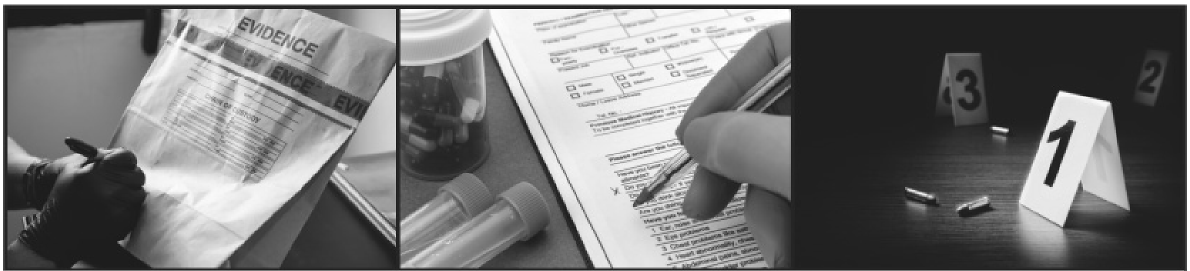

Department of Criminal and Procedural Law

LAW OF EVIDENCE

Only study guide for **LEV3701**

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CONTENTS

INTRODUCTION

1 GENERAL

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

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

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

2 AIMS OF THIS STUDY GUIDE

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

3 LITERATURE

3.1 Prescribed material

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

3.2 Additional books

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

- Zeffertt DT & Paizes A. Essential Evidence (2010) LexisNexis Durban
- Cross R & Tapper C. Cross on Evidence 12 ed (2010) Oxford University Press
- Malek HM (ed). Phipson on Evidence 18 ed (2015) Sweet & Maxwell London
- Van Niekerk SJ, Van der Merwe SE & Van Wyk AJ. Privilegies in die Bewysreg (1984) Butterworths Durban

Students who are really enthusiastic about the law of evidence may want to have a look at Wigmore's monumental work, A Treatise on the Anglo-American System of Evidence in Trials at Common Law. It consists of ten parts numbering 800 to 900 pages each.

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

- Du Toit E et al. Commentary on the Criminal Procedure Act (1987) Juta Cape Town
- Kruger A. Hiemstra's Criminal Procedure (2008) LexisNexis Durban

4 METHOD OF STUDY

4.1 General

This study guide consists of 18 learning units. These learning units have been developed in such a way that one unit should keep you busy for about a week. That leaves you enough time to complete the various activities which are included in the learning units, do your assignments (in addition to the activities), and prepare for the examination.

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

4.2 The structure of the study guide

The guide follows the following general scheme:

Part 1: General concepts and sources of the law of evidence
Part 2: The presentation of evidence
Part 3: The admissibility of certain types of evidence
Part 4: The evaluation of evidence
Part 5: Tutorial assistance

Part 1 briefly informs you about what the law of evidence is, what some of the basic concepts mean, and where these concepts come from. In part 2, we teach you how evidence is presented in court. Part 3 discusses whether certain kinds of evidence are admissible or not and, in part 4, you learn how the admissible evidence presented in court is evaluated by the court in order to reach a conclusion. Part 5 contains tutorial assistance in the form of a glossary (list of technical terms) and feedback on some of the activities which you are expected to do.

Each learning unit is based on the following format:

1. The list of sources is followed by an ORIENTATION. The information contained in this section provides background to help you to fit that particular learning unit into the larger picture of the law of evidence as a whole. Although you do not have to study this section, you should understand it.
2. Practically all learning units contain one or more ACTIVITIES. This may involve some reading or filling in a few words, or even writing a whole essay. By doing these activities you will test your understanding of the subject matter on an ongoing basis. Quite often you will be compiling your own tutorial material by doing these activities. Feedback on your answers will be given either at the back of this tutorial letter or in a number of other tutorial letters which you will receive during the course of the semester. Where you need to test your insight, feedback will be given in this tutorial letter since you need to know immediately if you are on the wrong track. Otherwise it will appear in other tutorial letters. All activities are numbered so that you can easily find the correct feedback. The end of an activity is indicated by a grey line.
3. Some practical examples will be provided. They are always indicated as follows:

Example

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

4. A boxed section printed in a different typeface (eg, bold) is an explanatory note. The following is an example of such a note:

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

   These sections are generally used to explain something which students found problematic in the past. If you understand the material well, you will often find that the explanatory note simply repeats what you have already grasped. This is fine and means that you may skip the note.

5. At the end of each learning unit there are some self-evaluation questions. These questions are very important and test your understanding of the study material. Feedback on these questions will be provided in a tutorial letter and this feedback is important for purposes of the examination.

4.3 Working through a learning unit

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

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

4.4 List of words and phrases

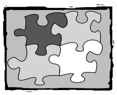
If you feel unsure about the meaning of a word or phrase in this tutorial letter, turn to the GLOSSARY for an explanation.

4.5 Using your textbook and casebook

You are frequently referred to these two sources. If you are told to read from the textbook or from a case, you need to do so in order to get some background. Remember, however, that all feedback on activities should be studied for the examination, even if the activity deals with work you were required only to read. If you are told to study a specific case or section in the textbook, you must do so because any number of questions may be set on that material. In this case, you should also keep your own notes in addition to those contained in the present tutorial letter. You will find that you cannot follow only one way of studying the law of evidence and that you will have to adapt your study methods according to the requirements of the particular learning unit.

5 ICONS USED IN THIS STUDY GUIDE

Icon	Description
	**Overview**. The overview provides the background to a particular topic or learning unit.
	**Activity**. This icon shows you the activities that you must do in order to develop a deeper understanding of the learning material.

	**Example.** This icon shows practical examples will be provided.
	**Outcomes**. This icon indicates which aspects of the particular topic or learning units you have to master.
	**Summary.** This section provides a brief summary of what was covered in a particular learning unit and what can be expected in the following learning unit(s).
	**Self-evaluation.** When you see the Self-evaluation icon you will be required to test your knowledge, understanding, and application of the material you have just studied.

6 CONCLUSION

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

Learning unit 1

Overview

You do not have to consult any source for this learning unit.

Orientation

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

Outcomes

Once you have completed this learning unit, you should be able to:

– explain what aspects of the law are covered by the law of evidence
– demonstrate how the law of evidence is divided into three main branches
– explain the different purposes of the three main branches of the law of evidence

1.1 THE LAW OF EVIDENCE IS A WHOLE FIELD OF LAW

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

1.2 OVERVIEW OF THE LAW OF EVIDENCE

General concepts and sources of the law of evidence

You will be taught certain basic concepts such as the definitions of the law of evidence, of evidence and of evidential material. You should not attempt to venture any further without knowing these terms and their meanings. This section is followed by a brief reference to the sources of the law of evidence because unless one knows where the law of evidence comes from, it will be difficult to look for answers.

The presentation of evidence

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

The admissibility of certain types of evidence

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

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

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

- evidence acquired in violation of the Bill of Rights in the Constitution may often have to be excluded

The evaluation of evidence

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

1.3 THE INEXACTNESS OF THE LAW OF EVIDENCE

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

1.4 THE IMPORTANCE OF THE LAW OF EVIDENCE

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

Part 1

General concepts and sources of the law of evidence

Contents

Learning unit 2

Concepts in the law of evidence

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

- **Schwikkard**

Orientation

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

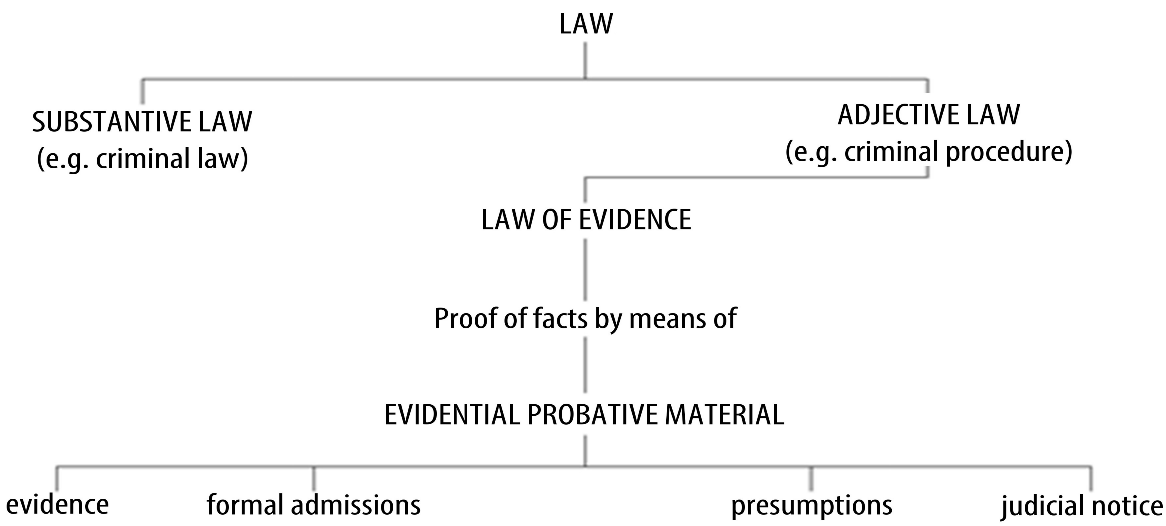
Outcomes

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

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

2.1 SUBSTANTIVE AND ADJECTIVE LAW

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



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

2.2 PROOF AND THE LAW OF EVIDENCE

In preparation:

Read Schwikkard §§ 24–25.

Study the following terms in the glossary: "proof", "evidence", "evidentiary material".

The law of evidence may be defined as follows:

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

From the above definition it is clear that "**proof**" is central to the entire field of the law of evidence.

"Proof" is explained by Schwikkard § 2 5 as follows:

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

The process of evaluation is discussed towards the end of the present tutorial letter.

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

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

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

Activity 2.1

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

....

....

(Feedback in this study guide)

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

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

The concepts that you have been working with are the basic building blocks that you will use in the rest of this course. It will be worth your while to make quite sure that you understand all the types of evidentiary material and that you are able to distinguish between them and relate them to one another.

Summary

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

Self-evaluation

Question 1

Does the word "evidence" only refer to oral evidence? Fully explain.

Question 2

Is evidence the only form of evidentiary material? Fully explain with reference to authority.

Question 3

Briefly explain the relationship between "proof" and the law of evidence.

Question 4

Briefly explain, with reference to the two main branches of the law, how the law of evidence fits into the general structure of the law.

(Feedback in tutorial letter)

Learning unit 3

Sources of the law of evidence

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

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

Orientation

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

Outcomes

Once you have completed this learning unit, you should be able to:

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

3.1 HISTORICAL SOURCES

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

3.2 KNOWLEDGE SOURCES

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

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

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

3.2.1 The rights of arrested people

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

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

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

3.2.2 The rights of a detained person

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

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

3.2.3 The rights of any accused person

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

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

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

Section 35(5) provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. This subject is dealt with in the learning unit dealing with the admissibility of admissions and confessions (learning unit 14).

3.2.4 The limitation clause

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

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

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

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

3.2.5 Interpretation

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

Example

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

3.3 RESIDUARY SECTIONS

In preparation:

- **Read Schwikkard §§ 33–36.**

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

Example

Section 206 of the Criminal Procedure Act provides:

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

In this regard, Schwikkard § 3 2 distinguishes between "direct incorporation" of foreign law by, for instance, South African statutes using the exact wording of foreign legislation, and "indirect incorporation" as in the case of residuary clauses, which simply determine that foreign law has to be followed in respect of topics for which no express local statutory law has been made. It was felt that residuary clauses which had indirectly incorporated English law should be changed before South Africa became a republic outside of the British

Commonwealth (as happened on 31 May 1961), as is proper for a totally independent country. Thus provisions such as the following in the Criminal Procedure Act 51 of 1977 now refer to the law as it was "on the thirtieth day of May, 1961":

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

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

Activity 3.1

(1) What does section 252 of the Criminal Procedure Act 51 of 1977 determine? Briefly explain.

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

(Feedback in tutorial letter)

3.4 THE LAW OF EVIDENCE AND CUSTOMARY LAW

3.4.1 Introduction

It is useful to discuss some interesting aspects from our customary law that relate to the law of evidence. This discussion shows that many of our current evidentiary principles have good reason to exist, and also places them into an African context. Many of these principles therefore have a strong foundation in our customary law. This should also be seen in the context of section 39(2) and section 211(3) of the Constitution. The information provided below is based on research done by MW Prinsloo on customary law in Lebowa (see MW Prinsloo: Inheemse Publiekreg in Lebowa 1983). It focuses on a specific group of people since an overview of customary law of evidence principles from all the different ethnic groups in South Africa and Africa would be far beyond the scope of the purposes stated above. **It is not necessary to study these principles for examination purposes.**

3.4.2 General

It can be said that our customary law of evidence is based on custom as encapsulated in customary idioms and proverbs. The idiomatic expressions and proverbs use figures of speech to express figurative meanings in culture. They are cited to provide points of comparison illustrating general truths and human behaviour during legal proceedings. Whilst they are unwritten and relatively informal, they are based on reasonableness and purposefulness. Their application in a given case is guided by their inherent principles.

In the case of criminal proceedings the notion of a prosecutor is unknown, but the court is represented by the Kgosi who puts the charge by way of a narration of what the accused did. The accused is then asked to respond. He or she may opt to do one of two things: accept guilt or deny the allegations and then tender evidence in defence prior to the complainant's evidence. Where the accused simply denies the charge and does not offer any evidence, the court is obliged to call the complainant and his or her witnesses to give evidence regarding their case.

Cross-examination is done during the presentation of the evidence and any of the elders or accused persons may ask questions at any stage during such presentation. Thus there is no clear demarcation between evidence-in-chief, cross-examination and re-examination. Prinsloo observes that, in civil proceedings, the court can, based upon convenience, make an exception and rule that the respondent start with the presentation of evidence, for example, where the respondent alleges that he or she has already fulfilled his or her obligations with regard to the claim or that the case has already been heard. In general, the court can be said to determine the sequence of events. The formal closing of the presentation of evidence is unknown. A party therefore has the opportunity to supplement his or her evidence during questioning or at any stage of the trial. This includes calling any material witness to his or her case. He or she can present evidence a second time with or without leave of the court if the evidence is material to the verdict of the court.

As is the case in our current law of evidence, it is important that the court consider the evidentiary material presented by both parties. It is said: *"tshekanoši e fiwa kgomo e swana"*. This means that, where one party alone proves a case, such party receives the black cow; in other words, where only one side presents its case, such party will always be successful. An objective evaluation of the evidentiary material further forms the basis for determining the facts. It is said: *"diphoofolo di bolawa ke dihlatse"*. This means that wild animals are killed by the witnesses, that is, that a case is determined by evidence. As is the case in our law, the extent (amount) of evidentiary material is not determinative, but rather the quality of such material.

The burden that has to be met in order to bring about a favourable outcome is the presentation of evidence that will, according to a reasonable person, prove the allegation that has been made. This applies to both civil and criminal proceedings.

Unlike our current law, in some jurisdictions absolution or discharge of the accused cannot take place before the respondent or accused has given evidence. Other tribes will, however, allow this to happen.

If a case has been heard and judgment given, such judgment is the final decision in the matter. It is said: *"selepe sa re kgo! Se remile"*. This literally means that, if the axe has chopped, a decisive conclusion has been reached. Stripped of its figurative meaning, it dictates that, once a decision has been made, no further correspondence on the matter will be entertained. In some jurisdictions, for instance among the Batswana, the same view is expressed as: *"lefoko la kgosi le agelwa mosako"*. This means that, once the *Kgosi* has given his decision, it is final. It is doubtful, however, if this approach would withstand constitutional scrutiny, notwithstanding the provisions of section 39(2) read with section 211(3) of our Constitution.

A high premium is placed on witnesses who were witnesses to the offence or the issue before the court. It is said: *"molato o rerwa (ahlolwa) ke dihlatse"*. This means that the facts of the case are determined by the evidence. Indeed, a high premium is also placed on direct evidence, that is, on the evidence of a person who was a witness to the facts first hand, for example, an eyewitness *(hlatse ya leihlo)* as opposed to *"pudi ya tsela"* (a wandering goat or a goat of the road), a witness to a contract or someone who overheard defamatory words.

