

# **LAW OF EVIDENCE B: 2014**

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## **OVERVIEW**

### **PURPOSE OF THE COURSE:**

For the student to acquire a deeper knowledge of certain aspects of the law of evidence not dealt with in Law of Evidence A. It presupposes that the student has already passed Law of Evidence A.

Together with Course A, this course should cover all the main aspects of the law of evidence encountered in practice.

### **HOW THIS FITS INTO THE OVERALL DEGREE STRUCTURE**

As a procedural (adjectival) law subject, this course equips the student to apply the substantive law and law of criminal and civil procedure in courts and tribunals in South Africa.

**CREDIT VALUE:** 10

This works out as follows:

18 hours 24 lectures @ 45 mins each

0.75 hours 1 written test

2 hours 1 written examination

79.25 hours Individual learning (pre- and post-lecture reading, preparation of written assignment, test and examination preparation)

Total: 100 hours' work

## **ASSUMPTIONS OF PRIOR LEARNING**

General exposure to the idea of legal principles (legal theory, constitutional law, interpretation of statutes, criminal procedure, civil procedure), as well as the whole spectrum of private law, such as contract, property, delict. Ability to read and interpret statute law, read and interpret decided cases in law reports, apply the doctrine of precedent. Ability to analyse a set of facts; identify the legal problem contained therein, apply the appropriate law to derive a solution.

## **OUTCOMES**

### **CRITICAL CROSS-FIELD OUTCOMES (CCFOs)**

This course should contribute to the following critical outcomes:

- a) identify and solve problems
- b) collect, analyse and evaluate information
- c) communicate effectively
- d) recognise problem solving contexts
- e) reflect on and explore effective learning strategies
- f) critique existing legal rules

## SPECIFIC INTENDED OUTCOMES

| <b>OUTCOME</b><br><b>Students will be able to:</b>   | <b>LINKED<br/>CRITICAL<br/>OUTCOME</b> | <b>ASSESSMENT CRITERIA</b>  | <b>ASSESSMENT TASKS</b>  |
|--|--|---|--|
| 1. Describe the various types of admissions by accused persons and parties to civil cases receivable as evidence, the rules applicable to each type, identify admissions of the various types from a factual scenario, and apply the appropriate rules to the admissions so identified | a, b, c, d, e, f                       | Describes <ul style="list-style-type: none"> <li>• Effect of admissions</li> <li>• Distinction between formal and informal admissions</li> <li>• Distinction in criminal case between confessions and other admissions</li> <li>• Correct rules for admissibility for each type</li> </ul> Identifies and applies rules in practical scenario | <ul style="list-style-type: none"> <li>• Class discussions: examining examples (formative)</li> <li>• Written test (summative): paragraph style description <u>or</u> factual problem requiring solution</li> <li>• Final examination (summative): paragraph style description <u>or</u> factual problem requiring solution</li> </ul> |
| 2. Describe what privileged evidence is; describe the two main categories of privileged evidence (private and State) as well as the sub-categories within each main category; identify a privileged occasion from a factual scenario and apply the applicable rule(s)                  | a, b, c, d, f                          | Describes <ul style="list-style-type: none"> <li>• Nature of privilege</li> <li>• Two main categories</li> <li>• Distinction between main categories</li> <li>• Sub-categories within each category</li> </ul> Identifies privilege in factual scenario and applies applicable rules  | Ditto  |

| <b>OUTCOME</b><br>Students will be able to:  | <b>LINKED<br/>CRITICAL<br/>OUTCOME</b> | <b>ASSESSMENT CRITERIA</b>  | <b>ASSESSMENT TASKS</b> |
|--|--|---|-------------------------|
| 3. Describe what hearsay evidence is; what the approach of courts to it is; identify hearsay evidence in a factual scenario and argue for its admission or exclusion   | a, b, c, d                             | Describes <ul style="list-style-type: none"> <li>• hearsay evidence</li> <li>• approach of courts to hearsay</li> </ul> Identifies hearsay in practical scenario and applies correct rules  | Ditto                   |
| 4. Identify and describe a previous consistent statement by a witness, apply the relevant rules to a factual scenario so as to decide when a previous consistent statement is allowable in evidence or not   | a, b, c, d                             | Describes <ul style="list-style-type: none"> <li>• previous consistent statement</li> <li>• rules relating to admissibility/inadmissibility thereof</li> </ul> Identifies previous consistent statement in practical scenario and applies correct rules | Ditto                   |
| 5. Describe the rules relating to the admissibility of evidence about prior conduct of an accused person tending to show a pattern or disposition; apply the rules to a factual scenario so as to decide whether a court should permit or refuse evidence about such prior conduct | a, b, c, d                             | Describes <ul style="list-style-type: none"> <li>• rules relating to admissibility of evidence about prior conduct of accused</li> </ul> Identifies in practical scenario whether prior conduct of accused would be admissible or not                   | Ditto                   |

