

Chapter One: Evidence law General Introduction

Introduction

The first chapter of this teaching material deals with the introductory or preliminary matters such as the definition, purpose and nature of evidence law. It also presents also study the common law and civil law approaches to evidence law with the various types of evidences. Here it shows the differences between two legal systems in their approach to evidence law.

Moreover, it discusses the evidence law in Ethiopia and the where about of evidence rules and principles in Ethiopia in relation with the general rules of evidence. In addition the chapter reflects the fundamental distinction between the operations of the rules of evidence in the civil context from the criminal context. Finally, the chapter tries to give a highlight on classification of evidence and who show evidence can broadly be classified be it oral, documentary evidence or otherwise.

Chapter Objectives

At the end of this unit, the students are expected to be able to

- describe what law of evidence is all about
- explain the significance of evidence
- identity the differences between the civil law and common law approach to law of evidence and the Ethiopian position
- discuss the concept of evidence law in civil and criminal cases
- discuss the type of evidences

1.1 Meaning, Nature and purpose of Evidence law

1.1.1 Evidence Law defined

What is evidence law?

Before dealing with “evidence law”, it is important to discuss about the concept of “evidence” in general since evidence and law of evidence are two different things. The word “evidence” is originated from a Latin term “*evidentia*” which means to show clearly, to make clear to the sight to discover clearly certain, to ascertain or to prove. Thus, evidence is something, which serves to prove or disprove the existence or non-existence of an alleged fact. The party who alleges the existence of a certain fact has to prove its existence and the party, who denies it, has to disprove its existence or prove its non-existence.

However, all facts traditionally considered, as evidence may not be evidence in the eyes of evidence law. Rather, evidence is something presented before the court for the purpose of proving or disproving an issue under question. In other words, evidence is the means of satisfying the court of the truth or untruth of disputed fact between the parties in their pleadings.

Draft Evidence Rules (DER) defines evidence, as “a means whereby any alleged matter of fact, the truth of which is submitted to investigation, is proved and includes statements by accused persons, admission, Judicial notice, presumptions of law, and observation by the court in its Judicial capacity”. This definition may be more than what you think to be evidence. However, even though the kinds of evidences enumerated under Rule 3 of DER are not exhaustive, it failed to cite “documentary evidence” which is considered as one of reliable evidences, especially in civil cases, as one types of evidence. This seems the result of poor drafts' man ship.

Activity

Discuss the literary meaning of evidence in comparison with evidence in the eyes of the law?

When we come to the meaning of evidence law, different writers defines it according to their own perceptions but with similar messages. The difference is one defines in amore elaborated way while others do not. For instance, Mc. Cormick defines evidence law as “... the system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated” But this definition is not as such very helpful especially to a beginner, because, it fails to incorporate what things are going to be dealt with by the course.

The title of the course, is the law of evidence. That does not mean only the rules concerning whether a given piece of information is admissible or not, but also such questions as what happens if there is no evidence on a given point? How much evidence, if any must a party introduces to prevent a court from ruling against him on factual proposition? What are the roles of the judge in evaluating the evidence and the like. To this effect, Robert Arthur Melin [here after referred as Melin], have made an attempt to define evidence law in a more comprehensive way. He defined it as follows.

The law of evidence is the body of legal rules developed and enacted to govern:

- A. facts that may be considered in court? This is the issue of relevant evidence that one should adduce before the court to support his allegation.
 - 1. Facts in issue
 - 2. Facts relevant to facts in issue
- B. The methods of securing consideration of these facts
 - 1.By proof
 - i. Real (e.g. documentary, exhibits) evidence
 - ii. Oral evidence
 - 2. Certain facts, which need not be proved
 - i. Judicial notice- Facts so notorious as to be facts in public knowledge ,capable of being verified by authoritative texts

- ii. Judicial admission (facts admitted in pleadings, at open court, in examination of parties, in testimony etc.)

C. The party that must secure consideration of what facts: This is about burden of proof and degree of proof required to win the case.

D. At the Appeal level evidence law can be said deal with the effect of failure to comply with rules in any of the above categories of evidence law (e.g. improper admission or rejection of evidence) Because the decision of the court regarding the admissibility or non admissibility of evidence may form the subject of a ground of appeal where an appeal is lodged against conviction, discharge or acquittal [see Art 184(c) of cr.p.c]. These errors on the admissibility or inadmissibility of evidence may be reversible or harmless error.

Here that one should ask is that “Does evidentiary errors constitute Reversible error? Most of the time, an evidentiary error alone is not very likely to induce an appellate court to term the error “ reversible” on the ground that the error affected a substantial right of a party. As a general matter, evidentiary reversal is perhaps most plausible, and most Justifiable, when the constitutional rights of a criminal defendant may be at stake or when it appeared to be outcome determinative. Otherwise they are considered as harmless error, which was not prejudicial to the rights of the party, and for which; therefore, the court will not reverse the judgment.

When we come to our case, a decision of any court in Ethiopia will not be ripe for cassation unless it shows prima-facie case for the existence of a basic error of law.

And even though there is no illustration of the implications “basic error of law” in general and on evidentiary errors in particular, the experience of the cassation division shows, among others, the cases depict that there is a basic error of law when any court renders a decision or makes ruling. (1) When false evidence is produced against the party (b) by framing an issue which the pleadings or oral arguments of the parties have not raised or (c) by failing to consider an issue the pleadings or oral arguments of the parties have raised and the like (“The cassation Division and the Requirements for Basic Error of law” Muradu Abdo WONBER” law Jour 2nd half-year, January 2008 at P 52-53

Activity

Is Milen's outline sufficient only to define evidence law as it exists in a common law system or it is equally applicable to a civil law system?

To finalize it, the law of evidence in the major legal systems/ i.e., in the common law, civil law or in countries that have a mixed legal system) is the body of legal rules developed or enacted to govern.

Ø What facts need to be proved and produced to the court

Ø Which of the parties have the burden of proof

Ø The required standards of proof to win the case

The admissibility, creditability, and weight of evidence and other procedural matters as to how the evidence shall be produced before the court of law.

1.1.2 Nature of Evidence law

Where is the place of evidence law in relation to other laws?

It is important to know the place of evidence law in relation to other laws. Laws may broadly be classified in to substantive and adjective. Adjective laws are concerned with the method of presenting cases to court proving them or generally enforcing the rights and duties provided under the substantive laws. While substantive laws, are those that defines rights and duties. This forms the greater part of the law, it would seem that it is more important part, since it defines what rights, privileges and duties one person may have against or owe another. However the rights, privileges and duties that exist under such law will mean nothing unless they can be enforced. This is why adjective law is just as important as the substantive law.

Law of evidence is categorized under adjective law together with procedural laws, both criminal and civil procedure

Of course some scholars suggested that there will not be any problem if we incorporate rules of evidence as one part of procedural law since they have similar purpose. However, the consensus has been reached in categorizing law of evidence as one part of adjective law for the sake of establishing more effective system of adjudication of cases before the court of law. Although one can see grains of evidence law in procedural laws, their main dealing is with how pleadings can be framed, investigation conducted, evidence collected etc... This does not necessarily make the law of evidence to be part of procedural law.

There are certain issues procedural laws never address and are left to evidence law. For instance, in the procedural law you did not study about the standard of proof, facts to be proved or need not be proved and the value to be given to each term of evidence etc. These are left to evidence law therefore evidence law is not strictly speaking procedural law, but shares the commonality with procedural laws in the sense that both are means to the enforcement of the substantive law. Thus, evidence law suitably falls within the general category of Adjective laws, which deal with the enforcement of the substantive law.

However this does not mean that all nations have their own code of evidence, which can be considered as one sect of Adjective law. For instance, as you see later our country Ethiopia does not have evidence code that when you are asked to show. The truth is that our rules of evidence are not put together in a code or proclamation, but are found widely scattered in both substantive and procedural law. You may remember articles on proof of marriage, proof of will, proof of contract, proof of ownership and a lot of legal presumptions that relate to evidence. In this case, the problem that you would face is whether law of evidence is part of procedural or substantive law?

Is law of evidence more of practical course?

Law of evidence has more of the smell of the courtroom than most law school classes and it offers the opportunity for some court- room type exercises. But it cannot hope to duplicate the reality of the court room. Because the process of proof involves many participants, and it is impossible to regulate each and every action of those participants by the law of evidence unless we interpret the rules in line with purpose of the law of evidence in general and the rational behind of the specific rule in particular.

One can understand more about the rules of evidence that he knows theoretically when he becomes a practitioner. For instance, it is the duty of the trial judge to ensure the defendant receives a fair trial. He can for example, limit the nature of questioning in cross-examination. And also he may exercise his discretion to exclude evidence if the prejudicial effect of which exceeds its probative value. Thus, the application of judge's discretion to secure the right to a fair trial may differ case to case bases.

Moreover, the rule of evidence are not applied independently from other factors and do not exist solely as a matter of academic interest and debate. They are a dynamic set of principles which interact with other essential factors in a case including the rule of substantive law, the rule of procedure and the substantive characteristics of many of the participants in the trial. The latter includes the judge's opinions and perception, the skill of the advocates, a party's or witness's demeanor in court, his credibility, criminal convictions and personality traits. All of these factors ultimately come together to provide the bases for the court's decision in the case.

Therefore, that is why we have said that the course will not try to teach you what you can better learn in practice or in clinical program. Rather, if you participate in a clinical program after your completion of this course you will probably report to your friends that you “learned more about evidence in two weeks in the clinic than in a whole semester in class”.

Activity

1. Discuss the relationship between procedural laws and evidence law?
2. “You will learn more about evidence rules in practice than in law

1.1.3 Purpose /significance of Evidence law.

Evidence is the “Key” which a court needs to render a decision. Without evidence there can be no proof. Evidence provides the court with information. Proving facts through the presentation of evidence means convincing court to accept a particular version of events. Of course, one can search truth even through violating the constitutional rights of the parties. However, evidences obtained through unlawful means could not contribute for the maintenance of justice in the future. So the process of proof should be regulated by evidentiary rules and principles in order to achieve accelerated, fair and economic Justice.

In both criminal and civil proceedings, the law of evidence has a number of purposes. In short, the law of evidence regulates the process of proof. The rule of civil and criminal evidence, in conjunction with the rules of procedure, establish the frame work for the process of proof and the conduct of litigation, so that a lawyer advising his client or preparing his case for trial or presenting it to the court or tribunal will know what issues his client must prove in order to succeed.

The law of evidence also has amoral purpose by establishing and regulating the rules relating to the process of proof in proceedings in courts and tribunals. Whilst this moral dimension is important in civil proceedings, it has special currency in criminal cases as it reflects the powerful public interest in bringing the guilty to justice, whilst allowing the innocent to go free. In some cases the rules of evidence may actually prevent the truth from being discovered in the wider public interest.

Moreover, especially in criminal cases, law of evidence stands to protect the accused's right to a fair trial for instance, by containing many rules which excludes potentially relevant evidences like the general rule that evidence of the defendant's character and

previous convictions will not be admitted at trial (see Art 138 of cr.p.c and Rule-145 of DER)

Is there a consensus on the importance of evidence law in regulating the questions of relevancy?

Even though there is a consensus on the significance of evidence law in shaping the process of proof, there is a dispute on the question whether the law of evidence shall determine which evidence should be produced and which are not i.e. on question of relevancy. Regarding this issue there are two approaches.

According to eminent legal thinkers like Jermy Bentham and William Twining the over all aim if the process of adjudication is the "*rectitude of decision making*". This is achieved by the correct application of substantive law to the true facts in the particular case .In this way; the aims of justice are served.

Bentham long espoused a utilitarian theory that the best way to arrive at the truth was through an application of "*free proof*". It was his considered opinion that a judge could be trusted to reach a factually correct verdict provided all relevant evidence was adduced. In his view, too many rules of evidence and procedure lead to the exclusion of too much relevant evidence, there by diminishing the search for a factually correct truth. Thus he advocated abolition of all laws operating to exclude evidence. Recognizing the need for some restrictions, Bentham felt laws of evidence were needed only to the extent of preventing '*vexation, expense or delay*' and not to hamper the judge from finding out the truth of matters by using different tactics and approaches.

However, the supporters of the second approach argued that it would obviously be undesirable and chaotic if a judge had unlimited discretion as to which evidence should be admitted in a case, and as such, there is clearly a need for there to be ground rules for the admission of evidence so that common standards are applied between all courts and tribunals dealing with the same type of case. Otherwise, the judges may loss their golden time which in return contributes for delay of justice. Therefore, they argued that, in order to give timely and effective justice the role of evidence rules which regulates the question

of relevancy is unquestionable. However this does not mean that the judges have no any discretion. In some instances the rule provides for the mandatory exclusion of evidence. In other instances discretion is given to the judge to exclude relevant evidence in circumstances where fairness demands it. But there is no judicial discretion to include relevant evidence, which might nonetheless have a bearing on the search for the truth, but which has to be deemed inadmissible by applying a rule of evidence.

As we shall see a number of rules relating to admissibility and use of evidence are directed towards minimizing the risk of wrongful convictions. And the main risks of error stem largely from the admission of unreliable or prejudicial evidence. Thus this concept of free proof may allow the court to admit unreliable or prejudicial evidence, which lead it to a hasty conclusion.

The concept of free-proof also ignores the fundamental importance of procedural rights and the symbolic importance of trials. Verdicts of the court to have amoral legitimacy, trials must uphold basic human and constitutional rights. And Justice must not only be done but be seen to be done. That is why most trials are held in public. That means the public must have a faith in its criminal Justice system and the verdicts that are delivered by it and this can only be the case if the trial is perceived to be a fair one. And respect for procedural rights through evidence law is a key component of the right to a fair trial.

Activity

1. Discuss the advantages and disadvantages of the existence of court's discretionary power in determining the relevancy of evidences?
2. Is the right to a fair trial necessarily in conflict with the aim of reaching a factually correct verdict?
3. The purpose of evidence law is regulating the process of proof and making the search of truth to be completed within a short period of time and with a little cost of litigation. However, the rule which gives privileges to the spouses not to testify against each other is against this purpose". Do you agree in the above statement? Why/why not?

1.2 Development of Evidence law

Is the need for evidence recent development?

No, it is not. It is possible to imagine that the need for evidence can be traced back to a time when people started to settle disputes before third parties. You can imagine how people settle disputes before elders of a certain locality.

The need for evidence was well known by ancient Greeks, Egyptians and Mesopotamians. Different concepts of evidence law such as relevancy of evidence, the duty to come up with evidence, proof by witnesses were practiced since ancient time even though they were not in such organized and comprehensive manner.

The present rules and principles of evidences are the outcome of the successive development, conducted in different stages of human civilization. In its very stage of progression, there was no any distinction on the rules of civil and criminal evidence. Moreover, the means they use to prove a disputed fact may not be well founded to ensure the rational basis of decision making. In other words, the evidences which were applicable at that ancient time were irrational.

Generally, we can classify the ancient means of proof in to two:

i. Proof by ordeals and

ii. Proof by oath

As we go back in history, the influence of religion is so strong that it is hardly possible to exclude religious notions. As a result, the above ancient means of proof had practiced for the past many years by using the psychological impacts of religious belief on the society.

In different parts of the world ordeals were used to identify the person who did wrong. Ordeal is about subjecting somebody to undergo a painful experience like walking on fire, holding glowing with heat, put hands in to boiling water etc..

The idea is that where a person who underwent the ordeals is not seriously affected like when the wound that resulted from the ordeal normally cures it is taken as a proof of innocence. If it, however, gets infection this is taken as proof of guilt.

Moreover, there was proof by battle. Here the victim and the accused required to fight to each other. And if the victim wins the accused, the accused will be considered as criminal and convicted. While if the accused wins the victim, the accused will be free.

Since proof by ordeal were extremely irrational and inhuman, relatively modern and human means of proof began to replace them immediately after 15th c. This was proof by oath in which the accused/ defendant had required to take an oath before his testimony in his own case. As we know where religious beliefs are predominant, oath taking plays a great role to prove or disprove the alleged fact. However, this testimony of the accused/ defendant under oath was not sufficient alone. In addition to it, the court required the testimony of supporting witnesses (compurgators) for the purpose of confirming whether the words of the suspect under oath are true or not. However, such compurgators were not required to testify on the merit of the fact rather their testimony was limited in confirming to the court of law about the truthfulness of the oath given by the suspect. So we can understand that how long the ancient proof by oath differs from the present one.

Gradually, the above ancient ways of proof had begun to replace by the new and modern concepts of evidence rules. The writing of different scholars, judicial decisions and different laws enacted at different times based on different legal traditions becomes instrumental for the then development of rules and principles of evidence.

Was there any traditional mechanism of proving alleged criminal acts in ancient Ethiopia?

In a traditional highland Ethiopia that is in previous times, different methods of proof were applied to ascertain the commission of an act by a suspect. Firstly, the “*laeba shai*” method was applied to solicit admission from a suspect in the time when it becomes difficult to get witnesses. In this method of proof, a person was made to drink some

herbal solution that would intoxicate him and he was left to run amuck and whoever is implicated by this person would be considered as the criminal.

Later, this “Leba shai” system becomes replaced by the institution called “*Afersata*” or “*awchachigh*”. This method involves the participation of the whole community. This seems that since the crime is against the community themselves, the member of the society may detect the crime and the criminal in secret manner, for instance by indicating the name of the criminal through poem.

However, the methods of proving in “Afersata” and “Leba shai” have their own basic deficiencies. Because, in the first place, the suspects do not have a chance to challenge the veracity or the truthfulness of the evidence in the case of “Leba shai”. And also, in the case of “Afersata”, assume how bad it may be if in every case the whole people had to be gathered which may hinder the people from doing their day to day activities.

Activity

1. Do you think the testimony given under oath is always true? Why?
2. Why proof by ordeals is considered as irrational means of proof?

1.3 Evidence in civil and common law legal systems

There are two major legal systems (legal traditions) in the world.

They are (1) The Anglo - American (or the common law legal system). And (2) The continental or the civil law legal system.

Is there a difference between the two legal systems regarding evidence rules?

Some argue that, it is hard to think of human relation in common law legal system to be completely different from that of the continental system and to be ruled entirely by different legal tradition they follow, the gap narrows. The points, which differentiate them, may relate to form or emphasis with some respects.

However, we believed that, it is important to discuss about the existing differences between the two legal systems regarding the different rules of evidence they follow, and the weights they have attached towards different types of evidences and the rational there of. Because, this helps us to critically examine which system provides a means which facilitates conditions for the maintenances of justice in general, and which system goes in line with the purpose of evidence rules to achieve fair, accelerated and economic Justice. Thus, now, we will discuss the existing differences between the two legal systems regarding the approaches of evidence rules they follow by the way of comparison. Through our discussion, we have tried to associate those approaches with the Ethiopian arena.

(A) Differences regarding the organization of the rule of evidence.

The countries, which follow the common law legal system, have separate rules of evidence or separate code of evidence law. The rules determine what evidence is admissible and what evidence is not admissible. While, when we come to the law of evidence in the continental system there is no separate code of evidence law. Rules of evidence are sparsely distributed in both substantive and procedural laws.

This may create a question in our mind as to why the civil law legal system did not take the lead in the codification of evidence law since the codification of law characterizes the civil law system more than the common law.

Why the common law countries took the lead in the codification of evidence law?

It is admitted by almost all authorities that the single main overriding reason for the existence of separate evidence law in common law tradition is the mistrust of Juries.[panels of some 12 men{non lawyers}]. It is widely accepted that most Jurors have little experience in analyzing evidence objectively, and many of them have prejudices that are not easy to suppress. Thus, to control, Jury to objectively analyze evidence, the option was to set rules which help jury regarding evidence.

However, unlike the Anglo -American legal system in which the law of evidence is directly related to the institution of jury trial in civil as well as criminal cases, the objective of evidence law is less significant to continental system. Because, here there is no fear that relates to jury to compel an independent code of evidence law. They believe that the protection of the individual rights and just and fair determination of issues of fact which the Anglo- American rules of procedure and evidence are designed to serve are equally well secured by a system which places responsibility for decision on professional Judges which personal evaluation is un encumbered by complex and detailed rules.

B/ Difference regarding the sources of evidence rules

Even though the common law countries have a separate code of evidence law enacted by the law-making organ, they have also judge made evidence rules due to the existence of the precedent system. In this system the lower courts are bound by the decisions of higher courts or by their previous decisions in order to secure the uniform application of the law. In other words, the lower courts are obliged to respect the decisions of the higher courts (on the case of having similar question of fact or law) as a law. Thus, by doing this, the judges have the authority to made laws including evidence rules. So we can say that in common law system there are judge made laws, while in the continental system- laws are enacted by the parliament. Thus, here, the judges are required to follow the decisions of the higher courts.

However, the fact that a question that has been passed before, may be very help full to another court when confronted with the same question. Even in countries where courts are not bound by decisions of the higher court or by their previous decisions, there is at tendency to look to past decisions and frequently to follow them.

Do you think Ethiopia follows the precedent system at present time?

Actually, at present time, all courts, whether federal or state, are bound to follow the decisions made by the federal supreme courts' cassation bench on question of law. (See Art 2(4) of the Fed courts' proclamation Re-amendment proclamation No 454/20005).

There fore, if the federal Supreme Court's cassation division passed a decision on question of law involving evidence, all other subordinate courts are bound to follow it as a law.

However, this precedent system employed in Ethiopia has certain limitation. In one hand, due to the absence of illustrations, which defines *basic error of law*, among a number of applications, which seeks review, only few of them have been gotten the chance of being reviewed by the cassation court.

Moreover, even though they have gotten the chance of being reviewed, there is no tradition of publishing and distributing case reports of the cassation through all level of courts in Ethiopia. As a result, the judges (especially of the regional state's judges) might not a warred about decision. And this hinders the application of the precedent system even on question of law.

Further more, this precedent system on question of law does not exist on the decisions of other courts other than the federal Supreme Court's of cassation bench. For instance, some of the regional supreme courts have their own cassation benches. However, their decisions do not have the effect of precedent. Do you think the subordinate Oromiya courts are bound to follow the decisions rendered by the oromiya supreme court's cassation bench?

Above all the precedent system does not works on the decisions involving question of facts unlike the common law traditions. There fore, even though the decisions of the federal supreme courts' cassation bench on question of law involving evidence serves as one sources of evidence rules, we can not say that Ethiopia follows the precedent system in its full sense.

C. The difference regarding the system of inquiry

The common law countries employ the "*Adversarial system*" of evidence gathering. An adversarial trial provides a forum in which two parties present competing version of the truth. This system is a party-lead system in which the judge has no investigative role.

Their function is to listen to the evidence Presented and decide which version of the facts they fell is closest to the truth. Here, judge acts as an impartial umpire, policing the rules of the *trial game* there by ensuring fair play.

Control in the adversarial process rests with the parties. They have complete auth anomy. For this reason, the role of the advocate in the presentation of evidence can not be underestimated. The court will learn of the facts in the case through the par tie's advocates .The parties' legal representatives collect the evidence and decide what evidence should be presented and how it should be presented.

However, the civil law system employ the "*inquisitorial system*" of inquiry .Here, the court has the task of making inquiry. It question witnesses, directs the police investigation, commissions the service of expert witness and examines all relevant evidences.

In this system, the trial judge plays a far more active role than his adversarial counter part. As the court is charged with the task of making inquiry, the role of the advocate is considerably less important and is largely confined to ensuring his client receives a fair trial by checking that correct law is applied and that procedural rights are respected. Since the witnesses are considered as witnesses of the court, it is the judge who obtains most of the evidence through the process of questioning witnesses. The advocates' questions are restricted to clarifying points and obtaining further in formation.

Evidence is generally extracted in a more humane and natural manner than that experienced by witnesses in the adversarial system. Witnesses are allowed to give their evidence in uninterrupted fashion although questions will be asked to obtain clarification and to prevent the witness from getting in to irrelevancies. There will also be questions to the witness that seek to challenge his or her credibility. However, it wound be rare to see the type of rigorous, some times aggressive questioning associated with cross-examination in the adversarial system.

Those who defend the adversarial system of justice do so passionately, arguing that it is in fact the most effective vehicle for ascertaining truth about past events. They do so in

the belief that it minimizes bias in the inquiry process and that it is likely to unearth more facts and greater information because there are two sides searching for an advantage, motivated by their own self-interest, which is to win.

However, some argue that, in truth no one system of justice is totally adversarial or totally inquisitorial. Many systems are a hybrid of each. What about the Ethiopian system of inquiry?

(D) The differences on the types of evidences they emphasized

Under common law legal system, the greatest weight and importance is attached to oral testimony of the parties and their respective witnesses. Here, there is clear preference for evidence to be tendered in oral form. Documentary evidence is generally regarded as being inferior to oral evidence. The physical presence of the witness affords the judge the opportunity of observing the witness demeanor. This is perceived as being a useful indication of a witness's truthfulness. The witness box provides the best place for critical evidence to be tested and challenged in that, aside from the witness's demeanors, it enables external and internal inconsistencies and matters going to the witness's credit to be tested. The physical presence of the witness also gives the accused the opportunity of confronting those who accuse him. This is widely felt to be component of the right to a fair trial. Moreover, in oral testimony, cross-examination is regarded as an invaluable tool for laying bare the truth. Because the smallest departure by a witness from his earlier written statement is likely to be used by the cross examining advocate as a weapon with which to attack the witness's credibility. Further more, testimonies are given on oath, the degree of being true is high. That is why the common law countries and their adversarial trial embrace the principle of morality.

However, in continental law system like in France and Germany, emphasis is laid on written evidence including notary- attested records of every sort of transaction, written formalities, registration etc. There are Registration offices like offices of notary public whose counter part is less common in common law. This makes it self-evident that the

continental system lays emphasis on documents. They believe that, documents do not lie and they are easily manageable, and economical to bring them before the court of law. However, in case of witness testimony, it is based on the recollections of different people who witnessed the events with their own senses. Thus, recollection is not always accurate, particularly if the witnessed event was over in a matter of seconds or was committed in circumstances of fear or excitement. Moreover, if the witness's evidence is received many months after the incident, there would be a risk of loss of memory over time. Not all witnesses give an account based on their honest recollection of event. Bias on the part of the witness or the will to perjure them may result in the court receiving evidence, which is misleading and untrue. Furthermore, it becomes difficult to get reliable witnesses if they die, disappear or become incompetent due to mental illness. Therefore, the followers of the civil law traditions confirm that, due to the above reasons, the contribution of oral testimony for the maintenance of justice is less significant than documentary evidences.

We are not, however, saying that no written evidence is important in common law nor do we say no oral evidence is important in continental legal system. They exist in both systems but the emphasis each system gives differs.

(E) Are parties themselves competent witnesses in their own case?

In common law legal systems, parties themselves are competent witnesses in their own case. Here, the defendant who chooses to plead not guilty puts the prosecution to proof of its case. The defendant is not a competent witness for the prosecution in these circumstances but is a competent witness in his own defense and may therefore choose whether or not to give evidence on oath.

However, in accordance with the general view in civil law system, it is considered best if no one is a witness in his own case. Though the parties usually view the proceedings under dispute from their own angle, they are, all the same, interested in the outcome of the litigation, and this often clouds their view of how the incidents on which the court's

decision depends have actually taken place. For this reason, a party can not nominate itself as testifying to the accuracy of its assertions. Even in civil law countries, the exclusion extends to third parties, like spouse, relatives and other closely related person's of the party since it is not likely to expect a neutral testimony from such persons.

Are parties competent Witnesses in their own case, in Ethiopia?

To determine whether a party is competent witness to his own case or not in Ethiopian context, we have to see it in civil and criminal context. Regarding civil proceeding, Art 261(2) of our civil procedure code provides 'If a party wishes to give evidence on his own behalf, he shall do so before calling his witnesses and he shall then for all practical purposes be deemed to be a witness.' From this, we can understand that parties are competent witnesses in their own case in civil proceedings, and they are considered as witness for all practical purposes. Therefore, like other witness, they are required to take an oath before testimony and are also subject to the rule of cross-examination.

However, there is no consensus regarding criminal proceedings as to the question whether the accused person is competent witness to his own case or not.

As we understand from art 142(1) and (3) of our criminal procedure code, after the witnesses for the injured party have been heard, the court shall inform the accused that he may make statement in answer to the charge and may call witnesses in his defense. And if the accused wishes to make a statement, he shall speak first. But the accused is not required to make his statements on oath. Moreover, he may not be cross-examined on his statements even though the court may put questions to him for the purpose of clarifying any part of his statement. Therefore, some argue that, unlike civil proceedings, the accused who made statement on his own behalf under Art 142 of Cr.p.c should not be considered as a competent witness for all practical purpose in the absence of tests of accuracy like cross examination.

However, other argues that even though it is left to the court to determine how much weight shall be attached to the testimony of the accused, there will not be any negative

impact on the task of the administration of justice, if the accused become a competent witness in his own case.

According to Art 20 (4) of the FDRE constitution, the accused persons have the right to produce any evidence including his own testimony in his own defense. There fore, we can say that if the accused wishes to produce his own testimony in is own defense, he shall do so. Since the accused persons have the right to be presumed innocent before conviction, they shall not be prohibited to produce their own testimony in their defense. (see art 20 (3) of FDRE constitution) .However ,what is provided under Art 142(3)of Cr.p.c should be amended in the manner that enables the prosecutor to cross examine the accused person who testify in his own behalf as it is in civil proceeding under Art 261(3) of Civ.p.c .

There fore, even though, from the outset, it seems that there is a difference between civil and criminal proceedings as to whether the parties are competent witnesses to their own case or not, it is important to know that the law does not make difference if we interpret it in line with the constitution.

F/ Is hearsay evidence admissible as a rule?

As we have said earlier, there is much emphasis on oral argument and persuasion in common law legal systems. But when they say oral evidence, they are saying the direct one. The oral evidence must be direct in common law legal systems. Here, there is a rule, which excluded hearsay evidences. Because, in hearsay evidence there is no test of accuracy which enables the opponent party in discerning or checking whether or not the witness is speaking the truth, like cross- examination and physical presence of the real witness since it is the right of the accused to confront his or her accusers.

However, in civil law legal system, there is no general analysis of rules of admissibility of proof. Here, a judge has a discretion to determine the admissibility or otherwise of the evidence by applying his own personal evaluation. Thus, in civil law legal system there is no rule which excludes "hearsay' evidence. Rather, it is left for the court to decide the

value of what has been said. Please read a detailed discussion on rule and exceptions of hearsay evidence under chapter four

Generally, having different approaches regarding evidence in the two major legal systems creates a difference in the cost of litigation required to dispose the case. The litigation in common law legal system like England is substantially more costly than for example, in France or Germany. This is because of the high rate of Advocate's participation in the common law proceeding and their tradition of giving much emphasis to oral evidences.

Activity

Discuss the advantages and disadvantages of adversarial and inquisitorial system of inquiry? What about the hybrid one?

1.4 Evidence in Ethiopia

The development of the Ethiopian evidence rule is traced back to the ancient days Fitha-Negest, the document which governs the spiritual and secular life the society before the enactments of modern codes. The document contains many provisions dealing about proof and means of proof, for instance it stressed the importance of man's oath in court and prevented parties and their kinsmen and close relatives from testifying. Moreover, it stresses the value of witnesses and contains its own hearsay rule. There is, there fore, a tradition of oral evidence in the ancient Ethiopian system.

However, since the application of Fitha negast was limited to Christian highlands, different traditional meanness of proof like Afersata ,lebashai ,waqif sera had been in use etc until the enactment of the modern codes in different parts of the country . And later on the drafters have tried to reflect the sprits of those customary practices and ftha negast in those modern codes.

Do you think Ethiopia has a separate mode of evidence?

You have to take note of the fact that up to now (Until the time of the preparation of this material) we in Ethiopia do not have a separate and codified law of evidence. Rather our evidentiary rules are found scattered throughout our substantive laws such as the criminal law, private laws you find in the civil code, commercial code, etc and adjective laws mainly the criminal procedure and the civil procedure. This here and there scattered evidence rules enables the Ethiopian evidence system to share both civil law and common law features.

Since our substantive laws are adopted from civil law legal system, considerable code emphasis is placed on the value of documentary evidence to include provisions for register and acts of notoriety, which is mainly the feature of continental approach. Moreover, since our substantive laws are adopted from the civil law legal system, we have a number of evidence rules scattered throughout our substantive laws like the Articles on proof of marriage, proof of will, proof of contract, proof of ownership and a lot of legal presumption which relate to evidence.

There are also common law features to the present Ethiopian evidence system. Since our procedural laws are adopted from the common law legal system, the method of presentation of evidence envisaged by the civil and criminal procedures is very much of the common law method of presentation of evidence. The common law features, for instance, cross-examination and impeachment of witnesses, objection to and rulings on admissibility of evidence and the like are included in our procedural laws. Therefore, we can say that, the present day Ethiopian evidence system is the hybrid of civil law and common law features.

However, this here-and-there scattered evidence rules are far from being complete. There are gaps in statutory evidence provisions, which allow for a great deal of judicial discretion. This means, in order to fill the existing gaps, the courts are using those internationally accepted rules evidence in their day-to-day activities. For instance, many of the principles of the draft Rules of 1967 (DER) have been in use in our courts without citing them as a law since they are not yet ratified by the law-making organ of the

country. This is not by accident but it is necessitated by the fact that our procedural laws required the implementation of some of the principles of the draft evidence law.

Ethiopians draft evidence rules basically copies the Indian evidence act with certain interesting twists of its own, particularly by way of omission. In Ethiopia, for more than forty years this draft evidence rules have been in use for academic purposes. It is recently accepted that we need to have separate rules of evidence and the preparation of the draft evidence law has already started thus, now it seems that we may have our evidence law in a foreseeable future. Generally, we can classify the present sources of Ethiopia's evidence rules in to three: -

(i) The evidentially rules which are found scattered through out our substantive, Procedural and other proclamations.

(ii) Modern and internationally accepted principles of evidences have been in use in our courts just to fill the existing gaps found in out substantive and procedural laws. It is believed that, applying such principles of evidence has a great importance in incorporating those modern evidentiary principles in to our judicial custom and in developing the general jurisprudence of evidence in the country.

(iii) Even though the tradition of publishing and distribution of case reports is not as such developed, case laws are also considered as the third source of evidence rules in Ethiopia. This is similar with the common laws precedent system in which the lower courts are bound to follow the decisions of the higher court involving the same question of law or fact.

However, this precedent system does not work on cases involving the same question of facts in Ethiopia. According to Art 2(4) of the Federal Courts' Establishment proclamation re-amendment proclamation No. 454/2005, interpretation of law rendered by the federal Supreme Court cassation bench is binding on federal as well as regional courts of all level. Therefore, if the federal Supreme Court's cassation bench gives decision on question of law, which involves evidence, it shall be bidding on all other courts as a law.

Activity

1. Since the preparation of the draft evidence law has already started, it seems that we may have our evidence law in foreseeable future. So what do you think will be the scope of application of the law? Do you think it will apply on Administrative tribunals and social courts?
2. Do we really need evidence law? Why?

1.5 Evidence law in civil and criminal cases

In both criminal and civil proceedings, the law of evidence has a number of purposes. However, due to the different nature of civil and criminal cases, the rules applicable on them may be different. The civil case is one instituted by individual for the purpose of securing redress for a wrong, which has been committed against him, and if he is successful he will be awarded money or other personal relief. While, a penal prosecution is instituted by the government for the purpose of securing obedience to its laws by the punishment or correction of the lawbreaker. Therefore, since the relief sought as well as the purpose of instituting civil and criminal cases is different, the existence of difference regarding the strict nesses of the evidentiary rules applicable on those two cases seems proper.

Generally, the purpose of evidentiary rules is to assist the court in establishing the truth between the party's conflicting versions of the fact in the case. However, in criminal cases the law of evidence has further important purpose, that is, the protection given to the accused in respect to his right to a fair trial. The protection of the accused against the case being proven against him by evidence which is prejudicial to his right to a fair trial is one of the main reasons why the law of criminal evidence contains so many rules which excludes potentially relevant evidences from being produced before the court including, for example, the general rule that evidence of the defendant's bad character or his previous convictions will not be admitted at trial, (see art 138 of cr.p.c) different privileges given to witnesses.. etc . The court may also exercise its discretionary power to support the defendant's right to a fair trial by excluding potentially relevant evidences.

The exclusion of evidence in an attempt to ensure a fair trial in criminal cases is considered at length on chapter 3.

While in civil proceedings, evidence that is relevant and probative of a fact, which needs to be proved to the court, will generally be admissible. There are no mandatory rules requiring the exclusion of evidence in civil cases. This state of affairs reflects the key difference between civil and criminal proceeding. Therefore, we can say that the fair trial provision is not as important in civil case as there is a greater equality in resources between the parties in contrast with criminal proceedings in which the power full government in one side and the weaker accused on the other side are there. Also, whilst losing civil case may result in the claimant or the defendant suffering serious damage to his financial resources or property, he will not loss his liberty life or suffer the same social stigma as a person who has been convicted of criminal offence. This is reasons why, there is huge difference regarding the standard of persuasion required in civil and criminal cases.