Of paramount importance is the questioning of such a witness to determine his or her credibility. It is said: *"kgomo e tshwarwa ka dinaka, motho o tshwarwa ka leleme"*. Loosely translated, this means that "a bull is caught by its horns, a human by his [or her] tongue". Stripped of its figurative meaning, it means that cross-examination can expose the truth, thereby discrediting or strengthening the credibility of such a witness.

When a case has been made out against a party and he or she refuses to lead evidence or, when giving evidence, refuses to answer certain questions that point to his or her guilt, the court can draw negative inferences. It is said: *"mojakgogo oa itshesegwa, o re mafofa ke ya go lahla kae"*. In other jurisdictions, as among the Batswana, it is said: *"moloi ga nke a re ke a loya"*. Loosely translated, this means that a witch never admits that she is a witch. So the facts will be there for all to see. Thus the guilty do not always accept their guilt despite mounting evidence against them.

Circumstantial evidence is also used to corroborate other evidence. Evidence that the respondent, for example, was found at night in the hut of the applicant's wife can give rise to the inference that infidelity took place and can further support the applicant's evidence.

Presumptions are also present in our customary law. A commonly accepted presumption is that an uninitiated man does not know the law and is also presumed to be a boy not worthy of attending to tribal issues or getting married. It is said: *"Leshoboro ga le tsebe molao"*.

Another presumption is the presumptive validity of a claim. It is said: *"lesepa la mpswa le nkgela semetseng, la oma le a hlaba"*. Loosely translated, this means that a dog's excrement smells whilst still fresh. It presupposes that, if one has a claim, it has to be brought within a reasonable time, otherwise it is presumed that it was not valid from the start.

3.4.3 Some examples of evidence or types of evidence

Normal hearsay evidence (*"pudi ya tsela"* or, literally, "a goat of the road or a wandering goat") is not considered in order to determine a fact and a court can stop a witness who wants to present only hearsay evidence. A statement made by a party to a witness serves as evidence of a fact, but has little evidential value if the party denies such fact. A statement made by a deceased regarding the division of his estate among his children is not considered to be hearsay and is in any case the only sufficient proof in this regard. It is said: *"lentšu la mohu ga le selwe"*. This means that the request of a deceased person cannot be ignored.

Evidence of previous convictions or character evidence is not admissible in customary-law proceedings since it is not seen as relevant to the current case. A witness's credibility is also not determined by his or her rank, occupation or character, but according to what he or she says or how he or she testifies. A court will, however, be cautious of a witness who has previously lied during testimony.

Real evidence is accorded strong probative force. It is said: *"legodu le swarwa ka morwalo"*. Loosely translated, this means that a thief is caught carrying or being in possession of the goods. This primarily emphasises the importance of real evidence as it is usually not contradicted. And, usually, if you are caught at night carrying someone else's goat, it is enough evidence of theft by you as the possessor.

Some extraordinary ways of proving matters also exist in our customary law, for example, through divination and judgement tests. This is especially the case where direct evidence is lacking or the proof of facts is problematic, such as in cases involving alleged witchcraft, infidelity and theft. Divination usually involves a wizard pointing to a suspect by the "throwing of the bones". Parties to the proceedings can also consult a traditional healer in secret and present his or her conclusion in court. The pointing out of the perpetrator by the traditional healer is not considered conclusive proof, but if two traditional healers point to a person or if such person is pointed out by means of divination, this is considered conclusive proof. Usually, these wizards do not come to a conclusion based solely on "throwing the bones", but also consider other factors, such their knowledge of the crime and family matters, as well as their resourcefulness and ability to read the minds of the people present at the trial. Judgement tests take on different forms. For instance, the suspect may have to drink a concoction prepared by a traditional healer *(ngaka)*. If affected by the drink, the suspect will be considered to be guilty.

Summary

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

Self-evaluation

Question 1

Mention the principal provisions of the Constitution of the Republic of South Africa, 1996, that affect the law of evidence.

Question 2

Explain what is meant by "indirect incorporation" of foreign law into our law of evidence.

Question 3

Explain how the limitation clause in section 36(1) of the Constitution functions.

Question 4

Explain the difference between the historical and knowledge sources of our law of evidence.

(Feedback in tutorial letter)

Part 2

The presentation of evidence

Contents

Learning unit 4

Stages in the trial process and the presentation of oral evidence

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

- **Schwikkard**
- **The casebook**

Orientation

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

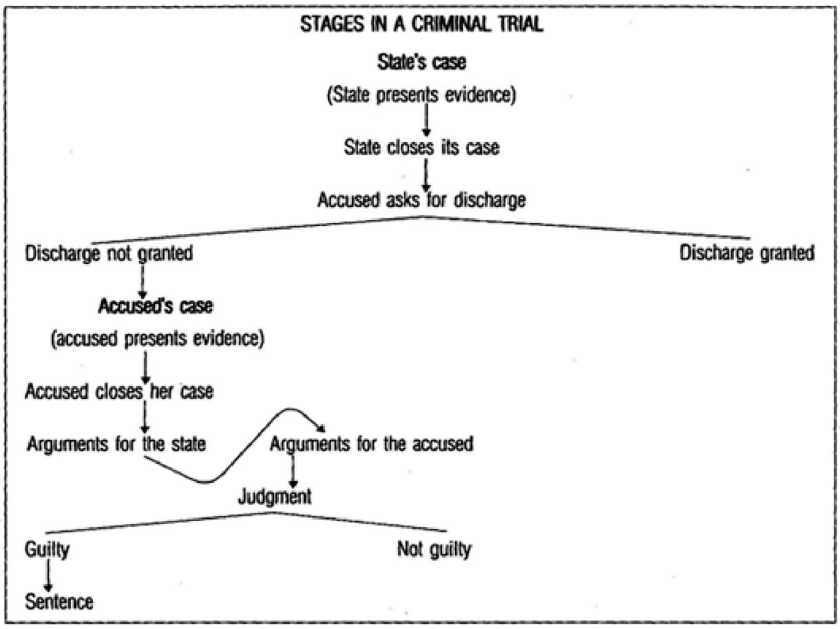
Outcomes

Once you have completed this learning unit, you should be able to:

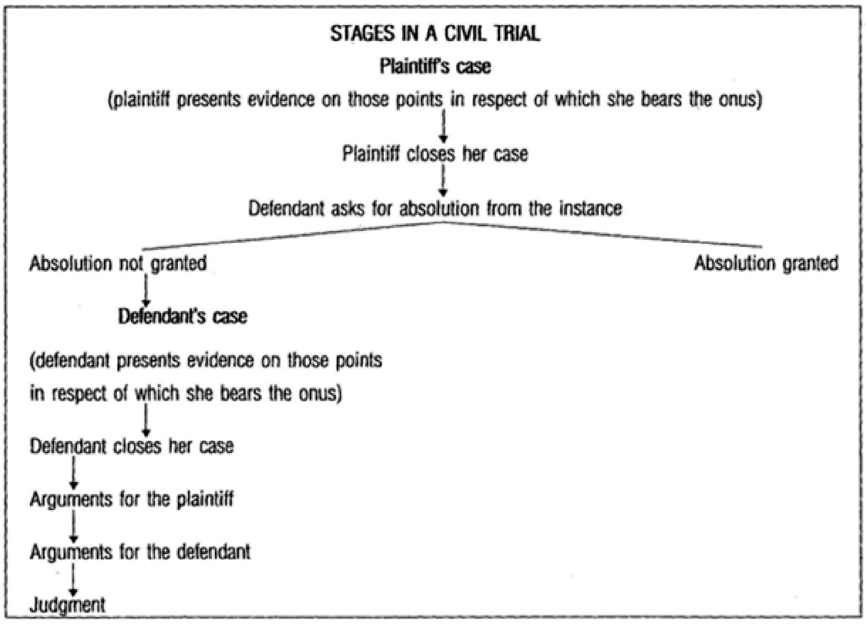
- distinguish between the various stages in the questioning of a witness
- explain, in the correct order of occurrence, the different stages in the trial process

4.1 OVERVIEW OF EVENTS IN CRIMINAL AND CIVIL TRIALS

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



In a civil trial, this diagram looks as follows:



4.2 THE PRESENTATION OF ORAL EVIDENCE

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

The cause of action in a civil case will also determine the nature of the evidence required. If the cause of action is breach of contract, there will usually be more documentary than oral evidence, although some oral evidence may be presented (documentary evidence is dealt with in learning unit 7).

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

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

4.2.1 Examination-in-chief

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

4.2.1.1 Credibility

It should be kept in mind that the party who undertakes the examination-in-chief is not allowed to attack the credibility of the witness. The reason for this should be obvious – the party calling a witness does so for the purpose of proving its case by relying on, among other things, the testimony of that witness. Impeaching the credibility of its own witness will certainly not further this purpose. The one exception to this rule is dealt with at 4.2.1.3 below. Questions about the witness's previous convictions and bad character may not be asked. (This is dealt with in learning unit 10.)

4.2.1.2 Leading questions

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

Example

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

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

Question 1 is a leading question but it is admissible because the fact assumed by this question is undisputed. Question 2 is a leading question. It is inadmissible because it suggests the answer.

4.2.1.3 Unfavourable and hostile witnesses

In 4.2.1.1, we mentioned that the party who undertakes the examination-in-chief may not ask any questions which might raise doubts about the credibility of its own witness. The party calling a particular witness will, however, be entitled to challenge the credibility of its own witness if the witness gives evidence which is unfavourable to the party that called her.

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

4.2.1.4 The witness may refresh her memory

In preparation:

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

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

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

The legal position in the case of (1) is quite simple: there is no general rule that prevents a witness from reading her witness statement, or some other statement that was drawn up soon after the event, before testifying or during an adjournment. In fact, there are many reasons why this practice should be encouraged (see Schwikkard § 24 3 and § 24 4 if you are interested). Also, there are no particular legal principles which should be complied with before this can happen.

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

Activity 4.1

Read Schwikkard § 24 5 and then answer the following questions based on what you have read:

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

....

....

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

....

....

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

....

....

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

....

....

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

....

....

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

....

....

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

....

....

(Feedback in tutorial letter)

4.2.2 Cross-examination

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

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

The purpose of cross-examination is

1. to elicit evidence that supports the cross-examiner's case
2. to cast doubt on the credibility of the opposing party's witness

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

It should be clear that the scope of cross-examination is wider than that of examination-in-chief, but its boundaries are not without limit. Questions asked during cross-examination must be relevant either to the issue or to the credibility of the witness. Questions about the accused's previous convictions or bad character are beyond the scope of cross-examination and such questions may not be asked (this is dealt with in learning unit 10).

Activity 4.2

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

	Examination-in-chief	**Cross-examination**
Purpose?		
Party that undertakes this type of examination?		
Leading questions?		
Attack on credibility of witness?		

(Feedback in tutorial letter)

4.2.3 Re-examination

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

1. it is undertaken by the party that called the witness
2. leading questions are not permissible

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

Activity 4.3

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

	Examination-in-chief	**Re-examination**
Purpose?		
Party that undertakes this type of examination?		
Leading questions?		
Attack on credibility of witness?		

(Feedback in tutorial letter)

4.3 WITNESSES CALLED BY THE COURT

In terms of section 186 of the Criminal Procedure Act 51 of 1977, the court may call witnesses of its own accord and must do so if the evidence of these witnesses appears to be essential in order to make a just decision (see also Schwikkard § 23 4 3). However, our courts rarely rely on this provision owing to concerns about becoming too involved in the issue.

There is no similar provision in civil cases and there the court may only call a witness with the consent of the parties (Schwikkard § 23 5 4).

4.4 ARGUMENT

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

Summary

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

Self-evaluation

Question 1

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

Question 2

Explain the difference between examination-in-chief and cross-examination.

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.

Question 4

Explain the practical significance of the phrase: "Each party will be given the opportunity to address the court in argument".

Question 5

Fully explain the difference between an "unfavourable" witness and a "hostile" witness. (Feedback in tutorial letter)

Learning unit 5

Witnesses

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

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

Orientation

In preparation:

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

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

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

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

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

Outcomes

Once you have completed this learning unit, you should be able to:

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

5.1 PROCEDURE

- **Study Schwikkard § 22 3.**

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

5.2 COMPETENCE

5.2.1 General rule

In preparation:

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

You will notice that section 192 refers to section 206 of the same Act. Section 206 states that the law which was in force in respect of criminal proceedings on 30 May 1961, which relates to the competence and compellability of witnesses to testify, shall be applicable in any case not expressly provided for by the Criminal Procedure Act or any other law. This means that English law (as it was on 30 May 1961) is applicable. Section 206 is an example of a **residuary clause**, which was discussed in greater detail under the sources of the law of evidence.

5.2.2 Exceptions to the general rule

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

5.2.2.1 Children

In preparation:

- **Read Schwikkard § 22 4.**

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

5.2.2.2 Mentally disordered or intoxicated witnesses

In preparation:

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

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

In the case of, for instance, a drunk person, this means that he will indeed be competent to testify after having sobered up.

In *S v Katoo* 2005 (1) SACR 522 (SCA), the court, in considering section 194 of the Criminal Procedure Act 51 of 1977, held that the first requirement of the section is that it must be shown to the trial court that the witness suffers from (1) a mental illness or (2) that he or she labours under imbecility of mind due to intoxication or drugs or the like. Further, it must be established that, as a direct result of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason. These two requirements must collectively be satisfied before a witness may be disqualified from testifying on the basis of incompetence.

The evidence led in *S v Katoo*, the court said, fell short of establishing that the stated requirements had been met. The psychologist's evidence did not indicate that the complainant suffered from a mental illness. It merely established that she was, in the outdated terminology of the Act, an imbecile. Imbecility is not a mental illness and per se did not disqualify her as a witness. It is only imbecility induced by intoxication or drugs or the like that falls within the ambit of the section (and then only when the witness is deprived of the proper use of his or her reason). It was also clear from the evidence led that the complainant was not deprived of the proper use of her reason simply because she had limited mental capacity.

5.2.2.3 *Officers of the court*

In preparation:

- **Read Schwikkard §§ 22 7 and 22 8.**

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

Example

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

The general rule applies with regard to the question of whether a party's legal representative or the prosecutor is competent to testify. The legal representative and prosecutor are therefore presumed to be competent and compellable witnesses. It is, however, undesirable for a party's legal representative or the prosecutor to testify in a case. Legal-professional privilege will in any event restrict the capability of a legal representative to testify against his or her client. (This privilege is discussed in learning unit 15 below.)

5.3 COMPELLABILITY

In preparation:

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

It should by now be clear to you that only a competent witness may be a compellable witness. As mentioned earlier, there are cases where a competent witness may not be a compellable witness.

These cases can be divided into the following three main categories: spouses, the accused and the co-accused.

5.3.1 Spouses

In preparation:

- **Read Schwikkard § 22 11.**

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

5.3.1.1 Spouse as a state witness

In preparation:

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

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

Activity 5.1

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?

The charge of assaulting her

The charge of assaulting her father

The charge of criminal defamation against her father

(Feedback in tutorial letter)

Note that section 195 of the Criminal Procedure Act 51 of 1977 has, to some extent, been amended by section 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The following amendments should be taken note of here:

Subsection 195(1)(a) now also includes a child that is in the care of the wife or the husband of the accused.

Subsection 195(1)(e) now refers to incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

A new subsection 195(1)(gA) has been added which refers to any contravention of any provision of section 17 or 23 of the Criminal Law (Sexual Offences and Related Matters)

Amendment Act 32 of 2007. These sections deal with the sexual exploitation of children and persons who are mentally disabled.

5.3.1.2 The spouse as a defence witness

In preparation:

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

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

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

Example

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

5.3.2 Accused persons

In preparation:

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

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

5.3.3 Co-accused

In preparation:

- **Read Schwikkard § 22 10.**

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

5.3.3.1 Co-accused as defence witness

Where A and B are charged jointly and are thus co-accused, A may testify in defence of B and vice versa. The general rule applies with regard to competence. As far as compellability is concerned, A may not be compelled by B to testify in B's defence, because A is also an accused. (See 5.3.2 above.)

5.3.3.2 Co-accused as prosecution witness

A co-accused is not a competent witness for the state, whether to prove the case against himself or against the accused, because he is also an accused. You will remember from what has been said earlier that the question of compellability does not even arise where the witness is not competent to testify.

