Rules of Evidence

- 2021 -

By I Hussain SC

Rules of Evidence

About the Instructor

The presenter is Ismail Hussain SC.

For 10 years he served as:

- ✓ Judge of the High Court
- ✓ Judge of the Competition Appeal Court and;
- ✓ A Judge of the Court of Military Appeals.

He was a member of the IEC

He has practised as an Attorney as well as Senior Counsel

Ismail Hussain SC is a former Judge of the High Court and Competition Appeal Court. He has been a highly popular LEAD trainer and has served on our panel of trainers for many years. He is an expert in commercial drafting, opinion writing, litigation and case management. He is also a published author and a professor of law at Nelson Mandela University.

Introduction

- As litigating lawyers, we present evidence in court to persuade the judge to accept our client's version of what actually happened. We present evidence in actions and in applications. How we present evidence is governed by a set of rules, both in common law and in statute. In this manual we do not present an academic treatment of the subject. You completed such a course at university.
- This course is about the practical application of the rules of evidence. The emphasis will be on what to do in order to make your client's version the more persuasive.
- At the very heart of trial presentation are the facts of your case. The facts occupy centre stage, the law is merely the supporting act. You can argue and present the law in a most elegant fashion, but if the law is not supported by the facts off your case, your eloquence alone will not persuade the judge.

  This is not academic law; it is applied law.

The Adversarial System

- Our courts use the adversarial system of dispute resolution. The judge does not investigate the facts nor can a judge become involved in your presentation of the evidence. The judge is a neutral trier of fact and will make a finding based on the evidence presented by the parties. There is little scope, if any, for the judge to go beyond the evidence presented in court.

The Judge

- It is important for you to understand what a judge is looking for and what they expect from you. Consider the following:
  - ✓ The judge would then like to know what happened between the parties and how the dispute came about. The judge will look to the facts. If the pleadings, or affidavits, are

unhelpful be prepared for the judge to ask you to tell him/her what happened. You will be the story teller.

- ✓ The judge is faced with a set of historical facts as presented by each party. The judge will be presented with each party's version of what actually happened. The judge is confronted with a choice between opposing versions.
- ✓ The judge will consider the evidence available according to the burden and standard of proof.
- ✓ The judge is not "a seeker after truth". He is constrained by the facts as presented according to the rules of evidence. An adversarial judicial officer does not investigate the facts.
- ✓ The judge will make a particular note of all the undisputed facts that emerge from the evidence. This will assist the judge to resolve disputes of fact and to weigh the probabilities of each party's version.
- ✓ The judge will, after considering the evidence, decide which version is the more probable. Obviously, if the judge finds good reasons to discredit a party's witnesses, the version is not considered to be persuasive at all.
- ✓ Having been persuaded to accept a version, the judge will show that her reasoning and conclusions of fact and law are practical, suit the facts as found and will provide an effective and workable remedy to the winner.
- ✓ The judge will want to make an order that is supported by the facts and the law.

Your job is to assist the judge to accept your client's version of the disputed facts.

It begins with good drafting; pleadings and affidavits. You must plead the peculiar facts of your case; do not plead from precedents.

The Trial Lawyer

- You must understand that the judge must be persuaded by the evidence you present. Your job is to present the judge with a persuasive story. This is what you need to know:
  - ✓ The story is told by witnesses who have personal knowledge of what actually happened;
  - ✓ The version must account for the undisputed facts; which facts must support the version tendered by the witness;
  - ✓ The version is presented by credible witnesses;
  - ✓ The version is supported by relevant detail;
  - ✓ The version must be probable in relation to the circumstances of the case;
  - ✓ The version must be presented in a chronological sequence and must make sense to the judge
  - ✓ The version presented must consist of admissible evidence (the rules of evidence apply);
  - ✓ The version, or material facts must contain all the elements of a legally recognisable cause of action or defence;
  - ✓ The story or version must come across clearly, logically and must be probable. Note that any version that appears to be improbable or contains elements of fact which the judge might find to be implausible, is not likely to be persuasive and your client will not be successful in discharging the onus. We assist you with this in more detail in the chapter on case analysis.
  - ✓ Remember to keep the evidence and your submissions relevant to the issues at hand and keep it short.

The Golden Rule

- Before we move on, let us remind ourselves of the Golden Rule of Evidence;

  "*All relevant evidence is admissible unless excluded by a rule.*"

  Evidence is **relevant** when it "has any tendency to make a fact more or less probable than it would be without the **evidence**" and "the fact is of consequence in determining the action." The evidence must amount to proof of a fact that is relevant. The evidence must be helpful to the judge in determining the issues before her.