The main difference regarding evidentiary rules in civil and criminal cases lies on the required standard of proof. The rules relating to the standard of proof determines how much proof is required for a party to persuade the court. The appropriate standard of proof that will have to be satisfied in a criminal case is heavier than in a civil case. In criminal proceeding, the public processor in order to win the case, he is required to proof, beyond reasonable doubt. While in civil case the standard is preponderance of evidence or probabilities.

The “*beyond reasonable doubt*” standard is constitutionally mandated in criminal cases. However, “beyond reasonable doubt” means that you must be virtually certain. The law does not demand that, for you to find the defendant guilt, you be absolutely certain of his guilt, because there are few, if any, things in life we can be absolutely certain about. Here, one may raise question that applying such strong standard in criminal cases may prevent the truth from being discovered in the wide public interest. However, we all know that guilty people may escape criminal punishment. A criminal might not be apprehended, if apprehended, he might not be tried, if tried, he might be acquitted. We

are not happy about this situation, but it is an every day matter that we tolerate. But consider how troubling- and how noteworthy- we find it on those rare occasions where we punish somebody for a crime that it turns out later, he did not commit

The standard of persuasion in civil case may be highly variable, depending on the nature of precise issue at stake. For instance, among 4 witnesses, if 3 of them testify in favor of the party on a given issue, we can say that the standard required in civil case has fulfilled. Because the testimony of those 3 witnesses over weighted the testimony of one witness who testified against the party.

Who has a burden of proof in criminal and civil proceedings?

The general rule in criminal cases is that the prosecution bears the burden of proving the defendant's guilt and the substantive law defines what the prosecution must prove in order to convict the defendant. This will usually comprise elements of the mens rea and actus reas, for example, when pursuing conviction for theft, the prosecution must prove all the elements of the offense as laid down by the Criminal code (namely a dishonest appropriation of property belonging to another with the intention to permanently deprive).

The allocation of the legal burden of proof on the prosecution is regarded as fundamental expression of the presumption of innocence. Because every one charged with criminal offence shall be presumed innocent until proved guilty according to law. It also reflects an aspect of procedural fairness in that the prosecution has considerably more resources at its disposal than the defendants and therefore it should bear the burden of proving the accused guilt. A Practical consequence of the prosecution bearing the legal burden of proof is that the prosecutor always opens the case at trial and presents its evidence first. In discharging its burden the prosecution must disprove any defense or explanation raised by the accused.(see Art 136 of cr.p.c)

Whilst the rules of civil evidence do not incorporate the same enshrined principles as in criminal case (i.e. the accused in a criminal trial is presumed innocent until proved guilty by the prosecution), the well established general rule about the incidence of the legal

burden of proof in civil proceedings is *that "he who asserts must prove"*. To put simply, the legal burden of proving a fact in issue in a civil trial is on the party that asserts that fact. Therefore, in civil cases, the burden of proof first lies in the plaintiff. However, this burden of proof will shift to the defendant if the defendant admits the allegations and come up with positive defense like "*counterclaim*". In such case, the burden of proof lies on the defendant (see Art 258 of civ.P.C).More detail of burden of proof and standard of proof is considered at length in chapter 6.

We have discussed the main differences existed between civil and criminal proceeding regarding evidence i.e. on burden and degree of proof. However, there are also another differences. Now we will discuss such other differences in line with our evidence rules shortly.

1. Less importance is attached to the principle of orality in civil proceedings, resulting in far greater reliance up on the admission of evidence in documentary form. Because in civil cases, most of the claims are raised from contractual, monetary or proprietary relationships which could mostly be proved by adducing documentary evidences. While due to the very nature of ways of committing a crime, the public prosecutor mostly proves his allegation by providing an expert and lay witnesses. And the crime, which could be proved by documentary evidences, is less in numbers since they are being committed in a more sophisticated way.

2. There is also a difference between civil and criminal proceedings regarding proof by admissions. Firstly, in civil cases, the defendant shall deny each and every fact alleged by the statement of claim specifically. [see Art 83 of civ.p.c]. And every allegations of fact in the statement of claim, if not denied specifically or by necessary implication, or stated to be not admitted in the statement of defense, shall be presumed admitted and the court shall give judgment on such admitted facts. (see Art 242 of civic).While in criminal cases, where the accused says nothing in answer to the charge, a plea of not guilty shall be entered. This means the silence of the accused of the accused does not amounts to admission.(see Art 27, and 134(1) of civ.p.c]. Moreover, failure to cross-examine on a

particular point does not constitute an admission of the truth of the point by the opposite party. [See Art 140 of cr.p.c]

Secondly, in civil proceedings, where a party formally admits the truth of a fact in issue in the case, the fact ceases to be in dispute between the parties, and as such any evidence to prove the fact will be ruled as inadmissible on the ground that it is irrelevant. To put in another way, judicial admissions are conclusive in civil cases. And the courts are under obligation to give judgments based on such admission without requiring the production of additional evidences. (see Art 242 of civ.p.c). While in criminal cases judicial admissions are not conclusive. Of course, when the accused admits without reservations every ingredient in the offence charged, the court shall enter a plea of guilty and may forthwith convict the accused. However, the court may require the prosecution to call such evidence for the prosecution, as it considers necessary and may permit the accused to call evidence. (see art 134 of cr.p.c). Therefore, unlike civil cases, in criminal cases the task of determining the conclusiveness of judicial admission is left to the discretion of the court.

Why judicial admissions are not conclusive in criminal cases?

In criminal cases, the issue may be the question of life and death. So the court shall take a due care that an innocent person not to be convicted and punished. So that, the courts are expected to critically examine the reasons behind of the confession. Because sometimes innocent person may admit the commission of crime to cover another person, for fame or to be known through out the world by his criminal act.

Thirdly, in criminal cases, admission shall be made without reservation. When we say the accused admitted, we are saying that he admitted each and every criminal elements of the alleged offence usually comprise elements of the mens rea and actus reus . However, in civil proceedings the party may admit the truth of the whole or any part of the case of the other party. For instance, the plaintiff has instituted suit against the defendant on breach of contract for the value of 10,000 birr. Here, the defendant may admit half of the plaintiff's claim and deny the rest. In such case, the issue (the point of disagreement) lies

only on the non-admitted claims of the plaintiff and the court shall give judgments on the admitted amount in accordance with Art. 242 of civ-p.c .We will discuss about admission of facts at length at chapter 2.

The above discussed differences between civil and criminal proceedings are not the only differences. You will come across with further differences through out your study of this course.

Activity

Art 140 of cr.p.c provides “failure to cross-examine on a particular point does not constitute an admission of the truth of the point by the opposite party.” Is it true in civil cases?

1.6. Classification of evidence

Evidence can directly or indirectly lead to the required conclusion as to whether a disputed fact exists or not. Thus, evidence is divided into two: direct and circumstantial.

If believed, direct evidence establishes a fact in issue directly. A fact in issue is something a party alleges to exist and the other party denies this is the disputed fact, which can only be resolved by the help of evidence.

Direct evidence is provided by witnesses giving oral testimony of something they perceived with their own senses. It is also afforded by the presentation of documents, photographs and the like which the judge is required to interpret with his senses and includes the physical presence of witness in the witness box giving rise to an assessment by the judge of the witness's credibility. It can include any incriminating admissions by a party in the case.

However, circumstantial evidence is indirect evidence that tends to establish a conclusion by inference. It doesn't directly tell you or prove the existence or non-existence of the alleged or disputed fact. But when you put them together, they form a chain leading to a logical conclusion. For this reason, criminal cases built entirely on circumstantial

evidence are the most difficult to prove the required standard of proof beyond reasonable doubt.

Circumstantial evidence requires the judge to draw generalizations from commonly held assumptions about human nature. In a murder case for example, evidence that a defendant lied to the police about his whereabouts of the relevant time and had a violent argument with the victim some days before the killing would constitute relevant circumstantial evidence of the accused's guilt. The inference is based on the common assumption that murderers normally have a motive for committing murder and will usually cover their tracks by lying.

Can a wrong inference be made from circumstances?

Since most of offences are being executed in a very sophisticated manner, it is difficult to get direct evidence. In such case, the option we have is, proving the disputed fact by circumstantial evidence. However, there is a possibility of making wrong inferences from such circumstances. For instance, in a murder case, if you consider the foot steps alone, it can be the foot steps of any one from the victim's house. And also it does not mean that any one who buys a pistol or knife has an intention to kill a person.

Thus, circumstances should be taken cumulatively and not in isolation of one from the other. Where the facts are put together, they lead to a certain logical conclusion. The circumstances should not be self-contradicting that is some consistent with the innocence of the accused and others consistent with his guilt. If they contradict, their capacity to prove decreases with the increase of the contradiction. That is why; we have said that the court must be careful when it gives a ruling on the basis of circumstantial evidence.

Unit summary

Evidence is something with which you prove the existence of or non-existence of a disputed fact. Evidence law is basically, dealing with the admissibility or non-admissibility of a certain piece of evidence.

In common law countries, evidence law is very organized and treated as especial branch of law. The main reason is the existence of a jury system. In civil law countries, on the other hand, evidence is found not as a separate body of law but as part and parcel of their substantive or procedural laws. However, now days, many countries have separate evidence codes without having the jury system. Our country Ethiopia is also in the way of preparing evidence code.

Due to their different nature, there are certain differences between civil and criminal evidences. The one and the main difference is as to the required standard of proof.

The methods of proving allegations may be orally, by documentary evidence, or by real evidence. Broadly, however, evidence may be classified as direct and circumstantial. The one that proves directly is called direct evidence and the one that proves indirectly by way of making inference from a given fact is called circumstantial evidence.

Review Questions

1. Does our country Ethiopia need a separate code of evidence? Why?
2. Giving broader factual discretion to the court in determining relevancy of evidence may negatively affect justice. Explain?
3. How should we determine the admissibility of circumstantial evidence?
4. Describe the advantage and disadvantages of the existence of court's discretionary power in determining the relevancy of evidence?
5. The Ethiopia evidentiary rules are found scattered through our substantive and adjective laws. There are also evidentiary provisions in the FDRE constitution. Sort out and discuss such constitutional provisions?

Chapter two: Facts, which may be proved other than by evidence

Introduction

The general rule in both civil and criminal proceedings is that where a party has the legal and evidentiary burden of proof on a fact in issue, the fact has to be proven by relevant and admissible evidence.

However, certain allegation of fact by a party does not necessarily need proof. There are three exceptions to the general rule requiring evidence to be adduced to discharge a legal or evidential burden where the court may treat a fact as proven without the need for the party bearing the legal and evidential burdens to put evidence before the court in respect of that fact.

The first exception applies where a party admits a fact by making a formal admission either before the trial or at the trial. The second exception applies where the proof of the fact in issue may be presumed by the court from an inference drawn from one or more primary facts. And the third exception to the general rule is dealt under the doctrine of judicial notice. Judicial notice covers those facts that are so well known and notorious that it is not necessary for a party to prove that fact formally to the court.

Therefore, generally, this unit will discuss the factual allegations which need no proof. Our discussion will be based on legal provisions that are available in our substantive, procedural, and the draft evidence rule of 1967.

Chapter objectives.

- At the end of the unit the students are expected to /will be able to
- Give reasons why admitted facts need no proof
- Differentiate the evidentiary value of admissions in civil and criminal cases.
- Define presumptions, and identify the difference between presumption of fact and presumption of law.

- Explain the need for judicial notice.
- Characterize facts of which the court can take Judicial notice
- Discuss judicial notice of law, and
- Apply the rules of evidence on matters that need no evidence in practice

2.1 Admitted facts.

What is admission?

Admission is a statement of fact, which waives or disputes with the production of evidence by conceding that the fact asserted by the opponent is true. Because, what a person himself admits to be true may reasonably be presumed to be so, and until the presumption is rebutted, the fact admitted has to be taken as evidence. Because, in the normal course of things, a person does not make himself liable by admitting facts against him self unless those allegations are true, and he is expected to know facts relating to him better than any body else. That is why Rule 3 of DER and Art 2002 of civil code considered party's admission as one kind of evidence.

Do you think the term “admission” is applicable in both civil and criminal cases?

In some countries the term “admission” is only used in civil cases and “confession” in criminal cases. While others used the term” admission” in both civil and criminal cases. But we can take “confession” as a species of “admission” which is applicable only in criminal cases.

What is the position of Ethiopian laws in using the terms?

As can be witnessed from the DER, the definition of confession is not given unlike that of admission. Thus, if we say the term admission is used only in civil cases we are saying that a statement of fact which waives the production of evidence can be made only in civil cases. But this is not true for instance, Art 134 (1) of cr.p.c used the term “admission” in criminal cases by saying “when the accused admits without reservation ...”. More over, Art 19(5) of the FDRE constitution used the term “admission” interchangeably with the term “confession” in criminal cases by saying “persons arrested shall not be

compelled to make confession or admission...” Thus, we can say that our laws used the term “admission” in both civil and criminal cases even though the Amharic version of these provisions used the term “ ባሳታፊ ባለ ” in criminal cases and the term “ ባሳታፊ ” in civil cases. But we cannot get such provision, which used the term “confession” in civil cases.

Any way one can make a definition of the term “confession” by making a comparison between civil and criminal cases. So simply confession can be defined as an admission made at any time by the person charged with a crime stating the inference that he committed the crime, or it is acknowledge of guilt.

Why admitted facts need no proof?

Courts are set up to try issues in dispute. When no dispute exists, proof ordinary should not be required. Thus, where a party admits the truth of a fact in issue in the case, the fact ceases to be in dispute between the parties, and as such, any evidence to prove the fact will be ruled as inadmissible on the ground that it is irrelevant except in some serious criminal cases like a homicide case as did in practice. Because in the normal course of things, a person does not make himself liable by admitting facts against him self unless those allegations are true, and he is expected to know facts relating to him better than any body else. But if proof is required for such admitted facts, undue delay will be created since other cases wait the court's attention. And undue delay causes injustice to others as well as the parties before the court. That is why Art 242 of civ-p.c and Art 134 of cri.p.c required the court to pass judgment on the admitted facts provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions as provided under Art 235(2) of civ.p.c and Art 134(2) of cr.p.c.

2.1.1 Limitations of Admissions

In some cases "Admitted facts need not be proved" is less applicable. This is especially true in criminal cases in which the court may exclude confessions on the grounds of oppression, unfairness and the like.

Confessions or self-incriminatory statements have to be tested against the presumption of innocence under the constitution. (Art 20(3) of the constitution). Confessions must be accepted or rejected as a whole and that the court is not competent to accept only the inculpatory part while rejecting the exculpatory part as being inherently incredible. Art 134 of cr.p.c requires that plea of guilt has to be without reservation. However, even though the confessions are made without reservation, the court may reject them if it is satisfied from other circumstances that they are untrue. (see Art 134(2), 135 of cr.p.c). Because, experience has shown that suspects confess for all sorts of reasons even where they know that they are innocent of the allegation made against them. So we can say that confession does not avoid the need for proof and this makes confession a very weak kind of evidence.

However, the effect of admission is in most cases destructive in civil cases since they can not be contradicted once they are made and the court may not require further proof because of the less standard of proof required in civil cases. However, if the admission is vague or doubtful, the court may require proof even in civil cases.

Does confession made by one of the co-offenders (conspirator) admissible against the other co-offenders?

In the time when one of the co-offenders made a confession affecting him and some other persons involved in the commission of an offence, the effect of confession shall be limited only on such person who made it.

As far as the DER is concerned, Rule 27 provides “A confession made by one person affecting himself and some other person in the commission of an offence is not admissible”. And this is a widely accepted principle regarding the limitation of admissions. Because, in the first place, any suspect enjoys a right to silence at a police station. And he shall be informed that he has the right not to answer and that any statement he may make in his free will may be used in evidence before the court of law. (see Art 27(2) of cr.p.c and Art 19(2) of the constitution). Therefore, the incriminating statements made by one of the co-offenders, shall not be admissible on those co-offenders

who do not get the opportunity to exercise the above mentioned constitutional rights. Moreover, admitting the confessions made by one of the co-offenders on the others will have an adverse effect on the fairness of the proceedings.

Secondly, the public prosecutor cannot call one of the co-offenders as a witness against the others in the same trial. This is because the accused may make incriminating statements against the other to make himself free. But if we allow him, we are contravening the constitutional right of other conspirators to be presumed as innocent before conviction. However, the public prosecutor can call the accused who choose to incriminate himself and others as a witness against the others by providing him separate trial.

What about in civil cases involving indispensable parties?

As you have learned in your civil procedure course, indispensable party is a party who ought to have been joined as plaintiff or defendant. Or whose presence is necessary for the determination of all the questions involved in the suit (see Art 40(2) of civ-p-c)

The question of indispensable, for instance, may arise in the case when a thing which is owned by two or more persons jointly, is subject of a dispute. For example, assume 'A' and 'B' are the joint owner of car. And their car caused an injury on 'C' for which 'C' instituted a suit against the joint owners (A and B). At trial "A" admitted the allegation of the plaintiff while "B" denied it. Now the question is may the court consider the admission of "A" as B'S admission?

If A and B were a joint plaintiffs they shall exercise their rights of recovery concurrently in proportion to their share in the thing jointly owned where one of them waive their right of recovery, such right may be fully exercised by the other joint owners. (see Art 1388 of civil code). While in the case when the joint owner defendants appeared in the first hearing in which one admits and the other deny the plaintiff's allegation, Art 43 of civ-p.c shall apply by analogy in which the plaintiff can claim from any one of the defendant most probably from the defendant who admitted the allegation. (see Art 43(4) of civ.pc).

This means in our case the litigation may continue between “A” and “B” on the question of contribution. Because “B” may deny his obligation to contribute “A” after the admitted party “A” pays the full amount of compensation to the victim. Thus, the court shall not take the admission made by one indispensable party against the other unless one authorized the other to appear and defend the case in accordance with Art 69 of civ-p-code in which case we consider the admission made by the party in the trial as if made by the other. But in other cases ,the plaintiff can claim the full amount from the indispensable party who admitted his allegation, and the litigation shall be continue on the question of contribution between those indispensable parties.Do you agree in the above argument? If not, do you have any other opinion?

Activity

Contracting wife hires Abebe to kill unwanted husband. At some point after Abebe fulfills his part of the contract, he and wife have a conversation. Abebe complains that he has not been paid. Wife reminds him of their agreement that he will be paid when she receives the proceeds of an insurance policy on husband's wife. She also complains that he botched the job by leaving incriminating behind. Should this conversation be admissible against either wife or Abebe or both?

2.1.2 Classification of Admission: formal and informal admissions

Admission may exist in the form of formal admission and informal admissions in both civil and criminal cases. A party may formally admit a fact in the pleadings in the case, i.e. in statement of claim or in defense or in a counter claim or in reply. He may also admit in open court in the first hearing or at the trial. Moreover, in criminal cases a formal admission may be made to a person in authority i.e. to the police officer in answers to interrogations. (Art 270 of cr.p.c). These all are considered as formal admissions.

While an informal admission is a written or an oral statement made by a party or by a person connected with the party that is adverse to that party's interests, and is most commonly made in a letter, fax or an e mail. An informal admission may also be made

orally in a witness's answer to a question asked in cross-examination. It also be made spontaneously by a person in response to the events given rise to the cause of action. For example, a driver may admit his responsibility for causing a road traffic accident by stating that *'It was my entire fault, I didn't see the other vehicle coming. The next thing I knew his vehicle hit me'*. Mostly, informal admissions are out-of-court admissions to a person who are not authorized to accept admissions, for example, to a friend. Where an informal admission has been made, it may be disproved or explained (corroborated) by other evidence at the trial and it is at the court's discretion to decide how much weight should be attached to the statement.

However, there is a consensus that lesser weight shall be attached to the out of court admissions given to an authorized person unless they are corroborated by other evidences. And such an out-of court assertion potentially can be undercut if the party opponent is able to show that he was joking or lying when he gave such assertion, or the other party's witness misperceived him or using words in an unorthodox manner.

Activity

Ato 'A' is the owner of a factory, which produces specific goods. He sells his products, generally for cash, out of his factory. On an application for a bank loan, he stated that he had earned 70,000 birr from his business in the previous year. On his tax return, however, he indicated 15,000 net earning from his business. Ato "A" is now on trial for tax evasion. The prosecution wants to introduce the bank application. Is the bank application admissible as a party admission?

2.1.3 Types of Admissions: Judicial and Extra- Judicial

What kinds of admissions are there?

Beyond the existence of admissions in the form of formal and informal, facts admitted may be of two types. These are judicial admissions and extra- Judicial admissions.

Judicial admissions are those admissions made as part of the proceeding in the lawsuit. The mere fact that the admission is made before the court of law does not make it a judicial admission. To be considered as judicial admission, it should be given before the court, which handled the case, and not in other courts as the case in Art 35 of cr.pc. They are ordinary conclusive on the party making them and may not be contradicted. For example, the defendant may admit in his pleading that he has entered in to a contract of loan with plaintiff as alleged by the plaintiff. This is a judicial admission, which cannot be withdrawn afterward.

Extra- Judicial admissions as opposed to judicial admission are not made in the course of court proceedings even though in criminal matters they may have been made in the course of the criminal proceedings. You may think of confession made before the investigative police.(see Art 27 of cr.P.c)

Evidentiary admissions may be submitted as evidence but they are not conclusive as judicial admissions and they may be contradicted. There for, some argue that, when we take about admissions as facts, which need not be proved we do not refer to all admissions but to judicial admissions .

2.1.3.1 Judicial Admissions civil and criminal cases

1. In civil cases

In civil cases, judicial admissions have the power to withdraw a fact from being in issue and avoid the need for proof. The effect of judicial admission is destructive in civil case. The reason is, for one thing, they cannot be contradicted once they are made, and for the other the court may not require further proof because of less standard of proof required in civil cases.

Judicial admissions may be made through different ways. Now, we will discuss ways of making judicial admissions in civil cases.

A. Facts expressly admitted in parties pleadings. (Art 83,242.Civ-p-c A party may formally admit a fact in the pleadings in the case, i.e. in statement of claim or in defense or in a counter claim or in reply. For example, in an action for breach of contract, the claimant may plead in his statement of case the existence of an oral contract. Thus, once the plaintiff admits the existence of the oral contract, he can not later produce a written contract. On the other hand, the defendant, in his defense, may admit the existence of the contract but deny that the contract has been breached. At the trial, the claimant is relieved of discharging burdens of proving the existence of the contract as the defendant has formally admitted the fact. The parties will there fore be free to deal with the issue of the breach as this fact remains in dispute between them.

B. Facts admitted by implication (Art 83,235 of civ-p-c)

Under the rule of procedure, admission is not only the one expressly made by the parties. Denial which is general may be considered as admission by the rule of procedure. (Art 83 of civ-p-code). For instance, if the defendant replies in his statement of defense as “I am not liable for the loan contract”, it is deemed as admission. Because the defense does not contain facts showing either the non- existence of the contract between them, or the fact showing that he had borrowed the money but he returned back it to the claimant.

Moreover, failure to deal specifically with an allegation of fact in the statement of claim by the statement of defense is an admission of the truth of the fact alleged. For example, the statement of claim reads “The defendant (the driver) was intoxicated during the car accident”. While the defendant did not made any comments up on this particular allegation of the statement of claim. Thus, the fact that “the defendant was intoxicated during the car accident” is admitted and proof there on need not be submitted by the defendant. Here three is no formal concession to the fact in issue but the law of procedure deems it to be admitted.

Consider Art 235 of civ-p-c

Art 235-Evasive denial.

1. *Where a defendant denies an allegation of fact in the statement of claim, he shall not do so evasively, but answer the point of substance and if an allegation is made with divers circumstances.*
2. *Every allegation of fact in the statement of claim, if not denied specifically or by necessary implication, or stated to be not admitted in the statement of defense, shall be taken to be admitted except as against a person under disability:*

Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

As we understand from the words of Art 235(2) evasion should not be considered as admission regarding person under “disability” Here, the question that should be answered is that why Art 235(2) make the disabled” persons an exception?

Under the civil code minor's, insane persons, judicially interdicted persons are considered as disabled persons. The law wants to protect those disabled persons due to their mental illness or immaturity. Thus, it is logical not to take their failure to deny specifically as admission. However, under Art 34 of civ-p.c ,a person under disability may sue or be sued through his legal representative and this legal representative is presumed sane and aged person whether he is represented by the disabled person himself or by the court in accordance with the relevant provisions of the civil code. (see Art 34(a) of civ-p-c). So when the Article says" ... *except as against a person under disability*", is it saying that only the disabled person who is not represented by legal representative or includes the represented disabled person too?

Under Art 196 of civ.c since capacity is presumed the plaintiff is not obliged to prove the capacity of the defendant. Thus, those disabled persons may be sued without being represented. But the court may be aware later about the fact of the in capacity of the defendant. In such case, if the disabled defendant failed to deny the allegations

specifically, the court shall not take his failure (silence) as admission under Art 235(2). Rather at the time when the court aware a bout the fact of the defendant's disability, it shall order the proceedings to be stayed until a legal representative is appointed (see Art 34(2) civ-p-c).One may argue that, the exception should not be work for the defendant who is represented. Because the presumption is that, the statement of defense has prepared by the legal representative who is considered as sane. But in the case when the representative himself is incapable, the exception may work if the court beliefs the fact of the insanity of the representative, in which case the court may appoint another representative by applying Art 34(2) analogically.

However, since the representative is acting on behalf of the disabled person, in one way or in other way, if the court takes the failure of the legal representative to deny the allegation specifically as admission, it will be against a person under disability. Therefore, it is better to argue that, even though the disabled person is represented by the "sane" representative, the exception shall apply for the benefit of the disabled person.

We have said that failure to deny specifically with an allegation of fact in the statement of claim by the statement of defense is an admission of the truth of the fact alleged. However, the court could, of course in the exercise of its discretion require that this admitted fact be proved. (see Art 235(2) of civ-p-c. But unless the court so exercises its discretion, the defendant cannot contest said fact. (Melin P. 114). From this we can understand that even judicial admission in civil case is not conclusive.

Do you think the court may use its discretion and require any fact so specifically admitted to be proved?

Consider Rule 50 of the DER

Facts admitted need not be proved

50- No fact need be proved in any preceding which the parties there of or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under before the hearing, they agree to admit by any writing under their hands,

or which by any rule of pleadings in force at the time they are deemed to have admitted by their pleadings.

Provided that the court may in its discretion, require the facts admitted to be proved otherwise than by such admission.

Art 235(2) of civ.p.c and the last sentence of Rule 50 of DER give the discretionary power to the court in requiring the admitted facts to be proved by evidences. In civil proceedings especially of out of court admissions, the court may require the admitted fact to be proved since in one hand they are not conclusive, and on the other hand they can be contradicted at a later time.

However we doubt on the issue that whether the court can exercise their discretion of requiring judicially admitted facts to be proved by evidence in civil proceedings in which Judicial admission is conclusive.

In the case of admission through evasive denial, the defendant's failure to deny a given allegation may be due to mistake or excusable omission. Thus, if the court exercises its discretion of requiring the proof of facts which is deemed as admitted under Art 235(2) of civ.p.c it may be logical in the angle of fairness. But requiring specifically admitted facts under the pleading to be proved is really a waste of time and out of the purpose of the evidence law. Of course, if the court has any doubt about the truth or clarity of an admission it should require proof of the admitted fact by the party who relies upon it. But this is usually true in criminal cases in which the accused may admit for various reasons, than in civil proceedings.

The writers of this material belief that, the above discretion of the court shall be applicable for those kinds of judicial admissions obtained through evasive denial. (Art 235(2) of civ.p.c). And unless the admission is doubtful or vague, the court should not require such specifically admitted facts to be proved. (see Art 83 of civ.p.c). Thus, the coming evidence code shall specifically limit the court's discretion, case by case in context of civil and criminal case in general and in Judicial and evidentiary admission in particular

C. Admission during Pre-trial hearings and at the trial.

A formal admission may be made by a party or his pleader during examination of first hearing pursuant to Art 241 and 242 of civ.p.c code or at a later time when called up on by the court to indicate whether he admits a fact or not (see Art 243 of civ.p.c).

Under Art 242 of civ.p.c, if the defendant has made admission of fact during the examination held under Art 241, the plaintiff may apply to the court for such Judgment or order as he may be entitled to up on such admission. However, this does not mean that the court can not pass judgment with out the application of the plaintiff thereof. For instance; assume the defendant denied the fact that he had borrowed 10,000 birr from the plaintiff. But later when the court asks the defendant, as to the amount of money that the plaintiff lend to him, he may admit that he have borrowed 8000 birr from the claimant. Here, even though the defendant denied his liability totally in his pleading, he admitted partially later during examination. Thus, in such a case the court is required to give judgment on such admission (Art 242 of civ.p.c).

Moreover, admission may be made by the party or his advocate during the trial .For instance, in application to amend in order to set up anew cause of action, counsel for the claimant made a number of admission at trial, the effect of which was to abandon the original claim.

In accordance with the common law countries like England , it may also possible to make a formal admission by default where a party fails to deal with one of the other party's allegation. In this situation, under the normal rules of witness testimony, where a party in cross examination fails to challenge the other side's witness's evidence on a particular fact, the court will deem the cross examining party to admit that fact.

Do you think this is true in our case?

In criminal proceeding Art 140 of cr.p.c provides “failure to cross-examine on a particular point does not constitute an admission of the truth of the point by the opposite party”. But we can not get such kinds of provision in our civil procedure code. However,

since cross-examination stage is optional which is based on the wishes of the parties, the case shall be true in civil cases too. Most of the litigant parties do not know how to challenge the other side's whiteness's through cross- examination. As a result, they prefer to jump their chance of cross-examining the other side's whiteness's evidence. Thus in such situation considering the failure of the party to cross examine as admission seems unfair. Rather the court shall determine the truth of the fact based on the evidence produced by the parties.

May a party deny a certain fact in first hearing of which he has admitted previously in his pleading?

As we can understand form Art 241(1) (especially of the Amharic Version) the court shall ask the party or his pleader whether he admits or denies such allegation of fact as are made in the statement of the other party and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. This means, for instance, regarding the defendant, the court itself ask him whether he admit or deny the allegation which we denied in his statement of defense (In Amharic “በቃቅቃቃ በቃቃ በቃቃ በቃቃ በቃቃቃቃ በቃቃቃቃ”). From this we can understand that he can admit what he has denied in his pleading Unless the court allow him to amend his pleading under Art 91 of civ.p.c, because admission made in pleading is conclusive and one can not withdraw later except with the permission of the court.

D. Facts admitted by a party who testifies before a commission

Where a court can not exercise its power to take evidence and to examine parties and their witnesses for any of the reasons stated in Art 127 of civ.p.c, it may delegate its power to a commissioner. (a court or a person) (see Art 122 of civ. P.c)

In accordance with Art 124(2) of civ-pc the commissioner (either a court or a person) may examine the parties themselves and may receive their admissions which are considered as judicial admission. And based on such admission the court shall pass judgment under Art 242 of Civ.p.c

However, as said earlier, judicial admissions are admissions made before the court which handled the case. While admissions made before a commissioner is an out of court admissions. If a commissioner is a person, he may examine the parties in their home or in any other place. And also in the case when the commissioner is a court, the admission given to such court is considered as extra- Judicial admission since it is another court other than the court having jurisdiction. Thus, the question may arise as to the reason why we categorized admissions made before a commissioner as judicial admission?

Even though the admission is made outside of the court to a commissioner it shall be considered as if made before the court having jurisdiction. Because in one hand the court delegates its power of examination to a commissioner and on the other hand, the evidence taken under it shall form part of the record of the suit. (see Art 128(2) of civ.p.c) Thus, the admission made before a commissioner is conclusive as if Judicial admission. For instance, if Ato “A” in his testimony informs the commissioner that he has entered a written contract with Ato “B” need no further proof of the fact that Ato “A” has entered a written contract with him.

E. Admission by testimony of the party on the stand or by statement of his counsel

Facts may also be admitted by a party when testifying as per Art 261 of civ-p.c. As said earlier in civil cases, a party can be a competent witness in his own case, in which he considered as any other witness for all practical purposes. So, while testifying during his case either in chief or cross-examination, he may admit facts.

When we say a party can be a competent witness in his own case, we are saying that the party himself may wish to give evidence on his own behalf or the other side may call him as a witness. For instance, the defendant may make the following statement “To save time I shall admit that if the plaintiff is entitled to recover in this case, his damage is birr 500”. Similarly, in an action for breach of loan contract of a certain amount, the defendant may make the following statement “I am not liable to perform the contract since the claimant has agreed to me to set off his claim with the same amount for which

he is liable to me extra- contractually”. In the above cases, the defendant admits the allegation of the plaintiff.

Moreover, in the case when the defendant stands as a witness of the plaintiff by the request of the later, the claimant may examine him in examination in chief. During examination for instance, the plaintiff may ask him as to the time when he lend him such a mount of money for which the defendant replies “on Tir 7, 2000”. In such case the defendant admit the fact of the existence of the loan contract through examination in chief.

May the court consider the default of the party to challenge the other side's cross-examination as admission?

We have said that if a party wishes he may be a witness in his own case. And he is subject of cross-examination made by the other party as a mechanism of testing the truthful nesses of his testimony. While during cross-examination he may fail to challenge or he may prefer to keep silent. In such case the question that should be answered is, do we consider his silence as admission?

As said earlier, cross- examination is a weapon used by the cross examining party to discredit or impeach the testimonies made against him. And it is considered as the stage in which the skills of advocacy have tested. Thus, if the advocate did well in cross-examining the other side's party, he may increase his probabilities of being a winner even though failure to cross-examine on a particular point does not constitute admission of the truth of the opposite party since the stage of cross-examination is optional.

However, the cross-examined party on the other side should able to challenge the cross-examining party. Otherwise, in civil cases, his silence may be considered as admission of the fact in question.

F. Admission by agreement of the parties.

Facts may be admitted by a party in a written agreement made before the hearing with the other party. This may be made even in response to a formal request to admit.

Where a party wishes his opponent to admit a fact in issue without the need to call evidence to prove the fact at trial, a party may serve “a notice to admit facts” on the other side. Where the fact is admitted, the opposing side is relieved of calling evidence in support of that fact at the trial. This procedure is appropriate where the fact to be admitted is uncontroversial or the party wishes to save expense by not having to call a particular witness to give evidence to prove the fact. Because by making an agreement on such little issues that they did not seriously plan to contest any way the issues requiring trial can be narrowed. But lawyers are often hesitant to give away something for nothing. As a result the fact may remain in dispute and the party on whom the legal burden is vested must discharge the legal and evidentiary burdens of proving that fact. However in common law countries, if the fact is subsequently proven at trial the party who refused to admit the fact may incur a costs penalty of proving the fact at trial.

Under Rule 50 facts may be admitted by a party in a written agreement made before the hearing with the other party. As Melin points out such facts would appear to be conclusively admitted unless leave could be obtained from the court at the first hearing to withdraw one's admission. But here the question is whether such admission by agreement of the parties would be considered as Judicial admission or not?

In this point, Melin argue that, since the admission is given in such agreement which entered outside of the court, it would remain evidentiary admission unless admitted to at the first hearing. Do you agree?

Is there any rule in our civil procedure code, which provides the above procedure?

According to Art 252 of civ.p.c, the parties may agree as to the question of fact or of law to be decided between them and they may state the same in the form of an issue. In such case the fact what was previously an issue may be admitted and the issue requiring trial

may be narrowed. Thus, such facts which are admitted under the agreement would appear to be conclusive on which the court can pass judgment.

Activity

Why a party to the case make an admission? How should the court weight the binding effect of a party's admission on the trial?

2. In criminal Cases.

Even though there is a slight different between civil and criminal cases, the accused may admit the charge brought against him on which he may be convicted. (see Art 134 of civ-p.code)

In criminal cases, Judicial admission refers to plea of guilty or not guilty .After having read the whole charge to the accused, the court asks the accused whether he pleads guilty or not. If he pleads guilty without reservation the court may enter plea of guilty. Where he admits but with reservation, the court will enter plea of not guilty. Because, unlike civil cases, in criminal cases the court can not split the facts and frame issues with respect to those which are denied. Here, a plea of guilty is a judicial admission of each and every elements of the offence charged.

Thus, some argue that the mere response of the accused i.e. “*yes I am guilty*”, for the question of the court whether he pleads guilty or not, should not be considered as admission. The statements of the accused to be considered as admission he has to get the chance of responding each and every elements of the offence charged. In other words the court shall ask him whether he pleads guilty or not of each elements of the offence charged. Thus, they argue that only the judicial admission given in such away is considered as conclusive evidence if it is made voluntarily and intelligently.