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

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

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

Activity 5.2

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.

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

Mrs A	State	Yes	
Mrs B	State		No
A	State		

(Feedback in this study guide)

Summary

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

Self-evaluation

Question 1

It is the evening of 20 April 2011 and Peter is at a well-known restaurant celebrating receiving his LLB degree earlier that night. Almost his whole family, including his wife and six-year-old daughter, are there to celebrate with him. During the evening, a family member who is a freelance photographer takes a number of pictures with a non-digital camera. Afterwards Peter, who has a drinking problem, drives home while under the influence of alcohol. A policeman notices his car swerving across the road and crashing into a parked vehicle. Fortunately, no one is injured but Peter is arrested on the spot and charged with driving under the influence of alcohol. Shortly after this incident, Peter's wife divorces him because of his drinking problem. Answer the following questions in detail:

(1) Discuss the competence of Peter's daughter to testify on behalf of the state.
(2) Discuss the competence and compellability of Peter's ex-wife to testify on behalf of the state and on behalf of the defence.
(3) Some of the pictures taken by the freelance photographer clearly show that Peter had consumed a variety of drinks that evening. Discuss the admissibility of the photographs as evidence for the state. Refer to matters such as the classification of evidence in your answer. (The answer to this question can be found in learning unit 8.)
(4) Accept that the policeman who witnessed Peter's car swerving across the road is the only witness who saw what happened. How should the court approach his evidence? Discuss this in detail with reference to decided cases. (The answer to this question can be found in learning unit 18.)

Question 2

Discuss the competency and compellability of officers of the court to testify.

Question 3

Fully explain the competence and compellability of a spouse as a witness in both criminal and civil matters. In your answer, refer specifically to a spouse as a witness for the defence.

Question 4

Comment in detail on the following statement: "The co-accused is an incompetent witness in respect of the state's case because he is also an accused."

Question 5

Explain the circumstances under which a spouse may be a competent and compellable witness.

Question 6

Briefly explain how the court will assess the evidence of a seven-year-old child. (The answer to this question can be found in both learning unit 5 and learning unit 18.)

Question 7

A and B are married. A, the husband, frequently abuses B, his wife, and their children. After watching a television talk show on legal issues, including spousal rights, B, the wife, warns A of the legal consequences of abuse. A does not heed the warning and B lays a charge of assault against A. B does not have a protection order. B comes to you for legal advice concerning the following:

(1) B is emotionally and psychologically traumatised and she is concerned that her weakened demeanour, when compared with A's supreme confidence, will be detrimental to her case. Discuss the significance of personal appearance in a trial. (The answer to this question can be found in learning unit 6.)

(2) A has intimidated and threatened B on numerous occasions as a result of the charge and B is afraid to testify. She wonders if she is competent to give evidence or can be forced to testify for the prosecution. Discuss.

(3) A states that, even if B proceeds with the case, he will not testify. He, A, claims that the court cannot render a decision in the absence of his testimony. Explain the relationship between the right to silence and the onus of proof. (The answer to this question can be found in learning unit 16.)

(4) A tries to intimidate B into dropping the charge by saying that he will defend himself and will embarrass and destroy B in court, especially when he argues his case. Explain to B the true legal nature of and procedure relating to a "closing argument". (The answer to this question can be found in learning unit 4.)

(Feedback in tutorial letter)

Learning unit 6

Real evidence

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

- **Schwikkard**
- **The casebook**

Orientation

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

Outcomes

Once you have completed this learning unit, you should be able to:

– recognise from any set of facts the different forms of real evidence as well as how they are linked to expert opinion evidence (in the case of fingerprints, for instance)
– appreciate the value of real evidence as a way of strengthening oral evidence
– explain the formal requirements for the admissibility of real evidence
– distinguish between real evidence and documentary, computer-based information

6.1 INTRODUCTION

In preparation:

- **Read Schwikkard § 19 1.**
- **Read the case of *S v Msane* 1977 (4) SA 758 (N) with the aid of the guidelines you will find in the casebook.**
- **Read *S v Ndiki* 2008 (2) SACR 252 (Ck) with the aid of the guidelines you will find in the casebook.**

You should note the different subdivisions of real evidence in Schwikkard. Although Hoffmann and Zeffertt (The South African Law of Evidence (1988) 406) classify photographs, cinematographic film, videotapes and tape recordings under a separate category of real evidence, Schmidt and Rademeyer (Bewysreg (1989) 338) prefer to deal with them under "appliances" or "devices". You will note that Schwikkard takes the latter route, yet still deals with certain appliances and devices in this chapter. We have always preferred to deal with these things as a third category of evidence (see learning unit 6 below) because their classification as either documentary or real evidence is so difficult. However, in *S v Ndiki*, the court seems to have reduced the available options to either documentary or real evidence even where computers are concerned.

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

In the second place, an expert witness is often called to explain an object or its operation. This, in fact, constitutes opinion evidence although the object itself remains real evidence.

Activity 6.1

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

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

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

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

(Feedback in tutorial letter)

6.2 PERSONAL APPEARANCE

In preparation:

- **Read Schwikkard § 19 2.**

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

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

6.3 INSPECTIONS IN LOCO, DEMONSTRATIONS AND BODILY SAMPLES

In preparation:

- **Read Schwikkard §§ 19 6 and 19 8.**

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

An inspection in loco may enable the court to:

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

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

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

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

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

6.4 FINGERPRINTS AND HANDWRITING

In preparation:

- **Read Schwikkard §§ 19 4 and 19 7.**

Because the very fine detail in fingerprints is generally not visible to the layperson, an expert witness usually has to be called and his opinion is then accepted as admissible evidence.

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

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

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

Activity 6.2

What methods are available to the state to:

(1) demonstrate the background and circumstances of a car accident?
(2) prove paternity in a maintenance case?
(3) prove the true author where the genuineness of handwriting is disputed?

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

(Feedback in tutorial letter)

6.5 EVIDENCE DERIVED FROM A COMPUTER AND OTHER DIGITAL DEVICES

In preparation:

- **Read Schwikkard §§ 21 1 to 21 4.**
- **Read *S v Ndiki* 2008 (2) SACR 252 (Ck) in the casebook.**
- **Read *S v Brown* 2016 (1) SACR 206 (WCC) in the casebook.**

A trend emerged in the South African law of evidence to classify this type of evidence in a third category, quite distinct from real and documentary evidence. However, this trend now seems to have come to an end as a result of the *Ndiki* case. In that case, the court made a distinction between machine-based evidence where a human had also been involved at some or other stage on the one hand, and evidence which had been created by machines (computers) working without human interference on the other. The different exhibits were then classified into either of these two categories without resorting to a third, the sui generis (of its own kind) category. (For the purposes of the present tutorial letter, the author has decided to stay with the existing tripartite division until further case law has confirmed the current trend.)

Where humans have been involved, this will be documentary evidence and if they have not, real evidence. If required, the latter type of evidence will be brought before court by an expert testifying about the reliability of the working of the machine.

NOTE:

A considerable part of the court's time (and space) was taken up by debating the implications of hearsay in this scenario. This was really all obiter, because it was not necessary to decide the case. It is also not necessary for you to study this, because hearsay falls outside the ambit of the present learning unit.

Summary

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

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

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.

Question 2

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

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. Discuss these concepts fully in your answer. (Part of the answer to this question can be found in learning unit 17.)

(Feedback in tutorial letter)

Learning unit 7

Documentary evidence

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

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

Orientation

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

Outcomes

Once you have completed this learning unit, you should be able to:

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

7.1 ADMISSION OF DOCUMENTARY EVIDENCE

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

1. if the original document is produced in court, and
2. if the document is proved to be authentic

Other requirements may be prescribed in particular instances, usually by legislation (see, for example, the Stamp Duties Act 77 of 1968 in 7.6 below).

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

The above paragraphs should always be read with the understanding that many modern documents, especially those in e-commerce, are typed, communicated and stored in an electronic digital format on computers. You should therefore not read this learning unit without first looking at learning unit 8 on evidence of uncertain classification. These electronic documents are subject to the statutory regime imposed by the Electronic Communications and Transactions (ECT) Act 2 of 2002, which will also be dealt with in learning unit 8 and is covered in chapter 21 in Schwikkard. Van der Merwe also gives a brief background to the ECT Act, as well as the constitutional challenges that actions in terms of this Act may pose to our courts.

7.2 THE DEFINITION OF DOCUMENTARY EVIDENCE

In preparation:

- **Read section 33 of the Civil Proceedings Evidence Act 25 of 1965.**
- **Read sections 221(5) and 247 of the Criminal Procedure Act 51 of 1977.**
- **Read Schwikkard § 202.**

The first element of documentary evidence is an obvious one, namely that it refers to evidence that is presented by way of a document. What is often less obvious is exactly what should be understood by the term "document". A good way of dealing with this question would be first to consider the primary sources of the law – legislation and case law. When one reads the above-mentioned legislation, it is clear that the ordinary meaning of the word "document" is of considerable importance. In addition, the legislation refers to specific things that should, for purposes of that particular statute, be considered documents. These things may be included in the ordinary meaning of "document", or may not.

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

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

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

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

A "data message" produced by a computer is also admissible in evidence (see s 1 of Act 25 of 2002). This will be dealt with in greater detail in the next learning unit, but it is worth considering that most documents are circulating in digital format nowadays. Everything that you read in this learning unit should be read subject to what you will find in the next one.

Activity 7.1

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

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

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

(Feedback in tutorial letter)

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

7.3 PRODUCING THE ORIGINAL DOCUMENT

7.3.1 General

The general rule is that no evidence may be used to prove the contents of a document except the original document itself (Zeffertt et al: The South African Law of Evidence (2003) 686). It is often said that "primary evidence" or "the best evidence" of the document has to be provided.

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

In *S v Adendorff* 2004 (2) SACR 185 (SCA), the matter centred on a copy of a paper receipt that had been handed in to the court by the state as evidence. The court found that, because it was not an original document, it really had no relevance except for the purpose of refreshing the memory of the witness. However, an admission by the accused with regard to the original source document made the copy admissible, leaving it to the court to deduce the weight that should be apportioned to it, subject to all the facts.

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

7.3.2 Exceptions (or the admissibility of secondary evidence)

7.3.2.1 General

In preparation:

- **Read Schwikkard § 20 3 1.**

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

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

7.3.2.2 The exception in the case of official documents

In preparation:

- **Read sections 19 and 20 of the Civil Proceedings Evidence Act 25 of 1965.**
- **Read section 234(1) and (2) of the Criminal Procedure Act 51 of 1977.**

Activity 7.2

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

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

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

(Feedback in tutorial letter)

7.3.2.3 Other exceptions

Activity 7.3

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

(Feedback in tutorial letter)

7.4 PROOF OF AUTHENTICITY

7.4.1 General

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

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

7.4.2 Proving authenticity

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

1. The author, executor or signatory of the document. These people would normally be the best people to authenticate a document as they are best placed to identify and authenticate it.
2. A witness. A person who saw the author drawing up the document or a signatory signing the document may also authenticate the document. (The position is slightly more complicated in the case of wills – see Schmidt & Rademeyer 340.)
3. A person who can identify the handwriting or signature. Such evidence is permitted only if the author or signatory is not available.
4. A person who found a document in the possession or under the control of an opponent. This exception applies owing to the principle that such a document is admissible evidence against the opponent.
5. A person who has lawful control and custody of a document. In isolated instances it is permissible for such a person to authenticate the document. This principle applies in the case of official documents (dealt with above). It also affects the position of documents older than 20 years, which are presumed to be authentic. Such a document must be produced from the control of the person (and from the place) where one would normally expect such a document to be kept, if authentic.

7.4.3 Exceptions to the rule regarding authenticity

In preparation:

- **Read section 246(1) of the Criminal Procedure Act 51 of 1977.**

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

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

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

Example

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

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

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

Activity 7.4

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.

(Feedback in tutorial letter)

7.5 PUBLIC DOCUMENTS

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

According to *Northern Mounted Rifles v O'Callaghan* 1909 TS 174, a public document is a document that "must have been made by a public officer in the execution of a public duty, it must have been intended for public use and the public must have had a right of access to it".

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

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

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

7.6 STAMP DUTIES ACT 77 OF 1968

In preparation:

- **Read Schwikkard § 20 3 3.**

In terms of the Stamp Duties Act 77 of 1968, certain documents are required to be stamped with revenue stamps. Should these provisions not be complied with, the relevant document is not supposed to be used as documentary evidence at all. However, as can be seen from the reading material, documents will be admitted even if the stamping is late. Schmidt and Rademeyer (at 344) object to the use of an evidentiary sanction to ensure payment of monies to the state, even if this legislation does not really hamper court proceedings in South Africa.

7.7 DISCOVERY, INSPECTION AND PRODUCTION OF DOCUMENTS

The three stages mentioned in the heading to this section are all very relevant in possible civil litigation. “Discovery” simply means that it may be expected (in terms of Supreme Court Rule 35 and Magistrate’s Courts Rule 23) of one of the litigants to discover all possibly relevant documents in his or her possession, in the sense of making them available to the opposing party. This is done by means of a written affidavit listing all possibly relevant documents in the possession of the declarant party or his or her lawyer, except for those which they may lawfully refuse to discover or which are no longer in their possession. If a party fails to discover possibly relevant documents, such documents may not be used in subsequent litigation without the express permission of the court. This process of discovery is especially important in the light of the defence of privilege, which will be dealt with later in this study guide.

Once the discovery affidavit has been analysed by the opposing side, the Rules also provide for the inspection of selected documents by such opposing party, although this may be complicated if the documents are voluminous and in electronic format. The same technical constraints may also apply to the production of the aforesaid electronic documents by the declarant party to the opposing party.

If a relevant document is in the hands of a third party (not involved in the litigation), such party may be ordered to come to court and bring the document with them. This happens in terms of a *subpoena ducestecum* (literally “a summons to bring it with you”) from the court.

7.8 ELECTRONIC DOCUMENTS

From what has been said up to now, you should have been able to gather that the coming of the computer has changed things somewhat as far as real and documentary evidence is concerned. Today, most documents are in electronic format and therefore subject to special evidential considerations. These will be discussed in the next learning unit. The general rules with regard to documentary evidence still apply to paper, but electronic documents have brought about their own special rules. (As was indicated previously, hearsay has also been a factor with regard to electronic documents).

Summary

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

Self-evaluation

Question 1

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

Question 2

Explain the significance and meaning of "authenticity". In your answer, refer to the parties who can authenticate a document and to relevant exceptions.

Question 3

Describe what is meant by the phrase "an original document". You should also discuss secondary evidence in detail in your answer.

Question 4

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

Question 5

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

Question 6

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

Question 7

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

(Feedback in tutorial letter)

Learning unit 8

Evidence of uncertain classification

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

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

Orientation

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

Outcomes

Once you have completed this learning unit, you should be able to:

– advise someone on how to prove the contents of the modern substitutes for paper documentation (eg computer files and videotapes)
– explain the importance of the Electronic Communications and Transactions Act 25 of 2002 for the law of evidence

8.1 PRODUCTS OF MODERN TECHNOLOGY AS EVIDENCE

In preparation:

- **Read Schwikkard § 19 3, § 19 5 and chapter 21 for a general background to this type of evidence.**
- **Read sections 1 and 11 to 17 of the Electronic Communications and Transactions Act (the "ECT" Act) 25 of 2002.**
- **Read *S v Ndiki* 2008 (2) SACR 252 (Ck) with the aid of the guidelines you will find in the casebook.**
- **Read *S v Brown* 2016 (1) SACR 206 (WCC) in the casebook.**

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

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

8.2 PHOTOGRAPHS AS EVIDENCE

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

The situation is arguably quite different when the photograph is simply used to represent something that is the subject matter of the particular court case. It then serves a documentary function and both the dictionary and judicial definitions of "document" are wide enough to cover it (see the learning unit on documentary evidence). The wording of Rules 35(1) and 36(4) of the Supreme Court Rules also seems to imply that a photograph may be considered to be a document.

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

8.3 VIDEO AND AUDIO AS EVIDENCE

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

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

Although the learned judge finds this type of medium "difficult to categorise", it is submitted that, like photographs, it should be considered to be documentary evidence if the subject matter is what is really in question.

