Law of Evidence

Introduction

Review of the First Chapter

Introductory Points

- What is evidence?
  - Evidence is anything with which the existence and non-existence of a disputed fact is proved.
    - The term ‘evidence’ may refer to the facts that are adduced as relevant and admissible to prove the disputed fact; or it may refer to the means/methods of presentation of the relevant facts such as oral testimonies, documents evidences, experiments, electronic data (audio, video, pictures, texts) etc.
  - The law that governs the relevancy, admissibility, production and related matters in a court or tribunal is referred to as evidence law.
  - In common law legal system, evidence law is a more organized discipline of law because the system involves jurors who are not legal professionals having no legal and analytical skill of evaluating evidences evidences presented by opposing parties in a court litigation; hence they need to be assisted and guided by a comprehensive code of evidence.
    - But as a late development, civil law countries are also adopting a separate evidence code in order to assist and guide the proof process in adjudication.

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- Evidence law in civil law and common law legal systems
  - The purpose of the comparative analysis is to identify the strength and weakness of each system and get a lesson.
  - The common law trial is characterized by adversarial system in which the opposing parties play a primary role in examining the witnesses; and the role of the judge is minimal as opposed to inquisitorial system. Does this traditional distinction affect the system of evidence?
    - The distinction does not seem to be valid anymore as most systems practice a blend of the two.
  - What are the other differences between the two legal systems in terms of evidence?
    - Oral Vs documentary evidence; which should obtain high evidentiary value? Do you agree with the difference of emphasis between civil and common law traditions?

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- How do see the debatable issue of being a witness to ones own case and taking testimony from those who are closely related to parties?
  - The general trend is that in common law systems, parties themselves can be competent witness; whereas in civil law, it is not allowed
  - This seems to be highly dependent upon the criminal justice administration in ensuring the deliberate prejudices and lies (perjury)during oral testimonies. But how far this ensure the high possibility of bias of witnesses in favor of their case or their relatives?
  - The Ethiopian perspective is that it can be understood from the reading of the Civil Procedure, Criminal Procedure and the FDRE Constitution that parties and their relatives can adduce oral testimony after giving oath, which follows the general tradition of common law evidentiary practice.

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- Hearsay evidence
  - Testimony of a witness who has no direct knowledge of what he tells about (hearsay) is not admissible in common law legal systems.
  - In civil legal systems, the discretion to admit hearsay evidence is left to the judge
  - How hearsay is looked at under the Ethiopian evidence law?

Ethiopian Evidence Law: A Preview

- There is no separate code of evidence law in Ethiopia.
  - The evidence law of Ethiopia shares the features of the civil and common law evidence systems.
    - Emphasis to documentary evidence and the admissibility of hearsay evidence based on the discretion of the judge characterizes Ethiopian evidence law taking the feature of civil law.
    - What commonalty could you mention between Ethiopian evidence rules and the common law evidence system?
- Sources of Ethiopian Evidence Law
  - Evidence rules are to be found scattered through substantive and procedural laws of the country.

Sources … Cont'd

- Cassation decisions on basic errors of evidence law.
  - Even though there is no full-fledged precedent system in Ethiopia, the cassation review of the Federal Supreme Court on fundamental interpretational errors of the lower courts is a binding interpretation; hence decisions related to evidence matters are another source of law for Ethiopian evidence law.
- Internationally accepted principles and rules of evidence
  - Besides the scattered rules across various laws of the country under titles such as "proof of marriage", proof of …" and many legal presumptions and other evidence related provisions, internationally accepted principles of evidence law are also another sources that have been used to fill the existing gaps of Ethiopian evidence rules.

Evidence in Criminal and Civil Cases

- The purpose of evidence law in criminal and civil cases
  - Evidence law has the same purpose both in criminal and civil proceeding which is to guide and assist the court to establish the truth; but the difference lies in the strict rules in criminal evidence to ensure fair trial to the accused.
  - criminal evidence contains many rules excluding relevant evidences such as bad character or previous conviction.
- The standard of proof
  - The standard of persuasion required in civil and criminal cases is different, owing to the serious consequences of criminal conviction to life and liberty of the accused; and the obvious imbalance of the parties in criminal litigation which may unfairly lead to wrong decision.
  - Accordingly, the standard of proof for criminal case is ‘beyond reasonable doubt’
    - The underlying assumption is that it is preferable to acquit a criminal than to punish an innocent.
  - The standard of proof for civil cases is preponderance/balance of evidence

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- The Burden of Proof
  - The burden of in criminal and civil disputes lies upon the one who claims.
  - In criminal matters, it is the public prosecutor that has to prove the elements of the crime as defined in the substantive criminal law.
    - This burden of proof has got its basis from the principle of the presumption of innocence.
  - In civil cases, the well known rule that the one who asserts will bear a burden of proof

