INTRODUCTION

The law of evidence requires a rigorous examination and understanding of the vast array of rules and exceptions in both criminal and civil law of evidence.[1] The proper application of the law of evidence requires the student and the practitioner to have a command of substantive law, that is, criminal law, land law, law of contract and commerce among many others. Trials in Ghana are an adversarial contest, and therefore, the parties will seek to present their case in the most persuasive manner that they can – this involves selecting the evidence that they will present.[2]

WHAT IS EVIDENCE?

Evidence means anything by which any alleged matter of fact is either established or disproved.[3] In simple terms, evidence is a fact that tends to prove a person's submission. Justice Brobbey states that evidence is information or material offered to the court to prove or disprove an issue in the case.[4]

Evidence is thus that branch of the law that regulates how issues may be proved in court. It establishes the sources and methods which a court may use in order to find that facts have – or have not – been proven, and thereby decide cases.[5] In Ghana, the Evidence Act NRCD 323 at Section 179 has defined **Evidence** as follows:

> "**Evidence** - means testimony, writings, material objects, or any other things presented to the senses that are offered to prove the existence or non-existence of a fact

Ultimately, the definitions of what is evidence indicate that evidence is any information, facts or materials presented to the court for the purpose of proving or disproving a matter of controversy before the court. The law of evidence lays down the guiding principles based on which a court can receive, apply, or reject the information, facts or materials presented in proof of a party's case. In **Ram Jas v Surrendra Nath [1980] A.I.R 385** at 388 Hari Swaroop J states as follows:

> *"The law of evidence does not affect substantive rights of parties but only lays down the law facilitating the course of justice. The Evidence Act lays down the*

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[1] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

[2] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

[3] Maxwell Opoku Agyemang, Law of Evidence in Ghana 2nd Ed Admax Law Series 2015.

[4] Justice S A Brobbey, Essentials of the Ghana Law of Evidence Darto Publications 2014

[5] Stable URL: https://www.jstor.org/stable/10.3366/j.ctv1c29r6b.5

rules of evidence for the purposes of the guidance of the courts. It is procedural law which provides, inter alia, how a fact is to be proved"

There are three important things that you must remember that the law of evidence governs:
(a) How facts are proven in court;

(b) The rules on how evidence should be put to and presented in court; and

(c) That these go along with the rules on which evidence should be excluded from the court altogether.[6]

One must appreciate that the parties to any action, whether it be a civil action or a criminal one, are not given blanket permission to put before the court all the evidence that may assist their case. The parties are only permitted to put before the court the evidence that is:

(a) Relevant to a fact in issue in the case and

(b) Admissible; and even then, the trial judge may decide to exclude it.[7]

According to Justice Brobbey, the law of evidence effectively enables the court to prevent rumours and gossip from being resorted to.[8] A person is required to prove what he claims or asserts.

THE APPLICATION OF THE LAW OF EVIDENCE

In a dispute, one often hears the question, where is your evidence? Or what is your evidence? This is in line with the oft cited legal principle "He who alleges must prove." In the celebrated case of **Majolagbe vs Larbi 1959 GLR 190** at Page 192 relying on **Khoury vs Ritcher** the court stated:

"Where a party makes an averment capable of proof in some positive way e.g. by producing documents, description of things, reference to other facts, instances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances from which the Court can be satisfied that what he avers is true."

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[6] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

[7] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

[8] Justice S A Brobbey, Essentials of the Ghana Law of Evidence Darto Publications 2014

According to Maxwel Opoku Agyemang "*the practical reality is that the truth or merits of a case are worthless unless they can be proved to the acceptance of the judge and thereby enable him to act on them accordingly. The function of the law of evidence is to lay down rules according to which the facts of a case can be proved or disproved before a court of law. The means which can be used to prove a fact are all controlled by the rules and principles laid down by the law of evidence."*

EVIDENCE AND SUBSTANTIVE LAW

Substantive law is concerned with the respective elements that must be proven in order for a criminal offence or civil wrong to have been committed. Adjectival law or Procedural law is concerned with the rules and regulations used to determine how the substantive law is to be proven.