The whole idea of "tape" sounds rather old-fashioned nowadays. Because of its digital format (which goes for almost all video and audio recordings these days), the ECT Act will govern its weight and admissibility.

Schmidt and Rademeyer (365–366) remark on the fact that a more liberal attitude was taken in *S v Mpumlo* 1986 (3) SA 485 (E) and *S v Baleka* (1) 1986 (4) SA 192 (T) than in *S v Singh* 1975 (1) SA 330 (N) and *S v Ramgobin* 1986 (4) SA 117 (N). In the first two cases, videotapes were considered to constitute real evidence and not documentary evidence, and therefore it was decided that the tapes did not have to comply with the (stricter) requirements for documentary evidence. At any rate, it was felt that any possible deficiencies should go to weight rather than admissibility.

8.4 COMPUTER OUTPUT AS EVIDENCE

In preparation:

- **Read Schwikkard § 21 3.**
- **Study section 15 of the ECT Act.**
- **Read sections 11 to 14 and 16 to 17 of the ECT Act.**
- **Read *S v Ndiki and Others* [2007] 2 All SA 185 (Ck) according to the guidelines in the casebook.**

8.4.1 Background to the ECT Act

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

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

What is meant by a "digital" format? Once a photograph, a letter, a picture or even a video has been stored in a computer, the format changes from analogue (much the same format as the original) to digital. In order to be stored in digital format, the entire content of the file or document is broken up into electronic bits and bytes (with eight bits constituting a byte) and the content is then said to be stored “digitally”. The digital format is quite advantageous in terms of storage space and speed of communication, but the traditional rules of evidence have struggled to keep up with and classify this evidence. That is why the present learning unit is entitled “Evidence of uncertain classification”.

8.4.2 Application of the ECT Act

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

Activity 8.1

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

....

....

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

....

....

(Feedback in tutorial letter)

Summary

After the century-old secure and seemingly foolproof division of most non-oral evidence into either real or documentary evidence, the products of new technology have thrown these traditional classifications into disarray. Photographs, cine film, videotape and computer output have to be classified into either real or documentary evidence. Courts and academic writers have not yet been able to agree on this contentious issue but recent legislation such as the ECT Act, has tackled the problem head-on. Cases such as *Ndiki* and *Brown* have shown that the courts are prepared to grapple with a new set of problems. The former case evaluated the ECT Act (25 of 2002), although it was found not to be necessary to decide the case on this basis.

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. 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 taken and voice recordings made by Mr X with his cell phone 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 cell phone to his laptop computer and later to a memory stick, and eventually onto a compact disc. Prior to the commencement of the trial, the cell phone was stolen.

(1) Do the photographs constitute documentary evidence or real evidence? Briefly explain.
(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.
(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.
(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 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 the learning unit dealing with corroboration.)

Question 2

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

- *data message*
- *electronic signature*

(Feedback in tutorial letter)

Part 3

The admissibility of certain types of evidence

Contents

Learning unit 9

Relevance and admissibility of evidence

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

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

Orientation

In learning unit 2, we explained that evidence is one of the ways in which proof can be provided. In the present learning unit, we explore the concept of relevance. Evidence cannot be admissible unless it is relevant to the case at hand. If evidence is irrelevant, it will be inadmissible. But the mere fact that evidence is relevant does not mean that it will necessarily be admissible. Other considerations also affect admissibility. Nevertheless, relevance remains one of the cornerstones of admissibility, and a good understanding of relevance is an essential starting point for an understanding of admissibility in general.

Outcomes

Once you have completed this learning unit, you should be able to:

- explain the meaning of relevance and its relationship with the admissibility of evidence
- list the "facts in issue" in any given case
- explain what is meant by the probative value of evidence and the potential prejudicial effect of admitting any evidence

9.1 INTRODUCTION

In preparation:

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

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

Both the Criminal Procedure Act 51 of 1977 and the Civil Proceedings Evidence Act 25 of 1965 provide that irrelevant evidence will be inadmissible. Our courts generally state the principle more positively, namely that evidence needs to be relevant in order to be admissible. This makes little or no difference as far as the principle is concerned. However, relevance is not the only requirement for admissibility and some evidence, though highly relevant, might still be inadmissible. A witness can, for example, refuse to disclose relevant but privileged information and a presiding official has, in both civil and criminal cases, a residual common law discretion to exclude unfairly (improperly) and also unlawfully (illegally) obtained relevant evidence in order to reinforce overriding notions of fairness. In addition, section 35(5) of the Constitution provides a criminal court with the power to exclude relevant evidence obtained in violation of a right in the Bill of Rights. Closely related to the last-mentioned situation is the discretion provided by section 252A of the Criminal Procedure Act 51 of 1977 to exclude evidence obtained by means of entrapment.

9.2 WHAT IS MEANT BY "RELEVANCE"?

In preparation:

- **Read Schwikkard § 5 3.**

Generally, there needs to be a logical connection between the issues of the case before the court and the evidence that stands to be admitted in order for it to be relevant. This logical relevance is a matter of common sense, but is easily complicated by any attempt to define it in greater detail. We will give you two examples, one involving facts that are clearly highly relevant and the other referring to facts that are clearly irrelevant.

Example 1

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

Example 2

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

The problem, of course, lies somewhere between the extremes of being clearly relevant and clearly irrelevant. As the logical relevance of the evidence diminishes, its irrelevance grows. This is why one can say that relevance is a matter of degree. The question that the court has to settle is the point at which the evidence should not be admitted. It is important to understand that this point is not going to be the same every time the decision is made. However, some principles have developed over time to assist courts in making this decision. In terms of the general meaning of "relevance", it is first of all important to determine "the issues" (or facts or points in issue) in any given case. This must be done because the probative value or potential weight of evidence can only be determined if these issues are pinpointed. In this sense, the weight of evidence must be such that a reasonable inference can be drawn from the evidence with regard to the facts in issue. The evidence must have enough probative value or weight in order to prove or disprove a fact in dispute. In the end, the court must take care not to admit evidence where the party that is being incriminated may be procedurally disadvantaged or prejudiced.

Three things, therefore, stand out when a court has to decide on relevance:

- the importance of "the issues"
- the potential weight of the evidence
- the potential prejudicial effect of admitting the evidence

9.2.1 Definition of relevance

In preparation:

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

Activity 9.1

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

(1) Stephen:

....

....

(2) The United States Federal Rules of Evidence:

....

....

(Feedback in tutorial letter)

Note that a decision on the relevance of evidence should not normally be elevated to a general principle. This matter was dealt with in *S v Shabalala* 1986 (4) SA 734 (A). The decision was that, although the principle on the admissibility of evidence regarding the behaviour of tracking dogs was set in *R v Trupedo* 1920 AD 58, the trial court in *Shabalala* had departed from this principle. The question is whether the court was justified in doing so. Firstly, the then Appellate Division stated another principle, namely that a decision on the relevance of evidence should not normally be elevated to a general principle (since relevance would normally be affected by the facts of the case). However, when a court decides that certain legal consequences should follow from certain facts, this decision will be binding in subsequent cases in terms of the normal principles of the doctrine of precedent. *Trupedo* contains such a decision. (Remember, the decision in *Trupedo* was a finding by the then Appellate Division, whose findings on the law had to be followed by all subordinate courts, such as the Supreme Court dealing with the trial of *Shabalala*.)

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

9.2.2 The importance of "the issues"

In preparation:

- **Read Schwikkard § 5 3 1.**

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

Example 1

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

(1) that a death was caused
(2) that the act that caused the death was unlawful
(3) that the perpetrator had the required state of mind (intent)

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

Example 2

The plaintiff institutes an action against the defendant for failure to comply with the terms of a contract of sale entered into between them. In terms of the substantive law, a contract requires consensus on matters such as the item of sale, the sale price and the date of delivery. In addition to these elements, the summons through which the civil action is instituted might contain further allegations related to, for example, the date of the contract and the place or area where it was agreed on. Each of these allegations has the potential to be a further fact in issue. The potential causes of action in civil procedure are much more varied than in criminal procedure. This will be clear from your studies of private and mercantile law.

Each one of the facts in issue has to be proved by the party who bears the burden of proof. However, each one of these facts can also be admitted by the opponent. Such an admission would place the fact beyond dispute. In other words, it is no longer in issue, and, therefore, not an issue. Admissions of facts in issue are dealt with in learning unit 14.

Note that facts relevant to the facts in issue (*facta probantia*) can become in issue themselves. An example would be the reliability of a witness. In such a case, one would be dealing with side issues. One of the considerations in determining whether evidence should be admitted because of its relevance is the question whether the admission of the evidence would not simply be a waste of time. A great deal of time might be wasted on a proper investigation of the side issues and then, even when admitted, they may prove to be of little value when it comes to the real issues. Read Schwikkard § 5 3 3 for an example related to lie detectors (polygraphs).

As stated by Zeffertt et al (The South African Law of Evidence (2003) 220):

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

9.2.3 The potential weight of the evidence

In preparation:

- **Read Schwikkard § 5 3 2.**

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

Activity 9.2

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

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

....

....

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

....

....

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

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

(Feedback in tutorial letter)

When it has to consider whether evidence should be admitted or not, the court is not concerned with a determination of the **final weight of the evidence**. This is only done at the end of the case, when all the evidence has been presented and the weight of a particular piece of evidence can be considered in the context of the other evidence allowed in the case. What the court needs to do now is to make an initial assessment of the potential weight of the evidence, and whether it is sufficiently substantial to justify admission – in other words, whether it is not "too inconsequential". This determination will often be affected by the facts of the particular case. Of course, it might eventually happen that the evidence, although admitted, proves to be of little probative value given the totality of all the other evidence.

Activity 9.3

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

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

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

(Feedback in tutorial letter)

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

9.2.4 The prejudicial effect of evidence

In preparation:

- **Read Schwikkard § 5 3 5.**

Evidence that is logically relevant may be excluded because of its prejudicial effect on the party against whom it is presented. Prejudice, in this sense, must be correctly understood. If a strong case can be made by presenting evidence with a high probative value against a party, it will be damaging (prejudicial) because it is likely to lead to the court finding against that party. The law of evidence has no problem with this kind of prejudice. In the present instance, however, it is concerned with procedural prejudice, or prejudice that prejudices the party (usually the accused) in the conduct of her defence (*S v Coetzer* 1976 (2) SA 769 (A) 773G–774B). Schwikkard at § 5 3 5 points out that incrimination here will take place in circumstances where the party concerned may be procedurally disadvantaged or otherwise exposed to a lengthy trial involving issues which, though logically relevant, are legally too remote to assist the court in its ultimate decisions. Another example would be where the court admits hearsay evidence. In this sense, it is likely to give rise to procedural prejudice because of the difficulty that the opponent will have in disputing or disproving this evidence (*S v Ndhlovu* 2002 (2) SACR 325 (SCA) para 49; hearsay is dealt with later in the present tutorial letter).

Summary

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

Self-evaluation

Question 1

Fully explain how the decision in S v Shabalala impacts on how the concept of relevance should be understood.

Question 2

What is meant by "relevance"? Fully explain with reference to legislation, decided cases and examples.

(Feedback in tutorial letter)

Learning unit 10

Character evidence

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

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

Orientation

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

Outcomes

Once you have completed this learning unit, you should be able to:

– explain whether an accused may present evidence of his good character
– explain when the state may present evidence of an accused's bad character
– indicate to what extent an accused may be cross-examined on his character
– explain to what extent evidence of an accused's previous convictions is admissible
– explain when, in a case of an indecent nature, evidence of the character of a complainant will be admissible

10.1 THE MEANING OF "CHARACTER"

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

10.2 CHARACTER OF THE PARTIES TO A CIVIL MATTER

In preparation:

- **Read Schwikkard § 6 3.**

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

10.3 THE CHARACTER OF PARTIES TO A CRIMINAL MATTER

10.3.1 Character of the accused

10.3.1.1 General

In preparation:

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

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

10.3.1.2 The accused's good character

In preparation:

- **Read Schwikkard § 6 2 1.**

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

10.3.1.3 The accused's bad character

In preparation:

- **Read Schwikkard § 6 2 2.**

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

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

10.3.1.4 Cross-examining the accused

In preparation:

- **Read section 197 of the Criminal Procedure Act 51 of 1977.**
- **Read Schwikkard § 623.**

Activity 10.1

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

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

(Feedback in tutorial letter)

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

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

10.3.1.5 The accused's previous convictions

In preparation:

- **Read section 211 of the Criminal Procedure Act 51 of 1977.**
- **Read Schwikkard § 624.**

Activity 10.2

Answer the following questions after studying section 211:

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

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

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

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

(Feedback in tutorial letter)

Activity 10.3

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

(Feedback in tutorial letter)

10.3.2 The character of witnesses other than the accused

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

10.3.3 The character of the complainant

In preparation:

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

Example

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

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

Activity 10.4

Answer the following questions after studying section 227:

(1) What does section 227(2)–(4) state about the court's function when evidence of the character of a complainant is to be led in cases of an indecent nature?

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

(3) What does section 227(5) provide for?

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

(5) What does section 227(6) state?

(Feedback in tutorial letter)

Summary

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

Self-evaluation

Question 1

What does section 227 of the Criminal Procedure Act 51 of 1977, as amended, state about the court's function when evidence of the character of a complainant is to be led in cases of an indecent nature?

Question 2

Give a full explanation of the admissibility of evidence regarding the character of the accused. Your answer should include a reference to matters such as legislation, previous convictions and similar fact evidence.

Question 3

A final-year law student is charged with the alleged rape of a fellow student. During the trial, the victim testifies that the rape took place one night after a function, on a deserted part of the campus. She explains that she was involved in a serious wrestle with her assailant and identifies the accused as her attacker. During cross-examination, it is put to her that she is lying, because she couldn't have observed the assailant's identity properly. There was no moon on the night in question and there are no lights in that part of the campus. The accused also cross-examines her about her sexual relations with various other men and indicates that he intends calling witnesses in this regard. The prosecutor responds by calling the complainant's flatmate, who testifies that the complainant gave her a similar version of the events that very same night. She also testifies to what the complainant said about the identity of her assailant.

(1) Fully discuss, with reference to the Criminal Procedure Act 51 of 1977 and guidelines from case law, whether you would also have allowed the questions that were put to the complainant during cross-examination. Also explain whether you will allow him to call witnesses in this regard.
(2) Because of the nature of the crime, the flatmate was allowed to testify as an exception. However, before this exception can apply, certain requirements must be satisfied. Fully discuss the exception and requirements with reference to decided cases. (You will find the answer to this question in the next learning unit.)
(3) If the prosecutor never called the complainant to testify, this changes the nature of the evidence that the flatmate can give. Fully explain whether you would still allow the flatmate to testify in such circumstances. Give a definition of this type of evidence in your answer and explain the exceptions with reference to decided cases. (This issue deals with hearsay evidence – see learning unit 12 in this regard.)

(Feedback in tutorial letter)

Learning unit 11

Previous consistent statements

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

- **Schwikkard**
- **The casebook**

Orientation

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

Outcomes

Once you have completed this learning unit, you should be able to:

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

11.1 DEFINITION OF A PREVIOUS CONSISTENT STATEMENT

In preparation:

- **Read Schwikkard §§ 9 1–9 3.**

A previous consistent statement is

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

Example

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

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

Statement

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

Another witness

It does not matter whether the witness testifying in court (W) is somebody other than the maker of the previous statement (M) – if W gives evidence about the previous consistent statement in order to corroborate M's evidence, it will still comply with the definition. Of course, if W testifies about the previous consistent statement, his evidence can be affected by the hearsay rule (see learning unit 12).

Corroboration

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

11.2 THE RULE IN RESPECT OF ADMISSIBILITY

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

Activity 11.1

If you do not understand this last sentence, go back and attempt, once again, to understand what relevance is all about.

(No feedback)

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

(Feedback in tutorial letter)

11.3 THE EXCEPTIONS TO THE RULE

11.3.1 General

It is generally accepted that there is a set number of exceptions to the basic rule (as stated in 11.2 above). Evidence of a previous consistent statement will be admissible if it falls within one of these exceptions. If not, it cannot be admissible. We will deal in some detail with two important exceptions.