However sometimes especially in serious criminal case like homicide case, the court may require the public prosecutor to produce evidence despite that the fact is admitted. The reason for requiring further proof is in one hand, the accused might have made the

admission due to various reasons like to cover another person or to make unknown a certain fact, to be famous by his criminal act especially in the case which gets large media coverage even though he is innocent. On the other hand, the very high standard of proof in criminal cases still justifies further proof, because, in some cases the confession of the accused alone may not have the capacity to prove the commission of a crime beyond reasonable doubt.

However, it is important to notice that the procedure does not say the court “shall” require further evidence but “may” which means that if the plea of guilt convinces the court beyond reasonable doubt the court may convict the accused. As a result, it is widely accepted that except in serious criminal cases the judicial admission of the accused should be considered as conclusive evidence. Even in some common law countries like U.S.A, there is a system, which encourages the accused to admit a charge brought against him. This procedure is known as “*plea bargain*”. In this procedure if the accused admits the fact before the court, in return the public prosecutor may apply to the court to mitigate the punishment. This is just made as a reward for the accused's contribution in saving a court's time. But some scholars disagree on the merits of such procedure. Because it may in courage the criminal to commit a further crime in believing that the procedure of “*plea bargain*” would apply in his case.

2.1.3.2. Extra- Judicial Admission: Civil and criminal case

In the previous sections, we have discussed about judicial admissions in civil and criminal cases. And the second type of admission is evidentiary admission. This is an admission made outside of the court either orally or in a written form.

Although any thing a party previously said may be used against her, it is not conclusive against her since it may be contradicted by the party making them. For instance, a party can deny making the statement or she can try to explain it away- for example by contending that she was joking.

However, as said earlier admission is destructive in civil cases. Thus, the evidentiary admissions may produce the effect of estoppel. Estoppel is a rule of civil action which

prohibits a person, who by his statement or conduct caused other person to act in away he would not have otherwise acted in the absence of such statement or conduct, to deny his statement to justify of the other person who acted up on such statement (see Rule 27 and 90 of DER). But any way, the discretion is given to the court as to how much weight shall be attached to evidentiary admissions. If such an out of court admission is proved and not contested in any way the court may well believe the fact admitted to be true.

Activity

“A” issuing “B” for failure to pay for shipment of Sony TV sets. “B” says that he did not make the order, much less receive the shipment.

Assume, 3 weeks after the alleged order, “A” sent “B” a letter, probably stamped, addressed and mailed, that said “this is to let you know that the hundred National Radio and the hundred TV sets that you ordered are on the way. The bill is 30,000 for the Radio and 200 for the TV sets, including delivery”.

To this “B” responded “you are crazy, I never ordered any Radios” can “A” introduce this exchange in support of his claim for the TV sets?

What is the effect of extra Judicial admission in criminal cases?

As said earlier in civil cases, admissions made before a commissioner is considered as judicial admissions even though it may be made outside of the court. However, the effect of extra-Judicial admission in criminal cases is different. This is due to the higher standard of proof required in criminal cases.

In criminal cases, an extra-Judicial admission may be made during police investigation (Art 27 of cr-p-c) or at the preliminary inquiry case (Art 35 of civ-p.c). The primary purpose of detaining and interrogating a suspect at a police station is to obtain information that is relevant to the crime under investigation. Notwithstanding the fact that a suspect enjoys a right to silence at the police station, the police hope that by persuading a suspect to talk they can encourage him to make incriminating admissions capable of

being used in evidence against him. As a result, the police may use force or coercion either physical or psychological. Thus, we should have a safeguard which regulates the way in which a confession is obtained and the way in which its admissibility is determined.

Even though the confession made during police investigation may be adduced as evidence before the court of law, they may be contradicted by the party making them. For instance, the suspect may exclude such confession on the ground of operation. In such case it is for the prosecutor to prove beyond reasonable doubt that the confession was not obtained by operation and it is not unreliable having regard to things said or done. (Art 27 of cr.p.c and art 19(5) of the constitution)

The oppression may include torture, in human or degrading treatment, and the use of threat of violence (whether or not amounting to torture).

Even in common law countries like England , the confession made during police investigation may be excluded on the ground of unfairness. This is the case when the suspect made his statements with out informed of his right which they call” *Miranda warning*”. Reasons for seeking exclusion of confession evidence under this situation may include denying access to a solicitor, lying to the suspect or tricking him in some way, failing to record the interview properly, failing to inform the suspect as to his right to silence and failing to inform the fact that any statement he may make may be used in evidence. May the court exclude the confession made under Art 27 of cir. p.code due to the mere fact that the suspect is not informed about his right before investigation?

Activity

How can we determine whether a certain act of police against the suspect is oppressive or not? Do you agree on the fact that oppression is a question of degree i.e what is oppressive as regards one individual may not be oppressive to someone of a more phlegmatic disposition?

Is admission made before the courts other than the court having Jurisdiction over the case, considered as evidentiary admissions?

In criminal cases, there is a difference on the admissibility of confessions made before the trial court, and before other courts. But the confession made before other courts may be excluded if it is contradicted by the accused person. For instance, a confession made before first instance court under Art 35 of cr.p.c seems to be conclusively admissible since it is made before the court of law. But this is not true. Because the accused is required to confess before a court while he is in police custody. Thus, if the accused chooses he can at his trial contradict or explain his statement at the preliminary inquiry. He could for instance, allege that he made the statement because he was afraid of the police, because he was confused or because he was paid to do so. (see Art 83(3) of cr.p.c). However, on the other hand, a judicial admission may not be contradicted if it is made voluntarily and intelligently.

Activity

Is it possible for the court to convict the accused on the strength of his extra-judicial confession alone? Explain.

2.2 Presumption

2.2.1 General introduction: basic fact and presumed fact

What is presumption?

The second situation where a party is relieved of the legal burden of proving a fact in issue is where the fact comes within the operation of presumption. Presumption is an inference made about one fact from which the court is entitled to presume certain other facts without having those facts directly proved by evidence. In this, the proof of one fact is taken as the proof of the other fact. Where there is an issue before a court the one that has to be proven is the disputed fact. However, the proof of such fact may not be needed if a fact the proof of which is equivalent to the proof of the disputed fact is proved. Here a

party who wants to benefit from presumptions must go the half way i.e. he must first prove the basic fact unless such fact is admitted by the other party. If the proof of A' makes the existence of fact "B" more probable it is sensible and time saving to assume the truth of fact "B" until the adversary disproves it. The following example shows the operation of presumption of paternity.

Example.

Assume "A" and "B" are husband and wife who actually lives separately in consequence of an agreement conclude between them, during which the child is conceived and born. Now the dispute arise between "A" and "B" on the question of paternity.

Here a child born in wedlock is presumed to be the child of the husband, because you expect sexual relations between the two (see Art 126 of RFC).The fact that "B" is the father of the child is presumed fact, and the fact that "A" and "B" are husband and wife is a basic fact. However, the spouses shall be deemed to have had no sexual intercourse with one another during the time when they actually lived separately. In this case, the husband shall not be deemed as the father of the child (see Art 169(1) of RFC) .Thus the fact that "B" is not the father of the child is presumed fact, and that the spouses (A and B) live separately is a basic fact . So "B" can disown the child by proving such basic fact even through the child is born in wedlock. However, as provided under Art 169 (2) of RFC, this presumption is reputable presumption. We will discuss about rebuttable and irrebutable presumptions at length in the next sections.

Why we need presumption?

There are policy considerations supporting the creation and invocation of presumptions. Presumption serves a number of purposes. Sometimes the strongest factor explaining the creation of presumption is probabilistic relation. Thus, the law draws presumption on those facts which are more likely to exist just to save time. For instance, the law presumed the possessor of the corporeal chattels as the owner thereof (see art 193 of civil code).This presumption is based on the probability that most of the time the individual possess chattel which belongs to him

Sometimes the law may provide presumptions for procedural convenience. For instance capacity is presumed under the law unless the other side alleges the disability of person in which case he is required to prove that such person is under disability.(see Art 196 of civil code).But if the court requires proof of capacity in all cases, it is possible to imagine how may it create procedural inconvenience. That is why the general competency of witness is presumed (See rule 92 of DER).Moreover, sometimes as you may see in the case of Art 832 of civil code; presumptions provided solution to cases, which are difficult to prove. If two persons are dead in the same accident, as to who died first and who died next is difficult to prove for purpose of succession unless the law of succession provides so.

The presumption may also be created under the law to protect public policy or greater interest of government. For instance, in order to protect the peace and order of the family, the law presumed all property acquired during marriage as a common property of spouses.(See art 653 of civil code).Similarly, the reason for the presumption of paternity of a child born either in wedlock or an irregular union is to enable every child to have some body as his father.(See Art. 126 and 130 of RFC)

To express by another example, there is a presumption as to the genuineness of certified copies of public documents and they may not be challenged except with the permission of the court (See art 2010(2) of civil code). This is to develop the confidence of the society on public officials since those officials are acting on behalf of the government.

Do all presumptions depend on the proof of the basic fact?

As said earlier, presumptions are circumstantial evidences from which if one fact (basic fact) is proved to exist, the alleged fact exists. Thus the beneficiary of the presumption must go half way by proving the basic facts. However, there are certain presumptions not depending on proof of basic fact. In such case, the person who alleges such presumption is not required to prove any basic fact. Rather, he can be the beneficiary of such presumptions by the mere fact that they are provided under the law due to different policy reasons. For instance presumption of innocence is among presumptions not depending on

proof of basic fact. During proceedings accused persons have the right to be presumed innocent until proved guilty according to law. (Art 20(3) of the FDRE constitution), and the burden of proof lies on the public prosecutor to prove the guiltiness's of the accused person beyond reasonable doubt.

Here, the accused persons are not required to prove any basic fact to be presumed as innocent before conviction. The presumption is provided simply to guarantee the human rights of the accused from being violated by different authorities in the name of protection of crime and criminals.

However, regarding presumptions which do not depend on proof of the basic fact, there is an argument that they are mandatory rules of law or initial allocation of burden of production than presumption. For instance, we say that a criminal defendant is presumed innocent, which is really away of emphasizing that the burden of proof are on the prosecution. Because there is nothing the innocent has to prove unless his innocence is rebutted by evidence the public prosecutor produces. That is why some argues the presumption of innocence more confirms to the initial allocation of burden of proof rather than “presumption”. The presumption, unlike the initial allocation, is involved only if the predicate is established or found to be true. But if the predicate is uncontested, the two type of rule virtually merge.

Moreover, presumption of innocence of the accused is not logically found. In the rule of criminal procedure, where the evidence is not sufficient, the public prosecutor shall close the file and not bring charges. And also, people accused, in most cases, get convicted .From this it follows that if a person is accused the presumption has to be that he is not innocent .Thus since they did not have basis in rules of logic, the argument is that they are rather mandatory rules of law than presumptions.

Activity

Art 1162(1) of civil code provides “Whosoever acquires a corporeal chattel shall be deemed to be in good faith where he believes that he is contracting with a person entitled to transfer the thing to him.”

What is the basic fact the party in whose favor the presumption runs has to prove in the presumption stated above?

What kinds of presumptions are there?

Presumptions can be divided as presumption of fact (permissive inferences) and presumption of law. Presumption of fact is logical inferences that can be drawn by experience upon proof of the basic fact. Such inferences are mostly true in the normal course of things.

However, as the naming implies presumptions of law are presumption which the law requires the court to make. They are mandatory in the sense that, where the law requires the court to presume a certain fact the court can not refuse to presume. These presumptions used the phrase” shall be deemed or presumed”.

2.2.2 Presumption of fact

As said before, presumption of facts are not prescribed by law. Rather they are about logical inferences that can be made from a given fact. This leads to the argument as to whether the issue of presumption is subject of law of evidence or subject of rules of logic or reasoning.

Presumptions of fact are not mandatory, rather they are permissive in the sense that the court can take it or leave it at its discretion. Since they are not prescribed by the law, some believed that presumptions of facts are not true presumptions although, unlike some presumptions, they can be rebutted, and unlike others, they require proof of a basic fact. Nevertheless if a presumption of fact arises and other side calls no evidence in rebuttal, the court is not bound to reach the conclusion indicated as it is in the case of true presumptions.

Consider Rule 88 of the DER. Is it mandatory?

Court may presume existence of certain facts

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the fact of the particular case.

As we understand from Rule 88 of DER, this presumption of fact is the presumption that the court may make inference from the experience, the common course of natural events and from the custom and behavior of a person in particular and the community in general. And such inferences are mostly true in the normal course of things. For instance, from the nature of human beings one can presume that every one loves his offspring and do not want to see his relative or his best friend in bad situations. As a result, if for instance a son is called to testify in favor of his father, one may presume that it is difficult to get a neutral testimony from such witness. That is why the opponent party tries to impeach the testimony of the witness by showing the existence of the degree of relationship that the witness has with the calling party.

The same is true in the application for removal of judge, if, for instance the judge is the joint owner of the property in dispute with one of the parties, one may presume this judge may be biased towards another party since every one is interested in the case involving his own property or money.

The presumption of fact may also arise from the common course of natural events that one presumes the existence of the fact from his experience by applying his logical inferences. If, for instance, the distribution of rain is good, one may presume the harvest to be good. There is however, no such legally established rule that requires or objects the court to presume fact.

Moreover, the court may presume the “*intention fact*” by taking into consideration previous similar occurrences. If the plaintiff is able to prove the basic fact (i.e. the existence of previous similar occurrences), the court may presume the fact whether the defendant did something intentionally or not. For example, “A” was found selling banana mixed butter in her shop repeatedly. One time a buyer after he has bought a butter discovers that it is

banana mixed. Here, the court may preserve the fact of similar sale of banana mixed butter by the defendant because, if it were once you would say it is done by mistake, but where it is repeated it should be intentional.

Activity

On the proof of the basic fact that “A” was alive on April 2007 there is a presumption of fact that she is still a live on some later date, for example 10 October 2008, when the court is invited to conclude that “A” is still a live

I. Do you think presumption of fact apply in case of continuance of life found in the above case? If so, on which sources of presumption of fact?

II. Assume the presumption is taken by court but no evidence is adduced to rebut that presumption, for instance, by adducing evidence that “A” was suffering from an incurable illness in April 2008. Then, may the court bound to draw the conclusion that “A” is still a live? Why?

2.2.3. Presumption of Law

As said earlier, presumptions of law are presumption, which the law requires the court to make. They are mandatory in the sense that, where the law requires the court to presume certain fact the court cannot refuse to presume.

The bases for the creation of presumptions of law may be different. Some of presumptions are natural presumptions through which the law recognized the application of such natural events. For example, the presumption under Art 3(1) of civil code is of such kind.

And another strong factor which explains the creation of a presumption is probabilistic relation or logical relation. Even a simple relation may be an adequate explanation, like “If fact “A” is true, then fact. “B” is probably true”. More often, the law may need a

narrower statement to justify a presumption, such as “ If fact “A” is true and the opponent party has no evidence suggesting fact “B” is not true, then “B” is probably true”

However all presumptions of law are not based on logical relations there are presumptions which are prescribed by the law for different social or governmental policy. As a result, we have such presumption of law (e.g. presumption of innocence) which is not depending on proof of basic fact.

What kinds of presumptions of law are there?

Presumptions of law are of two types: rebuttable and irrebutable presumptions. In the following sections we will discuss such presumptions in detail.

2.2.3.1. Irrebutable Presumption

Do all presumptions have the effect of shifting the burden of proof to another party?

As said earlier, the party in whose favor the presumption made is relieved from proving the fact in issue. In stead of proving the disputed fact, he proves a basic fact or groups of facts whose interference makes the existence or non-existence of the fact in issue more probable.

In principle, presumption has the effect of shifting the burden of proof from the party in who's employed in case of presumption of fact and reputable presumptions. However, conclusive or irrebutable presumption is really an awkwardly expressed rule of law which can not be disproved by another party. Thus irrebutable presumptions do not have the effect of shifting the burden of production to another party. Once the person who has the irrebutable presumption on his side proves the basic fact then the other party will be won without counter proof on his side, even if he has possible grounds of disproving the allegations. (See Rule5 [3] of the DER).

This in other words means, that where the basic fact is proven, the inference must be made and the issue between the parties is disposed .It results in an instruction of the form, If you find X, then you must find “ Y' and this instruction is proper no matter how much

evidence is presented that “Y” is not true. It thus amounts to rule of law that if “X” is true consequence “Y” must follow”. For instance, under Art 2024 of civil code debts due in respect of rents for house or agricultural estate shall be deemed to have been paid where two years have elapsed since they fell due. And no proof shall be admitted to rebut such presumptions. (See Art 2026 (1) civil code). In this point, the cassation division of the federal Supreme Court passed decision that if the fact in dispute is the one which is covered by the mandatory legal presumptions, the court shall apply such presumptions irrespective of the fact that whether the given fact is denied or not by the defendant .(see □□□□ □□□ □□□□□□ □□□□ Vs Mr. Byronic Areca, fed. Sup. Court cassation bench File No 1768/1997.E.C)

Activity

1. Some argue that irrebutable presumptions are rather mandatory rules of law than presumptions. Do you agree? Why/Why not?
2. Art 2035(2) of civil code provides “Ignorance of law is no excuse”. Does this provision depend on presumption? If yes, is the presumption logically convincing? What about the presumption provided under Art 346(2) civil code? N.B. Regarding irrebutable presumptions of law consider the following articles. Art 128 of RFC, Art 3 (1) Art 4 (1), Art 672(2), 2020 civil code etc...

2.2.3.2 Rebutable presumptions.

A rebuttable presumption of law operates where, on the proof of admission of primary fact, and in the absence of further evidence, another fact *must* be presumed. The party relying on the presumption bears the legal and evidentiary burdens of proving the primary fact. Once the party has adduced sufficient evidence to establish the presumed fact, the presumption will apply unless the other party successfully discharges its legal and evidential burden to rebut the presumption. Thus, rebuttable presumption of law unlike irrebutable presumption has the effect of shifting the burden of proof to another party. For instance, in the case of presumption of legitimacy, a person will be presumed to be legitimate where the primary fact is proven that he was born or conceived during

the period of his parent's lawful married life or irregular union. (Art 126 and 130 of RFC). However, the alleged father to rebut the presumption of legitimacy may, for example, introduce evidence proving that he could not have sexual intercourse with the mother during the period between the 300th and 180th day before the birth of the child. (See Art 168 of RFC).

What is the standard of proof required to rebut the presumption?

The standard of proof required to rebut the presumption may be determined by the area of substantive law in which the presumption operates. In a civil case, the party that has the legal burden of rebutting the presumption is required to prove the issue to the normal standard of “on the balance of probabilities”. That means if the party on whose favor the presumption is made failed to challenge the rebuttal evidences of the other party, we can say that the other party fulfilled the normal standard required to rebut the presumption. However, in some cases, it seems that the provision requires the party to prove the issue to the higher standard of proof which confirms to the standard of “beyond responsible doubt “as it is in criminal cases. For instance, under Art 168 of RFC, the person to whom the law attributes the paternity of a child may disown such child by proving *decisively* that he could not have had sexual intercourse with the mother during the period between 300th and 180th day before the birth of the child. Here, the phrase “...by proving *decisively that...*” shows that the standard required in such case is some how above the balance of probabilities.

Can one rebut the presumption by adducing any evidence?

In case of rebuttable presumption, sometimes the law restricts the ground upon which the presumption may be rebutted, and in other cases does not impose any restriction on how to rebut the presumption. Thus some rebuttable presumptions are rebuttable on unlimited grounds while others on limited grounds. These differences may also have its own impact on the standard of proof required to rebut the presumption. For instance, under Art 2006 of civil code statements contained in written instrument may be challenged by those who signed it only by tendering on an oath to the party who avails himself thereof. And no

proof by witnesses is admissible against such statements. From this we can understand that as the meanness of rebutting the presumption restricts, the required standard of proof may increase.

Those rebuttable presumptions which are rebuttable on unlimited grounds usually provides” *proof to the contrary may be adduced by any means*”. For instance, Art 1147(1) of civil code provides” unless the contrary is proved, he who began to possess on behalf of another person shall be regarded as a mere holder”, and sub (2) of this Article says “proof to the contrary may be adduced by any means. The same is true under Art 169(2) of RFC.

When we say rebuttable on unlimited grounds we are saying that the law does not impose any restriction on how to rebut the presumption. Thus even though, the provision does not specifically say”... *by and means*”, one can rebut it by providing any evidence as far as the law does not impose any restriction on how to rebut the presumption. For instance, the saying “*proof to the contrary is admissible to rebut such presumption*” or “*unless the contrary is proved*” is equivalent to the saying “*proof to the contrary by any means is admissible*”.

Moreover, some of the provisions of the law may impose a limitation on the person who could rebut the presumption. For instance, under Art 172 of civil code, if ten years have elapsed since the date of the last news, the absentee shall be presumed dead and this presumption of death can be rebutted only by absentee him self or by his special attorney after the date of the judgment declaring the absentee and not by other persons.

Another kind of rebuttable presumptions are those rebuttable on limited grounds. Here one can not rebut the presumption by any evidences other than those provided under the provision of the law in which the presumption operates. For instances consider the following presumption.

Art 1153 of Civic - Bees.

1. *Bee swarms which have left their hive shall be deemed to things without a master.*
2. *The person in whose hive they settle down shall become the owner of such swarms by virtue of occupation.*
3. *The former owner may take them back where he chases them and arrives where they have settled immediately afterwards.*

In the above provision, the former owner of bees can rebut the presumptions, which are provided under sub (1) and sub (2), only by proving the fact that he chases them and arrives where they have settled immediately afterwards .And he can not rebut the presumptions by any other means for instance, by witnesses .But what if the bees was chased by any other person on owner's behalf? And what if the owner chases them but he could not arrived immediately after they have settled?

To express by another example Art 4 (2) of civil code provides” A child shall be deemed to be not viable where he dies less than 48 hours after his birth” and sub (2) of this article impose a restriction on how to rebut the above presumption. That is one can rebut the presumption only by proving the fact that the death of the child is due to an external cause , for instance, by proving the fact that the cause for the death of the child is the contaminated milk that he drank after birth , etc...

Similarly you can get presumptions which can be rebutted on limited grounds under Art 1196, 2025, 2782 of civil code etc...

Activity

How can we identify the provisions providing “rebutable presumptions” from irrebutable presumptions?

As said earliest, we can classify presumptions in to presumption of fact and presumptions of law unlike presumption of law presumption of fact are not mandatory, rather they are permissive in the sense that the court can take it or leave it as its discretion, and they are

not prescribed by the law. From these differences one may believe that all presumptions which are prescribed under the law as presumption of law and mandatory in their nature. However sometimes, the law may provide the presumption what we call “*permissive presumption*”. Now, we will discuss the nature of permissive presumptions and the relations they have with presumptions of fact and law.

2.2.3.3 Permissive presumptions

What is meant by permissive presumption and what makes it differ from other presumptions?

Permissive presumptions, like presumption of fact, they are not mandatory, and like presumption of law they are prescribed under the law. The provisions of the law which provides permissive presumption contain the phrase “*may presume...*” which shows its permissive nature. For instance, consider Art 22 of civil code which provides “where a person refuses to submit himself to a medical examination had the object of ascertaining not involving any serious danger for the human body the court may consider as established the fact which the examination had the object of ascertaining”. Here, for example, a person charged of knowingly transmitting AIDS to woman may refuse to submit to examination. [Art 20(1) of civil code]. However, the court may consider the status of the accused as HIV positive. But this should be true in civil proceedings where the victim claims compensation for moral or/and material (if any) damage caused up on her. Because, here a question arise whether the presumption provided under Art 22 of Civil code is applicable in criminal cases. If the case is the criminal one the suspect/accused can not refuse to submit himself to a medical examination including blood test.(see Art 20(2)of civ.c and Art 34 of cr.p.c).The higher standard required in criminal case further justify the above saying.

However, the party on whose favor the presumption is made cannot enforce the court to reach to such conclusion. It is up to the discretion of the court.

Is permissive presumption a rebuttable presumption?

As said above, in the case of permissive presumption, the court has two options. These are the court may call the production of evidence or may consider the disputed fact as established. But if the court prefers to take the presumption the question may rise as to whether the party against whom the presumption is made has a right to rebut it or not. Regarding this issue, there are different arguments.

The first is, once the court considers the disputed fact as established; the other party doesn't have the right to rebut it. Thus in this case, permissive presumptions resembles to irrebutable presumptions. While According to the second argument, permissive presumption has the effect of shifting the burden of proof to another party, which enables him to rebut it. And since, from the begging permissive presumptions are not mandatory as it is in irrebutable presumption of law, the other party shall have right to rebut it. Otherwise it become unfair and against the sprit of evidence law. For instance, Assume how much it become unfair if the court denies the right of the other party to rebut the presumption in the case where it a ware about the fact that the victim has not affected by HIV/AIDS after a repeated blood test. 1

The third argument is the one which consider permissive presumptions as rebutable presumptions even though the right of the party to rebut the presumption is depend on the discretion of the court unlike reputable presumptive.

Which of the above argument is acceptable for you? Why? Do you have any other position?

Activity

Discuss the difference between permissive presumptions and the two kinds of presumptions of law?

2.3 Judicial Notice

What is judicial notice?

Speaking generally the term judicial notice refers to circumstances in which the judicial system assumes a factual proposition to be true even without proof of that proposition.

It refers to facts which a judge can be called up on to receive and to act up on either from his knowledge of them or from enquires to be made by him self for his own information from sources to which it is proper for him to refer. In such cases when the matter alleged is so well known to the court it would be a waste of time to compel the party to offer evidence of its truth. For example, facts like city of Addis Ababa is the capital of Ethiopia, Guenbot 20 is a holiday, criminals lead unhappy lives are among those facts of which the court will take judicial notice.

Taking judicial notice has a great value to the courts and the litigant parties in shortening of trials. As most of the scholars agree the matter to take or not to take judicial notice is left to the discretion of the court and if there is the slightest doubt as to whether the fact is true the party must be required to submit proof to the court.

However, the law may require a court to take a judicial notice of a certain facts. In such cases they are obliged to do so. For instance, under rule 42 (2) of DER judges are obliged to take judicial notice of all laws published in Negarit Gazette, the territories under the government of Ethiopian, the seals of all ministers, the division of time and the like.

What facts are subject of judicial notice?

In common law countries like England; the law recognizes two forms of judicial notice: judicial notice without inquiry and judicial notice after inquiry.

Judicial notice without inquiry at common law is taken in respect of those facts that are so much part of common knowledge that they require no proof and cannot be rebutted in

evidence. The court may also take judicial notice without inquiry of certain matters prescribed by the law.

However, judicial notice after inquiry applies to those facts that are not so notorious or part of common knowledge of which notice may be taken by the judge after he has made appropriate inquiries. The inquiry may include referring to text books, works of reference, certificates from government officials and oral statements from witnesses. Most cases, which fall in to this category of judicial notice, relate to facts of a political or historical nature or matters of custom or professional practice.

Generally facts of which the court may take judicial notice can be classified as judicial notice of a judicative facts and judicial notice of laws /legislative facts. In the following sections we will discuss them in detail.

2.3.1 Judicial notice of adjudicative facts

The basis for invoking judicial notice seems to be that, even absent the formal introduction of evidence, the proposition in question appears overwhelmingly probable. There are two basic ways of reaching that conclusion. The proposition may be a matter of common knowledge or it may be capable of certain determination by sources whose authority is not questioned.

In both cases there is a criteria of ‘*indisputability*’. That means judicial notice should only be allowed in cases that are beyond reasonable dispute. If there is the slightest doubt as to whether the fact is true the party may be required to submit proof to the court.

A. Facts of common knowledge

How can we determine the communality of knowledge of a certain fact?

A fact of common knowledge is a fact generally known to be true by the ordinary intelligence of the people and beyond dispute. It is not something one knows because of

his academic background. A fact of common knowledge, as you may understand refers to knowledge that is commonly shared by all people. These facts of common may be either a matter of ordinary course of nature or matters that a member of a given community can easily recognize like known public places and customary practices.

Thus, the judge in taking of judicial notice he should take in to consider the general knowledge of the community that they have towards the fact.

A judge may not take judicial notice of matters known to him to be true because of his private knowledge unless they are generally known. Thus this principle excludes personal knowledge.

Should a fact to be taken as a fact of common knowledge, be a fact of common knowledge every where?

A fact to be subject of judicial notice does not have to be universally known to be true or everywhere. Rather it is sufficient if a fact is a fact of common knowledge in the territorial jurisdiction of a trial judge. Especially this is true regarding facts like name of places, custom of a given society and the like which could probably known only to the member the society. For instance, a judge sitting in Afar court may take a judicial notice on the fact of the existence of a small stream in Afar but when a judge sitting in Gondar takes a judicial of such small stream in Afar it is not justifiable even though he personally knows it.

Here, personal knowledge is excluded to increase the confidence of the society on the judiciary. Because if the judge take judicial notice based on his personal knowledge, the persons who attends the trial may loss confidence on the court and it may questioned its impartiality. However, this does not mean that there are no a big nationally known facts on which all courts in Ethiopian are expected to take a judicial notice of them. For instance, if a capital city of Ethiopia is an issue in a certain case any court in Ethiopia can take a judicial notice of it. Thus, we can say that the yard stick for a fact to be a common knowledge whether in a particular territory or nation wide differ from case to cases based on the degree of notoriety of a fact.

Moreover sometime a judge may not be aware about the fact while it is a common knowledge in the society. In such case the question may arise as to whether he is justified in taking judicial notice of the fact or not?

Generally a judge need not know or even have known a fact of which he is asked to take judicial notice as far as the fact is generally known by the society. For instance the trial judge may be a stranger who is not yet familiar with territory or of custom. In such case he is justified in taking judicial notice of the fact if he can ascertain its unchallenged existence by his own examination of the subject matter. The question here should be whether the fact is known by the people in general or not. Whether the fact is known by the sitting judge or not is immaterial.

Activity

1. Do you think it is possible to identify all of the facts assumed to be common knowledge across the entire country under the law? Why?
2. "Making a mobile conversation with one hand while driving substantially raises one's chances of getting in to an accident. Is it a common knowledge that a court can take a notice on it? Why?"

B. Verifiable facts

What are veritable facts?

The other category of facts of which the court may take judicial notice refers to veritable facts as said earlier those facts are not so notorious or part of common knowledge but are facts that can indisputably be ascertained by reference to authoritative means and those matters of public knowledge. These facts are mostly related to science, history, art etc... For example, the fact that whether an epilepsy may suddenly make a person unconscious or not can be ascertained from text of medicine or by consulting a physician, if necessary. Furthermore, if the date in which the Ethio-Eritrea war had commenced is in dispute it can be ascertained by historical records. The same is true regarding

geographical facts and political subdivision of a state which can be ascertained by referring to maps or geography texts.

Here, the reference themselves should be undisputed authorities and the fact must be found to be unchallenged, because what is written on the text is not always true. For instance, texts may reflect the personal opinion or the political stand of the historians. Thus, it is difficult to rely on them unless they are authoritative. But the question that should be answered here is how can we determine whether the text is authoritative or not? Can we say that the book is authoritative if there are no any other texts, which argue contrary regarding the fact in dispute?

We believe that, the mere fact of the existence of different ideas towards a given fact does not make it unauthoritative. All people need not have a consensus on ascertain scientific or historical facts. Thus the court can use a reference which is acceptable by the majority and which is up to date. For instance, regarding historical facts it is better to refer history texts. Because, at least through teaching learning process, the possibility of such facts of being a public knowledge is higher than other texts in which the personal opinion of the author might be reflected.

However, it is better that the party to submit proof to the court if there is the slightest doubt as to the truth of the fact. Because the criteria of “*indisputability*” is also there regarding verifiable facts. Thus, if the text is disputable the fact cannot be verified since high level of ascertainment is a requirement.

Activity

Can the party against whom judicial notice is taken object the authoritative nature of the reference? How?

2.3.2 Judicial notice of law

What is judicial notice of law?

Judicial notice of law is the process by which the courts determine the applicable law in a case. Because the issue that arise between parties may not only be issues of fact but also issues of law. [see Art 240 of civ.p.c]

For instance, in the case when the defendant admitted the allegation of the plaintiff, the later may require the court to pass judgment on the admitted fact. But assume the defendant argue that there is no law which makes him liable to the claimant by the mere fact of his admission. In such case, the plaintiff should not be required to produce art 242 of civ.p.c to prove the above issue of law. Rather, the court can take judicial notice of art 242 by referring it from the civil procedure code.

Do the process of taking judicial notice of law similar in civil and common law countries?

As said earlier, a civil law legal tradition is characterized by codification of laws. Thus, civil law countries have codified laws either in the form of proclamation, regulation or directives as enacted by different law making organs in different levels. And it is also presumed that judges are familiar with those laws which have a nationwide application. As result the process of taking judicial notice of law in civil law countries seems relatively easy.

However, in common law countries judges are authorized to make laws. And all subordinate courts are bound to follow the decisions of the higher court which are given in the cases involving similar question of facts or laws. Now we are concerned as to how it becomes difficult for the judges to take judicial notice of law in common law countries. Because, sometimes two decisions may come to fundamentally different conclusions as to what the law should be .In such cases, a judge may face a difficulty as to on which decisions they could take judicial notice of law. For instance, assume the defendant ask the court to take judicial notice of the decision” *A criminal defendant has a privilege to*

preclude his spouse from testifying against him". When the judge looks over it he gets two previous decisions having different conclusions. The first case gives privilege for the criminal defendant to preclude his spouse from testifying against him. While the other case provides only the witness spouse has the privilege i.e. she may be neither compelled to testify nor foreclosed from testifying. In such cases, the court can act on its perception of legislative facts even if those facts are not established beyond genuine dispute. Moreover, they may not be confident about the likely effects on marriage of allowing the witness spouse to testify over the defendant spouse's objection. Even they may be forced to consult social psychologists.

However, this is not the case in civil law countries, which have codified laws. Because you cannot get such fundamentally different provisions in codified laws unlike case laws. That is why we have said that a judge can take judicial notice of laws in a confident manner in civil law countries than common law countries.

Activity

"Law of evidence is principally about proof of fact than proof of laws. Thus judicial notice of law is not subject of evidence law". Do you agree in above proposition? Why/why not?

Which laws are subject to judicial notice of law?

The term "*law*" covers a wide field which includes law of the state venue, laws of other sister state, foreign laws, international laws, customary laws, administration regulations and directives and the like. But here the question is which kind of laws is subject of judicial notice and by which courts?

The federal Negarit gazeta establishment proclamation no 3/1995 of art 2(3) provides all federal or regional legislative, executive and judiciary organ as well as any natural or judicial person shall take judicial notice of laws published in federal negarit gazeta. From the word "*shall*" we can understand that judicial notice of laws is mandatory, thus any

federal or regional courts have a duty to take judicial notice of laws published in negarit gazeta.

In accordance with the proclamation, courts can take judicial notice of law if two things are fulfilled. In one hand, the law should be published in negarit gazeta .And in the other hand; such negarit gazeta should be the federal negarit gazeta. Thus, now let us examine whether the following laws are eligible for judicial notice or not.

V. Federal **laws**: - *what are federal laws?*

Federal laws are those laws, which are enacted by the federal law making organs like the proclamation as enacted by the house of people representatives (HPR), administrative regulations and directives as enacted by the executive departments of federal government.

The HPR has the power to enact specific laws on the matters provided under art 55(2) of FDRE constitution, labour code, commercial code and criminal codes(see Art 55(3),(4),and(5) of the FDRE constitution). Further more, the HPR can enact civil laws if it deems necessary to establish and sustain one economic community. (See art 55(6) of the constitution).Those federal laws of Ethiopia are equally laws of each state. Therefore, state courts will notice federal laws .But here the question may arise as to whether regional courts have a duty to take judicial notice of federal laws enacted in accordance with art 55(1) of the constitution to be applicable in administrations that are directly accountable to the federal government .For instance, the present revised family code (RFC) of the federal government has enacted in accordance with art 55(1) of the constitution, and the states are not bound to apply it ,but since it is published in federal negarit gazeta ,state courts should notice its existence. Do you agree?

Are federal treaties federal laws?

According to art 9 (4) of the constitution international agreements ratified by Ethiopia are an integral part of the law of the land. Thus those treaties ratified by the HPR should be considered as federal laws .And if they are published in federal Negarit Gazeta all courts have a duty to notice them. But the question that remains to be answered is whether

courts are required to take judicial notice of treaties which are ratified but are not yet published in federal Negarit Gazeta. As we understand from the words of the proclamation, if they are not published in federal Negarit gazeta the courts shall not be bound to take judicial notice of them. Do you think this is true on international human rights treaties having the status of customary law?