It is admissible if it relates to the facts in issue, or to circumstances that make those facts probable or improbable, and has been properly obtained.

- We know that evidence must be relevant to the issues before the judge and must be admissible in its form. If you breach this rule, you will certainly fail to persuade the judge. Here is the rule:

  Evidence, if it is to be received, must be logically relevant and of sufficient probative force to warrant its reception.

- For trial lawyers the version of what happened takes centre stage, this is where the persuasion happens. The facts and/or the evidence must amount to a version that is probable in relation to the facts and circumstances of the case. The judge must be persuaded to find that your version is likely or most likely to have happened. Remember the judge is not looking for the truth, just the probabilities.

- If the judge finds your version to be improbable, you lose. If your witness presents a version the judge finds to be improbable, you lose.

- So, the golden rule of evidence tells us the following about your facts:
    - ✓ Must be RELEVANT
    - ✓ Must be ADMISSIBLE
    - ✓ Must be PROBABLE

Test your evidence according to the golden rule. If you fail even one of these three, you lose. If you satisfy all three, you will be persuasive.

Just consider this:

When an adversarial judge finds in a judgement "*Mr Mokoena impressed me as a witness and I accept his version as being the truth"*; the judge is not saying that Mokoena actually told the truth; what the judge is saying is that, "*for purposes of this trial, I am persuaded that Mokoena was telling the truth".*

Please understand how the golden rule works, it is the very foundation of the standard of proof: "*on a balance of probabilities*".

Once you have presented proof of your facts the court will begin evaluating the facts in order to decide if the party bearing the onus of proof succeeded in doing so.

Our courts evaluate the facts based on two standards:

Beyond reasonable doubt (the criminal standard)

On a balance of probabilities (the civil standard)

You cannot be persuasive if, in presenting your facts, you breach the rules of evidence.

Define "Evidence"

- We briefly consider the definition of evidence;

  Testimony, **FACTS,** in support of or for a conclusion.

  Information, given personally or drawn from documents, tending to establish **FACT.**

  Statements or proofs ADMISSABLE as testimony in court.

  You would have noticed that by definition, "evidence" is about the **facts of your case.**

  Evidence consists of oral statements made in court under oath or affirmation or warning – **oral evidence**. It also includes admissible documents and objects, exhibits, produced and received in court.

  Evidence is presented as **proof of a fact**.

- Evidence is used at trials to prove or disprove certain facts that would tend to show whether something was true or not. There are four types evidence by which facts can be proven or disproven at trial which include:
  - ✓ Real evidence;
  - ✓ Demonstrative evidence;
  - ✓ Documentary evidence; and
  - ✓ Testimonial evidence.

  Not all of these types of evidence carry the same weight (value as proof of a fact) at trial. For instance, real evidence may be more believable than demonstrative evidence. It's the judges role to weigh each type of evidence and make a determination as to the believability of the evidence presented.

Real Evidence

- Real evidence, often called physical evidence, consists of material items involved in a case, objects and things the judge can physically hold and inspect. Examples of real evidence include fingerprints, blood samples, DNA, a knife, a gun, and other physical objects. Recently, we have seen the emergence of digital evidence in the form of CCTV footage, satellite imagery, downloads from ECUs etc.

  Real evidence is "visual evidence" and it can be persuasive. It can provide support for oral evidence.

  Real evidence is usually admitted because it tends to prove or disprove an issue of fact in a trial. Real evidence is usually involved in an event central to the case, such as a murder weapon, clothing of a victim, or fingerprints.

  In order to be used at trial, real evidence must be relevant, material, and authentic. The process whereby a lawyer establishes these basic prerequisites is called laying a foundation, accomplished by calling witnesses who establish the item's chain of custody.

Demonstrative Evidence

- Demonstrative evidence, usually charts and diagrams, demonstrate or illustrate the testimony of a witness. It's admissible when it fairly and accurately reflects the witness's testimony and is more probative than prejudicial. Maps, diagrams of a crime scene, charts and graphs that illustrate physical or financial injury to a plaintiff are examples of demonstrative evidence. Witnesses create and use demonstrative evidence at trial, and opposing counsel may use the same evidence to prove contrary positions. Note that this form of evidence will be subject to the rules of discovery and will require agreement between the parties to avoid lengthy proceedings in proving authenticity.

Documentary Evidence

- The production of documents at trial is documentary evidence which is presented to prove or disprove certain allegations at trial. These documents can be from a vast number of sources from diaries, letters, contracts, newspapers, and any other type of document that you can think of. There are restrictions and qualifications for using documents at trial as there is a need to make sure they are authentic and trustworthy. Again, the rules of discovery apply and all production will be subject to the requirements of relevance and proportionality. The process is now case managed to avoid disputes over discovery.

