Ghana School of Law

Course Manual for
Law of Evidence

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Lecture Distribution

2019

Week One

1. INTRODUCTION
   a. Meaning of evidence: common law and Evidence Act
   b. Concepts and terminologies; purposes and categories of evidence
   c. Judicial enquiry: facts in issue; preliminary and collateral facts
   d. Means of proof: traditional classification of evidence: testimonial evidence; hearsay evidence(brief introduction); introduction to documentary evidence

Week Two

1. MEANS OF PROOF
   a. Circumstantial evidence
   b. Traditional evidence
   c. Digital or electronic evidence
   d. Witness statements

Week Three

1. RELEVANCE, ADMISSIBILITY OF EVIDENCE
   a. Meaning of 'relevant' evidence
   b. Evidence Act and admissibility pf evidence
   c. Judicial discretion and admissibility
   d. Evidence as regards character
   e. Evidence obtained by improper means

Week Four

1. PROOF/BURDEN OF PROOF
   a. Matters not requiring proof
   b. Judicial notice: meaning
   c. Judicial notice without enquiries/judicial notice upon enquiries

d. Personal knowledge and judicial notice
e. Formal admissions
f. Proof of foreign law

Week Five

1. BURDEN OF PROOF
   a. Nature of burden of proof
   b. Types of burden: legal/evidential burden
   c. Who bears the burden: criminal/civil matters
   d. Express statutory exceptions: onus reversal provisions/implied statutory exceptions
   e. Shifting of the burden: defences and burden of proof

Week Six

1. BURDEN OF PROOF 2
   a. Insanity and burden of proof
   b. Standard or degree of proof: civil/criminal
   c. Preponderance of probabilities – meaning
   d. Proof beyond reasonable doubt –meaning
   e. Proof of crime in civil matters

Week Seven

1. PRESUMPTION
   a. Meaning of presumption: inference; presumption of fact/presumption of law
   b. Types of presumptions: conclusive/rebuttable
   c. Presumptions and authentication and identification of evidence
   d. Estoppels general meaning
   e. Estoppels by records (res judicata)
   f. Types of estoppels res judicata
   g. Privity, identity and capacities of parties and estoppels
   h. Estoppels by conduct: acquiescence/written documents
   i. Estoppels in criminal cases

Week Eight

1. TRIAL BY JUDGE AND JURY
    a. Functions of judge and jury: general
    b. Criminal prosecutions: duty of the judge/duty of the jury
    c. Exceptions to the general rules
    d. Judicial control of the jury: withdrawal of issues; exclusion of admissible evidence
    e. Summing-up

Week Nine

1. WITNESSES: GENERAL OVERVIEW
    a. Brief historical overview
    b. Competent and compellable witness under Evidence Act
    c. Special categories of witnesses: accused and accomplices; spouse; children and persons of unsound mind; sovereign and diplomats; judges and jurors; court witnesses
    d. Oath and affirmation
    e. Procedural issues relating to witnesses

Week Ten

1. QUESTIONING OF WITNESSES
    a. Examination in chief
    b. Leading questions
    c. Refreshing memory
    d. Hostile and unfavourable witness
    e. Cross-examination
    f. Testing credibility of witnesses
    g. Rule against narrative and exceptions
    h. Evidence Act and testing credibility of witnesses
    i. Corroboration

Week Eleven

1. EVIDENCE OF CHARACTER
    a. Character generally: character and reputation
    b. Admissibility/exclusion of character evidence
    c. Evidence of previous convictions

d. Good and bad character
e. Similar facts evidence: Lord Herschell is rule and modifications

Week Twelve

1. PRIVILEGE: General introduction
   a. Privilege against self-incrimination
   b. Lawyer-client privilege
   c. Waiver of privilege generally
   d. Exceptions /fraud
   e. Religious advice privilege; informants
   f. Compromise and matrimonial reconciliation
   g. Marital communication

Week Thirteen

1. HEARSAY EVIDENCE
   a. General character of hearsay: direct and indirect evidence
   b. Common law hearsay rule
   c. Evidence Act and hearsay rule
   d. Exceptions to the general hearsay rules:
      1. Former testimonies
      2. Evidence of state of mind
      3. Family history
      4. Admissions: silence and admissions; vicarious admissions

Week Fourteen

1. HEARSAY EVIDENCE 2
   a. Lawyer client relations and hearsay rules
   b. Statement by referees
   c. Confession statements
      1. What constitutes voluntariness
      2. Independent witness: requirement of
      3. Facts discovered in consequence of inadmissible confession
      4. *Voire dire* and admissibility of confession
   d. *Res gestae*
   e. Dying declarations

Week fifteen

1. DOCUMENTARY EVIDENCE
    a. What is a document and uses of document
    b. Authentication and proper execution of documents
    c. The best evidence rule: common law rule
    d. Evidence Act on uses of originals and duplicates
    e. The Evidence Act and best evidence rule
    f. Exceptions to the rule: secondary evidence rule
        1. Official writings/bankers books

Week sixteen

1. DOCUMENTARY EVIDENCE 2
    a. Parol evidence rule
    b. Parol evidence as aid to interpretation
    c. Parol evidence and construction of Wills
    d. Illiteracy and proof of documents

Week Seventeen

1. OPINION EVIDENCE
    a. General introduction: opinion and facts
    b. Duty of witness to adduce facts not opinion
    c. Exceptions to the general rule
    d. Lay opinion evidence: the test for it
    e. Expert opinion evidence: test for admissibility
    f. Qualification of expert
    g. Expert opinion and ultimate issues

Week eighteen

1. Public policy
    a. General overview of public policy in law
    b. Rationale behind exclusion of evidence on basis of public policy
    c. Privilege and public policy: exclusion of evidence
    d. Examples of matters of public policy
        1. Maters of public interest and public security
        2. Diplomatic relations

3. Identity of informants
e. Discovery, disclosure and inspection of documents
f. Public policy and illegality

2. EVIDENCE IN APPELLATE PROCEEDINGS
a) Statutes governing appeals in Ghana
b) Time in appeal proceedings
c) Grounds of appeal

Week Nineteen

3. Review of current legislation and judicial decisions in the course of the year

week Twenty

FINAL MOCK EXAMINATION[1]

1 Tutorials and practical exercises should be FACTORED INTO THE Weekly Distribution.

How This Course is Organised

The outline shows the areas covered in this course. There are fourteen chapters covered in this material

Chapter 1 deals with the development of the law of evidence: the common law and statutory law in Ghana; the scope of the law of evidence; the relationship between law of evidence and substantive law and the sources of the law of evidence. The chapter also deals with the general notions underlying the law of evidence. The chapter concludes with the various means of proof including circumstantial evidence, traditional evidence and electronic evidence

Chapter 2 deals with the issue of relevance and admissibility of evidence. The chapter explains the meaning of relevant evidence, consideration of irrelevant evidence, the discretion of court in admitting relevant evidence, whether the court has inclusionary discretion in admitting evidence. The chapter concludes with brief discussion of the admissibility of evidence regarding character, evidence obtained through improper or unlawful means and fresh evidence on appeal.

Chapter 3 is concerned with the fundamental notion of proof and matters not requiring proof. It deals with the meaning of judicial findings, judicial notice, the statutory ambit within which to take judicial notice, the extent to which judges can rely on personal knowledge in taking judicial notice. The second part of the chapter deals with burden of proof, its meaning and the two main legs of the burden of proof: legal and evidential burden, the placement of the burden in criminal and civil cases, defences and burden of proof and the standard of proof in criminal and civil trials. The chapter concludes with the proof of crime in a civil matter and proof of matrimonial causes.

Chapter 4 is concerned with presumption and inferences in judicial enquiries. It starts with the meaning and differences between presumption and inference, the types of presumptions: conclusive and rebuttal presumptions as well as the relevance of presumptions in identification and authentication of evidence. The chapter also deals with the difference between conclusive presumptions and estoppels, types of estoppels: estoppels *in personam* and *in rem;* estoppels res judicata and effect of same; estoppels by conduct: silence and acquiesence and double jeopardy as a form of estoppels in criminal trials.

Chapter 5 which calls for the reading of provisions in the Criminal Procedure Code (Act 30) deals with a trial by judge and jury. It deals with the basic functions of a judge and jury, exceptions to the general rule relating to the provinces of judge and jury and the meaning of a judge sitting in a composite position. The chapter also deals with judicial control of the jury including issues such as the power of a judge to withdraw issues from the jury, determination of prima facie case and its effect, discretion to exclude admissible evidence, determining admissible evidence and the summing up of evidence after close of parties case.

Chapter 6 and 7 will be taken together as they deal with witnesses and procedural matters relating to witnesses. This part will therefore deal briefly with general and historical overview relating to categories of witnesses, competency and compellability of witnesses, special categories of witness namely an accused person, spouses of accused persons, children and persons of unsound mind, sovereign and diplomats, judges and jurors as well as court witnesses. The second part deals with the witnesses to be called, the procedure for calling witnesses, failure to call material witnesses; the questioning of witnesses: examination in chief, cross-examination and re-examination. It will also deal with the difference between hostile and unfavourable witnesses, collateral questions and finality of answers, failure to cross-examine and the legal effect, how to test the credibility of witness. Additionally, we will deal with the common law rule on narrative or rule against self-serving and the exceptions to the rule, the Evidence Act and credibility of witnesses, specifically dealing with effect of previous inconsistent statement and exhibition of bias and corroboration.

Chapter 8 deals with character evidence, the nature of character evidence; good and bad character; evidence of previous convictions; similar facts evidence; distinction between crime and surrounding circumstances and similar facts evidence and proof of identity.

Chapter 9 is concerned with privilege dealing with the general introduction of privilege; types of privilege namely privilege against self-incrimination; lawyer client privilege, issue of confidentiality, the extent of the privilege, the protected material, the difference between litigation privilege and professional advice privilege, waiver of privilege, fraud and lawyer-client privilege; mental treatment (doctor-patient) privilege; religious advice (penitent-priest) privilege; protection of informants; privilege relating to compromise and settlement negotiations; matrimonial reconciliation and marital communication privilege.

Chapter 10 deals with one of the major areas of evidence, that is rules on hearsay. The chapter treats the general character of hearsay (exclusionary principle); the common law rule and the Evidence Act and hearsay; the main exceptions to the general hearsay rule: evidence of state of mind; business and public records; family history/pedigree; admissions; admissions by conduct, admissions by silence, vicarious admissions; hearsay rule and lawyer client relationship; admission of co-conspirators; nature, procedure and admissibility of confession statements discussing among others what constitutes voluntariness; procedure for admission of confession statement – voir dire, the admissibility or otherwise of facts discovered in consequence of inadmissible hearsay; res gestae, its nature – contemporaneousness in time and space; and dying declarations.

Chapter 11 tackles documentary evidence dealing in detail the best evidence or primary evidence rule and the exception to the rule :secondary evidence rule namely: official writings; bankers books and the parol evidence rule discussing among others the use of parol evidence as an aid to interpretation; extrinsic evidence and construction of wills and then illiteracy and proof of documents.

Chapter 12 deals with the general notion of public policy and discusses matters of public interest; national security and diplomatic relations; identity of informants; rule on discovery, disclosure and inspection of documents (Students have to consult their notes on this topic in Civil Procedure and the provisions on same in CI 47). The chapter concludes with the discussion of the issue of illegality and public policy.

Chapter 13 deals with the nature and use of opinion evidence. It starts with the discussion of the inherent dangers of expert evidence, the admissibility of expert evidence, the provisions of the Evidence Act on expert evidence; some common law test for admissibility such as relevance, necessity and absence of any exclusionary rule. The chapter also discusses the qualification of experts; expert opinion and ultimate legal issues, the court and consideration of weight of expert evidence. The chapter ends with a brief discussion on lay (non-expert) witnesses.

The final chapter, chapter 14 deals with evidence in appellate proceedings, courts with power of review and and grounds of appeal.

Materials Required for this Course

In this Manual most of the essential reading materials come from textbooks and cases. It is strongly recommended to buy your own copy of at least one major

textbook. Students must also procure the Evidence Act, Act 323; Criminal and Other Offences Procedure Code, Act 30 and the Civil Procedure (High Court) Procedure Rules. Doing comparative study of the rules of evidence, as in other common law jurisdictions has an added advantage.

Textbooks

Maxwell Opoku-Agyemang, Law of Evidence in Ghana, Second Edition, ADMAX Law Series 2015

Ofori Boateng, Law of Evidence

S.A. Brobbey, The Essentials of Law of Evidence

Eggleston on Law of Evidence

Wigmore on Law of Evidence

Professor Avtar Singh Law of Evidence in India

References may also be made to:

Maxwell Opoku-Agyemang, Relying on Emotions, Prejudice in Proof of Crime Beyond Reasonable Doubt; GBA CLE Series 2012

Maxwell Opoku-Agyemang, The Ten Commandments of Cross-Examination, GBA CLE Series 2013

Self-Assessment Questions or Workplan

These are general questions developed to set the parameters of each study unit of the course and test students' appreciation of the various principles. Students should carefully and dutifully work through these questions or workplans using their textbooks and casebook to assist them. The workplans will be of great value to students especially during review and revision periods or the final examination

Learning Outcomes

Each unit of the course (chapter or sub-chapter) contains a list of learning outcomes or objectives which indicate what students should be able to do at the end of each unit. If a student cannot meet the objectives or outcomes of a particular unit, then his or her knowledge and understanding is not yet complete.

The essence of this Manual

This manual is neither a textbook nor a substitute for a textbook; it merely serves as a guide through the complex web of legal principles and relevant cases in the law of evidence. The Manual obviously refers to important cases which students should know and more importantly understand. However, it is not to be implied that cases not referred to in this Manual can be ignored or are of no consequence.

Students are advised to read relevant portions of the Manual to get a general picture of a topic before referring to his or her text or casebook. Students are encouraged to read the major cases referred to in each unit. Cases should as much as possible be read as a whole rather than referring to headnotes.

After exhausting each unit, students should ask themselves the following rhetorical questions:

How does this topic relate to what I have already learnt in this course?

Are the cases consistent in the application of common law and statue?

How is the area of law developing? Are there developments in other common law jurisdiction relevant to this country.

Chapter One

This chapter is divided into TWO units namely:

Introduction to The Law of Evidence;
and Means of Proof

Unit 1

INTRODUCTION AND NATURE OF LAW OF EVIDENCE

This part provides a general introduction of the course and to some basic concepts, general notions underlying the law of evidence and the sources of law of evidence. You need to understand evidence as is used for purposes of judicial inquiry and its central place in the resolution of legal controversies.

Read: Opoku-Agyemang (Second Edition), Chapter 1, p 1-19 and Brobbey, Chapter 1 p. 1-11

Objectives

By the end of this Unit you should be able to:

a. Define evidence in relations to judicial inquiry
b. Identify the main sources of the law of evidence
c. Explain what are facts in issue and collateral facts which require evidence
d. Explain the general notions underlying the law of evidence
e. Explain the relationship between law of evidence and substantive law

Students should from this onset acquire working knowledge of the provisions of the Evidence Act, Act 323 on judicial inquiry and the purposes of the law of Evidence and its relationship with the Constitution, 1992 on fair trial

Evidence

Your understanding of evidence at this point is to answer the question in any litigation "where is your evidence or what is your evidence? The answer from the litigant helps the court to make its decision. Evidence in simple terms is a fact which tends to prove a person's submission. Whenever a judge is called upon to pronounce the rights and liabilities of parties, certain information or evidence must be submitted to him which will create a belief or otherwise in his mind as to what the real facts are. The mathematical equation for judicial decision should be Facts + Law = Judicial Decision. The function of the law of evidence is to lay down rules according to which facts can be proved or disproved. Law of evidence is thus procedural.

Working definition of evidence

Evidence means anything by which any alleged matter of fact is either established or disproved. In other words anything that makes the thing in question evident to the court.

Act 323 definition of evidence Section 178(1): evidence means "testimony, writings, material objects or other things presented to the senses that are offered to prove the existence or non-existence of a fact"

Relationship between substantive law and law of evidence

You should have a firm grasp of the substantive areas of law such as the law of contract, constitutional law, criminal law, immovable property, family law, company law etc. The law of evidence and substantive law should move in tandem as the law of evidence comes to fulfil the substantive law but not to replace it.

> "The law of evidence does not affect substantive rights of parties but only lays down the law facilitating the course of justice. The Evidence Act lays down the rules of evidence for the purposes of the guidance of the courts. It is procedural law which provides, inter alia, how a fact is to be proved" HARI SWAROOP J in RAM JAS V SURRENDRA NATH [1980] A.I.R 385 at388

You should take one area of law; identify the ingredients which must be proved. Once that is done you must refer to the rules of evidence to determine how you proved the various elements or ingredients. This is done after you have identified whether the matter is CIVIL or CRIMINAL.

Sources of Law of Evidence

You should remember the source of law as taught in Ghana Legal System by recalling Article 11 of the Constitution 1992 which provides that the laws of Ghana shall comprise:

a. The Constitution;
b. Enactments made by or under the authority of the Parliament established by the Constitution....etc

All existing laws which are consistent with the provisions of the Constitution 1992 are not affected by the coming into force of the Constitution. The Evidence Act (previously called Evidence Decree 1976 NRCD 323) forms part of the existing law under the Constitution.

Specifically the following may be said to constitute the sources of law of evidence

i. The Constitution 1992
ii. Acts of Parliament, Decrees, existing laws and their amendments relevant to evidence and
iii. Judicial decisions on rules of evidence

Evidence Act, Act 323

You should be familiar with the provisions of this Act. The Act took effect in January 1976 and sought to codify the English common law rules on evidence. Among others, as provided in the MEMORANDUM to the Act "The Act replaces the common law and most of the statute law relating to evidence and provides a comprehensive set of rules which will greatly assist in the administration of justice". The Act "shall apply in every action whether civil or criminal" SECTION 178(1). Since one of the intentions of the drafters of the Act was to reduce technicalities and cumbersomeness of the common law, SECTION 178(2) enjoins that in "applying this Act, and in particular in determining whether and to what extent to exercise its power under section 8[1], the court shall have special regard to the fair application of this Act in respect of a party not represented by a lawyer. The provisions of the Act are to be interpreted and applied so as to achieve a consistent law of evidence and the most just, expeditious and least costly administration of the law: SECTION 178(4).

1 Section 8 of the Act deals with the power of court to exclude evidence as follows: evidence that would be inadmissible if objected to by a party may be excluded by the court on its own motion

Even though common rules have been codified nothing prevents Ghanaian courts from looking up to English decisions as a guide to the correct interpretation of the Act in circumstances where similar provisions are found under the common law or under an English statute.

You should have working understanding of Article 19 of the Constitution 1992 which deals with fair trial (due process) and its relevance with the rules of evidence. This is consistent with our understanding of the principles of fair hearing – rules of natural justice: *audi alteram partem* etc (Article 19(3) and the right to remain silent (Article 19(10).

General notions underlying law of evidence

Notwithstanding the promulgation of the Evidence Act of Ghana, law of evidence is highly influenced by English common law rules. The Act did not abolish the common law rules, such as the exclusionary rules like hearsay, admissibility and relevance but codified them;

There is deep-seated fear of persons offering evidence. That such persons will not act against their interest. Persons testifying are considered Devil Advocates as "no man would declare anything against himself, unless it was true; but that every man, if he was in difficulty, or in the view to any difficulty, would make a declaration for himself".

The system of oath swearing, the jury system and common law adversary system play pivotal role.

Basic concepts and terminologies

1. Evidence must be relevant for it to be admitted;
2. Evidence must be admissible. All relevant evidence is admissible except otherwise provided; all irrelevant evidence are inadmissible
3. Judges exercise exclusionary discretion in admitting relevant evidence;
4. Judges have no discretion in admitting irrelevant evidence
5. Parties produce evidence and court determines the weight of evidence at the end of trial

Judicial inquiry

This consists of two facets: question of facts and questions of law. In judicial inquiry, questions of law are determined by the court (SECTION 1 EVIDENCE

ACT); questions of facts decided by the trial of facts (SECTION 2). You should identify some exceptions to the general delineation of the functions of judge and jury including the issue of summing-up; determination of foreign law and admissibility of evidence etc.

Facts in Issue

This is very important for the preparation of any case. Courts determined facts which are in issue, that is, what parties have joined issue to contest and nothing more. A fact can be said to mean and includes: anything, state of things or relation of things, capable of being perceived by the senses; any mental condition of which any person is conscious. A fact may therefore be physical or mental. Thus, that a man has a certain reputation is a fact; the state of mind of a person is a fact: good faith, bad faith; intention or negligence.

The duty of the court is to identify the areas of controversy. Facts which are in dispute are the FACTS IN ISSUE. There are two principal facts in issue: THOSE WHICH ARE IN ISSUE AS A MATTER OF SUBSTANTIVE LAW (Restricted facts in issue) and facts in issue deduced from the LAW OF EVIDENCE (extended facts in issue. The restricted facts in issue are all the issues which a party must prove in order to succeed including the existence or non-existence, nature or extent of any right, liability or disability or defence etc

You are to refer to one criminal and one civil case. Identify both the restricted and extended facts in issue for the determination of the court. In your view was there an omission of any relevant fact in issue?

Most cases involve more than one issue. However, it is not fatal for parties to contest only one issue. In criminal cases the charge sheet constitutes the facts in issue. If the accused raised a defence it becomes part of the facts in issue. In a civil matter the facts in issue are deduced from the pleadings of parties (mostly from the STATEMENT OF CLAIM; STATEMENT OF DEFENCE AND COUNTERCLAIM). You should take seriously your understanding of PLEADINGS AND DRAFTING OF PLEADINGS and the effect of failing to deny a claim in civil procedure.

In addition to main facts in issue, you should understand preliminary/collateral or subordinate facts in issue. These are mainly issues borne out of the rules of evidence and they include admissibility or inadmissibility of evidence, qualification or disqualification of a witness etc

Activity

The discussions in this Unit may not on its own form a subject of an examination question but underlines all questions in any examination. They are of fundamental nature and must be the basis of any activity in this course.

Review Questions

UNIT 2

Means of Proof: Traditional classification of rules of evidence

This part provides the comprehensive tools that a litigant needs to prove his or her case. Once a litigant has identified the facts in issue in a litigation, he or she must resort to the various strands of evidence which enable him or her to prove or disprove a claim.

