed people in the area where the court sits". Courts are reluctant to take judicial notice of locally well-known facts, but they have, for example, taken judicial notice of the fact that a road that passes 50 meters from the court is a public road.
- A presiding officer should, however, not take judicial notice of local conditions of which they may be aware of simply because of personal observation or out of interest.

- In *R v Van der Merwe* 1943 CPD 25 it was held that the magistrate at Uniondale was entitled to make use of his knowledge of conditions in the streets of that town in order to decide that it was dangerous to the public to drive through it at 60 miles an hour.
- It would therefore be possible for the magistrate to take judicial notice of the fact that St George's Street is a particularly dangerous street as far as traffic is concerned.

The locality of St Georges Street...

- The next issue is if the court can take judicial notice of the location of St George's Street.
- This is another fact of local notoriety that a court will be able to take judicial notice of if that fact is "notorious among all reasonably well-informed people in the area where the court sits".
- In *R v De Necker* 1921 CPD 567 the court was willing to take judicial notice of the fact that St George's Street was in Cape Town. The judge remarked that "it may well be argued that where the place in question is one of the principle streets in the town where the court sits, its situation is so notorious that judicial notice may be taken of it".

Reckless driving – a transgression of the law

- The next issue is whether the court can take judicial notice of the law. Reckless driving is a crime in term of section 63 of the National Road Traffic Act of 93 of 1996 (legislation therefore). The court must take judicial notice of the law. Because the presiding officer is legally trained, it would be absurd for testimony to be led about the relevant legal rules. No evidence may therefore be led with regard to the nature or scope of a 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 in respect of the legal position that may be applicable in any given case. In terms of section 224 of the Criminal Procedure Act 51 of 1977 the court has 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. It was, therefore, unnecessary for the prosecutor to prove the existence and content of the relevant legislation.

Operation of the traffic lights

- Must the prosecutor prove that the traffic lights in St George's Street were functioning properly on the evening in question? The functioning of traffic lights is a fact that is readily ascertainable and 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, 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 as judicial notice. Again, it was unnecessary for the prosecutor to prove that the traffic lights in St George's Street were functioning properly on the night in question.

Constitutionality of the statutory provision...

- The final issue to be discussed is the constitutionality of the relevant statutory provision in terms of which the registered owner of a car is presumed to be the driver.
- In *S v Meaker* 1998 (2) SACR 73 (W) the conviction of the accused was dependent on the application of the presumption contained in section 130(1) of the Road Traffic Act 29 of 1989.
- This presumption is similar to the one in the question and stated 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.
- In order to determine whether a statutory presumption is constitutional or not, one must follow the approach adopted by the Constitutional Court in *S v Zuma* 1995 (1) SACR 568 (CC).
- First of all, one must look at the wording of the specific presumption in order to determine whether the presumption creates a so-called "*reverse onus*".
- It is therefore essential to establish the exact nature of the onus placed upon the accused.
- *A reverse onus is a legal onus of proof that is placed upon 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.
- If, at the end of the trial, the probabilities are evenly balanced, the presumption will therefore apply. If a presumption applies "until the contrary is proved" (or other words to that effect), it creates a "reverse onus".
- Where it is stated "that evidence of one fact constitutes prima facie proof of", or "prima facie evidence of", only an evidential burden is, however, created. The words "in the absence of evidence to the contrary", have the same effect.
- If a statutory presumption creates a "reverse onus", this means that the blanket provision in section 35(3) of the Constitution (which establishes the right of every accused to a fair trial) is infringed or violated.

- More specifically, the rights to be presumed innocent, to remain silent and not to be compelled to give self-incriminating evidence are at issue. The most important principle is that if a presumption has the result that the accused can be convicted in the face of reasonable doubt, it will infringe the rights mentioned in section 35(3).
- An infringement of the Constitution will be unconstitutional unless, in the particular circumstances of the case, the infringed right should be limited by the limitation clause in the Constitution.
- Depending on the wording of the presumption in question, it could create a "reverse onus". If this is the case, the court must consider whether the infringement could be justified by the limitation clause.
- In *S v Meaker* the court found that a similar presumption that infringed the Constitution to be justified by the limitation clause. This was because the provision was 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 further operates logically, because most owners buy a vehicle with the aim of using it. Owing to the value of vehicles it can also be expected that even if the owner was not the driver himself, 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 that have been found not to comply with the requirements of the limitation clause.

SELF-EVALUATION

Question 1

A notorious fact is a well-known fact. Certain notorious facts are matters of general knowledge which our courts have taken judicial notice of. Mention 5 such facts.

- The fact that there is a national road network in South Africa and that these roads are public roads
- The fact that chess, billiards and table-tennis are games of skill
- The fact that there are seven days in a week
- The instinctive behaviour of domesticated animals
- The fact that scab is a well-known sheep disease

- The fact that dangerous wild animals remain potentially dangerous even after docile behaviour has come about as a result of semi-domesticity
 - The fact that brand marks on cattle do not fade completely
 - The fact that rhinoceros are rarer than elephants
-

Question 2

Explain how it is determined whether a fact is of local notoriety and thereafter mention four facts that have been considered sufficiently well-known at local level for the courts to have taken judicial notice of?

Matters of local notoriety

Courts may not take Judicial Notice of fact that is not general knowledge ('notorious among all reasonably well-informed people in area where court sits')

- Courts are reluctant to take notice of locally well-known facts (but they have)
- Courts have declined to take Judicial Notice of distance between certain cities.
- Presiding officers should also not take notice of local conditions of which they may be aware (if she is aware of them because of personal interest / observation)

Courts have taken judicial notice of...

- *The functioning of traffic lights*
 - *The notoriety of specific areas for the attraction of 'criminal types'*
 - *Criminal activities in specific areas*
 - *Socio-economic realities & tendencies at a local level.*
-

Question 3

Explain the meaning of judicial notice with reference to statutory law and the common law.

Statutory Law

- Judicial notice of statutory law is prescribed in:
Sect 224 of the Criminal Procedure Act & Sect 5 of the Civil Procedure Evidence Act
- With reference to the above provisions – courts have to take notice of any law / matter officially enacted and published law in the Government Gazette or other official publications.

Common law

Courts have to take notice of Common law.(no matter how vague / obscure – no exceptions)

S173 Inherent power

- The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

S39 Interpretation of Bill of Rights (Const)

- (1) *When interpreting the Bill of Rights, a court, tribunal or forum-*
 - (a) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
 - (b) *must consider international law; and*
 - (c) *may consider foreign law.*
- (2) *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the BoR*
- (3) *The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.*

Question 4

Describe how judicial notice impacts on the law with reference to statutory law, the common law, foreign law and indigenous law.

Statutory Law

- Judicial notice of statutory law is prescribed in:
Sect 224 of the Criminal Procedure Act & Sect 5 of the Civil Procedure Evidence Act
- With reference to the above provisions – courts have to take notice of any law / matter officially enacted and published law in the Government Gazette or other official publications.

224 CPA Judicial notice of laws and other published matter

Judicial notice shall in criminal proceedings be taken of-

- (a) any law or any matter published in a publication which purports to be the *Gazette* or the *Official Gazette* of any province; [Para. (a) amended by s. 1 of Act 49 of 1996.]
- (b) any law which purports to be published under the superintendence or authority of the Government Printer.

5. CPEA Proof of law or anything published in official publications.-

- (1) Judicial notice shall be taken of any law or government notice, or of any other matter which has been published in the *Gazette*. [Sub-s. (1) amended by s. 1 of Act No.49 of 1996.]
- (2) A copy of the *Gazette*, or a copy of such law, notice or other matter purporting to be printed under the superintendence or authority of the Government printer, shall, on its mere production, be evidence of the contents of such law, notice or other matter, as the case may be. [Sub-s. (2) amended by s.1 of Act No.49 of 1996.]

Common law

Courts have to take notice of Common law.(no matter how vague / obscure – no exceptions)

S173 Inherent power

- The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

Foreign Law

(Read Schwikkard –

27 6 3)

Judicial notice of foreign law is governed by sect 39 of the Constitution and the sect 1 of the Law of Evidence Amendment Act 45 of 1988

S1 Judicial notice of law of foreign state and of indigenous law

(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty:

Provided that indigenous law shall not be opposed to the principles of public policy and natural justice:

Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

(2) The provisions of subsection (1) shall not preclude any part from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.

Hence...