Chapter Two

Facts Which May Be Proved Other Than By Evidence

Facts That Need No Proof

- As a general rule, every claim of the parties in the litigation must be supported by evidence. Exceptionally, however, there are three types of facts that do not necessarily need proof; these are:
  1. Admitted facts
  2. Presumptions & inferences
  3. Judicial notice
- Lets discuss each of these exceptions one by one

1. Admissions

- Admission is to concede to the fact asserted by the opponent.
- If a fact alleged by the one is admitted to be true by the other party, it doesn't have to be proved by the claiming party; because a party is not expected to make himself liable through admission; he is expected to know better about himself than anybody else.

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- Admission can either be formal or informal
  - Formal admissions are those that are made before a body authorize to receive admission such as courts, investigating officer, commissioner delegated to conduct trial proceedings.
  - Informal admissions refer to those admissions that are made in civil dealings and everyday relationships.
    - Ex: an admission made to a friend orally, in a letter or email.
  - It is obvious that the ones that are given before the authorized organ have high evidentiary weight (probative value) than informal admissions.

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- Again, formal admissions may further be classified as judicial and extra-judicial (out of court) admissions.
  - Judicial admissions: are those admissions made before a court entertaining a case or a commissioner delegated for by a court having a jurisdiction on the case.
    - Regarding the conclusiveness of judicial admissions, they are conclusive for civil cases unless the admission is vague and doubtful in which case the court may require the other party to substantiate his claim with evidence.
    - Admission in civil cases can be made in pleadings, during hearing. Or though mutual agreement of the parties.
      - Evasive (general) denial of the a claim constitutes admission by necessary implication.

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- Judicial admissions in criminal cases
  - A s a rule, a plea of guilty before court is conclusive and the court shall give verdict forthwith.
  - But if a court believe that the confession is made for other reasons such as to cover someone's crimes or for fame, he may require the prosecutor to continue producing evidences in accordance with the elements of the charge.
  - The law clearly provides that if the confession is made with reservation, a plea of not guilty shall be entered.

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- Extra-judicial admissions
  - These are out of court formal admissions made before an authority.
  - In criminal cases, confessions made before a police officer is not conclusive, and in most cases it is subject to rejection by criminal benches, taking the brutality and illegal method police investigation.

END OF CHAPTER ONE AND TWO

Review of the Last Class

- We have discussed an introductory points about evidence law
  - Evidence & and Evidence law
  - Evidence in civil and common law countries and
  - Themes of evidence law such as relevancy & admissibility of evidence
- Facts that need no proof

1. Admission
   - Admission is to concede to the fact alleged by an adversary
   - Admission can be formal or informal
   - A formal admission can further be classified as judicial and extra-judicial
   - Specific judicial admissions in civil cases is conclusive
   - Specific judicial admission without reservation in criminal cases is conclusive as a rule, but the court may reject if it deems that the confession is made due to other reasons other than guiltiness.

II. Presumptions

- The second type of facts on which the alleging parties are relieved of the burden of proof are presumptions.
  - There are presumptions that depend upon proof of basic facts;
  - There are also presumptions that do not depend on basic facts, which are initial allocation of burden of proof.
    - Ex: presumption of innocence
  - When parties must go half way proving basic facts before presumption of fact or law operates.
- There are two kinds of presumptions
  1. Presumptions of fact (permissive inferences)
  2. Presumptions of law (mandatory presumptions)

1. Presumption of Fact (Permissive Inferences)

- These are inferences the court deduces from facts that are proved as basic facts which lead to the presumed fact following the natural course of things (cause and effect relationships).
- Such kind of presumptions are always rebuttable; the other adversary can produce a contrary evidence .
  - The presumption will have the effect of shifting the burden proof to the other party.
- Permissive presumptions may be indicated by law or the court, with out such an indication, may presume facts the existence of which can be deduced from other basic facts
- It is to be noted that the mere fact that a court has taken a presumption and it does not mean it always reaches to a conclusion and final verdict on the basis of the presumed fact.

2. Presumption of Law

- These are presumptions which the law requires the court to make as a matter of obligation.
- Why the law obliges the court to take presumptions? Natural course of things which necessarily result in the fact meant to be presumed is the strongest of reasons for presumptions of law.
  - In other words, probabilistic/logical relationship between the basic fact and the presumed fact the main reason for legal presumptions.
- The presumption of the law can be dependent upon the proof of the basic fact; or it may be made to be presumed without the need for proof of the premise fact. (Ex: the presumption of innocence).
  - Presumptions without proof of basic fact are predominantly aimed at achieving the public policy besides its probabilistic aspect.