Read: Opoku-Agyemang (Second Edition) Chapter 1, p 19-62

Objectives

By the end of this Unit you should be able to

a. Explain all the means of proof including testimonial evidence; documentary evidence; real evidence and material objects;
b. Explain and examine the use of circumstantial evidence
c. Distinguish between circumstantial evidence and mere rumours and suspicion
d. Explain and apply the test for resolving conflicting traditional evidence
e. Explain and examine provisions in the Evidence Act and other statutes for the admissibility of electronic or digital evidence;
f. Identify the procedure and the effect of witness statement (CI 87) on viva voce evidence

Testimonial evidence

This is the oral statement given by a witness in court in the witness box. Oral testimony is offered as the evidence of the truth of that which is stated. Most of the rules of evidence as regards oath, competence, cross-examination are designed to ensure that testimonial evidence are reliable.

These rules are discussed in detail in **OPOKU-AGYEMANG** (Chapters 6 and 7).

You need to understand the general rule that a witness can give evidence only of facts of which he has a personal knowledge of, unless he gives evidence as an expert. He must give evidence which he had perceived with one of his five senses: taste, touch, seen, smell, hear. In other words, oral evidence must be direct, that is telling the court of only a fact of which he has first hand personal knowledge.

For example, if the question before a court is whether a particular statement was made, a person who heard the making of that statement may appear in court to tell the court the fact that the statement was made in his presence or hearing. That amounts to direct oral evidence.

On the other hand, if the statement was not made in his presence or hearing and he subsequently came to know of it through some other sources, he cannot appear as a witness offering direct evidence for his knowledge is nothing but hearsay and hearsay is generally held irrelevant (SEE R V ERISWELL(INHABITANT) (1870) 3 R.R 707; 106 ER 815.

To have a deeper understanding of HEARSAY read CHAPTER 10 of **OPOKU-AGYEMANG** and sections 116-118 of the Act.

A party against whom testimonial evidence is given against has the right to cross-examine that witness.

Documentary Evidence

For detailed discussion of DOCUMENTARY EVIDENCE as a means of proof refer to Opoku-Agyemang chapter 11

A document may be used either for its content or as a chattel. When the contents of a document is relied upon, it is incorporated as part of the testimonial evidence of the witness. When treated as a chattel, the document constitutes part of the real evidence or material objects. For instance, if a will is stolen, it can be produced in court to show that it bore the fingerprints of the accused. When treated as a statement however, a document may form part of the testimonial evidence or as part of circumstantial evidence. When used as a circumstantial evidence, although it is produced and identified by the witness, the document is not incorporated into the testimony as haven been written or read by him, neither are its contents as proof of anything they may assert. It is offered to the court, for example, as a kind of document which would only have been executed by someone in possession. You may read the Canadian case of R V EMES (2001) 157 CCC 3d

124. In this case the court agreed that the presence of personal documents in an apartment show the occupation of the said apartment by the accused.

For the detailed rules on admissibility or otherwise of documentary evidence, REFER to sections 163-177 of the Act

Real Evidence/Material objects

This evidence takes the form of material objects or physical things produced as exhibits for the court to see or smell or feel or listen. Material objects must be presented in the presence of parties and failure to do so may be the subject of observation by the judge. In exceptional cases the court will accept secondary evidence of real objects rather than requiring their physical production, eg. Photography of a tombstone rather than the tombstone itself. You must know that real evidence is valueless unless accompanied by testimony identifying it as the object the qualities of which are in issue. In certain cases, a court may visit the locus in quo to examine real or physical evidence

Circumstantial evidence

You must take this evidence very seriously as circumstantial evidence most often forms a basis for various examination questions. In addition, it is very essential in proving many criminal cases. The importance of this evidence is the fact that in most cases crimes are committed outside the view of witnesses. Thus, parties resort to circumstantial evidence where there are no eye-witnesses.

Circumstantial evidence is defined as any fact from the existence of which the judge may infer of a fact in issue. It is based on reasonable deductions from narrated circumstances. A typical instance is afforded by a statement of a witness at a murder that he saw the accused carrying a blood-stained knife at the door of the house of the victim. With this evidence, the prosecutor invites the jury or the court to assume that the witness is speaking the truth, and second, to infer that the accused inflicted the fatal wound on the deceased with the blood-stained knife.

The danger of mere speculations, suspicions and rumours is not lost on the court in the use of circumstantial evidence in proving the guilt of an accused. You should therefore be able to distinguish between a reliable circumstantial evidence from mere speculations and rumours. This call for reading of the most important cases on the topic such as:

R V EXALL (1866) 4 F&F 922 at 929 where POLLOCK CB explains the nature of circumstantial evidence NOT A CHAIN but rather MORE LIKE THE CASE OF A ROPE COMPRISED OF SEVERAL CORDS. ONE STRAND OF THE CORD MIGHT BE INSUFFICIENT TO SUSTAIN THE WEIGHT, BUT THREE STRANDED TOGETHER MAY BE QUITE OF SUFFICIENT STRENGTH...

Relying on circumstantial evidence as your best evidence: authorities include R V TAYLOR (1928) CRIM APPEAL REP 21; R V ONUFREYCYK (1955) 1 QB 388: IT IS OFTEN THE BEST EVIDENCE. IT IS EVIDENCE OF SURROUNDING CIRCUMSTANCES WHICH BY UNDESIGNED COINCIDENCE IS CAPABLE OF PROVING A PROPOSITION WITH THE ACCURACY OF MATHEMATICS. IT IS NO DEROGATION OF EVIDENCE TO SAY IT IS CIRCUMSTANTIAL

DISTINGUISHING CIRCUMSTANTIAL EVIDENCE FROM MERE RUMOURS AND SPECULATION.

You must read the cases of STATE V ALI KASSENA [1962] 1 GLR 144; STATE V BROBBEY AND NIPA [1962] 2 GLR 101

Brobbey and Nipa is fully dealt with in **OPOKU-AGYEMANG** pp 25-28

The test for relying on circumstantial evidence to convict: A presumption from circumstantial evidence should be drawn against the appellant only when the presumption follows irresistibly from the circumstances proved in evidence; and in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the appellant, and incapable of explanation upon any other reasonable hypothesis than that of guilt

You should read the following cases:

STATE V ANANI FIADZO [1961] GLR 416;

KAMIL V REPUBLIC [2011] 1 SCGLR 300

GLIGAH & ANO V REPUBLIC [2010] SCGLR 870

THESE CASES ARE FULLY DEALT WITH IN OPOKU-AGYEMANG PP 28-35

On proof of adultery with circumstantial evidence in matrimonial cases YOU SHOULD READ

ADJETEY & ANO V ADJETEY [1973] 1 GLR 216 (This case can be found in Opoku-Agyemang pp 35-37

The importance of circumstantial evidence in adultery cases is borne out of the statement in Halsbury's Law Report quoted with approval in Adjetey as follows:

DIRECT EVIDENCE OF ADULTERY IS RARE. IN NEARLY EVERY CASE THE FACT OF ADULTERY IS INFERRED FROM THE CIRCUMSTANCES WHICH BY FAIR AND NECESSARY INFERENCE LEAD TO THAT CONCLUSION. THERE MUST BE PROOF OF DISPOSITION AND OPPORTUNITY FOR COMMITTING ADULTERY....AND LIKEWISE THE COURT IS NOT BOUND TO INFER ADULTERY FROM EVIDENCE OF OPPORTUNITY ALONE...

You should also read about circumstantial evidence generally in Brobbey, SA THE ESSENTIAL ELEMENTS OF LAW OF EVIDENCE, P 252-268

Traditional evidence

The use of traditional evidence as a means of proof is crucial in cases such as ownership of lands, stools, etc. Cases like these are proved through conflicting traditional stories, myths, folklores by rival families.

Traditional evidence is often derived from tradition or reputation or statements of deceased persons with regard to questions of pedigree, ancient boundaries etc when no living witnesses are available to testify to such matters. There is difficulty in adducing direct evidence. Traditional evidence is mostly hearsay. But for SECTIONS 128 AND 129 OF THE ACT, TRADITIONAL EVIDENCE WOULD HAVE BEEN INADMISSIBLE. It is thus an exception to the hearsay rule.

To identify the test for resolving conflicting traditional evidence YOU MUST READ ADJEIBI-KOJO V BONSIE (1957) 3 WALR 257

In this case the PRIVY COUNCIL laid down the most satisfactory method in resolving such disputes in these words:

...THE MOST SATISFACTORY METHOD OF TESTING TRADITIONAL HISTORY IS BY EXAMINING IT IN THE LIGHT OF SUCH MORE RECENT FACTS AS CAN BE ESTABLISHED BY EVIDENCE IN ORDER

TO ESTABLISH WHICH OF TWO CONFLICTING STATEMENTS OF TRADITION IS MORE PROBABLY CORRECT

In attempting to amplify the test as provided above, See Wiredu and Aikins JJSC in ADJEI V ACQUAH & ORS [1991] 1 GLR 13 Where it was said that WHAT THE AUTHORITIES REQUIRED WAS THAT TRADITIONAL EVIDENCE HAD TO BE WEIGHED ALONG WITH RECENT FACTS TO SEE WHICH OF THE TWO RIVAL STORIES APPEARED MORE PROBABLE. THE COURT WAS OF THE VIEW THAT FACTS ESTABLISHED BY MATTERS AND EVENTS WITHIN LIVING MEMORY, ESPCECAILLY EVIDENCE OF ACTS OF EXERCISE OF OWNERSHIP AND POSSESSION MUST TAKE PRECEDENCE OVER MERE TRADIONAL EVIDENCE

As to whether this statement subordinate traditional evidence to acts of recent events and therefore changes the classical test laid down in Adjeibi-Kojo v Bonsie YOU MUST READ IN RE KODIE STOOL; ADOWA V OSEI [1998-99] SCGLR 23 where Hayfron-Benjamin JSC with Sophia Akuffo JSC concurring said

> "I THINK COUNSEL FOR THE PLAINTIFF HAS MISUNDERSTOOD THE AMPLIFICATION-PERHAPS IF I MAY SAY SO, THE SIMPLIFICATION OF THE ADJEIBI-KOJO PRINCIPLE. THE DICTUM OF EWDARD WIREDU JSC IN ADJEI V ACQUAH DOES NOT MEAN THAT RIVAL TRADITIONAL EVIDENCE MAY BE RESOLVED SOLEY BY RECENT ACTS OF EVENTS WITHOUT REFERENCE TO THE TRADITIONAL EVIDENCE ON RECORD. EDWARD WIREDU JSC IN THAT DICTUM REQUIRES TWO STEPS TO BE TAKEN IN ASSESSING THE PROBABILITY OF THE CORRECTNESS OF RIVAL TRADITIONAL STORIES. FIRST THE RIVAL STORIES MUST BE WEIGHED ALONG RECENT FACTS TO ASCERTAIN WHICH STORY APPEARS THE MORE PROBABLE; AND SECOND, FACTS ESTABLISHED BY MATTERS AND EVENTS WITHIN LIVING MEMEORY MUST NECESSARILY TAKE PRECEDENCE OVER MERE TRADIITINAL EVIDENCE".

For deeper understanding and application of the Adjeibi-Kojo principle YOU MAY READ THESE ADDITIONAL CASES:

RE TAAHYEN AND ASAAGO STOOLS; KUMANIN II V ANIN [1998-99] SCGLR 399;

RE KROBO STOOL (NO1); NYAMEKYE V OPOKU [2000] SCGLR 347; ACHORO & ANO V AKANFELA & ANO [1996-97] SCGLR 209

On the scope of materials which fall within the category of traditional evidence, refer to HILODJIE & Ano v George [2005-2005] SCGLR 974; How reliable are books written about a community or lyrics of a song on the subject matter? In the view of the Supreme Court per Georgina Wood JSC (as she then was) are not reliable historical accounts to be relied upon.

The detailed discussion of traditional evidence is found in OPOKU-AGYEMANG pp 37-51. Additional information may be found in BROBBEY SA pp 455-466

Digital/electronic evidence

This is a new area in the law of evidence in Ghana. There are no judicial decisions on the topic in Ghana. However, the intrusion of electronic evidence has increased exponentially in many jurisdictions. You may assess how the following affect your private life and think about how the law should deal with them: emails, digital photographs, word processing documents, instant message histories, internet browser histories, databases etc

In understanding the use of digital evidence, we always situate scenarios within the existing non-digital rules and then determine how to resolve issues. Consider a scenario where K accuse A of stealing his 5 Cedis. K alleges that he gave his mobile phone to A who manipulated the phone and managed to transfer that amount of credit from his phone to her phone. K is relying on the message of that transaction sent to him via text message from the provider.

The main issue when it comes to digital or e-evidence would be how authentic or reliable is this form of evidence and also whether the text message or internet messages should be admissible.

You must familiarise yourself with issues of authenticity in the Evidence Act PART IX

You must also understand the scepticism of the court in admitting digital evidence which is defined as ANY PROBATIVE INFORMATION STORED OR TRANSMITTED DIGITALLY AND WHICH A PARTY TO A JUDICIAL DISPUTE MAY USE IN THE TRIAL;

The scepticism was expressed in the US case of CLAIR V JOHNNY'S OYSTER & SHRIMP INC (1999) 76 F SUPP 2D 773 at 774-775

"WHILE SOME LOOK TO THE INTERNET AS AN INNOVATIVE VEHICLE FOR COMMUNICATION, THE COURT CONTINUES TO WARILY AND WEARILY VIEW IT LARGELY AS ONE LARGE CATALYST FOR RUMOUR, INNUENDO AND MISINFORMATION. SO AS NOT TO MINCE WORDS, THE COURT REITERATES THAT THIS SO-CALLED WEB PROVIDES NO WAY OF VERIFYING THE AUTHENTICITY OF THE ALLEGED CONTENTIONS..."

Therefore, from the above, the main hurdle of a proponent of digital evidence is authentication of same. You must however understand that the mere possibility of alteration does not and cannot be the basis for excluding emails or digital evidence as unidentified or unauthenticated as the traditional SOURCES OF EVIDENCE LIKE PAPER DOCUMENTS ALSO SUFFER SAME INFIRMITIES: READ US V SAFAVIAN (2006) 435 F SUPP 2D 36

You MAY also refer to SECTION 901(B) of the US FEDERAL RULES OF EVIDENCE which sets forth some parameters for authenticating and identification of evidence. THESE RULES ARE SIMILAR TO THE PROVISIONS OF PART IX OF THE EVIDENCE ACT OF GHANA AND ARE RELIED ON TO ADMIT ELECTRONIC EVIDENCE IN THE US

You must have a working understanding of the following sections:

Section 136(1): authenticating evidence through oral testimony of witness with knowledge: Thus a witness authenticating electronic evidence must be able to show or provide evidence as to how the electronically stored information is created, acquired, maintained and preserved without alteration or change. Failure to provide such information may lead to rejection of such electronic evidence;

Section 141 authentication by comparison: Though this provision had in mind authentication of handwriting, signature, seal or finger impression through comparison with authenticated specimen it may be applied to authenticate electronic mails as well. READ US V SAFAVIAN (2006) 435 F. SUPP 2D 40 WHICH ALLOWED THE AUTHENTICATION OF EMAILS BY COMPARISON TO OTHER EMAILS ALREADY AUTHENTICATED

Section 144 authentication or identification by evidence of distinctive characteristics, appearance, contents, substance or internal patterns. Courts may rely on this provision by looking at 'hashtags' or metadata. You must have a working understanding of these terms.

A hash value may be described as a unique numerical identifier that can be assigned to a file, group of files or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set; Give personal examples of hash values known to you for example #OCCUPYGHANA#

Metadata may be described as information describing the history, tracking, or management of an electronic document. This data about data may constitute a distinctive feature permitting authentication under this section.

You must always be aware that this method of authentication is fraught with problems as they are not entirely foolproof – issue with hacking and approved intrusion into a system;

Section 147 authentication by process or system used to produce a result and showing that the result is accurate.

For detailed discussion of authentication of e-evidence REFER to Opoku-Agyemang pp 51 – 60

Civil Procedure Rules and proof

In addition to the discussions above, YOU should familiarise yourself with the specific provisions of proof of matters in civil trial. You should have a working understanding of Order 38 Rule (2) of CI 47 especially Order 38 Rule 3 which particularise means of proof of facts in issue either by:

a. By statement on oath of information or belief or;
b. By the production of documents or entries in books; or
c. By copies of documents or entries in books; or
d. In the case of a fact which is or was a matter of common knowledge either generally or in a particular district by the production of any publication of general circulation which contains a statement of fact.

Witness statement: a new means of proof intended to substitute in most measure viva voce evidence (refer to examination in chief discussed earlier). Students must have a working understanding of the provisions of CI 87 which is an amendment of CI 47. You must pay attention to this new rule in your Civil Procedure Class which will provide you with the basis, the procedure and the effect of non-adherence to the new rule.

Chapter 2

RELEVANCE, ADMISSIBILITY AND WEIGHT OF EVIDENCE

This chapter discusses the type of evidence required to prove a fact in issue, the rules on admissibility or otherwise of evidence and the discretion of a judge in admitting or excluding evidence in a trial.

Read: Opoku-Agyemang (Second Edition) Chapter 2 p 63-103; Cross & Tapper On Evidence (Tenth Edition, Chapter 1, p 1-81; Brobbey, paragraph 4.6 p 74-77

Objectives

By the end of this chapter you should be able to

a. Explain what is relevant or irrelevant evidence;
b. Identify and apply the rules on admissibility of evidence;
c. Determine whether the discretion of a judge is inclusionary or exclusionary in so far as admissibility of evidence is concerned
d. Determine the consequence of wrongful admission of evidence
e. Specifically identify and explain the statutory provisions on admissibility of evidence in Ghana
f. Explain the legal position on the admissibility or otherwise of character evidence;
g. Explain the methods used in proving character
h. Distinguish between relevance and weight of evidence;
i. Determine and explain the rule on admissibility of improperly obtained evidence; and
j. Explain the rule on the admissibility of fresh evidence on appeal

In discussing this topic, you should ask yourself whether a judicial inquiry would be better served if parties are allowed to adduce all the material upon which

they base their claims; or whether the law should prescribe a quality standard or threshold for any piece of evidence being adduced.

You should have a working understanding of what constitutes relevant evidence as provided by:

Stephen, Digest of Law of Evidence 12th Ed. Article 1

"Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other"

Lord Simon in Dpp V KilbournE [1973] AC 729

"Evidence is relevant if it is logical, probative or disprobative or evidence which make the matter which requires proof more or less probable".

FEDERAL RULES OF EVIDENCE (USA)

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

EVIDENCE ACT, ACT 323

Relevant evidence means evidence, including evidence relevant to the credibility of a witness or a hearsay declarant which makes the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without it.

You should understand the following basic rules

Evidence is relevant if it has a material connection with a fact in issue and has a probative value

Relevant evidence does not mean a conclusive evidence and admitting evidence does not mean the evidence is true

You should be very familiar with Sections 51-52 which provides for admissibility of relevant evidence/inadmissibility of irrelevant evidence (51) and judicial discretion to exclude relevant evidence.

You should be familiar with the test for exclusion of relevant evidence as provided in Section 52 (a) – (c)

YOU should also be familiar with SECTION 8 of the Act which gives the COURT THE POWER TO EXCLUDE EVIDENCE THAT WOULD BE INADMISSIBLE IF OBJECTED TO BY A PARTY IF NOT OBJECTED BY THE PARTY. THIS IS WHAT IS CALLED THE POWER OF THE COURT TO EXCLUDE INADMISSIBLE EVIDENCE IN SUO MOTU

On the fatality or otherwise of erroneous admission of evidence, you should READ and understand the effect of SECTION 5 OF THE EVIDENCE ACT. In the main YOU should know that no finding, verdict, judgment or decision shall be set aside, altered or reversed on appeal or review because of the erroneous admission of evidence unless the erroneous admission of evidence resulted in a substantial miscarriage of justice SECTION 5(1)

You should refer to the factors considered in determining whether admission of evidence has resulted in substantial miscarriage of justice in SECTION 5(2) (a) – (e) and (3).

As admissibility of evidence is important in any trial, a party has the right to object to evidence in every action, and at every stage at the time the evidence is offered. Such a preliminary objection must be recorded and ruled upon by the court as a matter of course REFER TO SECTION 6.

You should read the relevant portions of the decision in BROBBEY & NIPA V STATE [1962] 2 GLR 101 especially the portion dealing with the erroneous reliance on EXHIBIT M by the trial judge in the conviction of the appellant. In this case the Supreme Court reversed the decision of the trial court because in the view of the Court the erroneous admission led to a substantial miscarriage of justice. As was put by the Court

> "If exhibit M had been excluded from consideration by the jury it would have been impossible for them to have returned the verdict which they did return" BROBBEY & NIPA at 105.

Evidence as regards character

You should understand the general notion why character evidence should be admitted with circumspection and even if admissible the timing of such admission. The reason why courts are wary in admitting character evidence is the inherent

danger of prejudice it can cause; that is while the evidence of identity of the criminal factor may be weak, the disclosure that the accused had committed an unrelated similar offence may have the tendency to distract the court from the main issue in the trial.

You should have a working grasp of the main provision on character evidence in SECTION 53 which makes CHARACTER EVIDENCE GENERALLY INADMISSIBLE UNLESS IT COMES UNDER (a) – (d)

In the main you should understand that section 53 is an amplification of the discretion given to the court in Section 52 which seeks to prevent prejudice.

Read the case of AVEGAVI & ORS V R [1971] 1 GLR 428

This case per SIRIBOE JA shows the application of section 53 and 54[1] which deal with the general exclusion of character evidence and the threshold a party needs TO CROSS IN IMPUTING THE CHARACTER OF A WITNESS.

The general rule is that if the accused attack the character of a witness of the prosecution or if he adduces evidence of his good character, then the other party can rebut with evidence of his character. As was said by Siriboe JA:

> "Under our law cross-examination as to the previous convictions and bad character of the accused is PERMISSIBLE ONLY WHEN THE NATURE OR CONDUCT OF THE DEFENCE IS SUCH AS TO INVOLVE IMPUTATIONS AGAINST THE CHARACTER OF THE PROSECUTOR OR THE WITNESSES FOR THE PROSECUTION WHICH ARE NOT REASONABLY NECESSARY FOR THE CONDUCT OF THE DEFENCE..."

Thus if what is said by the defence or accused amounts in reality to no more than a denial of the charge, albeit in an emphatic manner, it should not be regarded as crossing the threshold as to statements not reasonably necessary for the conduct of the defence.