- When law of foreign state is relevant in case in order to determine legal aspect of our law.
- The courts may take Judicial Notice of that Foreign law for purpose of comparison
- This used to be position – now been confirmed by Constitution for purposes of interpreting the Constitution & BoR.
- When law of Foreign law itself is in issue – i.t.o Sect 1(1) of the Law of Evid Act – a court may take Judicial Notice as far as can readily ascertained with sufficient certainty.

Indigenous Law

Read Sec 39(2) & (3) of Const – above & Read Sec 1 of Law of Evid Act - above

- Court can take Judicial Notice of indigenous law only if is consistent with Bill of Rights.
 - Can also take Judicial Notice if can be readily est with sufficient certainty & if not in conflict with 'public policy & natural justice'
-

Question 5

Write a short note on the relationship between judicial notice and presumptions of fact, with specific reference to the functioning of traffic lights.

The function of traffic lights

- In number of cases court found they can take Judicial Notice of fact that if traffic lights in an intersection facing one direction are green, lights facing right angles are red.
- Also been held that evidence may be accepted in order to rebut such Judicial Notice

Functioning of traffic lights – may be taken from assumption if lights one way are green then the others are red in civil but not in criminal cases

Operation of the traffic lights

- The functioning of traffic lights is a fact that is readily ascertainable and 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, it has also been held that evidence may be accepted in order to rebut such judicial notice.
- This is probably an incorrect labeling of the operation of a presumption of fact as judicial notice. Again, it was unnecessary for the prosecutor to prove that the traffic lights in St George's Street were functioning properly on the night in question.

Question 6

X and Y are employed at a hospital. One night they are caught stealing copper pipes and electrical cables on the hospital grounds. As a result of their activities the hospital's functioning is severely impaired and disrupted, with a consequence that a patient in the intensive care unit dies. They are charged with the following crimes: murder, theft and malicious injury to property.

Answer the following:

- 6.1** *Assume that you are the prosecutor in the case. You are sure that you can get a conviction on the theft and malicious injury to property charges. However, you are unsure of a conviction on the murder charge. You are hopeful of a conviction on culpable homicide, a competent verdict (where conviction on a lesser charge not stipulated in the charge sheet is allowed under certain conditions) and where negligence rather than intention of the accused is required. **Are you compelled to ask the judicial officer presiding over the case to take judicial notice of the law in this matter? Explain with reference to authority.***

The Law*(Read Schwikkard – 27 6**& 27 6 1)*

- Courts must take judicial notice of the law – no evidence may therefore be led with regard to the nature and scope of a legal rule
- Judicial notice is taken of Acts of Parliament and of the provincial legislatures
- Colonial laws, provincial ordinances are judicially noticed in terms of common law
- Public international law that has acquired the status of custom is judicially noticed
- Judicial notice may now be taken of foreign law in order to determine some legal aspect of our law for purposes of comparison
- The courts may take judicial notice of indigenous law only if it is consistent with the Bill of Rights and if they are not in conflict with public policy and natural justice
- Presiding officer supposed to be legally trained
- No evidence may be led with regard to nature / scope of any SA legal rule.
- But parties have to be given opportunity to address court with respect to legal position that may be applicable in any given case.

S39 Interpretation of Bill of Rights (Const)

- (1) *When interpreting the Bill of Rights, a court, tribunal or forum-*
 - (a) *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
 - (b) *must consider international law; and*
 - (c) *may consider foreign law.*
- (2) *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the BoR*
- (3) *The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.*

Statutory Law

- Judicial notice of statutory law is prescribed in:
Sect 224 of the Criminal Procedure Act & Sect 5 of the Civil Procedure Evidence Act
- With reference to the above provisions – courts have to take notice of any law / matter officially enacted and published law in the Government Gazette or other official publications.

Common law

Courts have to take notice of Common law.(no matter how vague / obscure – no exceptions)

S173 Inherent power

- The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

Foreign Law

(Read Schwikkard –

27 6 3)

Judicial notice of foreign law is governed by sect 39 of the Constitution and the sect 1 of the Law of Evidence Amendment Act 45 of 1988

S1 Judicial notice of law of foreign state and of indigenous law

(1) Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty:

Provided that indigenous law shall not be opposed to the principles of public policy and natural justice:

Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

(2) The provisions of subsection (1) shall not preclude any part from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned.

Hence...

- When law of foreign state is relevant in case in order to determine legal aspect of our law.
- The courts may take Judicial Notice of that Foreign law for purpose of comparison
- This used to be position – now been confirmed by Constitution for purposes of interpreting the Constitution & BoR.
- When law of Foreign law itself is in issue – i.t.o Sect 1(1) of the Law of Evid Act – a court may take Judicial Notice as far as can readily ascertained with sufficient certainty.

Indigenous Law

Read Sec 39(2) & (3) of Const – above & Read Sec 1 of Law of Evid Act - above

- Court can take Judicial Notice of indigenous law only if is consistent with Bill of Rights.
 - Can also take Judicial Notice if can be readily est with sufficient certainty & if not in conflict with 'public policy & natural justice'
-

6.2 Assume that in the course of the investigation the police take confessions from X and Y. However, it later appears that the defence teams wish to challenge the admissibility of the confessions on the grounds that they were not made freely and voluntarily. **Discuss the current position as regards any statutory provision that may be applicable, as well as the constitutional implications, with reference to authority.** (You will find the answer to this question in su 9.)

209 Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

217 Admissibility of confession by accused

(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence

Constitutional Provisions

35 Arrested, detained and accused persons

(3) Every accused person has a right to a fair trial, which includes the right-

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

S 35(3)(h) of the Constitution provides for the following three rights;

- *Presumed innocent*
- *Remain silent*
- *Not to testify during proceedings*

In *S v Zuma* it found a statutory presumption is unconstitutional if it allows a conviction despite the existence of reasonable doubt. A presumption can survive only if it survives the limitation clause

- The 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, i.t.o 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.

6.3 *What would the legal position be if the only evidence against X and Y are their respective confessions to the abovementioned charges. What, if any, evidential rule and legislation are applicable, that allows for a conviction on the single evidence of a confession. Explain with reference to authority. (You will find the answer to this question in su 13.)*

209 Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

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Corroboration in case of a confession

(Read

Schwikkard – 30 3 3)

- A confession is an unequivocal admission of all the elements of a crime and an accused can be convicted without any further evidence led – provided it has been made voluntarily.
- Evidence attempts to exclude untrustworthy confessions by applying strict rules in respect of the admissibility of confessions and applying the statutory requirement of corroboration
- *For corroboration S209 provides in one of two requirements; the confession itself (corroboration thereof) and the crime in respect of which it is made is satisfied;*

209 Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

- Corroboration is satisfied if other material is produced which confirms the confession in a material respect
 - Evidence that that an offence had actually been committed is satisfied by adducing evidence. This may also be evidence outside the confession
 - But even if either of the above two requirements have been met, it does not mean a conviction follows since guilt beyond reasonable doubt must be proved
- By nature, a confession should be handled with care in court (because of damning nature of confession)
- Confession is admission of all charges against accused & can be convicted by strength of confession alone.
- Another danger – confession may not have been made voluntarily.
- Law of evidence attempts to exclude possibility of untrustworthy confessions in 2 ways:-
 - # Applying strict rules of admissibility of confession
 - # Applying statutory req of corroboration

2.1 Requirements of the Corroboration of a confession

Sec 209 – Confession may follow on accused's confession if 1 of 2 req are met.

1st = Relates to **confession itself**

2nd = Relates to **crime** i.r.o which confession is made

- 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).

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. May be from various sources
Eg: 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. (incriminating evidence)
- 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.

Evidence that an offence had actually been committed

- Criminal Procedure Act specifically states that this requirement be satisfied by adducing **evidence**.
- Any other form of evidentiary matter eg: a presumption - will not suffice

2.2 Relationship between the 2 requirements

In *R v Mataung*

- Accused charged with stock theft – to which he confessed
- BUT could not be convicted before prosecution had satisfied one of req mentioned earlier.
- Prosecution had adduced evidence that stock had disappeared from fenced camp
- Court found evidence not to be sufficient to satisfy 2nd req
- It did, however, confirm confession in material respect & sufficient to found conviction upon confession alone

R v Mataung 1949 (2) SA 414 (O)

- The accused is charged with theft. He made a confession (which had all the elements of the crime admitted).
- The confession confirmed the confession a material respect, as such that it was sufficient to justify a conviction on the confession alone.