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- Presumptions of law are of two types:
  - Rebuttable presumption
    - Once a certain fact is presumed, either upon the proof of the basic fact or not, the other party is allowed to produce evidentiary facts to the contrary of the presumed fact.
    - Rebuttable presumptions have the effect of the shifting the burden of proof the other party.
  - Irrebutable presumption
    - Irrebutable presumption is conclusive against which a contrary evidence may not be adduced; hence it does not shift the burden of production to the other party.
    - If basic facts to the irrebuttable presumption are proved, the case may come to an end, given that the presumption is so decisive in disposal of the case.

III. Judicial Notice

- Judicial notice refers to circumstances in which the judicial system assumes a factual proposition to be true even without proof.
- It is a judicial discretion given that if the matter is notorious that it is known or can by the trial judge, judicial notice has to be taken.
- The purpose, as other facts that do not need proof, is that it saves the time and resource of the court and prevents unnecessary delay of justice.
- Judicial notice can be exercised both in respect of laws and facts.
  - **Judicial notice of law**: courts are obliged to take notice of laws that are made accessible through publication.
  - **Judicial notice of facts:** it is a well founded principle of evidence law that if a certain fact is part of common knowledge; and it can independently be verified by the court, a presumption must be taken and proof of the same shall not be required from the alleging party.
- Further explanation each points is made as follows.

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- Judicial Notice of Adjudicative Facts
  - ‘adjudicative’ to refer to facts that relevant and decisive for the disposition of the case.
  - A fact which is part of common knowledge or a fact that can be ascertained from the undisputable sources are subject to judicial notice.
  - Facts of common knowledge
    - These are facts that are known by an ordinary intelligent people without academic background. So the yardstick here is not the personal knowledge of the judge, rather the generality and commonality of the fact in question.
    - It is sufficient for a certain fact to be known in the locality where the court has jurisdiction; as the same time, what is commonly known in other areas may not be a subject of judicial notice to the courts of other localities; so the degree of notoriety is a decisive factor.
      - Ex: custom of the society where the court is situated

Cont’d

- Verifiable Facts
  - Facts that can be ascertained by referring to authoritative and indisputable sources, even if they not part of common knowledge, are verifiable facts on which a judicial notice can be taken.
  - Theses facts are mostly from science, history, art etc… that are firmly established.
  - Note that the mere presence of different ideas does not make the facts presented unauthoritative; that which is acceptable by overwhelming majority shall be referred and be noticed.
  - But if there is a doubt on the part of the court as to the indisputability of the fact, the court shall not take notice thereof, hence shall require the production of evidence in support of it.

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- Judicial Notice of Law
  - If one of the parties raise an issue of law which is known by the court, the other party is not required to adduce a legal proof; the court takes notice of the relevant law.
  - Judicial notice in civil law countries is easy because of the tradition of legal codification where judges are supposed to know the legal principles and rules arranged and codified across various code of laws; whereas in common law system, it is judge made law where judges are bound to follow the decisions of higher courts on similar cases; but the problem lies where there are two different decisions on the same precedent case in which case the parties have to persuade and prove to the court which decision shall be chosen as the governing law. The judges shall also take the interest of the public in determining and choosing the applicable legislative facts.

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- Which laws are subject to judicial notice?
  - As per the Federal Negarit Gazeta Establishment Proclamation No. 3/1005, all federal or ***state*** government organs, natural or juridical persons are bound to take judicial notice of laws of the country that are published in Federal Negarit *Gazeta*.
  - There is an issue with the obligation imposed by the federal proclamation on state courts to take notice of federal laws published in Negarit *Gazeta*. Do you think this is in line with the constitutional division power and the principle of non intervention?
  - What if the law which is the integral law of the land is not published in the official gazette such as international treaties ratified by Ethiopia, administrative directives and decisions of the cassation bench of the Federal Supreme Court? It is not necessary for the litigants to prove issues subject to those laws that are not published in Negarit Gazette if they are recognized and known by the entertaining court.; if not, the alleging party has to prove.

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- Besides law, courts may also take notice of facts that are part of the common knowledge; and that can be verified (verifiable facts).
  - Requiring the production of evidence for such facts would be an error in terms of saving the time and resources of the court and the parties; resulting in delay of justice.
- But judicial notice of facts is dependent upon the knowledge of the trial judge; thus even though the matter is of public knowledge. Hence, judicial notice of facts is discretionary.
- Is the presumption of fact or law by the judiciary rebuttable?
  - Since presumption is a type of ordinary evidence, unless stated otherwise by the relevant law, a contrary evidence can be adduced; thus the trial judge has to consider evidences produced against what has been recorded as judicial notice of law or fact.

