

# LEARNING GUIDE: LAW OF EVIDENCE B: 2020

## 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. As already alluded to, it builds on Law of Evidence A. In terms of the overall LLB structure, Law of Evidence B (as is the case for Law of Evidence A) builds on the foundational knowledge and skills obtained in the modules offered in the first, second and the current year of study including criminal law, contract and law of persons. For example, Criminal Law, as one of the modules encountered in the previous years, engages with aspects of crimes and their definitions. Thus, the skills of modules such as Criminal Law are built upon in the Law of Evidence as the rules of adducing evidence are necessary to prove the commission of crimes which are taught in criminal law. The skills imparted by the law of Evidence will prove relevant in other modules including the Law of Criminal Procedure, Civil Procedure and Clinical Legal Education.

### CREDIT VALUE: 10

This works out as follows:

18 hours	26 lectures @ 45 mins each ( <b>NB.</b> Some of these lectures may have to proceed online depending on severity of Covid-19 pandemic).
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) The word count for the written assignment is 2500 words (fully referenced)
Total:	100 hours' work

## 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 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> <li>• Identifies and applies rules in practical scenario</li> </ul>	<ul style="list-style-type: none"> <li>• Class discussions: examining examples (formative)</li> <li>• Written test (summative): paragraph style description or factual problem requiring solution</li> <li>• Final examination (summative): paragraph style description or factual problem requiring solution</li> <li>• Online discussion via the RUConnected discussion forum: Examining examples (formative)</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	<p>Describes</p> <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> <li>• Identifies privilege in factual scenario and applies applicable rules</li> </ul>	Ditto (as above).
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	<p>Describes</p> <ul style="list-style-type: none"> <li>• previous consistent statement</li> <li>• rules relating to admissibility/inadmissibility thereof</li> <li>• Identifies previous consistent statement in practical scenario and applies correct rules</li> </ul>	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	<p>Describes</p> <ul style="list-style-type: none"> <li>• previous consistent statement</li> <li>• rules relating to admissibility/inadmissibility thereof</li> <li>• Identifies previous consistent statement in</li> </ul>	Ditto

		practical scenario and applies correct rules	
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> <li>• Identifies in practical scenario whether prior conduct of accused would be admissible or not</li> </ul>	Ditto
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	<ul style="list-style-type: none"> <li>• Describes</li> <li>• Concept of entrapment</li> <li>• Common law rules relating to</li> <li>• Rules laid down in s 252A of Criminal Procedure Act</li> <li>• Critically examines appropriateness of provisions of s 252A</li> <li>• Identifies and applies appropriate rules in practical scenario</li> </ul>	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 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)

**NB.** With the unprecedented times we are in due to the Covid-19 pandemic, it is critical for us to be open to adjusting to new methods of learning, many of which might never have been envisaged. Face-to-face lectures cannot be ruled out and they will continue to be the norm. However, some lectures might be online taking the form of audio recordings, discussion forums, to mention but a few. Amidst the possible limited face-to-face classes (depending on how the Covid-19 outbreak unfolds), the learning process will in many respects incorporate assessment for purposes of testing one's own knowledge of the unit.

- Skeleton slides for teaching purpose only
- Reading list at each lecture
- Class and group discussion
- Assignment
- Test and examination
- Students shall from time to time be expected to participate in role-play activities when treating topics that require practical exposure, e.g. examination in chief and cross-examination.

## RESOURCES AND OWN NOTE MAKING

**NB: Lecture slides WILL NOT BE MADE AVAILABLE to students.**

**Students are expected to TAKE NOTES IN CLASS and use the textbooks below and cases cited to make their own notes.**

### TEXT BOOKS:

- **Adrian Bellengere et al: *The Law of Evidence in South Africa, Basic Principles*. Oxford (2<sup>nd</sup> edition – 2019).**
- **Zeffert and Paizes: *The South African Law of Evidence*. LexisNexis (3<sup>rd</sup> edition- 2017).**
- **Schwikkard & Van der Merwe: *Principles of Evidence*. Juta (4<sup>th</sup> edition – 2016).**

**NB.** Please note that the editions cited above are the most recent editions. Therefore, for purposes of personal study, the pages cited (based on the current edition) may differ for the version you are currently using (which could be an earlier edition).

### See also

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

### **Other sources**

- Constitution of the Republic of South Africa 1996
- Criminal Procedure Act, Act 51 of 1977
- Civil Proceedings Evidence Act 25 of 1965
- Electronic Communications and Transactions Act 25 of 2002
- Law of Evidence Amendment Act 45 of 1988
- Case Laws to be provided in class as per the topic covered

### **SUMMATIVE ASSESSMENT TASKS**

Exam	70%
Classwork	30%
Assignment	15% (the word count for the assignment is 2500 words (including references).
Test	15%

### **ASSESSMENT CRITERIA**

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

- Presentation: 10%
- Structure: 10%
- Content: 20%
- Understanding: 30%
- Insight: 30%

### **COURSE CONTENT**

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

- 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 (Week 2)**

- 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 Confessions to lesser or related offences
- 3.0 Civil cases

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

- 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 (Week 3 and Week 4)**

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

## **TOPIC 5: STATE PRIVILEGE (Week 5)**

- 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 (Week 6 and Week 7)**

- 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 (Week 8)**

- 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 (Week 9 and Week 10)**

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 (Week 11)**

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 and the cautionary approach to entrapment
- 9.5 Criticism of s 252A
- 9.6 Relationship with Constitution
- 9.7 Entrapment in civil cases

## **TOPIC 10: UNCONSTITUTIONALLY OBTAINED EVIDENCE (Week 12 and Week 13)**

- 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 Exclusionary rule in Mauritius: brief survey
- 10.8 Position in SA common law: inclusionary approach, and development since constitutionalism
- 10.9 Interim Constitution
  - 10.9.1 Protection of constitutional right to fair trial
  - 10.9.2 Discretion to exclude unconstitutionally obtained real evidence
  - 10.9.3 Public opinion and repute of system
- 10.10 S 35(5) of Constitution
  - 10.10.1 Threshold test
  - 10.10.2 Causal link between violation and procurement
  - 10.10.3 'Standing'
  - 10.10.4 Admissibility of evidence unconstitutionally procured by private individuals
  - 10.10.5 Limitations clause in s 36
  - 10.10.6 Co-accused's constitutional right to fair trial
  - 10.10.7 Derogation in state of emergency
  - 10.10.8 Impeachment of accused
- 10.11 First leg of test in s 35(5): 'must be excluded if admission would render the trial unfair'
  - 10.11.1 Trial fairness
  - 10.11.2 Contents of accused's constitutional right to fair trial
  - 10.11.3 Trial fairness and court's discretion

- 10.11.4 Waiver, trial fairness and court's discretion
- 10.11.5 Privilege against compelled self-incrimination: trial fairness and court's discretion
- 10.11.6 Waiver, trial fairness and admissibility of derivative evidence
- 10.11.7 Trial fairness and admissibility of identification evidence obtained at identification parade in absence of accused's legal representative
- 10.12 Second leg of test in s 35(5): 'if admission would otherwise be detrimental to the administration of justice'
- 10.12.1 Presence or absence of good faith, and reasonable/unreasonable police conduct
- 10.12.2 Public safety and urgency
- 10.12.3 Nature and seriousness of violation
- 10.12.4 Availability of lawful means or methods of securing the evidence
- 10.12.5 Real evidence
- 10.12.6 Inevitable discovery, or discovery on basis of independent source
- 10.13 Section 35(5) and procedural matters.