Evidence goes hand in hand with substantive law. Substantive law always defines the conduct, which may be the subject of litigation or trial. For instance, contract law, land law, criminal law, family law etc. The substantive law concerns matters such as the elements of a criminal offence or a tort or the circumstances leading to the discharge of a contract, and the adjectival law relates to practice and procedure. The law of evidence concerns the use of materials to prove the existence or non-existence of any elements of the substantive law.[9]

An illustration can be the crime of Murder. Pursuant to section 47 of the Criminal Offences Act, Act 29 provides: "*A person who intentionally causes the death of another person by an unlawful harm commits murder unless the murder is reduced to manslaughter by reason of an extreme provocation or any other matter of partial excuse,..."*

Therefore, the ingredients provided by the substantive law, which must be proved by the prosecutor, are namely;

a. Somebody is dead;

b. That the person died through unlawful harm;

c. That the accused person caused the unlawful harm; and

d. That the accused intended that death should result.

[9] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 2

The process by which the prosecutor can prove a particular ingredient or issue is determined by the rules of evidence. For example, in a murder case, the jury will often have to decide whether the defendant intended to kill or to cause serious bodily harm. These aspects of the trial relate to the elements of the offence, and fall within the remit of the substantive criminal law.

However, a number of evidential rules will regulate how the case is prosecuted in court. They will dictate where the burden and standard of proof lies, what material may be used by the parties, the form of questioning that can be adopted by the advocates, and the manner in which the jury should assess the evidence. It is, therefore, unsurprising that, in practice, knowledge of the operation of evidential rules is essential to a complete understanding of the legal process as a whole. No matter how well-versed a lawyer may be in substantive law, they will be unable to provide advice to a client or to prosecute a case without a firm grasp of the law of evidence.[10]

One can thus say that the substantive law deals with rights and obligations, but to be able to prove or disprove a right or an obligation, a party must submit to the court the fact on which he relies and by which the court or tribunal can determine that the issue before it is or is not as claimed by the party, and this process is what evidence is about.

SOURCES OF LAW OF EVIDENCE

The sources of law in Ghana are provided under Article 11 of the 1992 Constitution and comprise: --

A. the Constitution[11]

B. enactments made by or under the authority of the Parliament established by the Constitution;

C. any Orders, Rules and Regulations made by any person or authority under a power conferred by the Constitution;

D. the existing law; and

E. the common law.

A. The Constitution

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[10] Jonathan Doak, Claire McGourley and Mark Thomas “Evidence Law and Context” 5th Ed Pg 2

[11] The 1992 Fourth Republican Constitution which came into effect on the 7th of January 1993

The 1992 Constitution of Ghana is the supreme law in Ghana. There are specific provisions that deal specifically with the law of evidence. For example: Article 19 and Article 135.

The main provisions of the 1992 Constitution, which bears upon the law of evidence, can be found in Article 19 (2) (c), (e) and (g), Article 19(10) of the Constitution, which deals with fair criminal prosecution.

These provisions ensure that a person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court. This principle of 'fair hearing' can be said to be fundamental in the administration of justice. It also forms part of the concept of natural justice, which requires that an accused person and his witnesses in any criminal trial be heard before the case against him is determined.[12]

B. Acts of Parliament

There are several acts of parliament that seek to regulate the law of evidence. The primary legislation is the Evidence Act, 1975 NRCD 323. Some relevant provisions in statutes have been highlighted below:

I. Evidence Act

Section 178(1) of the Evidence Act provides that

"178. Application

(1) This Act applies in an action, whether civil or criminal, and to privileges as provided in section 87.

(2) In applying this Act, and in particular in determining whether and to what extent to exercise its power under section 8, the Court shall have special regard to the fair application of this Act in respect of a party not represented by a lawyer.

[12] Maxwell Opoku Agyemang, Law of Evidence in Ghana 2nd Ed Admax Law Series 2015.

(3) A rule of law which provides that acts in derogation of the common law shall be narrowly construed does not apply to this Act.

(4) This Act shall be interpreted and applied so as to achieve a consistent law of evidence and the most just, expeditious and least costly administration of the law."

II. Courts Act, 1993 Act 459

Sections 58 – 67 on witnesses.

Section 58. Summoning witnesses

"In proceedings, and at any stage of the proceedings, a Court, either on its own motion or on the application of a party, may summon a person to attend to give evidence, or to produce a document in the possession of that person or excerpts from the document, subject to the applicable enactment or the relevant rule of law."