The court however insisted that:

1. Corroboration evidence be adduced by the state and that...
2. Evidence that crime had in fact been committed (predecessor SPW 209) be adduced.
 - In this case the corroborating evidence comprised supporting affidavits of the witnesses, Siemens and Fourie.
 - Both provided circumstantial evidence regarding the missing cattle, that they were well encamped and that there was no means of escape from the encampment.
 - This testimony did not meet the 2nd requirement, namely that the crime was in fact committed and that the court could postulate other possibilities regarding the disappearance of the cattle.
 - This lead to discharge of the accused.

In *S v Makeba & Another*

- Supreme Court of Appeal stated that indirect use of confession of another person as evidence against accused amounts to contravention of sec 219 of Crim Proc Act & is not permitted – even if used only for purpose of corroboration

S v Makeba & Another 2003 (2) SASV 128 (HHA)

SCA ruled that the indirect use of a confession from someone else as evidence against an accused amounts to a breach of the CPA a219 and is therefore inadmissible, even if used only for corroboration.

Examples of rebuttable presumptions of law

Activity 1

The following are examples of true presumptions of law. **Based on the way in which presumptions operate, 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) 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.

Activity 2

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?

1

A presumption of law	A factual presumption
<ul style="list-style-type: none"> ■ is a legal rule compelling the assumption of the presumed fact ■ affects the burden of proof. (In order to rebut such presumption proof is required, at least on a preponderance of probabilities) 	<ul style="list-style-type: none"> ■ is merely an inference that the court is not obliged to draw if it does not accord with common sense ■ can, at most, give rise to an evidentiary burden on the party against whom it operates

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

In *Arthur v Bezuidenhout & Mieny* 1962 (2) SA 566 (A) the court said that presumptions of fact are not presumptions.

Schwikkard also finds the phrase "presumptions of fact" to be misleading, since they are not rules of law at all.

Describing them as presumptions actually amounts to a disregard for the rules of logic, applying to inferences that are drawn from circumstantial evidence.

Activity 3

You are a magistrate in a case in which the prosecutor is relying on the presumption contained in section 130(1) of the Road Traffic Act 29 of 1989 to prove that the accused was the driver of a specific car. **What would be your finding on the constitutionality of this reverse-onus presumption? Give reasons for your finding.**

The issue to be discussed is the constitutionality of the relevant statutory provision in terms of which the registered owner of a vehicle is presumed to be the driver.

In *S v Meaker* 1998 (2) SACR 73 (W) the conviction of the accused was dependent on the application of the presumption contained in section 130(1) of the Road Traffic Act 29 of 1989. This presumption states 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.

In order to determine whether a statutory presumption is constitutional or not, one must follow the approach adopted by the Constitutional Court in *S v Zuma* 1995 ⁽¹⁾ SACR 568

First of all, one must look at the wording of the specific presumption in order to determine whether the presumption creates a so-called "reverse onus".

It is therefore essential to establish the exact nature of the onus placed upon the accused.

A reverse onus is a legal onus of proof that is placed upon 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, the probabilities are evenly balanced, the presumption will apply. If a presumption applies "until the contrary is proved" (or other words to that effect), it creates a "reverse onus".

Where it is stated "that evidence of one fact constitutes prima facie proof of", or "prima facie evidence of", only an evidential burden is, however, created. The words "in the absence of evidence to the contrary", have the same effect.

Constitution: If a statutory presumption creates a "reverse onus", this means that the blanket provision in section 35(3) of the Constitution, which establishes the right of every accused to a fair trial is infringed or violated. More specifically, the rights to be presumed innocent, to remain silent and not to be compelled to give self-incriminating evidence are at issue.

The most important principle is that if a presumption has the result that the accused can be convicted in the face of reasonable doubt, it will infringe the rights mentioned in section 35(3). **An infringement of the Constitution will be unconstitutional unless**, in the particular circumstances of the case, the infringed right should be limited by the limitation clause in the Constitution.

In **S v Meaker** the court found that the presumption infringed the Constitution, but that it is justified by the limitation clause. This was because the provision was 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 further operates logically, because most owners buy a vehicle with the aim of using it. Owing to the value of vehicles it can also be expected that even if the owner was not the driver himself, 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 that have been found not to comply with the requirements of the limitation clause.

SELF EVALUATION: SU 8:

Question 1

Fully explain the meaning and functioning of rebuttable presumptions of law with reference to marriages and children.

Examples of Rebuttable Presumptions of law

- Presumption that a marriage is valid (*Schwikkard – 28 5 1*)
- Presumption that man & woman living together as man & wife do so in consequence of a valid marriage (*Schwikkard – 28 5 1*)
- Presumption - a child conceived / born during a lawful marriage is legitimate (*Schwikkard – 28 5 3*)
- Presumption that a man admitting to having intercourse with a woman is the father of her illegitimate child (*Schwikkard – 28 5 4*)
- Presumption that a registered letter that was posted was delivered (*Schwikkard – 28 5 6 1*)

Marriage

- Validity presumed once evidence is adduced showing that a marriage ceremony was performed.
- Onus is on challenger to show the marriage is invalid which is done on a balance of probabilities.
- Where couple lived together as man and wife, the law will presume unless the contrary is proved that this was a consequence of marriage.
- Every marriage is presumed in community of property

Legitimacy

- Once a party has proved that the child was conceived by a woman whilst married, the child will be presumed legitimate.
- The party contesting this must prove on a balance of probabilities that the child was not conceived between the spouses – this creates a legal burden

Paternity of children born out of wedlock

- If it is proved that a person had intercourse with the mother at the time the child could have been conceived, the person is, in the absence of other evidence presumed to be the biological father – S36 of the Children's Act
 - This clause places an evidential burden on the alleged father in contrast to common law which created a legal burden
-

Question 2

Discuss the difference between rebuttable presumptions of law and irrebuttable presumptions of law. Use examples to illustrate your answer.

3.2 Irrebuttable Presumptions of Law

- Simply an ordinary law rule of Substantive law formulated to look like a presumption.
- Provides conclusive proof of the fact presumed and cannot be rebutted
- Not really a presumption & doesn't operate like one (We call it that because was described as such in Common Law)
- *Eg. A child under 7 years of age is presumably incapable of discerning good from evil & thus 'irrebuttably presumed' not to be able to commit a crime.*

3.3 Rebuttable Presumptions of Law

(Read

Schwikkard – 28 3)

The true presumption

- Rules of law compelling provisional assumption on a fact
- Assumption will stand unless destroyed by countervailing evidence
- These are therefore the true presumptions of our law

Question 3

Describe the application of the principle relating to presumptions of fact with reference to **regularity** and the maxim known as **res ipsa loquitur**.

Examples of presumptions of Facts

Regularity & res ipsa loquitur

Regularity

(Read Schwikkard – 28 5 6 &

28 5 6 1)

- What happens regularly is likely to have happened again
- **Letters:** circumstantial evidence can prove a letter was posted – party alleging posting, may lead evidence establishing the existence of a routine. An unregistered letter that was posted will not be presumed to have received but this is not the case with registered letters.
- For the latter the presumption places an evidentiary burden that the person did not receive the registered letter.
- Party who alleges that a **letter** has been posted may lead evidence with fact that routine for posting of letters was followed & letter in question was dealt with in routine manner
- Once it has been established – will provide for circumstantial evidence that owing to '*presumption of regularity*' the letter was posted.

- **Validity of official acts:** public officials are rebuttably presumed to have been properly appointed – i.e. legal burden to prove the contrary.
- Such routine easier to prove in case of public officials (court will take judicial notice of existence of office routine) than i.r.o people working in private sector
- Court not entitled to infer that letter was also **received**.

Res ipsa loquitur – *the matter speaks for itself*

- Means 'matter speaks for itself'
 - Used in our law exclusively if cause of certain occurrence is unknown & court asked to draw inference as to cause of event from picture painted by provided evidence
 - Principle has come to be exclusively applied to infer negligence from circumstantial evidence i.r.o conduct of defendant, which may infer that such incident does not normally occur in the absence of negligence... thus an inference of negligence may be drawn.
 - Where an inference of negligence is drawn, an evidential burden is cast on the defendant - whom must then show that the facts are consistent with an inference not involving negligence or adduce evidence to raise reasonable doubt
 - ***Administrator, Natal v Stanley Motors 1960*** (1) SA 690 (A).
The principle *res ipsa loquitur* is exclusively applied to infer negligence from circumstantial evidence about the actions of the defendant, as in the case of the cause of collisions or other accidents. Negligence can only be deduced in this way if the actual cause of the accident is unknown.
-

Study unit 9 :

Statutory Presumptions SG65 TB

Activity 1**35 Arrested, detained and accused persons**

(3) Every accused person has a right to a fair trial, which includes the right-
(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

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

1 to be presumed innocent

2 to remain silent

3 not to testify during the trial

Activity 2

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.

