Course introduction

Law of evidence is a course, which is inevitably crucial for administration of justice unavoidable dispute settlement. Its concern is about what is true?, who is right or correct?, what is really existing or occurred and so on. This course equips students with a basic knowledge to the law of evidence. It begins with discussion on meaning, nature and development, and classification of evidence in various legal systems. The course deals with proof without evidence such as cases of admission, Judicial Notice, and presumptions and proof with evidence giving special focus to relevancy and admissibility of facts in various aspects. Oral evidence encompassing competence of witnesses and grounds of incompetence, privilege, and status of hearsay as evidence are integral part of the course. Documentary, scientific, real and demonstrative evidences are also inevitable component the course has to deal with. The burden and standard of proof of facts in civil and criminal cases is last part of the course. The material tries to incorporate in all relevant topics with which constitutional rights and protections shall the concerned organs comply while investigating suspects or witnesses, searching people or premises, seizing materials etc. The course teaches students how justice could be secured with critical observance of constitutional values related with evidence.
General objectives

The material is the continuation of the first module. So, the successful completion of this material will enable the students to have full understanding of the law of evidence. In particular, the learner will be able to:

- Grasp how facts in issue and relevant facts are to be proved;
- Explain the importance of oral evidence in proving facts;
- List the grounds of incompetence;
- Explain the justifications for privileges;
- List the type of privileges;
- Explain the importance of real evidences in proving facts;
- Distinguish the standard of proof in civil and criminal cases.
CHAPTER FOUR: ORAL EVIDENCE

4.1 General
After it is decided what facts are to be proved in court (facts in issue & relevant facts), the next step is how to prove these facts or to choose the method of securing their consideration. Most evidences submitted during the trial consist the testimony of witnesses to facts they claim to have seen, heard, felt, tasted or smelled. There are few cases where only real evidence is offered and many more where only oral evidence is available.

In systems of proof based on the English common law tradition, almost all evidence must be sponsored by a witness who has sworn or solemnly affirmed to tell the truth. The bulk of the law of evidence regulates the types of evidence that may be sought from witnesses and the manner in which the interrogation of witnesses is conducted during direct examination and cross-examination of witnesses. Other types of evidentiary rules specify the standards of persuasion (e.g., proof beyond a reasonable doubt a trier of fact of such as a jury must apply when it assesses evidence.

This chapter deals with such type of evidence called oral evidence. After showing the general concepts of oral evidence, the chapter will deal with competency of witnesses. The principle concerning competency is that all persons are capable of testifying before the court. The chapter will deal with the exceptions to the principle.

The justifications for granting privileges to some group of persons will be the concern of this chapter. In addition, the lists of privileges are covered. Hearsay evidence (justification for exclusion and exceptions to exclusion) is also part of the discussion of this chapter.

Specific Objectives:
Successful reading of this chapter will enable the reader to:
- Explain the importance of oral evidence in proving facts;
- List the grounds of incompetence;
- Explain the justifications for privileges;
- List the type of privileges;

4.2 Oral evidence: Definition

The Blacks law dictionary, which is the 8th edition, defines oral evidence as: “Verbal evidence: which is given by word of mouth: the oral testimony given by witnesses in court”. That is, oral evidence is ordinary kind of evidence given by witness by word of mouth. The phrase oral testimony needs also further clarification that it is statement made by a competent witness, under oath or affirmation, usually related to legal proceeding. In addition, to testify means the making of a statement under oath or affirmation in a judicial proceeding: to make a solemn declaration under oath or affirmation for the purpose of establishing proof of some fact to the court.

Even though different writers define oral evidence in a different form, the message they convey is the same.

All statements which the court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry; such statements are called oral evidence.

So, what is a witness?

A witness is defined as:
Someone who has first hand knowledge about a crime or dramatic event through their senses (e.g. seeing, hearing, smelling, touching) and can help certify important considerations to the crime or event.  

A witness who has seen first hand is known as an eye-witness. Witness, in general, is one who being present, personally sees or perceives a thing; eyewitness, who is called to testify before a court. One, who testifies to what he has seen, heard, or otherwise observed. As one type of witness, an expert witness testifies not only what he has seen, heard, or otherwise observed personally but he may also offer an opinion applying his expert knowledge to facts he has not personally observed.  

The function of a witness is to present evidence from which the trier of fact can make a determination as to what happened. Generally to be eligible to testify a witness must have a personal connection with the relevant occurrences coupled with mental and physical facilities sufficient to observe the events at the time of their occurrence, and recollect and relate them to court in a manner, which renders the testimony relevant.  

In general, evidence of witness is given orally, and this means oral evidence. The expression “oral evidence”, therefore, includes the statement of witness before the court, which the court either permits or requires them to make.  

### 4.3 Importance of Oral Evidence  

The importance of the law of evidence in general and oral evidence in particular is highly related with the goals of an adjudication, which is a form of dispute resolving mechanism and the fundamental aim of adjudication is correctness of decision making. The correctness of the decision-making is realized by the proper application of the substantive laws to the true facts of the dispute. In this case the true fact is established through the accurate evaluation of relevant and reliable evidence by a competent and impartial adjudicator applying the specified burden and standard of proof. Specifically the purpose of the law of evidence is to assist in the achievement
of rectitude or correctness of decision making by ensuring that by any means the evidence before the court is relevant and reliable to establish the true fact. This is done by several mechanisms:

**First**, much evidence that could be overemphasized or which could lead to erroneous inferences being drawn is inadmissible. For example, hearsay evidence is often both unreliable and as such is generally inadmissible in criminal proceedings; an expert opinion cannot be given on matters of general knowledge because the tribunal of fact might attach too much weight to it; and the accuser’s criminal disposition is generally inadmissible because of the risk that unduly prejudicial inferences might be drawn from it.

**Secondly**, the law imposes a requirement that a fact in issue must be proved to an appropriate degree of probability. In criminal trials the burden on the prosecution to prove the accuser’s guilt beyond reasonable doubt and preponderance of evidence is applied in civil adjudications.

**Thirdly**, the process of cross-examination provides a mechanism for testing credibility of witness and revealing to the tribunal of fact any vested interests, bias or mistakes adversely affecting the cogency of their testimony.

The other main importance of oral evidence is in case of absence of documentary evidence. This is true especially in criminal cases that most of time it is hard to get documentary evidence. Hence, the possible option to prove the alleged fact is by producing oral evidence. Since oral evidence is given by a person who has personally seen, heard, or otherwise observed, its credibility is high. That is why witnesses are described as” The eyes and ears of justices”.

**4.4 Nature and Development of Oral Evidence in Different Legal Systems**
In the previous chapters we have discussed the distinction between the common and civil law legal systems. In this sub topic we will briefly discuss the basic points of distinction concerning the two systems.

A. Common Law

In common law legal system, oral evidence is given considerable weight and will usually prevail over written evidence. In a common law trial witnesses are examined and cross-examined in the presence of the judge jury. Counsel often makes motions and objections orally, and the judge acts as umpire, ensuring that the rules on procedure and evidence are followed, directing the jury on the law to be applied and reminding them of the evidence that they have heard. The jury’s roles are firstly to decide questions of fact, i.e., to makeup their minds between conflicting accounts as to what happened and then to decide on the guilt or innocence of the defendant.

Thus, the rules of oral evidence draw their significance from this process since it is solely on the evidence retained in court, usually by formal oral testimony that the decision is based. The common law gives predominance to the day in court, with the opportunities for cross-examination of opposing witnesses and for argument on both sides. That is, in oral evidence it is believed that the person who gives his testimony is before the judge and the action is physical expression. This helps the jury the matter to be clear and for the accused to have a chance of cross-examination.

Lastly, one important point in common law in relation to the oral evidence, is-so called “preparation of witnesses”. In common law, counsel would normally prepare his witnesses for the hearing in order to avoid surprises during the trial and to make sure that the witness statements are accurate.

B. Civil Law

We can assume that the continental /inquisitorial/ system unlike the Anglo-American/adversary/ system has its own character, according to which the determination of what issues to rise, what evidence to introduce, and what arguments to make is left almost entirely to the discretion of the
judge rather than the parties. One can sometimes observe the fact that in civil law trials, questions are to put to witness by the judge instead of by counsel for the parties or by the parties themselves. This kind of experience, leads someone to the inference that the civil law judge determines what questions to ask and unlike the common law judge in effect determines the scope and extent of examination.

In the civil law legal system, all oral witnesses are the courts’ witnesses, though generally speaking the parties tender them. This is what is called ‘inquisitorial.’ There is substantially no cross-examination and for practical purposes none at all by the parties or their legal representatives. The witness in effect makes his statement in his own words… there being no “hearsay rule” rule. It is for the court to decide the value of what has been said.

Finally, in civil law, the preparation of witnesses is strictly forbidden. The attorneys are normally not allowed to discuss the issues related to trial with witnesses out of court and may face disciplinary sanctions if they breach this rule. If the judge is informed that the attorney before the trial questioned a witness, the witness testimony may not be given full credibility.

Generally speaking, a civil trial is consisted of a number of hearings, and written communications between the parties, their attorneys and the judge during which an eventual dispute on court jurisdiction is resolved, evidence is presented, and motions are made. There is less emphasis on oral arguments and examination.

4.4.1 The Traditional Ethiopian Oral Litigation

Are traditional litigation systems still practiced in your community?

Ethiopia has a long history of using formalized litigation dating back centuries. In Ethiopia oral evidence was recognized in the law firstly by the ‘Fetha Negest’ (the law of the king) in an
elaborate way. It has a number of paragraphs dealing with witnesses. For example, there are certain competency requirements to be a witness in the law of the king such as the age of the witness should be not less than twenty years old; the witnesses should be two or above in number; the witness should not be a family member, a beggar, a soldier or ‘ashker’. The hearsay evidence had not gotten acceptability.

the traditional procedure of litigation was transmitted from generation to generation by oral tradition. This procedural law includes the law of evidence, which incorporate a highly sophisticated technique of interrogation and cross-examination known as ‘Tatayyaq muget’. “Esette-ageba-muget” was used interchangeably used with tatayyaq to denote features of court proceedings and the same mode of litigation.

General E. Virgin summarized his vivid eyewitness account of court proceedings conducted according to the indigenous mode of litigation of Ethiopia, in the following manner:

*The Abyssinian is a born speaker and neglects no opportunity of exercising this talent. A law-suit is a heaven-sent opening and entails as a rule a large and appreciative audience: now threatening and gesticulating, now hoarsely, whispering with shrugged shoulders, now tearfully, he tells of his vanished farthing, and points a menacing, trembling finger towards the accused. The judge in the midst of circle of spectators, having listened to the eloquence with a grave and thoughtful men, now invites the accused to reply. Like a released spring he leaps up, and with raised hands calls heaven to witness his innocence, the falls on knee, rise, stands on tip toe, drops back on his heels, shakes his fist under the nose of his adversary and approaches the judge with clasped hands, while all the time unceasing stream of words pours lips.*

*What can you understand from the above statement made by the foreigner?*
This theoretical exposition of court proceedings shows how the “tatayyaq” mode of litigation, which forms part and parcel of the Ethiopian cultural heritage operated.

with regard to oath, the witness would close the door of a church and\or hold the Holy Bible, saying:

\[
\text{May He perforate me like his cross,} \\
\text{May He erase me like his picture,} \\
\text{May He chop me down into pieces like his flesh,} \\
\text{May He spill me like his blood, and} \\
\text{May He choke me up as his altar is closed?} \\
\text{If I am not telling the truth.}
\]

If he had already testified out of court, the party may impeach the credibility of his testimony or may claim that it may not be admissible at all. The party, which called the witness, would, before asking him to testify, warn him as follows:

One may go to hell after death;
One maybe reduced to bones, lying sick in bed;
One may also be a permanent inmate of a hospital;
All the same, one is obliged to tell the truth.

\section*{4.5 Competence of witnesses}

What do you think must a person fulfill to be a witness?

Ordinarily, competence refers to capacity of a person to do something. Here, competency of a witness takes to the inquiry as to which persons are capable to testify or are competent witnesses.

Thus, a competent witness is one who is fit and commonly gives his testimony before courts or a judicial proceeding under oath or affirmation. And the topic of competency concerns itself with
what witnesses will be permitted to testify at all. A competent witness is one who is able to testify or one whom nothing prevents from testifying unless there are some conditions which bar him from doing so.