11.3.2 Complaints in sexual cases

In preparation:

- **Study *S v Cornick* 2007 (2) SACR 115 (HHA) according to the guidelines in the casebook.**

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

1. evidence that such a complaint was made
2. evidence about the contents of the complaint

Activity 11.2

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

(Feedback in this study guide)

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

Section 58 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 makes it clear that the court may not draw any inference only from the absence of a previous consistent statement in a case of a sexual nature. The section states:

> Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.

Schwikkard § 9 6 6 points out that the absence of a previous consistent statement does, however, remain one of the factors that "may be taken into account with all other factors and circumstances which may affect credibility and which must ultimately go into the scale to determine whether there is proof beyond reasonable doubt".

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

1. The exception applies to cases of a sexual nature if there has been some degree of assault involved, or if the complainant was the victim of a sexual offence which involved physical contact. In the case of young children, however, no such physical contact is required. Examples of offences where this exception is clearly applicable are rape, indecent assault and incest. It does not matter whether the complainant is male or female.
2. The complaint must have been made at the first reasonable opportunity. What this reasonable opportunity would be depends on the circumstances of each individual case, and factors such as the age and understanding of the complainant and whether contact was made with a person in whom the complainant could confide. The trial court has to exercise a discretion in this regard. An example of this is to be found in *R v Gow* 1940 (2) PH H 148 (C) where the court found it reasonable that a girl who was assaulted on a train did not complain to the ticket inspector, but only later to her mother. Complaints have been admitted even though they may have been made as long as six weeks after the offence.

   Note that section 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 now determines that, in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

   Schwikkard § 9 6 6 points out that this section does not really affect the common law approach in this regard. A complaint made at the first reasonable opportunity can prove consistency and enhance reliability in view of all the other evidence. A court cannot, however, draw an "adverse inference solely from the fact that there was an undue delay between the alleged incident and the first report".

3. The complaint need not have been made totally spontaneously, but may not be made after questioning which can be considered **intimidating** or **leading** (ie putting the words in the complainant's mouth). The court has to decide how much intimidation it will allow before the evidence will become inadmissible. In *S v T* 1963 (1) SA 484 (A), the complainant's mother threatened to hit her with a stick if she did not tell her who had sexually assaulted her. The daughter then identified her stepfather. This evidence was excluded by the court.

4. The complainant has to give evidence. In the absence of any evidence by the complainant, the evidence will be inadmissible because it then stands to be admitted as hearsay, unless it is found to be relevant for some purpose other than proving the content of the complaint (see learning unit 12 for the law regarding hearsay). One such example can be found in *S v R* 1965 (2) SA 463 (W). There, the complainant, whilst distressed and crying and under the influence of alcohol, complained about having been raped almost immediately after the incident. At the time of the trial, however, she could not remember anything about the incident. The court allowed evidence (by another witness) of her complaint and the contents thereof, since it found such evidence relevant to indicate the complainant's state of mind at the time of the incident, and to counter the defence of consent (to sexual intercourse).

11.3.3 To rebut an allegation of fabrication

In preparation:

- **Read Schwikkard § 9 5.**

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

Activity 11.3

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

....

....

(Feedback in tutorial letter)

11.3.4 Other exceptions

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

Summary

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

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

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

Self-evaluation

Question 1

The rule of the law of evidence is that it is inadmissible for a witness to testify that she made a statement consistent with her evidence in court. Does this rule also apply to complaints in sexual cases? Fully discuss with reference to cases and applicable examples.

Question 2

See the self-evaluation question at the end of the previous learning unit.

(Feedback in tutorial letter)

Learning unit 12

Hearsay

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

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

Orientation

So far, we have shown that relevance is the main criterion for admissibility of evidence. In learning unit 9 we indicated that, even though irrelevant evidence will never be admissible, one cannot assume the converse, namely that all relevant evidence will always be admissible. Hearsay evidence is an example of evidence that might be logically quite relevant but which is generally inadmissible. It is inadmissible because it is unreliable, since the witness who gives the hearsay evidence cannot vouch for its reliability. In this learning unit, we look at the definition of hearsay and consider the basic rule regarding its inadmissibility, as well as the exceptions to the basic rule. We will also distinguish hearsay from other parts of the law of evidence that may be confusingly similar.

Outcomes

Once you have completed this learning unit, you should:

- be able to discuss the definition of hearsay evidence in order to identify hearsay and to explain this definition in any answer
- know and always state the general rule regarding the admissibility of hearsay
- know the exceptions to the general rule regarding the admissibility of hearsay, namely
  - ◊ consent
  - ◊ if the other party testifies
  - ◊ if the court exercises a discretion and allows hearsay
  - ◊ common law exceptions
  - ◊ statutory exceptions
- know and explain how the stated principles are applied in practice through the prescribed cases

12.1 INTRODUCTION

In preparation:

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

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

12.2 DEFINITION OF HEARSAY

In terms of section 3(4) of the Law of Evidence Amendment Act 45 of 1988, hearsay evidence "means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

It is necessary to consider the different elements of this definition separately, since this is crucial for a proper understanding of the definition of hearsay.

12.2.1 Evidence, oral or in writing

To begin with, hearsay evidence is evidence given in court. It can either be oral or written evidence. Written evidence will invariably be contained in a document, which means that the principles relating to documentary evidence also come into play.

12.2.2 Probative value

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

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

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

Evidence is always given for a reason – if it has no purpose in a particular case, it will be irrelevant. Therefore, evidence must always provide proof of some fact in issue. When one has to determine the probative value of a certain piece of evidence in a given case, one first has to establish what the reason for that evidence is (in other words, which fact in issue it is supposed to provide proof of). The second question is the extent to which the evidence actually provides proof of the particular fact in issue. If the piece of evidence only provides a little proof, it will have little probative value; if it provides a good deal of proof, it will have a good deal of probative value. One can therefore say that, if hearsay is presented as the truth and in order to prove a fact in dispute, it will generally be inadmissible. If evidence in the form of hearsay is, however, not presented for the truth thereof, but merely to prove that, for example, a certain statement was previously made in order to show the consistency or credibility of a specific witness, it will not be hearsay.

12.2.3 Credibility of a non-witness

The credibility of the witness who is testifying will often be an important factor in determining how much or how little probative value the particular piece of evidence has. The credibility of a person is determined by a combination of factors, such as her truthfulness and trustworthiness, her powers of observation, and her memory. Credibility can be described as the extent to which a person can be believed.

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

12.2.4 Depends upon

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

12.2.5 A person other than the witness

Since a witness, standing in the witness box, can be cross-examined and her reliability tested, and since she can vouch for her own observations, it is only when the credibility of a person other than the witness is involved that the evidence can be hearsay. It makes no difference if the other person will testify at a later stage (see 12.4.3 below).

12.2.6 Summary

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

Activity 12.1

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

(1) A is charged with theft. It is alleged that she took a radio belonging to C from C's house. While giving evidence, C testifies that, although she did not see A taking the radio, her friend F did see A walking from C's house carrying a radio similar to C's. Is C's evidence hearsay?

.... Yes/No

....

(2) Would your answer in (1) have differed had the prosecutor intended to call F as a witness (and F was eventually called as a witness)? Would the evidence given by C be hearsay?

.... Yes/No

....

(Feedback in this study guide)

12.3 THE RULE IN RESPECT OF ADMISSIBILITY

In preparation:

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

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

According to the case of *S v Ndhlovu* 2002 (2) SACR 325 (SCA) (at para 13), the reason for this lack of reliability is twofold. Firstly, hearsay testimony is not subject to the same reliability checks applied to direct testimony (of which the main guarantor would obviously be the right to cross-examine). In the second place, the party opposed to the admission of the hearsay evidence would be procedurally disadvantaged by not being able to "counter effectively inferences that may be drawn from it". According to Cameron JA (at para 17), these factors might even give rise to constitutional concerns and he spells out the duties of a presiding officer in this regard:

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

12.4 THE EXCEPTIONS TO THE RULE

12.4.1 General

Section 3(1) of the Law of Evidence Amendment Act 45 of 1988 specifically states three exceptions to the general rule that hearsay is inadmissible. The section also makes the admissibility of hearsay "subject to the provisions of any other law". This means that there are certain statutory exceptions that also determine the admissibility of hearsay evidence. In addition, the common law exceptions to the hearsay rule could also still apply today – read Schwikkard § 13 7 7 in this regard. It is now necessary to consider these exceptions, namely

- consent
- if the other party testifies
- if the court exercises a discretion and allows hearsay
- common law exceptions
- statutory exceptions

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

12.4.2 Consent

In preparation:

- **Read Schwikkard § 13 5 carefully.**

It is important to remember that the consent must be informed consent. However, the consent need not be expressly given – implied consent by a legal representative has been accepted (*S v Aspeling* 1998 (1) SACR 561 (C) 568).

12.4.3 The other person testifies

In terms of section 3(1)(b), if the person on whose credibility the probative value of the evidence depends testifies at a later stage, the hearsay evidence becomes admissible. However, it was decided in *S v Ndhlovu* 2002 (2) SACR 325 (SCA) (para 34) that section 3(1)(b) cannot be read literally. In other words, the mere fact that the person testifies at a later stage cannot always result in the hearsay evidence being admissible, since this person might not confirm the hearsay evidence. If this person **affirms** the hearsay evidence during subsequent testimony, the hearsay evidence will be admissible in terms of section 3(1)(b). Otherwise, the court found, this exception should be read with section 3(1)(c), which permits the admission of hearsay evidence in the interest of justice (see 12.4.4 below). In summary, the law is stated as follows:

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

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

12.4.4 The discretion of the court

Activity 12.2

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

(Feedback in tutorial letter)

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

12.4.5 Common law exceptions

In preparation:

- **Read Schwikkard chapter 14 and study § 14 2 11.**

It is important that you know about the common law exceptions, because the general principle is that the court should allow hearsay evidence if it would have been admissible under the common law (*Mnyama v Gxalaba* 1990 (1) SA 650 (C)). This does not, however, mean that it will always be necessary for a court to decide whether a specific common law exception should apply.

12.4.6 Statutory exceptions

In preparation:

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

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

12.5 PRACTICAL APPLICATION OF ACT 45 OF 1988

Activity 12.3

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

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

....

....

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

....

....

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

....

....

(Feedback in tutorial letter)

Activity 12.4

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

....

....

(Feedback in tutorial letter)

12.6 DISTINGUISHING HEARSAY FROM CONFUSINGLY SIMILAR CONCEPTS

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

1. First determine whether the witness testifies solely about her own experiences. If the witness relates what another person showed or told her, or what she read or saw of another's observations or experiences, the evidence will generally be hearsay. It is, however, important to determine whether evidence in the form of hearsay is presented as the truth and in order to prove a fact in dispute. If so, it will generally be hearsay. If evidence in the form of hearsay is, however, not presented for the truth thereof, but merely to prove that, for example, a certain statement was previously made, in order to show the consistency or credibility of a specific witness, as in the case of previous consistent statements, it will not be hearsay. Remember that evidence of a previous consistent statement is not given to prove the truth of that statement, but merely to show that a particular witness is consistent in her testimony. Such evidence can never serve as corroboration of the witness's evidence.
2. If the witness in a criminal case tells the court that something was admitted or confessed by another person (see learning unit 14 for the exact meaning of these terms), the admissibility of that evidence should only be determined with reference to the law on admissions (or confessions, depending on the nature of the other person's statement). Although evidence about such statements is strictly speaking hearsay evidence, their admissibility is only determined in terms of the law on admissions and confessions. This is because the Law of Evidence Amendment Act 45 of 1988 gives section 217 and section 219 of the Criminal Procedure Act preference when the admissibility of such statements is determined in criminal proceedings.

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

3. Generally, in all other situations that comply with the definition of hearsay, the law of hearsay will determine the admissibility (or otherwise) of the evidence.

Summary

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

Self-evaluation

Question 1

A well-known businessman, Mr Shakes, is arrested and accused of committing massive fraud and corruption relating to government tenders. It is alleged that he, inter alia, bribed a high-ranking government official in order to obtain many of these tenders. While he is detained, the police search his house and place of business, and also the offices of his attorney. Among other incriminating documentation, they seize a fax that is important proof of the generally corrupt relationship between Mr Shakes and the high-ranking government official. The author of this fax is a foreign national and fears that he will be arrested if he ever sets foot in South Africa. Fully discuss, with reference to section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 and relevant case law, whether you would allow this fax to be handed in as evidence.

Question 2

The owner (E) of a motor vehicle shoots and kills D while he (D) is trying to hijack E's car. E is hereafter charged with murder. During the trial, a newspaper salesperson testifies that E said the following to him: "Yes, I did shoot him, but he tried to steal my car!" How must the admissibility of this evidence be determined – according to the rules regarding the admissibility of admissions and confessions or according to hearsay principles?

(Feedback in tutorial letter)

Learning unit 13

Opinion evidence

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

- **Schwikkard**
- **The casebook**

Orientation

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

Outcomes

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

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

13.1 THE MEANING OF "OPINION"

In preparation:

- **Read Schwikkard § 8 2.**

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

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

proved by the direct evidence of a witness with personal knowledge, or it may be proved by way of inference from other facts which tend logically to prove the fact in issue. As used in the law of evidence, "opinion" has the meaning of an inference or conclusion of fact drawn from other facts.

13.2 ADMISSIBILITY OF OPINION EVIDENCE: GENERAL RULE

In preparation:

- **Read Schwikkard §§ 8 1 and 8 3.**

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

A court need not rely on opinion evidence in respect of matters which require only ordinary knowledge and skill. If the opinion is related to a situation on which the court can deliberate on its own (without requiring the opinion of an expert or a knowledgeable layperson), opinion evidence will be irrelevant and, as a result, inadmissible. Therefore, the opinion evidence will have no probative value. In other words, if the court is as competent as a witness to draw inferences from the evidence, an inference made by a witness (eg regarding the guilt of the accused) will be superfluous and hence irrelevant. On the other hand, it is obvious that, for example, the opinion of a ballistic expert in a case involving a firearm would not be superfluous or irrelevant.

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

13.3 OPINION EVIDENCE GIVEN BY A LAYPERSON

In preparation:

- **Read Schwikkard §§ 8 4 and 8 5.**

Activity 13.1

Answer the following questions after you have read Schwikkard:

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

....

....

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

....

....

(3) Fill in the missing words:

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

(Feedback in tutorial letter)

13.4 THE ADMISSIBILITY AND EVALUATION OF EXPERT EVIDENCE

In preparation:

- **Read Schwikkard § 8 6.**

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

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

1. The court should be satisfied that the expert is capable of giving evidence about the specific issue. In other words, a foundation for the expert's expertise must be established. It is therefore very important to test her expertise by asking searching questions on her qualifications (and even the date when they were obtained), practical experience in her field, as well as her previous track record as an expert witness.
2. Secondly, the court must be generally informed of the reasons and grounds upon which the opinion is based. This will enable the court to compare the expert's findings with other findings of fact in the particular case to see whether the expert's findings are corroborated by them. In the Appellate Division case of *S v September* 1996 (1) SACR 325 (A), for instance, the court a quo's finding on the very point on which the expert witnesses were testifying, was set aside. The reason for this was that the evidence by one of the state witnesses, Dr George, that the accused had lacked criminal capacity with regard to the crime with which he was charged, was preferred by the court a quo over the evidence by Dr Jedaar, who testified that he did, in fact, have criminal capacity. A third doctor, Dr Quail, could not choose between either of the two views. Hefer JA used his common sense and deduced

that, from the accused's calculated behaviour before and after the alleged crimes had been committed, he had not lacked criminal capacity.

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

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

Activity 13.2

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

(No feedback)

13.5 THE RULE IN HOLLINGTON V HEWTHORN

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

Activity 13.3

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

(Hint: You may find some clues to the answer in learning unit 3.)

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

(Feedback in tutorial letter)

Summary

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

Self-evaluation

Question 1

Fully discuss, with reference to decided cases, the requirements for the admissibility of expert evidence.

(Feedback in tutorial letter)

Learning unit 14

The admissibility of admissions and confessions

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

- **Schwikkard**
- **The Criminal Procedure Act 51 of 1977: sections 219A, 217(1) and 218**
- **The Constitution: section 35(1), (2), (3)**
- **The casebook**

Orientation

In this learning unit, we consider the admissibility and proof of relevant statements that are to the detriment of the person from whom they emanate. This type of evidence emanates from a party to the issue and is of major practical importance. A thorough knowledge of it is essential for any practitioner or law enforcement officer.