END OF SESSION

RELEVANCE AND ADMISSIBILITY OF EVIDENCES

Fact in Issue

- Before defining relevancy, a fact at issue need to be understood.
- Fact in issue is what is disputed by the parties and to be resolved by help of evidence; a fact at issue comes into picture when a fact is alleged by one and denied by another.
- The disputed issue of fact can be physical or mental (psychological).
  - Ex: whether an accused has committed the crime with intent? (mental – *mens rea*) – the words and other actions of the suspect can inform the state of mind of the accused – indirect/circumstantial evidence).
  - The witness has saw the event with his naked eyes (physical – direct evidence).
- Major and collateral/subordinate issues of fact
  - Facts in issue can be major having a direct bearing to the outcome of the case; and such issues are identified at the first hearing.
  - It can be collateral/subordinate is which is necessary to prove the major issues of fact.
    - Ex: the competence or credibility or expertise of the witness according to the case.
  - What are the facts that are universally accepted to be relevant to facts at issue? This will be the topic of the next session.

Relevancy and Admissibility

- An evidence is said to be relevant when it has a tendency to make the fact at issue more or less probable (direct or inferential connection).
  - Direct evidences are those facts that are point ***directly*** to the issue of fact; such evidences are those that are represented by five senses of a human.
    - There is nor level of proof (probative value) in direct evidences; what is to be ascertained is their authenticity/ truthfulness.
  - Indirect (circumstantial) evidences are those facts that make the existence or non-existence of the disputed fact more probable; it depends upon the surrounding circumstances from an inference taken regarding the alleged fact.
    - It is rare to obtain direct evidences for most factual issues framed by courts; they are circumstantial evidences that play the main role in the disposition of case before courts.
    - The probative value or the level of tendency making the disputed fact probable in favor one part differs among various circumstantial evidences.
  - Circumstance evidences that are generally identified as relevant to the facts in issue in the literature of the field are discussed hereafter.
- Admissibility is related to a public policy and morality. An evidence which is relevant can be made inadmissible for some reasons to be discussed ahead.

Relevancy of Facts

- Relevancy is a relative to the issue of fact framed by the court; hence the relativity those facts that are generally identified to be relevant is not to be disregarded; a fact which is relevant to a certain issued may not be to the other, even though both are generally mentioned as relevant facts.
- Relevant evidence has two components: materiality (relational aspect) and probative value
  - Materiality: there must be a logical relationship between the fact-evidence and fact in issue.
    - Assessment of relevance is governed by the cannons of logic, general experience and common sense.
  - Probative value: the extent or the capacity of what is found to be a relevant fact to the fact in issue.

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- The relevant fact (evidence) offered does not have to be conclusive; if it has a certain tendency of making the issue probable, it is relevant though it might not be sufficient.
- Facts that are Relevant facts in issues according to the accepted rules of evidence and rules of logic include the following:

a) ***Res Gestae:*** Facts forming part of the elements of the fact in issue or same transaction; and those facts that are closely connected with elements the fact in issue in terms of their continuity and less possibility for them to be fabricated.

- Facts that have occurred contemporaneously with the fact in issue (main fact), or immediately before or after the event.
- The parameter used to determine whether a certain fact is part of the fact in issue or closely related with the main fact is logic or experience; thus their no definite legal regulation in this regard.

  - Ex: if the issue if the suspect has caused a willful injury on the victim, his statement that he will hurt the victim today, or after the event, his statement that he taught a lesson to the victim. Since facts constitute the elements of the issue i.e. Whether injury was caused by the suspect, they are *res gestae* facts.
  - Spontaneous declarations a 3rd person that ' oh he is going to kill him, catch him" or don't let him flee, the police is coming' are, thought not part of the main issue, they are closely related to the main issue and have a strong probative value if testified by any one who has witnesses or heard the statements.

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b) Facts being the occasion, cause or effect of facts in issue,

- Occasion/State of things
  - Occasions provide an opportunity for the occurrence of the event (fact in issue). In terms of time, place and other surrounding factors.
- Cause or Effect
  - The causal fact to the fact in issue; where there is a logical or experiential cause-effect connection between a fact and the fact at issue, or the issue of act as a cause and the evidential fact as an effect.
  - Causal and consequential facts are generally relevant to the fact in issue as an effect or cause, though there might not be a necessary (conclusive) relationship between the two, they would make the issue of fact more probable.
    - Ex: The fact that there was a fierce fight between the suspect and victim immediately before the latter's death is relevant to the factual issue of who/what killed the victim.
    - The victim has insulted the suspected before he was found injured immediately thereafter.