| <b>OUTCOME</b><br>Students will be able to:   | <b>LINKED<br/>CRITICAL<br/>OUTCOME</b> | <b>ASSESSMENT CRITERIA</b>   | <b>ASSESSMENT TASKS</b> |
|---|--|--|-------------------------|
| 6. Describe what entrapment is and the rules relating to the receipt of entrapment evidence; identify entrapment in a factual scenario and apply the appropriate principles in order to decide whether to allow or disallow such evidence; critically examine appropriateness of provisions of s 252A | a, b, c, d, g                          | Describes <ul style="list-style-type: none"> <li>• Concept of entrapment</li> <li>• Common law rules relating to</li> <li>• Rules laid down in s 252A of Criminal Procedure Act</li> </ul> Critically examines appropriateness of provisions of s 252A<br>Identifies and applies appropriate rules in practical scenario | Ditto                   |
| 7. Describe the history of the approach of South African and selected foreign courts to evidence obtained in violation of a constitutional right; identify unconstitutionally obtained evidence from a factual scenario and argue for it to be allowed or disallowed.                                 | a, b, c, d, g                          | Describes development of approach of courts in SA and elsewhere to evidence obtained in violation of rights<br>Identifies unconstitutionally obtained evidence in a practical scenario and applies appropriate principle to decide whether to allow or reject such evidence  | Ditto                   |

## **TEACHING METHODS**

Lectures (mainly with the aid of PowerPoint slides)  
skeleton handouts  
reading list  
class discussion  
assignment

## **COURSE CONTENT**

### **TOPIC 1: INFORMAL ADMISSIONS IN CIVIL AND CRIMINAL TRIALS**

- 1.1 Requirements for admissibility
- 1.2 Admission by conduct
- 1.3 Vicarious admissions
- 1.4 Examples of exceptions to the vicarious admission rule
- 1.5 Statements made without prejudice
- 1.6 Admissions made by accused in criminal trial

### **TOPIC 2: CONFESSIONS IN CRIMINAL TRIALS**

- 2.1 Introduction
- 2.2 Distinction between admissions and confessions
- 2.3 The meaning of a confession
- 2.4 Requirements of admissibility
- 2.5 Burden of proof
- 2.6 Procedure: trial within a trial
- 2.7 Inadmissible confessions which subsequently become admissible
- 2.8 Confession only admissible against maker
- 2.9 Civil cases

### **TOPIC 3: FORMAL ADMISSIONS IN CRIMINAL AND CIVIL TRIALS**

- 1.1 Nature and rationale: distinction between formal and informal admissions
- 1.2 Civil proceedings
- 1.3 Criminal proceedings: common law; s 220 of CPA
- 1.4 Admissions by cross-examiner

### **TOPIC 4: PRIVATE PRIVILEGE**

- 4.1 Nature of
- 4.2 Categories of private privilege
- 4.2 Rules applying to different categories

### **TOPIC 5: STATE PRIVILEGE**

- 5.1 Nature of
- 5.2 Distinctions between State privilege and private privilege
- 5.3 Development in English law
- 5.4 Development in South African law
- 5.5 Categories of State privilege
- 5.6 Constitutionality of informer privilege

## **TOPIC 6: HEARSAY EVIDENCE**

- 6.1 Introduction
- 6.2 Legislation
- 6.3 What is hearsay?
- 6.4 Admissibility provisions
- 6.5 Application:
  - 6.5.1 Hearsay communication whether verbal or non-verbal, express or implied
  - 6.5.2 Implied assertions
  - 6.5.3 Person upon whose credibility the probative value of the evidence depends
  - 6.5.4 Tendered to prove the truth of the communication
  - 6.5.5 *Res gestae*
- 6.6 Statements by deceased persons
- 6.7 Statements about physical or mental condition
- 6.8 Documentary hearsay

## **TOPIC 7: PREVIOUS CONSISTENT STATEMENTS**

- 7.1 The rule: previous consistent statements are inadmissible
- 7.2 Rebutting a claim of recent fabrication
- 7.3 Identification
  - 7.3.1 Identification parade
  - 7.3.2 Voice identification
  - 7.3.2 Identification by dog
  - 7.3.4 Evaluation of evidence of identity
- 7.4 Complaints of sexual offences
  - 7.4.1 Which offences?
  - 7.4.2 Requirements
  - 7.4.3 Effect and probative value
- 7.5 Part VI of the Civil Proceedings Evidence Act, 1965 (sec 222 of CPA)