III. Stamp Duty Act, 2005, Act 689

Section 32

"(6) Except as expressly provided in this section, an instrument

(a) executed in Ghana, or

(b) executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana,

shall except in criminal proceedings, not be given in evidence or be available for any purpose unless it is stamped in accordance with the law in force at the time when it was first executed."

C. Orders, Rules and Regulations

High Court Civil Procedure Rules 2004 C.I 47 Order 38 as Amended by C.I 87 (2014)

Order 38 rule 1 General Rule

"Subject to the Constitution, the Evidence Act, 1975 (NRCD 323), these Rules and any other enactment to the contrary, a fact to be proved at the trial of an action by the evidence of the witnesses shall be proved by a trial of their oral evidence given in court"

Order 38 rule 3 *Evidence of particular facts*

"(1) Without prejudice to rule 2, the Court may at or before the trial of an action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order.

(2) The power conferred by subrule (1) extends in particular to ordering that evidence of any particular fact may be given at the trial

(a) by statement on oath of information or belief; or

(b) by the production of documents or entries in books; or

(c) by copies of documents or entries in books; or

(d) in the case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of any publication of general circulation which contains a statement of that fact."

D. Judicial decisions on evidential rules

Several judicial decisions have shaped the law of evidence. In recent times some notable cases are

Case: **Republic v Eugene Baffoe-Bonnie and 4 others, Reference No J1/06/2018 dated 7th June 2018.**

Background: This case interprets specific provisions in Article 19 of the 1992 Constitution and indicates that accused persons are entitled to a fair trial. One way of ensuring this is if the prosecution makes a full disclosure of evidence gathered in the course of investigations.

Held: *On a proper and true interpretation of article 19 (2) (e) and (g), we hold that it is inherent in the right to a fair trial, of an accused person's right to be given adequate time and facilities for the preparation of his defence as well as facilities to examine in person or by his lawyer, the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses on the same condition as those applicable to witnesses called by the prosecution.*

Consequently, we hold that *to give meaning to this right to a fair trial, the accused person in a summary trial is entitled to be given or have access to copies of witnesses' statements, copies of documents and exhibits in the possession of the prosecution, including materials they do not intend to tender before a trial court.*

The duty to disclose is to be made before the commencement of the trial or within a reasonable time in the course of the trial, before they are tendered as evidence in court by the prosecution.

The duty to disclose is not absolute; the prosecution has the discretion to withhold material on the grounds of relevance and privilege. The need to preserve the information must outweigh the need for disclosure in the interest of justice. This discretion is subject to review by the trial judge or magistrate and in the appropriate case by the Supreme Court in accordance with Article 135. The duty to disclose is a continuing one and disclosure must be completed when additional information or material comes into the possession of the prosecution.

Failure to disclose a material before tendering it in evidence does not render the material inadmissible, but should result in an adjournment to enable the accused to study the evidence or material before it can be used by the prosecution.

Failure to disclose does not automatically nullify a trial. When the issue is raised on appeal, the court must consider whether such failure impaired the right of the accused to make a defence, which in turn depends on the nature of the information withheld and

whether it might have affected the outcome or the failure has occasioned a miscarriage of justice under ***section 31 of the Courts Act, 1993 (Act 459)***

Case: **The Republic v High Court, Commercial Division Ex parte Kwabena Duffour Civil Motion No. J5/05/2021 dated 10th February 2021.**

Background: This case deals with when an objection can be raised as to the admissibility of evidence. This case arose because of the practice of trial courts rejecting evidence at the Case Management Conference stage in the trial.

Held: *Thirdly, there is a clear internal inconsistency in the direction stated in Part 4(3)(g) of the Practice Direction that objections to any matter disclosed by the Prosecution shall be made, as directed in terms of section 6 of NRCD 323 at the Case Management Conference stage. This inconsistency lies in the fact that the direction flies in the face of the very section 6 of NCRD 323 which the direction clearly defers to. Section 6(1) of the NRCD 323 expressly regulates objections to evidence and it is clearly so headed. In its terms, it provides as follows:-*

> ***"6. Objections to evidence;***
>
> (1) ***In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered."***

The statutory provisions on objections to evidence says in very certain terms and with clarity that in ***"an action"****(regardless of whether it is a civil or criminal)****"and at every stage of the action [including case management] an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered".** *This without fear of contradiction whatsoever means that the only time when an objection can be taken to the admissibility of evidence is* ***at the time*** *(not before, or after, or in between)* ***"when the evidence is being offered".***