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c) **Motive and Preparation, Previous or subsequent conduct**

- Motive is what precedes intent; thus proof of motive has a probative value for the proof of intention which is essential in criminal proceedings.
- The motive of an individual can be deduced/inferred from his statements or actions.
  - Ex: if one of the security of the university gets upset and says that it was this
- Preparation/Previous or subsequent conduct
  - Previous or subsequent conduct refers to acts that are performed by a party from which a judge can infer a fact that supports proves the fact in issue.
    - Ex: if a suspect runs out of a taxi while some was crying for his mobile, this subsequent conduct of his can be produced as a relevant fact to the issue of whether the suspect has stolen. In this case, since the action of the suspect seems to be spontaneous reaction to the cry, it may also considered as a res gestate fact.
- But it must be noted that proof of motive or preparatory acts may not necessary indicate to the fact in issue; it is possible that they may indicate to other possibilities; But their relevancy is not to be denied based on other determining factors; Regret and leaving the original plan can also be another intervening possibility; hence the probative values of motive or preparation as relevant facts shall be assessed together with other surrounding circumstances in order to avoid wrong inference and conclusion.

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- Generally, relevant–circumstantial evidences can be either of the following three:
  - Forward-looking to the fact in issue (prospectant facts), or
  - They may be occur side by side or simultaneously with the fact in issue (concomitant evidences), such as alibi, *res gestae* facts, or
  - They may point to disputed fact backwardly, meaning when a later fact refers to a former fact in issue as a matter of reason or experience. (retrospectant evidence).

Relevancy/admissibility of confession and judicial decision

- Confessions as dealt under the topic of ‘facts that need no proof’, can be judicial or extra-judicial; the judicial ones are admissible proofs to resolve the issues of fact, save the exceptions.
- But, is confession really a matter of relevancy? The same question can be raised with respect to judicial decision?
  - Relevance, as discusses, is to do with logical connection of a fact with a fact in issues, governed by sound reasoning and common experience.
  - Confession or judicial decision in itself cannot be relevant to the factual issues frmed by a court; but they can be admissible.

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- Judicial decision

Admissibility

- Once a certain fact is found to be relevant, its admissibility need to be ascertained before it is utilized by a court as evidence to the fact in issue.
- Relevance has to do with policy justification behind acceptance of some sort of evidences in the court of law.
- A court may abandon hearing or evaluating relevant evidences for reasons other than admissibility which include:
  - 'needless presentation of cumulative evidences' i.e. if a fact presented by some items of evidence, the same fact has not to be produced repetitively by another evidences with no addition in the weight of evidence except waste of time.
    - Ex: Ten witnesses testifying to exactly the same fact.
  - Consideration of undue delay": even if the evidence intended to be presented is relevant, it it is going to delay the case unduly, the court may proceed to dispose the dispute on the basis of the available evidences; this is the case particularly when the a party decides to produce evidence in the middle of the trial. The court will have a discretion to decide in light of the cost, inconvenience, delay of the case the production entails.

Relevant But Inadmissible Facts

Introduction

- Preliminary Issues
  - Approaches to evidence law in civil and common law systems
  - Ethiopian perspectives
    - Whereabouts
- General rules of evidence
- Special rules of evidence, like procedure
- Rules of evidence from criminal context
- Rules of evidence from civil context
- Classification of evidence

Cont’d

- Types of evidences as enumerated in the Draft Evidence Rules
  - Statements by accuses persons
  - Admission
  - Judicial notice
  - Presumptions of law
  - Observation by the court in it its judicial capacity
  - Documentary evidence
    - Documentary evidence is specially important for civil cases

Terminologies

- Alleged fact
- Disputed fact
- Issue of fact
- To prove & to disprove
- Contrary/counter
- claim/proposition/allegation
- Outcome of the case
- Collateral/subordinate/side issues of fact

Relevancy of Evidence

- Depending on the relevance, an evidence may either be direct or indirect (circumstantial).
  - It the evidence at hand proves the existence or otherwise of the disputed fact directly.
  - If the evidence tends to establish the issue through inference (indirectly).
    - It is difficult to meet the criminal standard of proof with circumstantial evidence, without the corroboration by direct evidences; but if the cumulative evaluation of the indirect evidences certainly leads to a conclusion, with no contradiction or reasonable doubt, it may be taken to have met the 'beyond reasonable doubt' standard; this is because in most cases it is difficult to find direct evidences to prove the facts at issue.