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

Outcomes

Once you have completed this learning unit, you should be able to:

- explain the difference between admissions and confessions and identify them in a set of facts
- identify and distinguish the various types of admissions in criminal and civil proceedings
- apply the requirements for the admissibility of admissions and confessions to practical situations
- explain when an otherwise inadmissible confession will become admissible
- explain how the Constitution affects the requirements for the admissibility of admissions and confessions
- explain the difference between evidence as to the existence of facts and evidence that the accused pointed out certain facts

- indicate when these types of evidence will be admissible and when they form part of an inadmissible admission or confession
- explain the relationship between the technical requirements for the admissibility of evidence of a pointing out and the Constitution

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14.1 DEFINITION OF AN ADMISSION

In preparation:

- **Read Schwikkard § 16 1.**

An admission can be defined as

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

Example 1

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

Example 2

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

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

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

14.1.1 "A statement"

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

14.1.2 "Or conduct"

In preparation:

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

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

In certain circumstances, a person's silence may amount to an admission, such as when someone is accused of fatherhood and he simply keeps quiet and lowers his head. (This is what happened in *Jacobs v Henning* 1927 TPD 324). In this case, the foundation of a logical inference against the accused was his silence. However, in criminal cases, the courts may be more unwilling to draw a negative inference from conduct than in civil matters. Whereas parties to a civil matter compete on an equal footing, this is not the case in criminal matters and the accused may feel that it will be an act of futility to say anything. The Constitution contains and protects the right to remain silent and the right to be presumed innocent (see learning unit 15. The courts are thereby probably precluded from drawing an adverse inference from the silence of the accused.

14.1.3 "Adverse to the person making it"

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

14.2 VARIOUS FORMS OF ADMISSIONS

14.2.1 Unintentional admissions

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

Activity 14.1

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

....

....

(Feedback in this study guide)

14.2.2 Formal and informal admissions

In preparation:

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

14.2.2.1 The distinction

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

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

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

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

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

Activity 14.2

Indicate whether the following situations relate to a formal or an informal admission or to neither and briefly explain your choice:

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

(2) X's mother confronts him: "Martha tells me that you are the father of her baby girl!" X, who wishes the earth would swallow him up, hangs his head in shame, but cannot find any answer. (formal/informal/neither)

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

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

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

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

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

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

(Feedback in this study guide)

14.2.2.2 Proving a formal admission

14.2.2.2.1 In civil proceedings

In preparation:

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

Activity 14.3

Answer the following questions:

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

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

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

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

....

....

(Feedback in tutorial letter)

14.2.2.2.2 In criminal proceedings

In preparation:

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

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

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

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

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

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

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

- For purposes of the present discussion, the facts of the case (421f–422d) are of no importance and you may skip them.
- At 424a to 424c the court gives a brief exposition of the onus of proof in criminal proceedings. This provides a good example of how many aspects of the law of evidence may be applicable to one case.
- Study the discussion from 424g up to the end of the quotation from *Valachia* (at 425e). The court then discusses various other decisions on the matter with which you do not need to concern yourself too much. However, you should study the summary at 428a to 428c.

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

14.2.3 Vicarious admissions

In preparation:

- **Read Schwikkard § 16 4.**

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

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

14.2.4 Statements made without prejudice

In preparation:

- **Read Schwikkard § 16 6.**

Activity 14.4

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

....

....

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

....

....

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

....

....

(4) State whether the following statements are true or false:

(a) Statements made without prejudice occur only in civil matters.
(b) If such a statement is accompanied by a threat of litigation, the statement will no longer be privileged.

(Feedback in tutorial letter)

14.3 DEFINITION OF A CONFESSION

In preparation:

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

Activity 14.5

Answer the following questions after reading the *Becker* case:

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

....

....

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

....

....

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

....

....

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

....

....

(Feedback in tutorial letter)

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

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

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

- **Study** *S v Yende* 1987 (3) SA 367 (A) 374C–375E. You must read the various points of view which are mentioned at 372H–374C, but you need not study them.
- **Read** *S v Grove-Mitchell* 1975 (3) SA 417 (A). Read the case as described in the casebook. The last section of the decision, which starts at 419H, is of no importance here.
- **Read** *S v Nyembe* 1982 (1) SA 835 (A) 839H–840C. You need to read only the section 839G–840C.
- **Read** the case as described in the casebook. Below you will be given the opportunity to assess whether the confession was found to be admissible.
- **Read** *S v Latha* 1994 (1) SACR 447 (A) 453h–454i. You need to read only section 453h–454i. Read the case as described in the casebook.

Activity 14.6

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

(Feedback in tutorial letter)

Note that a confession is not a statement made voluntarily by a person in his sound and sober senses and without undue influence. The essence of the definition of a confession is that it is a statement by a person in which the commission of a crime is fully admitted without reservation. (You must, of course, study the definition as dealt with above). Whether the statement was made voluntarily by a person in his sound and sober senses and without undue influence, has nothing at all to do with the question whether the statement is a confession or not. These factors are the requirements for the admissibility of a confession and are discussed below. However, one cannot know that they are involved unless you have first determined that the statement is, in fact, a confession. Because they are separate issues, (1) the definition of a confession and (2) the requirements for the admissibility of a confession are dealt with separately in this learning unit. You should also keep them apart in this way. This means that if you have to establish whether a statement is an admission or a confession, the voluntariness of the statement has no bearing on the answer. It is only once you have established that the nature of a statement is, for argument's sake, a confession, that you will apply the requirements for the admissibility of a confession. Also, if these requirements are not complied with, it does not affect the nature of the statement as a confession, but only its admissibility – the statement, once determined to be a confession, remains a confession and cannot become something else because the requirements for its admissibility have not been complied with. It can only be an admissible confession or an inadmissible confession.

Also, the term "statement" refers to any "declaration" – see the glossary at the end of the study guide. It is not restricted to formal statements made to the police or to one's lawyer. It also includes anything that a friend might have told you informally.

Finally, it is not a requirement for the admissibility of a confession that the confession must be made to a police officer or magistrate. It can also be made to any private person. In fact, you can be compelled to testify in court about a confession which a friend of yours made to you, provided that it complies with the normal three admissibility requirements for a confession (see later in this learning unit).

14.4 THE ADMISSIBILITY OF AN ADMISSION IN CIVIL MATTERS

In preparation:

- **Read Schwikkard § 16 2.**

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

14.5 THE ADMISSIBILITY OF AN ADMISSION IN CRIMINAL MATTERS

In preparation:

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

14.5.1 Section 219A

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

Activity 14.7

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

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

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

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

(Feedback in study guide)

14.5.2 "Made voluntarily"

In preparation:

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

It is accepted that the requirement of voluntariness in the Criminal Procedure Act is the same as that of the common law. *R v Barlin* 1926 AD 459 still provides an authoritative discussion on the common law position.

How to read *R v Barlin* 1926 AD 459:

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

Activity 14.8

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

(Feedback in tutorial letter)

Activity 14.9

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

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

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

(Feedback in tutorial letter)

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

14.5.3 Procedure

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

14.6 THE ADMISSIBILITY OF A CONFESSION

In preparation:

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

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

1. freely and voluntarily
2. by a person in his sound and sober senses
3. without being unduly influenced thereto

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

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

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

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

14.6.1 The first three requirements

In preparation:

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

Activity 14.10

Answer the following questions from Schwikkard:

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

....

....

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

....

....

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

....

....

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

(1) Explain the test which is used to determine whether there was undue influence in a specific instance or not.

....

....

(Feedback in tutorial letter)

14.6.2 The fourth requirement

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

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

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

14.6.3 Practical examples of the application of the requirements

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

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

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

14.6.4 The admittance of an otherwise inadmissible confession

In preparation:

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

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

Activity 14.11

Answer the following questions after reading *S v Nieuwoudt*:

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

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

(Feedback in tutorial letter)

14.7 DETERMINING THE ADMISSIBILITY OF ADMISSIONS AND CONFESSIONS

In preparation:

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

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

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

You need to read this case from 495h to 497b only. It gives a typical explanation of the problems which courts experience in assessing the evidence in a trial within a trial in order to determine whether or not a confession was made freely and voluntarily.

Activity 14.12

Answer the following questions after reading Schwikkard:

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

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

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

(Feedback in tutorial letter)

14.8 REQUIREMENTS FOR ADMISSIBILITY OF ADMISSIONS AND CONFESSIONS, AND THE CONSTITUTION

In preparation:

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

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

Example

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

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

Example 1

A suspect is arrested by a police sergeant for an alleged rape. During the arrest it is explained to him that he has the right to remain silent and that, if he says anything, it could later be used as evidence against him. The suspect refuses to say anything and is detained in the police cells. After a day in the cells, he calls the investigating officer and indicates that he wants to make a confession. The investigating officer once again warns him in terms of section 35(1)(b) of the Constitution and then takes him to a magistrate to take down the confession. Before taking down the confession, the magistrate also warns the suspect in terms of section 35(1)(b) and thereafter takes down the confession. During the subsequent trial, the accused alleges that, although the statutory requirements for the admissibility of confessions were met, he was never informed about his right to a legal representative in terms of section 35(2)(b) of the Constitution.

Example 2

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

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

The answer is found in section 35(5) of the Constitution which states that any evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. A full discussion of the exclusion of unconstitutionally obtained evidence is beyond the scope of this course, but you can learn more about the practical application of section 35(5) from Schwikkard and the following cases in your casebook:

- *S v Mthembu* 2008 (2) SACR 407 (SCA)
- *S v Mphala* 1998 (1) SACR 388 (W)
- *S v Pillay and Others* 2004 (2) SACR 419 (SCA)

Note that you do not need to study these cases for purposes of the examination.

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

In preparation:

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

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

Example

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

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

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

14.10 THE ADMISSIBILITY OF EVIDENCE OF A POINTING OUT

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

14.10.1 Decided cases

In preparation:

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

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

Activity 14.13

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

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

(Feedback in tutorial letter)

Summary

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

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

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

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

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

Self-evaluation

Question 1

The accused (A) is charged with the rape of a niece (C). C testified at the trial as to what had happened to her during the rape, and the prosecution led supporting evidence in the form of an agreement reached between A and the family of C. This agreement was mediated by S, an upstanding member of the local community. A did not admit verbally to having raped C, but he did sign the agreement in terms of which he had to pay a fine of 17 cattle to C. The agreement's heading read: "On the matter of the rape of [C] by [A]." At the trial, S testified about the signing of the agreement and the facts occurring at the time. Answer the following questions, with reference to authority, where applicable:

(1) Fully discuss, with reference to authority, the nature of S's evidence.
(2) Assume that A, instead of keeping quiet, stated during the signing of the agreement that: "Yes, I should not have done this to C." Fully discuss, with reference to S v Yende 1987 (3)

SA 367 (A), how it should be determined what the nature of A's statement is in such an instance. Give full definitions to explain your answer.

Question 2

X is arrested and charged with the murder of a woman whom he had recently married. The victim was found dead in her bath. The investigating officer, a captain in the SAPS, tells X that the police are also investigating other murder cases against him and that he would possibly not be charged with the other murders if he confesses to the current charge against him. X goes ahead and confesses to the murder. Fully discuss the admissibility of X's confession to the investigating officer.

Question 3

If a confession is made to a peace officer who is not a justice of the peace or a magistrate, the Criminal Procedure Act 51 of 1977 states that the confession has to be confirmed and reduced to writing in the presence of a magistrate or a justice of the peace. What is the difference between a peace officer and a justice of the peace? Briefly explain.

Question 4

During a trial a dispute arises over the admissibility of a confession. Explain the procedure that will be used to resolve this dispute. Also explain whether an otherwise inadmissible confession can later become admissible.

Question 5

X manages to commit the perfect murder by drowning his girlfriend while taking a swim at a beach known for its strong currents and dangerous rocks. A lifeguard who was on duty at the time later testifies on behalf of X that X came running from the sea stating that he became separated from his girlfriend while swimming and that she is missing. The next day, her body washes up on the beach and the coroner (Dr Quincy) later finds that her death was caused by drowning. Most probably this happened after she had hit her head against a rock, because she had some head injuries. He also notes some injuries to her neck. X receives a large amount of money because of a life insurance policy that was taken out not long before his girlfriend's death. Shortly before spending nearly all the money, X's conscience gets the better of him and he decides to confide in a priest. He tells the priest that he caused the death of his girlfriend and that he wants to give himself up to the police. The priest phones the police and X is arrested. While in custody, X changes his story and decides to plead not guilty.

(1) An important piece of evidence against X is the statement he made to the priest. Is this statement an admission or a confession? Fully discuss with reference to authority. (Do not include any reference to the requirements for the admissibility of these statements in your answer).
(2) Mention and explain the requirements for the admissibility of a confession made to the priest. Are these requirements different from a confession made to a peace officer?

Question 6

X is arrested and charged with the murder of a woman whom he had recently married. The victim was found dead in her bath. The investigating officer, a captain in the SAPS, tells X that the police are also investigating other murder cases against him and that he would possibly not be charged with the other murders if he confesses to the current charge against him. X goes ahead and confesses to the murder and also proceeds to point out a pair of gloves hidden away in his garage. This pair of gloves was allegedly used in the process of drowning the victim and has some of her hair attached to them. During the trial, however, the accused, who stands *to benefit financially from the woman's death, alleges that the confession was not voluntarily made and also that the woman's death resulted from an epileptic fit.*

(1) Fully discuss the admissibility of X's confession to the investigating officer.
(2) Discuss the admissibility of X's pointing out of the gloves as evidence in terms of section 218(2) of the Criminal Procedure Act 51 of 1977.
(3) Discuss the admissibility of the gloves as evidence in terms of section 218(1) of the Criminal Procedure Act 51 of 1977.
(4) Discuss the admissibility of the gloves as derivative real evidence in terms of section 35(5) of the Constitution of the Republic of South Africa, 1996.

(Feedback in tutorial letter)

Learning unit 15

Privilege

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

- **Schwikkard**
- **The Constitution: section 35**
- **The Criminal Procedure Act 51 of 1977: sections 200, 201, 203 and 204**
- **The casebook**

Orientation

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

We will explain some features common to the various privileges, as well as the privilege against self-incrimination and the marital privilege. We will also deal with the other forms of privilege, such as legal-professional privilege and police docket privilege.

Outcomes

Once you have completed this learning unit, you should be able to:

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

15.1 GENERAL OVERVIEW

In preparation:

- **Read Schwikkard § 10.1.**

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

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

15.1.1 Private privilege

Take note of the following important points related to private privilege:

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

15.1.2 State privilege

You can read more about state privilege in Schwikkard § 11 1, but you do not need to know the content for purposes of the exam.

15.2 PRIVILEGE AGAINST SELF-INCRIMINATION

15.2.1 Introduction

In preparation:

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

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

15.2.2 The accused

In preparation:

- **Read Schwikkard § 10 2 3.**

In 15.2.1 you were instructed to study certain provisions of the Constitution. In particular the provisions which guarantee the accused the right to a fair trial include protection against self-incrimination. These include the right not to be a compellable witness against oneself. The accused's right against self-incrimination finds application at different stages of the criminal process and the accused must be informed of this right at all these stages in both pre-trial and trial proceedings.

15.2.2.1 Trial proceedings

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

15.2.2.2 Pre-trialproceedings

In preparation:

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

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

> Consequently, a person who is questioned by the police, and who does not know that he or she is not obliged to answer the questions, and feels compelled to speak, will be detained for the purposes of the Constitution.

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

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

Activity 15.1

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

(Feedback in tutorial letter)

15.2.3 The witness in criminal proceedings

In preparation:

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

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

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

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

This is not a problem, however, as the privilege against self-incrimination already does so.

Activity 15.2

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

(No feedback)

Activity 15.3

Answer the following questions using the above material:

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

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

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

(Feedback in tutorial letter)

Activity 15.4

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

(Feedback in tutorial letter)

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

15.2.4 The witness in civil proceedings

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

15.3 MARITAL PRIVILEGE

In preparation:

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

Activity 15.5

Answer the following questions:

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

(2) By whom may this privilege be claimed?