Testimonial Evidence

- When a person gets up on the stand at trial and relates something that they saw or heard, that is testimonial evidence. It is simply a witness giving testimony under oath about the facts of the case. The best evidence you can present is the testimony of an eye-witness who testifies from personal knowledge. The evidence must also be relevant, admissible and the version must be probable in relation to the facts of the case.

The Trial Lawyers View

- *Evidence covers the burden of proof, admissibility, relevance, weight and sufficiency of what should be admitted into the record of a legal proceeding.*

The Facts

- Now that you GATHERED ALL THE KNOWN FACTS; what do you do?

  You will have all the evidence.

  Before you present the evidence in court; you have to evaluate the evidence in order to decide **how** you will present the facts. You will also decide **what** facts to present.

  Remember to keep it RELEVANT and Persuasive. AND the version must be probable.

The Case Concept

- Before you evaluate the evidence and work out how you will present it in court, you must have a firm understanding of your case concept or theory of your case. Without it you will be navigating your way through court without a chart and without direction. Disaster.

  Your case concept, in plain language, is "what happened according to your client's version of the facts".

- Thomas Mauet defines "theory of the case" as follows:

  "Theory of the case is a logical, persuasive story of 'what really happened'. It is your position and approach to all the undisputed and disputed evidence that you anticipate will be presented at trial. Developing a theory of the case is the process of integrating the undisputed facts with your version of the disputed facts to create a cohesive, logical position which illuminates the evidence in the most favourable light to your client. This position must remain consistent through each phase of the trial. When, at the end of the trial, the trier of fact is faced with the question, 'what really happened?', your position must constitute the most plausible explanation."

  It is your client's version of the disputed facts. This is your explanation of how the events are likely to have happened.

  As a lawyer, you need to know: What really happened?

How do you evaluate?

- Carry out an evaluation of available evidence by doing the following:
- Establish a **CHRONOLOGICAL SEQUENCE** of the facts including documents.
- Establish the **MAIN DISPUTES** or potential disputes.
- Identify the **GOOD FACTS** (facts that favour your version).
- Identify the **BAD FACTS** (facts that favour your opponent's version).

Why sequence the facts?

- Carrying out a chronological sequence of the facts and documents is essential; here is why:
- Assists you in defining your client's cause of action or defence.
- Helps you to manage your witnesses.
- Helps the witness to tell his version.
- Provides order, logic, completeness and accuracy.
- How evidence is managed in court – beginning to end.
- Helps to focus on important facts and events.
- Helps focus on facts in relation to the main issues.
- It keeps you organized.
- It keeps you relevant.
- Helps you to avoid misdirection.

This is how you are expected to present the evidence in court.

You will succeed only if you *present your facts in a manner that is persuasive*.

Remember that as a practicing lawyer, *the facts come first***.** Not the law.

Remember that as a Trial Lawyer, always think sequentially.

Why the facts first?

- Consider the following with regard to the facts:
- You will need the facts to establish a cause of action or defence.
- You will need the facts to establish each element of the cause of action.
- You need the facts to identify the dispute.

- You will have to investigate all possible sources of fact.
- Your client is not expected to cover all the possible sources of fact/evidence.
- You will often be faced with a lack of factual resource. Your client cannot give you sufficient facts. This will require further investigation from different sources. Do not underestimate the value of good investigation.
- You will have to consider the admissibility and reliability of the source of facts.
- Do not accept everything that your client and witnesses tell you, test the reliability and the probabilities of their respective versions in relation to the dispute.
- At this stage do not make assumptions; do not assume something to be a fact. Make sure you have proof of all your material facts.

Get this wrong and you WILL lose the case.

Some Practical Suggestions:

- There is a tendency to leave trial preparation to a time soon before the trial date. This is wrong and it is not what good trial lawyers do. At an early stage, before you issue summons, consider the following:
    - ✓ Be alive to inherent contradictions of fact in your own case, be prepared to explain this. You must be able to present a coherent set of facts.
    - ✓ Take statements from witnesses as soon as possible and take steps to ensure that you can secure their presence in court when the time comes.
    - ✓ Gather and preserve all relevant documentation.
    - ✓ Where appropriate, visit scenes and take photographs and measurements and prepare sketch plans as soon as possible, visual evidence is persuasive.
    - ✓ Collect and preserve visual evidence such as exhibits that you will need to prove your facts.

- ✓ Tell your client if a version being presented is implausible and not likely to be accepted by a judge.
- ✓ If your client has a non-meritorious case; advise him not to go to court. Use Rule 42A instead.

Fact Analyses

- Having gathered all the facts, you are now ready to conduct an analyses or evaluation of the facts.