Notes

- Why silence is taken to mean opposition/denial of the allegation of the prosecutor in criminal cases?
- Judicial admissions are conclusive for civil cases without the need for production of evidence, whereas judicial admissions are not conclusive to criminal cases meaning that even if an admission given, the court may disregard it and require the prosecution to provide evidence.
- If admission is with reservation or part of the accusation
- What is the rationale behind thus rule of criminal evidence?
- The whole caution is not to convict innocent that it is possible that an accuses person may admit for other reasons (to cover another person, fame)
- Classification of evidence
- Direct evidence: evidence relevant directly to the disputed issue.
- Circumstantial (indirect) evidence:-
- Themes of evidence law
- Relevancy of evidence
- Facts that is relevant to the fact in issue
- About means of adducing evidence
- Real evidence
- Oral evidence (testimonies)
- Facts that need not be proved
- Notorious facts to which judicial notice will be taken, facts that are part of public knowledge
- Admitted facts: - if facts that prove the disputed facts are admitted before an open court testimony or examination

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- About admissibility of evidence
- This is a policy perspective, where relevant fact evidence is examined for its propriety to be adduced t to prove the fact in issue, despite its relevancy, for some policy justifications.
- Standard and burden of proof
- Standard (degree) of proof for civil cases
- Burden of proof
- Who is obliged to adduce evidence in support of the disputed facts?
- At the appeal level
- The above issues of relevancy and admissibility may form a ground of appeal
- Evidential errors is of course is reversible. If the error is significant as to affect the judgment, it has to be reverses, if not it is a harmless evidentiary error.
- Weight of evidence
- How much they support the issue of fact and how much they are direct and relevant.

Means Of Producing Evidence – Oral & Real Evidence

ORAL EVIDENCE

- Once the relevant and admissible facts (evidences) are identified, the next step is to produce such facts through various means, the one and the dominant mechanism testimony of witnesses.
- Since obtaining real evidence for alleged facts is rare in most instances particularly in criminal cases, oral evidence constitutes the main mode of presentation of facts as claimed.
  - What think about the soundness of the common law tradition where oral evidence has got more dependability, even more weight than real evidences?
  - Are witnsses witnesses of the court or witnesses of parties? If they are courts witness, it means it is the inquisitorial system practiced by cicil law coutnreis in which case preparation of witnesses is ot allowed (it is unethical); if witnesses are for the litigants, it means it is an advesarial system of common law countries where the court has no role verifying the truth, except to make sure that rules of procedure and evidence are observed on the proceedings.
- This section deals with general concepts about oral evidence, competency of witnesses and privileges granted to some group of persons not to testify as an exception to the general principle of competency of all persons.

Oral Evidence: Definition

- Oral evidence is a solemn declaration or a statement made under oath to establish the fact under question before the court.
- A witness is the one who has a first-hand knowledge (what he has perceived in his senses directly) about the fact in issue
  - Except witness is the one who gives his professional opinion over on the issues framed by the court, unlike testimony on the basis of perception in case of ordinary witnesses.
- The fact presented by the witness can be a direct testimony to the fact in issue, it may be relevant to the fact in issue.
  - In other words, the witness may give oral attestation to the fact in issue itself or another fact which is supposed to be relevant to the fact in issue.

Competency of Witnesses

- General competency
  - As a rule, any person is considered to be capable to testify before the court unless proven otherwise by the other party.
  - General competence represents the ability of a witness to testify to facts he has perceived in his senses, without forming opinion by way of inference from the raw facts.
- Special competency
  - It refers to the an opinion of a witness on the basis of the facts he has witnessed. This is a personal analysis, deduction and conclusion of a witness. Ex: opinion about age or the state of intoxication.
  - A witness may give his opinion on matters that every lay man can make an opinion i.e. layman opinion. This is a kind of opinion that can be formed by any person. If the opinion or conclusion to be drawn is very specialized that require an expertise on the part of the witness, this is an expert opinion that can’t be testified by a layman.

Grounds of Incompetence

- Remember that competency is a rule (presumed), and incompetence is an exception; hence the party producing witness may not be required to prove the capacity of his witnesses; the burden to prove their incompetence lies on the one who claims their incapacity. To disprove the presumption, one of the following points must be proved:
  - Mental incapacity of the witness owing to age (children), insanity and intoxication.
  - Given the principle that even child or a person with mental defect can testfify so long as they can perceve what they have observed or heared and relate it to the court, the oppositng part shall prove that such person cannot correctly comprehd what they have collected in their senses and communicate it to a third person; otherwise the mere argument that a wutness is a minor or mentally derange does not bar the a person from standing as a witness.
  - The probative values attached to minors or mentaly infirm witness might not have to be the same, thetruthfulness and credibility of witnesses in general shall be examined/impeached throught various mechanisms including proof of prior conviction and it has tobe crosschecked by other relevant evidneces.
    - If the accuses becomes a witness, can he be impeached by way of previous conviction? No. why?