In reading AVEGAVI you should pay attention to the statement of the accused in cross-examination inter alia: I do not know if Sgt Hanu concocted the statement which he says I made. I never begged Sgt Hanu or anyone saying I had done

1 You must read these sections in tandem with the Criminal Procedure Code (Amendment) (No 2) Decree 1975, NRCD 324

wrong. I SAY SGT HANU HAS LIED TO THE COURT IN WHAT HE HAS SAID ABOUT ME"; determine whether this amounts to attack on the character of Sgt Hanu, a prosecution witness and thereby crossing the threshold or amounting to imputations to allow evidence of his character

You may also refer to: SELVEY V DPP [1968] 2 WLR 1494

Methods of proving character evidence

You should pay particular attention to Section 54(3) of the Evidence Act which provides for instances where specific evidence of a person's conduct, including the commission of a crime or civil wrong may be adduced. These specific instances are relied upon as part of circumstantial evidence to build cases against a person and may be adduced to show such facts as MOTIVE, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY OR ABSENCE OF MISTAKE OR ACCIDENT.

Motive

Motive can be relied on to prove a fact in issue. Motive is the moving power which impels one to do an act. You should know that motive itself is not a crime, no matter serious it may be. You should further understand that existence of motive becomes important once crime has been committed. The rationale is that in considering the conduct of a person, regard is had to the ordinary conduct of human affairs. When a person does an extraordinary or a wicked thing, there is probably some cause inducing or impelling him to do so and the more heinous the act is the more important the question of motive.

For examples of reliance on MOTIVE, PREPARATION AND CONDUCT to prove character you should read R V PALMER (1856) Reported in Cockle's Cases and Statute on Evidence p 58; 8th edition.

In this case the accused was financially distressed and to overcome his difficulties borrowed huge sums of money from his friend. Palmer and the friend used to go to races together. One night after attending the races, his friend came back to his hotel and died soon after midnight under circumstances which raised a suspicion that he had been poisoned. The fact that the accused had a strong motive to eliminate his creditor was held to be relevant.

For a detailed discussion of motive, preparation and conduct and application of R V PALMER as explained by LORD CAMPBELL CJ read Opoku-Agyemang 79-84

Previous conviction

In a criminal trial, it may be considered prudent and normal for prosecution to adduce evidence of the previous conviction of the accused. This may tally with common sense that as an ex-convict the presumption is that he committed the offence charged after all once a thief always a thief. You should identify the inherent dangers in adopting this common sense approach and how the law avoids this prejudicial evidence. YOU SHOULD PAY ATTENTION TO SIMILAR RULE IN YOUR CRIMINAL PROCEDURE CLASS.

You should have a working understanding of SECTION 1 OF NRCD 324 which provides that:

"Section 129(1) A person charged and called as a witness in pursuance of this Code shall not be asked, and if asked shall not be required to answer any question tending to show that he has committed or been convicted or been charged with any other offence other than that wherewith he is then charged or is of bad character UNLESS ...

the proof that he has committed or been convicted of such other offence is admissible to show that he is guilty of the offence wherewith charged.

FOR FURTHER AND DETAILED DISCUSSION OF CHARACTER EVIDENCE READ OPOKU-AGYEMANG CHAPTER 8

Evidence obtained by improper/unlawful means

At this stage you must recollect the TEST for admissibility of evidence which is said to be its relevance. You should also remember the factors provided in SECTION 52 for the exercise of judicial discretion to exclude relevant evidence. The question at this point is whether the court should consider the circumstances in which evidence is obtained to determine its admissibility. You should be aware of the TWO MAIN SCHOOL OF THOUGHTS: No one should be allowed to benefit from an unlawful or improper conduct; and all evidence necessary to enable justice to be done should be admitted.

This question has become imperative in Ghana considering the recent corruption expose on the judiciary and the claim of defence of entrapment. To have a

deeper understanding of this area, YOU MAY ATTEMPT A COMPARATIVE STUDY OF OTHER JURISDICTIONS LIKE IRELAND, CANADA, NEW ZEALAND, USA AND INDIA.

Prior to undertaking such a study, you need to understand the common law position by reading the case of R V LEATHAM (1861) 8 COX CC 498. Pay attention to the statement by CROMPTON J at 501 where he said "IT MATTERS NOT HOW YOU GET IT; IF YOU STEAL IT EVEN, IT WOULD BE ADMISSIBLE IN EVIDENCE".

The common law position *simpliciter* places premium on the relevance of the evidence and not how it is obtained. This rule has been applied in the following cases: KURUMA, SON OF KANIU V R [1955] AC 197, PC; FOX V CHIEF CONSTABLE OF GWENT [1985] 3 ALL ER 392 @ 397 WHERE LORD FRASER SAID "THE DUTY OF THE COURT IS TO DECIDE WHETHER THE APPELLANT HAS COMMITTED THE OFFENCE WITH WHICH HE IS CHARGED AND NOT TO DISCIPLINE THE POLICE FOR EXCEEDING THEIR POWERS";

R V SANG [1980] AC 402 This case deals with a form of entrapment or criminal inducement through an agent provocateur where counsel asked the court to exercise its discretion to exclude the evidence of the informer who instigated the commission of the crime by the accused. The House of Lords upon appeal said among others that although the fact that evidence was obtained by the use of agent provocateur or by the police and an informer inciting the accused to commit the offence, could be taken into account in mitigation of sentence, and could give rise to criminal proceedings against the police, it was not a ground on which the trial judge could exclude evidence.

SEE ALSO R V APICELLA [1985] 82 CR APP REP 295, CA

You should have a working understanding of the impact of the POLICE AND CRIMINAL EVIDENCE ACT (PACE) 1984 on the common law position as propounded in R V LEATHAM. READ SECTION 78 OF PACE WHICH DIRECTS THE COURT TO HAVE REGARD TO ALL THE CIRCUMSTANCES INCLUDING THOSE IN WHIC THE EVIDENCE WAS OBTAINED INCLUDING ILLEGALITY, IMPROPRIETY OR UNFAIRNESS.

You must distinguish decisions of pre and post PACE in England in order not to be confused in your application of the rules. POST PACE CASES APPLY

SECTION 78(1) on case by case basis and apply the COST-BENEFIT OR THE UTILITARIAN PRINCIPLE. In other words they consider the effect of the impropriety and its benefit to the society. Where the benefit to society outweighs the effect or impact on a person, the courts admit the evidence.

You should read the following cases:

R V H [1987] CRIM LR 47;

R V KHAN [1997] AC 558

You must know that PACE is not applicable to Ghana and therefore the cases thereon are all of persuasive effect. The question is whether in Ghana evidence obtained through improper means is admissible. You may answer this question by considering the common law position which seems to be the position of the law as there is no express provision in the Evidence Act. As provided by Section 52 relevant evidence, obtained by whatever means may be excluded if the probative value is outweighed by its prejudicial value. Thus, if the evidence is of probative value, it may matter not how it was obtained.

You must also read the following cases dealing with same issue in other jurisdictions

MIRANDA V ARIZONA 384 US 436 (1966)

> "THE LATIN MAXIM SALUS POPULI SUPREMA LEX (THE SAFETY OF THE PEOPLE IS THE SUPREME LAW) AND SALUS REPUBLICAE SUPREMA LEX (SAFETY OF THE STATE IS THE SUPREME LAW) CO-EXIST AND ARE NOT ONLY IMPORTANT AND RELEVANT BUT LIE AT THE HEART OF THE DOCTRINE THAT THE WELFARE OF AN INDIVIDUAL MUST YIELD TO THAT OF THE COMMUNITY. THE ACTION OF THE STATE, MUST HOWEVER BE RIGHT, JUST AND FAIR"

On Indian Supreme Court and the admissibility of improperly obtained evidence read the following cases

STATE OF PUNJAB V BALDEV SINGH & ORS [2000] 3 LRC 140

DK BASU V STATE OF WEST BENGAL [1997] 1

In DK BASU the final contention of the Supreme Court of India was "THE USE OF EVIDENCE COLLECTED IN BREACH OF THE SAFEGUARDS

PROVIDED BY SECTION 50 AT THE TRIAL WOULD RENDER THE TRIAL UNFAIR

These cases are dealt with in detail in **OPOKU-AGYEMANG** pp 92-96

Fresh evidence on appeal

To understand this topic, you must pay attention to Civil Appeals in civil procedure and adducing evidence on appeal. In civil procedure you will be taught that a party should go to court with his whole case but not on piecemeal. This is in consonance with the Latin maxim INTEREST REPUBLICAE PUT SIT FINIS LITIUM (IT IS IN THE PUBLIC INTEREST THAT LITIGATION MUST COME TO AN END.

You should understand that it is not generally permissible for parties to adduce fresh evidence on appeal. What is important to know however are the exceptions if any to this rule and the factors to be considered before allowing fresh evidence on appeal. These factors are succinctly provided by Lord Justice DENNING in AG V MARSHALL [1954] 3 ALL ER 745

READ ALSO THE RESTATEMENT OF THE RULE BY JIAGGE JA IN KAKARI V WIAFE [1982-83] 864

> "...However there were a few exceptions to the general rule and one such rule was where material evidence that might have altered the conduct of the trial was discovered after the trial. the court might in such a case grant leave to adduce fresh evidence at the hearing of the appeal provided there was satisfactory proof that the failure to produce the material evidence at the trial was not due to lack of diligent search on the part of the appellant".

Read also the Supreme Court decision on the same rule in R V ADAMA-THOMPSON & ORS; EX PARTE AHINAKWAH II [2012] 2 SCGLR 378

In this case the Supreme Court applied Rule 76(1) and (2) of the Supreme Court Rules (1996) CI 16 which re-enacts the common law position of the general inadmissibility of fresh evidence on appeal and the discretion to admit if the court is satisfied the party could not have obtained such evidence with due diligence or the evidence could not have been available and was not available to the party at the hearing of the original action.

This Rule is similar to RULE 26(1) AND (2) OF THE COURT OF APPEAL RULES (1997 CI 19. On similar application of CI 19 READ POKU V POKU [2007-2008] 2 SCGLR 996

In the nutshell the rule may be summarised in the words of DOTSE JSC as follows

> "...Consequently in an application to lead fresh or new evidence before the court of appeal, the first criterion which an applicant ought to establish, was whether the evidence sought to be adduced was neither in the possession of the applicant nor obtainable by the exercise of reasonable diligence or human ingenuity before the impugned decision was given by the lower court. It was only when that first hurdle had been surmounted that the court should proceed to determine the other pertinent question whether or not the intended evidence would have a positive effect on the outcome. If the first criterion was not met, no useful purpose would be served by examining the other factors" – EX PARTE AHINAKWAH II at PP 386-387.

Procedure for Evidence on Appeal: specific rules on adducing evidence on appeal especially in civil cases. Pay particular attention to this in your Civil Procedure class

Admissibility and weight of evidence

You must distinguish the issue of admissibility from the weight of evidence. The question of admissibility is a matter of law for the judge while the weight of evidence is a question of fact in a jury trial. The weight of evidence may be determined after the close of case; considering the totality of the evidence.

Chapter 3

PROOF: MATTERS NOT REQUIRING PROOF/BURDEN OF PROOF

This chapter is divided into TWO UNITS as follows

Unit 1: Matters not requiring proof and **Unit 2** Burden of proof

Matters not requiring proof

This Unit essentially deals with cases where the requirement of burden of proof or obligation to substantiate a fact in issue or any fact is dispensed with.

Read: Opoku-Agyemang (Second Edition) Chapter 3 p 104-125; Brobbey Chapter 5 p 104-112

Objectives

By the end of this Unit you should be able to:

a. To identify and explain the exception to the general rule that he who avers must prove
b. Explain judicial notice and the statutory conditions for it to be taken
c. Explain the extent to which the personal knowledge of judges may be relied upon in taking judicial notice;
d. Identify certain matters of which judicial notice may be taken; and
e. Explain the legal consequences of formal admissions in proof of cases

You must understand the general rule that all facts in issue or relevant to the issue in any given case must be proved: this is the assertion that HE WHO AVERS MUST PROVE. Proof of a matter is through the tools of proof which we have already considered.

There are however exceptions to this rule. These include judicial notice, presumption (estoppels) and formal admission. Judicial inquiry is always on issues joined by parties. If parties are not in controversy over any matter, the wheel of the court does not turn

Judicial notice

It simply means recognition by the court without proof of something as existing or being true. The rationale of the notion of judicial notice is that where a fact IS WELL KNOWN OR ITS EXISTENCE IS SO EASILY DETERMINABLE FROMUNIMPEACHABLE SOURCES, it will not be good sense to require formal proof. This is the two-tier notion of judicial notice. You should therefore have a working understanding of section 9(2) (a) and (b) of the Evidence Act which just re-enact the common law position of NOTORIOUS FACTS AND REFERENCE TO UNIMPEACHABLE SOURCES as test for judicial notice. You should also understand that when it comes to the first tier of judicial notice, that is a notorious fact, there is a jurisdictional requirement; meaning the fact must be notorious within the jurisdiction of the court. Therefore a fact notorious in Ashtown Kumasi may not be so known in James Town Accra.

For examples of facts taken judicial notice of, See:

R V LUFFE (1867) 9 EAST 193; 103 ER 316. In this case the question was as to the legitimacy of a child where the husband was away and retuned only a fortnight before the birth, it was held the court could take judicial notice of the fact that the husband could not have been the father; it being impossible in the course of nature to occasion and produce a birth within those limits of time;

NYE V NIBLETT [1908] 1 KB 23 that cats are kept for domestic purposes;

WOOLF V WOOLF [1931] P 134 that men and women sharing a bed are likely to have sexual intercourse

You should understand that where a decision is based on a fact not shared within the jurisdiction of the court, then section 9(2)(a) is not applicable. You MUST READ THE FOLOWING CASES:

R V IGOMBE (1964) 3 P 816

CUBSON V BON GALAHN 185 NYSP 154 (SC)

R V MENSAH [1979] GLR 523. In reading this case, you must refer to the reasons of Cecilia Koranteng-Addow in reversing the decision of the trial court who took

judicial notice of world economic factors as being responsible for the problems of Ghana as follows:

a. The general rule governing admissibility of evidence was that only evidence which was sufficiently relevant to an issue before the court was admissible. In the instant case what the defence put in issue was the seditious nature of the document and the relevant intent with which it was published. Since no evidence was led to link the evidence on the loan contracted by Mensah to any of the issues in the case, the condition of admissibility was not fulfilled. The judge should therefore have disregarded that evidence in his judgment.

b. In a trial for sedition it was no defence for an accused to prove the truth of the seditious matter. Therefore evidence to prove its truth was irrelevant and inadmissible

c. Judicial notice referred to facts, which a judge could be called upon to receive and act upon either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it was proper for him to refer. To take judicial notice of a fact however, the judge had to be convinced that the matter was so notorious as not to be the subject of dispute among reasonable men, or that the matter was capable of immediate accurate demonstration by readily accessible sources of indisputable accuracy. The facts which the trial judge took judicial notice of in the instant case could not be classified under this definition. Although world inflation was a matter of public notoriety the extent to which word inflation affected each country was not a matter of which judicial notice could be taken...Furthermore a court was not the proper forum for the evaluation of economic factors, which contributed to inflation.

For your understanding of the second tier of judicial notice, that is, JUDICIAL NOTICE UPON INQUIRY OR RESORT TO INDISPUTABLE SOURCES, Refer to:

MCQUAKER V GODDARD [1940] 1 KB 687; [1940] 1 ALL ER 471 . This case is discussed in **OPOKU-AGYEMANG** pp 127-129.

AUSTRALIAN COMMUNIST PARTY V COMMONWEALTH (1951) 83 CLR 1 .This case deals with judicial notice of political matters. This is how the Australian Supreme Court dealt with the issue as reported in page 196

"Just as courts may use the general facts of history as ascertained or ascertainable from accepted writings of serious historians and employ the common knowledge

of educated men upon matters and for verification refer to standard works of literature and the like, so we may rely upon knowledge of the general nature and the development of the accepted tenets or doctrines of communism as a political philosophy ascertained or verified, jot from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take account the course of open and notorious international events of a public nature. But we are not entitled to inform ourselves of and take into consideration particular features of the Constitution of the USSR".

You may also read: DUFF DEVELOPMENT CO LTD V GOVERNMENT OF KELANTAN [1924] AC 797

In concluding this part, you must understand that there are situations where certain judges are appointed based on their expertise. In such situations the strict application of the rule that judges should not rely on their personal knowledge may defeat the purpose of their appointment. In such cases, their personal knowledge may be valuable. It seems however that personal knowledge may be professional knowledge rather than purely private knowledge

On this point you may refer to:

R V FIELD JUSTICES; EX PARTE WHITE (1895) 64 LJMC 158; REYNOLDS V LLANELLY ASSOCIATED TINPLATE CO [1948 1 ALL ER 140

Formal admissions

Parties prior to trial may admit facts. Such admissions are binding on the party for the purpose for which they are made. You must distinguish formal admissions from informal admissions. Informal admissions are evidence tendered at the trial which may or may not be admitted by the court or which if admitted may be rebutted by the other party. Informal admissions will be discussed in relation to HEARSAY. To understand formal admissions and the legal effect, YOU MUST UNDERSTAND PLEADINGS IN CIVIL PROCEDURE ESPECIALLY THE DRAFTING OF STATEMENT OF DEFENCE. You should understand the effect of admission in SILENTO. You must also have a working understanding of Order 23 of the CI 47.

In criminal trials, the only formal admission that may be made is where there is a plea of guilt properly made by the accused person.

Unit 2

Burden of proof

This topic is very central to the study of the Law of Evidence. You should therefore pay attention to all the sub-topics under this unit as each sub-topic may even be a subject for any law of evidence examination.

Read: Opoku-Agyemang, Chapter 3 p 125-194; Brobbey Chapter 2 p 24-67; Cross & Tapper on Evidence Chapter II

Objectives

By the end of this unit you should be able to

a. Explain what is meant by proof in a litigation
b. Identify and explain the two categories of burden of proof
c. Identify and place the burden of proof on a litigant
d. Identify exceptions as to the general rule of who bears the burden of proof in a criminal matter
e. Explain the standard of proof and distinguish the standard of proof in civil and criminal matters
f. Explain whether the burden of proof can shift from one party to another
g. Determine and explain the standard of proof of the issue of crime in a civil case

Meaning and nature of burden of proof

In a litigation when a person is bound to prove the existence or otherwise of any fact, it is then said that the burden lies on him. It is thus the obligation which lies on a party to establish facts which go in his favour.

There are three main occasions where the burden of proof becomes significant; namely

1. It determines the eventual outcome of a case; it helps in determining who should lose if no evidence was produced;
2. It helps to determine which party has the duty to begin adducing evidence
3. It helps the judge in the course of the proceedings on how he should direct the jury

You should understand what is also meant by proof as stated by Ollennu in MAJOLAGBE V LARBI [1959] GLR 190

> "Proof in law is the establishment of a fact by proper legal means, in other words, the establishment of an averment by admissible evidence"

For practical examples of failure to provide proof in a case and its effect SEE NDC V ELECTORAL COMMISSION [2001-2002] SCGLR 954.

You must also read and understand Rule 46(2) of the Supreme Court Rules 1996 CI 16 on the requirement of proof of an allegation. The Rule seeks to stipulate what parties should provide in their Statements of Case in proof of their allegations or claims. Specifically it requires parties to state:

a. The facts and particulars, documentary or otherwise, verified by an affidavit, upon which the plaintiff seeks to rely
b. The number of witnesses to be called, if any; and
c. A list of the decided cases and the statute law on which the plaintiff intends to rely.

The failure of a party to furnish the court with these relevant particulars may be sufficient for the court to dismiss the action for want of proof

You should know that burden of proof indicates TWO BURDENS: the LEGAL OR PERSUASIVE OR ULTIMATE BURDEN AND THE EVIDENTIARY BURDEN

Persuasive burden

You should understand that this burden usually flows from the substantive law which creates the offence in a criminal trial; in civil matters from the pleadings.

This is the obligation of a party to meet the requirement that a fact in issue be proved or disproved, in accordance with the requisite standard of proof.

You must be familiar with section 10 of the Evidence Act which explains the BURDEN OF PERSUASION OR PERSUASIVE BURDEN as the obligation of aparty to establish a requisite degree of BELIEF concerning a fact in the mind of the tribunal of fact or the court.

You must complement the above provision by reading the case of BARKERS-WOOD V NANA FITZ [2007-2008] SCGLR 879 where the Supreme Court explains the term burden of persuasion in these words

> "Persuasion is the act of convincing or seeking to convince. It is derived from the word 'persuade' The same Webster's Unabridged Dictionary... defines 'to persuade' as to 'urge, influence, move, entice, impel, induce, imply or influence someone's thoughts or actions".

Who bears the persuasive burden

As stated earlier, generally he who avers must prove. Therefore in a criminal trial, the burden of persuasion generally lies on the prosecution. In a civil matter, the plaintiff or claimant bears the persuasive burden.

You must identify and understand the three main exceptions to the general rule in a criminal trial which were provided by LORD SANKEY IN WOOLMINGTON V DPP [1935] 25 CR APP R 72

Prior to identifying the exceptions you need to understand the basic rule as stated by LORD SANKEY

> "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law England and no attempt to whittle it down can be entertained".

LORD SANKEY provided two main exceptions in WOOLMINGTON namely

1. Express statutory exceptions; and
2. Insanity as a defence

A third exception which flows from normal application of law is implied statutory exceptions. FOR A FULLER DISCUSSION OF THE EXCEPTIONS READ OPOKU-AGYEMANG PP 151-161

Express and implied statutory exceptions are deduced by resorting to interpretation of statutes. The ONLY EXCEPTION stated in the Evidence Act is INSANITY AS A DEFENCE which is provided in SECTION 15(2) OF THE EVIDENCE ACT.

You must know that the proposition of LORD SANKEY in WOOLMINGTON was fully endorsed by the Ghana Supreme Court per KORSAH CJ in COP V ISAAC ANTWI [1961] GLR 408 AT 412.

As a practical demonstration of problems associated with placing the burden of proof, you must read SUMAILA BIELBIEL V DAMU DRAMANI AND AG (NO3) [2012] 1 SCGLR 370

In this case the court had to determine a preliminary issue as to which of the parties, that is the plaintiff or the first defendant should open the case by adduction of evidence. The court had at earlier instance invited the first defendant to begin the adduction of evidence as to whether he holds or has revoked his British citizenship prior to contesting the elections as a Parliamentary candidate. Counsel for first defendant rejected the invitation insisting on the old norm that he who avers must prove and that in such a civil case, the plaintiff, not the defendant must begin in adducing evidence on such a critical issue. The court withdrew the invitation and proceeded on the known path.