The discussion so far exposes the fact that the High Court's decision that the practice in civil cases where all objections intended to be made are made at the case management conference stage with the effect that if any document annexed to the witness statement was objected to and was upheld by the court that document is marked ***"Rejected"*** *and "****cannot be used in the trial"*** *by either side or the court itself, flies in the face of the clear provisions of Section 6(1) of the Evidence Act 1975 (NRCD 323). It is a palpable error committed by the High Court.*

The timing of such objections whether in civil or criminal proceedings must be at the time when the evidence is offered. This is confirmed by the Practice Direction and also

the rules of civil procedure. The contrary practice adopted by the High Court in civil and criminal trials is at variance with the Practice Direction and the rules.

BASIC CONCEPTS AND TERMINOLOGIES

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

JUDICIAL ENQUIRY

In any judicial enquiry, there would have to a determination of both questions of fact and law. The Evidence Act provides that in a judicial enquiry, all questions of law, including but not limited to the admissibility of evidence and the construction of the Act, are to be decided by the court.

A. Questions of Law

Generally, questions of law will relate to the definition of an offence, elements of an offence and rules of evidence, i.e. admissibility and existence of sufficient evidence to allow the jury to consider an issue.

Section 1 Evidence Act NRCD 323

> ***"Questions of law***
>
> *(1) A question of law including but not limited to the admissibility of evidence and the construction of this Act, shall be decided by the Court.*
>
> *(2) The determination of the law of an organisation of states to the extent that the law is not part of the law of Ghana, or of the law of a foreign state or sub-division of a foreign State, is a question of fact which shall be determined by the Court.*
>
> *(3) The determination whether a party has met the burden of producing evidence on a particular issue is a question of law which shall be determined by the Court.*

(4) Where the Court determines that a party has not met the burden of producing evidence on a particular issue the Court shall, as a matter of law determine the issue against that party."

Section 2 Evidence Act NRCD 323

"Questions of fact

(1) Except as otherwise provided in this or any other enactment in a jury trial a question of fact shall be decided by the jury.

(2) Subsection (1) does not preclude the Court from summing up the evidence to the jury, or from commenting on the weight or credibility of the evidence but the Court shall make it clear to the jury that they are to determine the weight and credibility of the evidence themselves and are not bound by the Court's summary or comments.

(3) In a trial without a jury, a question of fact shall be decided by the Court."

What is a Fact?

A fact can be said to mean anything, state of things, or relation of things capable of being perceived by the senses, or any mental condition of which any person is conscious. Facts can be described as events. A fact may, therefore, be physical or mental.

Evidence must be confined to the facts of the case. Facts extraneous to the case need not bother the parties or the court to waste precious time over such facts. Even with reference to the facts of the case, it must be limited to areas where the parties are in dispute. Evidence becomes necessary only in reference to facts which are in controversy between the parties.

Facts in Issue

Facts which are in dispute are facts in issue. A fact in issue is sometimes referred to as the 'principal fact' or factum probandum. There are two principal types of facts in issue. These are, those, which are in issue as a matter of substantive law, and those, which are in issue as a matter of the law of evidence itself. The facts in issue; which are as a matter of the substantive law, may be described as the 'restricted meaning' and the

facts in issue as deduced from the law of evidence can be referred to as 'extended meaning".[13]

The main facts in issue, or the primary facts in issue are all those issues which the claimant in a civil action or the prosecution in a criminal proceedings must prove in order to succeed. The facts in issue also include the further facts that the defendant or accused must prove in order to establish a defence. In a civil matter, the facts in issue are usually identifiable by reference to the pleadings, which help in ascertaining the factual issues on which the parties agreed or disagreed to enable the Court know in advance what matters are left in dispute and what facts will have to be proved or disproved at the trial.[14]

For instance in a case of defamation, the plaintiff must prove the elements as provided in the law of torts, which are that there was a publication, that the publication was about the plaintiff, that it was defamatory as it was tended to expose the plaintiff to ridicule or contempt. On the part of the defendant, he may be required to deny the publication or that even if it was published, it was not published of the plaintiff or that it was not defamatory or that it was justified.