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?

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

- 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 own 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?*

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

- (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 effect statutory provisions which have the appearance of a presumption, but which actually create new crimes.

SELF-EVALUATION

Question 1

What is a "reverse onus"? Fully explain.

- 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.

Question 2

Give a full discussion of the constitutionality of statutory presumptions. Refer to legislation and court decisions in your answer.

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

- 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.
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- (b) It has not declared all reverse onuses invalid.
- (c) Neither does it effect statutory provisions which have the appearance of a presumption, but which actually create new crimes.

4. *Subsequent judgements on Statutory Presumptions*

- Many statutory presumptions reversing onus of proof on accused have been declare unconstitutional since *S v Zuma*
- Those presumptions that assisted prosecution in drug cases have fallen away one by one.
- The decision in all these cases were based on most important decision in *S v Zuma* – eg that a presumption that allows for conviction despite reasonable doubt as to guilt of offender is unconstitutional

One exception was in *S v Meaker* -

Appellant was convicted of contravention of sec 85(4)(a) of Road Trafficking Act 29 of 1989.

Conviction was dependant on application of presumption contained in sec 130(1) – which provides that ‘it is material to prove who was driving the vehicle, it shall be presumed, until contrary is proved’ that it was the owner of the vehicle

- It was a clear reverse onus presumption – found in violation of Constitution BUT the presumption survived owing to application of limitation clause.
- A reverse onus is a real onus on the accused to be placed only on a balance of probabilities disproved.
- This is in conflict with and an infringement of section 35(5)(h) of the Constitution which ensures;
 - the presumption of innocence
 - the right to remain silent - and -
 - the right not to testify during the proceedings.
- In applying principles set out in *S v Zuma* – court found provision is designed to achieve effective prosecution of traffic offenders.
- Presumption furthermore, targets specific group of people - vehicle owners
- Furthermore, must be proved that offence was committed by driver of vehicle before presumption finds any application
- On other hand – is frequently impossible for prosecution to determine identity of driver
- All these factors distinguish presumption of those which have been found not to comply with requirements of the limitations clause

Part 2 : The Assessment of Evidence

Study unit 10 :

The onus of proof in criminal matters SG70 TB

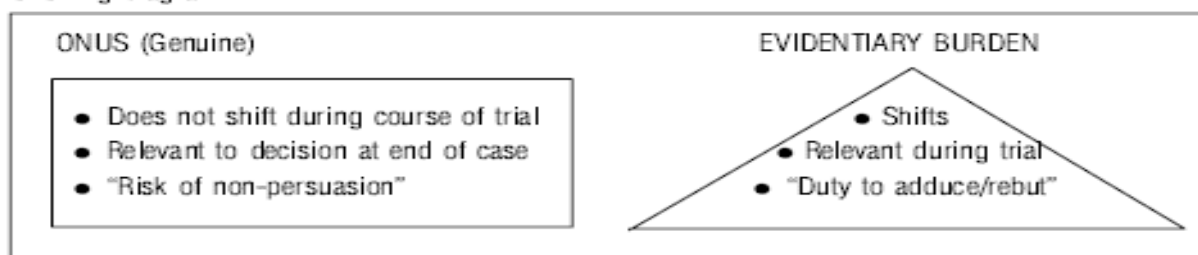
Activity 1

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?

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)

Distinction between Onus of Proof & Evidentiary Burden

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



Distinction is the following:-

ONUS

- # Does not shift during course of trial
- # Relevant to decision at end of case
- # 'Risk of non-persuasion'

EVIDENTIARY BURDEN

- # Shifts
- # Relevant during trial
- # 'Duty to adduce/rebut'

***S v Bhulwana; S v Gwadiso* 1995 SACR 748 (CC)**

Both possess marijuana over v 150g. Possession vs suspicion of trading in... prohibited substance. - Section 21(1) Drugs and Drug Trafficking Act No. 140 of 1992. Presumption of constitutionality - Unconstitutional.

Legal question:

- Presumption in act (provided that if in the prosecution of anyone prove that the accused was in possession of over 115 grams of marijuana was found shall be presumed, until the contrary is proved, that the accused in such material was trading)
 - Test: Constitutionality i.t.o. sect 35 of the Constitution regarding the right to : a fair and just trial; to be presumed innocent; & not giving incriminating evidence.

In **S v Bhulwana, S v Gwadiso** the court found that an evidentiary burden requires the accused to create reasonable doubt whereas the true burden of proof relies on a preponderance of probabilities. Note in court the onus does not shift during the course of a criminal trial – it always rests with the state.

Evidentiary burden;

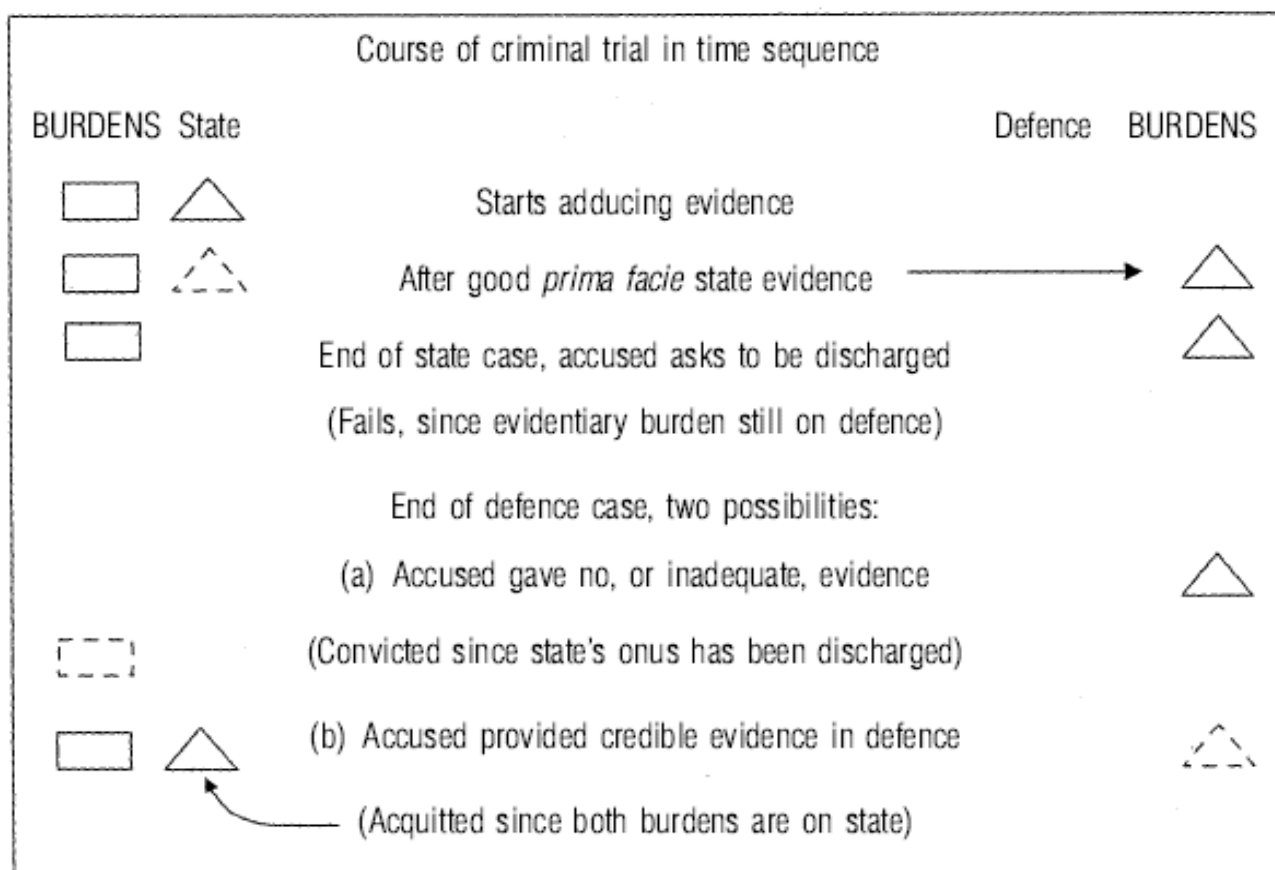
- Refers to a party's duty to produce sufficient evidence for a judge to call on the other party to answer - i.e. to call upon a litigant to adduce evidence to combat a prima facie case made by his opponent
- At the outset the state must discharge this burden by establishing a prima facie case against the accused - once established this shifts to the accused to adduce evidence to escape conviction.
- Under the constitution the accused can remain silent and not adduce this evidence

Activity 2

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.)