FOR DETAILED DISCUSSION OF THE CASE AND THE REASON FOR THE INVITATION SEE OPOKU-AGYEMANG PP 148-148; READ ALSO IN FULL THE REASONS OF DATE-BAH JSC

Evidential burden

You must remember the explanation of persuasive burden and attempt to distinguish it from evidential burden. At all times you must have a working knowledge of sections 10 (Persuasive burden) and 11 (evidential burden)

The evidential burden is the obligation of a party to show sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, with due consideration of the standard of proof required. This burden simply requires production of sufficient evidence so that the court would be justified to find that the fact is proved .

You can illustrate this burden by considering the scenario given by ARCHIBOLD IN CRIMINAL PLEADINGS 34TH ED P 371

"Where the prosecution gives prima facie evidence from which the guilt of the prisoner might be presumed and which therefore calls for an explanation by the prisoner and no answer or explanation is given, a presumption is raised upon which the jury may be justified in returning a verdict of guilt. But if an

explanation is given on behalf of the prisoner which raises in the mind of the jury a reasonable doubt as to his guilt, he is entitled to be acquitted.

The prosecution to begin with has a section 11 duty to provide sufficient evidence in order to establish a prima facie case. After establishing a prima facie case, the accused may give evidence in explanation (evidential burden) to raise a doubt in the prosecution case. The prosecution must rebut that explanation by persuading the court to convict the accused (persuasive burden).

You need to understand that where the persuasive burden on an issue is placed on the accused as for instance as provided in the exceptions to the general rule, the accused discharge on the balance of probabilities. However, when the persuasive burden is on the prosecution it is discharged beyond a reasonable doubt.

For a further discussion on the distinction between section 10 and 11 READ SUMAILA BIELBIEL V ADAMU DRAMANI AND OR (NO3) (SUPRA) where Date-Bah stated among others

> "The distinction between the two burdens of proof namely the burden of persuasion as defined in section 10 and the burden of producing evidence as defined in section 11 of the same Act is important because the incidence of the burden of producing evidence can lead to a defendant acquiring the right to begin leading evidence in a trial, even though the burden of persuasion remains on the plaintiff. Ordinarily the burden of persuasion lies on the same party as bears the burden of producing evidence[1]

Brobbey JSC on his part drew the distinction in this more practical fashion

> "The burden to produce evidence is the duty that lies on a party to adduce sufficient evidence to support his case regarding the issue at stake in order to avoid a ruling of the court being given against him...That (burden of persuasion) refers to the level of proof which will suffice to convince the trier of fact to believe in the case put forward by the evidence. It certainly refers to the quality of weight that the evidence conveys and which will induce the tribunal of fact to accept the merits of the case of a party in preference to the merits of his opponent's case...Ordinarily, the evidence

1 This was his Lordship attempt to rationalise the invitation to the First Defendant to begin adduction of evidence in the case which was rejected by counsel for defendant who successfully argued that on such a critical issue he who avers must prove prudent case management notwithstanding.

must be before the court before there can be consideration of the burden of persuasion. In effect, the burden of persuasion is determined at the end of the trial after all the evidence has been adduced in the court."

Evidential burden can therefore be said to be determined at the beginning of a trial while persuasive burden is at the end of the trial. This explains why a judge may dismiss or withdraw an issue from a jury if the party on whom the obligation lies refuses or fails to adduce any evidence in support of his claim. This is further explained in criminal trials where sufficient evidence may be adduced to establish a prima facie case but accused may be found not guilty at the end of the trial because the totality of the evidence at the end of the trial was not persuasive.

Defences and burden of proof

As have been said already, in a criminal trial the accused has no burden and if he has any burden at all, it is not to prove anything but to raise a doubt about the prosecution's case. This is because of the accused's right to remain silence and the presumption of innocence. You have to remember the three exceptions to this principle as discussed. You recall that one of the exceptions is the plea of insanity as a defence.

You should understand that when it comes to defences, although the prosecution bears the persuasive burden of disproving them, the accused bears the burden of adducing sufficient evidence to show its existence. You should further understand that as provided in section 10(3) of the Act in a criminal trial, the burden of producing evidence when it is on the accused as to any fact the converse of which is essential to guilt requires the accused to produce sufficient evidence so that on all the evidence a reasonable mind could have a reasonable doubt as to guilt. The standard of proof on the accused is therefore the preponderance of probabilities as provided in SECTION 12(2). You must remember that when the burden is on the prosecution the standard is beyond reasonable doubt.

What is the justification for placing the burden of proof on the accused with regards to a claimed defence?

Read: GLANVILLE WILLIAMS: CRIMINAL LAW: THE GENERAL PART 2ND ED 1961 PARA. 289

"The object of placing the evidential burden on the defendant is twofold: (1) to save the prosecution the trouble of meeting the defence unless it is first raised by the defendant, with sufficient evidence in support of it

to be left to the jury; and (2) particularly where the matter relates to the defendant's state of mind, to force the defendant to go into the witness box and give evidence, if he wishes to deny a sate of mind or other fact that would normally be inferred from the circumstantial evidence".

If accused fails to lead evidence on the claimed defence, there would be no need to leave it to the jury for consideration. You should know however that a judge may deduce a defence from the statement of an accused and direct the jury on same even if not expressly raised as a defence.

Specifically on the issue of INSANITY as a defence READ SECTION 15(3) of the Act. YOU should also relate the provision to the provisions in ACT 29 dealing with defences such as insanity; self-defence (SECTION 36;37, 39-44); provocation (section 52-56); intoxication (SECTION 28) which are opened to the accused. You should also remember section 27 of Act 29 dealing with the SPECIAL VERDICT.

You must always remember that in criminal cases the presumption is that each person is sane. If a person intends to rebut the presumption he must lead evidence to that effect. If the accused leads sufficient evidence on insanity, the pendulum will switch back to the prosecution to disprove the claim by persuading the court to disbelieve the accused.

On a general discussion of INSANITY AND THE PRESUMPTION OF SANITY you must read BRATTY V AG OF NORTHERN IRELAND [1963] AC 386

Standard of proof

In discussing this part, you must have a working understanding of SECTIONS 12 AND 13 OF THE EVIDENCE ACT. REMEMBER IN YOUR CIVIL PROCEDURE CLASS THAT THE STANDARD OF PROOF IN CIVIL CASES IS PREPONDERANCE OF PROBABILITIES (SECTION 12). IN YOUR CRIMINAL PROCEDURE CLASS THE STANDARD IS BEYOND REASONABLE DOUBT (SECTION 13(1).

As will be discussed below, when a criminal issue is raised in a matter, whether civil or criminal, the standard of proof is consistent in Ghana. The applicable standard is beyond reasonable doubt.

Preponderance of probabilities

To understand this read section 12(2) of the Evidence Act which explains preponderance of probabilities to mean that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

What is required is not that the evidence must be unequivocal or remove all reasonable doubt. Rather, evidence from which a reasonable man may conclude that upon the whole it is more likely that what is alleged happened than it did not.

Thus, by way of example if there are five persons in an room and one of them is killed in circumstances which show that it is the work of any one of them, evidence will be allowed of every fact which makes it probable which one of them caused the death or which one of them was probably connected with it.

On the contrary, facts which make things highly improbable are also relevant. SEE THE INDIAN CASE OF SANTA SINGH V STATE OF PUNJAB [1956] AIR 525, SC where the witnesses testified that they saw the deceased being shot from a distance of twenty five feet. The medical report showed that the nature of the wound was such that it could have been caused only from a distance less than a yard. The expert opinion rendered the testimony of the witness highly improbable and on the balance not persuasive.

In simple terms, you should understand that the balance of probabilities convey the idea that a party has to submit sufficient evidence so as to make it on the balance outweigh the other. In other words, plaintiff is said to have proved his case on the preponderance of probabilities if he produces evidence which leads a tribunal of fact to believe that what the plaintiff claims is more likely to be true than not.

Proof beyond reasonable doubt

Proof beyond reasonable doubt is the standard of proof in a criminal trial SECTION 13. You must understand that though this degree is higher, IT NEEDS NOT REACH CERTAINTY. IT IS IMPOSSIBLE TO REMOVE ALL THE SHADOWS OF DOUBT. WHAT IS SUFFICIENT IS TO PROVE BEYOND REASONABLE DOUBT. Read the exposition of DENNING J on this in MILLER V MINISTER OF PENSIONS [1947] 2 ALL ER 372 at 373-374

> "That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not

mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice..."

One area you should pay particular attention to is how a judge directs the jury on the standard of proof in a criminal trial. You must understand the issue of SUMMING-UP IN JURY TRIALS as most often it constitutes a ground of appeal.

You must however understand that there is no exact formula in directing the jury on the standard. In R V ALLAN [1969] 1 ALL ER 91 at 92 the court said 'it has been said a good many times that it is not a matter of some precise formula or particular form of words being used.

Example of cases on IMPROPER DIRECTION ON THE STANDARD OF PROOF

D(LJ) V THE QUEEN (1997) CANLII (PE); 148 NFLD & PEIR 72

Consider this direction by the trial judge and what do you consider to be the flaw?

"When I speak of reasonable doubt I use the words in their ordinary natural meaning, not as a legal term having any special connotation. Reasonable doubt is self, essentially self-defining. Thus reasonable doubt is an honest and fair doubt based upon reason and common sense after having considered all of the evidence as a whole. It is a real doubt, not an imaginary or frivolous doubt...Thus the Crown is not compelled to prove guilt to the impossible degree of proof to a certainty. In the end proof of guilt beyond reasonable doubt equates to the absence of reasonable doubt as to the accused guilt".

READ AWEDAM V REPUBLIC [1982-83] GLR 902

"Now in dealing with the prosecution's case you must remember that on any issue of fact to which you find yourself in doubt, there must be some matter the prosecution have said this and the defence has said that, and you are in doubt; you do not know which version to accept. If it happens you must give the benefit of the doubt to the defence. At the same time you must be careful not to err against the state, because all the work we should have done will be useless".

Though there is no precise formula for directing jury on the standard of proof, A REASONABLE DOUBT should not be described as an 'ordinary concept'. It is also not helpful to describe reasonable doubt simply as proof to a moral certainty. To avoid problems, it is always preferable to qualify the 'doubt' with the adjective 'reasonable' rather than words like 'substantial doubt'; haunting doubt; serious doubt etc.

Jury must be told also that a reasonable doubt must not be imaginary or frivolous. See an example of a frivolous and imaginary doubt in DOMENA V COP [1964] GLR 563.

FOR DETAILED ANALYSIS OF PROOF BEYOND REASONABLE DOUBT REFER TO OPOKU-AGYEMANG pp 165-184

Proof of crime in civil cases

As already discussed section 12 provides for preponderance of probabilities as the standard of proof in civil cases while section 13 provides proof beyond reasonable doubt for criminal trials. Section 13(1) expressly provides that in ANY CIVIL OR CRIMINAL ACTION...". This means that in Ghana whether a matter is civil or criminal once there is an allegation of crime, that allegation must be proved beyond reasonable doubt.

You must distinguish the Ghanaian position from that of the English common law. Under English common law an allegation of crime in a civil matter must be proved on the preponderance of probabilities SEE HORNAL V NUEBERGER PRODUCT LTD [1957] 1 QB 247 which seemed to have resolved the issue as to which standard is applicable.

For further understanding of the application of SECTION 13(1) YOU MUST READ THE FOLLOWING GHANAIAN CASES

FENUKU V JOHN TEYE [2001-2002] SCGLR 985

SASU BAMFO V SINTIM [2012] 1 SCGLR 136

Review questions

Chapter 4

Presumption

This chapter discusses the general nature of presumption, estoppels and methods of proving the authenticity and identity of documents and witnesses. You must differentiate presumption as taught in evidence from that in the Law of Interpretation. In the latter, presumptions are interpretative criteria.

Read: Opoku-Agyemang (Second Edition) Chapter 4 p 195-262; Brobbey, Paragraph 8.11, p 380-394

Objectives

By the end of this chapter you should be able to:

a. Explain presumption and draw a distinction between presumption and inference;
b. Identify the two main categories of presumption: rebuttable and irrebuttable: and explain the legal effect of each category
c. Identify examples of rebuttable and irrebuttable presumptions
d. Explain the modes of proving identification and authentication including the use of presumption
e. Explain and identify types of estoppels especially *res judicata*

Presumption is one of the devices which a court can use to pronounce on an issue without evidence being adduced. It can ve considered as part of the discussion on matters not requiring proof. It is also a device which helps the court to allocate a burden of proof. Presumptions are mostly rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence, provided it is a rebuttable presumption.

You should have a basic understanding of SECTION 18 of the Evidence Act which defines presumption:

"an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action.

An inference is defined as a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise establish in the action.

You must know that the definition of presumption and inference is akin to the common law distinction between PRESUMPTION OF LAW AND PRESUMPTION OF FACT. Presumption of law are arbitrary consequences expressly annexed by law to particular facts, while presumption of facts are case specific and logical deductions from facts of a case.

You must know that presumption is either CONCLUSIVE (IRREBUTABLE) OR REBUTTABLE – section 18(3). You must also have a working understanding of SECTION 19 which is an interpretative criteria to wit in constructing an enactment if it provides that a fact or group of facts is prima facie evidence then the enactment should be construed as rebuttable presumption.

You should also understand SECTION 21 which deals with the procedure in applying rebuttable presumptions where the standard of proof is preponderance of the probabilities. READ SECTIONS 22 AND 23 on the procedure and standard of proof of presumption in a criminal trial. In a criminal trial presumption operates against the accused as to a fact essential to guilt if the existence of the basic facts given rise to the presumption are found or established beyond a reasonable doubt. The procedure applied as in SECTION 23 is that the court shall not direct the jury to find a presumption against the accused if that fact is essential to guilt, unless on all the evidence a reasonable mind could have no reasonable doubt either as to the existence of the basic facts that give rise to the presumption or as to the existence of the presumed fact.

Conclusive presumptions

It is a presumption which once admitted cannot be controverted SEE SECTION 24.

For further understanding of the nature of conclusive presumptions READ RICHARD EGGLESTON, EVIDENCE, PROOF AND PROBABILITY (1978) p 92 and JOHN H WIGMORE, A STUDENTS TEXTBOOK OF THE LAW OF EVIDENCE (1935) p 454

The Evidence Act has provided list of CONCLUSIVE PRESUMTIONS FROM SECTION 25-29. You must be familiar with all these presumptions. You must know that the list is not exhaustive. In the journey of our legal education we have and will continue to come across others, such as *doli incapax;* presumption of innocence etc. Estoppels are a nature of conclusive presumptions and this is treated in detail later.

Rebuttable presumptions

You must pay more attention to the discussion of rebuttable presumptions. A rebuttable presumption is an inference drawn from certain facts that establish a prima facie case which may be overcome by the introduction of contrary evidence. YOU MUST REFER TO SECTION 21 on the procedure and degree applied in civil cases and sections 22 and 23 for criminal cases.

You must know that when a rebuttable presumption is drawn, the party against whom it is drawn has the dual burden of producing evidence as well as persuading the court of the non-existence of the presumed fact.

Consider section 23 of the Evidence Act and determine whether a judge in a jury trial for rape can presume lack of consent of the victim knowing that consent or lack of it is essential to guilt. You should understand that it would be impossible for a court to presume lack of consent in a jury trial for rape.

FOR DETAILED DISCUSSION OF SOME REBUTTABLE PRESUMPTIONS UNDER THE EVIDENCE ACT, read Opoku-Agyemang pp 206-217

These include

a. presumption of validity of marriage SECTION 31. Read also CAP 127 (Marriage Ordinance). You may also read: RAMIA V RAMIA [1981] GLR 275, CA; MAHADERVAN V MAHADERVAN (1964) P 233

An illustration of presumption of marriage may be found in the Indian case of BADRI V DEPUTY DIRECTOR OF CONSOLIDATION [1978] 2 AIR 1557, SC

> "For around 50 years, a man and woman, as the facts in this case unfold lived as husband and wife. A strong presumption arises in favour of wedlock where the partners have lived together for a long spell as husband and wife. Although the presumption is rebuttable, a heavy burden lies

on him who seeks to deprive the relationship of legal origin; law leans in favour of legitimacy and frowns upon bastardy. The contention of the petitioner that long after the alleged marriage evidence has not been produced to sustain its ceremonial process by examining the priest or other witnesses deserves no consideration..."

b. Presumption of legitimacy of a child SECTION 32: a child of a woman who has been married born within 300 days after the end of the marriage is presumed to be a child of that marriage SECTION 32: READ KNOWLES V KNOWLES [1962] 1 ALL ER 659;

YOU MUST READ DABOA DAGARTI V DORNIPEA [1982-83] GLR 594

For the REBUTTAL OF THIS PRESUMPTION READ R V KING'S LYNN MAGISTRATES' COURT AND WALKER; EX PARTE MOORE [1988] FAM LAW 393; R V MANSFIELD INHABITANTS (1841) 1 QB 444

c. Presumption of authenticity of proclamations, Acts of State etc SEE SECTION 154. To have a deeper understanding and how to rebut this presumption YOU MUST READ IN RE YENDI SKIN AFFAIRS; ANDANI V ABDULAI [1981] GLR 283, CA.

d. Another rebuttable presumption found in SECTION 37 is the presumption of regularity of official duty performed (OMNIA PRAESUMUNTUR RITE ET SOLEMNITER ESSE ACTA. The Supreme Court in SEIDU MOHAMMED V SAANBAYE KANGBERE [2012] 2 SCGLR 1068 said

"the presumption of regularity in law had been given statutory recognition in section 37 of the Evidence Act. That meant that institutions of State like the Lands Commission, Survey Dept and the Land Registry were presumed to conduct their affairs with a certain degree of regularity in line with the statutes that had established them.

You must know that this presumption is reinforced by the equity maxim that equity looks on that as done which ought to be done.

SEE BERRYMAN V WISE (1791) 4 TERM REP 366 A person who acted as a solicitor was presumed to have been properly qualified as a solicitor. SEE ALSO R V ROBERTS (1878) 14 COX CC 101 where it was presumed that someone who sat as a deputy county court judge was both properly qualified for the job and properly appointed.

You must understand that the presumption cannot be relied upon to prove or establish an ingredient of an offence if the regularity of the act is in question. READ CAREFULLY SECTION 37(2) especially on the issue of lawfulness of arrest.

Authentication and identification

These issues are dealt with separately from presumptions in the Evidence Act however they are linked as there are STATUTORY PRESUMPTIONS when attempting to prove the authenticity of evidence.

You must understand that there are TWO METHODS of proving authenticity of evidence namely EITHER THROUGH TESTIMONIAL EVIDENCE OR PROVISIONS ON PRESUMPTIONS

REFER TO SECTIONS 136–161 for the various permissible means of authentication and identification.

READ OPOKU-AGYEMANG PP 217-221

On presumption of authenticity of a document and the truth or otherwise of the content of that document READ APPIAH V REPUBLIC [1987-88] 2 GLR 379. Refer particularly to page 393 where FRANCOIS JSC SAID AMONG OTHERS

> "...THE PROVISION (SECTION 156) AMOUNTS TO ONLY PRIMA FACIE RECOGNITION BEING ACCORDED TO THE EXISTENCE OF A NEWSPAPER BUT NOT ITS CONTENTS AND EVEN LESS THE TRUTH THEREIN.."

Estoppel

You must remember that estoppels in Ghana are treated under the provisions on conclusive presumptions as treated under SECTION 24(2). The question is whether estoppels can be distinguished from conclusive presumptions or that they are the same.

To answer the question you must read the Supreme Court decision per PROF. MODIBO OCRAN JSC IN RE SUHYEN STOOL; WIREDU AND OBENWAA V AGYEI AND ORS. [2005-2005] SCGLR 424 quoting with approval the argument of OFORI-BOATENG (INTRODUCTION TO EVIDENCE, 4TH ED P 124) SAID

"estoppels has two characteristics of evidence to distinguish it from presumption, which is a rule of substantive law. The first difference is procedural. Estoppel usually must be pleaded before the evidence to establish it will be allowed, but a presumption is not to be pleaded. The second difference becomes particularly clear in cases of estoppels by conduct. The party pleading this type of estoppels has to adduce evidence to establish the estoppels. Under such circumstances, the existence or non-existence of the estoppels would be impossible to tell until the end of the trial, after the other side would have supplied evidence in rebuttal. But the essence of conclusive presumption is to stop the other party in the first place from adducing evidence to the contrary".

The old definition of estoppels may be found in the statement of COKE CJ "IT IS CALLED ESTOPPEL BECAUSE A MAN'S OWNE ACT OR ACCEPTANCE STOPETH OR CLOSETH UP HIS MOUTH TO ALLEGETH OR PLEAD A THING

PHIPSON defines it as THE RULE WHEREBY A PARTY IS PRECLUDED FROM DENYING THE EXISTENCE OF SOME STATE OF FACTS WHICH HE HAD FORMERLY OR EARLIER ASSERT.

You should recall at this point your notes on PROMISSORY ESTOPPEL AND RES JUDICATA IN CONTRACT AND EQUITY AND SUCCESSION

Res judicata

You must remember the rationale underlying RES JUDICATA which is the maxim INTEREST REI PUBLICAE UT SIT FINIS LITIUM (it is for the common good that there should an end to litigation. Related to this is another maxim NEMO DEBET BIS VEXARI PRO EUDEM CAUSA (no one should be sued twice on the same ground)

Estoppel by record or res judicata is not expressly mentioned in the Evidence Act but being in the nature of conclusive presumption is covered under 24(2). SECTION 26, 27, 28 AND 29 DEAL WITH DIFFERENT ASPECTS OF ESTOPPELS AND YOU MUST FAMILIARISE YOURSELF WITH THEM

For basic understanding of *RES JUDICIA* REFER TO AMISSAH JA IN FOLI V AGYA ATTA [1976] 1 GLR 194, CA when he quoted with approval WIGAM VC IN HENDERSON V HENDERSON (1843) 3 HARE 100

"I believe I sate the rule of the court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case and will not except under special circumstances permit the same parties to open the same subject matter of litigation in respect of matters which might have been brought forward only because they have frok negligence, inadvertence, or even accident omitted part of the case.

YOU MUST PAY ATTENTION TO CIVIL PROCEDURE PLEADINGS AND SUMMONS FOR DIRECTIONS AND ALSO ON THE LECTURE THAT A PARTY CANNOT LITIGATE PIECEMEAL

You must know the conditions to be met to rely on estoppels. REFER TO SPENCER-BOWER AND TURNER in RES JUDICATA 2ND ED PAGE 9 PARA. 9

1. Decision generally must be final;
2. Determination by court of competent jurisdiction;
3. Over the parties privies, assigns etc
4. The subject-matter of litigation.