## **TOPIC 8: SIMILAR FACT EVIDENCE**

- 8.1 Similar facts admissible if there is logical connection
- 8.2 Connecting factor (nexus)
- 8.3 Similar facts (*probandum* and *probans*)
  - 8.3.1 The act
  - 8.3.2 Acts of preparation
  - 8.3.3 Voluntariness
  - 8.3.4 Opportunity, means and capacity
  - 8.3.5 Identity and alibi
  - 8.3.6 Systematic conduct
  - 8.3.7 Negligence
  - 8.3.8 Intent
  - 8.3.9 Motive
  - 8.3.10 Character or nature
  - 8.3.11 Association
  - 8.3.12 Relationship

- 8.3.13 Clarification of ambiguity
- 8.4 Related matters
  - 8.4.1 Judicial discretion
  - 8.4.2 Different charges
  - 8.4.3 Provisional admission
  - 8.4.4 Previous convictions
  - 8.3.5 S 211 of CPA
  - 8.3.6 S 240 and 241 of CPA

## **TOPIC 9: ENTRAPMENT**

- 9.1 Meaning of entrapment
- 9.2 Common law approach
- 9.3 Advent of s 252A of Criminal Procedure Act
- 9.4 Detailed rules of s 252A
- 9.5 Criticism of s 252A
- 9.6 Relationship with Constitution
- 9.7 Entrapment in civil cases

## **TOPIC 10: UNCONSTITUTIONALLY OBTAINED EVIDENCE**

- 10.1 Introduction
- 10.2 Competing interests
- 10.3 Rationale of inclusionary approach
- 10.4 Theoretical basis and practical purpose of exclusionary approach
- 10.5 Exclusionary rule in USA: brief survey
- 10.6 S 24(2) of Canadian Charter: brief survey
- 10.7 Position in SA common law: inclusionary approach, and development since constitutionalism
- 10.8 Interim Constitution
  - 10.8.1 Protection of constitutional right to fair trial
  - 10.8.2 Discretion to exclude unconstitutionally obtained real evidence
  - 10.8.3 Public opinion and repute of system
- 10.9 S 35(5) of Constitution
  - 10.9.1 Threshold test
  - 10.9.2 Causal link between violation and procurement
  - 10.9.3 'Standing'
  - 10.9.4 Admissibility of evidence unconstitutionally procured by private individuals
  - 10.9.5 Limitations clause in s 36
  - 10.9.6 Co-accused's constitutional right to fair trial
  - 10.9.7 Derogation in state of emergency
  - 10.9.8 Impeachment of accused
- 10.10 First leg of test in s 35(5): 'must be excluded if admission would render the trial unfair'
  - 10.10.1 Trial fairness
  - 10.10.2 Contents of accused's constitutional right to fair trial
  - 10.10.3 Trial fairness and court's discretion
  - 10.10.4 Waiver, trial fairness and court's discretion
  - 10.10.5 Privilege against compelled self-incrimination: trial fairness and court's discretion
  - 10.10.6 Waiver, trial fairness and admissibility of derivative evidence

- 10.10.7 Trial fairness and admissibility of identification evidence obtained at identification parade in absence of accused's legal representative
- 10.11 Second leg of test in s 35(5): 'if admission would otherwise be detrimental to the administration of justice'
  - 10.11.1 Presence or absence of good faith, and reasonable/unreasonable police conduct
  - 10.11.2 Public safety and urgency
  - 10.11.3 Nature and seriousness of violation
  - 10.11.4 Availability of lawful means or methods of securing the evidence
  - 10.11.5 Real evidence
  - 10.11.6 Inevitable discovery, or discovery on basis of independent source
- 10.12 Section 35(5) and procedural matters.

## RESOURCES

**TEXT BOOK:** Schwikkard & Van der Merwe: *Principles of Evidence* (3<sup>rd</sup> edition) (2009)

**The Law of Evidence in South Africa, Basic Principle Procedural Law, Oxford 2013, Adrian Bellenge're, Robin Palmer et al**

### Other recommended reading

South African Law of Evidence (2<sup>nd</sup> ed), by Zeffertt, Paizes and Skeen (2009)

Commentary on the Criminal Procedure Act, by Du Toit and others (looseleaf)

Students will also be provided with outline notes on statutory law, cases etc that they will be required to study in more detail. Note that these notes are not complete in themselves, ie they will merely serve as pointers to where further reading is to be found.

## ASSESSMENT CRITERIA

(For written assignments, and, with due allowance for time and other constraints, for tests and examinations)

|                       |     |
|-----------------------|-----|
| <b>Presentation:</b>  | 10% |
| <b>Structure:</b>     | 10% |
| <b>Content:</b>       | 20% |
| <b>Understanding:</b> | 30% |
| <b>Insight:</b>       | 30% |