4.2.1 Types of Competency of Witnesses

The witness' competency is classified in to two; general competency and special competency.

4.2.1.1 General Competency

General competency refers to the witness’ ability to testify to facts he has observed. In simplistic terms, it is about telling to the court what one has heard, seen, smelt, touched, etc. It is widely accepted that every body is presumed to be competent. That is, with the exception, perhaps, of certain witnesses, general competency is presumed.

For that matter, it would be a waste of court time to conduct an inquiry in to the competency of every witness testimony. But from the allegation of opposing counsel that there is reason to question the witness’s competence, an inquiry into general competence will be made.

Thus, to be included as witness in the general competency a person must posses the organic and moral capacities. This is to mean that the test to competency relates to the ability to understand questions and give rational answers. To put it in another way, competency of a person is determined by his ability to perceive, remember, communicate and understand the duty to tell truth.

4.2.1.2. Special Competency

Special competency refers to a witness's ability to testify to opinions or conclusions he has arrived at by evaluating facts he has observed, facts presented to him by counsel or a combination of both types of facts. That is, special competency refers to the ability to analyze facts about which one testifies. For example, if you go to a hospital you don’t tell your illness to
the doctor, but you tell the facts about your illness, then, he analyzes the facts and tells you what you are suffering from.

Unlike general competency of witnesses, special competency is not presumed. Special competency of witnesses is subdivided in to two: layman’s opinion, and expert opinion given as testimonies.

A Lay witness is a witness with no expertise in the matter concerning which he testifies beyond that of the judge. This type of witness (one that is not shown to have any special expertise in the subject matter concerning which he testifies) may testify to opinions based only on facts he has observed, and may ordinarily venture opinions as to intoxication, age, appearance, general characteristics of weather, a value of service, conduct of business, etc, and leaves the conclusion to the court, depending on the case and chiefly on the practice. However, the opinion on of non-expert witnesses will not be admissible upon the particular cause thereof and of all subjects where it is neither practicable nor possible; for they would be vain and unprofitable.

The opinion of expert witness may be required by the court or by either of the parties. To call expert testimony, the subject matter must be so complex that judges should be assisted in forming proper judgment regarding the fact. Consequently, for an expert to be qualified as qualified witness he must show special experience. But since this expertise is not present in the ordinary witness, the expert’s specialized competence must always be shown before he will be allowed to venture his opinion.

4.6 Grounds of incompetence

The competency of ordinary witnesses has its own exceptions. These exceptions are the incompetence of the ordinary witnesses due to lack of organic and moral capacities of presumed witnesses. Because of the existence of these exceptional grounds of in competency, one writer stated that; “The witnesses...competency is the rule, their incompetence the exception, and that incompetence lies within a very narrow compass.” Thus, the above quotation may enable us to
say that the competency of ordinary witness is the general rule while their incompetence is the exception.

There are few grounds, in the Rule 39 of the Court Rules of 1943 and Rule 92 of Draft Evidence Rule, which make a person incompetent from testifying before courts of law. These are:

A. Mental incapacity

The incompetence of mentally incapacitated persons was a ground for raising objections in both the common law and the Ethiopian legal system. But no flat rule today under Common law, Draft Evidence Rule (DER) or present Ethiopian law which, declaring any of these people incompetent witness. The ground covers mostly the organic incapacity aspects of the incompetency of witnesses. It comprises children, insane, and intoxicated persons, whose conditions may be long lasting or intermittent in nature.

The present common law position on the general rule today well expressed as:

*The essential test of the competency of the infant witness is his comprehension of the obligation to tell the truth, and his intellectual capacity of observation, recollection and communication.*

Here, we can understand that having intellectual capacity of observation, recollection, narration or communication of what has been observed and recollected and understanding the duty of telling the truth are the main elements to be considered in the process of determining the competency or incompetence of a required witness. He does not need to believe in God. So long as there is some standard such as respect, decency, reverence which he feels makes it necessary to tell the truth in the court proceedings, he may, if other wise incompetent, testify as a witness.

The DER, which is substantially the same with common law, under its rule 92 states that a child or a person with mental defects are generally competent if they understand the questions put to them and rationally answer them. Thus, the witness must be able to perceive, to understand and to communicate in order to be a competent witness. In addition to this, the DER in Rule 104(1)
includes a second test for the competency of a child or mentally infirm witness. To give answers or an affirmed testimony, such a witness must not only be possessed of sufficient intelligence to justify reception of the evidence but also he must understand the duty to speak the truth.

What is more, the testimony of every witness, including mentally deranged ones, was and still is subject to the assessment of court. Thus, by way of interpretation mentally defective persons are permitted to have the right to tell to the court what they have in mind because there is inherently presumed civil right of persons to stand as witness before courts. In proactive too, courts accept any witness when necessary for both civil and criminal cases, though the general provision in the civil code dealing with contracts excludes some persons from being witnesses to a contract. This exclusion does not continue to the effect that they are not capable enough to testify in connection with civil matters for civil cases are connected with the preponderance of evidence to make one of the parties the winner of the suit.

B. Physical incapacity

This covers those persons, who have visual, hearing, and speaking deficiencies. Such persons can, in principle, perceive the occurrence or non-occurrence of certain events. However, defects such as blindness, deaf or dumb may impair the power of observation to make a given witness incompetent to testify. However, according to the general rule, physical incapacity is no bar to a witness's competency as long as he can understand the questions put to him and give rational answers to those questions.

Rule 92(2) of DER by supporting the above assertion states that, if a person cannot speak, see and hear, he may still testify if questions can be put to him in some accurate fashion and he can reply by signs or writing which can be accurately interpreted by some one sworn to do so accurately.

Hence, in Ethiopia, even though there is no law which governs such issue, practically these types of persons are not incompetent to stand as witnesses merely because they are blind, deaf and
dumb if they are able to observe, recollect and communicate. Their infirmity may make them incompetent to testify. the whole idea of this discussion is that

C. Conviction of a crime

In present Ethiopia this is no longer a bar to competency of a witness. This can be inferring from the substantive laws such as the FDRE Constitution and the procedural laws, i.e., Art 142 of the Criminal Procedure Code, and Art 268 of the Civil Procedure Code, and etc. However, a witness may be asked about prior convictions to impeach his credit. In Ethiopia, if the witness is also the defendant, the prosecutor may not impeach his credit by proof of prior conviction at any time prior to conviction in the case before the court.

D. Interest in the outcome of the case as ground of incompetence

This ground of in competency covers different types of persons, i.e., parties to the case, consanguinal and affinal relatives, other emotional grounds and so on. These grounds are inherently linked with the bearing of biases. In early times both criminal charges and civil suits, persons were disqualified as they were considered incompetent. No matter what the degree of interest of the witness and the type of relation he had, the interests of the witness used to determine his competency to a great extent. As a result, interested persons could have been competent witnesses if he had divested himself of his interest or if it has been extinguished or is released liability.

There is no such restriction in the present times. The ground has no relevance with regard to the competency or incompetence of a witness. Simply, the witness is presumed to be competent if he meets the requirements laid down as:

- As per Art 93 of the DER, in all civil proceedings the parties to the suit and the husband or wife of any party to the suit, shall be competent witnesses; and
As per Art 94 (1) & (2) of the DER in criminal proceedings against any person, the husband or wife of such person shall be a competent witness if called by the accused, or for an offence committed against the wife or husband such wife or husband shall be a competent witness for the prosecution.

However, the fact that a witness is the spouse of a party to a suit can be used to impeach said witness credibility. This was specifically provided under Rule 40 of the Court Rules of 1943. The court has discretionary power to attach whatever weight it thinks fit to the testimony of a party or a person who has any relationship to the parties such that his evidence may be partial.

**4.7 PRIVILEGES**

This sub-topic will discuss the exception to the right not to be compelled to testify and duty of every person to testify. We will see the different types of privileges and the reasons for granting such privileges.

The term privilege means a freedom from compulsion to give evidence, or a right to prevent or bar evidence from other sources, usually on grounds unrelated to the goals of litigation.

In the absence of privilege, parties, witnesses, and others, can be compelled by a court to give testimony or other material they may have, that is needed for court proceeding, even if it is damaging to themselves or others. The usual principle is that the law is entitled to every person’s evidence. Similarly, a person normally cannot prevent another person from disclosing confidences or other matters under legal compulsion or voluntarily, for use in judicial proceedings. Privileges are a narrow exception to these general rules. As such, they sometimes interfere with the truth-seeking function of the law. It always should be borne in mind that privileges operate to exclude good proof, in the name of some other social objectives. For this reason, courts often say privileges should be narrowly construed.

Most privileges are designed to promote certain kinds of relationship, and particularly to promote confidential communication with in the socially desirable relationships. So, privileges should not
be conditional and must be protected at any time because uncertainty of coverage at the time of the communication reduces the encouragement to communicate.

### 7.4.1 Policies underlying privileges

As just indicated, a common policy underlying privilege is to encourage desirable communication with in certain kinds of special relationships, for purposes that society particularly wishes to foster. The privileges for confidential communications in the attorney-client, physician-patient, psychotherapist-patient, and husband-wife contexts are examples. It often is asserted that these relationships would not accomplish their purposes, or would accomplish them far less effectively, without legal protection of confidences through rules of privilege. Although this conclusion is controversial, it is the foundation of several of our most importance privileges.

A second and distinct policy is to protect the desired relationship itself, even to the extent that it is not dependent upon confidential communications. Thus, to foster the marital relationship, many jurisdictions recognize a privilege of one spouse to refuse to testify adversely to the other. This privilege usually extends to adverse testimony on any subject, whether it concerns confidential communications or not.

Other policies may be to uphold the integrity of a profession; to avoid futile efforts to coerce testimony against principled resistance; to avoid likely perjury if so coerced; or to serve commonly shared principles of privacy, fairness, or morality.

Other privileges operates to advance economic policies, such as those protecting trade secrets, or to encourage voluntary compliance with law, as in the case of privileges for certain required reports to government agencies, which may also incorporate “housekeeping” concerns about disruptive requests for documents and document loss. Still other privileges serve to limit governmental invasion of the security of individuals. The privilege against self-incrimination is an example.
The limits of these policies, together with the need for particular types of information define the boundaries and exceptions to privileges. For example, communications intended to facilitate further commission of crime or fraud are not protected by the attorney client privilege. The discovery of this information is particularly necessary, and a rule of nondisclosure is inappropriate because none of the purposes of the attorney-client relationship can support the privilege when the object is crime or fraud. This is one example of how the law limits privileges narrowly to their legitimate policy because of their tendency to frustrate the truth-seeking function.

Most rules of evidence, including privilege, on occasion may render inadmissible evidence offered on behalf of a criminal defendant, that could help raise a genuine reasonable doubt concerning defendant’s guilt. At some point, such exclusion may trench on the defendant’s constitutional right to present information, compulsory process, or due process clauses of the constitution.

### 7.4.2 Types of privileges

#### A. The right against self-incrimination

**Definition and the substance of the privilege**

The privilege against self-incrimination guaranteed by the FDRE Constitution encompasses two privileges (1) the privilege of the criminally accused, which includes both (a) a right not to take the witness stand and, if he does take the stand, (b) a right to turn away impeachment questions that might open up other crimes committed by him (in case he takes a stand it means he has waived his right in that case). (2) The privilege of other civil or criminal witnesses to turn away particular questions that might open up crimes committed by them. “Open up” in both instances means increase the person’s exposure to criminal prosecution or criminal liability.

Unless waived, the witness’s privilege can be invoked by any civil or criminal witness to resist giving testimony in court, whenever it can be made to appear to the judge that there is some appreciable likelihood that information disclosed by the invoker might be used either in investigation or as evidence, in a way that would increase the chances of the invoker’s
prosecution for or conviction of some crime under any law anywhere. The standard is the same for the criminal accused’s right to turn away particular questions.

If the possibility of prosecution is removed, for example by the expiration of the statute of limitations or by the fact that conviction or acquittal has already taken place, there is no privilege, at least insofar as the privilege would be based on fear of that crime. Similarly, the grant of “use” immunity (guaranteeing the witness) removes the chance the testimony will incriminate.

**B. Governmental privileges**

Certain records required by the government to be kept or submitted may be attended by a “required report privilege.” Although on occasion they may overlap, this privilege is to be distinguished from the privileges protecting certain other governmental matters such as state or military secrets, official information, and the identity of informers.