Question usually asked is whether default judgement for example may suffice to ground estoppels. To answer the question READ FOLI V AGYA ATTAH (SUPRA); LARYEA V OFORIWAH [1984-86] 2 GLR 410 at PAGE 423 ABBAN JA SAID

"There is no doubt that a default judgment is capable of giving rise to an estoppel but it should always be critically examined and scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what it must necessarily have decided"

LORD MAUGHAM NEW BRUNSWICK RAILWAY CO V BRITISH AND FRENCH TRUST CORP LTD [1939] AC 1 at 21 said

"an estoppels based on a default judgment must be very carefully limited"

LORD RADCLIFFE KOK HOONG V LEONG CHEONG KWENG MINES LTD [1964] 1 ALL ER 300, PC at 305

"...a judgment by default speaks of nothing but the fact that a defendant for unascertained reasons, negligence ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and indeed grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion.

APALOO CJ in CONÇA ENGINEERING V MOSES [1984-86] 2 GLR 319 discussed the obvious danger in using default judgment as ground for estoppels and the reason why courts should be wary in applying it.

As you know or ought to know estoppel is an equitable relief and therefore at the discretion of the court. you should also remember that he who comes to equity must come with clean hands and that fraud vitiates everything. therefore a judgment obtained through fraud cannot form the basis for estoppel: read LORD LANGDALE IN PERRY V MEDDOWCROFT 50 ERT 529 AT 534; RANDOLPH V CAPTAN & ANO [1959] GLR 347

Types of estoppels *res judicata*

There are two types: cause of action estoppels and legal issue estoppels

LORD DENNING MR explains CAUSE OF ACTION ESTOPPEL in FIDELITAS SHIPPING CO LTD V EXPORTCHLEB [1966] 1 QB 630 AT 640

"IF one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause"

FOR THE SCOPE OF CAUSE OF ACTION ESTOPPEL READ WIGRAM VC in HENERSON V HENDERSON (SUPRA)

"...The plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time".

Legal issue estoppels

You must find the explanation of this estoppels by LORD DENNING MR in FIDELITAS (SUPRA)

> "WITHIN one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that once an issue had been raised and distinctly determined between the parties, then as a general rule, neither party can be allowed to fight that issue again".

Issue estoppels is restricted to issues actually determined and does not extend to issues which the litigant should have raised but failed to.

Court of competent jurisdiction

This is a fundamental requirement for a decision to ground estoppels. You must therefore understand what a competent court is. You must complement your study with the teaching of JURISDICTION IN BOTH CIVIL AND CRIMINAL PROCEDURE. You should know that issues of jurisdiction go to the root of every matter. You need to distinguish between judicial and purely administrative decisions. You must therefore read IN RE SEKYEDUMASE STOOL ; NYAME V KESE ALIAS KONTO [1998-99] SCGLR 476

In reading this case you need to understand the consideration of the status of the various judicial committees of the traditional councils; whether they are considered as court of competent jurisdiction or mere fact finding administrative bodies. You must read KYEREH V KANGAH [1978] 83 and at page 89 for SOWAH JA's description of these committees.

You must refer to ACQUAH JSC's consideration of SOWAH JA's statement in RE SEKYEDUMASE

> "That proceedings at the chieftaincy tribunals are in the nature of fact-finding is not disputed. But that statement (in KYEREH V KANGAH) does not imply that a chieftaincy tribunal is permitted to hear a matter already adjudicated upon by a judicial tribunal of competent jurisdiction. This will be a recipe for chaos and endless litigation..."

Privity, identity and parties

You should recall your study of privity under contract and vicarious liability under the law of torts (negligence). You must remember that judgment of a court is considered conclusive against privies, that is, agents, assigns, descendants etc of the parties.

Judgments are thus not enforceable against total strangers. To successfully plead estoppels against a party, you must prove the interest of that person and the subject-matter. The principle underlying estoppels of parties may be found in the statement of LORD PENZANCE in WYTCHERLEYV ANDREWS (1871) LR 2 P&D 237 @ 328 quoted with approval by the Judicial Committee of the Privy Council in NANA OFORI ATTAH II V NANA ABU BONSRA II [1957] 3 WLR 830:

"If a person knowing what was passing was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to reopen the case...".

One critical point from the authorities is that the person must STAND BY as was shown in Nana Ofori Attah II case. Where the person took steps but was frustrated, such a person cannot be said to have stood by for him to be stooped . This was the essence of the decision in SEY V CROMWELL [1973] 2 GLR 412. READ SEY V CROMWELL, determine how the case was distinguished from the decision in NANA OFORI ATTAH II V NANA ABU BONSRAH II

This is how CHARLES CRABBE J puts it in SEY V CROMWELL

> "In the Ofori Attah case it was a question of standing by while another fought one's battle for him. But in the instant case the issue at the circuit court was a claim for accrued rents and mesne profits. The plaintiff did not stand idly by. She took steps and was joined as a third party which was set aside. She took steps to protect her interests. Her action was set aside on the technical ground that Order 16A, r 7(1) had not been complied with...."

For a detailed discussion of party and subject-matter estoppels read ROBERTSON V REINDORF [1962] 1 GLR 508, SC. I n this case pay attention to the reasons of AMISSAH JA in dismissing the appeal where he said as follows:

a. If in action in respect of a portion of land to a wider area covering that portion is put in issue, a judgment given in that action operates as estoppels

against any subsequent suit involving a portion of the larger area. The decision in the earlier suit on the quarry site was arrived at after the court had pronounced that the larger area in which the quarry site was situate belonged to the respondents' family. The estoppels raised by that decision should not therefore be limited to the quarry site only;

b. For a judgment to operate as an estoppels against a person, he or those he represents must have been a party or a privy to a party in the case. Although the family involved in the earlier suit of ...was a smaller section of the larger family involved in the present suit, the co-defendant in that earlier case was not only head of the smaller family but also head of the larger family. Even if the parties were not identical, they were at least privy to one another

Read also the decision in PROFESSOR KWAME CHARLES SERBEH-YIADOM V ALHAJI FATTAU EL-AZIZZ (CIVIL APPEAL NO H/188/13. JUDGMENT DELIVERED ON DECEMBER 12 2013

For a detailed discussion of this case read Opoku-Agyemang (Second Edition) p 246-249

Estoppel by conduct

A person who by his words or conduct wilfully or negligently causes another to believe in the existence of certain state of things and induces him thereby to act on that belief or to alter his position is stopped from asserting against the other person that a different state of things existed at the time or none at all.

Estoppel by conduct may manifest itself in many ways:

Read SECTION 26 of the Evidence Act

This is akin to the rule on DEPARTURE as provided in ORDER 11 RULE 10(1) which provides that "a party shall not in any pleading make any allegation of fact or raise any new ground or claim inconsistent with a previous pleading made by the party".

For the Supreme Court's application of Order 11 and issue of estoppels by conduct READ FRABINA LTD V SHELL GHANA LTD [2011] 1 SCGLR 429

a. By agreement which may be oral or written

b. A representation which may be covert or overt, express or implied. Such a representation must one of fact and specific, not nebulous or a mere opinion or consent. (You must recall your studies on NEGLIGENT

MISREPRERSNTATION AND INDUCEMENT TO ACT IN TORT; OFFERS BY CONDUCT IN LAW OF CONTRACT ETC)

c. Election that is wilfully making a choice where there are options. REMEMBER TUFFUOR V AG the argument was that by agreeing to appear before vetting, APALOO CJ was stopped by conduct to complain after his rejection by Parliament. Estoppel by election is also related to issue of compromise of compromising a court decision and then claiming res judicata:: SEE ALSO AKWEI V AKWEI [1961] GLR 212 at 213 where OLLENNU J said among others:

"If after a court of competent jurisdiction had adjucated upon a dispute between parties VOULTARILY SUBMITTED the dispute in respect of the same subject-matter to arbitration, they will be stopped from claiming the fruits or benefits of the said judgment of the court, and would be bound by the award of the arbitration held subsequent to the judgment"

In applying these cases as estoppels by election such as COMPROMISE the arbitration must be voluntary. You may recall your notes on the RULES OF CUSTOMARY ARBITRATION.

d. Acquiescence; read RAFAT V ELLIS (1954) 14 WACA 430 and at 431 where WINDSOR-ABBREY J explained acquiscence as estoppels in these words:

"If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active, and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by mistake which I might have perceived..."

Estoppel in criminal cases

This may be found with reference to the RULE AGAINST DOUBLE JEOPARDY in Criminal Procedure. Read the explanation of DOIUBLE JEOPARDY by LORD PEARCE in CONNELLY V DPP (1964) CR APP REP 183 at 276

"Just as in civil cases the court has constantly had to guard against attempts to relitigate decided matters, so too the court's criminal procedure needed a similar protection against the repetition of charges after an acquittal or even after a conviction which was not followed by a punishment severe enough to satisfy the prosecutor. It was no doubt to meet those two abuses of criminal procedure that

the court from its inherent power evolved the pleas of AUTREFOIS ACQUIT AND AUTREFOIS CONVICT...IT IS CLEAR FROM SEVERAL CASES THAT THE COURT IN ITS CRIMINAL JURISDICTION RETAINED A POWER TO PREVENT A REPETITION OF PROSECUTIONS EVEN WHEN IT DID NOT FALL WITHIN THE EXACT LIMITS OF THE PLEAS IN BAR.

For the doctrine of double jeopardy to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is been charged. The word offence embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply therefore it must be the same offence both in fact and in law.

For further discussion of the doctrine read : REPUBLIC V COURT MARTIAL; EX PARTE MENSAH [1976] 2 GLR 154.

You are to identify the identical facts and legal provisions relied on the two cases brought against the applicant; find out the determination of the doctrine by JIAGGE JA; find out the reason(s) for which decision of the trial court martial was affirmed; in your view was the doctrine of double jeopardy applicable in this case considering the facts?

Chapter 5

TRIAL BY JUDGE AND JURY

This part is to complement your studies of TRIAL PROCEDURES in Criminal Procedure. In criminal procedure you will learn the modes of trial which are the SUMMARY TRIAL AND TRIAL ON INDICTMENT. You must pay attention to TRIAL BY JURY and distinguish it from the TRIAL WITH AID OF ASSESSORS. In Ghana, you should know that there is no JURY TRIAL in CIVIL PROCEEDINGS. You must remember the introductory lectures of the functions of a Judge and Jury as provided in SECTION 1 AND 2 OF THE EVIDENCE ACT.

Read: Opoku-Agyemang (Second Edition) Chapter 5 p 263-283;; Brobbey, Practice and Procedure in Courts and Tribunals Part II Chapter 3

Objective

By the end of this chapter you should be able to exhibit

a. An acquaintance with the duty of judge and jury in a criminal proceedings
b. A detailed knowledge and understanding of the exceptions to the general rule on functions of judges in jury; and
c. Detailed knowledge and explanation of summing-up by judges after close of parties cases in jury trials

Criminal prosecutions: duty of judge and jury

As was stated earlier in the course, in a trial on indictment, especially in a jury trial, it is the duty of the presiding judge to decide all questions of law arising in the course of the trial. These legal issues include questions as to the relevancy of facts and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties and the discretion to prevent the production of admissible evidence whether objected to or not by a party.

The duty of a judge is to fairly evaluate the evidence of parties and apply the law fairly. In a jury trial, a judge is to fairly and completely analyse the facts of the case so as to highlight the crux of the case for the benefit of the jury. As you are aware the onus is on the prosecution at all times to prove their case beyond reasonable doubt. So in a jury trial if there is evidence emanating from the prosecution itself which raises doubt, the judge is under a duty to draw the attention of the jury to it.

See the PRACTICE DIRRECTION on the appropriate direction of the JURY: STATE V AMUAH [1961] GLR 196 SC

Read also YANKEY V STATE (1968) CC 105; R V AHENKORAH [1960] GLR 160, CA; ZUTA KWABENA ALIAS DONKOR V THE STATE [1963] 2 GLR 545, SC

You should know that the sum total of the decisions in the cases is that judges should refrain from encroaching the province of the jury: which is the determination of facts. However, you must also understand that there are exceptions to the strict application of sections 1 and 2 of the Act dealing with determination of law and facts by the judge and jury. For the general discussion of the exceptions to the general principle READ OPOKU-AGYEMANG pp 268-274

Summing-up

Summing-up is explained in section 277 of the Criminal Procedure Code, Act 30. It is the duty of a judge after the close of parties case in a jury trial to summarise the law and evidence to assist the jury in their deliberation. Whether or not the duty is discretionary or mandatory: See Practice Direction in STATE v KWAME AMOH [1961] 2 GLR 637, SC.

You should remember that though there is no formula or exact words to be used in summing up, summing-up should not be used to pre-empt the jury's verdict or seek the ratification of judge's verdict by the jury. Summing up must be fair and balanced and not a biased rehearsal of a one-sided and unfair comment.

Refer to LORD SIMON in DPP V STONEHOUSE [1978] AC 55 at 80 where he admonished judges not to direct the jury to accept his view of disputed facts but to merely direct and remind them that they have the final say in the determination of the facts before. You must be aware that nothing prevents a judge from commenting robustly on the evidence in a summing-up but should always leave the verdict to be made by the jury.

On the fatality of a misdirected summing-up READ the following cases:

R V OJOJO [1959] GLR 207

BARKAH V THE STATE [1966] GLR 590, SC

R V AFENUVOR [1961] 2 GLR 655, SC

AWEDAM V REPUBLIC [1982-83] GLR 902

NICHOLLS V R [2001] 2 LRC 427

For detailed discussion of summing-up READ Opoku-Agyemang pp 274-283

Chapter 6 and 7

WITNESSES AND PROCEDURAL ISSUES RELATING TO WITNESSES

This part deals with general discussion of the qualification and compellability of witnesses and the procedure relating to witnesses testifying in court. You must recall your study of the means of proof which includes oral testimony or direct evidence, which is very important in the proof of matters. The issues relating to credibility of witnesses, consistency and inconsistency are all relevant at this stage.

Objective

By the end of this part you should be able to:

a. Determine who is a competent and compellable witness
b. Discuss the rule on the competency or otherwise of children and persons of unsound mind;
c. Explain the importance and the difference between oath and affirmations in a trial
d. Apply the procedures of leading witnesses in a trial
e. Determine the importance of cross-examination and the dos and don'ts in cross-examination including the use of leading questions;
f. Determine the differences and the uses of evidence in chief, cross-examination and re-examination
g. Distinguish hostile witnesses from unfavourable witness

A witness by way of introduction is the one who gives evidence in a cause before a court that is persons whose lips testimony is extracted to be used in any judicial proceeding and includes deponents and affiants as well as persons giving oral testimony.

In reading about witnesses, you should remember that the main issue is to determine the competency and compellability. In doing so you should be mindful of the provisions of the Evidence Act which has abolished the common law

disqualifications such as non-Christians, atheists, spouses of parties, accused persons and accomplices etc. Ghana law has simplified the issue of competence and compellability in sections 58 and 59.

To have a deeper understanding of the reforming nature of the Evidence Act with regards to the provisions on witnesses, READ Paragraph 13 of the MEMORANDUM to the Evidence Act.

In Ghana by virtue of section 58 of the Evidence Act every person is competent to be a witness and no person is disqualified from testifying from testifying to any matter. All competent persons are compellable to testify to any matter. This is however subject to persons immuned by way of PRIVILEGE (SECTION 88—); On the competence and compellability of accused SEE section 63(1) of the Act. Even though an accused is a competent witness, he enjoys the right to remain silent and enjoys privilege against self-incrimination (this will be dealt with under Chapter 8 dealing with Privilege).

You should therefore understand that in Ghana there is no longer categorisation of competent witnesses: every person is competent except where the person is disqualified by virtue of SECTION 59(1). You should remember that section 59(2) specifically and for the avoidance of doubt makes a child and a person of unsound mind competent witness in Ghana so long as:

a. They can express themselves so as to be understood, either directly or through interpretation by one who can understand them or
b. Capable of understanding the duty of a witness to tell the truth.

These are the two considerations for determining the competence or otherwise of a witness.

However, you should also know the general requirement that a witness may not testify to a matter unless sufficient evidence is introduced to show that he has personal knowledge of the matter – SECTION 60(1) (DIRECT EVIDENCE; not applicable to indirect evidence such as hearsay or expert evidence SEE SECTION 112)

For competence of a child refer to Morikawa v State [2001] 3 LRC 418; persons of unsound mind see R v Bellamy (1985) 82 Cr App Rep 222; R v Hill (1851) 2 Den 254

The three prong test in determining the weight to be attached to a testimony of a person of unsound mind may be found in R v Hill namely:

1. If in the opinion of the judge a proposed witness, by reason of defective intellect does not understand the nature and sanction of the oath, he is incompetent to testify;
2. A person of defective intellect who does not understand the nature of the oath may give evidence and it will be left to the jury to attach such weight to his testimony as they see fit;
3. If his evidence is so tainted with insanity as to be unworthy of credit, the jury may properly disregard it.

Even though under Ghana Law, a person of unsound mind is qualified to be a witness provided he or she satisfies section 59, the principles in Hill may still be relevant in determining the weight to be attached. Thus, even if the witness (a person with unsound mind) satisfies section 59 in the opinion of the judge or jury, the evidence is so tainted with insanity no credit or weight may be attached to it. You have to understand that competence to testify is different from the weight to be attached to the testimony.

Competent but not compellable witnesses

1. Sovereign and diplomats

   You must distinguish competency from compellability. A sovereign may be competent but not compellable by virtue of the Ghana Diplomatic Immunities Act. The essence of this privilege may be found in the case of Engelke v Musmann [1928] AC 433. You may also read the Canadian case of Rhita El Ansari v Minister of National Revenue [2004] Tax Court 385; Read Armon v Katz [1976] 2 GLR 115

2. Judges and Jurors

   To understand this part, you need to read and interpret section 65 of the Evidence Act with regards to a judge as a competent and compellable witness. This will help you to answer the question whether a judge can testify in a case he is presiding.

   With regards to jurors, you need to understand situations in which a juror may testify. This is found in section 66(2). You need to understand that a juror may not be compelled to testify to matters concerning the effect of any matter upon the determination of the verdict concerning the mental processes by which the verdict was reached. This may be distinguished from an improper conduct which does not concern the determination of

the verdict. For further understanding read R v Budai & Ors (1999) 180 DLR (4) 565. You may also read the following cases on competence and compellability of jurors: Ras Behari Lal & Ors v The King Emperor [1933] All ER 723; Mansell v R (1857) 8 e&b 54; 169 ER 1048

3. Court witness

   You need to understand the discretion of a court to call a witness; the extent to which the discretion may be exercised and whether consent of parties is necessary before calling a court witness. You must refer to section 58 of the Courts Act (1993) Act 459 and section 68 of the Evidence Act. Court witnesses may include bystanders or parties of a case and are under the same procedure as any other witness. You must understand that a court witness must be cross-examined and it will be a wrong for a judge to deny witnesses called by the court to be cross-examined. To what extent should the court use section 68 of the Evidence Act and 58 of the Courts Act? Refer to Kombat v Lambim [1989-90] 1 GLR 324.

PART TWO of this part, Chapter 7, deals with the procedural issues relating to witnesses. You must complement this part with your notes from civil and criminal procedure. You will understand that the type and number of witnesses called may depend whether the matter is civil or criminal.

The general rule however is that there is a preference for the oral examination of witnesses. However, in civil matters CI 87 has introduced the use of witness statements in lieu of viva voce evidence. This has amended Order 38 Rule 1 of CI 47 (High Court(Civil Procedure) Rules.

One important issue you must also understand is who a material witness is and who determines a party's material witness. You must READ the following cases:

1. Abadoo v Awotwi [1973] 1 GLR 393;
2. Gyamfi v Badu [1963] 2 GLR 596;
3. Hausa v Dawuda [1961] 2 GLR 550

Refer to these criminal law cases on the issue of material witness and order of calling witnesses: R v Russel-Jones [1995] 3 All ER 239; Tetteh v Republic [2001-2002] SCGLR 848; R v Essien (1938) 4 WACA 112; Annin v R [1972] 1 GLR 354

The most important part in this chapter is the introduction to the mode and practical way of questioning witnesses. There are three stages of questioning witnesses in court and you must understand the essence of each stage. This part

should always be complemented with court visitation and practical advocacy drills. The three stages are

1. Examination in chief;
2. Cross-examination; and
3. Re-examination

The essence of examination in chief is to obtain or elicit testimony in support of your claim from your own witnesses. What you need to understand is that as a general rule, leading questions are not allowed in evidence in chief. You must understand the meaning of leading question and the applicable rule. A leading question is simply a question that suggests the answer. Section 70(1) of the Evidence Act defines it as a question that suggests directly or indirectly the answer that the examining party expects or desires. It is used by counsel to testify through the witness, that is he testifies and the witness just ratifies.

You must be familiar with the exceptions to the general prohibition of leading questions. These include leading questions on formal and introductory matters and the discretion of a judge in section 70(2) and (4): leading questions may be asked as to matters which are introductory or undisputed or which in the opinion of the court have already been sufficiently proved (when sufficient foundation has been laid)

Read: R v Rose (2001) 53 Ontario Report (3d) 417; R v Coffin [1956] SCR 191; R v Situ (2005) Alberta Court of Appeal 275.

For a general discussion of PROCEDURAL ISSUES RELATING TO WITNESSES read Opoku-Agyemang (2nd ed) pp 321-399; See also Brobbey, S.A, Essentials of the Ghana Law of Evidence pp 146-162

You need to also understand that during examination in chief, a witness may be allowed to refresh his memory; that is he may refer to a document or previous writing in order to refresh his memory or a person is allowed to refer to documents before stating the facts orally. For the provision on refreshing memory refer to section 77(1) of the Evidence Act..

Hostile witness

The essence of the rule relating to hostile witness is that a party is not allowed to impeach the credit of a witness he calls. You must however understand the distinction between a hostile witness and an unfavourable witness. You should know that while a party is not allowed to impeach the credit of an unfavourable witness, he can do so to a hostile witness with the leave of the court.

Read section 72 of the Evidence Act dealing with adverse witness. Read the following cases: Ewer v Ambrose (1825) 3 B&C 746; Melhuish v Collier (1850) 15 QB 878; R v Malik & Bagri (2003) BCSC 1428; In Re Okine(Decd); Dodoo & An v Okine & Ors [2003-2004] SCGLR 582. You may refer to the definition of a hostile witness as provided by Kludze JSC at p 626. On the consequence of the testimony of a hostile witness, refer to Re Okine at p 628

Cross-Examination

For a detailed discussion, **READ OPOKU-AGYEMANG 2ND ED PP 344-387**

Cross-examination is the questioning of a witness after evidence in chief. You must be able to distinguish cross-examination from evidence in chief; for instance while leading questions are generally not allowed in evidence in chief, it is allowed in cross-examination.