Operation of Evidentiary Burden & Onus of Proof in Crim matters

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



Key:  Burden of proof  Evidentiary burden

- There is an interaction between Onus of Proof & Evidentiary Burden

- Onus of Proof rests on state throughout – but Evidentiary Burden sometimes shifts onto accused, for instance when good prima facie evidence has been given.
- If accused doesn't acquit herself of Evidentiary Burden by giving satisfactory evidence – court will no longer have any reasonable doubt about 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.

Activity 3

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.

Mental illness or mental defect:

An accused is criminally non-responsible if at the time of the offence he was, as account of this defect, unable to appreciate the wrongfulness of the act S78(1) of the CPA provides that every person is presumed sane unless the contrary is proved on a balance of probabilities = codification of the M'Naghten rule merely an obligation to raise the defence.

The M'Naghten rule - *Queen v. M'Naghten*, 8 Eng. Rep. 718 [1843]

States that: "A criminal defendant is not guilty by reason of insanity if, at the time of the alleged criminal act, the defendant was so deranged that she did not know the nature or quality of her actions or, if she knew the nature and quality of her actions, she was so deranged that she did not know that what she was doing was wrong.

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

S v Eadie the court provided that: - A sane person who engages in conduct giving rise to criminal liability does so consciously and voluntarily

- An accused who raises such a defence is required to lay a foundation sufficient to provide reasonable doubt. Evidence in support of this must be scrutinized
- The court must decide on the question of criminal capacity taking into account the evidence and nature of accused's action during this period

SELF-EVALUATION

Question 1

Explain whether a negative inference may be drawn from an accused's failure to testify. (Your answer should include an explanation of the difference between the "real onus" and the "evidentiary burden".)

Right to silence and onus of proof

How can the const right to silence be reconciled with fact that accused can be convicted if she keeps quiet while the evidentiary burden rests upon her?

Following argument useful:-

- In past – keeping quiet meant guilty conscience
- Constitution changed everything – now has a right to silence – to speak when she wanted to.
- Doesn't mean she cannot be convicted
- BUT if court in no way contested by accused / her legal team – will have no other option but to convict (provided other prerequisites have been complied with)
- Then its done objectively – evid burden rests upon her because of good evidence state had to produce which she made no effort to rebut.
- The Constitution has changed the notion that the silence of the accused was a form of circumstantial evidence used to bolster a weak case.
- In *S v Hena* the Court emphasised a lack of evidence on the part of the defence in order to rebut the state's case did not mean automatic conviction – silence on the part of the accused could not make up for deficiencies in the state's case.

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In S v Hena & Another

- Accused failed to testify themselves after state's case had been closed
- Judge emphasised lack of evidence on defence side in order to rebut state's case – didn't mean automatic conviction of accused
 - Silence on part of accused could not make up deficiencies in state's case.
 - On other hand, Accused nr.2 was linked by DNA to case.
 - Because had done nothing to controvert this evidence – conviction stood.

Question 2

Explain the difference between, and the working of, the real onus of proof and the evidentiary burden. Use diagrams if possible.

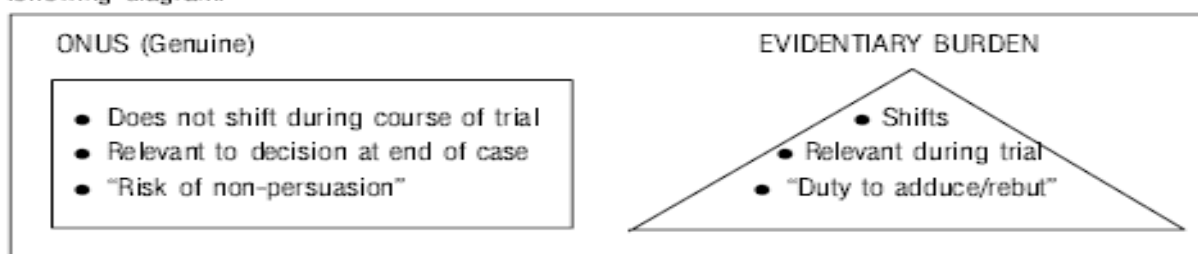
Distinction between Onus of Proof & Evidentiary Burden

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Evidentiary burden;

- Refers to a party's duty to produce sufficient evidence for a judge to call on the other party to answer - i.e. to call upon a litigant to adduce evidence to combat a prima facie case made by his opponent
- At the outset the state must discharge this burden by establishing a prima facie case against the accused - once established this shifts to the accused to adduce evidence to escape conviction.
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EVIDENTIARY BURDEN

- # Shifts
- # Relevant during trial
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- RD is the common law for the formal law whereas English is common law for substantive law
- Onus has now been decided as a matter of substantive law
- The burden of proof, once established never shifts – the test for determining who bears the burden is that the person who makes a positive assertion is called upon to prove it (*Pillay v Krishna*) - i.e. the person who seeks to change the status quo - often the plaintiff

***Pillay v. Krishna* 1946 AD 946 951 -3**

From this decision, the basic rule arose with regard to the location of the burden of proof that he who alleges must prove. This decision illustrates the fact that the real onus has usually already been established in the pleadings.

- The true onus of proof is usually established during the pleadings and the evidentiary burden comprises the duty cast upon a litigant to begin adducing evidence and the duty to adduce evidence to combat a prima facie case made by the opponent.

Question 3

Is the question of the incidence of onus of proof in civil matters a question for the substantive law or the formal law? Explain.

Is question of the incidence of the Onus of Proof one of Substantive or Formal Law?

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

Introduction / Onus

- *Principle of finality requires presiding officers to make an affirmative finding in every case irrespective of the deficiencies in the evidence*
- Important to determine whether incidence of the onus of proof is *substantive or formal* since it determines whether English or Roman Dutch law is used (*Tregea v Godart*)

Q is important because will determine if English / Roman-Dutch Law will have to be consulted

The onus of proof in civil matters ... substantive of formal... law?

Tregea v Godart 1939 AD 16 :

Validity of a will – a substantive matter i.t.o the RDL. The will-denier carries onus of proof i.r.o. validity. Failing which the denier will lose the case.

Facts :

A testator made a new will about 2 hours before he died. He left half of his estate & his house to his nurse. His heirs (family) disputed the will a.r.o of his alleged mental incapacity, prior his death. The majority of the judges were not sure that he was really mentally impaired.

Legal question:

- # Q in this case concerned incidence of burden of proof.
- # Court had to determine which party bore onus of proof

Ratio decidendi:

- They considered the Roman-Dutch law approach to determining validity – which placed the onus on the heirs to prove the invalidity of the will.
- They considered the English law approach to determining validity – which stated that the person who claims that a will is valid bore the burden of proof, which meant that the nurse would carry the onus of proof.
- The Roman-Dutch law is the common law regarding the substantive law in South Africa, while the English law is the common law that applies to the formal law.

Decision:

- The court decided that it was a matter of substantive law, and therefore Roman-Dutch law applied, which means that the family members carried the burden of proof and lost the case.
- AD confirmed that burden of proof was a matter of substantive law.

2. Incidence of the Onus of Proof in Civil Cases

- **Basic rule in civil cases – for onus of proof – HE WHO ALLEGES MUST PROVE**
- Rule derived from decision in *Pillay v Krishna* – Illustrates fact that true onus of proof is usually est by pleadings
- Distinction between “true” onus of proof & so-called “evidentiary burden”
- **Evidentiary burden comprises:-**
 1. Duty cast upon a litigant to begin adducing evidence
 2. Duty to adduce evidence to combat a *prima facie* case made by opponent

The burden of proof, once established never shifts – the test for determining who bears the burden is that the person who makes a positive assertion is called upon to prove it (*Pillay v Krishna*) - i.e. the person who seeks to change the status quo - often the plaintiff

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From this decision, the basic rule arose with regard to the location of the burden of proof that he who alleges must prove. This decision illustrates the fact that the real onus has usually already been established in the pleadings.

Activity 1

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 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.**

Standard of proof in Civil Cases*(Read Schwikkard – 32 7)*

- Proof **on a balance of probabilities** is required
- Civil Standard consists of a **comparative / relative** standard rather than **quantitative** test (in crim matters –
- determines how much evidence is req to comply with standard)
- Comparative test is easier – because easier to say one thing is more probable than the other
- This way one has also determined on whose side balance of probability lies.

