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. 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* 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 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.

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 processor in order to win the case, he is required to proof, **beyond reasonable doub**t. 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 through out 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 form 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 any one 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 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 with out 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.

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 anybody else.

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.

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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 in admissible on the ground that it is irrelevant except in some serious criminal cases like a homicide case as did in practice.

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. (see Art 134(2), 135 of cr.pc).

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 aright 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). There fore, 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.

What about in civil cases involving indispensable parties?

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.

2.1.2 Classification of Admission: formal and informal admissions

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.

Mostly, informal admissions are out-of-court admissions to a person who are not authorized to accept admissions, for example, to a friend.

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.

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).

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. <u>Facts expressly admitted in parties pleadings</u>. (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.

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

Denial which is general may be considered as admission by the rule of procedure. (Art 83 of civ-p-code).

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.

Consider *<u>Art 235-Evasive denial</u>*.

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

<u>Facts admitted need not be proved</u>

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.

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.

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).

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 "**የካደውን ነገር ያምን ወይም ይክድ እንደሆነ ይጠይቀዋል**".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

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.

May the court consider the default of the party to challenge the other side's cross-examination 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 for mal 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.

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.

2. In criminal Cases.

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. (see Art 134 of civ-p.code).

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.

2.1.3.2. Extra- Judicial Admission: Civil and criminal case

The second type of admission is evidentiary admission. This is an admission made outside of the court either orally or in a written form.

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 27and 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.

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.

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 instant 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 woreda 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. However, on the other hands, a judicial admission may not be contradicted if it is made voluntarily and intelligently.

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 with in 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 prove by evidence. In this, the proof of one fact is taken as the proof of the other fact.

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.

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.

Why we need presumption?

There are policy considerations supporting the creation and invocation of presumptions. Presumption serves a number of purposes.

The law draws presumption on those facts which are more likely to exist just to save time.

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.

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).

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.

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

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.

2.2.3. Presumption of Law

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"

What kinds of presumptions of law are there?

Presumptions of law are of two types: rebutable and irrebutable presumptions.

2.2.3.1. Irrebutable Presumption

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

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.

2.2.3.2 Rebutable presumptions.

A rebutable 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, rebutable presumption of law unlike irrebutable presumption has the effect of shifting the burden of proof to another party.

Can one rebut the presumption by adducing any evidence?

In case of rebutable 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 rebutable presumptions are rebutable 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.

2.2.3.3 Permissive 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.

2.3 Judicial Notice

What I s judicial notice?

It refers to facts which a judge can be called up on to receive and to act up on either from his know ledge of them or from enquires to be made by him self for his own in

formation from sources to which it is proper for him to refer.

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.

What facts are subject of judicial notice?

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 inquires .The inquiry may include referring to text books, works of reference, certificates from government officials and oral statements from witnesses.

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.

Chapter three: Relevance and admissibility of evidences

Introduction

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.

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.

3.1 Facts in issue

Evidence is not relevant in the abstract but rather to some preposition, and for the evidence to be admissible it must be relevant to a material proposition.

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 one's that can be perceived by our five senses.

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.

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).

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.

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.

Thirdly, collateral facts may have to be proved as a condition to the admissibility of certain types of evidence.

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.

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.

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.

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 other wise in admissible.

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.

Assessment of relevance is governed by the cannons of logic general experience and common sense.

3.3 Facts Relevant to facts 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.

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 un reflected 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 thought 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.

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 starting 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.

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.

(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.

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.

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.

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.

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.

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 a avert suspicion from himself are relevant on the question of his quilt.

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.

3.4 Relevancy of Confession

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.

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 in criminate himself may be considered inadmissible and may be excluded on the ground of unfairness.

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 there by 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.

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.

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, (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.)

2. Concomitant evidence (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.) and

3. Retrospectant evidence. (is the opposite of prospectant evidence. It is the case when the existence of the later fact refers the existence of the former or which is based on back ward looking style of reasoning.)