To understand the importance and essence of cross-examination you must read the following cases:

1. R v Rowwbotham (No5) (1977) 2 CR (3d) 293;
2. R v Osolin (1994) 26 CR (4th) 1;
3. R v Seaboyer [1991] 2 SCR 577;
4. Mansah v Nimo [1961] GLR 511

Though cross-examination is fundamental, you must know that the mode of the examination may be controlled by the court; See Section 69 of the Evidence Act;

READ

1. Brown & Murphy v Queen [1985] 2 SCR 273;
2. Adzaku v Galenku [1974] 1 GLR 198

The courts control the mode of questioning to avoid over aggressive cross-examination or prevent improper questioning: For what constitutes improper questioning:

READ OPOKU-AGYEMANG PP351-354

For the effect of failing to cross-examining a witness on a fact in issue, **SEE:**

1. Fori v Ayirebi [1966] GLR 627;
2. Quagraine v Adams [1981] GLR 599

Another important issue under cross-examination is: what is the effect of answers to collateral questions? You must first appreciate what constitutes a collateral question; Read AG v Hitchcook (1847) 1 Ex. Ch 91; R v Busby (1981) 75 Cr App Rep 79; R v Bashir & Manzur [1969] 1 WLR 1303; R v Kraus [1973] 57 Cr App Rep 466. You must also draw the distinction between the issue of cross-examination as to credit and cross-examination as to matters in issue

Students should pay attention to the common law rule against narrative or self-serving evidence as a mechanism in testing credibility of witness: Refer to Lord Radcliffe statement on the rule in Fox v General Medical Council [1960] 3 All ER 225 at 230. You should pay particular attention to the exceptions to the rule as applied in sexual offences cases, namely

1. Complaints in sexual cases
2. Statement to rebut allegations of recent fabrication and
3. *Res gestae*

Students should familiarise themselves with the statutory provision in testing credibility generally, notably sections 75, 76 and 80 of the Evidence Act.

Issues considered in testing credibility under the Act include

1. The demeanour of a witness
2. Previous consistent and inconsistent statement
3. Exhibition of bias

Students should also have a firm understanding and the current legal position on corroboration. READ Ofori Boateng The Ghana Law of Evidence (1983) p 41 for explanation of corroboration. You must read SECTION 7 of the Evidence Act on the necessity or otherwise of corroboration. Refer also to the following cases:

R v Baskerville [1916] 2 KB 658 at 667

COP v Ameyaw [1962] 2 GLR 162

Atadi v Ladzepko [1981] GLR 218

Hanson v Republic [1978] GLR 477

The last important topic in this section is re-examination and its use after cross-examination. You must appreciate the limits to the use of re-examination as provided in Section 73 of the Evidence Act. Read the Supreme Court decision in Okudzeto v COP [1964] GLR 588

Chapter 8

EVIDENCE OF CHARACTER

This part deals with the relevance and admissibility of the evidence of character. This is sequel to the discussion on general test for the admissibility of evidence. See discussion in CHAPTER TWO.

Objectives

By the end of this chapter you should be able to:

1. Explain character evidence
2. Identify the types of character evidence: good character and bad character
3. Identify and apply the statutory rules on admissibility of character evidence
4. Explain the issue of prejudice and substantial miscarriage of justice as the test for exclusion of character evidence

Students may read the statement of Ackner LJ in F v Burke (1985) 82 Cr App R 156 on the cardinal principles in common law underlying the admissibility of character evidence in criminal trials.

Students shall read the following provisions in relation to character evidence:

1. Sections 53 and 54 Evidence Act
2. Section 129 Criminal and Other Offences Procedure Code Act 30

In reading these provisions, you should try and differentiate between character and reputation (if any): You may READ SCOTT V SAMPSON (1882) 8 QBD 491; R V AMADO-TAYLOR [2001] EWCA CRIM 1898; DABLA V REPUBLIC [1980] GLR 501

You must understand that as a general rule character evidence is generally not admissible unless the evidence is necessary and its probative value is not outweighed by substantial prejudice. You should also know that character evidence is not per

se excluded because it is irrelevant but excluded on the basis of its prejudicial value. That it comes under the exclusion discretion of judges in section 52 of the Evidence Act.

Students should also pay particular attention to the common law rule on similar fact evidence.

Consider this scenario: An accused person has been charged with an offence. In addition to the facts that the prosecution will adduce to connect the accused with the crime, they attempt to narrate other incidents involving the accused which show that the accused had in the past committed similar offence, which he was either charged or not charged with tem. The danger is this evidence may excite the mind of the jury for instance that having done it once, he is likely to do it again. In other words, history is likely to repeat itself.

You should get the basic understanding of this rule as propounded by Lord Herschell in MAKINS V AG FOR NEW SOUTH WALES [1894] AC 47. You should understand the difference between mere disposition, suspicion and mere circumstances. You should understand that similar fact evidence may be too prejudicial but can also be relied upon to invite rational and logical deductions from consistent misconduct in particular ways. Your understanding of circumstantial evidence as a means of proof would help you to appreciate the rule; You should compare the basic rule and the reformulated rule by Lord Wilberforce in DPP v BOARDMAN [1975] AC 421

Look for the similar facts if any in BAORDMAN

The accused was charged with buggery and incitement to commit buggery with two boys. Both boys were in the same school of which the accused was the headmaster. Facts as narrated showed that the accused would go to their dormitories around twelve midnight and warn them not to wake up the other boys. He was the passive partner in the sexual act. Evidence of the boy was admitted as corroborating that of the other boy. Among the statements made by Lord Herschell was this

> "In the case of an alleged homosexual offence, just as in the case of an alleged burglary evidence which proves merely that the accused committed crimes in the past and is therefore disposed to commit the crime charged is clearly inadmissible. It has however never been doubted that if the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused the manner in which

the other crimes were committed may be evidence upon which the jury could reasonably conclude that the accused was guilty of the crime charged. The similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence"

You must read the following cases to help you apply the rule:

- R v Ball [1911] AC 47
- R v Smith [1949] AC 182, PC
- Noor Mohammed v R [1952] AC 694

You should know that the test for the application of similar fact evidence is the proof of striking similarity and strong degree of probative force. For what constitutes striking similarity read: R v Ryder [1994] 2 All ER 859; DPP V P [1991] 2 AC 447; R V H [1995] 2 AC 596; R VB [1990] 1 SCR 717 PER MCLACHLIN J AT 730

On the use of similar fact evidence for the identification of an accused person See DPP V P (ibid) and MCGRANAGAN V R [1995] 1 Crim App R 559

In summarising the rule on similar fact evidence, you may refer to McLachlin J in R V C (MH) [1991] 1SCR 768 AT 771-772

"Such evidence is likely to have severe prejudicial effect by inducing the jury to think of the accused as a 'bad person'. At the same time it possesses little relevance to the real issue, namely, whether the accused committed the particular offence with which he stands charged. There will be occasions however, where the similar act evidence will go to more than dispositions, and will be considered to have real probative value. That probative value usually arises from the fact that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence. Only where the probative force clearly outweighs the prejudice, or the danger that the jury may convict for non-logical reasons, should such evidence be received".

Some aspects of similar fact evidence may be found in SECTION 142 of Act 323. You must familiarise yourself with the provision which deals with voice identification. Comparing a voice with a voice already heard to use the similarity of the voice to link the accused with the crime.

Similar facts evidence may be adduced as part of circumstantial evidence to invite the court to make a reasonable finding that the accused committed the offence charged. It is may also be part of the prosecution evidence to show the character of the accused or to disprove issues of coincidence, accident or innocent association. You must refer to the general limitation of SECTION 52 of the Act on the exclusion of relevant evidence.

Chapter 9

PRIVILEGE

This part provides a comprehensive discussion on privilege in the Law of Evidence. Students at this point should be familiar with the concept of privilege, immunity and rights as discussed in Jurisprudence: Read Ronald Dworkin on Taking Rights Seriously.

Students should familiarise themselves with sections 88-110 of the Evidence Act which provides for the categories of privileges codified by statute. Students should be aware that common law privileges not codified by statute are no longer in force.

Objective

By the end of this Chapter you should be able to:

1. Explain the meaning of privilege and who can claim privilege
2. Explain the issue of compellability of a witness and privilege; privilege and contempt of court (refusal to provide privilege evidence)
3. Determine the status of common law privileges
4. Identify, explain and apply the rules on the various categories of privilege in the Evidence Act
5. Explain and apply the provision on the general waiver of privilege: Refer to section 89 of the Evidence Act
6. Explain the relationship between discovery and interrogatories in Civil Procedure and provisions on privilege

Privilege is a special right, immunity or exemption by which a person may refuse to give evidence or disclose a fact or prevent others from doing so in court. You should recall the discussion on Competence and Compellability. The general rule is that every person is a competent witness and all competent witnesses are compellable unless otherwise provided.

You need to distinguish the provisions on subpoenas in the Courts Act, Act 459 ss 58,59 and 62 from the provisions on privilege. The Courts Act provides for the procedure for calling persons to appear in court. If a compellable witness refuses to appear, there are consequences, notably contempt. The relationship of these two statutes is that if a person appears in accordance with the Courts Act, he may claim immunity and may refuse to testify or disclose a document on grounds of privilege. Such refusal may not amount to contempt.

You may also pay attention to the Civil Procedure rules on Discovery and Interrogatories: REFER TO ORDER 21 OF CI 47

You should pay particular attention to the following privileges:

a. **Privilege against self-incrimination:** To understand this common law privilege which tends to protect a witness from being compelled to give evidence which lead to criminal proceedings against him, READ PYNEBOARD PTY LTD V TRADE PRACTICES COMMISSION (1983) 152 CLR 328

   For the statutory provision of the privilege READ SECTION 97(1) of the Evidence Act

   You need to understand what constitute an incriminating evidence; See BLUNT V PARK LANE HOTEL [1942] 2 KB 253 at 257; whether the rule is applicable when evidence rather incriminate a stranger or employer: See RIO TINTO ZINC CORP V WESTINHOUSE ELECTRIC CORP [1978] AC 547 at 637; whether the rule is applicable to civil proceedings: See AT&T ISTEL LTD V TULLY [1993] AC 45. In discussing this part, you should refer to Order 22(1) of CI 47 (Civil Procedure Rules 2004) which provides among others that privilege is available in all proceedings, that is both civil and criminal.

Students may distinguish between the rule as applied in Ghana and the current developments in other jurisdictions, especially the European human rights system, especially on rules of compulsory disclosure of evidence: See the following cases:

- HEANEY MCGUINNESS V IRELAND [2001] 33 EHHR 12
- FUNKE V FRANCE (1993) 15 EHHR 297
- SANDERS V UK (1996) 23 EHHR 313

b. Lawyer client privilege

You should pay more attention to this privilege as it is relevant not only for the law of evidence but also for Advocacy and Legal Ethics as well. The essence of the

privilege is that persons must be able to consult their lawyers in confidence since otherwise he must hold back. To plead the privilege, there must be

a. Existence of lawyer-client relationship;
b. There must be communication between the lawyer and client
c. The communication must be made in confidence
d. It must be made for the purpose of legal advice or litigation.

Students should understand the core of the privilege which is protection of the confidential communication between lawyer and client. You should know that the privilege is that of the client. Read sections 100-102 of the Evidence Act to know the extent and the claimants of the privilege. For the general understanding of lawyer client privilege, you may read the following cases:

- General Accident Assurance Co v Chrusz (1999) 180 DLR (4th) 241
- Anderson v BANK OF BRITISH COLUMBIA (1876) 2 CH D 644
- RE SARAH GETTY TRUST (1857) 7 H&N 736
- BALABEL V AIR INDIA [1988] 2 ALL ER 246
- DUBAI BANK LTD V GALADARI [1989] 3 ALL ER 769

You should also understand the following:

1. The distinction between litigation privilege and legal advice privilege;
2. What constitutes the privilege: confidential communication and protected material;
3. Whether it extends to communication with third parties: Under this you should understand the issue relating to 'dominant' and subordinate purpose of the communication: READ: WAUGH V BRITISH RAILWAYS BOARD [1980] AC 521; NEILSON V LAUGHARNE [1981] QB 736; GUINNESS PEAT PROPERTIES LTD V FITZROY ROBINSON PARTNERSHIP [1987] 2 ALL ER 716
4. What is the duration of the privilege: See CALCRAFT V GUEST [1898] 1 QB 759
5. Are there exceptions to privilege? See R V DERBY'S MAGISTRATES' COURT, EX PARTE B [1995] 4 ALL ER 526, HL; Pay particular attention to fraud as an exception: You should read section 101(a) of the Evidence Act. You may also read R V COX RAILTON (1884) 14 QBD 153; you may distinguish this case with that of BUTTLER V BOARD OF TRADE [1971] CH 680; SEE ALSO GEMINI PERSONNEL LTD V MORGAN

AND BANKS LTD [2001] 1 NZLR 14; RE FIRM OF SOLICITORS [1991] LRC 764

6. Identify other exceptions to the lawyer client privilege by reading the whole of SECTION 101 of the Evidence Act

Mental treatment privilege

You should have a general understanding of the extent of this privilege: confidential communication between a physician or psychologist or other persons and patient participating in the diagnosis or treatment of a mental or emotional condition.

You should understand that the privilege is not applicable to general doctor-patient relationship as it is limited to mental or emotional treatment: SEE SECTION 103.

Religious advice privilege

This is also referred to as penitent priest privilege. For the common law basis of this privilege, you MAY read the statement by BEST CJ in BROAD V PITT (1828) 3 C&P 518; NORMANSHAW V NORMANSHAW AND MEASHAM (1893) 69 LT 468.

You must read SECTION 104. You must identify who a professional minister of religion and what constitutes professional role of a spiritual adviser; you must also determine whether this is applicable to all religious sects or to sects whose code prevents disclosure of confidential communication

Students should familiarise themselves with other categories of privilege such as:

a. **Privilege against disclosure of compromise and settlement negotiations:** See SECTION 105. You may read: SEM V COP [1962] 2 GLR 77, SC; RUSH & TOMPKINS LTD V GREATER LONDON COUNCIL [1988] 3 ALL ER 737; CHEDDAR VALLEY ENGINEERING LTD V CHADDLEWOOD HOMES LTD [1992] 4 ALL ER 942

   On matrimonial reconciliation and non-disclosure see D V NSPCC [1978] AC 171; HARRIS V HARRIS [1931] P 10; MOLE V MOLE [1951] P 21; THEODOROPOULAS V THEORODOPOULAS [1964] P 311

   Read also SECTION 8 of the Matrimonial Causes Act (1971) Act 367 on non-disclosure of proceedings at matrimonial reconciliations

b. **Identity of informants:** privilege against disclosure. You should understand that this privilege is claimable only by government and its agencies.

Communication must be related to information revealing commission of crime: READ SECTION 107 of the Evidence Act

c. **Marital communication privilege:** Students should understand the difference between 'confidential communication' between spouses and disclosure of an act committed by a spouse. This privilege is applicable if marriage is subsisting and communication made in confidence: READ SECTION 110 of the Evidence Act

Chapter 10

HEARSAY EVIDENCE

The hearsay evidence rule is regarded as one of the most complex and confusing of the exclusionary rules. It is always distinguished from direct evidence which is preferred by the courts. To understand this rule, you must divide the topic into two units:

1. Understand the general nature of hearsay; why it is considered an exclusionary rule; its common law antecedent and the statutory interventions;
2. Identify the numerous exceptions, notably admissions, confessions, res gestae and dying declarations.

Objective

By the end of this chapter you should be able to:

1. Explain what hearsay evidence is;
2. determine the reason behind the exclusionary nature;
3. explain the conditions under which to describe a statement as amounting to hearsay
4. identify and explain the various exceptions to the rule.

You should start with the common law explanation as to what constitutes hearsay; determine whether the common law explanation is consistent with the definition of hearsay as in the Evidence Act – See SECTION 116 (c).

You should pay attention to SECTION 117 the general exclusion and the exception clause. You should identify any existing enactment which provides for instances of Hearsay. On this YOU MAY READ SECTION 24 (repealed and replaced by SECTION 31 OF Act 759 of the Chieftaincy Act and the cases of:

a. EDWARD NASSER V MCVROOM [1996-97] SCGLR 468
b. IN RE WA NA; B.K. ADAMA V YAKUBU SEID [2005-2006 SCGLR 1088

For the common law antecedent and strict application of the rule, read the following cases:

- R V ERISWELL (INHABITANTS) (1790) 3 TERM REP 707
- R V RISHWORTH (1842) 2 QB 476
- R V GIBSON (1887) 18 QBD 537
- SUBRAMANIAN V PUBLIC PROSECUTOR [1956] 1 WLR 965
- APALOO AND OTHERS V REPUBLIC [1975] 1 GLR 156

You should understand that hearsay rule is exclusionary in nature, that is to say it is primarily designed to exclude hearsay evidence. You should understand the reason for the exclusion notably the inherent danger of receiving concocted evidence without opportunity of seeing the witness or cross-examining the witness: You may read: R V BLASTLAND [1985] 2 ALL ER 1095; TEPER V R [1952] 2 ALL ER 447

Part Two of the chapter deals with the provisions of the Evidence Act, most importantly the numerous statutory exceptions to the hearsay rule. Prior to discussing any exception to the rule, students should always remember the general provisions as found in sections 116-118. This is to reinforce the fact that hearsay evidence is generally exclusionary.

Students should familiarise themselves with the following sections:

- Section 116: statutory definition of hearsay evidence; meaning of unavailable witness etc;
- Section 117: the general exclusionary nature except as provided in the Act or any other enactment
- Section 118: Meaning of first hand hearsay: For a discussion of this **you may read OPOKU-AGYEMANG pp 495-496; BROBBEY at pp 350-352; See Pierterse v Amankrah [1982-83] 1 GLR 785**

Students should familiarise themselves with all the exceptions to the general rule as found in sections 119 to 132.Students should however pay particular attention to the following exceptions:

1. Admissions – section 119: In discussing this you may refer to discussion of matters not requiring proof and the distinction between FORMAL AND INFORMAL ADMISSIONS

   Admission is a voluntary acknowledgement of the existence of facts relevant to the opponents case. In other words it amounts to a concession of a fact

2. Confessions – section 120

   Confession may be described as a criminal aspect of admissions: In discussing confession, you must pay attention to the meaning of it, the procedure provided in section 120 as well as the conditions for its admissibility. These include the requirement of voluntariness and an independent witness.

   Students should read the the following cases on the controversy surrounding qualification as independent witness:

   a. Frimpong alias Iboman v Republic [2012] SCGLR 279 (Supreme Court) per Brobbey JSC;
   b. AWUTU ELLIS KAATI & ORS V REPUBLIC (2014) UNREPORTED COURT OF APPEAL per Dennis Adjei JA See OPOKU-AGYEMANG PP 546-548

      You should also understand the rule on the admissibility of facts discovered in consequence of inadmissible confessions. You should read and understand the position of the rule as stated in R V WARICKSHALL (1783) 1 LEACH 263; YOU MAY READ ALSO THE INDIAN CASE OF PULUKURI KOTTAYA V EMPEROR (This case is fully discussed by OPOKU-AGYEMANG at pp 566-568

3. Res gestae – section 124: The section provides for the two main conditions for the admissibility of res gestae which simply means the facts surrounding the happening of an event or every act, omission or statement which throws some light upon the nature of the transaction or reveals its true quality or character. For the conditions of its admissibility READ:

   a. RATTEN V R [1972] AC 378, PC
   b. WOLEDZI V AKUFO-ADDO [1982-83] GLR 421
   c. R V BEDDINGFIELD (1879) 14 COX CC 341
   d. DUA V REPUBLIC [1987-88] 1 GLR 343

      For detailed discussion of RES GESTAE READ OPOKU-AGYEMANG PP 568-581

4. Business/official records – sections 125 and 126
5. Family history – section 128

For a detailed discussion of the various exceptions to the rule, **READ OPOKU-AGYEMANG PP 501-583; BROBBEY, ESSENTIALS OF THE GHANA LAW OF EVIDENCE PP 360-365**

Chapter 11

DOCUMENTARY EVIDENCE

This part deals with one of the means of proof which was dealt with in Chapter One. Documents are very important in modern day litigation or official correspondence. The use of documents in evidence requires the understanding of the issues of proper execution of documents and authentication. At the end of this part YOU should be able to:

1. Explain what a document is;
2. Explain issues of authenticity and proper execution of documents;
3. The best evidence (primary evidence) rule
4. The secondary evidence as exception to best evidence rule

In your reading, you need to understand the various uses of documents. For instance, a document may be the subject matter of a dispute or may be relied on as a hearsay document. The most important part of this chapter is the discussion on production of either the original or a duplicate of a writing or document.

A document is any written thing capable of being evidence; or something tangible on which words, symbols, or marks are recorded

FOR THE GENERAL DISCUSSION OF DOCUMENTARY EVIDENCE, READ BROBBEY PP 270-286; OPOKU-AGYEMANG PP 584-622;

Students should familiarise themselves with the basic common law rules on admissibility of documents and the old common law rule on best evidence. Students MAY read the following cases on the application of the rule in common law:

- CHERIE V WATSON (1797) PEAKE ADD CAS 123
- WILLIAS V EAST INDIA CO (1802) 3 EAST 192
- R V SMITH (1768) 1 EAST PC 1000

- R V GOVERNOR OF PENTONVILLE PRISON; EXPARTE OSMAN [1990] 1 WLR 277
- MACDONNELL V EVANS (1852) 11 CB 930

The basic test for admissibility of documentary evidence is the BEST EVIDENCE RULE: where the original document is available as evidence, it must be produced unless there is a reasonable explanation for the absence of the original. Where the explanation is accepted by the court, a party may resort to the SECONDARY EVIDENCE RULE

To understand the best evidence rule and the exceptions, student should pay attention to Sections 163 (original writings) and 164 meaning of duplicates. The BEST EVIDENCE RULE is provided under Section 165.