The facts in issue are the facts that are being contested by the parties. In some cases, an accused may plead not guilty and simply deny any knowledge of the offence. In such a case, all the elements of the offence effectively become facts in issue since they are contested by both parties. Here the prosecution must prove all elements of the offence.[15]

Facts in issue: civil cases

In civil cases it is possible to ascertain which facts are in issue from a document known as the Statement of Case. This document contains a statement of material facts upon which the party claiming has based their claim. In short, the facts that are in issue in civil cases are *those facts that the claimant must establish in order to succeed* in their claim *and to disprove any defence* raised by the defendant.

The facts in issue are usually identifiable by reference to the pleadings, which help in ascertaining the factual issues on which the parties agreed or disagreed to enable the Court know in advance what matters are left in dispute and what facts will have to be proved or disproved at the trial

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[13] Maxwell Opoku Agyemang, Law of Evidence in Ghana 2nd Ed Admax Law Series 2015.

[14] Maxwell Opoku Agyemang, Law of Evidence in Ghana 2nd Ed Admax Law Series 2015.

[15] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 2

As stated earlier, the substantive law in any cause of action provides the elements, which must be proved in order to sustain claims or counterclaims. The main facts in issue, or the primary facts in issue are all those issues which the claimant in a civil action or the prosecution in a criminal proceedings must prove in order to succeed.

Simply put, it can be said to include any fact from which either by itself or in connection with other facts, the existence or nonexistence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding necessarily follows.

Facts in issue: criminal cases

The facts that are in issue in criminal cases mainly tend to be the facts that the prosecution must prove to establish a defendant's guilt, i.e. the elements of an offence, but they also include those facts that constitute a defence raised by the defendant. Therefore, the prosecution will also have to adduce evidence in order to disprove any defence that the defendant has raised.

In criminal cases, it has been said "whenever there is a plea of not guilty, everything is in issue, and the prosecution has to prove the whole of their case, including the identity of the accused, the nature of the act and the existence of any necessary state of mind. Apart from the primary facts in issue, collateral or subordinate facts in issue which may be affecting the competence or credibility of a witness, or the relevance or admissibility of evidence may be in issue in a particular case on the account of the law of evidence itself, and not on account of the substantive law.

Preliminary Facts/Collateral Facts

Preliminary or collateral facts, are sometimes also referred to as subordinate facts. Those facts that are not directly relevant to the facts in issue are known as 'collateral facts'. Collateral facts are usually only relevant to the court insofar as they go to the credit of the witness, or to the credibility of primary evidence – such as the admissibility of a confession. Thus, counsel may carry out cross-examination purely designed to undermine the credibility of the witness in the eyes of the jury and persuade them to give less weight to the evidence of the particular witness or a particular piece of evidence.[16] These are facts upon which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or nonexistence of a privilege.

It is also important that you understand what collateral facts are and what effect they have. Collateral facts are those facts that affect the admissibility of evidence. For example, the police obtain a confession from Yaw Owusu through oppressive means; in

[16] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 4

this instance, the existence of oppression is a collateral fact because it will affect whether or not the court will allow the prosecution to adduce this evidence. Collateral facts also include those facts that affect the credibility of a witness or the weight that is given to a piece of evidence. Procedurally, collateral facts are normally put to the court before the evidence is presented; for example the defence may, in a voir dire (a trial within a trial), apply to have excluded a confession such as that discussed earlier.[17]

The existence or non-existence of all preliminary facts is a question of law which shall be decided by the court.

Section 3 Evidence Act NRCD 323

> **"*Preliminary facts***
>
> *(1) For the purposes of this section and of section 4 a **"preliminary fact"** is a fact on which depends*
>
> *(a) the admissibility of evidence,*
>
> *(b) or the inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or*
>
> *(c) the existence or non-existence of a privilege.*
>
> *(2) The Court shall determine the existence or non-existence of a preliminary fact.*
>
> *(3) A ruling on the admissibility or the inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or non-existence of a privilege implies a finding of fact which is prerequisite to it and unless otherwise provided by an enactment a separate formal finding of fact is not necessary.*
>
> *(4) A party, and as regards a claim of privilege, the person claiming the privilege, may present evidence and arguments relevant to a determination under subsection (2)."*

[17] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge

TRADITIONAL CLASSIFICATION OF RULES OF EVIDENCE TESTIMONIAL EVIDENCE

Direct Evidence and Indirect Evidence

Direct evidence is evidence of the fact in issue itself. Indirect evidence is that which, although not evidence of the thing itself, might lead – or help lead – us to the conclusion that the fact has or has not been proven.