Required report privilege statutes differ widely in form, substance, and judicial interpretation. They are normally individually tailored to a particular regulatory area: income tax returns; census reports, claims for veteran’s benefits, patent applications, filing of corporate trade, securities, financial, product, work-conditions, or environment information with various agencies, unemployment compensation claims, public assistance records, information obtained from citizens in conjunction with health services, public health records and adoption records, to name some.

Although the policy behind a particular required report privilege is rarely clearly articulated in the statute or judicial interpretations thereof, the privileges generally seem to be founded upon either one or both of two distinct policies:

1. **Encouragement of voluntary compliance.** The intent here is to encourage citizens (or companies) to accurately and fully report potentially self-damaging information which they
would otherwise hesitate to furnish for fear of the consequences resulting from later uses of such information. It is this kind of statute that will principally concern us.

(2) Governmental concerns. The concern here is with the government’s internal processes, i.e., (a) preventing disclosure of government officers’ and investigators’ notations or opinions; (b) preserving documents from loss, or destruction, alteration or wear; (c) avoiding the general inconvenience resulting from frequent demands for disclosure; or (d) preventing direct exertion of judicial power on executive personnel, a policy with “separation of powers” overtones. Rarely will such matters be the only or the principal concern under the privileges discussed here.

**Governmental privileges for state and military secrets. Informers, intra-agency communications etc.**

The required report privileges may be analytically distinguished from five other privileges or non-disclosure principles applicable to information in the hands of the government. These principles overlap one another. Two of them have their origin at common law: the governmental privileges not to disclose military or diplomatic secrets of state (and, perhaps, certain other official information) and not to reveal the identity of an informer.

A **third** governmental privilege is the federal statutory privilege of government agency heads to make rules (respected in court) prohibiting subordinates from disclosing intra-departmental communications, agency files, and information obtained by agency investigation.

A fourth privilege encompasses some of the fundamental principles of the above mentioned privileges and is embodied in state statutes which provide that “a public officer cannot be examined as to communications made in official confidence,” a somewhat analogous judge-made rule exists in some jurisdictions. These four nondisclosure principles are extensively qualified.
Finally, there is a fifth type of privilege called executive privilege, exercisable by the president or by certain of his officers. This privilege rests on several policies, including the constitutional separation of powers.

C. Professional confidentiality

there are different types of professional privileges stated in one or more national laws. in this sub topic we will deal only two types which are commonly enacted by all nations: the attorney-client and doctor-patient privileges.

i. Attorney-client privilege

Definition and Limits of Attorney-Client privilege
The main purpose of attorney-client privilege is to facilitate informed legal services by assuring the clients that the statements made with their attorneys will not be disclosed to third persons including the court.

As this policy to foster legitimate legal services, advice about how to commit crimes or frauds would not be privileged, nor would statements by a client seeking such advice. Similarly attorneys involved in activities for a corporation of a “business” as opposed to “professional legal” nature, frequently find that the communications made pursuant thereto are held not privileged.

Note that in determining the existence of a crime or fraud exception, the reference is to a future crime or fraud. Thus, a client’s statement, “I want your advice because I’m planning to commit a crime,” is not privileged, but I’ve just committed a crime and I want your advice on how to defend myself;” is squarely privileged. Defending a past crime or fraud is just the sort of thing the privilege is designed to cover. Harder examples occur between the two extremes represented by the quotes. How should this be handled? Suppose the attorney in this situation advises an illegal method? Would this deny the client his privilege? Does anything depend up on whether a client realized illegal advice has been given?
The thing to be considered in this case is the significance of the client’s culpability (know or should have known the act he has intended to do was illegal), rather than the attorney’s. In addition, the test is whether the advice was sought or obtained by the client to commit an illegal act.

ii. Doctor-patient privileges

The aim of the law with respect to the physician-patient privilege is sometimes, although not universally, extended to cover matters in the doctor’s such as information obtained by the doctor concerning the patient from other doctors and hospitals, physicians’ uncommunicated opinions, facts observed by the doctor, communications by the doctor to other doctors, and communications passing from the doctor to the patient (as well as the reverse). In some jurisdictions these matters are covered only to the extent that they may inferentially reflect communications from the patient. In each instance, of course, the information must relate to the patient’s care.

There are good arguments for the broader coverage. Where permission or information is needed from the patient for the doctor to gather a complete file on the patient from other doctors or hospitals, the patient may be encouraged to give it by a promise of confidentiality. The patient may also be more forthcoming about communicating facts knowing that records in the patient’s file that could reflect them are secret. Other doctors or hospitals also may be more forthcoming about supplying information if they know it is protected. There is a diversity of authority concerning these extensions, as well as the related matters of whether the privilege should cover the fact that a doctor was visited (or retained) or the fact that not only to encourage information, but also to encourage the seeking of professional help, that would justify privileging this latter information.

In view of the purpose of the privilege, perhaps test of whether communicated information is germane to treatment should be whether the patient thought it was germane. Would the fact of where an injury occurred ordinarily be germane? Usually not (unless the unsanitary nature of the place might affect treatment). How it occurred? Who inflicted it? Usually not (except in certain psychological aspects of treatment for certain injuries, as, e.g., family inflicted injuries.) would
alcohol smelled by the doctor on the patient’s breath be germane? (Perhaps this last example would be ruled out because it is not a communication, but some jurisdictions extend the privilege beyond verbal communications.) The presence of alcohol in the body might influence the choice of medication. In any event, the controlling issue usually is whether a reasonable person would or would not have thought a matter germane to treatment.

Since the purpose of the privilege is to improve treatment, the presence of a nurse at the consultation would not ordinarily destroy the privilege. Perhaps this principle could be extended to third persons generally if they facilitate treatment. What about physicians’ assistants who help collect billing information? Or a friend brought by the patient for moral support? there is disagreement. Family members usually qualify. Should the privilege terminate upon the patient’s death? Assurance of secrecy even after death may significantly encourage some kinds of patient-to-doctor disclosure.

D. Marital privileges

The ancient common law in competency of one suppose to testify for or against the other in legal proceeding eventually eroded in to least two (and possibly three) bread privilege principles: first, the confidential marital communications privilege, and second, the privilege not to testify against one’s spouse (which may be treated as including a third, the privilege to prevent adverse spousal testimony against oneself).

First, the confidential communications privilege protects confidential communication made during the marital relationship, so as to foster such communications. Second, an unwilling spouse called to testify against the other spouse may have a privilege to refuse, so as to avoid rupture of the relationship. Third, some jurisdictions permit a spouse to prevent the other spouse from testifying against him/her, even if the testifying spouse is willing. As with most privileges, the statutes and the judicial interpretations must be examined closely, but certain generalizations can be made.
i. The “confidential communications” privilege in the marital context

The confidential marital communications privilege permits the suppression in any civil or criminal case of so much of a spouse’s testimony as may reveal confidences passed between the spouses by reason of the marital relationship. The privilege thus only applies to a “confidential communication”. A cluster of problems arises surrounding the requirements both of “confidentiality” and of “communication.” Can the act of placing money in a bank account, observed by a spouse, be implied “communication?”

Although there are different rulings on this, usually, the spouse’s observation of an act done for reasons independent of the observation is not considered a communication. Under this view, the observed act would not be privileged—but a later statement of it, say to a spouse not present during the act, might be privileged. If this kind of act can be communication, is it “confidential,” where others could perceive it, but only the spouse knew its significance in a course of criminal dealings? (Do we draw this distinction communications? Perhaps.) is the act of putting something in a drawer at home privileged insofar as viewed by the opposite spouse? Does it matter whether the spouse placing it in the drawer would not have done so openly but for the marital relation? does it matter if he meant to hide it from the spouse? courts have varied in their answers to these kinds of questions. We are concerned here with interpreting “confidentiality”, and “communication”. Are we concerned with yet another concept? Need the matter be a “marital” communication? Would it be appropriate to ask of verbal communications whether they would not have been made but for the marital relationship? This inquiry is extremely rare.

ii. The “Adverse Spousal Testimony” Privilege (as Distinct from the communications privilege)

The other marital privilege, adverse spousal testimony, permits the suppression of all testimony of one spouse against the other (often only in the latter’s criminal prosecution). The distinctions between the privileges, where the privileges remain “pure,” may be generalized in the following fashion: the communications privilege applies only to prevent disclosure of confidential marital communications; the adverse spousal testimony privilege can entirely prevent the
spouse from taking the stand as a witness adverse to other connubial partner, regardless of the subject matter of the expected testimony. The communications privilege applies in civil and criminal litigation unless subject to an exception; the testimonial privilege is frequently confined to criminal.

How do you see this privilege in light of the duty of spouses to cooperate and be honest between each other?

The communications privilege applies regardless of whether the testimony is for or against the spouse; the testimonial privilege can prevent only testimony adverse to the spouse. The communications privilege applies whether or not a spouse is party to the litigation; the testimonial privilege requires a spouse as a party. Indeed, the communications privilege can apply even where neither of the spouses is a party or a witness. Only the adverse spousal testimony privilege applies when the testimony does not relate to a matter transpiring during the marriage; the communication under the communications privilege must have transpired during the marriage. In addition, the communications privilege may cover evidence other than spousal testimony; the testimony; the testimonial privilege cannot. Such “other evidence” might be the letter that constitutes the communication, testimony of third persons having knowledge of the communication’s contents, a tape recording, etc.

Do you think these privileges will be affected if the marriage is dissolved?

Only the adverse spousal testimony privilege is destroyed by divorce. This is because the marital communications privilege is said to be intended to encourage spouses in the population generally, to confide in each other; whereas the aim of the privilege against adverse spousal testimony is said to be to preserve and promote harmony in the particular marriage before the court, (Would it really harm marital harmony for one spouse to testify under compulsion of law against the other? One suggestion has been that the real reason for the privilege is that adverse spousal testimony deeply offends our “sense of justice.”) perhaps, given its purpose, the adverse spousal testimony privilege should end at separation or a showing of irreconcilability.
Conversely, perhaps the argument can be made that it should be extended to those who cohabitate. But such modifications of the law probably would open up greater problems.

Both marital privileges are frequently subject to a number of exceptions, limiting them, for example, only to criminal cases, or conversely refusing to apply them at all in certain criminal cases (usually those involving crimes against the spouse or a child of either of the spouses). Their application in civil cases is equally inconsistent, with the spouses are adverse parties or tort actions based on criminal activity that would be subject to exception. The adverse spousal privilege is typically limited to cases in which the spouse is a party rather than injured indirectly by the testimony, and federal courts generally restrict its invocation to criminal cases. Many statutes relating to both spousal privileges prohibit their application in cases involving separation and divorce.

E. Other privileges

Are there other socially desirable relationships or professions whose work or solidarity ought to be facilitated in a fashion similar to that extended to doctors, lawyers, and spouses? To name just a few possibilities, should there be a journalist-formant or accountant-client privilege? Why isn’t it considered as desirable to foster, with privilege, communications between other family members such as a parent and child, as it is between husband and wife? Perhaps it also would be desirable to foster the work environment by a boss-secretary privilege, or to create a researcher-subject privilege, or for that matter, a’ friend “privilege that would result in nondisclosure of confidences among close friends. The policy of limiting the extent to which privileges defeat the truth-seeking function, as well as the difficulty of defining them, have led most states to reject the better examples.

A number of jurisdictions have some form of clergy, journalist, and/or accountant privileges. There is scant authority for the others. A social worker and a researcher privilege are not unknown. A number of jurisdictions have codified qualified privileges for statements made to rape or substance-abuse counselors, or for peer review in hospitals. This sort of privilege has been suggested for domestic violence counselors as well. The problem can hinder the
ascertainment of truth in vitally important inquires, both public and private. They also have constitutional ramifications when they prevent a criminal defendant from receiving or using relevant information.

### 4.7 Hearsay evidence

In this sub topic we will see one type of oral evidence, hearsay evidence. This is a type of evidence given by a witness based on the information he has attained from the statements made by others. For many reasons hearsay is in principle inadmissible. We will discuss the reasons for exclusion of hearsay evidence and the exceptions to the exclusion.

**Definition of hearsay**

W (witness) reports on the stand that she heard D (declaring who made the statement, not defendant) state out of court that he (d) saw X Shoot Y. Perhaps W relate D’s story in relevant detail, but D does not testify. W’s testimony as to what D said is hearsay if offered to establish that the shooting took place, that X did it, or that it was in any other respect as stated by D.