  A fact analysis is the lawyer's evaluation of all the known facts. This is crucial in litigation, without it you run the risk of a poor outcome. Note that each of the following steps is about the evidence you will lead.

Here are the ten basic steps:

- ✓ Make sure that you have gathered all the known facts.
- ✓ First arrange all the facts in a chronological sequence.
- ✓ Arrange all documents in a chronological sequence.
- ✓ Evaluate all the material facts by applying the RAP test.
- ✓ Make a note of all the facts that are good for your case (supports your version)
- ✓ Make a note of all the facts that are bad for your case (supports your opponent's version).
- ✓ Make a note of your best facts.
- ✓ Make a note of your worst facts.
- ✓ How can you present proof of your best facts?
- ✓ Can you reduce the impact of your worst facts?

The facts must be found, preserved and will ultimately be presented at the trial.

This is the most effective method of preparing the evidence.

What Facts?

- For purposes of understanding the evidence, here are some concepts to consider.

  In any trial the evidence will consist of:

  ✓ The facts that are common cause (the parties all agree);

  ✓ The facts that are admitted (requires no proof of the facts);

  ✓ The facts that are undisputed (the opposing party puts up no basis for denial); and

  ✓ The facts that are disputed (requires proof of the facts).

The Undisputed Facts

- The undisputed facts are vital for your preparation to lead evidence.

  ✓ Make a particular note of all the undisputed facts between the parties.

  ✓ The undisputed facts are equally important in obtaining a successful outcome.

  ✓ They assist you in determining the probabilities.

  ✓ They assist in establishing the actual issues between the parties.

  ✓ They assist the judicial officer to determine the probabilities.

  ✓ They are essential in resolving disputes.

  ✓ Where there is a dispute of fact, it is the undisputed facts that help to determine which parties' version is probable and therefore more persuasive.

  ✓ Remember the Plascon Test.

  Under the rule set out in Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd1984 (3) SA 623 (A) in motion proceedings where a dispute of fact arises on the affidavits, a final order can

only be granted if the facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify an order. See also National Director of Public Prosecutions v Zuma2009 (2) SA 277 (SCA) (2009 (1) SACR 361; 2009 (4) BCLR 393; [2008] 1 All SA 197) at 290F where it is stated that it 'may be different if the respondent's version consists of bald or uncreditworthy denials'.

Absent proper fact analysis - run the risk of losing the case.

The benefits of fact analysis

- A thorough fact-finding and analysis must be done as soon as possible; the benefits are as follows;
  - ✓ You will uncover and preserve key evidence.
  - ✓ You will be able to protect evidence from going missing or destruction.
  - ✓ Timely fact finding gives you insight into the strengths and weaknesses of your case.
  - ✓ You will be able to advise client at an early stage and avoid wasted costs.
  - ✓ You will be in a better position to decide on full scale litigation or an alternative, such as settlement.
  - ✓ This will reduce unnecessary expenses and fees.
  - ✓ Early fact finding gives you confidence in your case and will help you manage your opponent.
  - ✓ Will help you consolidate and understand the legal principles underlying your case.
  - ✓ This will help you to give your client a report on the strengths and weaknesses of his case. Be brutal about this.
  - ✓ You will be able to identify material problems with client's legal and factual position.
  - ✓ This will help you identify the material facts you need to sustain your cause of action or defence. You will avoid motions of exception.
  - ✓ You will be more effective and confident in case conferences.

Note that this must be done before you issue a summons or file a plea, in a civil case, and before you enter a plea in a criminal case.

Under the new case management system being introduced in our courts, fact analysis will become indispensable. Imagine attending a case conference without having carried out an analysis??

What is the *Law* of Evidence?

- The law of evidence or the rules of evidence govern how and in what form facts may be presented in court so as to *be admissible as proof of facts in issue.*
- The law of evidence governs the proof of facts in court and forms part of the procedural machinery that makes substantive law effective.

The main functions of the law of evidence, is as follows:

- ✓ To determine what facts are legally admissible to prove facts in issue,
- ✓ In what manner evidence should be adduced,
- ✓ What evidence may lawfully be withheld from the court,
- ✓ What rules may be taken into account in assessing the weight or cogency of evidence, and
- ✓ What standard of proof must be satisfied before a party bearing the burden of proof can be successful?

- Note that the facts in issue are those facts which a party must prove in order to succeed. You will typically find this in the pleadings or charge sheet and this is commonly described as the "elements of your claim" or "elements of the offence". This is the *facta probanda* .