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.

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.

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.

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.

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.

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

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.

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.

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

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 5ofciv.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 abiding effect up on 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 in no provision which explicitly states as to whether a conviction is or is not binding on civil court.

3.8 Relevancy of character evidence

What is meant by "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.

- The relevancy of character evidence is different in civil and criminal cases.

In civil cases, character is generally irrelevant.

In criminal cases good character of the accused is always relevant.

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.

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.

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).

Good character will be produced for mitigation and bad character for aggravation. (Art. 148 and 149 of cr. P. code).

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.

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.

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.

There are also some facts which are relevant but which may not be proved.

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.

There are three relevant evidence which may but be proved in the name of public policy. These are evidence as to affairs of state, information 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.

(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.

(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.

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.

- 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.

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?

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. (Read rule 53-57 of DER and, Art 2003 of civil code)

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.

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 no where 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.

CHAPTER FOUR: ORAL EVIDENCE

4.2 Oral evidence: Definition

"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.

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.

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.

4.3 Importance 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.

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.

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.

4.3Nature and Development of Oral Evidence in Different Legal Systems

A. Common Law

In common law legal system, oral evidence is given considerable weight and will usually prevail over written evidence.

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

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.

There is less emphasis on oral arguments and examination.

4.3Competence 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.

Thus, a competent witness is one who is fit and commonly gives his testimony before courts or a judicial proceeding under oath or affirmation.

A) Types of Competency of Witnesses

There are 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.

Thus, to be included as witness in the general competency a person must posses the organic and moral capacities.

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.

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.

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.

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.

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.

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.

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.

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

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.

4.6. Examination of witness

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.

The other important point to be considered is that the prohibition leading question in examination-in-chief. (Art. 263(2) of civil procedure code and Art.137 (2))

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.

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 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. (Art. 263/3 cip.code/).

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.

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 is confined to issues that were covered in cross-examination.

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."

4.7 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.

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.

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.

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
B. Absence of oath
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.

4.7.3 Exception to hearsay evidence

There are certain exceptions to the hearsay rule, which makes the hearsay evidence admissible.

1. Dying Declaration (Art. 29/a/ of DER)

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.

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.

2. Statements made in the ordinary course of Business (Art 29 of DER)

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.

3. 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.

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.

4. 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.

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.

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.

Most privileges are designed to promote certain kinds of relationship, and particularly to promote confidential communication with in 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 with in 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.

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.

Other policies may be to uphold the integrity of a profession.

Other privileges operates 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.

4.8.2 Types of privileges

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.

2. Governmental privileges

Certain records required by the government to be kept or submitted may be attended by a **“required report privilege**.”

3. Professional confidentiality

The attorney-client and doctor-patient privileges.

4. Marital privileges

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.

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.

CHAPTER FIVE: REAL EVIDENCE

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.

5.1 Demonstrative evidence

Demonstrative evidence concerns itself with any type of physical objects which are capable of being inspected by the court and demonstrate the existence of a fact in issue.

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.

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.

Demonstrative evidence is evidence that illustrates or helps explain oral testimony, or recreates a tangible thing, occurrence, event, or experiment.

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,

The next most general rule involves the foundational requirements for demonstrative evidence. Certain preliminary steps must he followed such as authentication and accuracy.

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.

Representational accuracy—the demonstrative evidence should fairly depict the scale, dimensions, and contours of the underlying evidence.

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.

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.

5.2. Documentary evidence

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.

The basic differences of documentary and physical evidence, a seemingly simple but complex distinction.

a) 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.

Documentary evidence is any evidence introduce at a trial in the from of hard or soft(electronic) documents.

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 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 unless there is a good reason not to do so.

5.3Authentication 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..

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?

B) Proof of signature or handwriting

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. (Art. 59/1/)

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.

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.

5.5 Proof of contents of documents

Rule 53 of the draft evidence rules stats 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.

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.

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 realties 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

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 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.

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.