Are Administrative regulations and directives laws?

The regulation of executive departments of the federal government are always noticed because they are published in the federal Negarit Gazeta. If we notice the federal proclamation, we have to notice the regulations there of since they are one form of subsidiary laws. Thus, all courts federal or state should take judicial notice of them.

However a problem may arise as to directives made by executive departments because they are not published in the federal Negarit Gazette as laws thus their existence may not be noticed.

Are the decisions of the cassation division of the federal Supreme Court laws?

As said earlier, according to art 2(4) of the federal courts establishment proclamation re-amendment proclamation no 454/2005, the interpretation of law rendered by the federal supreme court cassation bench are binding on federal as well as regional courts of all level. This means, courts treat such decisions as a law. Thus, in principle, since they are laws, courts are expected to take notice of them. But a problem may arise as to whether courts are bound to take judicial notice of such decisions or not, because they are not published in the federal Negarit Gazeta as laws. Thus, their existence may not be noticed. Do you agree?

Activity

Do you think the court can take judicial notice of foreign laws in the case where questions of conflict of laws arise? What about customary practices of a given society?

State laws: - *what are state laws?*

State laws are those laws, which are enacted by state councils in accordance with art 52(2) (b) (f), and art 55(5) of the constitution. Those state laws are published in state “Negarit Gazzettas. “However art 2[3] of the proclamation No 3/1995 does not talk about the judicial notice of laws published in “*state Negarit Gazeta*”. Thus, the question that remains to be answered is whether federal organs are required to take judicial notice of laws published in” *state Negarit Gazetas*”. According to Art 6 of the federal courts establishment proclamation no 25/96, the federal courts may apply a state laws. In doing so, a federal court can take judicial notice of state laws.

Similarly, where state courts are obliged to take judicial notice of laws of other state is also another issue. This may happen in the case of internal conflict of laws. Here, some argue that as long as the courts can understand the language in which the laws are published, it does not contradict with the pro no 3/1995. Thus, state courts may take judicial notice of laws published in “Negarits” of other sisterly states, and federal courts may take judicial notice of law published in state “Negarits”.

Read rule 49 of the DER and determine which of these facts relates to facts of common knowledge and which are verifiable?

In reading the rules, you have to look them in the way consistent with the present situation of Ethiopia .

Facts judicially noticed need not be proved

49 (1) No fact of which the court will take judicial notice need be proved.

(2) The court shall take judicial notice of the following facts

(a) all laws of the empire of Ethiopian and generally any matter published in the negarit gazetta or similar official government publication, including the accession to office, names, titles and function of the person filling any public office.

(b) The accession and the sign manual of imperial majesty

(c) The sells of all ministers, government departments ,agencies of other public administrative authorities, offices or establishments of all the courts in Ethiopia, of the Ethiopia orthodox church and of notaries public.

(d) The existing title and national flag of every state or sovereign recognized by the government of Ethiopia and every international organization of which Ethiopia is a member.

(e) The divisions of time, the geographical division of the world and public festival

(f) The territories under the government of Ethiopia .

(g) the commencement, continuation and termination of hostilities between Ethiopia and any other state or body of persons.

(h) The name of the members and officers of the court and of there deputes and subordinate officer and assistants.

(2) In all these cases and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

(3) If the court is called up on by any person to take judicial notice of any fact it may refuse to do so unless it may consider necessary to enable it to do so

Can you imagine cases where taking judicial notice be come mandatory?

A party or his counsel should be prepared to suggest to the trial court matters he feels should be judicially noticed. Because, as said earlier a judge need not know a fact of which a judicial notice could be taken. For instance, there may be possibility that adjudge

may not know a fact while it is a common knowledge in the society. So in such case, the judge may fail to take judicial notice of such facts even though they are generally known.

As melin points out, most matters of judicial notice are discretionary not mandatory with the trial judge. For instance, regarding verifiable facts the court may require the production of the document from which it can ascertain a fact judicial notice of which is demanded, if the text is not accessible to it. And where such materials are not produced the court may not take judicial notice. This is justifiable regarding verifiable facts, because in one hand most of our courts do not have a library. On the other hand, even though some of the courts (especially supreme courts) have libraries, they are not well equipped by the necessary and diversified references. Moreover, even if the reference is produced, if the court is uncertain whether ascertain scientific or historical fact is thoroughly established, it will require proof.

However, for the judge to refuse to take judicial notice of matters that are clearly certain and indisputable would be an error. For instance, refuse to take judicial notice of big nationally known facts (eg - Addis Ababa is the capital city of Ethiopia ; Ginbot 20 is a holyday, cow has four legs etc...) which could be easily noticed without inquiry by any rational person would be really an error. So some argue that, in such cases it may be mandatory to take judicial notice of fact. But if the matter is less certain (especially of verifiable facts) requiring proof will be justifiable and in such case it shall be permissive for the court to take judicial notice.

However, even in the case of verifiable facts there are, for instance some notorious facts like facts disclosed by the almanac and calendar relation to time, days and dates which can be easily noticed. For example, if the issue was whether Tir 10, of the current year has lied on Tuesday or not, the judge can easily ascertain by looking a calendar and it is highly presumed that any court has an access to the colanders of the year. But do you think the court may require party to produce the calendar if the issue was whether tir10, 1980 has lied on Tuesday or not?

Generally, melin points out that under the DER judicial notice would remain largely discretionary and only the facts in rule 49 (2) must be judicially noticed. And even as to those facts, a court may refuse to take judicial notice until a party requesting it to do so supplies such books and documents as it considers necessary to do so.

However, the question that should be answered is whether the court can require the party to produce laws published in Negarit Gazeta. And if the party fails to do so under rule 49(3) DER may the court refuse to decide the case until party supplies the appropriate law?

As we know the purpose of publication of law is to make the law accessible to every citizen and to implement the principle “*Ignorance of law is no excuse*”. In principle, the judges are expected to know the laws of the country and they cannot give judgment by using repealed laws. In this regard, we can say that if the parties do not present the court with the law it feels it needs to ascertain a matter of legislative fact, the court should found the law by its own. And the court cannot refuse to take judicial notice of law by the mere fact that the parties do not present the court such law.

However, if we see the reality, the mere fact of publication of laws under Negarit Gazeta do not justify, the fact that they are accessible to each judges sitting in all levels of courts. Especially, this is true when certain provision of the former law has amended or reamended by the next one with in short period of time; which makes it difficult to be timely accessible especially to the judges sitting in first instance courts. This may be the reason why some judges have used the repealed laws as the basis of their decision; and later become the ground of appeal to the cassation division of the federal Supreme Court. But some skillful advocates who hardly search the existence of the newly enacted or amended laws may be a warred about their existence. In such case; the advocate may produce the law for the purpose of taking judicial notice.

As we witnessed from the phrase “*in all these cases and ...*” under rule 49(2), the judicial notice of law which is provided under rule 49[2] is included. And the court may resort for its aid to appropriate books including laws. But here the question is what if the court is

not a warred about the existence of the law on which the judicial notice has required. *Can the court refuse to take Judicial notice of such law due to the failure of the party to present the court with the said law?*

In the first place, when the party requires the court to take judicial notice of law, it means he has accessible to the said law. So, if this is true, there is no justification that the party can refuse to produce the law unless he has an intention to delay the case. Thus in such case, the compromising idea may be, first the court should do its own research to ascertain whether the said law is there or not. But if the judges failed to find the said law even after the necessary investigation, they can apply the law, which they believe to be applicable even though it has repealed. Because, the parties themselves should contribute and help the judge for the maintenance of Justice. Do you agree?

However, unlike adjudicative facts, the judges cannot refuse to take judicial notice of law if they are aware about the existence of the said law either by their own or by the help of the parties.

If judicial notice is taken of a fact, can a party or his counsel who disagree after proof to rebut it?

As said earlier, a party should call the Judge's attention to the necessity or desirability of taking judicial notice of certain fact. If the judge does decide to take judicial notice, his ruling should be recorded. While if there is the slightest doubt as to whether the fact is true, the court must require the party to submit proof even though it is mandatory to the court to take judicial notice of law.

However, it does not mean that a judge may not make a mistake in taking judicial notice of fact or law. For instance, the judge may take notice of verifiable facts by referring out dated texts. As we know, man's knowledge progresses through time with the development of science and technology. What was acceptable before ten years may not be remained acceptable to day. For instance, assume ascertain medicine, which was considered as the best medicine few years before may be discovered dangerous. And all up to date medical books may advise the physician not to prescribed. If ascertain

physicians gives such medicine to his patient he becomes guilty of imprudence or of negligence constituting definite ignorance of his duties. (see art 2031 of civil code). Thus, if the fact that whether that medicine is dangerous or not is disputed, the judge should refer the up to date medical books than the outdated ones to ascertain the truth of the fact. Here, face in the case when a judge takes judicial notice of a fact whose existence is really doubtful the objecting counsel is not bound by the ruling if he has evidence to offer to the contrary. Because in taking judicial notice of verifiable facts, the court is required to take in to consider the present development of science and technology.

But the evidence offered to disprove the fact of which judicial notice was taken must have some foundation of credibility other wise the court will refuse to hear it.

Similarly, like judicial notice of facts, a judge may take judicial notice of already amended or repealed laws. In such case, the objecting counsel can rebut it by showing the law of which judicial notice was taken has repealed or amended.

Do the common law countries like U.S.A allow the production of rebuttal evidence after once judicial notice is taken?

In this regard, they argue differently in civil and criminal context. In the first place, a court's power to take judicial notice is in no way limited by the fact that the case at hand is criminal rather than civil. If the fact at hand is a proper subject for judicial notice, the type of case is immaterial. However, criminal courts may be more liberal than civil courts in exercising their discretion to refuse judicial notice and require proof. This is due to the fact that the standard of proof required in criminal case is higher than that of civil cases.

In the same token, they argue, that in a civil case the court will not allow evidence controverting the proposition covered by the judicial notice. Because it is sometimes said that judicial notice should only be allowed in case that are beyond reasonable dispute, and therefore that if judicial notice is proper, contradicting evidence is inappropriate. In this sense, some argue that judicial notice resembles an irrebuttable presumption even though they have noticed the existing differences between the two.

However, regarding criminal cases, they have the rule which makes clear that criminal jury is not required to accept as conclusive any fact judicially noticed. And some argue that, this means the opponent has the right to introduce evidence contrary to a fact judicially noticed due to the highest standard of proof required in criminal cases i.e beyond reasonable doubt. Is this a good approach to follow?

Activity

Do you think there is any difference in the Ethiopian context regarding civil and criminal cases as to whether the opposing side should have the option of introducing contrary evidence once judicial notice is taken?

Summary

All facts do not necessarily be proved .If all facts have to be proved, this may sometimes result in an unnecessary delay of justice. Thus, in this unit, and you have seen situations where one need not produce evidence. These situations are admitted facts, presumed facts and judicial notice.

Admitted facts need not be proved. They have power to withdraw a fact from being in issue and there by avoid need for evidence. All admissions do not have the power to produce the above effect except the judicial admission.

The second situation is where the law takes it for granted that certain things are presumed to be true if certain factual situations are satisfied these are called presumption.

The third situation is when the court is bound to take judicial notice, that is, when the court simply accepts the known facts in the locality as they are without further proof. Such facts are: facts of common know ledge and verifiably facts that can be indisputably be verified from text.

Review questions

- 1- Judicial notice of facts of common knowledge excludes personal knowledge .Explain this.
- 2- Discuss the difference between ordinary presumptions and judicial notice?
- 3- What is the yardstick whether certain fact is known to all persons or not?
- 4- Are there any disadvantages of proof without evidence?
- 5- Is it possible to take presumptions in criminal cases?
- 6- Among types of presumption which is contrary to the principle of evidence?
- 7- How many types of presumption are there? Disuse there difference?

Chapter three: Relevance and admissibility of evidences

Introduction

In this unit we will discuss the most important concepts in the study of evidence that is about the concepts of relevancy and admissibility .In other words, the unit focuses to individual items of evidence, examining what items are relevant and the procedure under which they relevant.

Evidence must be relevant and--that is, it must have a tendency to make a fact at issue in the proceeding be more or less probable than it would be with out the evidence..If evidence is not relevant to some fact of consequence to determination of the action, then there is no reason to admit it. Thus, the unit will discuss facts relevant to facts in issue and relevancy of individual items of evidence like relevancy of character evidence, circumstantial evidence, judicial judgments and similar occurrences.

However, the relevancy of evidence is ordinarily necessary condition but not sufficient condition for the admissibility of evidence. for example ,relevant evidence may be excluded if it is unfairly prejudicial ,confusing or cumulative due to different social or policy reasons. Thus, the last section of the chapter deals with relevant but inadmissible evidences.

Objective

By the end of this unit, you should be able to

- Identify fact in issue
- Define what relevancy is in evidence law
- Explain relevancy, differentiate it from admissibility
- Discuss the relevancy of facts forming part of the same transaction, motive, preparation, and conduct, similar occurrences
- Discuss the relevancy of character, and circumstantial evidence

- Identify when the court can use its discretionary power in admitting or prohibiting the admissibility of a piece of evidence, and
- Apply the rule of relevancy in practical case.

3.1 Facts in issue

Common to all criminal and civil cases is the need to identify the facts requiring proof in a particular case to which evidence must be directed. Evidence is not relevant in the abstract but rather to some proposition, and for the evidence to be admissible it must be relevant to a material proposition. But before the discussion on facts in issue, question as to what a fact is has to be answered. As you may know, evidence is all about proof of facts. The law of evidence does not recognize things in the abstract as, for example, crime, marriage, contract, etc. The law of evidence reduces it down into pieces of facts so as to make it ready for proof. And it is possible to break down the provisions of the substantive law into a set of propositions called elements.

What is fact?

Fact means any thing or relations of things capable of being perceived by the senses and includes any mental conditions of which a person is conscious. Thus, every thing is a fact the only difference is that some of the facts are mental (internal or psychological facts) and some of the facts are physical (external facts). The latter are the ones that can be perceived by our five senses. Those physical facts can be proved or rebutted by direct evidences. However, those facts, which are subject to one's consciousness, are facts that cannot be perceived by our sense organs. These relate to facts of intention, negligence (mainly advertent negligence), facts of good faith and bad faith. As you may know the state of mind of the actor or of the accused is equally important in criminal cases where mental element (mens rea) is an element of every definition of a crime. But the question is how can we prove mental facts?

One may infer the mental condition of a person from his conduct or from his words. It is difficult to prove such psychological facts directly. Rather we can prove such facts by taking circumstances cumulatively.

Activity

Discuss the difference between physical facts and psychological facts?

What is fact in issue?

Fact in issue is the fact, which is disputed between the parties and to be resolved by the help of evidence. Issue arises when a certain fact alleged to exist is denied by the other.

How can we determine fact in issue?

The law of evidence does not tell us what facts are “*of consequence to the determination of the action*”. At base, that is a matter of the substantive law to govern the case.

In criminal cases, the criminal code determines what the prosecution must prove in order to establish an accused's guilt. In a trial for theft the prosecution has to prove all the elements that make up the offence of theft under the specific provision.

As said earlier, in criminal cases, the accused shall admit without reservation. If he admits with reservation, a court shall enter a plea of not guilty. And the whole charge turns out to be in issue. Thus, all the essential elements of the crime are the facts in issue and evidence must be adduced in respect of each to the required standard of proof, beyond reasonable doubt before the prosecution can succeed.

In civil cases, the facts in issue are normally to be found in the pleadings: that is in the claimant's statement of claim any defense put forward by the defendant. In other words, a fact in issue is determined in the process of framing of issues at the first hearing. (see Art 246 of civ.p.c)

The pleading identify the substantive law and the fact requiring proof. In breach of contract action, the material fact which needs to be proved by the claimant will be the assertion that: the defendant owed the duty to perform, the duty of performing the contract was breached (non-performance), as consequence the claimant suffered loss.

If admissions are made to all proposition of fact, which constitute the claim, there is no issue to be framed and the parties are called parties not at issue (see Art254 of civ.P.c). However, the parties may admit certain facts in issue in which case no evidence need be adduced on that particular issue. For instance, in the above example, if the defendant admits the issue of the existence of the contract and the issue of non-performance but, denies the existence of damage the fact in issue will be "whether there is damage or not". And the court may pass a judgment it thinks appropriate on the admitted facts. (Art 242 of civ-p.c)

May one case contain subordinate facts?

As said before, trial is limited to the issues framed at the first hearing, which are affirmed by one party and denied by the other. Such facts are major facts such have direct relevance to the outcome of the case.

However, there may also a collateral or a subordinate fact, which is not of direct relevance to the out come of the case, but which may nevertheless be raised at the trial .A collateral fact is a fact which proves the minor issue which is relevant to the major fact in issue .For instance, first, those facts which affect the competence of a witness to give evidence is a collateral fact in issue. Evidence which proves a witness to be incompetent perhaps because the witness has a mental illness or evidence which prove that an expert witness lacks the necessary qualification or degree of experience to be competent to give expert opinion evidence are common examples of collateral fact in a case.

Secondly, fact which affects the credibility of a witness is a collateral fact since the weight to be attached to witness's evidence depends, in part, on an assessment of the witness's credibility. Thus, evidence may adduce which is relevant to a witness's credibility such as exposing a motive for the witness to lie on oath.

Thirdly, collateral facts may have to be proved as a condition to the admissibility of certain types of evidence. For example, in criminal case, it is represented that the accused's confession is unreliable or was obtained by oppression. Such a confession constitutes an evidential fact relevant to the fact in issue in the case. The prosecution

would have to prove the condition for the admissibility of the accused's confession before it could be admitted.

Activity

1. Discuss the difference between facts in issue and collateral facts?
2. What are physical facts in criminal law?

3.2 Relevant facts

What is relevancy? And how can we determine relevancy?

Relevancy is the first principle of both civil and criminal evidence. The fact in issue in a case and any collateral facts can only be proved by adducing relevant evidence. Whatever the form of the evidence, whether testimonial, documentary, real, direct or circumstantial, to be admissible evidence needs to be both logically and sufficiently relevant. Relevant evidence always has a bearing on the search for the truth determination of a past event.

Before discussing what relevant evidence is, it is better to consider Rule 6 of DER. According to this Rule, where some one has to prove something before a court he has to prove either facts in issue or facts relevant to facts in issue. For instance, in the case where the defendant denies the fact that he borrowed the money, the fact in issue will be whether he borrowed the money or not. And this may be proved by witnesses who directly prove the fact in issue the witnesses may for instance testify that they saw the defendant borrowing the money from the claimant.

The other possibility According to Rule 6, is by proving a relevant fact which is a fact connected to the fact in issue.

What is a relevant fact?

In accordance with Rule 3 of DER, “Relevant fact” means any fact which directly or inferentially leads to one of the conclusions necessary to the proof or disproof of a fact in

issue and a fact is said to be relevant to another when one is connected with the other in any of the ways mentioned in the Rules. Thus, from the above definition we can understand that relevancy exists as a relation between an item of evidence and a fact in issue.

Notice that relevance is always a relative term that is in saying that evidence is relevant we must cite a material proposition to which it is relevant. Because evidence is not relevant in the abstract but rather to some proposition and for the evidence to be admissible it must be relevant to a material proposition. For instance, in the case where whether X committed theft or not is an issue, a fact that X was found selling similar items said to be stolen on an open market may be a relevant fact since it has a connection to fact in issue. Therefore, any evidence which proves fact in issue directly or which proves relevant fact is relevant evidence.

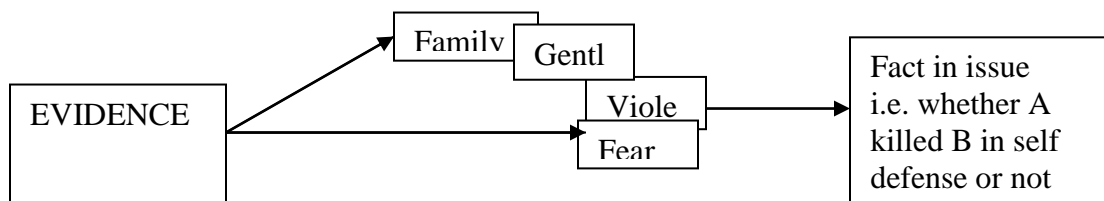
Relevant evidence has two components: materiality and probative value. Materiality refers the relational aspect of relevancy. For evidence to be relevant a logical relationship needs to be established between the evidence tendered and the fact to be proved. This connection may be either direct connection or indirect connection with a fact in issue. If the evidence is offered to help prove a proposition which is not in issue the evidence is immaterial

Under Art 137 of cr.p.c and Art 263 of civ.p.c questions put in examination in chief shall only relate to facts which are relevant to the issue to be decided. Moreover, under Art 138 of civ.p.c the court may at any stage of the suit reject any document, which it considers irrelevant or otherwise inadmissible. Even though the codes nowhere specify what categories of facts are relevant the above and other provisions underline the importance of relevancy. Thus it would be proper to raise an objection under Art 146 of cr.p.c or Art 270 of civ.P.c on the ground of irrelevancy. In the law of evidence we are not interested only in the connection but in the capacity to prove or disprove a fact. Thus, the second aspect of relevancy is probative value. This requires relevant fact to have the capacity to prove. The point is that mere connection but without probative value does not serve any

purpose. It is, therefore, clear that relevancy refers to the probative value of evidence and its relation ship to the purpose for which it is offered.

As said earlier, evidence is not relevant in the abstract but rather to some proposition and for the evidence to be admissible it must be relevant to a material proposition. But here the question may arise as to what propositions are materials and how one can determine their materiality. To strength our knowledge on this point, let us see the following example. For instance, suppose that A is on trial for the murder of B. A admits killing B and he pleads self-defense however. He testifies “when I saw B again he said “I am going to kill you now you pig and reached in side his pocket. Luckily I beat him to the draw”. "A" also offers the testimony of “C” that after the argument but before the killing, A told C “I am going to buy more life insurance for my wife, kids and dear old mother, because B has a violent streak”. Here “A” offers evidence to prove FAMILY, GENTLE, VIOLENT and FEAR. Now the question is which proposition is material proposition.

In the following diagram the propositions are represented by family, gentle, violent and fear. And the evidence adduced to prove the above propositions are represented by EVIDENCE



First, A might offer evidence to prove FAMILY the proposition that he is a good family man. Evidence probably is relevant to family but unfortunately for A, Family is not a material proposition. Because, the proposition that he is a good family man is nothing to do with the issue whether he killed B by self-defense or not.

Secondly, A might offer evidence to prove GENTLE the proposition that he is a person of gentle disposition. This is material proposition, for if it is true GENTLE diminished the probability that A would be the aggressor in a fatal fight.

Thirdly A might offer evidence to prove VIOLENT, that B is a person of violent tendencies. This too is a material proposition for if it is true B is more likely to have been the aggressor. And EVIDENCE is clearly relevant to VIOLENT indeed that very proposition is part of what 'A' asserted according to 'C'.

Fourthly A might offer EVIDENCE to prove FEAR, the proposition that A feared B. This proposition is material because if A feared B he was less likely to be the aggressor.

However, assume the evidence offered to prove VIOLENT that B is a person of violent tendencies is excluded under the Rule. In this case even though the proposition is a material proposition to the fact in issue, it may be considered as inadmissible evidence. We will discuss at length about the admissibility of evidence in 3.9

Therefore, since relevance has an infinitely variable quality assessing whether evidence is relevant in a particular case is not always easy. Assessment of relevance is governed by the canons of logic, general experience and common sense. As logic reasoning is particular to the individual differing conclusions as to the relevance of evidence are likely to arise.

Is it necessary that the evidence be conclusive of the case?

"*Relevant evidence*" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The trials will not ordinarily prove or disprove the factual propositions absolutely and indeed such absolute proof is rare if it exists at all. Rather the proof will leave the proposition somewhere in the range between totally implausible and totally certain. Thus, to be relevant evidence must have a role in that determination. That is it must either raise or lower the probability that would be assigned to the proposition in the absence of the evidence.

"A brick is not a wall". A party's entire case is the wall; each evidentiary item is a single brick with a limited function. Relevant evidence need only alter the probability of a material proposition. It is not necessary that the evidence be conclusive of the case.

While conclusiveness is almost never attainable sufficiency is. Evidence to be relevant it must have a sufficient degree of probative force. Sufficiency of a body of evidence to prove a proposition means that the evidence is sufficient to carry the proponent's burden of producing evidence with respect to that proposition, so that the judge might conclude to the degree of confidence required by the law that the proposition is true.

Moreover, evidence will possess a sufficient degree of relevance if the benefit of admitting it outweighs the cost" interims of the risk that it might cause confusion, multiply the issues in the case or lead to too many speculative inferences.

Activity

1. Discuss the two aspects of relevancy?
2. Now consider evidence that slightly increases the probability that somebody else committed the crime suppose that A" was stabbed to death outside her home and that her-ex-husband is being charged with the murder. Should the defense be allowed to introduce evidence that "B" had stayed with "A", and that "B" was an active drug user, on the theory that perhaps drug declares to whom "B" owed money murdered "A" by mistake, or to send "B" a message?

3.3 Facts Relevant to facts in issue

As said earlier the codes nowhere specify what categories of facts are relevant. Thus, here the question may arise as to how we can distinguish relevant fact from the irrelevant one. As it is the case in the majority of instances, the determination of relevancy is based on logic and common sense.

However, DER gives hint as to which connection of facts should not be disregarded as irrelevant. The following discussion focuses with regard to which facts that evidence may be submitted in addition to fact in issue.

A . Facts forming part of the same transaction (Res-Gestae)

Rule 7 of DER state that: Any fact is relevant which, though not in issue, is so connected with a fact in issue as to form part of the same transaction whether both facts occurred at the same time and place or at different time and place,

Res-Gestsae is a Latin term, which means things done or said in the course of a transaction. As stated in the rule, the facts must be so closely related so as to form part of the transaction. Transaction consists both physical facts and verbal facts (words spoken).

For instance, A is accused of the murder of B by him. The following facts may be considered as relevant facts.

1. Whatever was said or done by A or by B

e.g. The beating action of A

- The saying "you beach, I will teach you a lesson now!"
- The cry, Have mercy, for God's sake! Or please, save me!

2. Whatever was said or done by the bystanders at the beating or so shortly before or after.

e.g.. The actions of the bystanders to save "B"

The cry, "oh,the man is killed"

In the list of facts given in the above example, you see how some of the facts are things done or physical facts and other words spoken or verbal facts.

Regarding physical facts there may not be problem to identify but with verbal facts. The question is whether all that is spoken may be taken as relevant under rule 7. Declaration or words spoken to be taken as res-gesta, they have to be spontaneous declarations to the existing (startling) occurrence and not as a result of reflection thought. That means, the declarations should be made by persons who are present at the time of the occurrence. Therefore, if the witness rushed to a crime scene on hearing the sounds of an explosion and heard from the mouth of the by standards as to what happened, his statement is not part of the transaction. Here, the remarks of the persons who are not present or witnessed the incident could only be hearsay because they must have picked up the news from others.

What is spontaneous declaration?

Spontaneous declaration is an excited utterance made to a dramatic fact in issue. A dramatic fact, in turn, is a fact so surprising that it is capable of producing a spontaneous unreflected verbal declaration in a normal person like fighting, car accident, or murder. It is not because one trained himself to cry so. They are so natural to every person who is healthy so startling happens, he cries. It does not matter who cries as long as the one who makes the declaration was at the essence of the dramatic fact that caused the declaration. Therefore, any one who heard the utterance may quote in the court even though the person made it doesn't testify.

What is the measure of time to satisfy spontaneity?

Spontaneous declarations are usually made of the time of the occurrence and the time of the declaration. Because high time interval makes the utterance non spontaneous. This is to avoid the possibility of fabrication of facts, the idea is that, when a person declares in a certain way to a dramatic fact, it is considered as not the person himself making the declaration, but the event itself speaking through the mouth of the person. The spontaneity of the utterance guarantees that it honestly reflects the dramatic event even though it may be inaccurate in the case when mental vision is clouded by excitement of the moment.

Even though normal spontaneous declarations are made while the transaction is being executed or immediately after, there may be certain gaps of time in some cases. If a person fell unconscious, he is not expected to make a declaration in a certain way. He may stay in a state of excitement for a considerable duration. Thus, the declaration he makes immediately the time he came back to his senses may also be taken as spontaneous declarations, though not spontaneous to the occurrence.

Is the intensity of the act necessary to determine whether the event is startling or exciting?

Some persons may cry to a simple occurrence due to the high rate of sympathy they have, and the other not. Thus, sufficiency of startling or exciting should be determined subjectively. What is important is the effect (i.e. spontaneous declaration), not the intensity of the act on the declarant. In a given case, the court may provide that, since the wounds inflicted upon the victim were small, the event is not startling (exciting) which is capable of producing spontaneous declaration. And the declaration should not be admitted as spontaneous declarations. Here, adopting a reasonable man's standard makes the case very complex. So the effects of the wounds on the victims (or the declarants) must be measured subjectively.

B. Facts being the occasion, cause or effect of facts in issue

Rule 8 of DER reads as follows:-

Any fact is relevant which is the occasion, cause or effect, immediate or otherwise of facts in issue or relevant facts or which constitutes the state of things under which such facts happened or which affords an opportunity for their occurrence or transaction.

In this rule you will specifically consider: occasion, cause or effect and state of things

(1) Occasion

The time, place and condition of a certain act help us to predict the possibility or impossibility of something. If “ time, place and condition” do not exist together, the possibility of a creation act to take place is less probable.

Occasion inquires in to the existence of a favorable environment for the alleged fact to exist or not. For example, in the case whether A killed B by knife is in issue, the time and place of the commission of a crime are relevant. A may kill B at day time or at night. If B was killed at night, the question may arise as to how a witness able to identify the killer or the kinds of the knife i.e whether it is a china-made or not, unless there was an electric light. Moreover, A may kill B in open market place, in dark corner or in forest. If the prosecution alleged that B was killed in open market, the question may arise as to the reason why the persons in the market and the police officers failed to arrest the killer. Thus, proving the fact of occasion is relevant to know whether there is a conducive environment or not for the alleged fact to exist.

However, the occasion alone may not help much unless there is an opportunity. For example, in a case whether A has stolen B's wallet from his pocket, the fact that B was trying to buy a bus ticket early in the morning from Gondar bus station in which too many security workers were there is relevant. This tells about the possibility of the alleged theft. However; assume that at the time of the commission of the offence, all the security workers were called urgently for a brief meeting. This is exactly the opportunity, without which the occasion is not enough in itself for the loss of the wallet. Where you show occasion and opportunity you are heading towards the proof of the truthfulness of the alleged theft.

ii. Cause or effect

When there is logical causal connection between two facts, back and forth inferences that are inference about the causes from the effect or about the effect from a given cause can be made. For example, in the case whether A murdered B is at issues, marks on the ground produced by the struggle or the blood spots at the place where the murder was committed are relevant facts since they are effects of the crime.

iii. State of things.

This is something that can be understood when you compare facts the way they were before and after an act. If books are arranged in a certain way, a person lives in a certain way; a person's health etc. before a certain happening or after, this is about state of things. When this state of things is disturbed, it must be because of something that indicates a certain happening. For example, if the issue is whether a property is stolen from your room or not, the present state of things has something to say about what has happened, and that is relevant.

Activity

1. Discuss the relationships between presumption of facts with facts showing cause or effect, or change of state of things?
2. The question is whether A poisoned B. The state of B's health before symptoms ascribed to poison and habits of B, known to A are relevant facts- Do you agree?

C. Motive, preparation, and previous and subsequent conduct

(I). Motive

Motive is the compelling force to do a certain act. There can be no action without a motive, which must exist for every voluntary act. Generally, speaking the voluntary acts of sane persons has an emotion or motive. If some one has motive to get money, he may be forced to think of selling his car, committing robbery or theft. He may ever possibly think of corruption.

Motive precedes intent that if you are given the motive you can prove intent. In criminal cases where intention is the most important, proof of motive is a step forward to the proof of intention. For example, in the case where A is tried for the murder of B, the fact that B knew that A had murdered C, and that B had tried to take money from A by threatening to make his knowledge public, are relevant,

Is the adequacy of motive necessary?

Adequacy is not a question, because very serious crimes may be committed for very minor and trivial motive. There fore, adequacy is not an issue. Any motive is relevant.

Activity

1. Is proof of motive relevant in civil case? What about in some extra contractual cases, which requires proof of intent to injure?
2. Is proof of motive relevant in negligent crime? Why?

ii. Preparation

Motive leads to a specific intent the realization of which may be preceded by preparation. Preparation is normally refers to things you do to a result by trying to obtain the means. Preparation on the part of the accused to accomplish the crime charged, or to prevent its discovery or to aid his escape, or to avert suspicion from himself are relevant on the question of his guilt.

Preparation does not exist in itself unless it is related to a certain purpose. If somebody has to prepare, he prepares for something. There fore, there is connection between preparation and the thing for which he prepares. Where a person prepares to kill someone he may buy poison, knife, etc. Thus, proofing the fact of preparation is relevant..

However, inference from preparation requires the cumulative evaluations of all related facts. Taking a single fact among the chain of facts may easily lead us to a wrong conclusion, because in the first place, the preparation may be an innocent preparation. For instance, any one who buys knife doesn't mean, that he prepares to kill. He may buy it for domestic use. But the inference may not be wrong if there was hostility between the buyer of the knife and the person killed, and similarity between the knife the offender was found buying and with which the victim is said to have been killed.

In the second place, there is also a possibility of a abandoning the plan voluntarily. That means, a person may regret and ignore his plant of killing. This is the case of active or voluntarily repentance. Therefore, all the surrounding circumstances have to be taken in to account to avoid mistaken inference.

iii. Conduct (previous or subsequent)

The conduct of a party in relation to a fact in issue is relevant whether such conduct is previous or subsequent to the occurrences of the fact in issue, for example, murder, theft etc.

The behavior of a person is usually dominated by what he wants to do and what he has done. Where a person wants to kill a person he may make all types of preparation, displace his family, sell out his property, etc. This is previous conduct or conduct before the killing of a person. After the killing a person may not feel comfortable and may attempt a number of things not to be detected or identified, or he may at least abscond or hide or disguise himself. This is conduct subsequent to the fact to be proved which is also relevant

The conduct of a party interested in a proceeding at the time, when the facts occurred out of which the proceeding a rises is extremely relevant. Accordingly, the word conduct does not include statements, unless those statements accompany, and explain acts other than statements. Statements made in the hearing or presence of the person whose conduct is relevant is admissible since they influence the conduct of the person. For example, in the case whether A robbed B, the fact that, after B was robbed, C said in A's presence, the police are coming to look for the man who robbed B, and immediately afterwards A ran away, are relevant.

3.4 Relevancy of Confession

As said earlier, judicial admission to be acceptable as evidence, the court should have a confidence on the truth of it. The accused may voluntarily confess for all sort of reasons, for instance to protect some one or to avoid embarrassment for themselves or others even

where they are innocent of the allegations made against them. Thus, unless a given confession is true it shall not be relevant evidence. And court may require the prosecution to call evidence. This is the case of excluding a confession on the ground of unreliability. (see Art 134(2) of cr.p.c)

However, even though the given confessions are true, they are made inadmissible if they are obtained in violation of rules of procedure. Here, improperly obtained confession evidences are rejected not due to the fact that they are irrelevant but because of legal prohibition made in furtherance of interests like privacy and human dignity.

An out of court confession to be admissible it should be the one which is made before the police officer or person in authority during the course of interrogation. Here, confessions made to other persons other than person in authority are inadmissible.

The out of court confessions shall be made in accordance with the procedure of Art 27 of cr.p.c. Accordingly, the investigating police officer shall inform the suspect about his right he has during the process of investigation(i.e. the right not to answer, access to a solicitor) and the effect of his statement (i.e. any statement he may make may be used in evidence.). Thus, the confession obtained from the defendant who had not been cautioned before being asked to incriminate himself may be considered inadmissible and may be excluded on the ground of unfairness. But here the question that should be answered is how could the court know weather the defendant had been cautioned before being asked to incriminate himself .In Ethiopia, the investigator police is required to write the fact that the defendant had been cautioned before the commencement of investigation, immediately after which the suspect is required to sign on it .But the question arise weather the police inform the suspect in did beside the confirmation on the police investigation file. In one case, the attorney of the accused person brought an objection on the admissibility of his client's confession in the police station on the ground that his client had not been cautioned before investigation. But the court refused the objection of the attorney and accepted the confession given under Art 27 of cr.p.c on the ground that he could not rebut the sayings of the prosecutor .The court's decision reads as follow-

In the case, the public prosecutor produced the document which shows the fact the defendant had been cautioned before being asked to incriminate himself. And the accused signed immediately after the writings on the same page. As we understood from the order of the writings, the accused gave his confession after his signature which confirms the fact that he had been cautioned before his confession. Moreover, the investigator police testified about the charge and the fact of 'warning' in the same manner with the contents of the document. Thus, from the cumulative observation of the above circumstances, we gate the attorney's objection un acceptable (Special first instant court, Addis Ababa, crim. File No16/75).