The facts relevant to the facts in issue are those facts which tend to prove or disprove the facts in issue. This is the *facta probantia.*

Types of evidence

- Four categories of evidence can be typically led in a trial:
  - ✓ DIRECT EVIDENCE – the eyewitness account**;**
  - ✓ INDIRECT EVIDENCE **–** circumstantial evidence, fact finding by inference;
  - ✓ EVIDENCE OF CREDIBILITY **–**establishes credibility of direct and indirect evidence – corroboration –supporting facts**;** and
  - ✓ EXPERT EVIDENCE **–** the opinion of an expert.

The most persuasive is the direct evidence. This is where a party relies on credible eyewitnesses and witnesses who can testify from their own/personal knowledge.

- Where you are faced with an opponent that presents direct evidence that does not favour your version of the facts; be prepared to respond to it. If you cannot undermine it, it will damage your case.

  Here are some suggestions:
  - ✓ Take your client carefully through the pleadings or state witness's statements. Remember to concentrate on every detail of the evidence.
  - ✓ What is your client's response to this?
  - ✓ What is your client's version of the facts?
  - ✓ Why is this witness implicating your client? Is there some motive to falsely implicate the accused? Why is the plaintiff bringing this action?
  - ✓ Test the witness's accuracy and knowledge of the facts.

- ✓ Ask if the witness's version is probable?
- ✓ Ask if your client's response is probable?
- ✓ What facts and probabilities emerge from the witness's statement?
- ✓ Check if your client's denial is based in fact.
- ✓ You must not accept a bare denial from your client. Explain the consequences of a bare denial.

All evidence led in court involves inferential reasoning on the part of the judicial officer. With direct evidence the trier of fact draws inferences as to the truth of the testimony. This happens with all of the first three categories mentioned above.

Circumstantial Evidence/Indirect Evidence

- In more than 50% of the cases you will deal with, the state or your opponent in a civil trial will not have direct evidence to prove a case; instead they will rely on *indirect evidence*. Here, the judicial officer, once the witness is found to be truthful, engages in a different set of inferential reasoning in what is called circumstantial evidence.
- Here your opponent, due to a lack of direct evidence, will set about presenting proof of certain facts through inferences to be drawn from a number of facts which, through inferential reasoning, will result in the desired inference being drawn.

Circumstantial evidence is a powerful weapon in an adversarial battle.

How do you deal with circumstantial evidence?

Here are some suggestions:

- ✓ In a criminal case read through the docket and check if the state is relying on circumstantial evidence. This is easily done, where you have no statement of a witness who can give direct evidence of your client's guilt, the state will be relying on inferential reasoning to prove the material facts.

- ✓ Make a list of the witnesses the state will rely on and next to each name jot down the material facts that will be presented by that witness.
- ✓ Then, assume that these witnesses will be believed; now ask what inferences and probabilities can reasonably be drawn from these facts?
- ✓ Do these inferences provide proof of your client's guilt? Apply the test in *R vs Blom* 1939 AD 188.
- ✓ Explain to client what is meant by circumstantial evidence. It is important for client to understand this so that the latter can assist you in making an assessment of the evidence.
- ✓ Take client through each witness's statement in order to find a basis to attack credibility and reliability.
- ✓ What is your client's version of the facts in relation to each of your opponent's witnesses?
- ✓ In drawing inferences and probabilities your opponent can only rely on a set of proved facts. Absent the proved facts, your opponent will be merely speculating.
- ✓ You only have to destroy the credibility and/or reliability of one or more of your opponent's material witnesses to be able to persuade the court that the required inference cannot be drawn. Note that you do not have to destroy *every* witness for the desired result.
- ✓ Prepare your strategy on the basis of damaging some of the witnesses (it can even be one material witness), in order to argue that the required inferences and probabilities cannot be made in order to support a conviction. Note that the court cannot treat each circumstance in isolation. The trier of fact will consider the cumulative effect of all the items of circumstantial evidence. Each item must be proved on the standard of proof beyond reasonable doubt in a criminal case and on a balance of probabilities in a civil case.
- ✓ In a civil case "the proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail".

Macleod v Rens 1997 (3) SA 1039 E

Evidence of credibility

- Evidence of credibility usually takes the form of a witness who is called to support a direct or even an indirect, witness. These witnesses are often called in corroboration. Corroboration makes it easier to conclude that the required standard of proof was met.

  Here are some practical suggestions:

  - ✓ Where a direct witness performs well, a good lawyer will not call a witness in support.
  - ✓ Where a witness in support is called, look for weaknesses in the first witness's version and base your cross-examination on this.
  - ✓ The same test applies to your client's case. If your client performs well in the witness box, you may consider it not necessary to call a supporting witness.
  - ✓ With some defences, such as an alibi, you may be compelled to call a witness in support.
  - ✓ If you must call a supporting witness, make certain that you consult carefully dealing with all the details. It can be fatal if your supporting witness contradicts the direct witness in material terms.
  - ✓ Note that if you call a witness in corroboration, it is preferred that the corroboration must emanate from a source independent of the witness who stands to be corroborated. (The rule against self-corroboration)

The Onus

- With Criminal cases there is no dispute that now the onus is on the state. Note that the reverse onus has been purged from our statutes as being unconstitutional.