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

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

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

(Feedback in tutorial letter)

15.4 LEGAL-PROFESSIONAL PRIVILEGE

In preparation:

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

15.4.1 General

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

The privilege of the client involves the following two things:

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

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

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

15.4.2 Statutory provision

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

15.4.3 Purpose of legal-professional privilege

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

15.4.4 Legal-professional privilege and the client

Legal-professional privilege entails the following:

1. It is the privilege of the client. In practice, the legal adviser will usually claim it on behalf of the client. However, if the client and the adviser have a difference of opinion on whether or not to claim this privilege, the court will accede to the client's choice. The court may not force the client to claim the privilege, although it may advise the client of the existence of this right.
2. The client may waive the privilege expressly or implicitly. It may be difficult to determine whether waiver has taken place by implication, but examples include situations where the client reveals the content of a statement or cross-examines on it. A mere reference to a particular statement is not enough – the content must have been revealed.

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

15.4.5 The requirements

Activity 15.6

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

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

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

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

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

(Feedback in tutorial letter)

15.4.5.1 Involvement of third parties

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

15.4.5.1.1 Agents

15.5 DEFINITION OF "AGENT"

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

Examples of agents are

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

15.5.5.1.1 Legal position of an agent

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

1. with the purpose of enabling the legal adviser to advise the client, and
2. after litigation has been contemplated, this communication will be privileged. The privilege will still belong to the client, who is the only person able to waive it.

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

15.5.5.1.2 Independent third parties

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

1. with the purpose of enabling the legal adviser to advise the client, and
2. after litigation has been contemplated, this communication will be privileged, but the independent third party cannot be prevented from disclosing this communication

should she prefer to do so. This means that the third party may refuse to disclose the information, but may not be prevented from doing so.

Activity 15.7

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

....

....

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

....

....

(Feedback in this study guide)

15.6 PROFESSIONAL PRIVILEGE FOR OTHER PROFESSIONS

In preparation:

- **Study Schwikkard § 10 4.**

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

15.7 POLICE DOCKET PRIVILEGE

15.7.1 General

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

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

15.7.2 The privilege today

In preparation:

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

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

- The facts of the case are of no importance.
- Read paragraphs [14] and [15] for a brief overview of the common law position.
- Know which provisions of the interim Constitution are of importance in dealing with this question. (The counterparts of these sections in the interim Constitution are the following in the new Constitution: for s 23, s 32; for s 25(3), s 35(3); for s 33, s 36. Remember that all these provisions are substantially different in the final Constitution, although these changes do not affect the decision in *Shabalala*.)
- Read paragraph [30].
- Study paragraphs [37]–[41].
- If you are interested in following the arguments of the various parties to the issue, you will find these and the court's answer to all of them in paragraphs [43]–[49].
- Study paragraph [50].
- Carefully read paragraphs [51]–[56].
- Read paragraphs [57]–[58].
- Study the six points in the summary of paragraph [72A] in conjunction with what you have already studied.

Activity 15.8

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

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....

(Feedback in tutorial letter)

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

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

However, this should not be seen as an unfettered discretion available to the prosecution to refuse to disclose information in the docket, and there may be circumstances in which the accused should have access to the docket (see Schwikkard § 11 5 2 for a discussion in this regard). Access should, for example, be granted where this would enable a bail applicant to place enough information before the court in order to enable the court to take a proper decision on bail. Access should also be granted where criminal proceedings have been instituted after a written statement has been made by the bail applicant to a peace officer. In terms of the Criminal Procedure Act 51 of 1977, the person in possession of such a statement must give the person who made the statement, at his request, a copy of such statement. This is necessary in order to ensure the applicant's constitutional right to a fair bail hearing. Because the prosecution's witnesses can look at their statements in the police docket prior to testifying, a bail applicant should enjoy a similar right.

Summary

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

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

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

Parties to a marriage are sometimes also protected by privilege and do not have to disclose the content of communications between them.

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

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

Self-evaluation

Question 1

Sipho and his wife, Eunice, had some difficulties in their marriage for some time. One evening, while Sipho was allegedly working late, Eunice was stabbed to death. After a long investigation, the police arrested and charged Sipho with the murder of Eunice. At the trial, Sipho's attorney attempts to have Innocent, Sipho's neighbour, testify that his wife, Joyce, had told him (Innocent) that she was having an affair with Sipho, and that she had murdered Eunice out of jealousy *and a "passionate desire" to be with Sipho. Innocent is ready and willing to testify. Although aware of the trial, Joyce decides to stay at home.*

(1) The prosecution objects to the admissibility of Innocent's evidence because it alleges that Joyce's statement is privileged information. Do you agree? Fully explain with reference to the content of marital privilege.

Question 2

Should there be legal recognition of a privilege attaching to communications between persons in professional relationships other than the lawyer-client relationship? Fully explain with reference to Schwikkard § 10 4 and Wigmore.

Question 3

One requirement for legal-professional privilege is that the communication between a client and legal adviser must be made in confidence. Fully explain how this requirement is achieved in the case of agents and independent third parties.

(Feedback in tutorial letter)

Part 4

The evaluation of evidence

Contents

Learning unit 16

The onus of proof in criminal and civil matters

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

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

Orientation

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

In the present learning unit the onus of proof in criminal and civil cases will be discussed. The learning unit will deal with the weight of evidence and how the court decides whether specific evidence is of sufficient value to comply with the standard of proof required.

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

Outcomes

Once you have completed this learning unit, you should be able to:

- explain the difference in the operation of the onus of proof and the evidentiary burden
- determine what type of onus will rest on an accused in a criminal matter where insanity becomes relevant
- solve the question of the difference between the onus of proof in criminal matters and the onus of proof in civil matters with reference to different issues, using practical examples
- explain the role legislation plays in determining the incidence of the onus of proof
- determine where the onus of proof will lie in a given case

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

In preparation:

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

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

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

Activity 16.1

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

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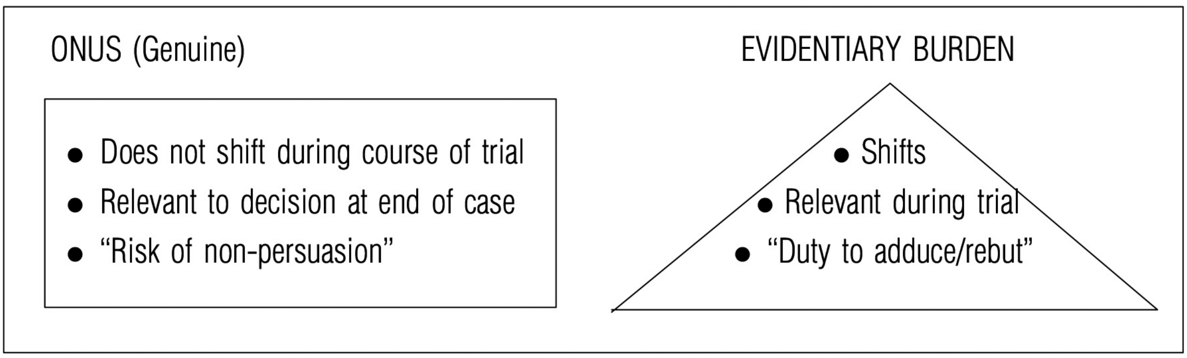
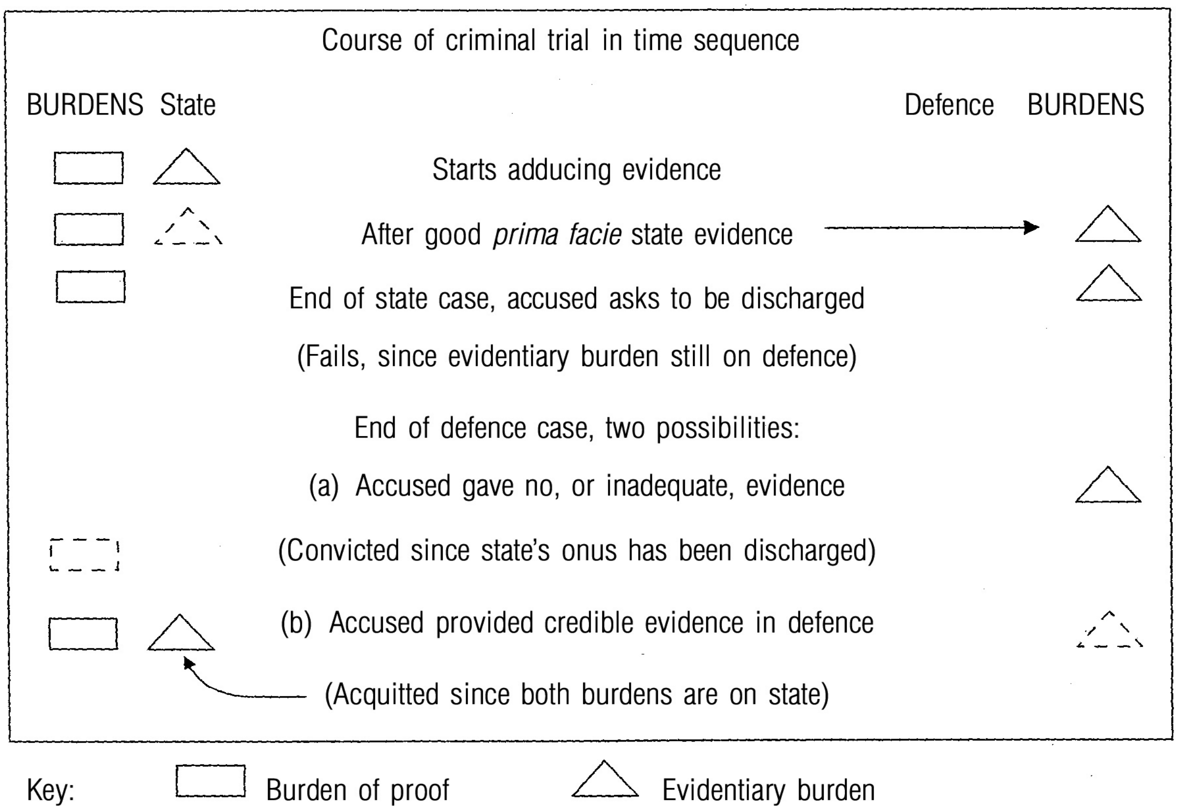
(Feedback in tutorial letter)

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



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

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



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

Activity 16.2

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.)

....

....

(Feedback in tutorial letter)

16.3 THE INCIDENCE OF THE ONUS OF PROOF IN CRIMINAL CASES

In preparation:

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

The matter of the incidence of the onus of proof is not really contentious in criminal matters. The state always bears the onus of proof with regard to all issues, even with regard to defences which the accused may raise. Traditionally, there has been an exception to this rule, namely in the case of a lack of criminal capacity as a result of mental illness or defect (the so-called M'Naghten rule). The question used to be whether this rule should simply be seen as a constitutional limitation which leaves the true onus of proof to the accused, or whether a better option might not simply be to leave her with an evidentiary burden.

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

Activity 16.3

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

(Feedback in tutorial letter)

16.4 THE RIGHT TO SILENCE AND THE ONUS OF PROOF

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

In the past the mere silence of the accused was seen as a sure sign of a guilty conscience – why would a person who is innocent not use the opportunity to protest her innocence?

Silence was used as a form of circumstantial evidence to bolster a weak case on the part of the state. Now the Constitution has changed everything. This type of inference may no longer be made, since a person has the constitutional right to remain silent if she wishes to. This does not mean that she cannot be convicted, however. If the state case is in no way contested by the accused or her legal team, the court will have no other option but to convict, provided that the other prerequisites for conviction have been complied with. This is then done objectively and the evidentiary burden rests on her because of the good evidence the state was able to produce, which she did nothing to rebut (consult the second diagram above again.)

In *S v Hena and Another* 2006 (2) SACR 33 (SE), the accused failed to testify themselves after the state's case had been closed. The judge emphasised that the lack of evidence on the side of the defence in order to rebut the state's case did not mean an automatic conviction of such accused. Silence on the part of the accused could not make up for deficiencies in the state's case. On the other hand, Accused Number 2 had been linked by means of DNA evidence to the case of the state. Because he had done nothing to controvert this evidence, the conviction stood.

16.5 THE STANDARD OF PROOF IN CRIMINAL MATTERS

In preparation:

- **Read Schwikkard § 31 6.**

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

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

16.6 THE ONUS OF PROOF IN CIVIL CASES

16.6.1 The incidence of the onus of proof in civil cases

In preparation:

- **Read Schwikkard § 32 2.**

In civil cases the basic rule as far as onus of proof is concerned is that he who alleges must prove. This rule is derived from the decision in *Pillay v Krishna* 1946 AD 946 951–953.

This decision illustrates the fact that the true onus of proof is usually established by the pleadings.

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

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

Refer back to 16.1 and 16.2 above if you still have any trouble distinguishing between the true onus and the evidentiary burden, and the interaction between the two. Basically, the onus boils down to the fact that if there is still any doubt at the end of a case, the decision will go against the person who bears the onus.

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

Activity 16.4

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.

(Feedback in study guide)

16.6.2 Different issues may generate different onuses of proof

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

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

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

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

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

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

In a civil case, the plaintiff claims damages from the defendant, since he claims that the defendant assaulted him. This is the first issue and obviously the onus of proving the assault rests on the plaintiff because of the rule "he who alleges must prove". However, it may turn out that the question of an assault by the defendant on the plaintiff is not even in dispute, since the defendant admits the assault but claims that it was done in self-defence against an attack launched by the plaintiff. This is the second issue, and the onus to prove that the prerequisites for self-defence existed rests upon the defendant. Again, this might not even be in dispute, since the plaintiff might acknowledge the primary attack from his side, acknowledge also that the defendant might have started off acting in lawful self-defence, but then claim that the defendant exceeded the bounds of his self-defence, that he went much further in the counter-attack than was necessary to ward off the primary attack, and that he was 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.

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.

16.6.3 The standard of proof in civil cases

In preparation:

- **Read Schwikkard § 32 7.**

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

According to Zeffertt et al (55–57), it is easier to describe the civil standard than the criminal standard, since the civil standard consists of a **comparative** or **relative** standard (on a balance of probabilities) rather than a **quantitative** test (beyond reasonable doubt). The quantitative test determines how much evidence is required to comply with the standard.

However, this test does not provide much help with regard to the determination of the ideal quantity. A comparative test is easier to understand, because it is not so difficult to say that one thing is more probable than another. In this way, one has also determined on whose side the balance of probabilities lies.

Summary

In this learning unit, you learnt to distinguish between the so-called true onus of proof and the evidentiary burden. You also looked at the interaction between the two. The implications of the Constitution for the incidence of the onus of proof, especially in cases of insanity, were also considered. We also dealt with the question of what the standard of proof really comprises in criminal and civil cases. We have seen that, in civil cases, the onus of proof is more complex than in criminal cases. For this reason, there has been much more litigation in civil cases pertaining to matters such as the incidence of the onus of proof, particularly when several issues result in different onuses of proof.

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".)

Question 2

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

Question 3

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

Question 4

The onus of proof in civil matters 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.

(Feedback in tutorial letter)

Learning unit 17

The assessment of evidence

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

- **Schwikkard**
- **The casebook**

Orientation

In the previous learning unit, we dealt with the onus of proof, the incidence of that onus, and the standard of proof required to answer that onus in both criminal and civil cases. In the following learning units, we will look at some of the main principles and rules that apply when the presiding officer evaluates the weight of evidential material in order to decide whether this standard has been met. You will see that, at the end of the trial, the weight of the admitted evidential material becomes of cardinal importance. In this learning unit, we also look at how the court should go about evaluating circumstantial evidence.

Outcomes

Once you have completed this learning unit, you should be able to:

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

17.1 INTRODUCTION

In preparation:

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

In *S v Chabalala* 2003 (1) SACR 134 (SCA), the Supreme Court of Appeal pointed out that the correct approach in evaluating evidence is to weigh up all the elements that point towards the guilt of the accused against all those elements that are indicative of his or her innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance is so heavily in favour of the state that it excludes any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party was decisive, but that can be only an *ex post facto* determination and a trial court should avoid the temptation to latch onto one obvious aspect without assessing it within the context of the full picture presented in evidence.