Therefore, as we understand from the above and other similar cases, the objection of the accused person on the acceptability of unlawfully obtained confession to be admitted by the court, he has to corroborate it with reliable evidences which have the capacity to rebut the evidences of the public prosecutor (Mezgebu Mitke, HIGAWINET, jour. of law, vol.1, No2, Nehase 1981 E.C, p 36)

Moreover, the confession evidence shall be obtained through the process of formal interrogation. The police may obtain incriminating admissions other than through a formal interview for instance, through unlawful installation of a court listening device or through unauthorized surveillance methods. Moreover, the status of the suspect during investigation should be taken into consideration. For instance, if the suspect was intoxicated, the police shall wait him until he gets his consciousness. Because it is difficult to conclude that the intoxicated suspect can give his confession freely and intelligently. Thus, the confession given to the police where the suspect was in state of intoxication shall not be admissible. Do you agree?

Similarly, the confession obtained after successive and tired sum interrogation for along period of time without break should not be acceptable. Especially this is true when the police refused to supply the suspect with, for instance cigarette where he is addicted of cigarette. (Mezgebu Mitke, 1981, pp50-52)

Consider the following activity.

Activity

1. The investigating officers forced the two suspects, implicated in the same offence to share a cell. The defendants made incriminating statements to each other. They did not realize their conversation was being secretly recorded. Would the statement of the suspects be admissible as evidence?

2. The defendant was suspected of having stolen goods and theft. A police constable posing as a potential buyer agreed to buy car from the defendant. In the course of the conversation, the constable asked the defendant how long the car had been stolen. He replied that two or three days earlier. May the court admit the above confessions? Why/why not?

Confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority. (see Art 31 of Cv.p.c). As we discussed before ,there is the procedure called “plea of bargain” in common law countries like USA in which the police or the public prosecutor can negotiate with the suspect/the accused that ,if he admit the allegation brought against him ,they would help him in mitigating his penalty. And such confession given under promise is admissible before the court of law. But this is not true in our system, because under Art 31(1) of cr.p.c no police officer or person in authority shall offer or caused to be offered any promise to any person examined by the police including the suspect. Thus, a confession may be excluded if it is obtained by oppression of the person who made it which includes any inducement, threat, promise or any other improper method.(Mezgebu Mitike,1981,p45)

According to Art 19(5) of the constitution one shall not be compelled to confess or admit facts against him. And evidence obtained under coercion (whether physical or psychological) shall not be admissible. Under Art 146 of the criminal procedure code, one of the possible objections to evidence may originate from the way the evidence is obtained. When we say improperly obtained evidence, we mean evidence obtained in

violation of rules of procedure and the constitution. This makes the evidence illegal and one shall not be convicted on something illegal since the means justifies the end.

Most of the time the court excludes confessions made during the course of investigation if the accused contended that he gave the statement by oppression or coercion. However, as we understand from the practice of courts, the confessions made during police interrogation are directly relevant and admissible if any corroborating real evidence is discovered as the result of the confession. For instance, “A” is arrested on suspicion of murdering a five year old girl. Under sustained pressure from investigating officers he confesses to the crime and tells them where the child's body, clothing and a knife he used to kill her can be found. Thus, if the investigating police and others found the deceased's body, clothing and knife by the help of the accused and if they are produced as exhibit evidence corroborating the confession evidence, such confession shall be admissible before the court of law.

Therefore, some argue that the mere fact that a confession is obtained through coercion does not affect the admissibility of any incriminating items discovered as a result of the confession. When we come to the Ethiopian arena, as we understand from different cases, the Ethiopian courts prefer to admit the incriminating real evidences discovered as the result of the confession even though it is the one obtained through coercion. For instance, in one case the court considered a confession given during interrogation as inadmissible on the ground that it is not corroborated with real evidences discovered under the direction of the accused himself. (Supreme court ., Addis Ababa, cr. File No 153/79).

Illegally obtained evidence including confessions presents the court with dilemma: to have a policy of excluding it every time would result in too many guilty defendants being acquitted thereby diminishing law enforcement. However, to have a policy that continually condones police malpractice would damage the credibility of the criminal justice system in the eyes of the public. In an effort to resolve this dilemma, the criminal courts shall have discretionary powers to exclude illegally and unfairly obtained evidence to be exercised in the particular circumstances of each case. *Do you agree?*

Activity

1. *“The focus of the court's attention shall be on the methods used by the police in order to obtain a confession, and the fact that the confession may be true is irrelevant to the courts decision” Discuss?*
2. *“The fact that the discovery of articles as a result of an in admissible confession helps legitimize that confession.” Explain?*
3. *“The more vulnerable the suspect, the more susceptible he is to make a false confession” Explain.*
4. *How do you see the relevancy of evidence obtained as a result of an unlawful search of a person or his property?*

3.5 Relevancy of Circumstantial Evidence.

As said earlier, circumstantial evidence is evidence that proves a certain fact indirectly. This evidence is depends on the surrounding circumstances. And those circumstances are facts, which should be proved by, evidence and which enables us to make inferences about the existence and non-existence of the alleged or disputed fact.

The disputed fact is not the one stands independently. Rather it is directly or indirectly connected with other facts in terms of place, time or occasions. The occurrence of a certain thing may contain the occurrence of the other thing or there may be another fact created following the occurrence of the fact in issue. Thus, as far as such circumstances have sufficient connection with the disputed fact they are relevant.

What kinds of circumstantial evidences are there?

Generally, we can classify circumstantial evidences in to three;

They are 1. Prospectant evidence,

2. Concomitant evidence and

3. Retrospectant evidence.

When the existence of a certain fact is at issue, the existence of previous thing or mental status is relevant. This is the case when the former infer the later, or which is based on the forwards looking probabilities. For example, the judge may have to make conditional prediction of what the plaintiff's income would have been in the period to date had she not been injured. Or, if it is a material issue whether it rained in a given afternoon is the past, evidence that it was cloudy in the morning may assist the judge. Because a rainy afternoon is substantially more likely when we know the morning was cloudy than it was before we knew whether it was cloudy or not.

Similarly, in the case when a thief “A” has cached in the compound where a guard “B” is stabbed to death, the intention of “A” to steal a certain property from the compound is relevant to the issue whether “A” killed the guard or not.

If the occurrence or not of a certain fact at a specific time is in issue, the occurrence of other facts at the same time by the same person are relevant as a concomitant evidence. For instance, if the question is whether “A” committed murder at Gondar in specific minutes of an hour and day or not, the fact that, on the day and minutes of the hour, “A” was at Bahirdar is relevant. Because, the fact of presence elsewhere is essentially inconsistent with the presence at the place and time alleged and makes impossible personal participation in the fact in issue. This is the theory of *alibi* (a Latin word which signifies “*else where*”). However, prove of alibi may not be acceptable if it can be shown that the accused was at such place as was within a reach i.e. only few kilometers away. Similarly as said earlier Res-gaesta evidences are relevant as concomitant evidence too.

Retrospectant evidence is the opposite of prospectant evidence. It is the case when the existence of the later fact infer the existence of the former or which is based on back ward looking style of reasoning. If it is a material issue whether “A” killed the stranger “B” or not ,evidence that “A” was driving at high speed and failed to stop even at red traffic light

is relevant since after a killing a person may try to abscond himself in order not to be detected.

Activity

1. Suppose that to start we know nothing about “A”, other than that she is an animal. Our hypothesis is “A” is a cow” and the evidence is “A has four legs”. The probability of the evidence given the hypothesis is very high while the probability of the hypothesis given the evidence is rather small. Do you agree? Why?

2. What is the difference between subsequent conduct of the offender and retrospectant circumstantial evidence? Discuss

3.6 Relevancy of similar Occurrence

What do you understand by similar occurrence?

When we talk about similar occurrences, the question that comes to mind is “similar to what?” Here, similarity is similarity to the fact in issue or disputed fact. If the issue to be resolved before the court is fraud, similarity refers other previous act of fraud committed by the same person.

The fact that, he had done similar acts before does not justify the conclusion that for whatever of similar acts, the accused is responsible. But it may increase the probability that the alleged crime committed by him. If for example, the defendant is accused of having robbed a bank then our assessment of how likely it is that he is guilty will almost certainly rise if we learn that he robbed a bank two years earlier. Most people do not rob banks, and a person who already has robbed a bank is more likely to rob a given bank on another occasion than a person who has never done so. Even if the probability that a given person on who has robbed a bank in the past will rob a bank in the future is quite low-and recidivism rates suggest that it is not all that low- it is presumably many times greater than the probability that a given person who has never robbed a bank will do so.

However, similar occurrence shall not be used to prove a fact in issue. Because, like character evidence, evidence of similar occurrence may produce an unfair bias, in the sense that it is likely to divert the attention of the court from the fact of the issue before the court to the general character of the accused since character is the cumulative effect of similar behavior of a person.

When does evidence of similar occurrence relevant?

Even though evidence of similar occurrences are not relevant to prove a fact in issue, they are relevant to prove whether a person did something intentionally or accidentally. The task of determining the existence of sufficient relation between the act in question and those similar occurrences is left to the discretion of the court.

Similar occurrences to be relevant, there must have the same characteristics with the act in question. Firstly, if the issue to be resolved before the court is fraudulent act, it is not relevant to produce previous acts of theft. Secondly, previous similar fraudulent acts must have similar characteristics with the fraudulent act in issue. For instance, a trader “A” was found selling banana mixed butter in her shop repeatedly. One time a buyer after he has bought butter discovers that it is banana mixed. Now similar sale of banana mixed butter is relevant since it may help us to establish the element of knowledge and thereby indicate that the defendant's participation in the alleged fraudulent scheme was not innocent or accidental, but intentional. But, similar sale of second hand clothes is irrelevant to know whether the defendant sold the banana mixed butter intentionally or not since previous similar occurrences have different characteristics with the alleged act in issue i.e fraud on sale of butter.

Moreover, sometimes a single similar occurrence may not be strong enough to indicate the intention of a person towards the commission of the alleged act. Because if it were once you would say it is done by mistake, but where it is repeated it should be intentional. However, even though the similar occurrence is a single one it may be relevant if the defendant knows his wrongful act immediately after the occurrence. For instance, “A” try to purchase a thing by forged note in shop “A” but the shop keeper

refused to accept the note and informed him that the note is forged. However, knowing this fact if Ato”A” try to purchase a thing by using the same forged note from shop “B”, his previous act is relevant even if it is a single previous similar occurrence.

Are similar occurrences relevant to understand a certain term in a course of business?

Similar occurrences concerning contracts or business dealings may be relevant to prove the terms of a contract, the meaning of these terms and a business custom. If for example, the contracting parties used to take one “Genbo” as five kilograms of honey, and later disagree as one of the parties says one “Genbo” is 3 kgms, previous similar cases are relevant to determine the meaning of the disputed term. Please read Rule 16 and 17 of DER

Activity

1. *Guled is accused of killing one of his wives, who drowned in a bathtub. He contends that she died of an epileptic seizure. The prosecution offers evidence that two other wives of Guled's also died in the bath tub. Is it admissible?*
2. *Grume is charged with possessing and selling stolen video cassettes, and to show his knowledge that the cassettes were stolen the Government offers evidence that previously he had sold very cheaply 38 TVs that he had obtained from the same source. Is it relevant?*
3. *Hagos owned Isuzu car that has burned down and he has sued on his policy against his fire insurer.*
 - A. *Can the insurance company introduce evidence that five other cars owned by Hagos have also burned down?*
 - B. *What if the insurance company has evidence that each of those previous fires was caused by arson?*
4. *Discuss the difference between bad character evidence and evidence of similar occurrence?*

3.7 Relevancy of Judicial decision.

One act may entail both civil and criminal liability, because most of the time a criminal act entails extra- contractual liability. Since civil cases unlike criminal cases, affects the personal interest of the victim it is up to the victim to institute or not to institute a civil actions. Thus, in the case when a certain act entails both civil and criminal liability of a person, the plaintiff will have two options regarding his civil claim. First, he may institute his civil claim in civil court independently. The civil court shall not wait the judgment of a criminal court. Both criminal and civil courts have to decide cases brought before them independently upon the evidence offered to each of them. Secondly, the plaintiff may apply to the criminal court trying the same case for an order that compensation be awarded for the injury caused. This is the case of joinder of criminal and civil cases.(see Art 154 of cr.p.c). However, the court may refuse the plaintiffs application due to one of the reasons provided under Art 155 of criminal procedure code. For instance, the court may reject the application of joinder if the hearing party's claim for compensation is likely to confuse, complicate or delay the hearing of the criminal case.

Thus, it is important to determine the relevancy of judicial decision incases of joined-suits and non-joined suits. Now we will discuss the relevancy of criminal court judgment in civil cases dealing with the same matter and the vise verse.

Is civil court judgment relevant as proof of guilt in criminal case?

As said earlier, the plaintiff may institute a civil action independently in civil courts. And a civil court shall not wait the judgment of a criminal court. Most of the time, a civil cases may get judgment with in a short period of time than the criminal cases. For instance, a civil court may pass judgment on the admission of the defendant in first hearing. (see Art 242 of civ.P.c). While a criminal court may take longer time in examining evidences. Thus, a civil court may pass judgment before a criminal court. In such case, a question as to the relevancy of civil judgments may arise. However, in the case of joined suits, a court always first adjudicates the criminal case before the civil case. (see Art 158 cr.p.c) Thus, in case of joined suits the question of relevancy of civil judgments may not be aroused.

Generally, judgments of civil court are not relevant and binding evidence on criminal courts. This is due to the reason that the standard of proof required for each case, criminal or civil is different. In criminal courts, the standard of proof is the formula of beyond reasonable doubt while in civil cases decision is based on preponderance of evidence. Thus, evidence which is sufficient for civil cases may not be strong enough to prove guilt in criminal case.

Is criminal court judgment relevant in civil cases dealing with the same matter?

As to this point, common law and civil law traditions have different positions. At common law proof of conviction or acquittal by a criminal court is not relevant in a civil court suit dealing with the same matter. The reasons are, in the first place the civil court should be as capable as the criminal court in deciding factual issues based on evidence presented before it than depending its decision on the “*opinion*” of the criminal court. And in the second place, the degree of proof necessary to find a given fact in dispute is different in two courts.(beyond a reasonable doubt in criminal court, preponderance of evidence in civil cases)

However, in civil law tradition (especially France and Italy) the judgment of criminal courts (whether conviction or acquittal) are binding on civil court. In France, the injured party or his representative can claim compensation either in criminal court trying the case or in other civil court having Jurisdiction. If the claim for compensation is instituted in civil court, this court shall require the judgment of criminal court. And this civil court is bound to accept the criminal court Judgments as evidence. But what if a criminal case is not yet instituted or gets judgment? Shall a civil court wait the criminal court's judgment?

Is evidence of the criminal court judgment admissible in a civil case in Ethiopia dealing with the same matter?

To answer this question let us examine the relevancy of criminal court judgment in two cases: Joined suits and non-joined suits

A. Joined suits

As said earlier with the permission of court, civil case may be joined with criminal case in criminal court. In this case, the court shall first determine the criminal liability of the accused before deciding on the question of compensation. There is a possibility where the judgment in criminal court can be applicable to decide civil claim, which originates from the very crime for which the accused is convicted.

Where the accused is convicted this criminal conviction will have a direct relevancy to determine the civil liability of the accused. This is due to the reason that the standard of proof required in criminal case is higher than that of civil case. Thus, evidence which is sufficient for criminal case is more than enough to prove liability in civil cases. Here, once the civil liability of the accused is determined by the criminal court, the injured party shall not be allowed to institute the same civil suit in civil court due to the principle of Res-judicata. (see Art 50 of civ.p.c)

However, where the accused is acquitted or discharged, the question of civil liability or compensation shall not be adjudicated by the then criminal court. Rather, the court shall inform the injured party that he may file a claim against the accused in civil court having jurisdiction (see Art 158 of cr.p.c). Thus; the acquittal judgment of the criminal court does not have any relevancy in civil cases.

B. Non-Joined suits

This is the case when the civil and criminal suits are instituted independently. Here, the result in criminal court may be either acquittal or conviction. If the result in the criminal court was acquittal or discharge, Art 2149 of civil code specifically provides that the criminal court judgment shall not have an abiding effect upon the civil court in deciding whether an offence has been committed. Because, in the first place a certain act may be considered as a non-criminal act due to the fact that it is not provided in criminal code. Moreover, even though the act is a crime, the accused may be acquitted due to the fact that the alleged act is made through necessity, self-defense or unforeseeable accident. But, on the other hand, in extra-contractual case the slogan is “*every damage caused shall*

be good". Thus, a person who is acquitted in criminal case may be held liable in civil case. Furthermore, the "*beyond reasonable doubt*" standard of proof in criminal case justifies the non-admissibility of criminal acquittal in civil case.

However, even though the court is not bound by an acquittal or discharge by a criminal court, it may of its own motion or on the application of any of the parties to a suit requires the production of records or judgments of criminal court. (see Art 145 (1) of civ-p.c)

Is criminal court conviction binding on civil courts?

When the result in the criminal court is conviction, there is no provision which explicitly states as to whether a conviction is or is not binding on civil court.

Even though Art 2149 of civil code specifically states that an acquittal is not binding on the civil court, it does not provide the binding effect of criminal conviction in civil cases. However, if we see from the angles of the standard of proof required in the two cases evidence which is sufficient for criminal cases is more than enough to prove liability in civil cases. Since the beyond reasonable standard is higher than preponderance of evidence. If this is so, the civil court shall not require the production of additional evidences to determine the civil liability of the accused. Rather the civil court may require evidences to decide on the question of the amount of compensation to be awarded.

Moreover, under Art 2035 of civil code the accused is extra contractually liable by the mere fact that he infringes the provision of criminal code. Because Art 2035 of civil code points out that an offense is committed when a person infringes any provision of law, decree or administrative regulations. That is why a criminal court when suits are joined makes the accused civilly liable if he is convicted. (The acontratio reading of Art 158 of er.pc)

Activity

- 1. In case of non-joined suits shall a civil court wait the decisions of a criminal court? What will be the relevancy of criminal convictions made after the civil court's acquittal judgment?*
- 2. The Ethiopian law follows which legal tradition (the common law or civil law) as to the relevancy of criminal court judgment in civil cases dealing with the same matter?*
- 3. Assume the criminal court made the accused civilly liable based on the criminal conviction. While later the appellate court acquitted the accused by reversing the conviction judgment of the lower criminal court. What will be its effect on the civil case? Does it make any difference if the suits were non-joined?*

3.8 Relevancy of character evidence

As a rule relevant evidence is worthy of acceptance or is admissible. This however does not mean that every relevant evidence may be brought before the court merely because it is relevant. Relevant evidence may not be admissible, if it has the tendency to result in an unfair prejudice.

One of the examples of relevant evidence that has to arouse sympathy or hostility is character evidence. Because of this both the laws of the procedure and evidence rules fight against its presentation.

What is meant by “Character”?

Before discussing the relevancy of character evidence it is important to say something on the meaning of “character”.

The word “character” includes both “*disposition*” and “*reputation*”. Thus, we may have character evidence of two types. The first is evidence of disposition of a party in a party in a particular instance for a particular character trait related by someone who has had enough experience with the individual (e.g. friend, work mate or family member) to know

that disposition. This is when the witness gives his own personal opinions about the character of an individual based on his personal dealings with the said individual. Thus, this character is the one which may be known by someone who had enough experience with the individual than by the community in general.

However, the second type of character evidence is evidence of general reputation in a particular community. This is the general character of a person which is known by the community in general. It is the community opinion not the opinion of a particular individual that determines reputation. Here the opinion given in court must be based on what the witness feels to be the individual's reputation in the community for the particular trait not the individual's reputation for that trait with the witness based on particular dealings between the witness and the individual.

Now the question may arise as to which type of character evidence is relevant to show the “character” of a person before the court when character itself is relevant. When we talk about “character”, it is the general character (general reputation) evidence is relevant to show character rather than the character which emanates from the personal or particular good or bad acts of a person.

Activity

“The witness who gives general reputation testimony shall be the one who knows the person”. Do you agree? How can we distinguish general reputation testimony from hearsay?

The relevancy of character evidence is different in civil and criminal cases. Thus, in the following paragraphs we will discuss the relevancy of character evidence in civil and criminal context.

In civil cases, character is generally irrelevant. For instance, the character of the contracting parties are irrelevant to determine the issue “whether there is a contract or not”. However, there is an exception in which character is relevant in civil cases. This is when character itself is in issue. In some civil cases, the issue will be whether the person

has good reputation or bad reputation. This is true in case of defamation. In the claim for compensation for defamation, the truthfulness of the defamatory statement is a defense. Thus, the defendant can produce evidence of bad character of the plaintiff (see Art 2047 of cv.c). Here, the nature of the issue itself compels this kind of evidence to be produced.

In criminal cases good character of the accused is always relevant. Here an accused may show evidence of good character for the particular trait or traits involved in the crime or crimes with which he is charged.

How do you think does good character become relevant?

The good character of accused may be the base for the presumption of innocence. A man with a good character may be less likely to commit a criminal act than a man with a bad character.

In criminal law, the focus is on the guilt or the blame worthy state of mind of the accused, that there is no crime where there is no intent to it. Thus, since a person reputed for his good character may not easily be suspected with commission of a crime with intent, the accused may be interested to bring evidence of his good character.

Do you think a bad character is relevant in criminal cases?

In principle the fact that the accused person has a bad character is irrelevant in criminal cases. (see Rule 47(2) of DER). Art 138 and Art 149 of the criminal procedure code prohibit the disclosure of the character or antecedents of the accused before conviction. If they are disclosed they have the potential to arouse the judge's hostility against the accused without regard to the evidence adduced to prove the alleged crime. The judge might decide that it would not be such a terrible thing to convict him even if he did not commit the crime because he is bad person who does not deserve to be free. Thus, a conviction should be based upon proof of the elements of the offense before the court and not up on inference drawn from a prior bad character.

When a bad character does relevant in criminal case?

As said earlier bad character is irrelevant in criminal case. But if the accused produces evidence of good character in his favor, the public prosecutor shall be allowed to challenge him. The accused should not be allowed to take advantage of the system and get the benefit of a reputation he does not in fact possess.

Moreover, bad character evidence of the accused is only irrelevant before conviction. After conviction, bad character evidence may be used to aggravate sentence. (see Art 149(3) of cr.p.c)

What is the difference between Art 138 and Art 149 of cr.p.code?

Art 138 of criminal procedure code disallows evidences of bad character before conviction. But Art 149 of cr.p.c freely allows both evidence of bad character and good character after conviction for the purpose of aggravating or mitigating sentence. Good character will be produced for mitigation and bad character for aggravation.

Activity

1. *“Character is what men really is. Reputation is what his neighbors say he is” Explain.*
2. *Can the prosecution present the accused's bad character if the “bad character” itself is in issue?*
3. *“Accused's good reputation or disposition for the particular trait involved must be reasonably connected in time with the time of his alleged offense to be relevant” Explain.*
4. *Do you think the previous conviction of the accused is considered as bad character? If so, can the prosecution produce accused's previous convictions in the case when the accused introduce evidence of his good character?*
5. *Can a witness give general reputation testimony about the person in fact he does not know personally?*
6. *Can the prosecution produce good character evidence in order to mitigate the punishment? Why?*

3.9. Relevant but inadmissible facts

Relevancy is a necessary condition for admissibility. However it is not a sufficient condition to guarantee fact to be admissible in court of law or before other decision making organ authorized by law. This is because there are legal prohibitions against some relevant facts to be produced as evidence for social and public policy reasons as stated below.

3.9.1 Admissibility: General

There is the principle of law of evidence that evidence that is not relevant is not admissible. If evidence is not relevant to some fact of consequence to determination of the action, then there is no reason to admit it.

However, relevancy does not guarantee admissibility, for countervailing factors may weight in favor of exclusion. For example, relevant evidence may be excluded if it is unfairly prejudicial, confusing, or cumulative. Further more, variety of social policies operates to exclude relevant evidence like in the case of evidence protected by private privilege or public interest immunity.

Evidence is in admissible if rejected for some reason other than relevancy. Admissibility is, there fore, abroad concept under which rules for exclusion of evidence irrespective of its relevancy are grouped. Thus, inadmissible evidence may not be received before a court, no matter what is relevance might be.

In many cases, evidence may alter the probability of a material proposition in minuscule degree due to the mere connection it has with the fact in issue. However, we should be concerned not only with the binary (i.e. yes-or-no) question of whether a given piece of evidence is relevant, or not but also with the question of degree. That is, how much does the evidence alter the probability of the material proposition for which it is offered? And this probative value of the evidence must be weighted against countervailing factors to determine its admissibility.

Among those factors are “*waste of time*” and, what is really a type of time wastage, “needless presentation of cumulative evidence”. This concern arises where substantial amount of other evidence has already been introduced as to the relevant fact or where the evidence is viewed as collateral i.e. where multiple sources of similar and contrasting evidence establish the same fact, such as ten witnesses all testifying to the same speed of the car. Thus, the court may exclude evidence which in the context of the litigation is merely repetitious or time consuming.

“*Consideration of undue delay*” is another fact. This factor addresses not so much how long it will take to present the evidence but how long the trial must await the evidence, for example, if in the middle of the trial a party decides that he wants to add a witness whom he had no previously designated but the witness is not immediately available, the court may decide depending on all circumstances- that the extra-wait involving cost and inconvenience to the court and the other parties, is not worth while.

Moreover, no document which should be but is not annexed to or filed with the pleading or produced at the first hearing shall be received at alter stage in the suit on behalf of the party who should have so annexed, filed or proceed it. However, as an exception, the party who failed to produce such documents in first hearing may apply to the court and the court may adjourn the hearing on such terms as to costs or otherwise as it thinks fit. (see art 137(1) (3) and Art 256 of civ.p.c). But in practice, the party who failed to filed with the pleading or produce of the first hearing used the provision of Amendment of pleading (Art 91 of civ.p.c) rather than Art 256 of Civ.p.c which is not appropriate in this case

Another of the factors is" *the danger of undue prejudice*' .For example, proof that an accused has along criminal record might encourage some judges to convict him even though they are not persuaded beyond reasonable doubt about his guilt of the crime charged in this case .Thus, according to Art 138 of Cr.p.c., it is prohibited to disclose the previous convictions of the accused since its probative value is outweighed by an unfair prejudice it creates.

When does evidences may be rejected by the court?

An evidence may be rejected or not received by court for two reasons. One, if it is not relevant and secondly, if there is a legal prohibition behind it. Therefore, in short, to be admissible, evidence has to be relevant to a material proposition, without any exclusionary rule preventing admissibility.

Activity

1. Admissibility is a question of law than a question of fact? Explain
2. Does evidence obtained under coercion has any relevancy? What about its admissibility?

There are also some facts which are relevant but which may not be proved. We will discuss such facts in the following sections.

3.9.2 Public policy and privilege

1. Public policy.

Even though, the evidence is relevant, it may be prohibited from being produced as evidence before the court of law. One of those situations is the case of public policy. This is because if they are disclosed, the national interest and governmental secrecy or the administration of judicial process may be affected. Protecting governmental interest means protecting public interest. And the public interest prevails over the individual interest. That is why their production is prohibited for the interest of the public in general.

There are three relevant evidence which may but be proved in the name of public policy. These are evidence as to affairs of state, in formation for the detection of crime and helical disclosure

(i) Evidence as to affairs of state

No one shall be permitted to produce any unpublished official records relating to affairs of state or to give any evidence derived there from except with the permission of the minister of the department concerned. Here, the fact that whether the document in question is public or private is immaterial. Rather the question should be whether such documents can be produced with out injury to public interest or not. Evidence which may fail under this category may be the one which concerns government secrets or public security, information concerning the stand and organization of military force, and other internal security matters which may potentially injured the nation's international relations.

(ii) Information for the detection of crime

No police officer shall be compelled to point out the person or the ways from which he got any information as to the commission of any offence. If we compel the police to disclose the person who gave information, it may discourage others not to give information about the commission of the crime. In some cases, like corruption case, the government may provide money to those people informing the commission of the offence.

The investigating police officers shall carry out their duties of not withstanding that they are of opinion that the information they may received is open to doubt. This means the person may inform the police about the commission of a crime either through telephone or letter secretly with out telling his name. (See Art 23 of cr. P.c.)Because the informing person may fear that the criminals will harm him if they aware the fact that he is the one who informed the police about the commission of the crime. In this situation, if we compel the police to disclose the name of the informing individual, persons may prefer to keep silent and failed to inform the commission of the offence to the police. In return this may affect the task of criminal investigation and criminal justice since the police alone can not detect crime and criminals without the help of the society.

Moreover, no police officer shall be compelled to disclose the information as to the ways of detecting a crime. Because, if the criminals a ware about the tactics of police as to the

detection of a specific crime, they may come up with a more sophisticated way of committing a crime which is beyond the reach of the police, and affect the process of investigation in the future.

(iii) Judicial disclosures.

No judge shall be compelled to disclose the judicial process of a given case or judgment. This is to protect the principle of independence of judiciary. Courts of any level shall be free from any interference of any government body, government official or from any other source. Otherwise the executive organs may spoil the independence of judiciary. (Art 77 of FDRE constitution)

2. Privilege

The purpose of excluding certain relevant evidences from being produced before the court of law in the name of privilege is to protect certain social interest, which prevails over the individual interest. For instance, no person who is or has been married shall be compelled to disclose any communication made to him during marriage by the person to whom he is or has been married. This is the case of spousal privilege provides to protect the marriage or the family from being dissolved due to the break of secrecy by one of the spouse. Similarly, there are privileges provides to protect professional secrecy like in the cases of client- Advocate, patient -physician, and priest- son relations. We will discuss at length about privilege in chapter 4. Now what is required is to inform you that privilege is one of the grounds of inadmissibility of relevant evidences.

.3 -Parole evidence or extrinsic evidence in relation to document

Can you state the best evidence rule? Does the principle of the best evidence rule have an exception?

Before discussing the admissibility of extrinsic evidence, it is important to know the best evidence rule. The best evidence rule provides that the best proof of a document's content is the document itself. A written document can only be proved by the instrumentality of

itself. In proving the terms of writing, where such terms are material, the original writing must be produced, unless it is established that the document evidencing the contract has been destroyed, stolen or lost. (Read rule 53-57 of DER and, Art 2003 of civil code which provides the best evidence rule for contract.)

What is the essence of the parole evidence rule?

The parole evidence rule restricts the use of extrinsic evidence be it oral or written and requires that the party proves his case exclusively by the evidence of the contents of a writing. As opposed to the best evidence rule, the parole evidence rule does not require that the evidence of the document be the document itself not oral or other evidence of the contents. Instead, it simply limits proof of the fact to the contents of the writing and prohibits consideration of any evidence which contradicts, alter, vary, change, and modify any of the terms or provisions of the written agreement.

The rational behind the parole evidence rule is that the parties by reducing their agreement to writing are regarded as having intended the writing they signed to include the whole of their agreement. The terms and provisions contained in the writing there because the parties intended them to be their.

For instance, “A” instituted acclain against “B” on the breach of loan contract. And he annexed the original document signed by the defendant on the value of 1600 birr. But the defendant disagrees as to the amount of the loan he borrowed. And he provides a defense witnesses who are ready to testify that the amount of loan is not as prescribed as in the contract. Rather it is 1060. In this case, the court shall not accept the defendant's witnesses. Since neither party is permitted subsequently to show that the contract they made is different from the terms and provisions as they appear in the written agreement.

Art 2006(2) of the civil code provides for the parole evidence rule for contracts. Accordingly, no proof by witnesses or any presumption is admissible against statements contained in a written instrument. Here the article does not provide whether it is possible to challenge the contents of a written contract by other written document.

When we observe the practice of courts, some judgments supports the spirit of Art 2006(2). While others provides the possibility of variation of the contents of the original contract by another contract entered by the parties. According to Art 1722, a contract made in a special form shall be varied in the same form. This means if the original contract was made in written form, the parties can vary its contents by another written contract. Thus, even though proof by witness or any presumption is in admissible proof, by another written contract is admissible against statements contained in written instrument under Art 2006(see Art 1722 of Civil code). *Do you agree?*

The parties may differ as to the proper or intended meaning of language contained in the written agreement, where such language is ambiguous or susceptible of different interpretation. To ascertain the proper meaning requires a construction of the contract. Therefore, rule of interpretation permit the introduction of evidence in order to resolve ambiguity and to show the meaning of the language employed and the sense in which both parties used it (Redid Art 1734 and 1736 of civil code).

Summary

In this unit, we have tried to see what relevant evidence is and the rules and the exceptions as regards relevant evidence. Evidence is said to be relevant if it has a tendency to prove or disprove a certain factual allegation. Relevant evidence may be direct or circumstantial. Obviously, if you can prove the fact in issue directly, that is recommendable. But this is not mostly possible and therefore, you prove the existence of the relevant facts or surrounding facts or circumstances from which the court can make an inference about the existence or non-existence of the disputed fact.

Even though the codes nowhere specify what categories of facts are relevant, the DER gives hint as to which connection of facts that should not be disregarded irrelevant like the facts of motive, preparation, state of things, res gestae and the like.

Evidence which is relevant is generally admissible. However, there are times where relevant evidence may be inadmissible. Therefore, number of reasons prohibits relevant evidence from being admitted like trial concerns and public policy concerns.

Review Questions

1. Go to your near by court and inquires information on how registrars and judges differentiate between relevant and irrelevant evidences to real case from the initial stage of institution of legal action.
2. What is the difference between
 - a) cause and occasion
 - b) Motive and criminal intention
3. Is the school record showing that A has been acknowledged by Ato B as his daughter acceptable proof of acknowledgement of paternity? If you were a judge, do you reject the school record on the ground irrelevancy? (see Art748(2),Art747(2),and Art146of civil code)
4. Suppose that you are a lawyer and Mr. Alemitu approaches you in order that you represent her on her legal action that she is going to institute against Mr Woyesa who claims to be the only heirs to Mr ketema's estate .However,MrsAlemitu is a child of Mr Ketema and his mistress Mrs Emebet .Having been given these facts what relevant evidence are you going to look for in order that you will get decision of the court in your favor.
- 5."Proof of preparation is immaterial unless the criminal used it for the realization of the alleged a fact" Do you agree? Explain?
6. The question is whether A was robbed .The fact that soon after the alleged robbery, he made complaint relating to the offence, the circumstances under which, and terms in which the complaint made, are relevant .Do you agree? Why /could your answer differ if the statement was made without making any complaint?

CHAPTER FOUR: ORAL EVIDENCE

4.1 Introduction

After it is decided what facts are to be proved in court (facts in issue & relevant facts), the next step is how to prove these facts or to choose the method of securing their consideration. Most evidences submitted during the trial consist the testimony of witnesses to facts they claim to have seen, heard, felt, tasted or smelled. There are few cases where only real evidence is offered and many more where only oral evidence is available.

In systems of proof based on the English common law tradition, a witness who has sworn or solemnly affirmed to tell the truth must adduce almost all evidence. The bulk of the law of evidence regulates the types of evidence that may be sought from witnesses and the manner in which the interrogation of witnesses is conducted during direct examination and cross-examination of witnesses. Other types of evidentiary rules specify the standards of persuasion (e.g., proof beyond a reasonable doubt a trier of fact of such as a jury must apply when it assesses evidence.

This chapter deals with such type of evidence called oral evidence. After showing the general concepts of oral evidence, the chapter will deal with competency of witnesses. The principle concerning competency is that all persons are capable of testifying before the court. The chapter will deal with the exceptions to the principle.

The justifications for granting privileges to some group of persons will be the concern of this chapter. In addition, the lists of privileges are covered. Hearsay evidence (justification for exclusion and exceptions to exclusion) is also part of the discussion of this chapter.

Chapter objectives:

Successful reading of this chapter will enable the reader to:

- Explain the importance of oral evidence in proving facts;
- List the grounds of incompetence;
- Explain the justifications for privileges;
- List the type of privileges;

4.2 Oral evidence: Definition

The Blacks law dictionary, which is the 8th edition, defines oral evidence as: “*Verbal evidence: which is given by word of mouth: the oral testimony given by witnesses in court*”. That is, oral evidence is ordinary kind of evidence given by witness by word of mouth. The phrase oral testimony needs also further clarification that it is statement made by a competent witness, under oath or affirmation, usually related to legal proceeding. In addition, to testify means the making of a statement under oath or affirmation in a judicial proceeding: to make a solemn declaration under oath or affirmation for the purpose of establishing proof of some fact to the court

Even though different writers define oral evidence in a different form, the message they convey is the same.