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 pre-requisites 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.

In the case of *Eskom v First National Bank* 1995 (2) SA 386 (A)

Here the judge, Grosskopf JA, had to determine on which of the two parties the onus of proof lay. With cognisance of the role of legislation, 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), and personal knowledge of the Banker he felt that the incidence of proof lay with the banker who had to prove two things, namely:

1. Good faith and
2. A lack of negligence

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.

SELF-EVALUATION

Question 1

The onus of proof in civil matter is slightly more complicated than the onus of proof in criminal matters. Describe how different issues may generate different onuses of proof in civil matters.

In civil matters... Different issues may generate different onuses of proof

- In civil issues, different issues may generate different onuses.
- For example in a case of assault
 - First issue – plaintiff claims damages for assault (plaintiff to prove)
 - Second issue – defendant may admit assault but claim it was in self-defence (defendant to prove)
 - Third issue – plaintiff believes assault exceeded limits of self defence (plaintiff to prove)
- In civil cases the burden of proof is discharged as a matter of probability – balance of probabilities – i.e. on a preponderance if it is probable that the particular state of affairs existed
- The civil standard is a comparative or relative standard rather than a quantitative test (beyond reasonable doubt), the latter determines how much evidence is required to comply with the standard.
- In Civil cases – Possibility that different parties may bear onus of proof regarding different issues – one may get impression that onus does indeed shift from one party to another
- *The burden of proof, once established never shifts*

Study unit 12 :

The Assessment of Evidence SG82 TB

Basic Principles

Activity 1

Read Schwikkard §§ 30 2 1 and 30 2 2 and make a list of the tips which you would give prospective presiding officers concerning the evaluation of evidence.

Basic Principles

The stated basic principles provide a good starting point in the evaluation process, but these principles must be used in conjunction with the legal rules that apply when specific issues are involved.

- First, evidence must be weighed as a whole. A piecemeal process of adjudication should therefore be avoided. In essence, a trier of fact must have regard to all considerations which reasonably invite clarification. In doing this, the court should take the following into consideration, among others:
 - all probabilities;
 - the reliability and opportunity for observation of the respective witnesses;
 - the absence of interest or bias;
 - the intrinsic merits or demerits of the testimony itself;
 - inconsistencies or contradictions; and
 - corroboration.
- It is, however, important to distinguish inferences and probabilities from conjecture (guesswork) and speculation.
- No proper inference can be drawn unless there are objective facts from which to infer the other facts.
- Probabilities must likewise be considered in the light of proven facts.
- A court should therefore, in principle, place more weight on credible direct evidence, even though this evidence might be in conflict with probabilities arising from human experience or expert opinion.

The Evaluation of Substantial Evidence

Activity 2

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.

- Blom had made the deceased pregnant.

The premises that led to the final conclusion, namely that Blom murdered his girlfriend:

- 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.

The test laid down in this case concerning the drawing of valid inferences from the circumstances

- 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.

SELF-EVALUATION

Question 1

Write a note on circumstantial evidence. Refer in your answer to both criminal and civil matters, as well as to decided cases. Does the evaluation of circumstantial evidence in criminal cases differ from the evaluation thereof in civil cases? Explain with reference to decided cases.

The Evaluation of Circumstantial Evidence

(Read Schwikkard – 30 5; 30 5

1; 30 5 2; & 30 5 3)

In a criminal matter:

- 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 matter:

- 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.
- 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.

Question 2

A and C have just ended a six-month relationship with each other. One day A goes out with his friend B, and B tells A that C is HIV positive. A who has a volatile temper gets furious and vows to get back at C. The next day A and B see C walking down the street and they chase her into an alley. A attacks C and B blocks C's only escape route out of the alley. C is seriously injured by A and taken to hospital. A is charged with assault with intent to do grievous bodily harm and B is charged as an accomplice.

2.1 *A realises what he has done and confesses. Assume that the only evidence available is A's confession. **What evidential rule is applicable? Fully discuss with reference to applicable case law.***

Corroboration of evidence must meet following requirements:-

1. Has to be **admissible**.
 2. May take on a **variety of forms** & doesn't consist solely of **oral evidence**
 3. Should consist of **independent** evidence (comes from rule against self-corroboration)
 4. Should **confirm** other evidence. Sec 209 of Crim Proc Act req confession be 'confirmed with material aspects'
 5. The standard of proof does not change in a particular case
- 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.

2. **Corroboration in case of a confession**

(Read

Schwikkard – 30 3 3)

- A confession is an unequivocal admission of all the elements of a crime and an accused can be convicted without any further evidence led – provided it has been made voluntarily.
- Evidence attempts to exclude untrustworthy confessions by applying strict rules in respect of the admissibility of confessions and applying the statutory requirement of corroboration
- For corroboration S209 provides in one of two requirements; the confession itself (corroboration thereof) and the crime in respect of which it is made is satisfied;

209 Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

- Corroboration is satisfied if other material is produced which confirms the confession in a material respect
- Evidence that that an offence had actually been committed is satisfied by adducing evidence. This may also be evidence outside the confession
- But even if either of the above two requirements have been met, it does not mean a conviction follows since guilt beyond reasonable doubt must be proved
- By nature, a confession should be handled with care in court (because of damning nature of confession)
- Confession is admission of all charges against accused & can be convicted by strength of confession alone.
- Another danger – confession may not have been made voluntarily.
- Law of evidence attempts to exclude possibility of untrustworthy confessions in 2 ways:-

Applying strict rules of admissibility of confession

Applying statutory req of corroboration

2.1 Requirements of the Corroboration of a confession

Sec 209 – Confession may follow on accused's confession if 1 of 2 req are met.

1st = Relates to **confession itself**

2nd = Relates to **crime** i.r.o which confession is made

- 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).

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. May be from various sources
Eg: 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. (incriminating evidence)
- 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.

Evidence that an offence had actually been committed

- Criminal Procedure Act specifically states that this requirement be satisfied by adducing **evidence**.
- Any other form of evidentiary matter eg: a presumption - will not suffice

2.2 Relationship between the 2 requirements

In *R v Mataung*

- Accused charged with stock theft – to which he confessed
- BUT could not be convicted before prosecution had satisfied one of req mentioned earlier.
- Prosecution had adduced evidence that stock had disappeared from fenced camp
- Court found evidence not to be sufficient to satisfy 2nd req
- It did, however, confirm confession in material respect & sufficient to found conviction upon confession alone

R v Mataung 1949 (2) SA 414 (O)

- The accused is charged with theft. He made a confession (which had all the elements of the crime admitted).
- The confession confirmed the confession a material respect, as such that it was sufficient to justify a conviction on the confession alone.

The court however insisted that:

1. Corroboration evidence be adduced by the state and that...
 2. Evidence that crime had in fact been committed (predecessor SPW 209) be adduced.
 - In this case the corroborating evidence comprised supporting affidavits of the witnesses, Siemens and Fourie.
 - Both provided circumstantial evidence regarding the missing cattle, that they were well encamped and that there was no means of escape from the encampment.
 - This testimony did not meet the 2nd requirement, namely that the crime was in fact committed and that the court could postulate other possibilities regarding the disappearance of the cattle.
 - This lead to discharge of the accused.
-

2.2 B decides, after considering the situation, that he wishes to become a prosecution witness. What evidential rule is applicable to B's evidence? Fully discuss with reference to applicable case law. (See SU 2).

Co-accused as prosecution witness

- Co-accused *not competent witness for state*.
- Question of compellability doesn't arise when witness not competent.
- Circumstances when court may call someone who has *previously* been a co-accused to testify – This can happen in one of 4 following ways:-
 - 1 Withdrawing charge against co-accused.
 - 2 By finding co-accused not guilty .
 - 3 By co-accused entering a plea of guilty. (trials of co-accused can be separated)
 - 4 If trials of co-accused are separated for some other valid reason.
- At any point during trial, court may order separation of trials of co-accused.
- Then co-accused may give evidence against each other. (but advisable that accused state intends calling – be sentenced first)

157 Joinder of accused and separation of trials

- (1) An accused may be joined with any other accused in the same criminal proceedings

at any time before any evidence has been led in respect of the charge in question.

(2) Where two or more persons are charged jointly, whether with the same offence or with the different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.