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- How about physical incapacity, when, for instance a witness is blind? can it be a justifiable ground for incompetence?
- How about conviction of crime (legal interdiction)?
  - It can be used to impeach the witness and discredit his testimony; but it maybe be a bar from stading as a witness. Why? Stabding as a witness is a support for the justice system, it is not to the advantage of the witness himself.
- What if the witness has interest in the outcome of the case? If a witness is a relative of consanguinity or affinity to the parties, or emotionally attached or a close friend, or a victim in criminal cases, the parties themselves?
  - This is no more a ground of incompetence. Why? What consideration has put weight in favor of accepting the testimony of close persons to the litigating persons? Presumption of ethics or pragmatic challenges i.e. absence of evidence in certain cases except those who are close?
  - But the other party can impeach the truthfulness of the testimony mentioning his interest in the case as one ground; the court had a discretion attach whatever weight it thinks fit to the testimony; together with other evidences including demeanor.

Hearsay Evidence

- Hearsay is an information oobtained from the statements of other persons; hence it doesn't represent a fcat that has been directly observed/witnessed/percieved by the witness.
- As a rule hearsay is not admissible, thought relevant, save exceptions. Why? There is no way that the statement repeated by the witness before the curt can be verified, i.e. it is an out-of-court statement prseneted before the court by a witness.
- Note that hearsay canbe determined depending upon to what issue of fatct it has been offered.
  - If 'what the document says' or 'what a person has said' is framed as a fcat in issue or a subsidiary factual issue, can it be said that presentation such statement in the document or verbalized by a person is a hearsay? No.
  - If the issue raised is 'whether someone is killed by someone' and if such is found in a document or said by a third person, presentation of such statements by the witness beofre the court definatelyconstitutes a hearsay.
  - So, the bottomline is hearsay is relative to the framed issue; a statement of a witness can be a direct knoledge or hearsay depending upon the disputed issue.

Cont’d

- The probative values attached to hearsay facts must defintely be lower than what is presented through direct knowledge; and its evidenciary value inlight of the criminal standard of proof is very much less, lilight of the rule that the judge has to be convinced abour the guilt of the accuses beyond doubt; and hearsay byitself leaves doubt because the stament mihgt have been fabricated by the one who said it first, or it migfht have been corrupted in the process of transmission due addtions or sustractions fact or misapprehensionn of the listner. the more the transmitters of of the fcat, the higher the posibality to be corrupted, and the hight the doubt it creates in the mind of the judge.
- This does ot mean that hearsay shall not be presented atlall incriminal cases; there is no harm if it is presented an one type if evidence; so that it is possible to corrobotoarte or supplement other evidences of higher evidentiary weight.
- the argument that it sshould not be admitted in criminal cases is not sounct, in my opinion; it is just an item of evidence, it does not have the effect of prejudicing the mind of the judge as in the case of character evidence.; so what is fear then?

Cont’d

- Some hearsay evidences can obtain a higher evidenceiary weight than other ordinary hearsays. These include?
  - **Dying declaration**:- if a dying person tells about the casue of his death, and such statement is reported to the court in the issue regarding the casue of death of the dying person, it is hearsay, but a higher weight msut be attached to this evidence. Why? The dying person is not expected to lie while facing death, with no motive for benefit. But why only about his death? How abouut the death of some other person or any other fcat which is relevant the issue framed?
    - This doesn’t mean that it is conclusive; still there a possibility that he might lief for the befit of others; or miscomprehended the event, and the telling witness might distort it.
    - The said hight weight is as compared to other hearsay evidences; and it doesn’t in any way compare with direct knowledge; efor example with the testimony of the a witness who was present at the situation that has caused the death og the person.

Cont’d

- What is hearsay about statements about ordinary course of business or statements against interest or statements about custom? For what issue are they be hearsays? If the issue is about what is affirmed by the statement, ther possibility if fabrication or msitake is very minimal; so how can they be hearsays? Even for other issues, if they are presented through witness, why they are hearsays?
- We look forward a further explanation of these points from the group working on hearsay evidence.

END OF SESSION

The previllege not to testify

- It is about the grounds based on which a person is justified not tosatnds a s a witness, for reasons unrelated to the outcome of litigation.
- This part shall be discusses under facts relevant, but not admissibile, regardless of the manner they are presented .. Orally, a document, electronically etc.