All statements which the court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry; such statements are called oral evidence.

So, what is a witness?

A witness is defined as:

Someone who has first hand knowledge about a crime or dramatic event through their senses (e.g. seeing, hearing, smelling, touching) and can help certify important considerations to the crime or event. [Ronald L. Melnick]

A witness who has seen first hand is known as an eye- witness. Witness, in general, is one who being present, personally sees or perceives a thing; eyewitness, who is called to testify before a court. One, who testifies to what he has seen, heard, or otherwise observed. As one type of witness, an expert witness testifies not only what he has seen, heard, or otherwise observed personally but he may also offer an opinion applying his expert knowledge to facts he has not personally observed.

The function of a witness is to present evidence from which the trier of fact can make a determination as to what happened. Generally to be eligible to testify a witness must have a personal connection with the relevant occurrences coupled with mental and physical facilities sufficient to observe the events at the time of their occurrence, and recollect and relate them to court in a manner, which renders the testimony relevant.

In general, evidence of witness is given orally, and this means oral evidence. The expression “oral evidence”, therefore, includes the statement of witness before the court, which the court either permits or requires them to make.

4.3Importance of Oral Evidence

The importance of the law of evidence in general and oral evidence in particular is highly related with the goals of an adjudication, which is a form of dispute resolving mechanism and the fundamental aim of adjudication is correctness of decision making. The correctness of the decision-making is realized by the proper application of the substantive laws to the true facts of the dispute. In this case the true fact is established through the accurate evaluation of relevant and reliable evidence by a competent and impartial

adjudicator applying the specified burden and standard of proof. Specifically the purpose of the law of evidence is to assist in the achievement of rectitude or correctness of decision making by ensuring that by any means the evidence before the court is relevant and reliable to establish the true fact. This is done by several mechanisms:

First, much evidence that could be overemphasized or which could lead to erroneous inferences being drawn is inadmissible. For example, hearsay evidence is often both unreliable and as such is generally inadmissible in criminal proceedings; an expert opinion cannot be given on matters of general knowledge because the tribunal of fact might attach too much weight to it; and the accuser's criminal disposition is generally inadmissible because of the risk that unduly prejudicial inferences might be drawn from it.

Secondly, the law imposes a requirement that a fact in issue must be proved to an appropriate degree of probability. In criminal trials the burden on the prosecution to prove the accuser's guilt beyond reasonable doubt and preponderance of evidence is applied in civil adjudications.

Thirdly, the process of cross-examination provides a mechanism for testing credibility of witness and revealing to the tribunal of fact any vested interests, bias or mistakes adversely affecting the cogency of their testimony.

The other main importance of oral evidence is in case of absence of documentary evidence. This is true especially in criminal cases that most of time it is hard to get documentary evidence. Hence, the possible option to prove the alleged fact is by producing oral evidence. Since oral evidence is given by a person who has personally seen, heard, or otherwise observed, its credibility is high. That is why witnesses are described as "The eyes and ears of justices".

4.4 Nature and Development of Oral Evidence in Different Legal Systems

In the previous chapters we have discussed the distinction between the common and civil law legal systems in general on law of evidence. Now, in this sub topic we will briefly discuss the basic points of distinction of oral evidence in the two legal systems.

A. Common Law

As mentioned in chapter one, in common law legal system, oral evidence is given considerable weight and will usually prevail over written evidence. In a common law trial witnesses are examined and cross-examined in the presence of the judge and jury. Counsel often makes motions and objections orally, and the judge acts as umpire, ensuring that the rules on procedure and evidence are followed, directing the jury on the law to be applied and reminding them of the evidence that they have heard. The jury's role is firstly to decide questions of fact, i.e., to make up their minds between conflicting accounts as to what happened and then to decide on the guilt or innocence of the defendant.

Thus, the rules of oral evidence draw their significance from this process since it is solely on the evidence retained in court, usually by formal oral testimony that the decision is based. The common law gives predominance to the day in court, with the opportunities for cross-examination of opposing witnesses and for argument on both sides. That is, in oral evidence it is believed that the person who gives his testimony is before the judge and the action is physical expression. This helps the jury the matter to be clear and for the accused to have a chance of cross-examination.

Lastly, one important point in common law in relation to the oral evidence, is-so called "preparation of witnesses". In common law, counsel would normally prepare his witnesses for the hearing in order to avoid surprises during the trial and to make sure that the witness statements are accurate.

B. Civil Law

We can assume that the continental /inquisitorial/ system unlike the Anglo-American/adversary/ system has its own character, according to which the determination of what issues to rise, what evidence to introduce, and what arguments to make is left almost entirely to the discretion of the judge rather than the parties. One can sometimes observe the fact that in civil law trials, questions are to put to witness by the judge instead of by counsel for the parties or by the parties themselves. This kind of experience, leads someone to the inference that the civil law judge determines what questions to ask and unlike the common law judge in effect determines the scope and extent of examination.

In the civil law legal system, all oral witnesses are the courts' witnesses, though generally speaking the parties tender them. This is what is called 'inquisitorial.' There is substantially no cross-examination and for practical purposes none at all by the parties or their legal representatives. The witness in effect makes his statement in his own words... there being no "hearsay rule" rule. It is for the court to decide the value of what has been said.

Finally, in civil law, the preparation of witnesses is strictly forbidden. The attorneys are normally not allowed to discuss the issues related to trial with witnesses out of court and may face disciplinary sanctions if they breach this rule. If the judge is informed that the attorney before the trial questioned a witness, the witness testimony may not be given full credibility.

Generally speaking, a civil trial is consisted of a number of hearings, and written communications between the parties, their attorneys and the judge during which an eventual dispute on court jurisdiction is resolved, evidence is presented, and motions are made. There is less emphasis on oral arguments and examination.

4 .4.1 The Traditional Ethiopian Oral Litigation

Are traditional litigation systems still practiced in your community?

Ethiopia has a long history of using formalized litigation dating back centuries. Ethiopia oral evidence was recognized in the law firstly by the ‘Fetha Negest’ (the law of the king) in an elaborate way. It has a number of paragraphs dealing with witnesses. For example, there are certain competency requirements to be a witness in the law of the king such as the age of the witness should be not less than twenty year old; the witnesses should be two or more in number; the witness should not be a family member, a beggar, a soldier or ‘ashker’. The hearsay evidence had not gotten acceptability.

The traditional procedure of litigation was transmitted from generation to generation by oral tradition. This procedural law includes the law of evidence, which incorporate a highly sophisticated technique of interrogation and cross-examination known as ‘Tatayyaq muget’. “Esette-ageba-muget” was used interchangeably used with tatayyaq to denote features of court proceedings and the same mode of litigation.

General E.Virgin as cited Melin summarized his vivid eyewitness account of court proceedings conducted according to the indigenous mode of litigation of Ethiopia, in the following manner:

The Abyssinian is a born speaker and neglects no opportunity of exercising this talent. A law-suit is a heaven-sent opening and entails as a rule a large and appreciative audience: now threatening and gesticulating, now hoarsely, whispering with shrugged shoulders, now tearfully, he tells of his vanished farthing, and points a menacing, trembling finger towards the accused. The judge in the midst of circle of spectators, having listened to the eloquence with a grave and thoughtful men, now invites the accused to reply. Like a released spring he leaps up, and with raised hands calls heaven to witness his innocence, the falls on

knee, rise, stands on tip toe, drops back on his heels, shakes his fist under the nose of his adversary and approaches the judge with clasped hands, while all the time unceasing stream of words pours lips. What can you understand from the above statement made by the foreigner?

This theoretical exposition of court proceedings shows how the “tatayyaq” mode of litigation, which forms part and parcel of the Ethiopian cultural heritage operated.

With regard to oath, the witness would close the door of a church and/or hold the Holy Bible, saying:

*May He perforate me like his cross,
May He erase me like his picture,
May He chop me down into pieces like his flesh,
May He spill me like his blood, and
May He choke me up as his altar is closed?
If I am not telling the truth.*

If he had already testified out of court, the party may impeach the credibility of his testimony or may claim that it may not be admissible at all. The party, which called the witness, would, before asking him to testify, warn him as follows:

One may go to hell after death;
One maybe reduced to bones, lying sick in bed;
One may also be a permanent inmate of a hospital;
All the same, one is obliged to tell the truth.

4.5 Competence of witnesses

What do you think must a person fulfill to be a witness?

Ordinarily, competence refers to capacity of a person to do something. Here, competency of a witness takes to the inquiry as to which persons are capable to testify or are competent witnesses.

Thus, a competent witness is one who is fit and commonly gives his testimony before courts or a judicial proceeding under oath or affirmation. And the topic of competency concerns itself with what witnesses will be permitted to testify at all. A competent witness is one who is able to testify or one whom nothing prevents from testifying unless there are some conditions which bar him from doing so.

A) Types of Competency of Witnesses

The witness' competency is classified in to two; general competency and special competency.

i) General Competency

General competency refers to the witness' ability to testify to facts he has observed. In simplistic terms, it is about telling to the court what one has heard, seen, smelt, touched, etc. It is widely accepted that every body is presumed to be competent. That is, with the exception, perhaps, of certain witnesses, general competency is presumed.

For that matter, it would be a waste of court time to conduct an inquiry in to the competency of every witness testimony. But from the allegation of opposing counsel that there is reason to question the witness's competence, an inquiry into general competence will be made.

Thus, to be included as witness in the general competency a person must possess the organic and moral capacities. This is to mean that the test to competency relates to the ability to understand questions and give rational answers. To put it in another way, competency of a person is determined by his ability to perceive, remember, communicate and understand the duty to tell truth.

ii) Special Competency

Special competency refers to a witness's ability to testify to opinions or conclusions he has arrived at by evaluating facts he has observed, facts presented to him by counsel or a

combination of both types of facts. That is, special competency refers to the ability to analyze facts about which one testifies. For example, if you go to a hospital you don't tell your illness to the doctor, but you tell the facts about your illness, then, he analyzes the facts and tells you what you are suffering from.

Unlike general competency of witnesses, special competency is not presumed. Special competency of witnesses is subdivided in to two: **layman's opinion**, and **expert opinion** given as testimonies.

A Lay witness is a witness with no expertise in the matter concerning which he testifies beyond that of the judge. This type of witness (one that is not shown to have any special expertise in the subject matter concerning which he testifies) may testify to opinions based only on facts he has observed, and may ordinarily venture opinions as to intoxication, age, appearance, general characteristics of weather, a value of service, conduct of business, etc, and leaves the conclusion to the court, depending on the case and chiefly on the practice. However, the opinion on of non-expert witnesses will not be admissible upon the particular cause thereof and of all subjects where it is neither practicable nor possible; for they would be vain and unprofitable.

The opinion of expert witness may be required by the court or by either of the parties. To call expert testimony, the subject matter must be so complex that judges should be assisted in forming proper judgment regarding the fact. Consequently, for an expert to be qualified as qualified witness he must show special experience. But since this expertise is not present in the ordinary witness, the expert's specialized competence must always be shown before he will be allowed to venture his opinion.

4.5.1 Grounds of incompetence

The competency of ordinary witnesses has its own exceptions. These exceptions are the incompetence of the ordinary witnesses due to lack of organic and moral capacities of presumed witnesses. Because of the existence of these exceptional grounds of in

competency, one writer stated that; “The witnesses...competency is the rule, their incompetence the exception, and that incompetence lies within a very narrow compass.” Thus, the above quotation may enable us to say that the competency of ordinary witness is the general rule while their incompetence is the exception.

There are few grounds, in the Rule 39 of the Court Rules of 1943 and Rule 92 of Draft Evidence Rule, which make a person incompetent from testifying before courts of law. These are

4.5.1.1 Mental incapacity

The incompetence of mentally incapacitated persons was a ground for raising objections in both the common law and the Ethiopian legal system. But no flat rule today under Common law, Draft Evidence Rule (DER) or present Ethiopian law which, declaring any of these people incompetent witness. The ground covers mostly the organic incapacity aspects of the in competency of witnesses. It comprises children, insane, and intoxicated persons, whose conditions may be long lasting or intermittent in nature.

The present common law position on the general rule today well expressed by Steven H.G in Barron’s Legal guide as:

The essential test of the competency of the infant witness is his comprehension of the obligation to tell the truth, and his intellectual capacity of observation, recollection and communication.

Here, we can understand that having intellectual capacity of observation, recollection, narration or communication of what has been observed and recollected and understanding the duty of telling the truth are the main elements to be considered in the process of determining the competency or incompetence of a required witness. He does not need to believe in God. So long as there is some standard such as respect, decency, reverence which he feels makes it necessary to tell the truth in the court proceedings, he may, if other wise incompetent, testify as a witness.

The DER, which is substantially the same with common law, under its rule 92 states that a child or a person with mental defects are generally competent if they understand the questions put to them and rationally answer them. Thus, the witness must be able to perceive, to understand and to communicate in order to be a competent witness. In addition to this, the DER in Rule 104(1) includes a second test for the competency of a child or mentally infirm witness. To give answers or an affirmed testimony, such a witness must not only be possessed of sufficient intelligence to justify reception of the evidence but also he must understand the duty to speak the truth.

What is more, the testimony of every witness, including mentally deranged ones, was and still is subject to the assessment of court. Thus, by way of interpretation mentally defective persons are permitted to have the right to tell to the court what they have in mind because there is inherently presumed civil right of persons to stand as witness before courts. In proactive too, courts accept any witness when necessary for both civil and criminal cases, though the general provision in the civil code dealing with contracts excludes some persons from being witnesses to a contract. This exclusion does not continue to the effect that they are not capable enough to testify in connection with civil matters for civil cases are connected with the preponderance of evidence to make one of the parties the winner of the suit.

4.5.1.2 Physical incapacity

This covers those persons, who have visual, hearing, and speaking deficiencies. Such persons can, in principle, perceive the occurrence or non-occurrence of certain events. However, defects such as blindness, deaf or dumb may impair the power of observation to make a given witness incompetent to testify. However, according to the general rule, physical incapacity is no bar to a witness's competency as long as he can understand the questions put to him and give rational answers to those questions.

Rule 92(2) of DER by supporting the above assertion states that, if a person cannot speak, see and hear, he may still testify if questions can be put to him in some accurate

fashion and he can reply by signs or writing which can be accurately interpreted by some one sworn to do so accurately.

Hence, in Ethiopia, even though there is no law, which governs such issue, practically these types of persons are not incompetent to stand as witnesses merely because they are blind, deaf and dumb if they are able to observe, recollect and communicate. Their infirmity may make them incompetent to testify. the whole idea of this discussion is that

4.5.1.3 Legal interdiction (Conviction of a crime)

In present Ethiopia this is no longer a bar to competency of a witness. This can be inferred from the substantive laws such as the FDRE Constitution and the procedural laws, i.e., Art 142 of the Criminal Procedure Code, and Art 268 of the Civil Procedure Code, and etc. However, a witness may be asked about prior convictions to impeach his credit. In Ethiopia, if the witness is also the defendant, the prosecutor may not impeach his credit by proof of prior conviction at any time prior to conviction in the case before the court.

4.5.1.4 Interest in the out come of the case as ground of incompetence

This ground of in competency covers different types of persons, i.e., parties to the case, consanguinal and affinal relatives, other emotional grounds and so on. These grounds are inherently linked with the bearing of biases. In early times both criminal charges and civil suits, persons were disqualified as they were considered incompetent. No matter what the degree of interest of the witness and the type of relation he had, the interests of the witness used to determine his competency to a great extent. As a result, interested persons could have been competent witnesses if he had divested himself of his interest or if it has been extinguished or is released liability.

There is no such restriction in the present times. The ground has no relevance with regard to the competency or incompetence of a witness. Simply, the witness is presumed to be competent if he meets the requirements laid down as:

- As per Art 93 of the DER, in all civil proceedings the parties to the suit and the husband or wife of any party to the suit, shall be competent witnesses; and
- As per Art 94 (1) & (2) of the DER in criminal proceedings against any person, the husband or wife of such person shall be a competent witness if called by the accused, or for an offence committed against the wife or husband such wife or husband shall be a competent witness for the prosecution.

However, the fact that a witness is the spouse of a party to a suit can be used to impeach said witness credibility. This was specifically provided under Rule 40 of the Court Rules of 1943. The court has discretionary power to attach whatever weight it thinks fit to the testimony of a party or a person who has any relationship to the parties_such that his evidence may be partial.

4.6. Examination of witness

As stated before in the preceding sections, of oral evidence is adduced in court by way of giving answers to questions put to the witness. There are three forms of questions, namely; examination in chief, cross-examination, and re-examination. It is the principle of evidence law that the party who bears the burden of proof has right to begin. Thus, as a rule the public prosecutor/plaintiff begin as the case may be then. The witness testifies by giving answer to examination- chief followed by cross-examination by the opposing party and re-examination by the calling party.

4.6.1 Examination-in-chief

Examination-in-chief is the processes where by a party who has called a witness to give evidence on his behalf elicits from that witness evidence relevant to the issues and favorable to the examiner's case.

A witness is examined-in-chief when the party calling him questions him in court for the first time. This is to mean examination-in-chief is a question put by the calling party to the witness so that the latter will tell the story about the fact he is asked. And as clearly provided in Art.137 of cr P c and Art.263 of civ.P c., the question put in examination-in-chief shall only relate to facts, which are relevant to the issue to be decided and to such facts of which the witness has direct or indirect knowledge. In fact what indirect knowledge is controversial as discussed under hearsay evidence. Hence, if the question is related to the issue, the testimonial answer will be related the to fact in issue.

In connection with this every examination-in-chief must be organized in a manner to achieve its purpose. A structure should be selected to enable the witness to tell an interesting, persuasive, and credible story. Further more, the witness may described the events in the order in which they occurred, or in the order in which the elements of a claim or defense need to be proved, for example, in civil cases, a witness can first discuss the facts which establish liability and explain the facts which support damages. Where as, in criminal case the witness can establish the facts, which show a conspiracy and then describe events that explain the criminal act

In Ethiopia there is no law that deals deeply on how the examinations have to be carried out except as mentioned above in the two procedures and Court rule the 1943.The court Rule 37 of 1943 stated as follows;

Every witness shall give his evidence on oath and orally and in open court and in the presence under the direction and super intendance of the court. The party calling a witness examines him...

From this rule is that the party who call the witness has the right to examine the witness. Whereas for other situations such as, the obligation of witness to testify only to the material facts with in his knowledge which will help the party to prove his case, the discretion of the court, the emotions of adversary left with out being explained by the rule.

The other important point to be considered is that the prohibition leading question in examination-in-chief. With the concept of leading questions-that is, a question that is phrased in such away that the desired answer is contained or implied in the question it self. Art. 263(2) of civil procedure code and Art.137 (2) of the the criminal procedure code in the same language stated ‘no leading question shall be put to a witness with out the permission the court.’

Sedler elaborate the above assertion by stating ‘the purpose of the rule forbidding leading question in the examination-in-chief is to prevent a witness who is quick to adopt the suggestion of the examiner from saying something that he would not say other wise ‘we can assume that the testimony must be that at witness and not at the examiner; the examiner can not ‘put words in the mouth of the witness ‘, so to speak. In other word, the examiner cannot suggest the answer he wants to receive and try to get that answer from the witness.

4.6.2 Cross examination

After a party examines his witness in chief, his opponent has right to cross-examine him. Cross-examination follows immediately the examination-in chief, unless the courts for some reason post pones it.

Cross-examination is the method by which a party to an action probes the credibility of an adverse witness.. In asking such questions, the examiner tries to weaken the testimony of a witness given through examination-in-chief.

Cross-examination is a constitutional right constituting an important aspect of due process of law and in criminal cases of the right of confrontation. Thus, cross-examination is an absolute right and not merely a privilege. It is part of the constitutional mandate that the witness against him must confront an accused, and testimony is not allowed to remain as evidence if the accused has not had the opportunity to fully cross-examine the witness giving the testimony.

As would be suggested the proper purpose of cross-examination is for the witness's evidence-in-chief to be tested for its accuracy and completeness. The cross examiner will seek to elicit from the witness any further evidence which may under mine the case of the party who called him and/or support the case of the cross-examining party, for example by showing that the witness's evidence was based on a mistaken understanding of the events. If it is not possible to obtain any thing favorable from the witness, the cross-examiner will 'cross-examine the witness as to credit' that is seek to under mine the weight of his evidence by attaching his character. He may try to show the witness ought not to be believed on oath because of his past conduct, his previous convictions, and his relationship with the party who called him, or his previous inconsistent statements.

In Ethiopia, it was rule 37 of court rule of 1943 the first law, which dealt with about cross-examination, stated as:

Every witness shall give his evidence in oath, orally and in open court, and in the presence of and under the direction and super intendance of the court. The party calling a witness shall examine him, and the other party may cross-examine him...

However, it is replaced by civil procedure code article 263(3). It expressed as follows, "a question in cross-examination shall tend to show to the court what is erroneous, doubtful the or untrue in the answer given in examination-in-chief." Leading questions may be put in cross-examination, which is similar to article 137(2) of criminal procedure code.

The Draft rule of law of evidence¹⁰⁸ (2) is more specific than that of civil and criminal procedure code, which has similar to the English approach that cross-examination is not limited to the matter of upon which the witness has already been examined-in chief, but extends to the whole case and therefore if a plaintiff calls a witness to prove the simplest fact connected with this case the defendant is at liberty to cross-examined him every issue.

Finally, it was directly provided that one of the fundamental rights of the accused under article 20(4) of the Constitution of Federal Democratic Republic of Ethiopia (FDRE), which stated as follows:

Accused person have the right to full access to any evidence presented against, to adduce or to have evidence produced in third own defense, and to obtain the attendance of and examination of witness on their behalf before the court.

Therefore, his right to confront witness giving of such right of confrontation was mainly armed or equipped at giving the opponent the chance to cross examine the witness.

4.6.3 Re-examination

Once a witness has been cross-examined; the party who called him is entitled try to repair any damage done to his evidence-in-chief by asking further question on the matters which arose during cross-examination. Re-examination logically results from the interaction between examination-in-chief and cross-examination. If testimony, which is giving in answer to examination-in-chief, is discredited by cross-examination, or shown to be erroneous, doubtful or untrue the party who has called the witness could re-examine the witness in the way to cure what is damaged during cross-examination.

Re-examination is confined to issues that were covered in cross-examination. And questions such as whether re-examination exceeds the scope of cross-examination, whether the testimony offered is in the nature of refutation, as well as the propriety of the form of the question, are ultimately rests in the discretion of the court. Further more, do not ask questions in re-examination unless you are sure the witness knows the answer choose your words carefully so that the witness knows exactly what the re-examination intends to focus on.

In Ethiopia the question in re-examination first dealt with court rule of 1943 in article 37. I t was then later incorporated in the civil and criminal procedure codes. Article 139 of the criminal procedure reads as follows; The public prosecutor, the accused or his advocate may in re-examination only ask question in the purpose of clarifying matters

which has been raised in cross-examination”, where as, in case of civil procedure code Article 263(4) states as follows” the re-examination shall be directed to the explanation of matters referred to in cross-examination and new matter may not be introduced in re-examination except by permission of the court.”

From the above, the writer concludes that leading questions and other questions than that arises in cross-examination will not be allowed except to explain and clarify matters. But the Draft Evidence Rule 108(3) seems to allow with the permission of the court. So that in application the Draft Evidence rule is wider than the criminal and civil procedure codes.

4.7 Hearsay evidence

In this sub topic we will see one type of oral evidence, hearsay evidence. This is a type of evidence given by a witness based on the information he has attained from the statements made by others. For many reasons hearsay is in principle inadmissible. We will discuss the reasons for exclusion of hearsay evidence and the exceptions to the exclusion.

4.7.1 Definition of hearsay

W (witness) reports on the stand that she heard D (declaring who made the statement, not defendant) state out of court that he (d) saw X Shoot Y. Perhaps W relate D’s story in relevant detail, but D does not testify. W’s testimony as to what D said is hearsay if offered to establish that the shooting took place, that X did it, or that it was in any other respect as stated by D.

Hearsay is legal term that describes statements made out side of court. However, all statement made out of court are not hearsay. In ordinary circumstance, hearsay may have various meanings, but the definition of hearsay under this topic is standardized in context of evidence rule and principles.

Black's Law defines hearsay as:

The term applies to that piece of testimony given by a witness who relates, not what he knows personally. But who others told him or what he has heard said by others.

In light of Federal Rule of Evidence of United States of America, hearsay means “*statement that was made other than by witness while testifying at the hearing, and that is offered to prove the truth of the matter stated.*” The word ‘statement’ used in this definition may be ‘oral’ or ‘written’, verbal expression or ‘non- verbal conduct’ intended as a substitute for oral or written verbal expression.”

All the above definition show that hearsay is a kind of evidence, made by another person other than the one who testify it before the court, and it is a kind of evidence which does not originate from the individual's direct knowledge and observation of facts sought to be proved, but from the mere narration and repetition of what has been said by another who is not in court to ascertain the fact. Generally, when we put it simply, hearsay is out-of-courts statement offered to prove the truth of the matter asserted in a civil suit or criminal charge.

4.7.2 Justification for exclusion of hearsay statements

Hearsay is what a witness who does not have first hand information but heard about something from a person and testifies before a court. That is, if the statement was not made in his presence or hearing and he subsequently came to know of it through some other source, he can not appear as a witness, for his knowledge is a derived knowledge and is nothing but hearsay and it is a maxim of law that hearsay evidence is not relevant.

The objective of the rule against hearsay is to prohibit the use of a person’s assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in the court on the stand where he/she may be placed under oath and cross- examination.

Is hearsay evidence admissible in Ethiopian as a rule?

There are different out looks regarding the admissibility of hearsay evidences in Ethiopia. Both Art 137(1) and Art 263(1) of the Ethiopian criminal procedures and civil procedure codes respectively provide that “*questions put in examination in chief shall only relate to facts which are relevant to the issue to be decided and to such facts only of which the witness has direct or indirect knowledge*”. Here, some provides that the phrase “*indirect knowledge*” in the above provisions include ‘hearsay evidence’. Thus, they argued that, in Ethiopia hearsay evidence is admissible as a rule, not as an exception. While, other argue that the phrase ‘*indirect knowledge*’ implies the circumstantial evidences rather than hearsay evidence. They provides that since admitting hearsay evidence as a rule is against the constitutional rights of the accused to confront his accusers as provided under Art.20 (4) of the FDRE constitution, we have to admit hearsay evidence only in exceptional circumstances as that of common law countries. When we see the practice of our courts it is clear there is confusion on admissibility of hearsay evidence. There is no uniform application of the rule; some judges admit it while others do not.

Even though, the provisions of our procedural laws are not clear as to whether hearsay evidences are admitted as a rule or as an exception, our DER Considered hearsay evidences as an exception. (See Rule 29 of DER).

The basic justifications for exclusion of hearsay evidence are:

A. Lack of cross- examination

Absence of cross- examination is the most important justification to exclude hearsay statement, because the declaration was made out of court rather than before the court, and not subject to the test of cross- examination. Cross- examination is described as the greatest legal engine invented for the discovery of truth. It is a means by which the other party tries to show how the testimony given by a witness against him is doubtful, erroneous or untrue. To this end the right person to be cross-examined is not the hearsay witness but the person who has the original information. The hearsay witness may be cross-examined, but the witness may refer the answer to the original declarant where

cross-examination becomes ineffective. He may simply say that is how he heard it or told. If it were the original person he cannot transfer because he said he had personal knowledge about the fact he testifies. He cannot say that he was told so. This shows that the lack of opportunity for the adversary to cross examine the absent declarant whose statement is reported by a witness is one of the main justification for exclusion of hearsay.

B. Absence of oath

The other most important reason next to cross examination is that the declarant is not under oath. Usually the out-of-court declarant was not under oath at the time of declaration. It is similar with the concept that, “hearsay statement is not testimony” due to the lack of oath purposes like solemnity of the proceedings and court’s commitment to the truth and the witness’s legal duty to tell the whole truth.

C. Testimonial infirmities

A testimonial infirmity is a concept dealing with problems of misperception, faulty memory, ambiguity and distortion in relation to an oral statement of an out of court declarant. This mean the person who made the statement may have wrongly perceived the events in question, and because of fallibility of human nature, the memory of the person who heard the statement, may be affected and finally there may be distortion of events.

4.7.3 Exception to hearsay evidence

There are certain exceptions to the hearsay rule, which makes the hearsay evidence admissible. An exception is an assertion, which is hearsay because it is offered to show its truth but which is nonetheless admissible because the assertion was made under circumstances, which the law regards as rendering the said assertion trust worthy.

Following are some of the exceptions to hearsay in which facts of indirect knowledge may be used as admissible evidence. Some of these exceptions are:

i. Dying Declaration

Defined in Rule 29(a) Draft Evidence rules as:

It is made by a person who is dead, or as any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes in to question, whether that person was or was not, at that time the statement was made, under expectation of death and what ever may be the nature of the proceeding in which the cause of his death comes in to question.

As to this definition, these are declarations made by a person who knows that his death is imminent and a person cannot be found at the time the testimony is required. The ideal is that, if the person who makes the declaration is religious, he will never prefer to die with lie on his lips when he goes to meet his God. Even if this is not true, people do not usually lie unless for a certain benefits. A person who is going to die does not have the motive for which he has to lie.

As Melin stated in the Ethiopian Evidence law book, the dying declaration is only admissible in so far as it details the cause of death and indicates the circumstances of the transaction which resulted in death, for example, as to Melin, it is not admissible to the extent it refers to quarrels between the declarant and the caused which quarrels can not be regarded as a part of the transaction resulting in death.

Furthermore, the declarant, just as any living witness, must have had an adequate opportunity to observe the facts, which he details. His statement, for example, must not be based on hearsay. He must be a competent witness.

Note also that, the justification for allowing evidence of dying declaration in the absence of the original seems to be necessity of evidence. If the original declarant is dead or cannot be found, there could be no better evidence than the hearsay.

ii. Statements made in the ordinary course of Business

Defined in Rule 29 (b) of the Draft Evidence Rules, and the idea behind this exception is that if the statement is made in the current routine of business, it is more likely to be trustworthy than otherwise. There are, perhaps, fewer motives to lie in the day-to-day aspects of ordinary business transactions than in exceptional private situations.

The term business has a broad meaning covering any trade, profession, occupation or calling. But, it certainly refers in this context, to a person's means of earning a livelihood although it is not perhaps necessary that it be income providing, that is, by ordinary course of business, it meant the current routine of business.

Rule 29(b) requires, of course, that the person who made statement in the ordinary course of business should fulfill certain formalities in his course of recording; in particular it must consist;

- 1) any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of a professional duty; or
- 2) an acknowledgement written or signed by him of the receipt of money; goods, securities or property of any kind; or
- 3) a document used in commerce written or signed by him; or
- 4) the date of a letter or other documents usually dated, written or signed by him.

Note, however, that records kept with a view to institution of the suit are not admissible under 29(b) when the person making the business record is unavailable at time of trial. If he is available there is no reason why he should not be called personally to the court.

iii. Declarations against interest

Defined in rule 29(c) of DER as:

When it is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

That is, it must be against (1) pecuniary interest- when it has the effect of charging maker with pecuniary liability to another or of discharging some other person upon whom he would have a claim; (2) proprietary interest- statement in disparagement of title to land; (3) the statement which exposes person to criminal prosecution or suit for damages. This exposure to suit must obviously be at the time the statement was made, not at the time statement is sought to be used in evidence.

Generally, there is an assertion to this that a person is not likely to make statements against his interest lightly or with causal regard for truth. This contributes to the trustworthiness of such statements and is the reason for this exception to the hearsay rule.

iv. Statements of opinion as to the existence of a public or general right or custom.

Defined in rule 29(d) which says:

When it gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest of the existence of which, if it existed, he would have been likely to be aware, provided it was made before any controversy as to such right custom or matter has arisen.

The opinion here is as to the existence of the right not the existence of facts, which make it likely the right, exists.

Generally, those exceptions stated above and those which are stated in rule 29 and 30 like, statements of pedigree, statements contained in documents, expression of a crowd, and evidence given in prior proceedings, etc are the exceptions of hearsay of rule which are recognized as admissible evidences because of their necessity.

4.8 Exclusionary rule: Privileges

This sub-topic will discuss the exception to the right not to be compelled to testify and duty of every person to testify. We will see the different types of privileges and the reasons for granting such privileges.

The term privilege means a freedom from compulsion to give evidence, or a right to prevent or bar evidence from other sources, usually on grounds unrelated to the goals of litigation.

In the absence of privilege, parties, witnesses, and others, can be compelled by a court to give testimony or other material they may have that is needed for court proceeding even if it is damaging to themselves or others. The usual principle is that the law is entitled to every person's evidence. Similarly, a person normally cannot prevent another person from disclosing confidences or other matters under legal compulsion or voluntarily, for use in judicial proceedings. Privileges are a narrow exception to these general rules. As such, they sometimes interfere with the truth-seeking function of the law. It always should be borne in mind that privileges operate to exclude good proof, in the name of some other social objectives. For this reason, courts often say privileges should be narrowly construed.

Most privileges are designed to promote certain kinds of relationship, and particularly to promote confidential communication within the socially desirable relationships. So, privileges should not be conditional and must be protected at any time because uncertainty of coverage at the time of the communication reduces the encouragement to communicate.

4.8.1 Policies underlying privileges

As just indicated, a common policy underlying privilege is to **encourage desirable communication** within certain kinds of special relationships, for purposes that society

particularly wishes to foster. The privileges for confidential communications in the attorney-client, physician-patient, psychotherapist-patient, and husband-wife contexts are examples. It often is asserted that these relationships would not accomplish their purposes, or would accomplish them far less effectively, without legal protection of confidences through rules of privilege. Although this conclusion is controversial, it is the foundation of several of our most important privileges.

A second and distinct policy is **to protect the desired relationship itself**, even to the extent that it is not dependent upon confidential communications. Thus, to foster the marital relationship, many jurisdictions recognize a privilege of one spouse to refuse to testify adversely to the other. This privilege usually extends to adverse testimony on any subject, whether it concerns confidential communications or not.

Other policies may be to **uphold the integrity** of a profession; **to avoid futile efforts to coerce testimony** against principled resistance; to **avoid likely perjury** if so coerced; or to serve commonly shared principles of **privacy, fairness, or morality**.

Other privileges operate **to advance economic policies**, such as those protecting trade secrets, or to **encourage voluntary compliance with law**, as in the case of privileges for certain required reports to government agencies, which may also incorporate **“housekeeping”** concerns about disruptive requests for documents and document loss. Still other privileges serve to **limit governmental invasion of the security of individuals**. The privilege against self-incrimination is an example.

The limits of these policies, together with the need for particular types of information define the boundaries and exceptions to privileges. For example, communications intended to facilitate further commission of crime or fraud are not protected by the attorney-client privilege. The discovery of this information is particularly necessary, and a rule of nondisclosure is inappropriate because none of the purposes of the attorney-client relationship can support the privilege when the object is crime or fraud. This is one

example of how the law limits privileges narrowly to their legitimate policy because of their tendency to frustrate the truth-seeking function.

Most rules of evidence, including privilege, on occasion may render inadmissible evidence offered on behalf of a criminal defendant, that could help raise a genuine reasonable doubt concerning defendant's guilt. At some point, such exclusion may trench on the defendant's constitutional right to present information, compulsory process, or due process clauses of the constitution.

4.8.2 Types of privileges

4.8.2.1 The right against self- incrimination

Definition and the substance of the privilege

The privilege against self-incrimination guaranteed by the FDRE Constitution encompasses two privileges **(1)** the privilege of the criminally accused, which includes both (a) a right not to take the witness stand and, if he does take the stand, (b) a right to turn away impeachment questions that might open up other crimes committed by him (in case he takes a stand it means he has waived his right in that case). **(2)** The privilege of other civil or criminal witnesses to turn away particular questions that might open up crimes committed by them. "Open up" in both instances means increase the person's exposure to criminal prosecution or criminal liability.

Unless waived, the witness's privilege can be invoked by any civil or criminal witness to resist giving testimony in court, whenever it can be made to appear to the judge that there is some appreciable likelihood that information disclosed by the invoker might be used either in investigation or as evidence, in a way that would increase the chances of the invoker's prosecution for or conviction of some crime under any law anywhere. The standard is the same for the criminal accused's right to turn away particular questions.

If the possibility of prosecution is removed, for example by the expiration of the statute of limitations or by the fact that conviction or acquittal has already taken place, there is

no privilege, at least insofar as the privilege would be based on fear of that crime. Similarly, the grant of “use” immunity (guaranteeing the witness) removes the chance the testimony will incriminate.