4. Cross-examination

- After witness gave evidence-in-chief he may be cross-examined by his opponent
- When persons tried jointly – Practice is for defence witness to be cross-examined 1st by co-accuser's legal representative & then by prosecution
- ***Purpose of cross examination is...***
 - Elicit evidence supporting the cross examiners case
 - Cast doubt upon the credibility of the opposing party's witness
- Leading questions may also be asked but previous convictions and character are beyond scope.
- Witness may be asked leading q's during cross-exam
- Q's asked during CE must be relevant either to issue / credibility of the witness.

5. Re-examination

- After cross-exam – may be re-examined by party who originally called them.
- Purpose of re-examination is to enable witness to clear any misleading impressions which may have resulted from answers during cross examination.

Re-exam similar to examination-in-chief:-

- Undertaken by party who called witness
- Leading questions are not permissible
- NB: confined to matters arising from cross examination.
- May be examined on new issues only with leave of court & in this event opposing party will have right to cross-examine on any new matter.

2.3 Assume that you are the judicial officer in this matter. Outline the basic principles that you will apply in assessing the evidence presented in this case.

Basic Principles

(Read Schwikkard – 30 2 1

& 30 2 2)

The stated basic principles provide a good starting point in the evaluation process, but these principles must be used in conjunction with the legal rules that apply when specific issues are involved.

- First, evidence must be weighed as a whole. A piecemeal process of adjudication should therefore be avoided. In essence, a trier of fact must have regard to all considerations which reasonably invite clarification. In doing this, the court should take the following into consideration, among others:
 - all probabilities;
 - the reliability and opportunity for observation of the respective witnesses;
 - the absence of interest or bias;
 - the intrinsic merits or demerits of the testimony itself;
 - inconsistencies or contradictions; and
 - corroboration.
- It is, however, important to distinguish inferences and probabilities from conjecture (guesswork) and speculation.
- No proper inference can be drawn unless there are objective facts from which to infer the other facts.
- Probabilities must likewise be considered in the light of proven facts.
- A court should therefore, in principle, place more weight on credible direct evidence, even though this evidence might be in conflict with probabilities arising from human experience or expert opinion.

Study unit 13 :

Corroboration of Evidence SG87 TB

Activity 1

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.

Even though corroboration was supplied, the evidence of BOTH parties was still not sufficient

to satisfy the burden of proof in this case. Embezzle should therefore be acquitted.

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

If the court adheres to its finding that the state has not proved its case beyond reasonable doubt, even after finding Liar to be satisfactory, this would not make any difference to the situation in terms of the previous paragraph. However, because of the

finding that Liar is a satisfactory witness, the evidential value of the evidence is increased and this may cause the court to find that the prosecution has proved its case beyond reasonable doubt. The evidence will then have been corroborated satisfactorily and Embezzle will be convicted.

Activity 2

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 SU 12 which deals with circumstantial evidence.)

1 The corroborative evidence consisted of confirming evidence from the prosecution witnesses, Siemens and Fourie. Both gave circumstantial evidence regarding the fact that they had lost several head of cattle, although the cattle had been well fenced in and there was no place from which they could escape.

2 This evidence did not prove the second requirement, namely that the offence had actually been committed. The court held that the testimony of the two witnesses did not prove that the crime of theft had actually been committed, since the court could postulate other explanations as to why the cattle had gone missing.

SELF-EVALUATION

Question 1

Explain the relationship between corroboration and the standard of proof.

Definition of Corroboration

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

Standard of proof in criminal matters

(Read Schwikkard –

31 6)

- In Crim Case where burden rests on prosecution – court req **beyond a reasonable doubt**.
- In crim case where onus rests on accused court req proof **upon a preponderance of probabilities** (also in Civil)
- Although evidentiary burden might sometimes rest on accused – in final instance – states still carries onus of proof to
- prove her guilt beyond reasonable doubt

- Proof beyond reasonable doubt should never be extended to req proof beyond slightest doubt

Standard of proof in Civil Cases

(Read Schwikkard

– 32 7)

- Proof **on a balance of probabilities** is required
- Civil Standard consists of a **comparative / relative** standard rather than **quantitative** test (in crim matters –
 - determines how much evidence is req to comply with standard)
 - Comparative test is easier – because easier to say one thing is more probable than the other
 - This way one has also determined on whose side balance of probability lies.
- ***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.

Question 2

*It often happens that evidence upon which the court has to base its finding is suspect for some reason. The evidential value of such evidence can then be raised with corroborative evidence. Not any evidence can, however, be used for corroboration. **Fully discuss the requirements for corroborative evidence.***

Corroboration of evidence must meet following requirements:-

6. Has to be **admissible**.
7. May take on a **variety of forms** & doesn't consist solely of **oral evidence**
8. Should consist of **independent** evidence (comes from rule against self-corroboration)
9. Should **confirm** other evidence. Sec 209 of Crim Proc Act req confession be 'confirmed with material aspects'
10. The standard of proof does not change in a particular case

Question 3

Define "corroboration" and explain how section 209 of the Criminal Procedure Act 51 of 1977, which deals with corroboration of a confession, affects the law with regard to corroboration. Refer to decided cases in your answer.

Corroboration in case of a confession

(Read Schwikkard –

30 3 3)

- A confession is an unequivocal admission of all the elements of a crime and an accused can be convicted without any further evidence led – provided it has been made voluntarily.
- Evidence attempts to exclude untrustworthy confessions by applying strict rules in respect of the admissibility of confessions and applying the statutory requirement of corroboration
- For corroboration S209 provides in one of two requirements; the confession itself (corroboration thereof) and the crime in respect of which it is made is satisfied;

209 Conviction may follow on confession by accused

An accused may be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, if the offence is proved by evidence, other than such confession, to have been actually committed.

Requirements of the Corroboration of a confession

Sec 209 – Confession may follow on accused's confession if 1 of 2 req are met.

1st = Relates to **confession itself**

2nd = Relates to **crime** i.r.o which confession is made

- 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).

accused; the mobility of the scene; corroboration; suggestibility; the accused's voice, face, build, gait and dress; and the result of any identification parade.

In a nutshell:

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

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.

- Such evidence has to be approached with care and skepticism. The court has to answer two questions:
- Was there a proper identification?
- Was the evidence reliable?
- The identification would be *improper* if a photo-identification was done when the suspect was already in custody, if the photograph was shown to the witness just before the identification parade, or testimony in court.
- The reliability of the evidence would be affected by factors such as the credibility of the witness, the opportunity of the witness to observe the offender during the crime, whether he had previously been shown a picture of the suspect, etc.

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

- The court (at 255a) found the evidence of the photo-identification to be **admissible**, in principle.

- The same strict principles which are required for a normal identification parade do not apply here.
- Evidence that the witness identified the offender from a photograph could therefore play a decisive role in the conviction of the offender.
- The evidence must, however, be approached with caution, as described in the answer in 1 above, to ensure that it has sufficient value to make a conviction possible.

Activity 4

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*?

The evidence of a single witness can be relied upon when it is clear and satisfactory in every material respect. (It cannot be relied upon, for example, where the witness has a conflicting interest to that of the accused or is biased against the accused.)

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

The court stated that the remarks of the judge in Mokoena's case were not to be elevated to an absolute rule of law.

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

- A conviction is possible on the evidence of a single witness. Such witness must be credible and the evidence should be approached with caution.
- Due consideration should be given to factors which affirm and factors which detract from the credibility of the witness.
- The probative value of the evidence of a single witness should also not be equated with that of several witnesses.

SELF-EVALUATION

Question 1

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-

Question 2

Mention the accepted instances, according to our case law, where cautionary rules should be applied.

Evidence from an Accomplice

Voice identification

Children

The Single Witness

Cases of Sexual Nature

Police traps & Private Detectives

Question 3

Under what circumstances, if any, should a child's testimony be assessed using the cautionary rule?