  The position is not so easily stated with civil cases.

  You may be guided by the following simple rules:

Rule one:

'If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it.'

Rule two:

'Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.' (confess and avoid)

Rule three:

'He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.

Intramed (Pty) Ltd v Standard Bank of South Africa Ltd 2004 (6) SA 252 (w)

Pillay v Krishna and another 1946 AD 946 at 951 – 2

Onus and evidentiary burden

- The onus of proof is the duty a party has of finally satisfying the court that he is entitled to succeed on his claim or defence. The incidence of onus decides which party must fail on a given issue if, after hearing all the evidence, the court is left in doubt. The "risk of non-persuasion" as Wigmore called it.

  The onus of proof never "shifts" during a trial from the party upon whom it originally rested, but the evidentiary burden may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.

  South Cape Corporation v Engineering Management 1977 (3) SA 534 (A) at 548

In preparing to lead evidence in a trial never lose sight of the onus. Getting this wrong can prove fatal.

- What happens where you have to close your case without leading any evidence. The question of onus is still material. " *In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination."* The rule in Galante v Dickinson.

A subpoena duces tecum

- Use this to secure the production of documents that are in the possession of persons not subject to ordinary discovery.

  This can be employed only in circumstances where attendance of a witness is sought for the purpose of testifying at a trial. And if such witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the court at the trial. The sub rule goes on to state that any witness, who is required to produce tangible evidence of the types listed above, must hand it over to the registrar as soon as possible, unless the witness claims that the evidence in question is privileged. Once it is given to the registrar, the parties are entitled to inspect it and make copies.

PFE International and others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)

Admissibility

- If what is adduced can in law properly be put before the court, it is admissible. It is only once it has been or could be admitted that its persuasiveness, alone or in conjunction with other evidence, in satisfying the court as to the *facta probanda* has to be considered. Also note that the admissibility of evidence is determined with reference to its relevance.

Define Relevance

- Bearing on/or pertinent to the matter in hand.

  Evidence having tendency, in reason, to prove any material issue.

  "Facts are relevant if from their existence inferences may properly be drawn as to the existence of a fact in dispute."

  R v Mpanza 1915 AD 348 at 352

  S v Mavuso 1987 (3) SA 499 (A) at 505B

  Now remember the *golden rule of evidence:* all relevant evidence is admissible unless excluded by a rule.

Our courts are strict about admitting evidence that is relevant. This prevents a proliferation of collateral issues and saves time and costs.

Prima Facie Proof

- Conclusive proof means that rebuttal is no longer possible. This is final proof.

  Prima facie proof implies that proof to the contrary is possible. This is proof but subject to rebuttal. In the absence of proof to the contrary, *prima facie* proof becomes conclusive proof. This is important where you proceed to court only for interim relief or a provisional order. For interim relief, you need *prima facie* proof. For final relief you need conclusive proof.

Hearsay

- Means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.

Law of Evidence Amendment act no 45 of 1988; section 3 (4).

There is a rule against the inclusion of hearsay evidence.

This rule is now subject to exceptions. The principal one being the changes brought about by the above act.

The applicable section of the Law of Evidence Amendment Act reads as follows:

'(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless —

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to —

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.'

- In *Metedad v National Employers' General Insurance Co Ltd*1992 (1) SA 494 (W) Van Schalkwyk J at 498I – 499A describes the section as follows:

'

> This section invests the court with a discretion, to be judicially exercised in the interests of justice. It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission.'

The section thus introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.

When can you use this rule.

- Certainly not during argument. This will amount to an ambush.

'An accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of [s 3 of the Law of Evidence Amendment Act 45 of 1988], and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.'