Hearsay is legal term that describes statements made out side of court. How over, all statement made out of court are not hearsay. discussed. At ordinary circumstance, hearsay may have various meaning, but the definition of hearsay under this topic is standardized in context of evidence rule and principles.

**Black's Law** defines hearsay as:

The term applies to that piece of testimony given by a witness who relates, not what he knows personally. But who others told him or what he has heard said by others.

In light of Federal Rule of Evidence of United States of America, hearsay means “statement that was made other than by witness while testifying at the hearing, and that is offered to prove the truth of the matter stated.” The word “statement” used in this definition may be
“oral” or "written", verbal expression or “non-verbal conduct" intended as a substitute for oral or written verbal expression.”

All the above definition show that hearsay is a kind of evidence, made by another person other than the one who testify it before the court, and it is a kind of evidence which does not originate from the individual's direct knowledge and observation of facts sought to be proved, but from the mere narration and repetition of what has been said by another who is not in court to ascertain the fact. Generally, when we put it simply, hearsay is out-of-courts statement offered to prove the truth of the matter asserted in a civil suit or criminal charge.

**Justification for exclusion of hearsay statements**

Hearsay is what a witness who does not have first hand information but heard about something from a person and testifies before a court. That is, if the statement was not made in his presence or hearing and he subsequently came to know of it through some other source, he can not appear as a witness, for his knowledge is a derived knowledge and is nothing but hearsay and it is a maxim of law that hearsay evidence is not relevant.

The objective of the rule against hearsay is to prohibit the use of a person’s assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in the court on the stand where he/she may be placed under oath and cross-examination. The basic justifications for exclusion of hearsay evidence are:

**A. Lack of cross-examination**

Absence of cross-examination is the most important justification to exclude hearsay statement, because the declaration was made out of court rather than before the court, and not subject to the test of cross-examination. Cross-examination is described as the greatest legal engine invented for the discovery of truth. It is a means by which the other party tries to show how the testimony given by a witness against him is doubtful, erroneous or untrue. To this end the right person to be cross-examined is not the hearsay witness but the person who has the original information.
The hearsay witness may be cross-examined, but the witness may refer the answer to the original declarant where cross-examination becomes ineffective. He may simply say that is how he heard it or told. If it were the original person he cannot transfer because he said he had personal knowledge about the fact he testifies. He cannot say that he was told so. This shows that the lack of opportunity for the adversary to cross examine the absent declarant whose statement is reported by a witness is one of the main justification for exclusion of hearsay.

**B. Absence of oath**

The other most important reason next to cross examination is that the declarant is not under oath. Usually the out-of-court declarant was not under oath at the time of declaration. It is similar with the concept that, “hearsay statement is not testimony” due to the lack of oath purposes like solemnity of the proceedings and court’s commitment to the truth and the witness’s legal duty to tell the whole truth.

**C. Testimonial infirmities**

Testimonial infirmities is a concept dealing with problems of misperception, faulty memory, ambiguity and distortion in relation to an oral statement of an out of court declarant. This mean the person who made the statement may have wrongly perceived the events in question, and because of fallibility of human nature, the memory of the person who heard the statement, may be affected and finally there may be distortion of events.

**Exception to hearsay evidence**

There are certain exceptions to the hearsay rule which makes the hearsay evidence admissible. An exception is an assertion, which is hearsay because it is offered to show its truth but which is nonetheless admissible because the assertion was made under circumstances, which the law regards as rendering the said assertion trust worthy.⁶
In addition to this, Both Ethiopian procedures (i.e. art. 137(1) of the criminal code and art. 263 of civil procedure code) allow a witness who has direct or indirect knowledge to testify. Indirect knowledge, as stated earlier, is a knowledge one gets about something from some other person. This is hearsay if both people of direct and indirect knowledge can testify before the court, it appears as if hearsay is allowed and contradicts with the principle of oral evidence. However, the procedure broadly provides that both may testify, but as to what kind of facts of indirect knowledge may come before the court is not the issue of procedure but evidence law. That is why the draft evidence rule provides some most important exceptions to the hearsay rule to be reconciled with the procedures.

Following are some of the exceptions to hearsay in which facts of indirect knowledge may be used as admissible evidence. Some of these exceptions are:

i. **Dying Declaration**

Defined in Rule 29(a) Draft Evidence rules as:

It is made by a person who is dead, or as any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes in to question, whether that person was or was not, at that time the statement was made, under expectation of death and what ever may be the nature of the proceeding in which the cause of his death comes in to question.

As to this definition, these are declarations made by a person who knows that his death is imminent and a person cannot be found at the time the testimony is required. The ideal is that, if the person who makes the declaration is religious, he will never prefer to die with lie on his lips when he goes to meet his God. Even if this is not true, people do not usually lie unless for a certain benefits. A person who is going to die does not have the motive for which he has to lie.

As Melin stated in the *Ethiopian Evidence law book*, the dying declaration is only admissible in so far as it details the cause of death and indicates the circumstances of the transaction which resulted in death, for example, as to Melin, it is not admissible to the extent it refers to quarrels
between the declarant and the *caused* which quarrels can not be regarded as a part of the transaction resulting in death.

Furthermore, the declarant, just as any living witness, must have had an adequate opportunity to observe the facts, which he details. His statement, for example, must not be based on hearsay. He must be a competent witness.

Note also that, the justification for allowing evidence of dying declaration in the absence of the original seems to be necessity of evidence. If the original declarant is dead or cannot be found, there could be no better evidence than the hearsay.

**ii. Statements made in the ordinary course of Business**

Defined in Rule 29 (b) of the Draft Evidence Rules, and the idea behind this exception is that if the statement is made in the current routine of business, it is more likely to be trustworthy than otherwise. There are, perhaps, fewer motives to lie in the day-to-day aspects of ordinary business transactions than in exceptional private situations.

The term business has a broad meaning covering any trade, profession, occupation or calling. But, it certainly refers as this context, to a person’s means of earning a livelihood although it is not perhaps necessary that it be income providing, that is, by ordinary course of business, it meant the current routine of business.

Rule 29(b) requires, of course, that the person who made statement in the ordinary courses business should fulfill certain formalities in his courses of recording; in particular it must consist;

1) any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of a professional duty; or

2) an acknowledgement written or signed by him of the receipt of money; goods , securities or property of any kind; or

3) a document used in commerce written or signed by him; or
4) the date of a letter or other documents usually dated, written or signed by him.

Note, however, that records kept with a view to institution of the suit are not admissible under 29(b) when the person making the business record is unavailable at time of trial. If he is available there is no reason why he should not be called personally to the court.

iii. **Declarations against interest**

Defined in rule 29(c) of DER as:

When it is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

That is, it must be against (1) pecuniary interest- when it has the effect of charging maker with pecuniary liability to another or of discharging some other person upon whom he would have a claim; (2) proprietary interest- statement in disparagement of title to land; (3) the statement which exposes person to criminal prosecution or suit for damages. This exposure to suit must obviously be at the time the statement was made, not at the time statement is sought to be used in evidence.

Generally, there is an assertion to this that a person is not likely to make statements against his interest lightly or with causal regard for truth. This contributes to the trustworthiness of such statements and is the reason for this exception to the hearsay rule.

iv. **Statements of opinion as to the existence of a public or general right or custom.**

Defined in rule 29(d) which says:

When it gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest of the existence of which, if it existed, he would have been likely to be aware, provided it was made before any controversy as to such right custom or matter has arisen.
The opinion here is as to the existence of the right not the existence of facts, which make it likely the right, exists.

Generally, those exceptions stated above and those which are stated in rule 29 and 30 like, statements of pedigree, statements contained in documents, expression of a crowd, and evidence given in prior proceedings, etc are the exceptions of hearsay of rule which are recognized as admissible evidences because of their necessity.

**SUMMARY**

Oral evidence is the most important mechanism for proving a certain fact in issue or a relevant fact. It is ordinary kind of evidence given by witness by word of mouth. the witness must be a person with knowledge of the fact to be proved that he got either directly or indirectly. Though it is the basic evidence to prove a certain fact, more weight is given to it in the common law legal system countries than the civil law. The Ethiopian tradition of litigation has always depended on the importance of oral evidence.

As oral evidence is to be made by witnesses, they shall be competent to give a valid testimony before the court. The principle with regard to competence is that every physical person is capable of giving his testimony before a court. The only requirements are that the person must have the capacity to comprehend the facts for which he wants to testify and that he must understand the consequences of giving false testimony. The grounds of incompetence are minority and senility, physical impairment and professional incompetence. These grounds will be impediments as long as they affect the capacity of the person to comprehend the facts or the understanding of the effect of giving untrue testimony. For instance, a child of whatever age can testify to the extent of his understanding of the fact and consequences of his testimony.

Being a witness is both a right and duty of individuals. If anybody having the knowledge of a certain fact wants to testify, he has the right to do so. On the other hand, a person with some
information which is necessary for the determination of a dispute can be obliged to give his testimony. The concept of privilege is the only exception for this rule. A person with privilege will either not be allowed to testify or will not be forced to testify.

Right against self incrimination is one type of privilege. A person will not be obliged to give a testimony on a fact if that fact will reveal his criminal act. This right is a constitutionally guaranteed fundamental right of individuals.

Privilege can also emanate from the need for secrecy in some government offices. Communication made by a patient with his doctor in the course of treatment is also a privileged statement and cannot be disclosed by the doctor and the court cannot force the doctor to give such evidence. The same applies with the attorney-client relationship. Marital communication is also privileged with some exceptions.

Hearsay is one type of oral evidence because it is made by a witness

CHAPTER FIVE: REAL EVIDENCE
Chapter objectives: after reading this chapter, students should be able to:

- Distinguish between real evidence and other types of evidences
- Know how documentary and demonstrative evidences authenticated and corroborated respectively
- Explain the concept of what best evidence to mean
- List down all instances in which copy (secondary) documents would be admissible

5.1. General Introduction

Although the developers of this material have made persistent reference to the teaching material of Ato Tewodros Alefe, specially this chapter is entirely take from the same with slight modifications because the material is found to be resent and well referenced. Accordingly, the material discusses what real evidence is here under.

Once what facts may be proved is clear to the concerned party (plaintiff or defendant in civil cases and prosecutor or accused in criminal cases), the next step is to find a mechanism on how to prove and convince the court using evidence. Oral evidence or testimony of witnesses is just one mechanism of proof discussed in the preceding chapter. This chapter outlines the second mechanism of proof: real evidence. Unlike oral evidence for which the court depends on observation of third parties (witnesses) on ascertaining whether a certain fact does or doesn’t exist, the courts direct observation and inspection is called in proving existence or non existence of facts in issue by real evidence. Hence, real evidence is a type of evidence for which the court can personally inspect and make inferences and conclusions on the existence or non-existence of fact to which the evidence is sought to prove.

Real evidence comprises of documents and physical objects in various forms. Not all documents and physical objects are real evidences to prove a fact unless they satisfy the tests of authentication and corroboration, respectively. The following sub-sections present a detailed discussion on those two types of real evidences turn.
Demonstrative evidence

Demonstrative evidence concerns itself with any type of physical objects which are capable of being inspected by the court and demonstrate the existence of a fact in issue. A lengthy analysis is given on the meaning, type of demonstrative evidences, and mechanisms of corroborating demonstrative evidence and related matters in various sources. Following is an adapted reading from Wikipedia and American legal information desk site on demonstrative evidence. Editing for the purpose of making the excerpts readable is applied to the contents and a modification of some jargon terms and phrases when necessary.

Physical evidence or demonstrative evidence is any evidence introduced in a trial in the form of a physical object, intended to prove a fact in issue based on its demonstrable physical characteristics. Physical evidence can conceivably include all or part of any object. In a murder trial for example (or a civil trial for assault), the physical evidence might include DNA left by the attacker on victim’s body, the body itself, the weapon used, pieces of carpet spattered with blood, or casts of footprints or tire prints found at the scene of the crime.

Where physical evidence is of a complexity that makes it difficult for the average person to understand its significance, an expert witness may be called to explain to the court the proper interpretation of the evidence at hand.

