

# **LAW OF EVIDENCE A: 2015**

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## **OVERVIEW:**

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

For the student to acquire a basic knowledge of general principles relating to the law of evidence.

With the knowledge acquired in this course the student should be equipped to deal with the more specialised principles covered in Law of Evidence B and apply such principles in a practical working legal environment.

### **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 minutes 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) solve legal problems in a practical scenario
- f) reflect on and explore effective learning strategies
- g) critique existing legal rules

## SPECIFIC INTENDED OUTCOMES

<b>OUTCOME</b> <b>Students will be able to:</b>	<b>LINKED CRITICAL OUTCOME</b>	<b>ASSESSMENT CRITERIA</b>	<b>ASSESSMENT TASKS</b>
1. Describe what law of evidence is; describe sources of SA law of evidence; describe the two main systems of gathering evidence: adversarial and inquisitorial, listing advantages and disadvantages of each; describe role of English law in SA law of evidence	a, b, c, f, g	Describes: <ul style="list-style-type: none"> <li>• What law of evidence is and purpose thereof</li> <li>• Two main evidence-gathering systems, with advantages/disadvantages of each</li> <li>• Role of English law of evidence in our system</li> </ul>	Class discussions: examining examples (formative) Written test (summative): paragraph style description Final examination (summative): paragraph style description
2. Describe key concepts: relevance, admissibility, weight; describe basic terminology used in law of evidence	a, b, c, f, g	Describes: <ul style="list-style-type: none"> <li>• Key concepts: relevance, admissibility, weight</li> <li>• Basic terminology</li> </ul>	Ditto

<b>OUTCOME</b> <b>Students will be able to:</b>	<b>LINKED CRITICAL OUTCOME</b>	<b>ASSESSMENT CRITERIA</b>	<b>ASSESSMENT TASKS</b>
3. Describe concepts of burden and standard of proof required in a court of law; describe presumptions assisting a party to prove a case	a, b, c, f, g	Describes <ul style="list-style-type: none"> <li>• Burden of proof and standard of proof for criminal and civil cases</li> <li>• Presumptions and their effect in proving a case</li> </ul>	Ditto
4. Describe concepts of competence to testify and compellability to testify; identify from a factual scenario whether a witness is competent to testify and whether a particular witness can be compelled to testify	a, b, c, d, e, f, g	Describes <ul style="list-style-type: none"> <li>• Concept of competence to testify and compellability to testify</li> </ul> Identifies whether in practical scenario a witness is competent and/or compellable to testify and applies correct rules	Class discussions: examining examples (formative) Written test (summative): paragraph style description <u>or</u> factual problem requiring solution Final examination (summative): paragraph style description <u>or</u> factual problem requiring solution

<p>5. Describe the course of evidence in a typical criminal and civil trial and the basic concepts such as sequence of parties' cases; evidence in chief, cross-examination, re-examination, proof of prior consistent statements, evidence taken on commission.</p>	<p>a, b, c, f, g</p>	<p>Describes</p> <ul style="list-style-type: none"> <li>• Course of evidence in a typical trial (criminal and civil)</li> <li>• Sequence of evidence</li> <li>• Way evidence is presented: examination in chief, cross-examination, re-examination;</li> <li>• Proof of prior consistent statements</li> <li>• Evidence taken on commission</li> </ul>	<p>Class discussions: examining examples (formative)  Written test (summative): paragraph style description  Final examination (summative): paragraph style description</p>
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<p align="center"><b>OUTCOME</b> Students will be able to:</p>	<p align="center"><b>LINKED CRITICAL OUTCOME</b></p>	<p align="center"><b>ASSESSMENT CRITERIA</b></p>	<p align="center"><b>ASSESSMENT TASKS</b></p>
<p>6. Describe the concept of judicial notice and principles applicable thereto; list some common examples in practice of matters of which judicial notice can be taken; identify in a given factual scenario whether judicial notice of a particular fact or facts can be taken, and what the effect thereof will be .</p>	<p>a, b, c, d, e, f, g</p>	<p>Describes</p> <ul style="list-style-type: none"> <li>• Concept of judicial notice</li> <li>• Rules applicable to judicial notice</li> <li>• Some typical examples of matters of which judicial notice can be taken</li> <li>• Effect of judicial notice</li> </ul> <p>Identifies opportunity for judicial notice in factual scenario and applies correct rules</p>	<p>Class discussions: examining examples (formative) Written test (summative): paragraph style description <u>or</u> factual problem requiring solution Final examination (summative): paragraph style description <u>or</u> factual problem requiring solution</p>
<p>7. Describe opinion evidence and the principles relating thereto; the traditional rule distinguishing between the opinion of experts and lay people; critique the validity of this distinction; describe the rules relating to the presentation of expert opinion evidence</p>	<p>a, b, c, d, e, f, g</p>	<p>Describes</p> <ul style="list-style-type: none"> <li>• Opinion evidence</li> <li>• Principles relating to</li> <li>• Rules relating to presentation of opinion evidence</li> </ul> <p>Critically analyses the appropriateness of some earlier cases which apply different criteria to opinions of experts and lay persons</p>	<p>Ditto</p>