S v Ndhlovu and Others 2002 (6) SA 305 (SCA)

> "The court a quo held that the position should be no different in civil proceedings. The appellant's contention was, however, that the court had erred. The difference between the two, so the appellant's argument went, is that in criminal proceedings effect must be given to the constitutional right of an accused person to a fair trial, in particular, the presumption of

innocence and the right to challenge evidence (in s 35(3)*(h)* and 35(3)*(i)* of the Constitution of the Republic of South Africa, 1996). But as I see it, the argument loses sight of s 34 of the Constitution which also entitles both parties to civil proceedings to a fair public hearing. That right is given effect to, inter alia, by the Uniform Rules of Court. In terms of rule 39 the defendant is afforded the right, where the plaintiff bears the onus, to apply for absolution from the instance at the end of the plaintiff's case or to close its own case without leading any evidence if the plaintiff has failed to establish a case which requires an answer. As I see it, it is essential for a proper exercise of these rights that the defendant should know whether the court considers the hearsay evidence relied upon by the plaintiff, admissible or not. Stated somewhat differently, in order to decide whether the plaintiff has made out a case to answer, a defendant is entitled to know the constituent elements of that case. It follows that rulings on the admissibility of hearsay evidence in civil proceedings should also be made at the end of the plaintiff's case.

GIESECKE & DEVRIENT SOUTHERN AFRICA (PTY) LTD v MINISTER OF SAFETY AND SECURITY 2012 (2) SA 137 (SCA) A

Observe the following rules of evidence

- Relevance
  - ✓ Evidence must be relevant to an issue
  - ✓ There has to be a question to be decided
  - ✓ Evidence must be helpful to the court
  - ✓ Evidence must help the court answer the question.

- Material
  - ✓ Evidence must be relevant and important
  - ✓ Evidence must support your case concept

- Admissibility
  - ✓ - Relevant evidence is admissible unless excluded by a rule
  - ✓ - hearsay, character, similar fact, opinion
  - ✓ - Improperly obtained evidence are excluded
  - ✓ - Probative value weighed against prejudice – consider this

- Making Findings of Fact
  - ✓ Presenting evidence is about presenting proof of the facts. You need to understand how fact finding happens after the judge hears the evidence.

What is Fact?

Admission or proof to the satisfaction of the court.

In making findings of fact two basic principles must be kept in mind:

- ✓ Evidence must be weighed in its totality, not piecemeal;
- ✓ Probabilities and inferences must be distinguished from conjecture or speculation. The inferences drawn must be supported by the facts.

How does a judicial officer go about making findings of fact based on the evidence before him?

In an adversarial hearing the trier of fact makes a finding only on the evidence presented by the parties.

Findings of fact and probabilities are made by evaluating each witness presented by the parties.

The court will consider the following:

- ✓ Credibility of factual witnesses
- ✓ Their reliability
- ✓ The Probabilities

- Credibility

Here are some factors used to test credibility:

- ✓ General impressions
- ✓ Veracity
- ✓ Candour
- ✓ Demeanor
- ✓ Bias latent/blatant
- ✓ Internal contradictions
- ✓ External contradictions of Established facts
- ✓ His version put to witnesses
- ✓ The probability or improbability of aspects of his version
- ✓ The cogency of his performance compared to other witnesses on the same fact

- Reliability

  Test opportunity to observe or experience an event.

  This is what a judicial officer will look for:

  - ✓ Time
  - ✓ Distance
  - ✓ Lighting
  - ✓ Weather
  - ✓ Unobstructed view
  - ✓ Knowledge

  TEST: the quality and independence of witnesses' recollection.

- Probabilities

  The reasoning:

  - ✓ TEST: what is likely to have happened given THE PROVED FACTS – what is probable?
  - ✓ Evaluate the probabilities or improbabilities of each party's version on each disputed fact.
  - ✓ NOW ask did the party bearing the onus discharge the onus.

  Having made this evaluation, the judicial officer will decide which witness's version of the facts is accepted as the truth.

  Your function is to present the evidence in such a manner as to persuade the judicial officer to accept your witness's version of the facts.

The Criminal Standard

- The criminal standard – each material element of the offence must be proved by this standard.

Consider this:

- ✓ Issues of onus –the onus is always on the state. Do not confuse onus with accused duty to explain.
- ✓ When does the state discharge the onus?
- ✓ How does a court test this?
- ✓ The preferred method is not to look at facts in isolation. The court will consider ALL THE PROVED FACTS in the states case to test the onus.
- ✓ Proof beyond reasonable doubt:

The degree of cogency which the evidence on a criminal charge must reach before the accused can be convicted.

COGENT=forcible, convincing

Reasonable doubt?

- What is "proof beyond reasonable doubt"?

Here is a test that has found approval in our courts:

"The degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean beyond the shadow of a doubt.

The law would fail to protect the community if it admitted fanciful possibilities to deflect justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence "of course it is possible but not least probable" the case is proved beyond reasonable doubt, but nothing short of that will suffice."

Denning J – Miller vs Minister of Pensions 1947 2 All ER 372

Benefit of the doubt

- Then what is meant by "benefit of the doubt" or a "doubt"?

  It is the duty of the prosecutor to satisfy the court of the accused's guilt.