How the credibility of witnesses are ensured

- Through examinations and impeachment
  - Examination in chief – by the party who called the witness
  - Cross-examination (finding two opposing statements of the witness, or let him say so through various questions leading discrepancy)
  - Re-examination: by the party who called the itness with the pupose of estabilishing what has been said during chief –examniantiona and somehow confused during cross-examination by the opponent. The questions at this shall not bring new facts, playing an active role in the procees of reaching at the truth, but restricted to clarification of what has been told by the witness during chief-examniation.
- This is more to do with procedure than evidence

Introduction

- Preliminary Issues
  - Approaches to evidence law in civil and common law systems
  - Ethiopian perspectives
    - Whereabouts
- General rules of evidence
- Special rules of evidence, like procedure
- Rules of evidence from criminal context
- Rules of evidence from civil context
- Classification of evidence

Cont’d

- Types of evidences as enumerated in the Draft Evidence Rules
  - Statements by accuses persons
  - Admission
  - Judicial notice
  - Presumptions of law
  - Observation by the court in it its judicial capacity
  - Documentary evidence
    - Documentary evidence is specially important for civil cases

Terminologies

- Alleged fact
- Disputed fact
- Issue of fact
- To prove & to disprove
- Contrary/counter
- claim/proposition/allegation
- Outcome of the case
- Collateral/subordinate/side issues of fact

Relevancy of Evidence

- Depending on the relevance, an evidence may either be direct or indirect (circumstantial).
  - It the evidence at hand proves the existence or otherwise of the disputed fact directly.
  - If the evidence tends to establish the issue through inference (indirectly).
    - It is difficult to meet the criminal standard of proof with circumstantial evidence, without the corroboration by direct evidences; but if the cumulative evaluation of the indirect evidences certainly leads to a conclusion, with no contradiction or reasonable doubt, it may be taken to have met the 'beyond reasonable doubt' standard; this is because in most cases it is difficult to find direct evidences to prove the facts at issue.

Notes

- Why silence is taken to mean opposition/denial of the allegation of the prosecutor in criminal cases?
- Judicial admissions are conclusive for civil cases without the need for production of evidence, whereas judicial admissions are not conclusive to criminal cases meaning that even if an admission given, the court may disregard it and require the prosecution to provide evidence.
- If admission is with reservation or part of the accusation
- What is the rationale behind thus rule of criminal evidence?
- The whole caution is not to convict innocent that it is possible that an accuses person may admit for other reasons (to cover another person, fame)
- Classification of evidence
- Direct evidence: evidence relevant directly to the disputed issue.
- Circumstantial (indirect) evidence:-
- Themes of evidence law
- Relevancy of evidence
- Facts that is relevant to the fact in issue
- About means of adducing evidence
- Real evidence
- Oral evidence (testimonies)
- Facts that need not be proved
- Notorious facts to which judicial notice will be taken, facts that are part of public knowledge
- Admitted facts: - if facts that prove the disputed facts are admitted before an open court testimony or examination

Cont’d

- About admissibility of evidence
- This is a policy perspective, where relevant fact evidence is examined for its propriety to be adduced t to prove the fact in issue, despite its relevancy, for some policy justifications.
- Standard and burden of proof
- Standard (degree) of proof for civil cases
- Burden of proof
- Who is obliged to adduce evidence in support of the disputed facts?
- At the appeal level
- The above issues of relevancy and admissibility may form a ground of appeal
- Evidential errors is of course is reversible. If the error is significant as to affect the judgment, it has to be reverses, if not it is a harmless evidentiary error.
- Weight of evidence
- How much they support the issue of fact and how much they are direct and relevant.

- Physical and demonstrative evidences
  - It includes objects, videos, audio and picture files, reconstructions, maps and drawings, scientific experiments from a fact alleged can be inferred.
  - When it is difficult for an average person to deduce fro, physical objects, an expert witness would be called to explain what the object demonstrates.
  - The exact representation of the evidentiary f fact demonstrative evidences will be evaluated in light of the corroborating evidences.
- Documentary evidence
  - Is a written document recording a fact which is relevant to the fact in issue framed by a court.

Cont’d

- For a document to be accepted as valid evidence, it has to be authenticated. How a document is authenticated:
  - Through admission by the parties; that it is the same document that they have signed, this would be conclusive to authenticate the document.
  - Proof of signature and handwriting by presenting persons who witnessed the execution of the document
    - After all, committing a transaction or an agreement, and having some persons as observers is a wise choice on the part of the engaging parties. This expands the means of authenticating the document, if it is contested.
    - Sometimes, attestation of a document by witnesses is required by the law – attestation includes witnessing the terms of the agreement reduced into writing and putting signature a document as a witness.
  - Authentication by way of comparison: an admitted or proved handwriting with or without the help of a lay witness or experts in the field.
    - If there are not admitted samples, the court may order the person to write words/figures except the accuses (why the exception? The right against self-incrimination).

Cont’d

- Proof of contents of documents
  - in trying to prove the issue in their favor, the parties who intend to produce relevant evidence by way of document has to provide the original document itself (best evidence rule).
  - By way of exception, if the original document cannot be found (lost, destroyed or stolen), secondary evidences such as copies of the original and oral testimony can be presented.
  - These rules does not affect the mandatory provisions of the law on proof of certain legal relationships by documents, taking the nature of the transaction into consideration.