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<p>8. Describe character evidence and the principles relating thereto; identify character evidence in a given factual scenario, and decide with reasons whether such evidence would be admissible</p>	<p>a, b, c, d, e, f, g</p>	<p>Describes</p> <ul style="list-style-type: none"> <li>• Meaning of character evidence</li> <li>• Principles relating to admission of such evidence</li> </ul> <p>Identifies whether in practical scenario character evidence would be permissible, and if admissible applies correct rules</p>	<p>Ditto</p>
<p>9. Describe real evidence (tangible objects used as evidence, eg murder weapon); describe the rules applicable to the presentation of such evidence; identify real evidence in a given factual scenario, and decide with reasons whether such evidence would be admissible</p>	<p>a, b, c, d, e, f, g</p>	<p>Describes</p> <ul style="list-style-type: none"> <li>• Real evidence</li> <li>• Rules relating to admission thereof</li> </ul> <p>Identifies real evidence in a practical scenario and applies correct rules thereto</p>	<p>Ditto</p>

<p style="text-align: center;"><b>OUTCOME</b> Students will be able to:</p>	<p style="text-align: center;"><b>LINKED CRITICAL OUTCOME</b></p>	<p style="text-align: center;"><b>ASSESSMENT CRITERIA</b></p>	<p style="text-align: center;"><b>ASSESSMENT TASKS</b></p>
<p>10. Describe documentary evidence (documents used as evidence of their contents, eg cheque, contract, letter); describe the rules applicable to the presentation of such evidence; identify documentary evidence in a given factual scenario, and decide with reasons whether such evidence would be admissible</p>	<p>a, b, c, d, e, f, g</p>	<p>Describes</p> <ul style="list-style-type: none"> <li>• Documentary evidence</li> <li>• Rules relating to admission thereof</li> </ul> <p>Identifies documentary evidence in factual scenario and applies correct rules thereto</p>	<p>Ditto</p>
<p>11. Describe evidence generated by machines such as computers; describe the history of rules applicable to the presentation of such evidence; describe the rules currently applicable to the presentation of such evidence; identify machine-generated evidence in a given factual scenario, and decide with reasons whether such evidence would be admissible</p>	<p>a, b, c, d, e, f, g</p>	<p>Describes</p> <ul style="list-style-type: none"> <li>• Machine-generated evidence</li> <li>• History of approach to such evidence</li> <li>• Rules currently applicable (s 15 of Act 25 of 2002)</li> </ul> <p>Identifies machine-generated evidence in a factua scenario and applies correct rules thereto</p>	<p>Ditto</p>

<b>OUTCOME</b> <b>Students will be able to:</b>	<b>LINKED CRITICAL OUTCOME</b>	<b>ASSESSMENT CRITERIA</b>	<b>ASSESSMENT TASKS</b>
12. Describe the principles applicable to the weighing up of evidence at the end of a trial; critique some approaches favoured by courts; in a given factual scenario identify the applicable rule(s) to be applied, and apply same to the facts	a, b, c, d, e, f, g	Describes process of weighing up evidence at end of trial Critically analyses some traditional approaches Identifies and applies correct rules from factual scenario	Ditto



## TEACHING METHODS

- Lectures (mainly with the aid of PowerPoint slides)
- Skeleton hand outs
- Reading list
- Class discussion
- Assignment

## RESOURCES

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

**Adrian Bellenge're, Robin Palmer et al: *The Law of Evidence in South Africa, Basic Principles*. Oxford ( 1<sup>st</sup> edition – 2013 )**

### See also

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, case references 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%

## **COURSE CONTENT / OUTLINE**

### **TOPIC 1: INTRODUCTION**

### **TOPIC 2: PRELIMINARY MATTERS**

- 2.1 Sources of South African law of evidence and impact of constitutional provisions
- 2.2 Relevance, admissibility, weight
- 2.3 Terminology:
  - 2.3.1 Testimony
  - 2.3.2 Real evidence
  - 2.3.3 Hearsay evidence
  - 2.3.4 Circumstantial evidence
  - 2.3.5 Direct and indirect evidence
  - 2.3.6 Facts in issue, facts relevant to facts in issue
  - 2.3.7 Evidence and argument
  - 2.3.8 Evidence and probative material
  - 2.3.9 Admissibility and weight
  - 2.3.10 Primary and secondary evidence
  - 2.3.11 Evidence and proof
- 2.4 Questions of law and questions of fact
- 2.5 Exclusionary rules
- 2.6 Civil evidence and criminal evidence
- 2.7 Accusatorial and inquisitorial procedure
- 2.8 Strict versus free system of evidence
- 2.9 Applicability of presumption against retrospectivity of statutes