Most commonly, evidence will take the form of direct oral testimony. This means that the witness will be called on to testify under oath in open court, and everything they say will be tendered as evidence of the truth of the facts asserted. Witnesses can only give evidence of matters that they have themselves perceived with one of their five senses – usually a witness will speak of what they saw or heard. Such testimony is always admissible, providing it is relevant and the witness is competent to testify.[18]

A. Oral Evidence/Testimonial evidence

This is the oral statement given by a witness in court (given in the witness box). It is offered as the evidence of the truth of that which is stated. Most of the rules of evidence, as regards oath, the competence of the witness and his cross-examination, are designed to ensure that testimonial evidence shall be as reliable as possible.

The general rule is that a witness can give evidence only of facts of which he has personal knowledge of, something, which he has perceived with one of his five senses.

This means that oral evidence must be direct. This means that a witness can tell the court of only a fact of which he has first-hand personal knowledge in the sense that he perceived the fact by any of the five senses.

The only exception to the rule is the expert witness testifying to matters calling for expertise. Parts of the testimony of an expert may be derived from textbooks or on what he has learned from other people. The party against whom testimonial evidence is given has a right to cross-examine the witness.

Hearsay

This is simply said to be a statement of a person who is not available in court. Instead, another person who has no personal knowledge of the event is the one in court seeking to give evidence on the matter, as the truth of the matter stated. Hearsay rules apply to what people wrote as well as to what they were heard to say, and to what the witness

[18] Jonathan Doak, Claire McGourley and Mark Thomas “Evidence Law and Context” 5th Ed Pg 12

himself said out of court as well as to what he proves to have been said by others whether they are or are not called as witnesses.

The Evidence Act defines hearsay evidence as ‘evidence of a statement, other than a statement made by a witness while testifying in the action at the trial offered to prove the truth of the matter stated. Therefore, one can say that an evidence or statement given in the same circumstance as hearsay evidence but not offered to prove the truth of the matter stated is not hearsay evidence.

B. Documentary Evidence

Not all evidence, however, needs to be received in oral form. Documentary evidence will also be admissible, and comprises not only written or typed papers, but also maps, plans, graphs, drawings, photographs, tapes (audio and visual), films, negatives and disks, CDs or DVDs, and digital recordings. In short, ‘documentary evidence’ is used to refer to every means of communicating information other than the direct spoken word. The purpose of producing a document varies according to the document and the particular case.[19]

The contents of a document may be incorporated in the evidence of a witness. A document may be put in evidence as a chattel, a substance, such as a paper bearing an inscription or else as a statement, that is, the inscription on the paper. When treated as a chattel, the document would constitute part of the real evidence. For instance, if a will is stolen, it can be produced in court to show that it bore the fingerprints of the accused. When treated as a statement however, a document may form part of the testimonial evidence of the witness or as part of circumstantial evidence. When used as circumstantial evidence, although it is produced and identified by the witness, the document is not incorporated into the testimony as having been written or read by him, neither are its contents as proof of anything they may assert.

Where documentary evidence is used, not as a chattel but, for the probative value of its content, or writing, there are various rules regarding its admissibility or otherwise, in the Evidence Act.

C. Digital/electronic evidence

This is a new area in the law of evidence in Ghana. There are few judicial decisions on the topic in Ghana. However, the intrusion of electronic evidence has increased exponentially in many jurisdictions. You may assess how the following affect your private life and think about how the law should deal with them: emails, digital

[19] Jonathan Doak, Claire McGourley and Mark Thomas “Evidence Law and Context” 5th Ed Pg 12

photographs, word processing documents, instant message histories, internet browser histories, databases etc

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

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

D. Real evidence

In addition to documentary evidence, the court may also receive 'real evidence'. This term is usually taken to mean some material object, known as an exhibit, that is produced to the court for inspection so that the court may draw its own inference from observation of the particular object. Although real evidence will frequently feature in the cases of either the prosecution or defence, it is usually of little intrinsic value without some accompanying testimony.

Thus, a knife may be produced in a murder case as a form of real evidence. However, unless other evidence is available to show that it was the murder weapon and that it is linked to the accused (e.g. it was found in their car and has the victim's blood on it), it proves nothing.