Demonstrative evidence is evidence in the form of a representation of an object. Examples include photos, x-rays, videotapes, movies, sound recordings, diagrams, maps, drawings, graphs, animations, simulation, and models. It is useful for assisting a finder of fact (fact-finder) in establishing context among the facts presented in a case. To be admissible, a demonstrative exhibit must “fairly and accurately” represent the real object at the relevant time. Before photographs and other demonstrative evidence, lawyers relied on purely testimonial or substantive evidence. Melvin Belli and Earl Rogers helped change that by introducing more demonstrative evidence. Scientific evidence emerged in the 1960.

The days are gone when courts took juries on expensive field trips to the crime scene. Today, just about anything they need to see can be accomplished with the use of exhibits, models,
reconstructions, videotapes, and animations. Almost anything “visual” (“sound “still enjoys certain fifth amendment protections ) can be presented in modern courts (under certain rules)and the effects are dramatic since people retain 87% of what they see and only 10% of what they hear. Exhibits generally fall into one of two (2) categories(1)real evidence; or (2)demonstrative evidence.

Real evidence is evidence that, in a sense, speaks for itself, as when the prosecutor holds up a bag containing the murder weapon, asks the police officer “is this the weapon you found?, and then enters it as “Exhibit A”. Even though it is authenticated by a witness, real evidence is separate, distinct, and doesn’t rely up on a witness’ testimony. It has the weight of being additional evidence and can serve many purposes.

Demonstrative evidence is evidence that illustrates or helps explain oral testimony, or recreates a tangible thing, occurrence, event, or experiment. Scientific evidence falls into this category, as when a toxicologist testifies that the victim died of lead poisoning and refers to a chart of the human body showing the circulatory pathways that the toxin traveled. Visual aids of this type are intimately tied to the credibility of the witness who testified with them, and although they are not separate pieces of evidence, like real evidence, a jury can usually view them again while it deliberates.

Here’s a list of some (not all ) of the things that can be used as demonstrative evidence:

- Plaster casts or molds
- Scale models
- Maps, charts, diagrams, and drawings
- Police composites, mug shots, sketches
- Photographs
- Microscopic enlargements
- Videotapes
- Computer reconstruction or animation
- Scientific tests or experiments
General rules

(1) The most general rule is that there must be some other piece evidence—a fact, an object, or testimony—that needs to be illustrated or demonstrated. Presentation is actually a two-stage process: first some issue of fact, then the explanation or demonstration stage. Demonstrative evidence is intended to be an adjunct to testimony,

(2) The next most general rule involves the foundational requirements for demonstrative evidence. Certain preliminary steps must be followed such as authentication and accuracy. This is known as “laying the foundation” and is mandatory whenever any scientific expertise is about to be forthcoming. Foundational requirements (other than those dealing with the expertise of the person) usually involve:

- **Authentication**—the demonstrative evidence should convey what it is meant to convey. What it conveys must not alter, distort, or change the appearance or condition of something in any significant way. A computer enhanced photograph, for example, to make a crime scene area look lighter than it actually was is probably inadmissible. There are specific rules, however, that do allow computer enhancements under some circumstances.

- **Representational accuracy**—the demonstrative evidence should fairly depict the scale, dimensions, and contours of the underlying evidence. A photograph or chart with some small section of it enlarged to focus in on is probably inadmissible. This is followed rigorously whenever comparisons (such as between two samples of handwriting) are made so that any lay person compare the evidence oculist subject a fidelibus.

- **Identification**—the demonstrative evidence must be an exact match to the underlying evidence or the testimony illustrated. This requirement is the same as with real evidence. For example, an expert witness is about to testify using a enlarged photograph (to scale) clearly showing the outline of a footprint with a unique manufacturer mark on the bottom of it. The victim (or police officer if the victim didn’t survive) who was boot-stomped by
it must identify that mark as the one that boot-stomped by it must identify that mark as the one that boot-stomped her.

(3) The next most general rule is that demonstrative evidence must pass the “three hurdles” of admissibility: relevancy; materiality; and competency. means the demonstrative evidence has something to do with the reason the trial is being held, a point at law, a question of guilt or innocence, etc. materiality means it goes directly to the purpose of illustration, is easily understandable, produces no wayward inferences, and is not just an exercise in “educating” the court or jury. Competency means it’s the kind of thing that fits with the décor and decorum of the court, is on the up-and-up, ethical, and doesn’t taint the court or subvert the justice process.

(4) The last most general rule is that demonstrative evidence must pass an additional balancing test for relevancy—a weighing of what is probative/prejudicial. Probative is what is relevant to “cinch” the case for the prosecution by anticipating all defenses. Prejudicial is whatever inflames the passions and prejudices of the jury. This rule necessary favors the defendant, in rooted in the principle of fundamental fairness, and protects them from unwarranted inferences about bad character or habit.

It’s important to understand that the weighing of what probative/prejudicial varies with each and every case, and is not an arbitrary standard. It should not be referred to as the “gruesomeness” standard, as it sometimes is called. The mere fact that a photograph, for example, shows a shocking crime scene does not automatically make it gruesome or inflammatory. The courts have also ruled that a photo of a nude, bloodstained body is not inadmissible, but innocuous. Autopsy photos are another matter, and depend upon how much cutting and opening the forensic physician has made. In each case, the evidence is to be judged as prejudicial, not so much the evidence itself. An extension of this makes it prejudicial error to dwell unnecessarily long on such evidence.

**Specific rules**
These are more like guides to judicial discretion than specific rules, and involve established practices or procedures for the presentation of various types of demonstrative evidence. In this respect, practices may vary considerably by jurisdiction.

(1) Plaster casts, molds, and models – these are most admissible when viewable in all dimensions. Three-dimensional is always better than two-dimensional. Whatever construction material is used doesn’t matter. Models of the crime scene are a regular feature of trials, and models that are not precisely to scale will also sometimes be admitted if they are professionally made and presented. An attorney, for example, cannot take a Styrofoam head and stab a knife through it in order to demonstrate the attack on the victim. Further, no one is usually allowed to play around with the models, and this is what was mostly involved in the controversy over anatomically correct dolls in the late 1980s.

(2) Maps, diagrams, sketch, and charts—it’s generally not important that the original creator of a map testify; only that whatever used is “official”. Police-generated sketches and diagrams fall generally within judicial discretion where accuracy is the main concern. Sometimes, the evidence is taken as hearsay, or falls under one or more hearsay exemptions. A lot depends on the conditions of fairness and reliability at the time the sketch or diagram was made. Charts are viewed as useful adjuncts to testimony or not.

(3) Photographs – the broad use of photographs is permitted. The photo must substantially and accurately depict the subject matter, and not be unduly prejudicial. Photos that support only one party’s theory, or a small part of a theory, are considered self-serving and untrustworthy. Examples of such inadmissible evidence would be staged or posed photo. Some courts place limits on lens filters, color, and other special equipment, but not many.

(4) Enlargements – some courts place limits on the magnification allowed, no more than twenty powers, for example. Photographs taken through microscopes depend up the standardized criminalities of the crime lab for a state or region.

(5) Videotapes – videotaped depositions and confessions are becoming common, and in civil cases, the practice of a “day-in—the–life “video is often admitted. The practice
of tapping drunk drivers is also popular in some states, but is best considered as real, father than demonstrative, evidence. Courts have upheld surveillance imagery of the perpetrator in action at the scene of the crime. With demonstrative evidence involving motion, each “frame” or specified number of milliseconds is considered a separate piece of evidence. In other cords, a move is treated as a series of still photographs since the courts are more comfortable and familiar with still photography. Any audio portion of videotape cannot be played (due to 5th amendment concerns), or if it is, requires separate authentication.

(6) Computer reconstruction – Reconstructions are a fast-growing forensic specialty, and the expertise involves a projection of possible outcomes mathematically predicted by a computer program. For example, known facts such as weight, physical dimensions, and surface friction are plugged into a computer algorithm to generate an accident simulation. It must be shown the simulation (algorithm is based on accepted principles of physics, and there are sometimes further requirements involving the credentials of the expert.

(7) Scientific tests/ demonstrations – if a laboratory test is performed in front of the judge and jury, the benefit is that jurors would be allowed to draw independent inferences from it rather than being warned by the judge later that they are free to disregard the scientific testimony. The standard, there fore, is substantial similarity. The expert presenting a test, upon being qualified, is assumed to represent the theory of virtual certainty that the test would yield consistent results if replicated under substantially similar conditions. However, cross-examination of such experts is notoriously fierce.

3. Documentary evidence

Document is defined in the draft evidence rules as any matter expressed or described upon any substance by means of letters figures, marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Documentary evidence is also defined by the draft evidence rules as all documents product for the inspection of the court.

Documentary evidence is a type of written proof that is offered at a trial to establish the existence or nonexistence of a fact that is in dispute. Letters, contract, deeds, license,
A certificate, ticket, or other writing are documentary evidence. Documentary evidence as the definition indicates is any inscription found in any material for which the content are submitted as proof. Besides exploring the meaning and application of documentary evidence, the following excerpt will highlight on the basic differences of documentary and physical evidence, a seemingly simple but complex distinction.

A piece of evidence is not physical evidence if it merely conveys the information that would be conveyed by the physical evidence, but in another medium. For example, a diagram comparing a defective part to one that was properly made is documentary evidence—only the actual part, or a replica of the actual part, would be physical evidence. Similar, a film of a murder taking place would not be physical evidence (unless it was introduced to show that the victims blood had splattered on the film), but documentary evidence (as with a written description of the event from any eyewitness).

A piece of evidence is not documentary evidence if it is presented for some purpose other than the examination of the continent of the document. For example, if a blood-spattered letter is introduced solely to show that the defendant stabbed the author of the letter from behind as it was being written, then the evidence is physical evidence, not documentary evidence. However, a film of the murder taking place would be documentary evidence (as a written description of the event for an eyewitness). If the content of that same letter is then introduced to show the motive for the murder, then the evidence would be both physical and documentary.

Documentary evidence is any evidence introduce at a trial in the form of documents. Although this term is most widely understood to mean writing on paper (such as an invoice, a contract or a will), the term actually include any media by which information can be preserved, photographs, tape recording, film, and printed emails are all forms of documentary evidence.

Documentary evidence is subject to specific forms of authentication, usually through the testimony of an eyewitness to the execution of the document, or to the testimony of the
witness who able to identify the handwriting of the purported author. Documentary evidence is also subject to the best evidence rule, which requires that the original document unless there is a good reason not to do so. The above meaning and difference of documentary evidence is subject to the rule of authentication for its admission as proof in court. There are various methods of authentication both in our substantive and procedural laws and the draft evidence rules. Authentication is a mechanism of ascertaining authorship of the document (who author of a document is?) and genuineness of the document sought to be introduced. Unless a documented is authenticated it may not be admitted as proof.

Modes of authentication

- Admission authorship by the writer: the writer himself may admit or concede that he is the author of a certain document and if this admission is a formal admission it will serve as a conclusive proof to the issue of who the author of the document is? Consult articles 2007 and 2008 of the civil code on proof in relation to contracts.

Proof of signature or handwriting

The following rules in the Ethiopian draft evidence of 1967 provides mechanisms how signature in documents and handwritings in issue to be proved.

58. If a document is alleged to be signed or to have been written or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in the person’s handwriting must be proved to be in his handwriting.

- Production of a person or persons who witnessed the writing or signature: persons who have observed or witnessed a certain document be writing by some one the persons may be called to ascertain the author of a specific document.

- Attesting witnesses: certain documents are required by law (for example article 1727 (2) of the civil code ) to be attested by witnesses whose signature will be included in the document and document of these attesting witnesses, when ever the authorship of an attested documents is questioned, is sufficient to prove that the author of the document is questioned, is sufficient to prove that the author of the attested document is the one who signed on the document attested by witnesses.
Presumption as to documents not produced

74. The court shall presume that every document called for and not produced after notice to produce was attested, Stamped, and executed in the manner required by law.

- Comparison: another mechanism of authentication is to compare the writings of the contested document with other writing proved to be authored by the same person. The court will compare two writings or the same person and may reach to the conclusion that the author of this specific document is the person whose writing is submitted to investigation.

Comparison of signature/writing with others admitted or proved

59. (1) in order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, or seal has not been produced or for any other purpose.

(2) The court may direct any person in court except a person accused of an offence to write any word or figures for so written with any words or figures alleged to have been written by such person.

(3) This rule applies with any necessary modifications to finger impressions.