YOU MUST FAMILIARISE YOURSELF WITH THE EXCEPTIONS TO THE BEST EVIDENCE RULE WHICH ENCAPSULATE THE SECONDARY EVIDENCE RULE: You MAY read OWUSU V REPUBLIC [1972] 2 GLR 262 to understand the acceptable explanation for the admission of photocopy in place of original

The exceptions to the best evidence rule, that is admitting duplicates to the same extent as original, are found in sections 166 to 177. Particular attention should be paid to sections 167 (where originals are lost) ;non-production by opponent after service of judicial process (this is done usually through notice to produce served on opponent who refused under Orders 21-23; 38 R3(2) of CI 47 section 169 (where original is under the control of a party's opponent); section 171 (voluminous writings); section 175 (copies of official writings). In all these situations duplicates may be admitted to the same extent as the original. You must know that the burden is on the person who relies on the exception.

Another important rule under this chapter is the rule against parol evidence or the rule against extrinsic evidence. Simply the rule means that a party to a written document is not permitted to adduce evidence to vary or contradict the terms of the document. .This is sometimes also referred to as the four corners rule: meaning court considers mainly the content of a document but not writings outside it. You must combine your reading of this part with your understanding from the Law of Contract (TERMS OF CONTRACT) and rules on the construction of documents in the Law of Interpretation. This part is also relevant in Conveyancing and Drafting especially the construction of WILLS.

You should READ SECTION 177 of Act 323 which is the codification of the said rule

YOU SHOULD READ OPOKU-AGYEMANG PP 594-606; BROBBEY PP 280-285.

YOU MAY READ these cases:

- BAKER V DEWEY (1823) 1 B&C 704; 107 ER 259;
- MOUGAINE V YEMOH [1977] 1 GLR 163;
- GORMAN & GORMAN V ANSONG [2012] 1 SCGLR 174;
- PY ATTAH&SONS LTD V KINGSMAN ENTERPRISES LTD [2007-2008] 2 SCGLR 946;
- BINEY V BINEY [1974] 1 GLR 318

The session ends with the consideration of proof of documents against illiterates. You should familiarise yourself with the provisions of Illiterates Protection Ordinance CAP 262 especially the express requirements in Section 4. The protection provided is a defence against estoppels of deed which was studied under PRESUMPTIONS meaning an illiterate may not be necessary bound by a documents which bears his or her mark.

To understand the rule READ KWAMIN V KUFFUOR (1914) 2 REN 808 PC; ZABRAMA V SEGBEDZI [1991] 2 GLR 221;

On the application of the rule to protect illiterates READ:

- BP (WEST AFRICA) LTD V BOATENG [1963] 1 GLR 232;
- SAT CO LTD V ARYEE [1961] GLR 185;
- RE KODIE STOOL; ADOWAA V OSEI [1998-99] SCGLR 23;
- ANTIE AND ADJUWAAH V OGBO [2005-2006] SCGLR 494;
- DUODU & ORS V ADOMAKO&ADOMAKO [2012] 1 SCGLR 198
- NARTEY V MECHANICAL LLOYD PLANT LTD [1987-88] 2 GLR 312, SC
- IN RE BREMANSU; AKONU-BAFFOE V BUAKU & VANDYKE (BREMANSU) [2012] 2 SCGLR 1313

YOU SHOULD READ OPOKU-AGYEMANG PP 606-622; BROBBEY PP 286-293

Chapter 12

PUBLIC POLICY

In the study of law in general and in the law of evidence in particular, consideration of matters relating to public policy is important. Student should recall the study of Law of Contract and issues of Public Policy such as Illegality and Contract etc. In the law of evidence the object of public policy is to prevent the production or disclosure of material that would be prejudicial or injurious to public interest.

At the end of this session students would be able to identify evidence not admissible on the basis of public policy and the rationale for excluding same.

For detailed discussion, **READ BROBBEY PP 426 – 441; OPOKU AGYEMANG PP 623-636.** You must understand the relationship between privilege and exclusion of evidence as against public policy. The statutory provisions on exclusion of evidence against public policy are found under PART VI of the Evidence Act dealing with PRIVILEGES. These are mainly matters against public interest or injurious to public safety. You should therefore read:

- Section 106 (evidence relating to state secrets privileged and the basis is public policy)
- Section 107 Privilege to refuse disclosure of evidence on informants.
- Section 108 refusal to disclose trade secrets
- Section 109 refusal to disclose political votes
- You may also refer to SECTION 65 of Act 323 on the policy consideration why a superior court judge is not obliged to testify on matters which take place in their official duties. YOU MAY READ REPUBLIC V HIGH COURT; DENU; EX PARTE AGBESI AWUSU II (No1), NYONYO AGBOADA (SRI III) INTERESTED PARTY [2003-2004 SCGLR 864; REPUBLIC V HIGH COURT, ACCRA; EX PARTE CONCORD MEDIA LTD (OWUSU MENSAH INTERESTED PARTY) [2011] SCGLR 546

The rationale for these privileges is the necessity to protect public service, public interest public defence and promote international relations.

You should also pay attention to the issue of public policy and illegality. This part is also relevant in the law of interpretation especially the exterior maxims in aid of interpretation such as *EX TURPI CAUSA NON ORITUR ACTIO* that is a plaintiff cannot found his action on an illegality. The same principle was found in the study of the equity maxim he who comes to equity must come with clean hands.

You must pay attention to the two broad ways in which public policy affects illegality: effects on contracts or agreements and breaches or non-compliance with statutes

YOU SHOULD READ: KWARTENG V DONKOR [1962] 1 GLR 20; the relevant portions of this case is found in BROBBEY at pp 438-439

For extensive discussion of this topic **READ BROBBEY PP437-441; OPOKU-AGYEMANG 631-636**

You may also read the following cases:

RAMIA V CHIAVELLI [1967] GLR 737

ADDY V IRANI [1991] 2 GLR 30

SCHANDORF V ZEINI & ANO [1976] 2 GLR 418

> "the courts on the ground of public policy would decline to enforce a contract which on the face of it was perfectly legal but which the plaintiff at the time of making it intended to perform in an unlawful way. It did not matter whether the defendant had the same intention because *portior est conditio defendentis*

AMA V CCW LTD [2012] 2 SCGLR 553

> "Under English common law, the general rule was that where a contract was found to be illegal, the benefits conferred under it were not recoverable. The two main exceptions to that rule were; (1) where the parties were not in *pari delicto;* and (2) where a party to an executory contract repented before the performance".

KESSIE V CHARMANT [1973] 2 GLR 194

"It was against public policy that a person should be hired for money or valuable consideration, when he had access to persons of influence, to use his position and interest to procure a benefit from the government"

ST JOHN SHIPPING CORP V JOSEPH RANK LTD [1956] 3 ALL ER 683: The duty of a court to raise issues of illegality *suo motu*

"The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake however that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice as between him and plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon immoral or illegal act..."

IN RE ARBITRATION: MAHMOUD AND ISPAHANI [1921] 2 KB 716

"The court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppels; it is for the protection of the public that the court refuses to enforce such a contract".

Chapter 13

OPINION EVIDENCE

Students should not decouple the reading of this part from the general reading on WITNESSES or TESTIMONIAL EVIDENCE. Once a person is qualified as a witness, the question is what can he testify to. The rule under this part is that every witness must be a witness of fact and not opinion. In other words a person who appears before a court is entitled to tell the court only the facts of which he has personal knowledge and not his opinion.

Objectives

At the end of this session students should be able to:

1. Explain what is opinion
2. Distinguish opinion from facts
3. Understand the general rule against opinion evidence
4. Identify the main exception to the rule against opinion evidence
5. Identify and apply the test for the admissibility of expert of expert opinion
6. Identify who is qualified to be an expert
7. Explain the role of an expert vis-a-vis the ultimate question for determination
8. Explain lay opinion evidence and its use in adjudication

You should know that there are two main exceptions to the general rule on admissibility of opinion evidence namely:

- Expert opinion evidence and non-expert or lay opinion evidence

You must familiarise yourself with the rationale for the exclusion of opinion evidence as well as the dangers inherent in even expert opinion evidence. You must also understand the reason for admitting expert evidence notwithstanding the associated dangers.

For a general discussion of admissibility of expert evidence in common law **READ OPOKU AGYEMANG** pp 638-647.

You may also READ the following cases: R V MOHAN [1994] 2 SCR 9; HG V R [1999] 197 CLR 414; DPP V JORDAN [1977] AC 699; R V DD [2000] 2 SCR 275

You must familiarise yourself with the provisions of the Evidence Act on opinion evidence, the general rule of exclusion and the exceptions. Section 67 deals with the qualification of an expert as a witness; Section 111 deals with a lay opinion evidence and the test for its admissibility; Section 112 provides the basic test for the admissibility of expert opinion: for example, if the opinion or inference is beyond common experience and will assist the court. In addition to expert witnesses called by parties, a court on its own may call a court expert to inquire into and report upon any matter on which the opinion will be admissible under section 112, that is, if the matter is beyond common experience and will assist the court.

You should know that the essence of the expert opinion is to assist the court but not to determine the matter. Thus a court is not bound by the expert opinion though incontrovertible. In other words, expert opinion is desirable but not necessary.

You should READ the following cases as well:

- TETTEH V HAYFORD [2012] 1 SCGLR 417
- OSEI V REPUBLIC [1976] 2 GLR 383; R V SILVERLOCK [1894] 2 QB 766 (who is qualified to be a witness)
- CONNEY V BENTUM-WILLIAMS [1984-86 2 GLR 301 (the role of an expert); WAKEFORD V LINCOLN(BISHOP) (1921) 90 LJ 174 PC
- NYAMENEBA V THE STATE [1965] GLR 723 (expert opinion and ultimate issue)
- MANU ALIAS KABONYA V THE STATE [1977] 1 GLR 196 (failure
- C to call desirable expert evidence the effect)4

You may also READ BROBBEY PP 334-340

Chapter 14

EVIDENCE ON APPELLATE AND REVIEW PROCEEDINGS

Objectives

By the end of this part, students should be able to:

a. Determine what constitutes Appeals and Reviews.
b. Differentiate Appeals from Reviews
c. Familiarise themselves with statutes governing Appeals and Reviews
d. Be in a position to prepare grounds of appeal and review with reference to their studies in the law of evidence
e. Appreciate the distinction between evaluation of evidence at the trial level and evaluation of evidence at the appellate and review levels
f. Be fully aware of the various consequence of appeal and reviews

This part should draw home to students that appeals are clearly different from reviews and more importantly that the evaluation of evidence on Appeals and Reviews are totally different from evaluation of evidence at the trial level.

Among others, students should be made aware that time is crucial in all appellate and review proceedings and may ruin the appeal or review if this is not clearly appreciated. All the law in appeals and reviews should be studied in detail by students.

The processes in NRCD 323, s. 5 and Act 459, s. 31 should be carefully studied and their application understood by students. Both sections emphasise on the difference between evaluation of evidence at the trial level and evidence at the appellate and review level. By the end of this part, students should be aware of the difference.

In the light of the introduction of internship programme by the General Legal Council, it is important for students to learn how to prepare grounds of appeal and grounds of review within the context of their studies of the law of evidence.

By the end of this part, students should be in a position to prepare grounds of appeal and grounds of review.

For detailed information on evidence on appeals and evidence on reviews, read Brobbey: Essentials of Ghana Law of Evidence, at paragraph 10 and 11.

General Review Questions

PART ONE

Question One

At the hearing of the Presidential Election Petition, the Petitioners submitted a number of Statement of Polls (Pink Sheets) which did not have the signatures of presiding election officers. It was the contention of the Petitioners that the said Statement of Polls (Pink Sheets) were not authentic and a clear proof of election malpractice. The Respondents did not join issue with the Petitioners on the matter except to disagree on the effect of the absence of signatures. In dismissing the contention of the Petitioners, Adiemra JSC, had this to say:

It is trite learning that a Presidential Petition is a civil matter. As a civil matter, both the evidential and legal burden is always on the Petitioners to prove the matter to the satisfaction of this Court. That, notwithstanding the known standard of proof in civil cases, in my respectful view, this is a case in which the Court can impose a higher burden of proof as it strives to maintain the fundamental right to vote. In my view therefore, the Petitioners must prove this case beyond the preponderance of probabilities to successfully discharge the burden.

With reference to relevant statutory and decided cases, critically analyse this statement.

Question Two

Answer EITHER A or B

(A)

Identify and discuss the evidential issues

(i) Under the Private Tutorial Act 2014, it is an offence for a lecturer to provide private tutorial lessons in his private residence for more than eight hours a week without authorisation from the General Legal Council. It is a defence for the accused to prove that the tutorials were given to people over 18 years old. Kwakye is charged with an offence under this Act. In her statement to the Police she claims the people were 21 years old. At the trial counsel for Kwakye insisted ferociously

that his client bears no burden and that it was the duty of the prosecution to prove all the elements of the trial including the ages of the people involved.

(ii) Comment on the following judicial summing up

"Ladies and gentlemen of the jury, you have heard the defence acknowledge that the accused struck the blow which felled Kwapee but that he had no recollection of this at all. If he does not convince you that it is more likely than not that she did suffer a black out you must find for the prosecution"

(B)

In an action for declaration of title to land both the plaintiff and defendant largely supported their respective claims with traditional evidence. At the end of the trial the learned trial judge delivered a judgment as follows:

> "From the evidence on record, both the plaintiff and the defendant relied on traditional evidence in proof of their case. Whilst the plaintiff insisted that his ancestors were granted the land as a result of their exploits in a war of conquest, the defendant insist that the land was discovered by their ancestor who was a renowned hunter on one of his hunting expeditions. I am left in a conundrum as to which of the rival version of traditional evidence to prefer. I must say that I am most impressed with the manner with which the Plaintiff's and their witnesses related their version and how coherent they were.

The Plaintiff representatives and their witnesses were very eloquent. Their testimonies were clear and concise. Contrasted with this the defendant's representative's testimony was full of inconsistencies, contradictions and weaknesses. He himself admitted that his grand uncle and his uncle in rending the traditional story to him years before this litigation could not agree whether the hunter discovered the land was called KojoTenten or Kojo Ware. Based on the above I have no choice but to prefer the traditional evidence of the Plaintiff and to reject the version of the Defendants. I am unable to grant their counter-claim for a declaration of title to the land. This is inspite of the clear evidence of ownership and acts of possession in favour of the defendants. A party whose traditional evidence is rejected is not entitled to a declaration of title. I must hasten to add that the only documentary evidence which was a pamphlet published by an unknown author but titled "A recording of the folktales of the people of the lower Denkyira" contains stories which support the plaintiff's case. Judgment is therefore given in favour of the plaintiff"

Comment on this judgment in the light of the principles for evaluation of conflicting traditional evidence.

Question Three

Torto and Lansana are jointly charged with the murder of Lovia. Both pleaded not guilty to the charge. Their explanation is that Lovia had tried to rape Torto and in the course of protecting her they both were obliged to push Lovia and he fell down some stairs. Both had fled the scene but later gave themselves up to the police. Lansana chooses not to give evidence but her counsel calls her local preacher to state that Lansana had been a Bible School teacher and sang in the church choir for decades. Her counsel also suggests in cross-examining a prosecution eye witness, Gasper, that he had been high on marijuana on the night of the alleged murder and that his account of events was therefore not reliable. Lansana has two previous convictions for stealing. Torto elects to testify and in the course of her testimony denied forcefully a purported statement in which she admitted an attempt to kill Lovia. She implored the court, as she puts it, "to ignore the lies of the police investigator". Torto has several drug-related convictions and is awaiting trial on a charge of violent disorder.

Discuss the evidential issues

Question Four

Hajia is charged with the manslaughter of Tomtom. The prosecution allege that Tomtom and Hajia, who were lovers, got into a heated argument whereupon Hajia, in a fit of rage, fatally stabbed Tomtom. Hajia denied and stated that the incident was an accident and that the two of them were in such conjugal bliss on the night of the incident.

Consider the admissibility of the following evidence:

(a) Koti, a passer-by, who administered first aid to Tomtom when he staggered out of his house covered in blood gasped "it was Hajia who did it, I have had it. Make sure that I have a Muslim burial".

(b) Tomtom's mother to whom Tomtom confided on the morning of the stabbing that even though he has always been scared of Hajia, he was going to confront her about her infidelity.

Question Five

Elija, the Chief Accountant of the Asuoso Municipal Assembly was charged with forgery, falsification of accounts and stealing of an amount of GH₵ 2,000,000 belonging to the Assembly. At the trial, the prosecution sought to tender a purported confession statement in which the accused wrote as follows:

"I wish to mention that I am the Municipal Chief Accountant. Somewhere in 2012, I and my deputy engaged in a deal whereby cheques meant for the Assembly were forged and falsified and paid into my personal account. The period between 2012 and 2014 is a long time and because the amounts were withdrawn at various times spaced between months, I cannot tell how much the amount is and cannot either agree with the figure or not..."

Counsel for the accused objected to the admissibility of the purported confession statement on the grounds that it sinned against section 120(3) of the Evidence Act in that the statement was written in the presence of a police officer who is not qualified to be an independent witness. At the *voir dire*, counsel relied copiously on the Supreme Court decision of **Frimpong alias Iboman vrs. The Republic [2012] 1SCGLR 297,** which held among others that an independent witness must not be someone who is so closely connected to the police as to make him more or less dependent on the police. The prosecution on its part urged the court to bear faith with the said section 120(3) of the Evidence Act as amended which did not contain the words "other than a police officer or member of the Armed Forces..."

As an intern of Sibo J, you have been asked to submit a reasoned legal opinion, indicating among others , the qualification of an independent witness and whether the High Court can depart from the decision of the Supreme Court in Frimpong alias Iboman vrs. The Republic and if so why?

Question Six

Uncle Sam, 50 a wealthy Fante businessman was married to Araba, 60 and the Paramount Queen-mother of Esuakyir in the Central Region of Ghana. The couple, as part of their usual annual vacation were on board the Malaysian Airliner MH 370 which crashed into the Indian Ocean killing all passengers and crew members. In the last Will and testament of Uncle Sam, he devised all his properties to Araba, his beloved wife if he predeceased her. In an application for a probate by Mimi, a 'daughter' of the deceased couple, Uncle Ebo, a nephew of Uncle Sam *caveated* on the grounds that on the true application of the *commorientes* rule, the devises so made in the Will of Uncle Sam are inoperative and that the assets of Uncle Sam has fallen into intestacy. At the hearing, Uncle Ebo also produced an old photograph showing the deceased couple, and Mimi, the applicant with the caption "From Left to Right, Uncle Sam, Araba, and Mimi, my Late Brother's daughter".

Identify and discuss the evidential issues

Question Seven

Gligo, a police constable stationed at Denu central police station is charged with rape. The facts were that the victim Afi, a trader and a hawker at the Denu Lorry Station adjacent to the police station claimed that while selling her wares on that fateful day, the accused called her to his office pushed her into a store room and had sex with her without her consent. The victim first reported the matter to her friend at the lorry station and upon advice reported the matter to the same police station, two days after the incident. The accused denied the charge contending that the complainant was his girlfriend and had been in a relationship for some time. According to the accused, he stopped seeing the complainant after she disgraced him for failing to give her money for a pregnancy. The accused further stated that on that fateful day, while in the charge office alone, the complainant came to his office, rained insults at him but he managed to push her out of the office into the main street. The accused categorically denied haven sexual intercourse with the complainant, claiming that the last time they had sex was about six months before the day of the alleged incident. In proving their case, the prosecution relied on the following circumstances;

i. The detailed and correct description given by the complainant of the office of the accused;
ii. The identification of the complainant by PW 3, a colleague of the accused as being seen on the corridors of the office that fateful morning;
iii. The presence of the earring stopper of the complainant on the foam mattress in accused office;
iv. Confirmation by a medical expert that the complainant has been carnally known by an erect male organ.

During cross-examination of the medical expert, on the examination of the male semen found on the under pants of the victim, the medical expert admitted that the said semen which matched that of the accused, might have been discharged on or about six months ago

Identify the evidential issues and discuss. Will your answer be different in the absence of the medical expert's answers at the cross-examination? If yes, why?

Question Eight

Joan, the plaintiff and widow of Jango, an employee of the Defendant Company, was killed in a railway accident. The company, pursuant to and in accordance with the provisions of the Railway Safety Procedure Act [2014] set up a Board of Administrative Enquiry to determine among others the cause of the accident, negligence of employees, if any, and to submit recommendations to prevent future

occurrence. The Board submitted its findings to the management of the Railway Company which forwarded it to both the internal and external counsel of the Company. At the hearing of the case, the plaintiff, through her counsel, sought the discovery and inspection of the said report of the Board of Inquiry under Order 21 of the High Court [Civil Procedure] Rules 2004 [CI 47]. Counsel for the defendants objected to the discovery and inspection on the grounds that the report as submitted to counsel was privileged. Though the defendants conceded that it was not their main purpose in setting up the Board to prepare for litigation, once the report is submitted to external legal counsel for legal advice, it must be clothed with privilege so as to maintain the confidentiality between client and counsel.

With reference to appropriate sections and cases, discuss lawyer client privilege. Indicate whether or not defence counsel's argument is tenable.

Question Nine

Kuuku, who was living with Esi, his step-daughter, was accused of sexually assaulting her by making the complainant touch his penis on numerous occasions in 2002-2004 when the complainant was 5 to 6 years old. Esi told no one about these events for two and half years. In 2005, Esi had a conversation with a school friend about bad things in the house, some of which were true and some which were exaggerated .During the conversation, Esi told her friend about the sexual assault. The friend reported the matter to her school authorities who referred the matter to the Department of Psychologist. A staff of the department interviewed Esi in the presence of a police officer. Esi first said she could not remember any sexual touching but later revealed incidents involving the accused Kuuku. Kuuku categorically denied the allegations. He was charged at the time Esi was over 10 years old. At the trial, defence counsel cross-examined Esi on why she had waited so long to report and suggested that she had fabricated the story to shore up the one told by her friend. In response to this line of argument, the prosecution sought to call a child psychologist to rebut defence's submission that the lateness of the complainant's disclosure supported inference that she was not telling the truth. The expert discussed what he termed: Abused Child Delayed Behaviour Syndrome, which according to him was based on his knowledge of the scientific literature on the matter. Defence counsel objected to the evidence of the expert on the ground that the test for admissibility of expert evidence has not been satisfied as the subject of the testimony is not sufficiently beyond common experience.

As the presiding judge, you are to rule on this matter after the *voir dire*.