Children

In **S v V 2000** (1) SASV 453 (HHA)

- Court emphasized that although there is no statutory requirement that a child's testimony be corroborated, it need not be assumed that the testimony of young children, in light of the nature of the complaint and the age of the complainant, should not be treated with caution.
 - The South African Law Commission has recommended that the cautionary rule as it applies to children, should be abolished, but this had not as yet provokes any reaction on the part of the government.
 - In this case the court held that one must guard against labelling children as "imaginative and susceptible to influence". The court followed a different approach, in which the child witness was viewed with less scepticism.
 - The SCA holds that courts should assume a cautious approach in case of child witnesses in appropriate conditions.
- Court stresses there is no statutory req that a child's evidence should be corroborated – its accepted that – given nature of charges & age of complainant, evidence of young children should be treated with caution

- SA Law Commission has recommended that cautionary rule applicable to children be abolished
- Court has to be sure child understands importance of telling the truth.
- Trustworthiness depends on number of factors
- Should guard against labelling children as 'imaginative & suggestible'

In **S v V** court followed different approach, in which less scepticism regarding child witness was evident evidence of young children should be treated with caution due to their imaginativeness and suggestibility

- There is no statutory requirement that a child's evidence be corroborated
- The court has to be sure that the child understands the importance of telling the truth
- Trustworthiness depends on the child's ability to observe, to remember the observations and to recall the events
- Current position is that the cautionary approach be applied to child evidence even though it has been suggested that it should not be

Question 4

B and D belong to rival gangs. One night a fight breaks out between the gangs and a passing motorist, C, is shot and injured. C lays a charge of attempted murder and during the course of the investigation C gives a description of his assailants to the police. An identification parade is held and B and D are picked out of the line-up. B and D are thereafter charged. Answer the following questions with reference to the trial:

4.1 Two bullets are extracted from C at the hospital and when B and D are arrested, the investigating officer finds a weapon in the possession of both B and D. What type of evidence is at issue here? Discuss with reference to the general rules applicable to this kind of evidence. (See SU 4.)

Definition of real evidence

(Read Schwikkard

– 19 1)

- While there is no formal requirement for the handing in of objects, it is however often accompanied by oral evidence, provided that someone has to identify object & place it in context.
- Court takes it into possession, marks it, & reference made to it as part of court record as an 'Exhibit #'
- An expert witness often is called to determine the efficacy of the object and possibly explain the utility and operation thereof.
- *An object* which upon proper identification, becomes, of itself, evidence e.g. knife, photograph, letter etc

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

4.2 Blood was also found at the scene of the crime and match the DNA-profile of B. What legal rules are applicable to this type of evidence? (See SU 4.)

Bodily Samples

(Read

Schwikkard – 19 8)

37 Powers in respect of prints and bodily appearance of accused

- (2) (a) Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, any registered medical practitioner or registered nurse may take such steps, including the taking of a blood sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) of subsection (1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.
- (b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of the blood of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take a blood sample of such person or cause such sample to be taken.

- Great advances have been made with sophisticated technology used to prove identity.
- Whilst blood tests play an important role in litigation e.g. affluence of alcohol - DNA fingerprinting has greatly advanced positive proof pertaining to the identity of victims / perpetrators etc.
- This technology heralds a vast improvement on old blood tests – which could only establish prove negative proof – excluding a person as any of the above...

- DNA fingerprinting can be used to establish parentage, identify the deceased, link a suspect to a crime – rendering positive proof that a person is or isn't a person as any of the above...
- It can thus be used to establish both guilt or innocence.
- All the above-mentioned is 'real evidence' & needs to be explained & corroborated by expert evidence.

Bodily Samples – DNA Sampling

In ***Van Der Harst v Viljoen 1977 (1) SA 795 (K)***

- DNA Tissue tests were used for the 1st time to in order to prove paternity – improving on the use of blood tests that only render negative proof, namely that a certain person cannot be the father of a child.

4.3 Explain the competence and compellability of B and D as defence and prosecution witnesses.(See SU 2.)

Competent witness

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.

Competent witnesses are...

- *Every person is competent and compellable to give evidence* (S192 - CPA)
- Whether an individual has the *mental capacity* to testify
- *A person whom the law allows a party to ask* but *not compel* to give evidence
- *A person whom the law allows a party to compel* to give evidence
- Concerned with whether a person *can be forced to give evidence*

3. Competency & Compellability

(Read

Schwikkard – 22 2)

Sec 192 of Crim Procedure Act 51 of 1977: ` **Every witness competent & compellable unless expressly excluded** – Every person not expressly excluded by this Act from giving evidence shall, subject to provisions of Sec 206, be competent & compellable to give evidence in Crim Procedure'

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.*

- *Spouses*
- *the accused and*
- *co-accused.*

4.4 Assume that C is the only witness that can identify B and D as his attackers. Fully discuss, with reference to decided cases, the two evidential rules that the court will have to apply when evaluating C's evidence at the end of the case.

The Single Witness

(Read Schwikkard – 30 11

4)

208 CPA Conviction may follow on evidence of single witness

An accused may be convicted of any offence on the single evidence of any competent witness.

16 CPEA Sufficiency of evidence of one witness.

Judgment may be given in any civil proceedings on the evidence of any single competent and credible witness.

In **S v Webber 1971** SA 754 (A) the court held that:

- If conviction is only possible on the testimony of a single witness, such a witness must be credible, whilst the evidence should be approached with caution.
- Proper attention should be given to the factors that either support or undermine the credibility of the evidence.
- The probative value of the testimony of a single witness cannot be equated to the probative value of encompassing wide & evidence from multiple witnesses.
- It was decided that the evidence of a single witness should be approached with caution but need not be rejected merely because of bias - the bias needs to be assessed in the light of the evidence as a whole

The Single Witness... continued... statutory provisions

- Statutory provisions make it **possible** for a court to convict a person / to give judgment against a party in evidence of a single witness alone
- If court satisfied that evidence given by single witness is satisfactory – it **may**, but **need not** regard evidence as sufficient to convict accused
- Degree of caution to be applied to testimony of single witness may also be increased by other factors
- Note a single witness may be for only one aspect of a case and numerous single witnesses may be required to prove each aspect

The Single Witness... continued... Who are single witnesses?

- Cautionary rule i.r.o single witnesses not limited to situation where only one person gives evidence for prosecution.
- Usually more than one point in issue in a any case, & if only 1 witness available to testify on particular point in issue – witness will be single witness
- If more then one charge – charges will be considered separately

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

Question 5

One night Mr Whiskey, (a well-known businessman), is driving while his blood-alcohol content has been well fortified by a "liquid supper" at the annual office party. After being pulled off by a policeman at a roadblock, a breathalyser test confirms that his alcohol content is well over the legal limit. A blood sample is taken and send for analysis. After about three weeks a certificate from the police forensic laboratory confirms the breathalyser test.

5.1 Based on these facts, would you say that the evidence against Mr Whiskey constitutes real evidence, documentary evidence, or evidence of an uncertain classification? Explain your answer. (See SU 6.)

Definition of Documentary evidence

(Read Schwikkard

– 20 2)

- There is no common law definition, but CPEA says it is any 'book, map, plan, drawing or photograph'
- The most widely accepted definitions can be found in **Secombe v Attorney General 1919** TPD 270 BY 277 '*The word document is a very wide term that includes everything that contains the written or pictorial proof of something*' - note two points 'written' and be able to provide proof of something.
- Currently it also includes '*data message*' which is data generated, sent, received or stored by electronic means and includes voice and stored records.
- First element of Doc evidence – that it refers to evidence that is presented by way of document.
- Less obvious what is to be understood term 'document'
- Ordinary consideration of word = important
- Legislation refers to specific things that should be considered documents
- For ordinary meaning of docs – to refer to case law:-
- Writing / drawing – integral part of any doc.
- Doc should be able to provide proof of something
- Examples = contracts, letters, pictures, photographs, birth certificates & wills etc.

Definition of real evidence

(Read Schwikkard

– 19 1)

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- Court takes it into possession, marks it, & reference made to it as part of court record as an 'Exhibit #'
- An expert witness often is called to determine the efficacy of the object and possibly explain the utility and operation thereof.
- *An object* which upon proper identification, becomes, of itself, evidence e.g. knife, photograph, letter etc
- The party wishing to produce real evidence must, *in the absence of admission* by an opponent, *call a witness to identify it as such*
- *Real evidence usually owes its efficacy to a witness* who explains how it was found or used or why he is the owner
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- An *expert called in to explain how an object operates is in fact opinion evidence* even though the *object itself remains real evidence*
- *Oral evidence* describing relevant real evidence not produced is not rendered inadmissible. *This deals with reported real evidence (the description) as opposed to immediate real evidence (the thing)*

Products of modern technology as evidence

(Read Schwikkard – 19 3; 19 5 &

Chapter 21)

- Schmidt – 1st to raise argument that law of evidence should stop trying to force products of modern technology into limited categories of either real / documentary evidence
- In support of argument - mentioned that present rules relating to discovery, reliability & authenticity were all based on paper documents.
- Although Schmidt made strong argument for unique classification of this type of evidence - Schwikkard uses same classification – Courts have not yet accepted it however in...

5.2 During Mr Whiskey's subsequent prosecution for drunken driving, the only evidence against him, (besides the certificate mentioned above), is evidence by the