- Lay witness authentication: there may be some persons who are well acquainted with the writings of the person who is submitted for investigation. Hence, calling these persons to verify whose writing is a specific document is another mechanism of ascertaining authorship. These witnesses do not apply modern ways of examining and ascertaining writing in laboratories or some where else but by a comparison between retained mental image of the supposed writer’s writing and the writing in dispute.
Authentication by expert witnesses: this is proof of authorship depending on the opinion of a person who has specialty on identifying the writing of persons. These persons are called expert witnesses for they form conclusions based on inferences.

Opinions of experts
42. (1) when the court has to form an opinion upon a point of foreign law or of science or art or as to identity of handwriting or finger impressions, the opinions that point of persons (hereafter called “experts”) specially skilled in such foreign law, science or art or in question as to identity of handwriting or finger impressions are relevant facts.

(2) Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

- Ancient document rule: a document which survived long enough, for example 30 years according to the Indian evidence Act, and kept in proper custody it will qualify as ancient document and then no need for proof of authorship. The draft evidence rules don’t contain document rule and neither do our substantive and procedural codes.

Best evidence rule
Authentication alone is not a sufficient for the admission of documentary evidence as proof but must also be qualified by the best evidence rule, which states the contents of a document can only be proved by adducing to prove the contents of a document if the original could not be found. Rule 53 of the draft evidence rules stats that the contents of a document may be proved either by primary evidence (this is the best evidence) and it is by way of exception that secondary evidence may be used to prove the content of a document. Rule 53 states:

Proof of contents of documents
53. (1) the contents of documents may be prove either by primary or by secondary evidence.

(2) Documentary must be proved by primary evidence except in the cases mentioned in rule 56 of these rules.
(3) Nothing in the rules hereinafter contained shall affect the provisions of any law regarding proof of the existence and contents of particular documents, such as the provisions of the civil code regarding proof of wills and contract.

Primary evidence is defined in rule 54 of the draft evidence rules as the document itself (the original) produced for the inspection of the court. Secondary evidence is the second next alternative for proving the contents of a document and is defined under rule 55 of the draft evidence rules. Rule 55 of the draft evidence rules defines secondary evidence in the following manner:

**Secondary evidence**

55. Secondary evidence means and includes:

1. Copies given under the provisions hereinafter contained;
2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
3. Copies made from or compared with the original;
4. Counterparts of documents as against the parties who did not execute them;
5. Oral accounts of the contents of a document given by some person who has himself seen it.

Secondary proof as means of proof of contents of a document is employed in limited circumstances as outlined in rule 56 of the draft evidence rules. The circumstances are described in rule 56 of the following manner for which a lengthy explanation is a waste of time.

**When secondary evidence may be given**

56. (1) secondary evidence may be given of the existence, condition, or contents of document when:

(a) The original is shown or appears to be in possession or power of the person against whom the document is ought to be proved or of any person out of reach or not subject to the process of the court or of any person legally bound to produce it and when after the notice mentioned in rule 57, such person does not produce it;
(b) The existence condition or contents of the original have been proved to admitted in writing by the person against whom it is proved or by representative in interest;

(c) The original has been destroyed, lost, or when the party offering evidence or its contents cannot for any other reason not produce it in reasonable time;…..

(d) The original is of such a nature as not to be easily movable;

(e) The original is a public document within the meaning of rule 60;

(f) The original is a public document of which a certified copy is permitted by these rules or by law in force to be given in evidence;

(g) The original consist of numerous accounts or other documents which can not conveniently be examined in court and the fact to be proved is the general result of the whole collection.

(2) In the cases mentioned in paragraph (a), (c) and (d) of sub-rule (1), any secondary evidence the contents of the document is admissible.

(3) In the case mentioned in paragraph (b) of sub-rule of (1) the written admission is admissible.

(4) In the cause mentioned in paragraph (e) and (f) of sub-rule (1) a certified copy of document, but no other kind of secondary evidence is admissible.

5. In the case mentioned in paragraph (g) of sub-rule (1) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in examination of such documents.

The civil code, especially in relation to proof of contracts, provides how the contents of a document shall be proved in as almost similar fashion with the draft evidence rules and does no harm in failing to discuss the provisions in the civil code. But providing a literature in to the roots and connected matters of the best evidence rule serves a better understanding and below is provided a selected excerpt from Wikepedia on best evidence rule.

The best evidence rule is common law rule evidence which can be traced back at least as far as the 18th century. The general rule is that secondary evidence, such as a copy or facsimile, will be not admissible if an original document is available.
The rationale for the best evidence rule can be understood from the context in which it arose: in the eighteenth century a copy was usually made by hand by a clerk (or even a litigant). The best evidence rule was predicated on the assumption that, if the original was not produced, there would be a significant chance of error or fraud in relying on such a copy.

In the age of digital facsimiles, etc. the rule is more difficult to justify. The likelihood of actual error (as opposed to mere illegibility) through copying is slight. The balance of convenience favours avoiding needless effort and delays where there is no dispute about the fairness and adequacy of a digital facsimile. Further, it is by no means clear what the ‘original’ of an electronic communication such as an e-mail actually is: as many as eight electronic ‘copies’ of a message might come into existence from creation to receipt.

The best evidence rule is also thought to be the basis for the rule precluding the admissibility of hearsay evidence, although the two rules are now quite distinct. In the United States the rule has been codified in the federal Rules of Evidence as rule1002:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of congress.

The rule requires that when writings are introduced as evidence in a trial, the original writing must be produced as the “best evidence”. In federal practice, however, any exact copies of the original carry the same legal weigh as the original unless their authenticity is in question.

The term “writing” has been liberally interpreted to include photographs, x-rays, and films. Note that for photographs and film, this could be construed to mean negatives, not prints, as they are the true ‘original’. The rule applies in two situations:

- Where the terms of the writing are legally dispositive in the issue at bar (not collateral documents or issues).
- Where the witness’s sole knowledge of a fact comes from having read it in the document.
There is an exception. If the original document is unavailable for reasons other than serious misconduct of the proponent, secondary sources of evidence (such as oral testimony) can be used in place of the original. Refer to civil code

Currently, both California law and the federal rules allow the use of mechanically produced duplicates unless a party has raised a genuine question about the accuracy of the copy or can show that its use would be unfair.

Summary

As discussed in detail in this chapter, real evidence refers to the manner of ascertaining alleged fact by physical observation or inspection by the court of the fact in issue. In other words, real evidence is a fact which could be over looked, sensed, or investigated by the judges themselves against the fact in issue. In this type of evidence, the court does not depend on testimony of witnesses.

In proving the existence or non-existence, or occurrence or non-occurrence of asserted facts by real evidence, the court may over look on things held as exhibits, physical appearance of suspects of victims of crime etc. When this is not possible, represented models of physical realities such as photographs, x-rays, charts, graphs, diagrams, computer animations and other demonstrative evidences could be used mostly in support of testimonial evidence. However, demonstrative evidence must be corroborated in order to be admitted as evidence.

The other important type of evidence discussed under this chapter is documentary evidence. It is the most reliable sort of evidence. But, in order the contents of documents to be reliable and admissible, they have to be authenticated. The manner of authentication may be by the acknowledgement of the one who has prepared them, by concerned government officials, or based on expert opinion as the case may be. As the best evidence rule dictates, primary (original) documents should be produced not copies except in special cases as discussed in the entire text.
CHAPTER SIX: BURDEN AND STANDARD OF PROOF

6.1 General introduction on burden of proof

Whenever Litigation (be it Criminal or civil) arises between parties and denies each other there obviously a need for evidence in support of a relief sought. This means, there is a burden of producing of sufficient and persuasive evidence. But before proceeding to the issue as to who shall bear burden of proof, it is logical to look for what burden of proof mean. Thus, Burden of proof refers to the obligation to prove allegations which are presented in a legal action. For example, a person has to prove that someone is guilty or not guilty (in a criminal case) or liable or not liable (in a civil case) depending on the allegations. More colloquially, burden of proof refers to an obligation in a particular context to defend a position against a prima facie other position.

That is, on the other hand, when an issue arises out of a case such issue has to be proved by the party who has burden of proof and who is to avail ultimately from the proof. Thus, for every issue there is burden of production, burden of going forward with Evidence, and burden of persuasion, Discharging or preventing the discharge of these burdens is the goal of introducing evidence.

As Steve Uglow stated for any particular question there may have evolved from considerations of convenience relative accessibility of proof of who is disturbing the status quo of what is to be likely the truth in the absence of evidence of the unusualness of the claim of whether the matter raises an exception to the general rule or of public policies such as deterrence.

A particular burden may be on one party as to some issues and on the other party as to the other issue in the same case, even as to one particular issue both burdens (burden of production and persuasion) may not lay on the same party.

Further more, the burden of production may shift from one party to the other during the course of the trial. What this means is that as evidence is introduced, first one party, second the other may run the risk of directed verdict or equivalent ruling if he allows the state of the evidence to remain as it is. “the party up on whom this risk rests is said to have burden of ’going forward
with evidence’ i.e. of producing evidence.” Uglow point out that, the burden of proof has been described as whose task is it to establish of a fact? However, there are preceding questions namely ‘what fact’ and why does that fact have to be established?

Chapter objectives: after reading this chapter, students should able to

- Distinguish between burden of production (evidentiary burden) and burden of persuasion (legal burden)
- Know up on whom burden of proof normally lays in civil cases and criminal cases
- Understand cases in which burden of proof shifts from the plaintiff to the defendant or from the prosecution to the accused in civil cases and criminal cases respectively
- Discuss the constitutionality of shifting burden of proof in criminal proceedings
- Explain the degree of proof required in civil litigations and criminal proceedings

6.1.1 Meaning and concept of burden of proof

Different authorities define burden of proof differently in terms of expression but with out difference in the conceptual meaning of the phrase. To begin with how Uglow, defines, burden of proof has been described as whose task is it to establish a fact. This definition seems to define the phrase in terms of burden of persuasion with out giving regard to burden of production. Black’s law dictionary, however, defines the phrase as “in the law of evidence the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties. The obligations of a party to establish by evidence a requisite degree of belief, concerning a fact in the mind of the tier of the fact or court”

Burden of proof is a term which describes two different aspects of burdens, burden of production and burden of persuasion. Black’s law dictionary for then explains that burden of production may shift back and forth between the parties as the trial progresses. But burden of persuasion can’t shift at any stage

The burden of proof may require a party to raise a reasonable doubt concerning the existence of the fact by preponderance of evidence or clear and convincing
proof or by proof beyond reasonable doubt. In criminal cases all the elements a crime must be proved by the government beyond reasonable doubt.

In whatever case, for whatever issue, there is a party who bears the burden of production of evidence or burden of going forward with evidence and burden of persuasion. Poal said that the allocation burden of pleading, production and burden of persuasion differ on issue by issue basis.

Some writers, like Uglow, compartmentalize burden of proof as legal burden and evidential burden. Other scholars again classify burden of proof as burden of production and burden of persuasion. To begin with the first category:-

Legal burden is simply adducing enough evidence to raise an issue must be distinguished from the burden placed on a party to persuade tier of fact to find for him or her on any particular issue. This later stage is burden of proof in a strict sense and is also known as the persuasive or probative burden.

This idea seems to what others call burden of persuasion.

The second aspect of burden of proof is as Uglow defines, the evidential burden. In such a category, the first process is the burden a party bears to adduce enough evidence in the satisfaction of the tier of fact. This is known as imposing an evidential burden and might be referred to as the problem of “passing the Judge” as any failure to satisfy the evidential burden means that the issue will never reach the Jury” The issue is bound up with that of the Judge’s role in withdrawing issue from the Jury.

The same party may bear both evidential burden and legal burden at the same time, i.e. where the party produce sufficient evidence to make a case he/she shall again establish a fact so as to persuade the tier of fact. These two burdens have not analogous application in civil actions and criminal offence. When we see legal burden in civil cases we face with the general rule that who asserts must prove on other hand, the party who positively asserts must bear the risk of his failure to prove his assertion. This does not mean that party can’t bear the onus of proving the negative dimension the fact. Thus, it is probably better expressed that a party who wishes the court to take
action on a particular issue the responsibility of showing why action should be taken. The defendant in the pleading positively stated that he had done so. Even though linguistically the defense case was a positive assertion, the burden of proof still rests on the plaintiff.