4.8.2.2. Governmental privileges

Certain records required by the government to be kept or submitted may be attended by a “required report privilege.” Although on occasion they may overlap, this privilege is to be distinguished from the privileges protecting certain other governmental matters such as state or military secrets, official information, and the identity of informers.

Required report privilege statutes differ widely in form, substance, and judicial interpretation. They are normally individually tailored to a particular regulatory area: income tax returns; census reports, claims for veteran’s benefits, patent applications, filing of corporate trade, securities, financial, product, work-conditions, or environment information with various agencies, unemployment compensation claims, public assistance records, information obtained from citizens in conjunction with health services, public health records and adoption records, to name some.

Although the policy behind a particular required report privilege is rarely clearly articulated in the statute or judicial interpretations thereof, the privileges generally seem to be founded upon either one or both of two distinct policies:

(1) Encouragement of voluntary compliance. The intent here is to encourage citizens (or companies) to accurately and fully report potentially self-damaging information which they would otherwise hesitate to furnish for fear of the consequences resulting from later uses of such information. It is this kind of statute that will principally concern us.

(2) Governmental concerns. The concern here is with the government’s internal processes, i.e., (a) preventing disclosure of government officers’ and investigators’ notations or opinions; (b) preserving documents from loss, or destruction, alteration or

wear; (c) avoiding the general inconvenience resulting from frequent demands for disclosure; or (d) preventing direct exertion of judicial power on executive personnel, a policy with “separation of powers” overtones. Rarely will such matters be the only or the principal concern under the privileges discussed here.

Governmental privileges for state and military secrets. Informers, intra-agency communications etc.

The required report privileges may be analytically distinguished from five other privileges or non-disclosure principles applicable to information in the hands of the government. These principles overlap one another. Two of them have their origin at common law: the governmental privileges not to disclose military or diplomatic secrets of state (and, perhaps, certain other official information) and not to reveal the identity of an informer.

A **third** governmental privilege is the federal statutory privilege of government agency heads to make rules (respected in court) prohibiting subordinates from disclosing intra-departmental communications, agency files, and information obtained by agency investigation.

A fourth privilege encompasses some of the fundamental principles of the above mentioned privileges and is embodied in state statutes which provide that “a public officer cannot be examined as to communications made in official confidence,” a somewhat analogous judge-made rule exists in some jurisdictions. These four nondisclosure principles are extensively qualified.

Finally, there is a fifth type of privilege called executive privilege, exercisable by the president or by certain of his officers. This privilege rests on several policies, including the constitutional separation of powers.

4.8.2.2 Professional confidentiality

there are different types of professional privileges stated in one or more national laws. in this sub topic we will deal only two types which are commonly enacted by all nations: the attorney-client and doctor-patient privileges.

i. Attorney-client privilege

Definition and Limits of Attorney-Client privilege

The main purpose of attorney-client privilege is to facilitate informed legal services by assuring the clients that the statements made with their attorneys will not be disclosed to third persons including the court.

As this policy to foster legitimate legal services, advice about how to commit crimes or frauds would not be privileged, nor would statements by a client seeking such advice. Similarly attorneys involved in activities for a corporation of a “business” as opposed to “professional legal” nature, frequently find that the communications made pursuant thereto are held not privileged.

Note that in determining the existence of a crime or fraud exception, the reference is to a future crime or fraud. Thus, a client’s statement, “I want your advice because I’m planning to commit a crime,” is not privileged, but I’ve just committed a crime and I want your advice on how to defend myself,” is squarely privileged. Defending a past crime or fraud is just the sort of thing the privilege is designed to cover. Harder examples occur between the two extremes represented by the quotes. How should this be handled? Suppose the attorney in this situation advises an illegal method? Would this deny the client his privilege? Does anything depend up on whether a client realized illegal advice has been given?

The thing to be considered in this case is the significance of the client’s culpability (know or should have known the act he has intended to do was illegal), rather than the

attorney's. In addition, the test is whether the advice was sought or obtained by the client to commit an illegal act.

ii. Doctor-patient privileges

The aim of the law with respect to the physician-patient privilege is sometimes, although not universally, extended to cover matters in the doctor's such as information obtained by the doctor concerning the patient from other doctors and hospitals, physicians' uncommunicated opinions, facts observed by the doctor, communications by the doctor to other doctors, and communications passing from the doctor to the patient (as well as the reverse). In some jurisdictions these matters are covered only to the extent that they may inferentially reflect communications from the patient. In each instance, of course, the information must relate to the patient's care.

There are good arguments for the broader coverage. Where permission or information is needed from the patient for the doctor to gather a complete file on the patient from other doctors or hospitals, the patient may be encouraged to give it by a promise of confidentiality. The patient may also be more forthcoming about communicating facts knowing that records in the patient's file that could reflect them are secret. Other doctors or hospitals also may be more forthcoming about supplying information if they know it is protected. There is a diversity of authority concerning these extensions, as well as the related matters of whether the privilege should cover the fact that a doctor was visited (or retained) or the fact that not only to encourage information, but also to encourage the seeking of professional help, that would justify privileging this latter information.

In view of the purpose of the privilege, perhaps test of whether communicated information is germane to treatment should be whether the patient thought it was germane. Would the fact of where an injury occurred ordinarily be germane? Usually not (unless the unsanitary nature of the place might affect treatment). How it occurred? Who inflicted it? Usually not (except in certain psychological aspects of treatment for certain injuries, as, e.g., family inflicted injuries.) would alcohol smelled by the doctor on the patient's breath be germane? (Perhaps this last example would be ruled out because it is not a communication, but some jurisdictions extend the privilege beyond verbal

communications.) The presence of alcohol in the body might influence the choice of medication. In any event, the controlling issue usually is whether a reasonable person would or would not have thought a matter germane to treatment.

Since the purpose of the privilege is to improve treatment, the presence of a nurse at the consultation would not ordinarily destroy the privilege. Perhaps this principle could be extended to third persons generally if they facilitate treatment. What about physicians' assistants who help collect billing information? Or a friend brought by the patient for moral support? there is disagreement. Family members usually qualify. Should the privilege terminate upon the patient's death? Assurance of secrecy even after death may significantly encourage some kinds of patient-to-doctor disclosure.

C. Marital privileges

The ancient common law in competency of one suppose to testify for or against the other in legal proceeding eventually eroded in to least two (and possibly three) bread privilege principles: first, the confidential marital communications privilege, and second, the privilege not to testify against one's spouse (which may be treated as including a third, the privilege to prevent adverse spousal testimony against oneself).

First, the confidential communications privilege protects confidential communication made during the marital relationship, so as to foster such communications. **Second**, an unwilling spouse called to testify against the other spouse may have a privilege to refuse, so as to avoid rupture of the relationship. **Third**, some jurisdictions permit a spouse to prevent the other spouse from testifying against him/her, even if the testifying spouse is willing. As with most privileges, the statutes and the judicial interpretations must be examined closely, but certain generalizations can be made.

i. The "confidential communications" privilege in the marital context

The confidential marital communications privilege permits the suppression in any civil or criminal case of so much of a spouse's testimony as may reveal confidences passed

between the spouses by reason of the marital relationship. The privilege thus only applies to a “confidential communication”. A cluster of problems arises surrounding the requirements both of “confidentiality” and of “communication.” Can the act of placing money in a bank account, observed by a spouse, be implied “communication?”

Although there are different rulings on this, usually, the spouse’s observation of an act done for reasons independent of the observation is not considered a communication. Under this view, the observed act would not be privileged-but a later statement of it, say to a spouse not present during the act, might be privileged. If this kind of act can be communication, is it “confidential,” where others could perceive it, but only the spouse knew its significance in a course of criminal dealings? (Do we draw this distinction communications? Perhaps.) is the act of putting something in a drawer at home privileged insofar as viewed by the opposite spouse? Does it matter whether the spouse placing it in the drawer would not have done so openly but for the marital relation? does it matter if he meant to hide it from the spouse? courts have varied in their answers to these kinds of questions. We are concerned here with interpreting “confidentiality”, and “communication”. Are we concerned with yet another concept? Need the matter be a “marital” communication? Would it be appropriate to ask of verbal communications whether they would not have been made but for the marital relationship? This inquiry is extremely rare.

ii. The “Adverse Spousal Testimony” Privilege (as Distinct from the communications privilege)

The other marital privilege, adverse spousal testimony, permits the suppression of all testimony of one spouse against the other (often only in the latter’s criminal prosecution). The distinctions between the privileges, where the privileges remain “pure,” may be generalized in the following fashion: the communications privilege applies only to **prevent disclosure of confidential marital communications**; the adverse spousal testimony privilege can **entirely prevent the spouse from taking the stand as a witness adverse to other connubial partner**, regardless of the subject matter of the expected

testimony. The communications privilege applies in civil and criminal litigation unless subject to an exception; the testimonial privilege is frequently confined to criminal.

How do you see this privilege in light of the duty of spouses to cooperate and be honest between each other?

The communications privilege applies regardless of whether the testimony is for or against the spouse; the testimonial privilege can prevent only testimony adverse to the spouse. The communications privilege applies whether or not a spouse is party to the litigation; the testimonial privilege requires a spouse as a party. Indeed, the communications privilege can apply even where neither of the spouses is a party or a witness. Only the adverse spousal testimony privilege applies when the testimony does not relate to a matter transpiring during the marriage; the communication under the communications privilege must have transpired during the marriage. In addition, the communications privilege may cover evidence other than spousal testimony; the testimony; the testimonial privilege cannot. Such “other evidence” might be the letter that constitutes the communication, testimony of third persons having knowledge of the communication’s contents, a tape recording, etc.

Do you think these privileges will be affected if the marriage is dissolved?

Only the adverse spousal testimony privilege is destroyed by divorce. This is because the marital communications privilege is said to be intended to encourage spouses in the population generally, to confide in each other; whereas the aim of the privilege against adverse spousal testimony is said to be to preserve and promote harmony in the particular marriage before the court, (Would it really harm marital harmony for one spouse to testify under compulsion of law against the other? One suggestion has been that the real reason for the privilege is that adverse spousal testimony deeply offends our “sense of justice.”) perhaps, given its purpose, the adverse spousal testimony privilege should end at separation or a showing of irreconcilability. Conversely, perhaps the argument can be

made that it should be extended to those who **cohabit**. But such modifications of the law probably would open up greater problems.

Both marital privileges are frequently subject to a number of exceptions, limiting them, for example, only to criminal cases, or conversely refusing to apply them at all in certain criminal cases (usually those involving crimes against the spouse or a child of either of the spouses). Their application in civil cases is equally inconsistent, with the spouses are adverse parties or tort actions based on criminal activity that would be subject to exception. The adverse spousal privilege is typically limited to cases in which the spouse is a party rather than injured indirectly by the testimony, and federal courts generally restrict its invocation to criminal cases. Many statutes relating to both spousal privileges prohibit their application in cases involving separation and divorce.

4.8.2.4 Other privileges

Are there other socially desirable relationships or professions whose work or solidarity ought to be facilitated in a fashion similar to that extended to doctors, lawyers, and spouses? To name just a few possibilities, should there be a journalist-formant or accountant-client privilege? Why isn't it considered as desirable to foster, with privilege, communications between other family members such as a parent and child, as it is between husband and wife? Perhaps it also would be desirable to foster the work environment by a boss-secretary privilege, or to create a researcher-subject privilege, or for that matter, a "friend" privilege that would result in nondisclosure of confidences among close friends. The policy of limiting the extent to which privileges defeat the truth-seeking function, as well as the difficulty of defining them, have led most states to reject the better examples.

A number of jurisdictions have some form of clergy, journalist, and/or accountant privileges. There is scant authority for the others. A social worker and a researcher privilege are not unknown. A number of jurisdictions have codified qualified privileges for statements made to rape or substance-abuse counselors, or for peer review in

hospitals. This sort of privilege has been suggested for domestic violence counselors as well. The problem can hinder the ascertainment of truth in vitally important inquiries, both public and private. They also have constitutional ramifications when they prevent a criminal defendant from receiving or using relevant information.

SUMMARY

Oral evidence is the most important mechanism for proving a certain fact in issue or a relevant fact. It is ordinary kind of evidence given by witness by word of mouth. the witness must be a person with knowledge of the fact to be proved that he got either directly or indirectly. Though it is the basic evidence to prove a certain fact, more weight is given to it in the common law legal system countries than the civil law. The Ethiopian tradition of litigation has always depended on the importance of oral evidence.

As oral evidence is to be made by witnesses, they shall be competent to give a valid testimony before the court. The principle with regard to competence is that every physical person is capable of giving his testimony before a court. The only requirements are that the person must have the capacity to comprehend the facts for which he wants to testify and that he must understand the consequences of giving false testimony. The grounds of incompetence are minority and senility, physical impairment and professional incompetence. These grounds will be impediments as long as they affect the capacity of the person to comprehend the facts or the understanding of the effect of giving untrue testimony. For instance, a child of whatever age can testify to the extent of his understanding of the fact and consequences of his testimony.

Being a witness is both a right and duty of individuals. If anybody having the knowledge of a certain fact wants to testify, he has the right to do so. On the other hand, a person with some information which is necessary for the determination of a dispute can be obliged to give his testimony. The concept of privilege is the only exception for this rule. A person with privilege will either not be allowed to testify or will not be forced to testify.

Right against self incrimination is one type of privilege. A person will not be obliged to give a testimony on a fact if that fact will reveal his criminal act. This right is a constitutionally guaranteed fundamental right of individuals.

Privilege can also emanate from the need for secrecy in some government offices. Communication made by a patient with his doctor in the course of treatment is also a privileged statement and cannot be disclosed by the doctor and the court cannot force the doctor to give such evidence. The same applies with the attorney-client relationship. Marital communication is also privileged with some exceptions.

Review questions

1. How would you measure competence of a witness? What are the requirements?
2. Suppose that Ato Simon is accused of raping his daughter in-law who is 13, the public prosecutor has produced the wife of the accused who is also the mother of the victim as one of the witnesses. Would there be any defense for the accused? Would there be any difference if the victim is not the daughter of the witness?
3. "Hearsay evidences shall be admitted as a rule in civil proceedings since the standard of proof required to win civil cases is the preponderance of evidence". Discuss on the validity of the statement?
4. What the whole policy behind professional privilege? What about of marital and against self – incrimination? Discuss them thoroughly.

CHAPTER FIVE: REAL EVIDENCE

Introduction

Although the developers of this material have made persistent reference to the teaching material of Ato Tewodros Alefe, specially this chapter is entirely take from the same with slight modifications because the material is found to be resent and well referenced. Accordingly, the material discusses what real evidence is here under.

Once what facts may be proved is clear to the concerned party (plaintiff or defendant in civil cases and prosecutor or accused in criminal cases), the next step is to find a mechanism on how to prove and convince the court using evidence. Oral evidence or testimony of witnesses is just one mechanism of proof discussed in the preceding chapter. This chapter outlines the second mechanism of proof: real evidence. Unlike oral evidence for which the court depends on observation of third parties (witnesses) on ascertaining whether a certain fact does or doesn't exist, the courts direct observation and inspection is called in proving existence or non-existence of facts in issue by real evidence. Hence, real evidence is a type of evidence for which the court can personally inspect and make inferences and conclusions on the existence or non-existence of fact to which the evidence is sought to prove.

Chapter objectives: after reading this chapter, students should be able to:

- Distinguish between real evidence and other types of evidences
- Know how documentary and demonstrative evidences authenticated and corroborated respectively
- Explain the concept of what best evidence to mean
- List down all instances in which copy (secondary) documents would be admissible

As stated in the introduction part real evidence comprises of documents and physical objects in various forms. Not all documents and physical objects are real evidences to prove a fact unless they satisfy the tests of authentication and corroboration, respectively. The following sub-sections present a detailed discussion on those two types of real evidences turn by turn.

5.1 Demonstrative evidence

Demonstrative evidence concerns it self with any type of physical objects which are capable of being inspected by the court and demonstrate the existence of a fact in issue. A lengthy analysis is given on the meaning, type of demonstrative evidences, and mechanisms of corroborating demonstrative evidence and related matters in various sources. Following is an adapted reading from Wikepedia and American legal information desk site on demonstrative evidence. Editing for the purpose of making the excerpts readable is applied to the contents and a modification of some jargon terms and phrases when necessary.

Physical evidence or demonstrative evidence is any evidence introduced in a trial in the form of a physical object, intended to prove a fact in issue based on its demonstrable physical characteristics. Physical evidence can conceivably include all or part of any object. In a murder trial for example (or a civil trial for assault), the physical evidence might include DNA left by the attacker on victim's body, the body itself, the weapon used, pieces of carpet spattered with blood, or casts of footprints or tire prints found at the scene of the crime.

Where physical evidence is of a complexity that makes it difficult for the average person to understand its significance, an expert witness may be called to explain to the court the proper interpretation of the evidence at hand.

Demonstrative evidence is evidence in the form of a representation of an object. Examples include photos, x-rays, videotapes, movies, sound recordings, diagrams, maps, drawings, graphs, animations, simulation, and models. It is useful for assisting a finder of

fact (fact-finder) in establishing context among the facts presented in a case. To be admissible, a demonstrative exhibit must “fairly and accurately” represent the real object at the relevant time. Before photographs and other demonstrative evidence, lawyers relied on purely testimonial or substantive evidence. Melvin Belli and Earl Rogers helped change that by introducing more demonstrative evidence. Scientific evidence emerged in the 1960.

The days are gone when courts took juries on expensive field trips to the crime scene. Today, just about anything they need to see can be accomplished with the use of exhibits, models, reconstructions, videotapes, and animations. Almost anything “visual” (“sound” still enjoys certain fifth amendment protections) can be presented in modern courts (under certain rules) and the effects are dramatic since people retain 87% of what they see and only 10% of what they hear. Exhibits generally fall into one of two (2) categories (1) real evidence; or (2) demonstrative evidence.

Real evidence is evidence that, in a sense, speaks for itself, as when the prosecutor holds up a bag containing the murder weapon, asks the police officer “is this the weapon you found?”, and then enters it as “Exhibit A”. Even though it is authenticated by a witness, real evidence is separate, distinct, and doesn’t rely up on a witness’ testimony. It has the weight of being additional evidence and can serve many purposes.

Demonstrative evidence is evidence that illustrates or helps explain oral testimony, or recreates a tangible thing, occurrence, event, or experiment. Scientific evidence falls into this category, as when a toxicologist testifies that the victim died of lead poisoning and refers to a chart of the human body showing the circulatory pathways that the toxin traveled. Visual aids of this type are intimately tied to the credibility of the witness who testified with them, and although they are not separate pieces of evidence, like real evidence, a jury can usually view them again while it deliberates.

Here is a list of illustrative facts used as demonstrative evidence:

- Plaster casts or molds

- Scale models
- Maps, charts, diagrams, and drawings
- Police composites, mug shots, sketches
- Photographs
- Microscopic enlargements
- Videotapes
- Computer reconstruction or animation
- Scientific tests or experiments

A) General rules

- (1) The most general rule is that there must be some other piece of evidences: a fact, an object, or testimony that needs to be illustrated or demonstrated. Presentation is actually a two- stage process: first some issue of fact, then the explanation or demonstration stage. Demonstrative evidence is intended to be an adjunct to testimony,
- (2) The next most general rule involves the foundational requirements for demonstrative evidence. Certain preliminary steps must be followed such as authentication and accuracy. This is known as “laying the foundation” and is mandatory whenever any scientific expertise is about to be forthcoming. Foundational requirements (other than those dealing with the expertise of the person) usually involve:
 - **Authentication** – demonstrative evidence should convey what it is meant to convey. What it conveys must not alter, distort, or change the appearance or condition of something in any significant way. A computer enhanced photograph, for example, to make a crime scene area look lighter than it actually was is probably inadmissible. There are specific rules, however, that do allow computer enhancements under some circumstances.
 - **Representational accuracy**—the demonstrative evidence should fairly depict the scale, dimensions, and contours of the underlying evidence. A photograph or chart

with some small section of it enlarged to focus in on is probably inadmissible. This is followed rigorously whenever comparisons (such as between two samples of handwriting) are made so that any lay person compare the evidence oculist subject a fidelibus.

- **Identification**—the demonstrative evidence must be an exact match to the underlying evidence or the testimony illustrated. This requirement is the same as with real evidence. For example, an expert witness is about to testify using a enlarged photograph (to scale) clearly showing the outline of a footprint with a unique manufacturer mark on the bottom of it. The victim (or police officer if the victim didn't survive) who was boot-stomped by it must identify that mark as the one that boot-stomped by it must identify that mark as the one that boot-stomped her.
- (3) The next most general rule is that demonstrative evidence must pass the “three hurdles” of admissibility: relevancy; materiality; and competency. means the demonstrative evidence has something to do with the reason the trial is being held, a point at law , a question of guilt or innocence, etc. materiality means it goes directly to the purpose of illustration, is easily understandable, produces no wayward inferences, and is not just an exercise in “educating” the court or jury. Competency means it's the kind of thing that fits with the décor and decorum of the court, is on the up-and-up, ethical, and doesn't taint the court or subvert the justice process.
- (4) The last most general rule is that demonstrative evidence must pass an additional balancing test for relevancy__ a weighing of what is probative/ prejudicial. Probative is what is relevant to “cinch” the case for the prosecution by anticipating all defenses. Prejudicial is whatever inflames the passions and prejudices of the jury. This rule necessary favors the defendant, in rooted in the principle of fundamental fairness, and protects them from unwarranted inferences about bad character or habit.

It's important to understand that the weighing of what probative/prejudicial varies with each and every case, and is not an arbitrary standard. It should not be referred to as the "gruesomeness" standard, as it sometimes is called. The mere fact that a photograph, for example, shows a shocking crime scene does not automatically make it gruesome or inflammatory. The courts have also ruled that a photo of a nude, bloodstained body is not inadmissible, but innocuous. Autopsy photos are another matter, and depend upon how much cutting and opening the forensic physician has made. In each case, the evidence is to be judged as prejudicial, not so much the evidence itself. An extension of this makes it prejudicial error to dwell unnecessarily long on such evidence.

B) Specific rules

These are more like guides to judicial discretion than specific rules, and involve established practices or procedures for the presentation of various types of demonstrative evidence. In this respect, practices may vary considerably by jurisdiction.

- (1) Plaster casts, molds, and models – these are most admissible when viewable in all dimensions. Three- dimensional is always better than two-dimensional. Whatever construction material is used doesn't matter. Models of the crime scene are a regular feature of trials, and models that are not precisely to scale will also sometimes be admitted if they are professionally made and presented. An attorney, for example, cannot take a Styrofoam head and stab a knife through it in order to demonstrate the attack on the victim. Further, no one is usually allowed to play around with the models, and this is what was mostly involved in the controversy over anatomically correct dolls in the late 1980s.
- (2) Maps, diagrams, sketch, and charts—it's generally not important that the original creator of a map testify; only that whatever used is "official". Police-generated sketches and diagrams fall generally within judicial discretion where accuracy is the main concern. Sometimes, the evidence is taken as hearsay, or falls under one or more hearsay exemptions. A lot depends on the

conditions of fairness and reliability at the time the sketch or diagram was made. Charts are viewed as useful adjuncts to testimony or not.

- (3) Photographs –the broad use of photographs is permitted. The photo must substantially and accurately depict the subject matter, and not be unduly prejudicial. Photos that support only one party’s theory, or a small part of a theory, are considered self- serving and untrustworthy. Examples of such inadmissible evidence would be staged or posed photo. Some courts place limits on lens filters, color, and other special equipment, but not many.
- (4) Enlargements – some courts place limits on the magnification allowed, no more than twenty powers, for example. Photographs taken through microscopes depend up the standardized criminalities of the crime lab for a state or region.
- (5) Videotapes – videotaped depositions and confessions are becoming common, and in civil cases, the practice of a “day-in –the –life “video is often admitted. The practice of taping drunk drivers is also popular in some states, but is best considered as real, rather than demonstrative, evidence. Courts have upheld surveillance imagery of the perpetrator in action at the scene of the crime. With demonstrative evidence involving motion, each “frame” or specified number of milliseconds is considered a separate piece of evidence. In other words, a move is treated as a series of still photographs since the courts are more comfortable and familiar with still photography. Any audio portion of videotape cannot be played (due to 5th amendment concerns), or if it is, requires separate authentication.
- (6) Computer reconstruction – Reconstructions are a fast-growing forensic specialty, and the expertise involves a projection of possible outcomes mathematically predicted by a computer program. For example, known facts such as weight, physical dimensions, and surface friction are plugged into a computer algorithm to generate an accident simulation. It must be shown the simulation (algorithm is based on accepted principles of physics, and there are sometimes further requirements involving the credentials of the expert.

- (7) Scientific tests/ demonstrations –if a laboratory test is performed in front of the judge and jury, the benefit is that jurors would be allowed to draw independent inferences from it rather than being warned by the judge later that they are free to disregard the scientific testimony. The standard, therefore, is substantial similarity. The expert presenting a test, upon being qualified, is assumed to represent the theory of virtual certainty that the test would yield consistent results if replicated under substantially similar conditions. However, cross-examination of such experts is notoriously fierce.

5.2. Documentary evidence

Document is defined in the draft evidence rules as any matter expressed or described upon any substance by means of letters figures, marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Documentary evidence is also defined by the draft evidence rules as all documents produced for the inspection of the court.

Documentary evidence is a type of written proof that is offered at a trial to establish the existence or nonexistence of a fact that is in dispute. Letters, contract, deeds, license, certificate, ticket, or other writing are documentary evidence. Documentary evidence as the definition indicates is any inscription found in any material for which the content are submitted as proof. Besides exploring the meaning and application of documentary evidence, the following excerpt will highlight on the basic differences of documentary and physical evidence, a seemingly simple but complex distinction.

A piece of evidence is not physical evidence if it merely conveys the information that would be conveyed by the physical evidence, but in another medium. For example, a diagram comparing a defective part to one that was properly made is documentary evidence-only the actual part, or a replica of the actual part, would be physical evidence. Similar, a film of a murder taking place would not be physical evidence (unless it was introduced to show that the victims blood. Had splattered on the film),

but documentary evidence (as with a written description of the event from any eyewitness).

A piece of evidence is not documentary evidence if it is presented for some purpose other than the examination of the content of the document. For example, if a blood-spattered letter is introduced solely to show that the defendant stabbed the author of the letter from behind as it was being written, then the evidence is physical evidence, not documentary evidence. However, a film of the murder taking place would be documentary evidence (as a written description of the event for an eyewitness). If the content of that same letter is then introduced to show the motive for the murder, then the evidence would be both physical and documentary.

Documentary evidence is any evidence introduced at a trial in the form of hard or soft (electronic) documents. Although this term is most widely understood to mean writing on paper (such as an invoice, a contract or a will), the term actually includes any media by which information can be preserved, photographs, tape recording, film, and printed emails are all forms of documentary evidence.

Documentary evidence is subject to specific forms of authentication, usually through the testimony of an eyewitness to the execution of the document, or to the testimony of the witness who is able to identify the handwriting of the purported author. Documentary evidence is also subject to the best evidence rule, which requires that the original document be produced unless there is a good reason not to do so. The above meaning and definition of documentary evidence is subject to the rule of authentication for its admission as proof in a court. There are various methods of authentication both in our substantive and procedural laws and the draft evidence rules. Authentication is a mechanism of ascertaining authorship of the document (who the author of a document is?) and genuineness of the document sought to be introduced. Unless a document is authenticated it may not be admitted as proof.

5.3 Authentication of Documentary Evidence

Documentary evidence is subject to specific forms of authentication for its reliability, usually through the testimony of an eyewitness to the execution of the document, or to the testimony of the witness able to identify the hand writing of the purported author.. There are various method of authentication both in our substantive and procedural laws and the draft evidence rules. Authentication is a mechanism of ascertaining authorship of the document (who author of a document is?) and genuineness of the document sought to be introduced. Unless a documented is authenticated it may not be admitted as proof.

5.3.1 Modes of authentication

A) Admission of authorship by the writer

The writer him self may admit or concede that he is the author of a certain document and if this admission is a formal admission it will serve as a conclusive proof to the issue of who the author of the document is? Consult articles 2007 and 2008 of the civil code on proof in relation to contracts.

B) Proof of signature or handwriting

The following rules in the Ethiopian draft evidence of 1967 provides mechanisms how

signature in documents and handwritings in issue to be proved.

58. If a document is alleged to be signed or to have been written or in part by any person, the signature or the **handwriting** of so much of the document as is alleged to be in the person's handwriting must be proved to be in his handwriting.

- Production of a person or persons who witnessed the writing or signature: persons who have observed or witnessed or witnessed a certain document be writing by some one the persons may be called to ascertain the author of a specific document.
- Attesting witnesses: certain documents are required by law (for example article 1727 (2) of the civil code) to be attested by witnesses whose signature

will be included in the document and document of these attesting witnesses, when ever the authorship of an attested documents is questioned, is sufficient to prove that the author of the document is questioned, is sufficient to prove that the author of the attested document is the one who signed on the document attested by witnesses.

C) Presumption as to documents not produced

According to Rule 74 of the DER, courts shall presume that every document called for and not produced after notice to produce was attested, Stamped, and executed in the manner required by law.

D) Comparison of signature /writing with others admitted or proved

Another mechanism of authentication is to compare the writings or signature of the contested document with other writing proved to be authored or signed by the same person. The court will compare two writings/signatures of the same person and may reach to the conclusion that the author/signatory of this specific document is the person whose writing is submitted to investigation. The court may ask help of experts in so doing. In this regard, DER on the issue is stated below;

59. (1) in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, or seal has not been produced or for any other purpose.

(2) The court may direct any person in court except a person accused of an offence to write any word or figures for so written with any words or figures alleged to have written by such person.

(3) This rule applies with any necessary modifications to finger impressions.

- Lay witness authentication: there may be some persons who are well acquainted with the writings of the person who is submitted for

investigation. Hence, calling these persons to verify whose writing is a specific document is another mechanism of ascertaining authorship. These witnesses do not apply modern ways of examining and ascertaining writing in laboratories or some where else but by a comparison between retained mental image of the supposed writer's writing and the writing in dispute.

- Authentication by expert witnesses: this is proof of authorship depending on the opinion of a person who has specialty on identifying the writing of persons. These persons are called expert witnesses for they form conclusions based on inferences.

E) Opinions of experts

Authentication by expert witnesses refers to proof of authorship depending on the opinion of a person who has specialty on identifying the writing of persons. These persons are called expert witnesses for they form conclusions based on inferences. DER states this here under in rule 42.

42. (1) when the court has to form an opinion upon a point of foreign law or of science or art or as to identity of handwriting or finger impressions, the opinions that point of persons (hereafter called "experts") specially skilled in such foreign law, science or art or in question as to identity of handwriting or finger impressions are relevant facts.

(2) Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

- Ancient document rule: a document which survived long enough, for example 30 years according to the Indian evidence Act, and kept in proper custody it will qualify as ancient document and then no need for proof of authorship. The draft evidence rules don't contain document rule and neither do our substantive and procedural codes.

5.4. Best evidence rule

Authentication alone is not a sufficient for the admission of documentary evidence as proof but must also be qualified by the best evidence rule, which states the contents of a document can only be proved by adducing the original document itself.

i) Justification for best evidence rule

Providing a literature in to the roots and connected matters of the best evidence rule serves a better understanding and below is provided a selected excerpt from Wikipedia on best evidence rule.

The best evidence rule is common law rule of evidence, which can be traced back at least to the 18th century. The general rule is that secondary evidence, such as a copy or facsimile, will be not admissible if an original document is available.

The rationale for the best evidence rule can be understood from the context in which it arose: in the eighteenth century a copy was usually made by hand by a clerk (or even a litigant). The best evidence rule was predicated on the assumption that, if the original is not produced, there is a significant chance of error or fraud in relying on such a copy.

In the age of digital facsimiles, etc. the rule is more difficult to justify. The likelihood of actual error (as opposed to mere illegibility) through copying is slight. The balance of convenience favours avoiding needless effort and delays where there is no dispute about the fairness and adequacy of a digital facsimile. Further, it is by no means clear what the 'original' of an electronic communication such as an e-mail actually is: as many as eight electronic 'copies' of a message might come into existence from creation to receipt.

The best evidence rule is also thought to be the basis for the rule precluding the admissibility of hearsay evidence, although the two rules are now quite distinct.

In the United States the rule has been codified in the federal Rules of Evidence as rule 1002:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of congress.

The rule requires that when writings are introduced as evidence in a trial, the original writing must be produced as the “best evidence”. In federal practice, however, any exact copies of the original carry the same legal weight as the original unless their authenticity is in question.

The term “writing” has been liberally interpreted to include photographs, x-rays, and films. Note that for photographs and film, this could be construed to mean negatives, not prints, as they are the true ‘original’. The rule applies in two situations:

- a) Where the terms of the writing are legally dispositive in the issue at bar (not collateral documents or issues).
- b) Where the witness’s sole knowledge of a fact comes from having read it in the document.

There is an exception. If the original document is unavailable for reasons other than serious misconduct of the proponent, secondary sources of evidence (such as oral testimony) can be used in place of the original.

Currently, both California law and the federal rules allow the use of mechanically produced duplicates unless a party has raised a genuine question about the accuracy of the copy or can show that its use would be unfair.

What do you think the situation in our legal system?

5.5 Proof of contents of documents

Rule 53 of the draft evidence rules states that the contents of a document may be proved either by primary evidence (this is the best evidence) or by way of exception that secondary evidence may be used to prove the content of a document.

i) Primary (Best) evidence

Primary evidence is defined in rule 54 of the draft evidence rules as the document it self (the original) produced for the inspection of the court. As clearly provided in rule 53(2) of DER) Documentary contents must be proved by primary evidence except in the cases mentioned in rule 56 as stated below. Nothing in the rules hereinafter contained shall affect the provisions of any law regarding proof of the existence and contents of particular documents, such as the provisions of the civil code regarding proof of wills and Contract.

ii) Secondary evidence

The contents of documents may be proved by secondary evidence where primary evidence could not be found. Secondary evidence is the second next alternative for proving the contents of a document and is defined under rule 55 of the draft evidence rules. Rule 55 of the draft evidence rules defines secondary evidence in the following manner

55. Secondary evidence means and includes:

- 1. Copies given under the provisions hereinafter contained;*
- 2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies Compared with such copies;*
- 3. Copies made from or compared with the original;*
- 4. Counterparts of documents as against the parties who did not execute them;*
- 5. Oral accounts of the contents of a document given by some person who has himself seen it.*

Secondary proof as means of proof of contents of a document is employed in limited circumstances as outlined in rule 56 of the draft evidence rules. The circumstances are described in rule 56 of the DER in following manner for which a lengthy explanation is a waste of time.

56. (1) secondary evidence may be given of the existence, condition, or contents of document when:

- (a) The original is shown or appears to be in possession or power of the person against whom the document is ought to be proved or of any person out of reach or not subject to the process of the court or of any person legally bound to produce it and when after the notice mentioned in rule 57, such person does not produce it;*
 - (b) The existence condition or contents of the original have been proved to admitted in writing by the person against whom it is proved or by representative in interest;*
 - (c) The original has been destroyed, lost, or when the party offering evidence or its contents cannot for any other reason produce it in reasonable time;*
 - (d) The original is of such a nature as not to be easily movable;*
 - (e) The original is a public document within the meaning of rule 60;*
 - (f) The original is a public document of which a certified copy is permitted by these rules or by law in force to be given in evidence;*
 - (g) The original consist of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection.*
- (2) In the cases mentioned in paragraph (a), (c) and (d) of sub-rule (1), any secondary evidence the contents of the document is admissible.*
- (3) In the case mentioned in paragraph (b) of sub-rule of (1) the written admission is admissible.*
- (4) In the case mentioned in paragraph (e) and (f) of sub-rule (1) a certified copy of document, but no other kind of secondary evidence is admissible.*
- 5. In the case mentioned in paragraph (g) of sub-rule (1) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in examination of such documents.*

The civil code, especially in relation to proof of contracts, provides how the contents of a document shall be proved in as almost similar fashion with the draft evidence rules and does no harm in failing to discuss the provisions in the civil code.

Authentication alone is not a sufficient for the admission of documentary evidence as proof but must also be qualified by the best evidence rule, which states the contents of a document can only be proved by adducing the document itself unless the original could not be found. Rule 53 of the draft evidence rules states that the contents of a document may be proved either by primary evidence (this is the best evidence) or secondary one. It is by way of exception that secondary evidence may be used to prove the content of a document.

Summary

As discussed in detail in this chapter, real evidence refers to the manner of ascertaining alleged fact by physical observation or inspection by the court of the fact in issue. In other words, real evidence is a fact, which could be over looked, sensed, or investigated by the judges themselves against the fact in issue. In this type of evidence, the court does not depend on testimony of witnesses.

