Chapter One: Evidence law General Introduction

1.1.1 Evidence Law defined

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.

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".

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.

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 are oral arguments of the parties have raised.

1.1.2 Nature of Evidence law

Where is 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.

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

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.

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.

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.

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.

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?

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

Common law countries: - have separate rules of evidence or separate code of evidence law. The rules determine what evidence is admissible and what evidence is not admissible. Whereas civil law countries: - there is no separate code of evidence law. Rules of evidence are sparsely distributed in both substantive and procedural laws.

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.

B/ Difference regarding the sources of evidence rules

The judges have the authority to made laws including evidence rules/precedent/. 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.

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). Therefore, 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, the precedent system does not works on the decisions involving question of facts unlike the common law traditions. Therefore, 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 cannot 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 **thereby ensuring fair play. Whereas the civil law system employs 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.**

(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. Whereas 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.

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

In common law legal systems, parties themselves are competent witnesses in their own case. 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.

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.'

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 .

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. Whereas 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.

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 of the society before the

enactments of modern codes. The document contains many provisions dealing about proof and means of proof.

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.

The present day Ethiopian evidence system is the hybrid of civil law and common law features.

Generally, we can classify the present sources of Ethiopia's evidence rules in to three: -

(i) The evidentially rules which are found scattered throughout 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.

1.5 Evidence law in civil and criminal cases

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.

The court may also exercise its discretionary power to support the defendant's right to a fair trial by excluding potentially relevant evidences. 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.

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*. In criminal proceeding, the public prosecutor 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.**

***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.

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 deface like "*counterclaim*". In such case, the burden of proof lies on the defendant (see Art 258 of civ.P.C.

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 discus 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 relation ships which could mostly 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 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). There fore, unlike civil cases, in criminal cases the task of determining the conclusive nesses 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 throughout the world by his criminal act.

Thirdly, in criminal cases, admission shall be made without reservation. However, in civil proceedings the party may admit the truth of the whole or any part of the case of the other party.

1.6. Classification of evidence

Evidence is divided in to two: direct and circumstantial.

Direct evidence establishes a fact in issue directly. 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.

***Can a wrong inference be made from circumstances*?**

For instance, in a murder case, if you consider the footsteps alone, it can be the footsteps of any one from the victim's house. And also it does not mean that anyone who buys piston 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.

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.

CHAPTER SIX: BURDEN AND STANDARD OF PROOF

Burden of proof refers to the obligation to prove allegations, which are presented, in a legal action.

6.1 Meaning and concept of burden of proof

Burden of proof is a term, which describes two different aspects of burdens, burden of production and burden of persuasion.

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.

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.

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 fined for him/her any particular issue. This burden of persuasion, beyond reasonable doubt in criminal cases and by preponderance of Evidence in civil actions.

6. 1.3 Burden of proof under the evidence law of Ethiopia

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.

I) Burden of Production in civil cases

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.

ii) Burden of persuasion in civil cases

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. Where as 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 fats 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 poof on the elements of his charge. Such an expression is provided under art 136(2) of the criminal procedure code of Ethiopia.

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.

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.

On the other hand 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.

Burden of persuasion pertains to establishing the fact in the judge's mind beyond reasonable doubt.

Here the public prosecutor is duty bound to beer burden of persuasion at least as the elements of the offence charged likewise the defendant is not left without 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.

6.1.4 Burden of proof in case of presumptions

There are different types of presumptions like permissive presumption, mandatory rebutable 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.

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.

6.2 Standard of proof

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)**

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.**

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.