Uglow states that in England, the burden of proof in civil cases/ actions/ generally, is born by the plaintiff in a negligence action the plaintiff would bear the burden of proving the existence and the breach of the duty of care as well as the extent of the injuries and damages. He added that the defendant in civil action may bear the burden of proof whether the defense goes beyond mere denial in negligence actions. for example, where questions of volition contributory negligence arises, the burden of proof of these issues rests up on the defendant. Thus, the defense of contributory negligence has been raised in a number of cases where a motorist was not wearing a seat belt and suffer more serious injuries than, would other wise, have been the case. In such cases the onus of proving negligence on the part of the plaintiff rests on the defendant.

In contract litigation, like wise, the plaintiff must bear the burden of proving the existence of the contract, its breach, and extent of any damage due to the breach of the contract. This is not an end expression rather, the defendant may carry a burden of proving an affirmative defense with respect to particular issue in a breach of contract action. This type of burden, dearly, is observed under civil law, Ethiopia, contract law.

6.1.2 Burden of production
A party who has a claim or an allegation bears the burden of producing evidence to Enable the court believe that there is an issue in the case. With respect to burden of production Blacks law dictionary defines as follows;

\[ \text{Burden of producing an evidence is the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue. Calif, Evid, code, such burden is met when one with the burden of proof has introduced sufficient evidence to make out a prima-facie case, though the cogency of the evidence may fall short of convincing the tier of fact to find for him. The burden of introducing some evidence on all the required elements of the crime or fort or contract} \]
to avoid the direction of a verdict against the party with the burden of proof.

As stated above Uglow explained burden of production as evidential burden. According to him “it is the burden that a party bears to adduce enough evidence for the Judge to be satisfied that the issue shall be left to the tier of fact. And he added that all issues on an action must be established in such away. More or less the production burden is influenced by the standard need for persuasion burden.” Failure to produce in this case refers the failure of the party who bears burden of proof to adduce sufficient evidence to enable the court find in favor of him or to enable the court believe that is an issue in the case brought before it (court). Burden of production of evidence determines whether or not the person who shoulders the burden of production will lose the case. Such person carries the risk of failure to produce an evidence because if there is no an evidence on an issue or, if the evidence does not satisfy the court, the case will be decided in favour of the other party. Therefore, the person shouldering the burden bears risk of losing the case.

6.1.3 Burden of persuasion

This type of burden of proof is the second burden that litigant party bears. This is determined by rules of substantive laws. This burden is simply adducing enough evidence to raise an issue must be distinguished from the burden imposed on a party to persuade the tier of fact to fined for him/her any particular issue. This burden of persuasion, beyond reasonable doubt in criminal cases and by preponderance of Evidence in civil actions.

Fact finders are duty bound to settle each issue in a stated way. They shall be convinced by preponderance of evidence (civil) and beyond reasonable doubt (criminal cases). Rothstein-Reader crump clarified this process there by pertaining it to an electrical switch. “This process may be compared to the effect of an electric switch, which starts out in one of its two positions, and rests there with some degree of stickiness unless and until sufficient force is mustered to dislodge it to the other position.” according to them the party who loses the issue, if it is not dislodged, has the burden of persuasion, and the degree of force needed is determined by the
standard for that burden.” In other words “the switch starts out lodged in the position that is against the position of the party with burden.”

When we say a party bears burden of persuasion, it is to mean that the party has to persuade the tier of fact so that a judgment is to be given in favor him. The party can win the case when only he proves persuasively the existence or non-existence, or occurrence or non-occurrence of the fact in issue

It is a logical and inevitable that the party who bears burden of persuasion bears the risk of non-persuasion. To this effect, the plaintiff in civil case and the prosecution in criminal case bear the risk of their failure to persuade the tier of fact/judge/as to their respective cause of action and elements of the charge.

A question may arise as the to degree of persuasion required in each case. In this regard, the degree of persuasion required differs in civil and criminal proceedings. In criminal case the prosecution is expected to show the judge the existence or non-existence of a fact in issue beyond reasonable doubt while in civil actions the plaintiff or in case of affirmative defence, the defendant has to prove the existence or non-existence of his cause of action by Preponderance of evidence. Preponderance of evidence refers to the quality not quantity which implies the idea that the fact exists more probably than not. This idea may be heightened by the fact that acquittal in criminal case does not result in bar of civil liability of the same offence. However, the beyond reasonable doubt is relevant in determining civil action of the same offence. Thus finally, the party who shoulders the burden of persuasion shall prove beyond reasonable doubt in criminal cases and shall prove to the extent of 51% (preponderance of Evidence,) in civil matters.

6. 1.4 Burden of proof under the evidence law of Ethiopia

In both civil and criminal laws of Ethiopia, like in other countries, there is the notion of production of evidence and burden of persuasion there of. However, as Melin has stated, “courts in Ethiopia consider burden of proof to mean burden of production only and on other times
burden of persuasion only, and some times it refers to both burdens.” without putting a clear cut distinction between the two

The drafters of DER could not clearly identify what type of burden is a burden of production and again what burden falls under persuasion burden. According to Melin rule 84(5) uses the term burden of proof to mean (apparently) or to refer to the burden of production. And rule 84(2) (c) does not use different terminology as to the two aspect of burden of proof.

The two aspects of burden of proof are to be discussed separately with respect to civil and criminal cases here under.

A) Burden of proof in civil actions

The burden of proof under civil law of Ethiopia is dependent upon the issue to be proved or the allegation (claim) raised by the party. It is to mean that as the issue in a case varies the burden to proof shifts from one party to the other. Where the plaintiff is entitled to begin the proceeding, he/she is the one to prove the issue so that he/she bears the burden of proof. However, in case of affirmative defense where the defendant is entitled to begin, he shoulders the burden of proof on the grounds he may raise as a defense. Sedler states that the general rule is that the party who has burden of proof has the right to begin. The contrary reading of this statement is that, the party who is entitled by law to begin the proceeding shoulders the burden of proving the issue in the case.

As the burden of proof is subject to the type of issue to be raised some examples are to be explained here under. Whenever there exists the need to prove the cause of action, the plaintiff bears the burden of proof there of. On the other hand, production of counter-deference to that cause of action lies on the defendant.

Let’s say what is demanded by the party is performance of a contractual obligation; then such party shall prove the existence of the obligation. We can, furthermore, see situation in a suit to recover damages for breach of a contract, whether the defendant has, exactly breached the contract and the plaintiff really has sustained damage as a result of the breach of the contract. On the other hand, if there is an issue as to the existence of a contract, and an issue as to force
majeure, the plaintiff has burden of proof on one of the issues in the case. Where the issues raised by the plaintiff are admitted by the defendant and the latter rather raise an affirmative defense, the burden of proof shifts to the defendant. Both the plaintiff and the defendant have burdened of proof on the same case notwithstanding that the fact to be proved and the way how to prove (in cause of action and in proving grounds of defense) may differ. The plaintiff shoulders burden of proof as to the cause of action

The defendant also bears burden of proof as to the grounds of defence he has already raised. Burden of proof is provided under a number of provisions of the civil code, the commercial code, revised family code and other proclamation of Ethiopia. When we consider the civil code articles;

<table>
<thead>
<tr>
<th>Provisions of the civil code</th>
<th>The party who has burden of proof</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. 5/1/, 783</td>
<td>The plaintiff</td>
</tr>
<tr>
<td>2081, 1055/1/, 1317, 553</td>
<td>The defendant (father, owner)</td>
</tr>
<tr>
<td>2141, 2285(3), 2001, 2776/2/</td>
<td>The defendant (creditor, seller, borrower)</td>
</tr>
<tr>
<td>2400/3/, 2807(2), 2942, 2970</td>
<td>The defendant (seller, warehouse, lessee, owner)</td>
</tr>
<tr>
<td>2942, 2970, 2706, 2447, 896, 2086, 321(3)</td>
<td>The defendant (lessee, owner, plaintiff in donation case, plaintiff( in case of will), defendant (abnormal risk case), plaintiff (bad faith claim))</td>
</tr>
</tbody>
</table>
Here are also some illustrative provisions of the commercial code as to who shall bear burden of proof.

<table>
<thead>
<tr>
<th>provision of commercial code</th>
<th>Burden of proof</th>
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<tbody>
<tr>
<td>364/5/</td>
<td>The defendants (directors of a company)</td>
</tr>
<tr>
<td>596,</td>
<td>The defendant (carrier)</td>
</tr>
<tr>
<td>637/3/,</td>
<td>The defendant (carrier)</td>
</tr>
<tr>
<td>634,</td>
<td>The defendant (carrier)</td>
</tr>
<tr>
<td>676,</td>
<td>The defendant (insurer) presumptions</td>
</tr>
</tbody>
</table>

i) Burden of Production in civil cases

Burden of production is adducing evidences to make a case. Black's law dictionary defines burden of production as,

*Burden of production is a party’s duty to introduce enough evidence on an issue to have the issue decided by fact finder rather than decided against the party in a peremptory ruling such as summary judgment or a directed verdict.*

Having seen the definition/or conceptual explanation of burden of production let’s assess the position of laws of Ethiopia in relation to burden of production. Art 259(1) of the civil procedure code provides that the burden of producing evidence in support of a claim is imposed on the plaintiff. While sub- article 2 of the same provision imposes burden of production of evidence on the defendant. This article clearly stipulate that both the plaintiff and the defendant shoulder burden of production of evidence on the same case proving facts oppositely. This is to mean that the plaintiff has burden of producing evidence on the cause of action, and the defendant do so on the grounds of his defense or on facts of his counter claim. Both the plaintiff and the defendant bear the risk of their failure to produce evidences to prove their respective interest. Any party who claims shall produce sufficient evidence indicating that he has real/proper/claim or cause of action. And this does not mean that the party having burden of production is always duty bound to produce strong enough evidence rather he is entitled, in same, cases, to produce a prima facie evidence hence fore burden of production shifts to the other party. Therefore it is agreed that the burden of production may shift to the other party if the party makes a prima-facie case on the issue.
The party having burden of production bears the risk of non-producing that evidence (non-production) that a peremptory ruling may be made against him in the case of he files to produce evidence on the issue. According to Melin, the burden of production has nothing to do with weighing evidence. Because a party may produce circumstantial evidence, prima-facie evidence which may not ultimately enable the court decide persuade the court i.e. burden of persuasion follows later.

ii) Burden of persuasion in civil cases

Melin points out that burden of persuasion is burden of establishing the fact in the mind of judges by preponderance of evidence or by proof beyond reasonable doubt as the case may be. Whatever it is, producing evidence be it circumstantial or prima-facie evidence or any other evidence is not an end by itself unless the party persuades the court as to the fact in issue. That is to mean, when the party who shoulders burden of production produces what he/she may consider enough to prove the issue in the case the other party may rebut such evidences so that the former party may not be successful for such fact that he has produced evidenced unless he persuades the Judge. To substantiate this by example, suppose Mr. X who is a baker has instituted a civil action against Mr. Y stating that the latter has failed to deliver 400 hundred quintals of flour on the due date despite clear agreement to this effect and caused him loss of 24,000 birr. Mr. X has produced the document of the contract as evidence. However, on the other hand, the defendant has contested the claim of the plaintiff establishing invalidity of the contract due to the existence of duress and produced evidence to that effect. Now, in order the case to be decided in favour of the plaintiff, producing document of the contract is not sufficient. Rather, he should able to persuade the court the existence of his claim by establishing the validity of the contract in defeating the defense of Mr. Y. The same is true with regard to the defense of Mr. Y. In this hypothetical case it is not enough for the defendant (Mr.Y) only simply to produce evidence as to the existence of duress but also the defendant should able to persuade the court on his defense against the claim of the plaintiff to the degree required.

The burden of persuasion differs in civil and criminal cases. As it is mentioned earlier, in civil case the litigant is expected to convince the court by producing preponderance of evidence.
Where as in criminal case there by producing evidence and convincing the tier of fact /court/ beyond reasonable doubt. The failure of the party having burden of persuasion to persuade the tier of fact is measured, more or less due to the fact that the judge is left in equilibrium as to the existence of the fact in civic cases generally. The party has burden of persuasion as to the facts he must put in his pleading. The plaintiff has burden of persuasion at least as to elements of his cause of action. The defendant again has burden of persuasion as to the ground of his defiance so that he can rebut the evidence produced by the plaintiff.