**Reading: *Principles of Evidence*, pp 1-57  
*The Law of Evidence in SA*, pp 1-73**

### **TOPIC 3: BURDEN AND STANDARD OF PROOF**

- 3.1 *Prima facie* proof and conclusive proof
- 3.2 Burden of proof
  - 3.2.1 Legal burden and evidential burden
  - 3.2.2 Incidence of legal burden
- 3.3 Standard of proof
  - 3.3.1 Criminal trial
  - 3.3.2 Civil trial
- 3.4 Presumptions

**Reading: *Principles of Evidence*, Ch 31, 32, 28  
*The Law of Evidence in SA*, Ch 6,7, 8**

### **TOPIC 4: WITNESSES: COMPETENCE AND COMPELLABILITY**

- 4.1 Distinction between competence and compellability
- 4.2 General rule

4.3 General procedural issues

4.4 Some categories:

- Children
- Mentally disordered and intoxicated persons
- Deaf-and-dumb persons
- Judicial offers
- Officers of court
- Accused
- Accused and co-accused in same proceedings
- Spouses: civil, criminal cases
- Spouses as co-accused
- Parliamentarians
- Diplomatic immunity

**Reading: *Principles of Evidence*, Ch 22, 23, 24  
*The Law of Evidence in SA*, Ch 17**

## **TOPIC 5: COURSE OF EVIDENCE**

5.1 Adversarial tradition

5.2 Course of trial

5.3 Adducing evidence

5.3.1 Civil proceedings

5.3.2 Criminal proceedings

5.3.3 Adducing evidence after closure of case

5.4 Examination-in-chief

5.4.1 Leading questions

5.4.2 Hostile witnesses

5.4.3 Prior consistent statements: criminal trials

5.4.4 Prior consistent statements: civil trials

5.4.5 Refreshing memory

5.5 Cross-examination

5.6 Re-examination

5.7 Evidence on commission:

5.7.1 Criminal cases

5.7.2 Civil cases

5.8 Evidence in former proceedings

**Reading: *Principles of Evidence*, pp 9-11; Ch 18  
*The Law of Evidence in SA*, Ch 18-26**

## **TOPIC 6: JUDICIAL NOTICE AND PRESUMPTIONS**

- 6.1 Nature and rationale
- 6.2 Procedure
- 6.3 Limits
- 6.4 What can be judicially noticed?
- 6.5 Rule 30 of the Constitutional Court Rules

**Reading: *Principles of Evidence*, Ch 27  
*The Law of Evidence in SA*, Ch 38, 39**

## **TOPIC 7: OPINION EVIDENCE**

- 7.1 Basics of opinion evidence
- 7.2 Opinion of lay person
- 7.3 Opinion of expert
  - 7.3.1 Rules of expert evidence
  - 7.3.2 Evaluation of expert evidence

**Reading: *Principles of Evidence*, Ch 8  
*The Law of Evidence in SA*, Ch 43**

## **TOPIC 8: EVIDENCE OF CHARACTER**

- 8.1 Character: meaning of
- 8.2 Character: criminal cases
  - 8.2.1 Character of accused
  - 8.2.2 Character of other witnesses
  - 8.2.3 Character of complainant
- 8.3 Character in civil cases

**Reading; *Principles of Evidence*, Ch 6  
*The Law of Evidence in SA*, Ch 44**

## **TOPIC 9: REAL EVIDENCE**

- 9.1 Introduction
- 9.2 Appearance of persons
- 9.3 Tape recordings
- 9.4 Fingerprints
- 9.5 Photographs, films, video recordings
- 9.6 Inspections in loco
- 9.7 Handwriting
- 9.8 Blood tests, tissue typing, DNA identification

**Reading: *Principles of Evidence*, Ch 19  
*The Law of Evidence in SA*, Ch 51,52,54**

## **TOPIC 10: DOCUMENTARY EVIDENCE**

- 10.1 Definition of original document
- 10.2 Production of original document
- 10.3 Proof of documents
- 10.4 Proof of authenticity and secondary evidence
- 10.5 Public documents
- 10.6 Judicial records and documents
- 10.7 Discovery of documents

**Reading: *Principles of Evidence*, Ch 20  
*The Law of Evidence in SA*, Ch 9 – 12**

## **TOPIC 11: MACHINE-GENERATED EVIDENCE**

- 11.1 Electronic Communication and Transactions Act, 25 of 2002

**Reading: *Principles of Evidence* Ch 21  
*The Law of Evidence in SA*, Ch 13**

## **TOPIC 12: THE EVALUATION OF EVIDENCE**

- 12.1 Introduction
- 12.2 Basic Principles
- 12.3 Corroboration
- 12.4 Credibility
- 12.5 Circumstantial evidence
- 12.6 Failure to testify and/or cross-examine
- 12.7 The cautionary rule
- 12.8 Testimony of children
- 12.9 Single witness

**Reading: *Principles of Evidence* Ch 30  
*The Law of Evidence in SA*, Ch 27-37**

**ASSESSMENT:** Examination: 2hrs; 70% of total mark  
Class work: Test: 15% of total mark  
Assignment: 15% of total mark