Real evidence may also be an original document, a visit to the scene of the alleged crime(s) by the judge and jury, a tape-recording, photograph or video image of the defendant.

Real evidence will usually constitute an exception to the hearsay rule. For example, in **R v Robson, Mitchell and Richards [1991] Crim LR 362** the defendants were convicted of armed robbery. The prosecution linked the second defendant with the crime by means of a computer printout of telephone calls made by the second defendant to the phone of the first defendant. It was held that the printout was not hearsay but real evidence since the printout was produced by a computer that operated automatically and independently without human intervention.[20]

E. Circumstantial evidence

[20] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 13

Circumstantial evidence is evidence of relevant facts from which the existence, or nonexistence, of the facts in issue may be inferred. Such evidence may include any of the above forms of evidence except, of course, direct testimony relating to the facts in issue.[21]

Example

Sarah is charged with the murder of Julia by stabbing her in an alleyway behind a club they both frequented. On the night of Julia's death, Sarah and Julia had an argument in the club, which resulted in Julia being thrown out at around 9.30 pm. Around 30 minutes later, Sarah was seen leaving the club in an agitated state through the back door, which led into the alleyway where Julia's body was later found. At about 10.15 pm, a woman fitting Sarah's description was seen running away from the alleyway, a few minutes after witnesses heard loud voices followed by a scream. Sarah's jacket was stained with lime wash, which was identical to that used on a wall in the alley where Julia's body was found, and a button from Sarah's jacket was found at the scene of the murder. The murder weapon, a carving knife, was of the same brand as those contained in a knife block in Sarah's kitchen. One knife is missing from the block.

In the above example, while no witnesses may have seen Sarah stab Julia, there is plenty of circumstantial evidence to suggest she was involved. When we tie the various strands of it together, there appears to be a very strong case against the accused.[22]

UNDERSTANDING OF KEY TERMINOLOGIES:

I. The 'facts in issue' are those matters that are being contested or disputed by the parties.

II. Facts in issue: criminal cases – these are facts that the prosecution must prove to establish a defendant's guilt or disprove a defence.

III. Facts in issue: civil cases – these are facts that the claimant must establish in order to succeed in their claim and to disprove any defence raised. They arise based on the pleadings, that is, Statement of Claim and Statement of Defence.

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[21] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 13.

[22] Jonathan Doak, Claire McGourley and Mark Thomas "Evidence Law and Context" 5th Ed Pg 14

IV. Collateral facts – these are facts that affect the admissibility of evidence, the credibility of a witness or the weight given to a piece of evidence. They are extraneous to the facts in issue.

V. Relevant facts – facts in issue are proven or disproven by what are known as relevant facts; that is, 'relevant, i.e. logically probative or disprobative, evidence is evidence which makes the matter which requires proof more or less probable.

VI. All evidence adduced at the trial must be relevant; the determination of relevancy is a matter for the trial judge.

VII. Evidence can be categorised into a number of types or forms, including direct evidence, documentary evidence, real evidence and circumstantial evidence.

- *"oral" evidence* – that given orally by a witness in court;

- *"real" evidence* – a thing or an item, lodged as a "production" in court. It is normally necessary for a witness to "speak to" (that is, refer to) the item in oral evidence for the real evidence itself to become evidence that the court can take into account;

- *"documentary" evidence* – documents which are lodged in court as productions. Like real evidence, they should normally be spoken to by a witness to become evidence themselves.[23]

VIII. Weight - Once it has been determined what facts in issue the evidence may prove or disprove (which means that it is relevant and that it is admissible), it is then down to the court or tribunal of fact (jury) to decide what weight to attach to it.

[23] James Chalmers "Scottish Evidence Law Essentials" Edinburgh Unversity Press (2021) p 5.

For some, the weight of evidence can seem like an abstract notion; in the law of evidence, the weight simply refers to the extent to which the evidence presented aids in proving or disproving a fact.

The weight that the jury gives a particular piece of evidence will be subjective, drawing on both logic and common sense when they determine what they do, or do not, believe. There are two possible outcomes to this: the evidence may be given no weight and therefore disregarded completely or it may be given weight, thereby influencing the jury's decision concerning the extent to which they perceive its reliability, strength and truthfulness.[24]

[24] Singh, C. (2016). Unlocking Evidence (3rd ed.). Routledge