  ✓ If the court is left in any degree of doubt whether the accused is guilty – then THE CASE HAS NOT BEEN PROVED.

  ✓ If it is doubtful that the state proved an essential fact or the existence of a fact is doubtful

  ✓ The state has failed to discharge the onus.

A note on experts

- Cases involving complex business, financial, scientific, technological and personal injury issues may be decided largely on the basis of expert testimony.

  It is therefore necessary to analyse your case at an early stage to identify issues that will require the services of an expert.

  You also need this information for purposes of budgeting.

  It is recommended that an expert be engaged at the earliest possible time. Do not go looking for an expert after pleadings close. Here are the advantages:

- ✓ The expert can advise on the strengths and weaknesses of your case and even identify issues you and your client were not aware of. This will assist in the early evaluation of the case for purposes of budgeting and settlement.
- ✓ You will be able to work with the expert and ensure that when the trial date arrives he will be ready to go to court. Remember that many experts are court shy.
- ✓ Sometimes you have what we call "a first-choice expert". An early decision will see you get this expert on your side and not in the opposite team.

Before you engage an expert, carry out due diligence. What are his qualifications, what is the reputation in the industry (peers), how well does he testify in court, what does he charge, are his views generally accepted etc.

Manage experts badly and you will pay a price.

NOTE: Experts are not FACTUAL witnesses.

They assist the court with an OPINION.

- Consider this:

  The expert draws an inference or conclusions from a SET OF FACTS

  - ✓ Be familiar with all aspects of these facts.
  - ✓ Are these facts relevant?
  - ✓ Where did the expert obtain his facts?
  - ✓ Probe accuracy of facts given to expert?
  - ✓ What was he asked to consider?
  - ✓ On what fact/s is his opinion based?
  - ✓ What other possible opinion can be drawn from these facts?
  - ✓ How would other facts influence his opinion?

Cross examination of experts

Here is a guide to cross examination of experts.

- Research the subject matter. Become an expert.
- Research the expert's credentials – you might find his expertise is limited.
- Consult your own expert with the same set of facts.
- Probe the facts first with your expert.
- Can these facts be used to undermine the witness?
- At the beginning of cross examination – try to obtain favourable concessions from the expert (note: always know the answer)
- Use the expert to affirm your own expert.
- Illicit areas of agreement between the experts.
- Probe with the expert the conduct of the police – illicit evidence to the advantage of your case
- Probe the expert's independence and impartiality.
- Probe possible bias – the witness may have followed a line of conclusions or positions over a period of time
- Focus on procedure and protocol – did the expert carry out the prescribed procedure and steps – an omission might undermine his conclusion. What does your own expert say about procedure?
- Consider the source of information relied upon by the expert. How reliable and accurate was this information?
- Experts usually use assumptions of one sort or another in formulating their opinions – change the assumption to suit your own case – at least get a concession that your assumption is not wrong.
- Test the witness by varying the facts he relied on.

- Expert's opinions are often based on facts established by other witnesses. Challenge the factual underpinnings.
- If you challenge an opinion – you must not only know that it is wrong, you must be able to show why it is wrong.
- Know when to stop.

Similar Fact Evidence

- Logic dictates that the same conclusions are likely to produce the same results. But in a court room, this presents practical difficulties. One will have to prove that the conditions on both occasions were sufficiently similar. This is where the problem arises in court. To prove this will result in the court having to deal with multiple collateral issues and the trial will become unnecessarily lengthy.
- Thus, our courts will expect a high degree of relevance before considering admission of similar fact evidence. "It should not be admitted unless its value as proof warrants its reception in the interests of justice and its admission does not operate unfairly against the other party – a particularly compelling consideration in criminal cases." – the brilliant Lord Denning
- In criminal case, the rule is: The prosecution may not adduce evidence of improper conduct by the accused if its only relevance is to show that the accused is of bad character and is, therefore likely to have committed the offence – the Makin formulation.

The Parol Evidence Rule

- With commercial litigation or disputes around contracts, this rule is important. The parol evidence rule prescribes that where parties to a contract have reduced their agreement to writing, it becomes the exclusive memorial of the transaction, and no evidence may be led to prove the terms of the agreement other than the document itself, nor may the contents of the document be contradicted, altered, added to or varied by oral evidence.

Where an agreement is partially written and partially oral, then the parol evidence rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the 'partial integration' rule."

- In litigation over written contracts, this rule must be observed when presenting evidence. The idea is to go to court without having to rely on parol evidence to prove your case. This can be achieved by properly pleading your version of what happened.
- Be familiar with electronically generated contracts. Understand how meta-data can assist you to attack the validity of a written contract.

Ismail Hussain SC

November 2021