In proving the existence or non-existence, or occurrence or non-occurrence of asserted facts by real evidence, the court may over look on things held as exhibits, physical appearance of suspects of victims of crime etc. When this is not possible, represented models of physical realities such as photographs, x-rays, charts, graphs, diagrams, computer animations and other demonstrative evidences could be used mostly in support of testimonial evidence. However, demonstrative evidence must be corroborated in order to be admitted as evidence.

The other important type of evidence discussed under this chapter is documentary evidence. It is the most reliable sort of evidence. But, in order the contents of documents to be reliable and admissible, they have to be authenticated. The manner of authentication may be by the acknowledgement of the one who has prepared them, by concerned government officials, or based on expert opinion as the case may be. As the best evidence rule dictates, primary (original) documents should be produced not copies except in special cases as discussed in the entire text.

CHAPTER SIX: BURDEN AND STANDARD OF PROOF

Introduction

Whenever Litigation (be it Criminal or civil) arises between parties and denies each other there obviously a need for evidence in support of a relief sought. This means, there is a burden of producing of sufficient and persuasive evidence. But before proceeding to the issue as to who shall bear burden of proof, it is logical to look for what burden of proof mean. Thus, Burden of proof refers to the obligation to prove allegations, which are presented, in a legal action. For example, a person has to prove that someone is guilty or not guilty (in a criminal case) or liable or not liable (in a civil case) depending on the allegations. More colloquially, burden of proof refers to an obligation in a particular context to defend a position against a prima facie other position.

That is, on the other hand, when an issue arises out of a case such issue has to be proved by the party who has burden of proof and who is to avail ultimately from the proof. Thus, for every issue there is burden of production, burden of going forward with Evidence, and burden of persuasion, Discharging or preventing the discharge of these burdens is the goal of introducing evidence.

As Steve Uglow stated for any particular question there may have evolved from considerations of convenience relative accessibility of proof of who is disturbing the status quo of what is to be likely the truth in the absence of evidence of the unusualness of the claim of whether the matter raises an exception to the general rule or of public policies such as deterrence.

A particular burden may be on one party as to some issues and on the other party as to the other issue in the same case, even as to one particular issue both burdens (burden of production and persuasion) may not lay on the same party.

Further more, the burden of production may shift from one party to the other during the course of the trial. What this means is that as evidence is introduced, first one party, second the other may run the risk of directed verdict or equivalent ruling if he allows the state of the evidence to remain as it is. “The party up on whom this risk rests is said to

have burden of 'going forward with evidence' i.e. of producing evidence." Uglow point out that, the burden of proof has been described as whose task is it to establish of a fact? However; there are preceding questions namely 'what fact' and why does that fact have to be established?

Chapter objectives: after reading this chapter, students should able to

- Distinguish between burden of production (evidentiary burden) and burden of persuasion (legal burden)
- Know up on whom burden of proof normally lays in civil cases and criminal cases
- Understand cases in which burden of proof shifts from the plaintiff to the defendant or from the prosecution to the accused in civil cases and criminal cases respectively
- Discuss the constitutionality of shifting burden of proof in criminal proceedings
- Explain the degree of proof required in civil litigations and criminal proceedings

6.1 Meaning and concept of burden of proof

Different authorities define burden of proof differently in terms of expression but without difference in the conceptual meaning of the phrase. To begin with how Uglow, defines, burden of proof has been described as whose task is it to establish a fact. This definition seems to define the phrase in terms of burden of persuasion without giving regard to burden of production. Black's law dictionary, however, defines the phrase as *"in the law of evidence the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties. The obligations of a party to establish by evidence a requisite degree of belief, concerning a fact in the mind of the trier of the fact or court"*

Burden of proof is a term, which describes two different aspects of burdens, burden of production and burden of persuasion. Black's law dictionary for then explains that burden of production may shift back and forth between the parties as the trial progresses. But burden of persuasion can't shift at any stage

The burden of proof may require a party to raise a reasonable doubt concerning the existence of the fact by preponderance of evidence or clear and convincing proof or by proof beyond reasonable doubt .In criminal cases all the elements a crime must be proved by the government beyond reasonable doubt.

In whatever case, for whatever issue, there is a party who bears the burden of production of evidence or burden of going forward with evidence and burden of persuasion. Poal said that the allocation burden of pleading, production and burden of persuasion differ on issue by issue basis.

Some writers, like Uglow, compartmentalize burden of proof as legal burden and evidential burden. Other scholars again classify burden of proof as burden of production and burden of persuasion. To begin with the first category;-

Legal burden is simply adducing enough evidence to raise an issue must be distinguished from the burden placed on a party to persuade trier of fact to find for him or her on any particular issue. This later stage is burden of proof in a strict sense and is also known as the persuasive or probative burden.

This idea seems to what others call burden of persuasion.

The second aspect of burden of proof is as Uglow defines, the evidential burden. In such a category, the first process is the burden a party bears to adduce enough evidence in the satisfaction of the trier of fact. This is known as imposing an evidential burden and might be referred to as the problem of “passing the Judge” as any failure to satisfy the evidential burden means that the issue will never reach the Jury” The issue is bound up with that of the Judge’s role in withdrawing issue from the Jury.

The same party may bear both evidential burden and legal burden at the same time. i.e. where the party produce sufficient evidence to make a case he/she shall again establish a

fact so as to persuade the trier of fact. These two burdens have not analogous application in civil actions and criminal offence. When we see legal burden in civil cases we face with the general rule that who asserts must prove on other hand, the party who positively asserts must bear the risk of his failure to prove his assertion. This does not mean that party can't bear the onus of proving the negative dimension the fact. Thus, it is probably better expressed that a party who wishes the court to take action on a particular issue the responsibility of showing why action should be taken. The defendant in the pleading positively stated that he had done so. Even though linguistically the defense case was a positive assertion, the burden of proof still rests on the plaintiff.

Uglov states that in England, the burden of proof in civil cases/ actions/ generally, is born by the plaintiff in a negligence action the plaintiff would bear the burden of proving the existence and the breach of the duty of care as well as the extent of the injuries and damages. He added that the defendant in civil action might bear the burden of proof whether the defense goes beyond mere denial in negligence actions. For example, where a question of contributory negligence arises, the burden of proof of these issues rests up on the defendant. Thus, the defense of contributory negligence has been raised in a number of cases where a motorist was not wearing a seat belt and suffer more serious injuries than, would other wise, have been the case. In such cases the onus of proving negligence on the part of the plaintiff rests on the defendant.

In contract litigation, like wise, the plaintiff must bear the burden of proving the existence of the contract, its breach, and extent of any damage due to the breach of the contract. This is not an end expression rather; the defendant may carry a burden of proving an affirmative defense with respect to particular issue in a breach of contract action. This type of burden, clearly, is observed under civil law, Ethiopia, contract law.

6.1.1 Burden of production

A party who has a claim or an allegation bears the burden of producing evidence to Enable the court believe that there is an issue in the case. With respect to burden of production Blacks law dictionary defines as follows;

Burden of producing evidence is the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. Calif, Evid, code, such burden is met when one with the burden of proof has introduced sufficient evidence to make out a prima-facie case, though the cogency of the evidence may fall short of convincing the tier of fact to find for him. The burden of introducing some evidence on all the required elements of the crime or tort or contract to avoid the direction of a verdict against the party with the burden of proof.

As stated above Uglow explained burden of production as evidential burden. According to him “it is the burden that a party bears to adduce enough evidence for the Judge to be satisfied that the issue shall be left to the tier of fact. And he added that all issues on an action must be established in such away. More or less the production burden is influenced by the standard need for persuasion burden.” Failure to produce in this case refers the failure of the party who bears burden of proof to adduce sufficient evidence to enable the court find in favor of him or to enable the court believe that is an issue in the case brought before it (court). Burden of production of evidence determines whether or not the person who shoulders the burden of production will lose the case. Such person carries the risk of failure to produce an evidence because if there is no an evidence on an issue or, if the evidence does not satisfy the court, the case will be decided in favour of the other party. Therefore, the person shouldering the burden bears risk of losing the case.

6.1.2 Burden of persuasion

This type of burden of proof is the second burden that litigant party bears. This is determined by rules of substantive laws. This burden is simply adducing enough evidence to raise an issue must be distinguished from the burden imposed on a party to persuade the tier of fact to find for him/her any particular issue. This burden of persuasion, beyond reasonable doubt in criminal cases and by preponderance of Evidence in civil actions.

Fact finders are duty bound to settle each issue in a stated way. They shall be convinced by preponderance of evidence (civil) and beyond reasonable doubt (criminal cases). Rothstein-Reader crump clarified this process there by pertaining it to an electrical switch. "This process may be compared to the effect of an electric switch, which starts out in one of its two positions, and rests there with some degree of stickiness unless and until sufficient force is mustered to dislodge it to the other position." according to them the party who loses the issue, if it is not dislodged, has the burden of persuasion, and the degree of force needed is determined by the standard for that burden." In other words "the switch starts out lodged in the position that is against the position of the party with burden."

When we say a party bears burden of persuasion, it is to mean that the party has to persuade the tier of fact so that a judgment is to be given in favor him. The party can win the case when only he proves persuasively the existence or non-existence, or occurrence or non-occurrence of the fact in issue

It is a logical and inevitable that the party who bears burden of persuasion bears the risk of non-persuasion. To this effect, the plaintiff in civil case and the prosecution in criminal case bear the risk of their failure to persuade the tier of fact /judge/as to their respective cause of action and elements of the charge.

A question may arise as the to degree of persuasion required in each case. In this regard, the degree of persuasion required differs in civil and criminal proceedings. In criminal case the prosecution is expected to show the judge the existence or non-existence of a fact in issue beyond reasonable doubt while in civil actions the plaintiff or in case of affirmative defence, the defendant has to prove the existence or non-existence of his cause of action by Preponderance of evidence. Preponderance of evidence refers to the quality not quantity which implies the idea that the fact exists more probably than not. This idea may be heightened by the fact that acquittal in criminal case does not result in bar of civil liability of the same offence. However, the beyond reasonable doubt is

relevant in determining civil action of the same offence. Thus finally, the party who shoulders the burden of persuasion shall prove beyond reasonable doubt in criminal cases and shall prove to the extent of 51% (preponderance of Evidence,) in civil matters.

6. 1.3 Burden of proof under the evidence law of Ethiopia

In both civil and criminal laws of Ethiopia, like in other countries, there is the notion of production of evidence and burden of persuasion there of. However, as Melin has stated, “courts in Ethiopia consider burden of proof to mean burden of production only and on other times burden of persuasion only, and some times it refers to both burdens.” with out putting a clear cut distinction between the two

The drafters of DER could not clearly identify what type of burden is a burden of production and again what burden falls under persuasion burden. According to Melin rule 84(5) uses the term burden of proof to mean (apparently) or to refer to the burden of production. And rule 84(2) (c) does not use different terminology as to the two aspect of burden of proof.

The two aspects of burden of proof are to be discussed separately with respect to civil and criminal cases here under.

A) Burden of proof in civil actions

The burden of proof under civil law of Ethiopia is dependent up on the issue to be proved or the allegation (claim) raised by the party. It is to mean that as the issue in a case varies the burden to proof shifts from one party to the other. Where the plaintiff is entitled to begin the proceeding, he/she is the one to prove the issue so that he/she bears the burden of proof. However, in case of affirmative defense where the defendant is entitled to begin, he shoulders the burden of proof on the grounds he may raise as a defense. Sedler states that the general rule is that the party who has burden of proof has the right to begin. The contrary reading of this statement is that, the party who is entitled by law to begin the proceeding shoulders the burden of proving the issue in the case.

As the burden of proof is subject to the type of issue to be raised some examples are to be explained here under. Whenever there exists the need to prove the cause of action, the plaintiff bears the burden of proof there of. On the other hand, production of counter-deference to that cause of action lies on the defendant.

Let's say what is demanded by the party is performance of a contractual obligation; then such party shall prove the existence of the obligation. We can, furthermore, see situation in a suit to recover damages for breach of a contract, whether the defendant has, exactly breached the contract and the plaintiff really has sustained damage as a result of the breach of the contract. On the other hand, if there is an issue as to the existence of a contract, and an issue as to force majeure, the plaintiff has burden of proof on one of the issues in the case. Where the issues raised by the plaintiff are admitted by the defendant and the latter rather raise an affirmative defense, the burden of proof shifts to the defendant. Both the plaintiff and the defendant have burdened of proof on the same case notwithstanding that the fact to be proved and the way how to prove (in cause of action and in proving grounds of defense) may differ. The plaintiff shoulders burden of proof as to the cause of action

The defendant also bears burden of proof as to the grounds of defence he has already raised. Burden of proof is provided under a number of provisions of the civil code, the commercial code, revised family code and other proclamation of Ethiopia. When we consider the civil code articles;

Provisions of the civil code

The party who has burden of proof

Art. 5/1/,
783
2081,
1055/1/,
1317,
553
2141,
2285(3),

The plaintiff
The defendant(father)
The defendant (owner)
The plaintiff(creditor)
The defendant(usufractory)
The defendant(employer)
The plaintiff(victim of a damage)
The defendant(seller)

2001, contract	The plaintiff(demanding performance of
2776/2/,	The defendant (borrower)
2400/3/,	The defendant (seller)
2807(2),	The defendant (warehouse)
2942,	The defendant (lessee)
2970,	The defendant (lessee)
2706,	The defendant (owner)
2447,	The plaintiff (in donation case)
896,	The plaintiff(in case of will)
2086,	The defendant (abnormal risk case)
321(3)	The plaintiff (bad faith claim)

Here are also some illustrative provisions of the commercial code as to who shall bear burden of proof .

provision of commercial code

Burden of proof

364/5/	The defendants (directors of a company)
596,	The defendant (carrier)
637/3/,	The defendant (carrier)
634,	The defendant (carrier)
676,	The defendant (insurer) presumptions

i) Burden of Production in civil cases

Burden of production is adducing evidences to make a case. Black slaw dictionary defines burden of production as,

Burden of production is a party's duty to introduce enough evidence on an issue to have the issue decided by fact finder rather than decided against the party in a peremptory ruling such as summary judgment or a directed verdict.

Having seen the definition /or conceptual explanation of burden of production let's assess the position of laws of Ethiopia in relation to burden of production. Art 259(1) of the civil

procedure code provides that the burden of producing evidence in support of a claim is imposed on the plaintiff. While sub- article 2 of the same provision imposes burden of production of evidence on the defendant. This article clearly stipulate that both the plaintiff and the defendant shoulder burden of production of evidence on the same case proving facts oppositely. This is to mean that the plaintiff has burden of producing evidence on the cause of action. and the defendant do so on the grounds of his defense or on facts of his counter claim. Both the plaintiff and the defendant bear the risk of their failure to produce evidences to prove their respective interest. Any party who claims shall produce sufficient evidence indicating that he has real /proper/ claim or cause of action. And this does not mean that the party having burden of production is always duty bound to produce strong enough evidence rather he is entitled, in same, cases, to produce a prima facie evidence hence fore burden of production shifts to the other party. Therefore it is agreed that the burden of production may shift to the other party if the party makes a prima-facie case on the issue.

The party having burden of production bears the risk of non-producing that evidence (non-production) that a peremptory ruling may be made against him in the case of he files to produce evidence on the issue .According to Melin, the burden of production has nothing to do with weighing evidence. Because a party may produce circumstantial evidence, prima-facie evidence which may not ultimately enable the court decide persuade the court i.e. burden of persuasion follows later.

ii) Burden of persuasion in civil cases

Melin points out that burden of persuasion is burden of establishing the fact in the mind of judges by preponderance of evidence or by proof beyond reasonable doubt as the case may be. Whatever it is, producing evidence be it circumstantial or prima-facie evidence or any other evidence is not an end by itself unless the party persuades the court as to the fact in issue. That is to mean, when the party who shoulders burden of production produces what he/she may consider enough to prove the issue in the case the other party may rebut such evidences so that the former party may not be successful for such fact that he has produced evidenced unless he persuades the Judge. To substantiate this by

example, suppose Mr. X who is a baker has instituted a civil action against Mr. Y stating that the latter has failed to deliver 400 hundred quintals of flour on the due date despite clear agreement to this effect and caused him loss of 24,000 birr. Mr. X has produced the document of the contract as evidence. However, on the other hand, the defendant has contested the claim of the plaintiff establishing invalidity of the contract due to the existence of duress and produced evidence to that effect. Now, in order the case to be decided in favour of the plaintiff, producing document of the contract is not sufficient. Rather, he should be able to persuade the court the existence of his claim by establishing the validity of the contract in defeating the defense of Mr. Y. The same is true with regard to the defense of Mr. Y. In this hypothetical case it is not enough for the defendant (Mr. Y) only simply to produce evidence as to the existence of duress but also the defendant should be able to persuade the court on his defense against the claim of the plaintiff to the degree required.

The burden of persuasion differs in civil and criminal cases. As it is mentioned earlier, in civil case the litigant is expected to convince the court by producing preponderance of evidence. Whereas in criminal case there by producing evidence and convincing the tier of fact /court/ beyond reasonable doubt. The failure of the party having burden of persuasion to persuade the tier of fact is measured, more or less due to the fact that the judge is left in equilibrium as to the existence of the fact in civic cases generally. The party has burden of persuasion as to the facts he must put in his pleading. The plaintiff has burden of persuasion at least as to elements of his cause of action. The defendant again has burden of persuasion as to the ground of his defiance so that he can rebut the evidence produced by the plaintiff.

B) Burden of proof in criminal cases

In criminal proceedings the prosecution has burden of proof on the elements of his charge. Black's law dictionary states, "in criminal cases the government has burden to prove the elements of the crime;" such an expression is provided under art 136(2) of the criminal procedure code of Ethiopia. This article provides that the public prosecutor shall then call his witnesses, which indicates burden of proof in criminal cases normally lies on the

prosecution. Article 20(3) of the FDRE constitution also imposes burden of proof on the public prosecutor tacitly there by providing presumption of innocence for the accused. Thus, in normal circumstances the guilt of the defendant is to be proved by the public prosecutor or /and by private complaint as the case may be. The defendant, hence forth, here, is having burden of producing contrary evidence in defense. In such circumstances the acquittal is subject to the degree of evidence produced by the prosecutor to make a case, i.e. if the evidence produced by the prosecutor is not strong enough to warrant a conviction, the court immediately orders acquittal of the accused. Here the defendant may not be ordered to produce his defense as no case has been made by the prosecutor.

But in the evidence law of England as Fisher pointed out, the judge is entitled to say “I am doubtful of this evidence but can see if it can be supplemented and improved by what can be elicited form the defence.” But, this is not the case in Ethiopia as no case has been made by the prosecutor, the judge orders the acquittal of the accused as per Art. 141 of the criminal procedure code. However, in case a suspected is accused of a crime of corruption, acquittal as provided by the aforementioned provision doesn't apply because even if the prosecutor fails to produce enough evidence to make a case (proved the case beyond reasonable doubt), the court does not order acquittal as the prosecutor is expected only to produce prima-facie evidences.

Thus the defendant is ordered to defend on the issue up on production of prima-facie evidence against him. In case where prima-facie evidence is produced for the prosecutor the evidence may not be strong enough to establish a fact /make a case but enable the judge believe reasonably, that an offence might have been committed. Thus the defendant bears the burden of proving non existence of the assertion made by the public prosecutor and bears the risk of failure to do so.

But what do you think the degree of proof required in defending oneself in cases where burden of proof shifts from the prosecution to the accused?

i) Burden of Production in criminal cases

Burden of production refers to Burden of going forward with evidence on a particular issue. This refers to burden of producing evidence and burden of proceeding with the evidence on a particular issue at start of a case. As the public prosecutor has/burden of production of an evidence he/she bears the risk of non-production. Art 141 of the criminal procedure code provides to this effect i.e. when the case for prosecution is concluded, and if the court finds that no case which would warrant conviction against the accused has been made, it shall record an order of acquittal. One rational for not making a case against the accused may be due to the prosecutor's failure to produce evidence which reasonably enable the court believe that there has been made a case against the accused so that to continue proceeding. However, where the prosecutor makes a case against the accused, the defendant /accused/ has burden of producing rebutting evidence as clearly provided under Art 142 of the criminal procedure code.

ii) Burden of persuasion in criminal cases.

As it has been persistently stated, producing an evidence on an issue in a case is not an end by itself unless other wise the prosecutor /any party having burden of persuasion) can persuade the tier of fact /the court/ beyond reasonable doubt. Hence, burden of persuasion pertains to establishing the fact in the judge's mind beyond reasonable doubt Always if the court is left in equilibrium as to the existence of the fact in issue, the party with this burden fails to establish it. Here the public prosecutor is duty bound to beer burden of persuasion at least as the elements of the offence charged like wise the defendant is not left with out being imposed burden of persuasion where a case has already been made against him. It is obvious that the prosecutor always has considerable burden of persuasion. when the accused has burden of persuasion, he must satisfy the court of the existence or non existence of fact in issue, which has been established against him by the prosecutors unless doing so he suffers the risk of non-persuasion.

“Rule 84(2) of the DER imposes up on the defendant the burden of proving criminal irresponsibility and limited responsibility” However, it is not clearly provided whether that rule imposes burden of production or burden of persuasion. But up on comparative

investigation of rule 84 of DER, it seems that it imposes up on the accused burden of production not burden of persuasion. Melin made an opinion that burden persuasion the accused is required in special defense of insanity. He also added, that referring to rule 84(2) [c], that the rule places burden of persuasion as well as burden of production up on the accused in proving criminal irresponsibility or limited responsibility. The prosecutor then has to prove beyond reasonable doubt on the Issues he has burden of persuasion.

6.1.4 Burden of proof in case of presumptions

The detailed discussion on presumptions is made under chapter two of the material. There are different types of presumptions like permissive presumption, mandatory rebut- able presumption, and mandatory irrefutable /conclusive/ presumption. Presumptions could be of presumption of facts or presumption of law. Thus, the effect of these presumptions on the burden of proof is to be discussed here under.

Uglow stated, “Presumption operates where certain facts may be presumed to exist even in the absence of complete proof.” According to him, the effect of applying presumption is to shift the risk of failure of proof in relation to particular issue. There are many provisions constituting presumptions in different laws of Ethiopian. As far as burden of proof in the existence of presumptions is concerned, the nature of presumption determines whether a party has burden of proof or he/she free of producing evidence. In case of rebuttal presumptions since such presumptions can be over turned by producing evidence to the contrary, parties have burden of proof. On other hand in case of mandatory irrebutable presumptions no party is allowed to adduce rebutting evidence, as they are conclusive evidence in favour of the holder of such presumption. For example, no contrary proof shall be admitted against the viability of a child born and lived for forty eight hours. Then no party has burden of proof in this regard. We can take some examples from civil and criminal cases to that effect.

As in criminal case let’s consider presumption of innocence as provided under Art20 (3) of the FDRE constitution; there is no requirement that a basic fact is proved before the presumption is rased. The burden of proof whether the accused is innocent or not rests on

the prosecutor. i.e. to prove the guilt,. Where he fails to persuade the court that the accused is guilty, the accused is to be acquitted. Thus in such type of presumptions the public prosecutor is expected to adduce a rebutting evidence and then has burden of proving to the contrary.

The question as to who bears burden of proof contrary to the presumption is determined by the fact that in favor of whom is the presumption provided. i.e. if the presumption is in favor of the accused and such presumption is rebuttal one the public prosecutor has burden of proof to the contrary. And if the presumption is in favor of the plaintiff, the defendant has burden of adducing rebuttal defensive evidence. There fore, the defendant bears the burden of proof to the contrary and bears the risk of his failure to rebut it.

Example, in case of presumption of sanity the accused, only, bears one or more burdens of proof if he hopes to be acquitted on that ground. Here, the prosecutor has no burden of proving the sanity of the accused.

In some cases parties are required to prove the presumption whether fulfilled or not rather than the actual happening of the act. For instance, in relation to declaration of absence in which the existence of a person is unknown for more than 6 years, the litigant who needs to prove the death and wants to avail him/her self from the death has to prove whether nothing has been he and (known) about the person over the last 6 years but he is not expected to prove the actual death of the person. However, in mandatory presumptions no one has burden of proof to the contrary because adducing rebuttal evidence is not admissible in such cases since mandatory presumptions are rules of substantive which provide that once the basic fact is taken as established and no evidence to the contrary is admissible to rebut that conclusion. Therefore the effect of presumptions on burden of proof is similar in both civil and criminal cases.

6.2 Standard of proof

Standard of proof is an important concept required to be met by the party who has burden of persuasion. In order the court be satisfied with the evidence produced and be in a

position to render its verdict, the concerned party should meet the degree of proof required by legally accepted principles. Here the excerpt from wikipedia free encyclopedia provided an interesting explanation on standard of proof as discussed below.

The "standard of proof" is the level of proof required in a legal action to discharge the burden of proof, that is to convince the court that a given proposition is true. The degree of proof required depends on the circumstances of the proposition. Typically, most countries have two levels of proof or *the balance of probabilities*:

- preponderance of evidence - (lowest level of proof, used mainly in civil trials)
- beyond a reasonable doubt - (highest level of proof, used mainly in criminal trials)

In addition to these, the U.S. introduced a third standard called clear and convincing evidence, (which is the medium level of proof).

The first attempt to quantify reasonable doubt was made by Simon in 1970. In the attempt, she presented a trial to groups of students. Half of the students decided the guilt or innocence of the defendant. The other half recorded their perceived likelihood, given as a percentage, that the defendant committed the crime. She then matched the highest likelihoods of guilt with the guilty verdicts and the lowest likelihoods of guilt with the innocent verdicts. From this, she gauged that the cutoff for reasonable doubt fell somewhere between the highest likelihood of guilt matched to an innocent verdict and the lowest likelihood of guilt matched to a guilty verdict. From these samples, Simon concluded that the standard was between 0.70 and 0.74.

6.2.1 In civil cases

Balance of probabilities, also known as the preponderance of the evidence, is the standard required in most civil cases. The standard is met if the proposition is more likely to be true than not true. Effectively, the standard is satisfied if there is greater than 50 percent chance that the proposition is true. Lord Denning, in *Miller v. Minister of Pensions*, described it simply as "more probable than not." In civil law cases, the "burden of proof"

requires the plaintiff to convince the trier of fact (whether judge or jury) of the plaintiff's entitlement to the relief sought. This means that the plaintiff must prove each element of the claim, or cause of action, in order to recover. In Ethiopian Legal system, there is no such concept of balance of probability or preponderance of evidence though judges in practice adopted what they have learned in school.

i. Clear and convincing evidence

Clear and convincing evidence is the higher level of burden of persuasion sometimes employed in the U.S. civil procedure. To prove something by "clear and convincing evidence", the party with the burden of proof must convince the trier of fact that it is substantially more likely than not that the thing is in fact true. This is a lesser requirement than "proof beyond a reasonable doubt", which requires that the trier of fact be close to certain of the truth of the matter asserted, but a stricter requirement than proof by "preponderance of the evidence," which merely requires that the matter asserted seem more likely true than not.

6.2.2 In criminal cases

In criminal cases the guilty of the accused must be proved by the so called standard of '*beyond reasonable doubt*'. This is the standard required by the prosecution in most criminal cases within an adversarial system and is the highest level of burden of persuasion. This means that the proposition being presented by the government must be proven to the extent that there is no "reasonable doubt" in the mind of a reasonable person that the defendant is guilty. There can still be a doubt, but only to the extent that it would *not* affect a "reasonable person's" belief that the defendant is guilty. If the doubt that is raised *does* affect a "reasonable person's" belief that the defendant is guilty, the jury(the court in our case) is not satisfied beyond a "reasonable doubt". The precise meaning of words such as "reasonable" and "doubt" are usually defined within jurisprudence of the applicable country.

What does that mean? Again the problem is with words being used in an abnormal or special way. The word "beyond" normally means farther than or more than. (See

Bugliosi) Clearly this is not the meaning of the word in the phrase “beyond a reasonable doubt.” The state does not have to “carry its burden” beyond some point that constitutes reasonable doubt. The state certainly is not trying to prove that there is more than a reasonable doubt. If anything the state’s responsibility is to prove that there is less than a reasonable doubt. The word “beyond” in the phrase beyond a reasonable doubt means “to the exclusion of.” That is the state must exclude any and all reasonable doubt as to the defendant’s guilt. Simply put, the phrase means that if a judge has a reasonable doubt it is her/his duty to return a verdict of not guilty. On the other hand, if a judge does not have a reasonable doubt then the state has met its burden of proof and it is the juror’s duty to return a verdict of guilty.

“What is a reasonable doubt?” Jury instructions typically say that a reasonable doubt is a doubt based on reason and common sense and typically use phrases such as “fully satisfied” or “entirely convinced” in an effort to quantify the standard of proof. These efforts tend to create more problems than they solve. For example, take the phrases “fully satisfied” and “entirely convinced.” A person is satisfied when she/he is content, pleased, happy, comfortable or at ease. The fellow leans back in his chair after a meal, pats his stomach and says, “that was one satisfying meal.” Is that what the state must do - offer sufficient proof that a judge is content, happy, pleased or comfortable with her/his verdict. Absolutely not. A judge is not required to be pleased with the verdict or happy with the verdict. The state is not required to produce sufficient evidence not only to eliminate all reasonable doubt but also to please the judge or to eliminate all reservations about whether the judge has done the right thing. “Satisfied” in the phrase “fully satisfied” simply means convinced. A person is “entirely satisfied” when she/he is convinced beyond a reasonable doubt. It is very important to assess the underlying reasons for the adoption of the general principle that the prosecution must prove the guilt of the accused beyond reasonable doubt by many countries’ legislations. The concept ‘beyond reasonable doubt’ is not adopted by Ethiopian laws despite practical adoption by judges in many cases. Coming back to the underlining rational for the requirement of high standard of proof in criminal proceeding is that:

1. The existence of presumption of innocence

2. The unbalanced position of the parties in criminal cases unlike that of civil cases
3. The irreversible grave nature of criminal punishment, if once erroneously executed i.e. in order not to punish innocent.

The constitutions of many countries enshrine the individuals' rights to be presumed innocent until proven guilty and the right not to incriminate one self. That is the right to remain silent.

Many legislations, which are enacted to protect the conviction of innocent people, accept the "beyond reasonable doubt" proof standard. In this regard Uglow asserts: "The standard of proof beyond reasonable doubt is seen as the cornerstones of the presumption of innocence." Thus the beyond reasonable standard of proof is to be born by the government (prosecution) to prove the guilt of the accused. Some lawyers assert that releasing 100 criminals is more justifiable than convicting one innocent person. The Fifth Amendment (America) states that: - "No person shall be compelled in any criminal cases to be a witness against himself."

Even though there is no the clear concept of proof beyond reasonable doubt in Ethiopia, the same protection for the accused is provided under Art 20(3) of the FDRE constitution and Art 19(2 &5) of the same in relation to arrested persons. This implies that the constitution is inline with the requirement of the concept of proof beyond reasonable doubt. That is meant by presumption of innocence imposes on the prosecution the burden of proving elements of the crime beyond reasonable doubt. Likewise, the right to remain silent brings about the fact that the prosecution, not the defendant, has to prove the guilt of the accused.

The other reason is that the position of the parties in ability to produce persuading evidence is not the same in criminal cases. The prosecution is the government institution with all its machineries while the accused is an individual person facing all possible constraints in defending himself.

Unless due care is taken in admitting and weighing evidence, innocent people may be convicted and punished, and the criminals may be escaped under the shadow of unduly

convicted innocents. If innocent people once punished erroneously, the grave nature of criminal punishment is irreversible. All these makes high standard of proof justifiable.

For example, if the defendant (D) is charged with murder, the prosecutor (P) bears the burden of proof to show the jury that D did murder someone.

- Burden of proof: P
 - Burden of production: P has to show some evidence that D had committed murder. The United States Supreme Court has ruled that the Constitution requires enough evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. If the judge rules that such burden has been met, then of course it is up to the jury itself to decide if they are, in fact, convinced of guilty beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307 (1979). If the judge finds there is not enough evidence under the standard, the case must be dismissed (or a subsequent guilty verdict must be vacated and the charges dismissed).
 - e.g. witness, forensic evidence, autopsy report
 - Failure to meet the burden: the issue will be decided as a matter of law (the judge makes the decision), in this case, D is presumed innocent
 - Burden of persuasion: if at the close of evidence, the jury cannot decide if P has established with relevant level of certainty that D had committed murder, the jury must find D not guilty of the crime of murder
 - Measure of proof: P has to prove every element of the offence beyond a reasonable doubt, but not necessarily prove every single fact beyond a reasonable doubt.

In other countries, criminal law reverses the burden of proof, and there is a presumption of guilt.

However, in England and Wales, the Magistrates' Courts Act 1980, s.101 stipulates that where a defendant relies on some "exception, exemption, proviso, excuse or

qualification" in his defence, the legal burden of proof as to that exception falls on the defendant, though only on the balance of probabilities. For example, a person charged with being drunk in charge of a motor vehicle can raise the defence that there was no likelihood of his driving while drunk. The prosecution have the legal burden of proof beyond reasonable doubt that the defendant exceeded the legal limit of alcohol and was in control of a motor vehicle. Possession of the keys is usually sufficient to prove control, even if the defendant is not in the vehicle and is perhaps in a nearby bar. That being proved, the defendant has the legal burden of proof on the balance of probabilities that he was not likely to drive.

Similar rules exist in trial on indictment. Some defences impose an evidential burden on the defendant which, if met, imposes a legal burden on the prosecution. For example, if a person charged with murder pleads the right of self-defence, the defendant must satisfy the evidential burden that there are some facts suggesting self-defence. The legal burden will then fall on the prosecution to prove beyond reasonable doubt that the defendant was not acting in self-defence.

In 2002, such practice in England and Wales was challenged as contrary to the European Convention on Human Rights (ECHR), art.6(2) guaranteeing right to a fair trial. The House of Lords held that such burdens were not contrary to the ECHR

- A mere evidential burden did not contravene art.6(2);
 - A legal/ persuasive burden did not necessarily contravene art.6(2) so long as confined within reasonable limits, considering the questions:
 - *What must the prosecution prove to transfer burden to the defendant?*
 - *Is the defendant required to prove something difficult or easily within his access?*
 - *What is threat to society that the provision is designed to combat?*
- (en.wikipedia.org/wiki/Burden_of_proof retrieved on 29/06/08)

Summary

Burden of proof constitutes burden of production (evidentiary burden) and burden of persuasion (legal burden). The former refers to making available of sufficient amount of evidence at the disposal of the court. On the other hand, burden of persuasion is to mean the obligation to persuade the court to the standard required by the nature of the case using the evidence produced by either party.

As to up on whom the burden of production and persuasion lie, almost all jurisdictions accept that the one who asserted cause of action should able to prove the existence of the alleged claim. To state in different language, the one who is going to take risk of failure to produce evidence and persuade the court has burden of proof of his case.

In general, the plaintiff and public prosecutor in civil matters and criminal proceeding respectively bear burden of proof. The justification for this rule is because in most cases it is believed that positive assertion is easier than negative disclaim in proving one's innocence. In addition, in criminal matters the underlying reasons for the adoption of the general principle that the prosecution must prove the guilt of the accused is because many courtiers including Ethiopia enshrine in their constitution, individuals' rights to be presumed innocent until proven guilty and the right not to incriminate one self realizing the right to remain silent. Defendants in criminal proceeding are not duty bound to defend them selves/ to testify against themselves/ and are entitled to remain silent through the trial.

Notwithstanding the application of the general rule, in some exceptional situations the burden of proof may shift to the defendant both in civil and criminal proceedings. In civil matter this happens where the defendant admitted the claim of the plaintiff and raised affirmative defense. In criminal matters on the other hand, the burden of proof shifts to the accused when proof by the public prosecutor is difficult but easier for the accused to produce evidence.

The standard of proof required in persuading the court differs in civil and criminal litigations. In civil suit, the evidence which could show a happening of a fact to be more probable than to be improbable is enough establish the occurrence of the alleged fact. Here, the rule is preponderance of evidence; the court could decide in favour of the one who has produced evidence weighed more than of the other party.

But, in criminal charge in order to convict an accused, the guilty of the latter must be proved beyond reasonable doubt. This shows that in criminal cases there is a need of high degree of proof for various reasons as stated above.

Review questions

1. Is there a legally established standard of proof in Ethiopia? If yes, how many standards does Ethiopia have?
2. Up on whom do you think burden of proof lays for example in situations qualifying self – defense in criminal cases? To what standard?
3. Discuss situation in which burden of proof and burden of persuasion lies on different parties if any.

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Acronym

civ.p.c is to mean Civil procedure code

cr.p.c is to mean criminal procedure code

cr.c is to mean the criminal code

civ.c is to mean the civil code

FDRE is to mean the Federal Democratic Republic of Ethiopia

DER is to mean Draft Evidence Rule

RFC is to mean the revised Family code