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

17.2 BASIC PRINCIPLES

In preparation:

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

Activity 17.1

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

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(Feedback in tutorial letter)

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. Some of these issues, such as circumstantial evidence, corroboration and the cautionary rules, will be discussed in the rest of the tutorial letter (you will find an extensive list of other relevant issues in Schwikkard, chapter 30).

17.3 CIRCUMSTANTIAL EVIDENCE

17.3.1 What is circumstantial evidence?

Direct evidence is given when an eyewitness 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 eyewitness finds someone fatally stabbed inside the house. Other examples of circumstantial evidence are fingerprint evidence and DNA tests performed on the tissue of the suspect in a rape case.

17.3.2 The evaluation of circumstantial evidence

In preparation:

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

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

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

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

Note that circumstantial evidence is not necessarily weaker than direct evidence and that the cumulative effect of pieces of circumstantial evidence could have even more value than direct evidence. Also, recent strides in technology have greatly strengthened some classes of circumstantial evidence. Here one thinks of fingerprint and DNA evidence.

Activity 17.2

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.

....

....

(Feedback in this study guide)

Summary

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

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.

Question 2

A and C have ended their six-month relationship. 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.

(1) A realises what he has done and confesses. Assume that the only evidence available is A's confession. What evidential rule is applicable? Discuss in detail with reference to applicable case law.
(2) After considering the situation, B decides that he wishes to become a prosecution witness. What evidential rule is applicable to B's evidence? Discuss in detail with reference to applicable case law. (See learning unit 5.)
(3) Assume that you are the judicial officer in this matter. Outline the basic principles that you would apply in assessing the evidence presented in this case.

(Feedback in tutorial letter)

Learning unit 18

Corroboration and the cautionary rule

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

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

Orientation

In making its judgment, a court cannot rely on evidence which is not trustworthy. If evidence seems suspect for any reason (eg the witness testifies hesitantly, displays bias or contradicts herself), it is imperative for the court to examine whether this evidence is supported or backed up by other evidence which could indicate whether this seemingly untrustworthy evidence is, indeed, trustworthy. In situations that are traditionally suspect, courts have developed the so-called “cautionary rule”, and, here, corroboration is also required. This rule was developed through practice, which has taught us that certain types of evidence cannot be relied upon unless accompanied by some satisfactory indication that the evidence is trustworthy. This may be the case either because of the type of witness giving the evidence or because of the subject matter of the evidence. The principle that certain evidence should be backed up or corroborated is the focus of this learning unit.

The rules regarding corroboration are derived from English common law and the present legal position in South Africa is that corroboration is required by statute in only one case. This is required when, in terms of section 209 of the Criminal Procedure Act 51 of 1977, the state relies for a conviction on a single confession by an accused that she committed the offence in question. A discussion of this issue is beyond the scope of this module, but you can learn more about it in Schwikkard.

Outcomes

Once you have completed this learning unit, you should be able to:

– define “corroboration” and be able to apply it to a set of facts
– explain why the cautionary rule does not affect the admissibility of evidence, only its probative value
– be in a position, where applicable, to apply the cautionary rule to a given set of facts

18.1 DEFINITION OF CORROBORATION

Corroboration is

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

18.1.1 Requirements for corroboration

In preparation:

- **Read Schwikkard §§ 30 3 1 to 30 3 2.**

Corroborative evidence must meet the following requirements:

1. Corroborative evidence (evidence which confirms or supports) has to be admissible. Inadmissible evidence, such as inadmissible hearsay evidence, cannot be used in a court and therefore may also not be used as corroborative evidence.
2. Corroborative evidence may take on a variety of forms and does not consist solely of oral evidence. Documentary evidence or real evidence (eg fingerprints) may also serve as corroborative evidence. Likewise, a formal admission or even a question under cross- examination may provide corroborative evidence.
3. Corroboration should consist of independent evidence, that is, evidence that does not come from the same source as the (untrustworthy) evidence which the corroborative evidence seeks to back up. This principle is derived from the rule against self-corroboration. The original reason for requiring corroboration is the suspicion that the evidence may be untrustworthy and therefore it is obvious that the corroborative evidence should come from a source other than that which appears to be suspicious or untrustworthy.
4. The corroborative evidence should confirm the other evidence. Section 209 of the Criminal Procedure Act 51 of 1977, which provides for the corroboration of a confession, requires that the confession be "confirmed in a material aspect". There are wide-ranging interpretations by our courts of the meaning of this phrase with respect to the nature of corroboration. The requirements for corroboration may vary depending on how suspicious the evidence is. It is not possible to formulate general rules on the exact nature or quantity of evidence which will result in corroboration, except to say that the corroborating evidence should be shown to be trustworthy. This would be the case, for instance, where the accused confesses to the charge of murdering her victim by poisoning him with arsenic, and there is evidence of a quantity of arsenic in the body of the deceased. The evidence of the post-mortem report would then confirm or corroborate this confession.

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

Activity 18.1

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.

....

....

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

....

....

(Feedback in tutorial letter)

18.2 THE CAUTIONARY RULE

18.2.1 Definition of the cautionary rule

In preparation:

- **Read Schwikkard § 30 11.**

The cautionary rule is

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

This rule has developed from practice and is independent of legislation. However, it may not be disregarded. Non-compliance with the cautionary rule will generally result in the finding of the court being set aside, as was done in *R v Mbonambi* 1957 (3) SA 232 (A). On the other hand, our courts tend not to apply this rule in such a formalistic manner that the exercise of caution is allowed to displace the exercise of common sense (*R v J* 1966

(1) SA 88 (SRA) 90). In the end, this rule only guides the court in answering the bigger question: has the party carrying the burden of proof satisfied this burden?

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

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

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

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

18.3 SPECIFIC INSTANCES

18.3.1 Introduction

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

18.3.2 The accomplice

In preparation:

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

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

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

Activity 18.2

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

....

....

(Feedback in tutorial letter)

18.3.3 Evidence of identification

In preparation:

- **Read Schwikkard § 30 11 2.**
- **Read *S v Moti* 1998 (2) SACR 245 (SCA) in accordance with the guidelines in the casebook.**

You need to read only the following pages for current purposes: the summary of facts (247i–248e); the summary of the judgment (248e–249d).

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

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

Activity 18.3

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

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

....

....

(Feedback in tutorial letter)

Activity 18.4

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

....

....

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

....

....

(Feedback in tutorial letter)

18.3.4 Children

In preparation:

- **Read Schwikkard § 30 11 3.**

Make sure that you understand the difference between a child's competence to testify and the situations in which the cautionary rule will be applied to a child witness (see learning unit 5 on the competence of children as witnesses).

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

The court has to be sure that the child understands the importance of telling the truth. Trustworthiness depends on a number of factors such as the child's ability to observe what happened, to remember what he observed, and to tell the court about these observations (*Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A)).

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

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

18.3.5 The single witness

In preparation:

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

The statutory provisions make it possible for a court to convict a person or to give judgment against a party on the evidence of a single witness alone. If the court is satisfied that the evidence given by the single witness is satisfactory, it may, but need not, regard that evidence as sufficient to convict the accused. The application of the cautionary rule in the case of a single witness has been dealt with in numerous cases in South African law.

Activity 18.5

Answer the following questions on the basis of *S v Webber* 1971 (3) SA 754 (A):

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

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

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

(Feedback in tutorial letter)

There is no rule-of-thumb test or formula to apply when considering the credibility of a single witness (see *S v Sauls* 1981 (3) SA 172 (A) 180). The evidence of a single witness may be satisfactory even though it is susceptible to criticism. The degree of caution which should be applied to the testimony of a single witness may also be increased by other factors. Where, for instance, the state relies upon the evidence of a single witness and does not adduce other available evidence (such as real or documentary evidence), there is a greater need for caution.

18.3.5.1 *Who are single witnesses?*

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

Example

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

18.3.6 Cases of a sexual nature

In preparation

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

The cautionary rule that used to exist in cases of a sexual nature was effectively abolished in *S v Jackson* 1998 (1) SACR 470 (SCA). In this judgment, Olivier JA pointed out that the "collective wisdom and experience" of judges, upon which the cautionary rule regarding the testimony of a complainant in a case of a sexual nature was said to have been based, had no factual justification and that empirical research which had been done in this regard disproved the idea that women lie more frequently than men, or that they are by nature unreliable witnesses. Another important consideration was that the cautionary rule has collapsed in a number of countries with a legal system similar to ours, such as Canada, England, Australia, New Zealand and Namibia (*S v D* 1992 (1) SA 513 (NmH)). The court reached the conclusion that this cautionary rule was based on outdated and irrational perceptions, and that it unjustly stereotyped complainants in sexual cases as unreliable witnesses. The court also confirmed the rule that the burden is on the state to prove the guilt of the accused beyond reasonable doubt. There needs to be a reason for suggesting that the evidence of the witness may be unreliable.

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

Note that section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 also states that a court may not approach with caution the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court merely on account of the nature of that offence.

18.3.7 Police traps and private detectives

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

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

18.3.8 More than one cautionary rule

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

Summary

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

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

Self-evaluation

Question 1

Explain the relationship between corroboration and the standard of proof.

Question 2

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

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.

Question 4

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

Question 5

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

Question 6

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

Question 7

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 from the line-up. B and D are thereafter charged. Answer the following questions with reference to the trial:

(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 learning unit 6.)
(2) Blood was also found at the scene of the crime and matches the DNA-profile of B. What legal rules are applicable to this type of evidence? (See learning unit 6.)
(3) Explain the competence and compellability of B and D as defence and prosecution witnesses. (See learning unit 5.)
(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.

Question 8

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

(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.
(2) During Mr Whiskey's subsequent prosecution for drunken driving, the only evidence against him (besides the certificate mentioned above) is evidence by the policeman at the roadblock. How would you define and classify this type of evidence? What rule applies with regard to this type of evidence? What decided cases might be relevant to the facts in the present case?
(3) Finally, Mr Whiskey decides to make a confession on the charge of drunken driving. What must happen before he can be convicted on the evidence of the confession alone? Discuss in detail with reference to decided cases.

(Feedback in tutorial letter)

Part 5

Tutorial assistance

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Learning unit 2

Activity 1

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

Learning unit 5

Activity 2

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

Learning unit 11

Activity 2

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

Learning unit 12

Activity 1

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

Learning unit 14

Activity 1

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

Activity 2

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

Learning unit 15

Activity 7

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

Learning unit 17

Activity 2

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

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

Study assistance 2

Glossary

accomplice

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

accused

the person *charged* with the commission of a crime

adjective law

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

administration of justice

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

admissible/admissibility

see learning unit 9

affidavit

a written or oral *statement* made under oath

alternative charge

see *charge*

a quo

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

beyond reasonable doubt

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

capacity (criminal capacity)

a person has criminal capacity when he/she

- can understand that his/her actions are illegal
- can act in accordance with this understanding

cautionary rules

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

see learning unit 10

charge (noun)

the crime for which the *accused* is *charged* (indicted) in court; it is contained in the *charge sheet*, which will read, for example, that the accused is "charged with the crime of theft", followed by further particulars; there can be a **main charge**, which will usually be the most serious crime on which the prosecutor hopes to get a conviction, and an *alternative charge* or charges, which will be lesser crimes of which the accused may be convicted if the main charge fails. Example: If the accused is charged with dealing in drugs (as the main charge), possession of those drugs may be an alternative charge to that main charge; if the accused is charged with drunken driving (as the main charge), driving with too much alcohol in his blood may be a first alternative, and reckless or negligent driving a second alternative

charge sheet

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

circumstantial evidence

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

civil case (action/matter/proceedings)

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

civil liability

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

co-accused

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

collateral facts

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

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

communication

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

compellability/compel

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

competence

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

competent verdict

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

complainant

see *complaint*

complaint

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

convicted

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

corroborate/corroboration

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

credibility

the extent to which the court can believe what the witness says *criminal case (matter/action/proceedings)*

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

cross-examination

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

declarant

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

deduction

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

defendant

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

direct evidence

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

discretion

a power to make a decision by choosing from a number of options; it should be distinguished from a "finding", where a person or body (such as a court) finds what has been proven before it; by applying a discretion the person or body adds to the facts which have been proven. Example 1: When a court imposes sentence, it has to exercise a discretion. Therefore, it not only makes a finding as to the factual matters which influence the appropriate sentence, but also has to make a choice from the sentencing options to decide which sentence will suit the particular case best. Example 2: According to section 35(1)(f) of the Constitution, an arrested person should be released "if the interests of justice permit". The court may make factual findings about the living conditions of the accused, the criminal record of the accused, the strength of the state's case, and so on, but in order to decide whether to release the accused, it has to exercise a discretion – it has to choose between "yes" or "no"

disposition

the real character of a person or the way that person really is *element (of the crime)*

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

evidence

evidential material which is produced in court; in this tutorial letter it therefore does not include the information gathered by the police during the investigation of a case

evidential

by way of *evidence*

evidential matter/material

relating to *evidence*

evidential value

see *probative value*

evidentiary burden

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

evidentiary material

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

examination-in-chief

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

exclusion/excluded (evidence)

inadmissible evidence

exculpatory

denying culpability

expert evidence

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

fact relevant to a fact in issue

see factum probans

facts (in issue/in dispute)

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

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

factum probans

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

fair trial

the constitutional requirement for all trials (see learning unit 3)

from the bar

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

guilty/found guilty

see *convicted*

hearsay (evidence)

see learning unit 12

House of Lords

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

illegal/illegally

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

implication/implicitly

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

inadmissible/inadmissibility

see *admissible*

incriminating (evidence)

indicating culpability (whether criminal or civil)

indemnify

to guarantee that no prosecution will follow

inference

a deduction drawn from certain facts or actions *inspection in loco*

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

intent/intentionally

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

interests of justice

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

investigating police official

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

irrelevant

the opposite of relevant (see learning unit 9)

issue

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

judicial notice

the process through which a court accepts a fact from its own knowledge

jury system/trials

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

justice (of the peace)

see learning unit 14

leading question

a question suggesting the answer

legal adviser

see *legal representative*

legal proceedings

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

legal representative

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

normally Parliament, the body of government responsible for legislation

legitimate inference

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

lesser crimes (offences)

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

logically relevant

see learning unit 9

nexus

a strong, logical connection

objective(ly)

existing outside the mind of an individual; the opposite of *subjective*; one can also say this is general, average knowledge or wisdom which is not influenced by an individual person's own personality, knowledge and other personal characteristics

onus of proof

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

oral evidence

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

peace officer

see learning unit 14

plaintiff

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

plea

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

pleadings

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

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

plea process

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

pointing out

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

police trap

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

potential for harm

the potential of evidence to harm someone (usually the accused); "harm" resulting from the *probative value* of the evidence is not at stake here, but it refers to other factors, such as the inferences and expectations which such evidence may hold (see learning unit 9)

precedent

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

prejudicial potential

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

presenting evidence/presentation of evidence

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

presumption

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

pre-trial proceedings

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

previous consistent statements

see learning unit 11

previous convictions

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

prima facie (case)

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

privilege

a right which entitles one not to disclose certain information (see learning unit 15)

Privy Council

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

probative material

see *evidentiary material*

probative value

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

procedural law

see *adjective law*

proof

having sufficient grounds for a finding on a point in **issue** (see learning unit 9)

prosecutor

the person who charges the *accused* on behalf of the state

proviso

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

public policy

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

refuse (evidence)

inadmissible evidence

relevant/relevance (to a fact in issue)

see learning unit 9

reputation

see learning unit 10

residuary authority

authority beyond the statutory authority which the court is given

residuary clause (section)

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

res ipsa loquitur

"the facts speak for themselves"

self-corroboration

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

self-incriminating

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

settlement

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

statement

a written or spoken declaration, often of a formal kind

statute books

a popular term for the complete collection of statutes

subjective

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

substantive law

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

sui generis

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

testimony

the giving of oral evidence

third (party)

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

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

trial court

the court in which the *trial* takes place; it is distinguished from the Supreme Court of Appeal, amongst others

unfair trial

see *fair trial*

value judgement

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

viva voce (evidence)

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

voluntary/voluntarily

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

waive

to give up willingly

weight (of evidence)

see *probative value*

witness

the person giving oral evidence in court

wrongful

the same as *illegal*