Question Ten

The Abusuapanin of the Etena Clan of Abetifi has instituted proceedings against the purported nomination and enstoolment of one Nana Asiedu Agyemang as the Chief of Abetifi and the Adontenhene of the Kwahu Traditional Area. In support of his action, the Abusuapanin averred that the Etena Clan of Abetifi is made up of three sub-divisions, namely Sosromansa, Apeiwa or Bedito and Kronkor. He further averred that it is only royals from Sosromansa who are eligible to ascend to ascend the Abetifi stool. The Abusuapanin recounted the names of the chiefs of Abetifi from 1880 to 1900 who all hailed from the Sosromansa royal clan. Even though the Abusuapanin admiited that there were two or three instances where royals from the other two gates ascended the stool of Abetifi, there were all with the tacit permission of the elders of the Sosromansa clan. In their response to the claims, the traditional spokesperson of the two other families debunked the claims of the Abusuapanin insisting that any royal from these three royal houses is qualified and eligible to be considered for nomination, election and enstoolment when the stool becomes vacant. The spokesperson also provided a list of the chiefs of Abetifi from 1901 to 2012 when the stool became vacant. The list included Nana Ohemeng Amanfo II (1901-1940) from Sosromansa; Nana Ofori Agyemang II (1940-1980) from Apeiwa; Nana Yaw Ofori II (1981-2000); from Kronkor clan; Nana Ofori Agyemang III (2001-2015). The respondents therefore debunked the assertion by the applicants that only royals of the Sosromansa clan are qualified to be enstooled as chiefs of Abetifi. The judicial committee of the Kwahu Traditional Council accepted the version of the Abusuapanin holding among others that considering the history of the people of Abetifi and further the length of the rein of the royals of Sosromansa, there was no doubt that the forefathers of Sosromansa clan settled on the Abetifi land and became the foundation chiefs of Abetifi from the date of settlement in 1880 1900. In the view of the judicial committee in matters of these nature history is very important and the determination of the founding chief of the town settles the matter.

You have been consulted by the respondents to appeal against the decision of the Kwahu Traditional Council. Identify and respond to the relevant issues.

Question Eleven

Hafiz has been charged with rape. The accused admitted haven consensual sex with the complainant. In his statement to the police, Hafiz stated that he met the victim for the first time at a public concert. That the complainant after identying him as the national star introduced herself as his fan and stated how she has been dying to see him. That after the event, the complainant followed him to his car where they had sexual intercourse in the parking lot. According to the accused,

after the intercourse, the complainant became hysterical asking him what has happened. She then asked the accused to pay her $10000 else she will spill the beans to the accused's wife. At the trial, when counsel for the accused during cross-examination asked the complainant whether she was in the habit for fishing for celebrities and submitting her body to them without discrimination for pay, the complainant denied that assertion. Defence counsel then sought leave of the court to call two other known celebrities who have fallen prey to the antics of the complainant. The trial judge refused the application on the ground that since the question was collateral further evidence may not be called to contradict them. The trial judge in his ruling further stated as follows:

No one can deny the importance of cross-examination. But in all cases the burden is on the judge sitting here to control the mode of the interrogation as justice demands. Our rules are clear that litigation must have an end and cross-examination should not lead to multiplicity of issues. Therefore, answers given by a witness under cross-examination to questions concerning collateral matters, must be treated as final and I do not intend to admit any exceptions.

Identify and discuss relevant evidential issues

Question Twelve

Kofi Agyei, a Libyan returnee was convicted by the jury of the murder of his wife Laila. In his statement to Inspector Yamoah in the presence of the District Crime Officer, Agyei stated that on December 25 2016 he killed his wife of three months by firing at her with a gun. The shot was fired about one hour after his arrival from a friend's party and shortly after they both had supper. He stated that it was during supper that he had decided to his wife. He contended that at the time he committed the act, he was the victim f a mental disease which deprived him of the ability to appreciate the nature of the act he was committing and which caused him to act under an irresistible impulsion without reflection. He stated also that at any rate the act had been committed without prior planning and without deliberation or premeditation. At his trial accused disagreed with his counsel who implored the trial judge to send the accused to Pantang Psychiatric Hospital for psychological evaluation. When asked by the trial judge whether he is 'correct' in the mind, the accused answered "I am more than correct, my Lord".

In directing the jury at the end of the trial, the trial judge asked the jury in their deliberations to consider whether the statement of the accused to the police amounted to a confession or whether it was a statement actuated by a disease of the mind.

The accused intend to appeal against his conviction and has consulted you. Identify the relevant evidential issues and advise him.

Question Thirteen

The accused, Guzman and Chapo were charged with murder following the shooting of Papo. The identity of the killer was the sole issue at the trial. Papo's girlfriend Eno was the only witness who provided direct evidence on this issue and she identified Guzman as the shooter. Papo and the accused persons were all heavily involved in the drug trade. Papo has earlier in 2003 broken ranks acrimoniously with another drug cartel. The prosecution's theory was that the shooting was retribution for Papo's failure to repay a large drug-related debt, and that Guzman was the shooter while Chapo acted as the lookout. Circumstantial evidence formed the core of the case against the accused persons. The prosecution led evidence that Papo was driven into hiding and was fearful for his safety in the weeks preceding his death, and that Guzman was on a relentless search for him. Papo's girlfriend Eno testified that shortly before his death Papo told her "If anything happens to me it is your cousin's family". Eno understood that Papo was referring to Guzman and that he was afraid. Defence counsel has invited the jury to consider the prosecution's theory as amounting to nothing but multitude of suspicions. Counsel argued that there is a second rational inference that the deceased might have been killed by others who have a motive to kill him from 2003.

As the trial judge, you are to instruct the jury on the circumstantial evidence and the basis for which it can be used to pronounce a guilty verdict..

PART TWO

Question One

At the hearing of the Presidential Election Petition, the Petitioners submitted a number of Statement of Polls (Pink Sheets) which did not have the signatures of presiding election officers. It was the contention of the Petitioners that the said Statement of Polls (Pink Sheets) were not authentic and a clear proof of election malpractice. The Respondents did not join issue with the Petitioners on the matter except to disagree on the effect of the absence of signatures. In dismissing the contention of the Petitioners, Adiemra JSC, had this to say:

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to vote. In my view therefore, the Petitioners must prove this case beyond the preponderance of probabilities to successfully discharge the burden.

With reference to relevant statutory and decided cases, critically analyse this statement.

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Answer EITHER A or B

(A)

Identify and discuss the evidential issues

(i) Under the Private Tutorial Act 2014, it is an offence for a lecturer to provide private tutorial lessons in his private residence for more than eight hours a week without authorisation from the General Legal Council. It is a defence for the accused to prove that the tutorials were given to people over 18 years old. Kwakye is charged with an offence under this Act. In her statement to the Police she claims the people were 21 years old. At the trial counsel for Kwakye insisted ferociously that his client bears no burden and that it was the duty of the prosecution to prove all the elements of the trial including the ages of the people involved.

(ii) Comment on the following judicial summing up

"Ladies and gentlemen of the jury, you have heard the defence acknowledge that the accused struck the blow which felled Kwapee but that he had no recollection of this at all. If he does not convince you that it is more likely than not that she did suffer a black out you must find for the prosecution"

(B)

In an action for declaration of title to land both the plaintiff and defendant largely supported their respective claims with traditional evidence. At the end of the trial the learned trial judge delivered a judgment as follows:

> "From the evidence on record, both the plaintiff and the defendant relied on traditional evidence in proof of their case. Whilst the plaintiff insisted that his ancestors were granted the land as a result of their exploits in a war of conquest, the defendant insists that the land was discovered by their ancestor who was a renowned hunter on one of his hunting expeditions. I am left in a conundrum as to which of the rival version of traditional evidence to prefer. I must say that I am most impressed with the manner with which the Plaintiff's and their witnesses related their version and how coherent they were.

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Comment on this judgment in the light of the principles for evaluation of conflicting traditional evidence.

Question Three

Torto and Lansana are jointly charged with the murder of Lovia. Both pleaded not guilty to the charge. Their explanation is that Lovia had tried to rape Torto and in the course of protecting her they both were obliged to push Lovia and he fell down some stairs. Both had fled the scene but later gave themselves up to the police. Lansana chooses not to give evidence but her counsel calls her local preacher to state that Lansana had been a Bible School teacher and sang in the church choir for decades. Her counsel also suggests in cross-examining a prosecution eye witness, Gasper, that he had been high on marijuana on the night of the alleged murder and that his account of events was therefore not reliable. Lansana has two previous convictions for stealing. Torto elects to testify and in the course of her testimony denied forcefully a purported statement in which she admitted an attempt to kill Lovia. She implored the court, as she puts it, "to ignore the lies of the police investigator". Torto has several drug-related convictions and is awaiting trial on a charge of violent disorder.

Discuss the evidential issues

Question Four

Hajia is charged with the manslaughter of Tomtom. The prosecution allege that Tomtom and Hajia, who were lovers, got into a heated argument whereupon

Hajia, in a fit of rage, fatally stabbed Tomtom. Hajia denied and stated that the incident was an accident and that the two of them were in such conjugal bliss on the night of the incident.

Consider the admissibility of the following evidence:

(c) Koti, a passer-by, who administered first aid to Tomtom when he staggered out of his house covered in blood gasped "it was Hajia who did it, I have had it. Make sure that I have a Muslim burial".

(d) Tomtom's mother to whom Tomtom confided on the morning of the stabbing that even though he has always been scared of Hajia, he was going to confront her about her infidelity.

Question Five

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As an intern of Sibo J, you have been asked to submit a reasoned legal opinion, indicating among others , the qualification of an independent witness and whether the High Court can depart from the decision of the Supreme Court in Frimpong alias Iboman vrs. The Republic and if so why?

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Identify and discuss the evidential issues

Question Seven

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i. The detailed and correct description given by the complainant of the office of the accused;
ii. The identification of the complainant by PW 3, a colleague of the accused as being seen on the corridors of the office that fateful morning;

iii. The presence of the earring stopper of the complainant on the foam mattress in accused office;

iv. Confirmation by a medical expert that the complainant has been carnally known by an erect male organ.

During cross-examination of the medical expert, on the examination of the male semen found on the under pants of the victim, the medical expert admitted that the said semen which matched that of the accused, might have been discharged on or about six months ago

Identify the evidential issues and discuss. Will your answer be different in the absence of the medical expert's answers at the cross-examination? If yes, why?

Question Seven

Joan, the plaintiff and widow of Jango, an employee of the Defendant Company, was killed in a railway accident. The company, pursuant to and in accordance with the provisions of the Railway Safety Procedure Act [2014] set up a Board of Administrative Enquiry to determine among others the cause of the accident, negligence of employees, if any, and to submit recommendations to prevent future occurrence. The Board submitted its findings to the management of the Railway Company which forwarded it to both the internal and external counsel of the Company. At the hearing of the case, the plaintiff, through her counsel, sought the discovery and inspection of the said report of the Board of Inquiry under Order 21 of the High Court [Civil Procedure] Rules 2004 [CI 47]. Counsel for the defendants objected to the discovery and inspection on the grounds that the report as submitted to counsel was privileged. Though the defendants conceded that it was not their main purpose in setting up the Board to prepare for litigation, once the report is submitted to external legal counsel for legal advice, it must be clothed with privilege so as to maintain the confidentiality between client and counsel.

With reference to appropriate sections and cases, discuss lawyer client privilege. Indicate whether or not defence counsel's argument is tenable.

Question Eight

Kuuku, who was living with Esi, his step-daughter, was accused of sexually assaulting her by making the complainant touch his penis on numerous occasions in 2002-2004 when the complainant was 5 to 6 years old. Esi told no one about these events for two and half years. In 2005, Esi had a conversation with a school friend about bad things in the house, some of which were true and some which

were exaggerated .During the conversation, Esi told her friend about the sexual assault. The friend reported the matter to her school authorities who referred the matter to the Department of Psychologist. A staff of the department interviewed Esi in the presence of a police officer. Esi first said she could not remember any sexual touching but later revealed incidents involving the accused Kuuku. Kuuku categorically denied the allegations. He was charged at the time Esi was over 10 years old. At the trial, defence counsel cross-examined Esi on why she had waited so long to report and suggested that she had fabricated the story to shore up the one told by her friend. In response to this line of argument, the prosecution sought to call a child psychologist to rebut defence's submission that the lateness of the complainant's disclosure supported inference that she was not telling the truth. The expert discussed what he termed: Abused Child Delayed Behaviour Syndrome, which according to him was based on his knowledge of the scientific literature on the matter. Defence counsel objected to the evidence of the expert on the ground that the test for admissibility of expert evidence has not been satisfied as the subject of the testimony is not sufficiently beyond common experience.

As the presiding judge, you are to rule on this

PART THREE

Question One

Tom and Jerry are charged with murder. The prosecution has available to it the following witnesses:

(a) An 11 year old girl who saw what happened.

(b) Tom's wife, Lucia, who initially was willing to testify that on the fateful day her husband came home with blood stains on his shirt and said he had been in a fight. Lucia is currently estranged from her husband and may be unwilling to testify against him.

(c) Jerry who is prepared to turn 'state witness'.

Discuss the competence and compellability of the witnesses to testify at the trial.

Question Two

Jobe, the plaintiff herein, and Lisa, the defendant, cohabited from 1988 to 2008 and between the two of then they had three children aged twenty, eighteen and twelve years respectively. In 1999 Jobe bought a house in the name of Lisa. The

house was admitted by both parties to have been paid out of moneys that the two had secretly taken from the factory where both worked as accounts clerks. In 2011, their relationship soured so badly that Jobe walked out of the house in which they had been living from 1999. In 2012, he instituted action in court for declaration of title to the house and for an order of possession in his favour. The defendant counterclaimed that she was a wife when the house was bought and so was entitled to the house on the basis of the equitable principle of advancement. In his judgment, the trial judge ruled as follows:

> "The fact that the parties cohabited for twenty years and had three children did not ripen their relationship into a valid marriage. The law on presumption of marriage is as contained in NRCD 323, s 31. By that law, relationship can give rise to a presumption of marriage only if there is proof of two conditions, namely celebration and witnesses. There is no evidence of witnesses or celebration. If even there are many court decisions upholding the view of the so-called common law marriage based on long association, those decisions are contrary to section 31. In the light of section 31, their long relationship did not lead to a presumption of marriage. The law is well settled that where the terms of a statute are clear, they have to be complied with to create a valid situation. No decision of the court can reverse the position as stated in the statute. There are many authorities on this principle. I therefore rule that by the laws of this country, no valid marriage subsisted on the basis of which the counterclaim can be made. The evidence shows that the money used to buy the house was jointly stolen by the plaintiff and the defendant. I take judicial notice of the fact that ownership of stolen property, which has been acquired with stolen property, does not vest in the thieves of the first or second property. By the parties' own showing, both are thieves. It is against public policy for anyone to expect the court to assist him in the perpetration of illegality. The plaintiff's claims and the defendants' claims fail and are all dismissed."

Identify and discuss the evidential issues in the ruling.

Question Three

In an action for declaration of title to land both the plaintiff and defendant largely supported their respective claims with traditional evidence. At the end of the trial the learned trial judge delivered a judgment as follows:

> "From the evidence on record, both the plaintiff and the defendant relied on traditional evidence in proof of their case. Whilst the plaintiff

> insisted that his ancestors were granted the land as a result of their exploits in a war of conquest, the defendant insists that the land was discovered by their ancestor who was a renowned hunter on one of his hunting expeditions. I am left in a conundrum as to which of the rival version of traditional evidence to prefer. I must say that I am most impressed with the manner with which the Plaintiff's and their witnesses related their version and how coherent they were.

The Plaintiff representatives and their witnesses were very eloquent. Their testimonies were clear and concise. Contrasted with this the defendant's representative's testimony was full of inconsistencies, contradictions and weaknesses. He himself admitted that his grand uncle and his uncle in rending the traditional story to him years before this litigation could not agree whether the hunter discovered the land was called KojoTenten or Kojo Ware. Based on the above I have no choice but to prefer the traditional evidence of the Plaintiff and to reject the version of the Defendants. I am unable to grant their counter-claim for a declaration of title to the land. This is in spite of the clear evidence of ownership and acts of possession in favour of the defendants. A party whose traditional evidence is rejected is not entitled to a declaration of title. I must hasten to add that the only documentary evidence which was a pamphlet published by an unknown author but titled "A recording of the folktales of the people of the lower Denkyira" contains stories which support the plaintiff's case. Judgment is therefore given in favour of the plaintiff"

Comment on this judgment in the light of the principles for evaluation of conflicting traditional evidence.

Question Four

Torto and Lansana are jointly charged with the murder of Lovia. Both pleaded not guilty to the charge. Their explanation is that Lovia had tried to rape Torto and in the course of protecting her they both were obliged to push Lovia and he fell down some stairs. Both had fled the scene but later gave themselves up to the police. Lansana chooses not to give evidence but her counsel calls her local preacher to state that Lansana had been a Bible School teacher and sang in the church choir for decades. Her counsel also suggests in cross-examining a prosecution eye witness, Gasper, that he had been high on marijuana on the night of the alleged murder and that his account of events was therefore not reliable. Lansana has two previous convictions for stealing. Torto elects to testify and in the course of her testimony denied forcefully a purported statement in which she admitted an attempt to kill Lovia. She implored the court, as she puts

it, "to ignore the lies of the police investigator". Torto has several drug-related convictions and is awaiting trial on a charge of violent disorder.

Discuss the evidential issues

Question Five

Elija, the Chief Accountant of the Asuoso Municipal Assembly was charged with forgery, falsification of accounts and stealing of an amount of GH₵ 2,000,000 belonging to the Assembly. At the trial, the prosecution sought to tender a purported confession statement in which the accused wrote as follows:

> "I wish to mention that I am the Municipal Chief Accountant. Somewhere in 2012, I and my deputy engaged in a deal whereby cheques meant for the Assembly were forged and falsified and paid into my personal account. The period between 2012 and 2014 is a long time and because the amounts were withdrawn at various times spaced between months, I cannot tell how much the amount is and cannot either agree with the figure or not..."

Counsel for the accused objected to the admissibility of the purported confession statement on the grounds that it sinned against section 120(3) of the Evidence Act in that the statement was written in the presence of a police officer who is not qualified to be an independent witness. At the *voir dire,* counsel relied copiously on the Supreme Court decision of **Frimpong alias Iboman vrs. The Republic [2012] 1SCGLR 297,** which held among others that an independent witness must not be someone who is so closely connected to the police as to make him more or less dependent on the police. The prosecution on its part urged the court to bear faith with the said section 120(3) of the Evidence Act as amended which did not contain the words "other than a police officer or member of the Armed Forces..."

As an intern of Sibo J, you have been asked to submit a reasoned legal opinion, indicating among others , the qualification of an independent witness and whether the High Court can depart from the decision of the Supreme Court in Frimpong alias Iboman vrs. The Republic and if so why?

Question Six

Gligo, a police constable stationed at Denu central police station is charged with rape. The facts were that the victim Afi, a trader and a hawker at the Denu Lorry Station adjacent to the police station claimed that while selling her wares on that fateful day, the accused called her to his office pushed her into a store room and had sex with her without her consent. The victim first reported the matter to her

friend at the lorry station and upon advice reported the matter to the same police station, two days after the incident. The accused denied the charge contending that the complainant was his girlfriend and had been in a relationship for some time. According to the accused, he stopped seeing the complainant after she disgraced him for failing to give her money for a pregnancy. The accused further stated that on that fateful day, while in the charge office alone, the complainant came to his office, rained insults at him but he managed to push her out of the office into the main street. The accused categorically denied haven sexual intercourse with the complainant, claiming that the last time they had sex was about six months before the day of the alleged incident. In proving their case, the prosecution relied on the following circumstances;

i. The detailed and correct description given by the complainant of the office of the accused;
ii. The identification of the complainant by PW 3, a colleague of the accused as being seen on the corridors of the office that fateful morning;
iii. The presence of the earring stopper of the complainant on the foam mattress in accused office;
iv. Confirmation by a medical expert that the complainant has been carnally known by an erect male organ.

During cross-examination of the medical expert, on the examination of the male semen found on the under pants of the victim, the medical expert admitted that the said semen which matched that of the accused, might have been discharged on or about six months ago

Identify the evidential issues and discuss. Will your answer be different in the absence of the medical expert's answers at the cross-examination? If yes, why?

Question Seven

Answer EITHER (A) or (B)

(A)

Joan, the plaintiff and widow of Jango, an employee of the Defendant Company, was killed in a railway accident. The company, pursuant to and in accordance with the provisions of the Railway Safety Procedure Act [2014] set up a Board of Administrative Enquiry to determine among others the cause of the accident, negligence of employees, if any, and to submit recommendations to prevent future occurrence. The Board submitted its findings to the management of the Railway Company which forwarded it to both the internal and external counsel of the Company. At the hearing of the case, the plaintiff, through her counsel, sought

the discovery and inspection of the said report of the Board of Inquiry under Order 21 of the High Court [Civil Procedure] Rules 2004 [C.I. 47]. Counsel for the defendants objected to the discovery and inspection on the grounds that the report as submitted to counsel was privileged. Though the defendants conceded that it was not their main purpose in setting up the Board to prepare for litigation, once the report is submitted to external legal counsel for legal advice, it must be clothed with privilege so as to maintain the confidentiality between client and counsel.

With reference to appropriate sections and cases, discuss lawyer client privilege. Indicate whether or not defence counsel's argument is tenable.

OR

(B)

In an action for declaration of title to land, the plaintiff testified that the Lands Commission, Tamale granted his father a lease in respect of the land in 1970. The plaintiff testified further that his father assigned his interest in the land to him in 1976. The Plaintiff at the trial tendered into the evidence without any objection from Counsel for the Defendant the lease made in 1970 and the Assignment in his favour made in 1976. Both the lease and assignment were not registered under the Land Registry Act. After a full trial, judgment was given in favour of the Plaintiff.

On Appeal to the Court of Appeal, the panel *suo motu* has raised the issue of non registration of both the Lease and Assignment. The court wonders whether in the light of **Section 24 (1)** of the **Land Registry Act, 1962, Act 122** which provides that

> *"subject to subsection (2) an instrument, other than a Will or judge's certificate, first executed after the commencement of this act, shall not have effect until it is registered"*

the Court of Appeal ought not to reject the documents. They have therefore posed the following question to the lawyers

> "can an appellate court on its own volition reject evidence which had been let in without objection at the trial and if so on what basis will it exercise this jurisdiction?

Counsel for the Respondent contend that having failed to raise an objection at the time the documents were tendered and received in evidence they formed part of the Record of the Court of appeal was duty bound to consider the same. He cite to the Court the case of **ARYEH & KAKPO vs. AYAA IDDRISU (2010) SCGLR 891** that

"If a party looked on and allowed inadmissible evidence to pass without objecting, it will form party of the record and trial judge would be entitled to consider it in evaluating the evidence on record for what it is with"

You have been invited by the court to respond to the argument.