B) Burden of proof in criminal cases
In criminal proceedings the prosecution has burden of proof on the elements of his charge. Black’s law dictionary states “in criminal cases the government has burden to prove the elements of the crime;” such an expression is provided under art 136(2) of the criminal procedure code of Ethiopia. This article provides that the public prosecutor shall then call his witnesses which indicates burden of proof in criminal cases normally lies on the prosecution. Article 120(3) of the constitution also imposes burden of proof on the public prosecutor tacitly there by providing presumption of innocence for the accused. Thus, in normal circumstances the guilt of the defendant is to be proved by the public prosecutor or /and by private complaint as the case may be. The defendant, hence forth, here, is having burden of producing a contrary evidence in defense. In such circumstances the acquittal is subject to the degree of evidence produced by the prosecutor to make a case, i.e. if the evidence produced by the prosecutor is not strong enough to warrant a conviction, the court immediately orders acquittal of the accused. Here the defendant may not be ordered to produce his defense as no case has been made by the prosecutor.

But in the evidence law of England as Fisher pointed out, the judge is entitled to say “I am doubtful of this evidence but can see if it can be supplemented and improved by what can be elicited form the defence.” But, this is not the case in Ethiopia as no case has been made by the prosecutor, the judge orders the acquittal of the accused as per Art. 141 of the criminal procedure code. However, in case a suspected is accused of a crime of corruption, acquittal as provided by the aforementioned provision doesn't apply because even if the prosecutor fails to produce enough evidence to make a case (proved the case beyond reasonable doubt), the court does not order acquittal as the prosecutor is expected only to produce prima-facie evidences.
Thus the defendant is ordered to defend on the issue up on production of prima-facie evidence against him. In case where prima-facie evidence is produced for the prosecutor the evidence may not be strong enough to establish a fact /make a case but enable the judge believe reasonably, that an offence might have been committed. Thus the defendant bears the burden of proving non existence of the assertion made by the public prosecutor and bears the risk of failure to do so.

But what do you think the degree of proof required in defending oneself in cases where burden of proof shifts from the prosecution to the accused?

**i ) Burden of Production in criminal cases**

Burden of production refers to Burden of going forward with evidence on a particular issue. This refers to burden of producing evidence and burden of proceeding with the evidence on a particular issue at start of a case. As the public prosecutor has/burden of production of an evidence he/she bears the risk of non-production. Art 141 of the criminal procedure code provides to this effect i.e. when the case for prosecution is concluded, and if the court finds that no case which would warrant conviction against the accused has been made, it shall record an order of acquittal. One rational for not making a case against the accused may be due to the prosecutor’s failure to produce evidence which reasonably enable the court believe that there has been made a case against the accused so that to continue proceeding. However, where the prosecutor makes a case against the accused, the defendant /accused/ has burden of producing rebutting evidence as clearly provided under Art 142 of the criminal procedure code.

**ii ) Burden of persuasion in criminal cases.**

As it has been persistently stated, producing an evidence on an issue in a case is not an end by itself unless other wise the prosecutor /any party having burden of persuasion) can persuade the tier of fact /the court/ beyond reasonable doubt. Hence, burden of persuasion pertains to establishing the fact in the judge’s mind beyond reasonable doubt Always if the court is left in equilibrium as to the existence of the fact in issue, the party with this burden fails to establish it. Here the public prosecutor is duty bound to beer burden of persuasion at least as the elements of the offence charged like wise the defendant is not left with out being imposed burden of persuasion where a case has already been made against him. It is obvious that the prosecutor
always has considerable burden of persuasion. when the accused has burden of persuasion, he must satisfy the court of the existence or non existence of fact in issue, which has been established against him by the prosecutors unless doing so he suffers the risk of non-persuasion.

“Rule 84(2) of the DER imposes up on the defendant the burden of proving criminal irresponsibility and limited responsibility” However, it is not clearly provided whether that rule imposes burden of production or burden of persuasion. But up on comparative investigation of rule 84 of DER, it seems that it imposes up on the accused burden of production not burden of persuasion. Melin made an opinion that burden persuasion the accused is required in special defense of insanity. He also added, that referring to rule 84(2) [c], that the rule places burden of persuasion as well as burden of production up on the accused in proving criminal irresponsibility or limited responsibility. The prosecutor then has to prove beyond reasonable doubt on the Issues he has burden of persuasion.

6.2.3 Burden of proof in case of presumptions
Primarily it is very important to take notice of what presumption mean? And what are types of presumptions before dealing with the burden of proof in case of presumptions. Black’s law dictionary defines the word presumption as:

presumption is an inference in favor of a particular fact, it is a rule of law is statutory or judicial by which finding of a basic fact gives rise to the existence of a presumed fact until presumption is rebutted.

A presumption is assumption of a fact that the law requires to be made from the fact or group of facts found or otherwise established in the action.

It is a legal device which operates in the absence of other proof to require fact certain inferences be drawn from the available evidence.

There are different types of presumptions like permissive presumption, mandatory rebut-able presumption, and mandatory irrefutable /conclusive/ presumption. presumptions could be of presumption of facts or presumption of law. Thus, the effect of these presumption on the burden of proof is to be discussed here under.
Uglow stated “Presumption operates where certain facts may be presumed to exist even in the absence of complete proof.” According to him, the effect of applying presumption is to shift the risk of failure of proof in relation to particular issue. There are many provisions constituting presumptions in different laws of Ethiopian. As far as burden of proof in the existence of presumptions is concerned, the nature of presumption determines whether a party has burden of proof or he/she free of producing evidence. In case of rebuttal presumptions since such presumptions can be over turned by producing evidence to the contrary, parties have burden of proof. On other hand in case of mandatory irrebuttable presumptions no party is allowed to adduce a rebutting evidence as they are conclusive evidence in favour of the holder of such presumption. For example, no contrary proof shall be admitted against the viability of a child born and lived for forty eight hours. Then no party has burden of proof in this regard. We can take some examples from civil and criminal cases to that effect.

As in criminal case let’s consider presumption of innocence as provided under Art20(3) of the FDRE constitution; there is no requirement that a basic fact is proved before the presumption is rased. The burden of proof whether the accused is innocent or not rests on the prosecutor. i.e. to prove the guilt. Where he fails to persuade the court that the accused is guilty, the accused is to be acquitted. Thus in such type of presumptions the public prosecutor is expected to adduce a rebutting evidence and then has burden of proving to the contrary.

The question as to who bears burden of proof contrary to the presumption is determined by the fact that in favor of whom is the presumption provided. i.e. if the presumption is in favor of the accused and such presumption is rebuttal one the public prosecutor has burden of proof to the contrary. And if the presumption is in favor of the plaintiff, the defendant has burden of adducing rebuttal defensive evidence. There fore, the defendant bears the burden of proof to the contrary and bears the risk of his failure to rebut it.

Example, in case of presumption of sanity the accused, only, bears one or more burdens of proof if he hopes to be acquitted on that ground. Here, the prosecutor has no burden of proving the sanity of the accused.
In some cases parties are required to prove the presumption whether fulfilled or not rather than the actual happening of the act. For instance, in relation to declaration of absence in which the existence of a person is unknown for more than 6 years, the litigant who needs to prove the death and wants to avail him/her self from the death has to prove whether nothing has been he and (known) about the person over the last 6 years but he is not expected to prove the actual death of the person. However, in mandatory presumptions no one has burden of proof to the contrary because adducing rebuttal evidence is not admissible in such cases since mandatory presumptions are rules of substantive which provide that once the basic fact is taken as established and no evidence to the contrary is admissible to rebut that conclusion. Therefore the effect of presumptions on burden of proof is similar in both civil and criminal cases.

6.2 Standard of proof

Standard of proof is an important concept required to be met by the party who has burden of persuasion. In order the court be satisfied with the evidence produced and be in a position to render its verdict, the concerned party should meet the degree of proof required by legally accepted principles. Here the excerpt from wikipedia free encyclopedia provided an interesting explanation on standard of proof as discussed bellow.

The "standard of proof" is the level of proof required in a legal action to discharge the burden of proof, that is to convince the court that a given proposition is true. The degree of proof required depends on the circumstances of the proposition. Typically, most countries have two levels of proof or the balance of probabilities:

- preponderance of evidence - (lowest level of proof, used mainly in civil trials)
- beyond a reasonable doubt - (highest level of proof, used mainly in criminal trials)

In addition to these, the U.S. introduced a third standard called clear and convincing evidence, (which is the medium level of proof).
The first attempt to quantify reasonable doubt was made by Simon in 1970. In the attempt, she presented a trial to groups of students. Half of the students decided the guilt or innocence of the defendant. The other half recorded their perceived likelihood, given as a percentage, that the defendant committed the crime. She then matched the highest likelihoods of guilt with the guilty verdicts and the lowest likelihoods of guilt with the innocent verdicts. From this, she gauged that the cutoff for reasonable doubt fell somewhere between the highest likelihood of guilt matched to an innocent verdict and the lowest likelihood of guilt matched to a guilty verdict. From these samples, Simon concluded that the standard was between 0.70 and 0.74.[1]

6.2.1 In civil cases

Balance of probabilities, also known as the preponderance of the evidence, is the standard required in most civil cases. The standard is met if the proposition is more likely to be true than not true. Effectively, the standard is satisfied if there is greater than 50 percent chance that the proposition is true. Lord Denning, in *Miller v. Minister of Pensions,*[2] described it simply as "more probable than not." In civil law cases, the "burden of proof" requires the plaintiff to convince the trier of fact (whether judge or jury) of the plaintiff's entitlement to the relief sought. This means that the plaintiff must prove each element of the claim, or cause of action, in order to recover. In Ethiopian Legal system, there is no such concept of balance of probability or preponderance of evidence though judges in practice adopted what they have learned in shool.

i. Clear and convincing evidence

Clear and convincing evidence is the higher level of burden of persuasion sometimes employed in the U.S. civil procedure. To prove something by "clear and convincing evidence", the party with the burden of proof must convince the trier of fact that it is substantially more likely than not that the thing is in fact true. This is a lesser requirement than "proof beyond a reasonable doubt", which requires that the trier of fact be close to certain of the truth of the matter asserted,
but a stricter requirement than proof by "preponderance of the evidence," which merely requires that the matter asserted seem more likely true than not.

### 6.2.2 In criminal cases

This is the standard required by the prosecution in most criminal cases within an adversarial system and is the highest level of burden of persuasion. This means that the proposition being presented by the government must be proven to the extent that there is no "reasonable doubt" in the mind of a reasonable person that the defendant is guilty. There can still be a doubt, but only to the extent that it would *not* affect a "reasonable person's" belief that the defendant is guilty. If the doubt that is raised *does* affect a "reasonable person's" belief that the defendant is guilty, the jury (the court in our case) is not satisfied beyond a "reasonable doubt". The precise meaning of words such as "reasonable" and "doubt" are usually defined within jurisprudence of the applicable country.

What does that mean? Again the problem is with words being used in an abnormal or special way. The word “beyond” normally means farther than or more than. (See Bugliosi) Clearly this is not the meaning of the word in the phrase “beyond a reasonable doubt.” The state does not have to “carry its burden” beyond some point that constitutes reasonable doubt. The state certainly is not trying to prove that there is more than a reasonable doubt. If anything the state’s responsibility is to prove that there is less than a reasonable doubt. The word “beyond” in the phrase beyond a reasonable doubt means “to the exclusion of.” That is the state must exclude any and all reasonable doubt as to the defendant’s guilt. Simply put, the phrase means that if a judge has a reasonable doubt it is her/his duty to return a verdict of not guilty. On the other hand, if a judge does not have a reasonable doubt then the state has met its burden of proof and it is the juror’s duty to return a verdict of guilty.

“What is a reasonable doubt?” Jury instructions typically say that a reasonable doubt is a doubt based on reason and common sense and typically use phrases such as “fully satisfied” or “entirely convinced” in an effort to quantify the standard of proof. These efforts tend to create more problems that they solve. For example, take the phrases “fully satisfied” and “entirely convinced.” A person is satisfied when she/he is content, pleased, happy, comfortable or at ease.
The fellow leans back in his chair after a meal, pats his stomach and says, “that was one satisfying meal.” Is that what the state must do - offer sufficient proof that a judge is content, happy, pleased or comfortable with her/his verdict. Absolutely not. A judge is not required to be pleased with the verdict or happy with the verdict. The state is not required to produce sufficient evidence not only to eliminate all reasonable doubt but also to please the judge or to eliminate all reservations about whether the judge has done the right thing. “Satisfied” in the phrase “fully satisfied” simply means convinced. A person is “entirely satisfied” when she/he is convinced beyond a reasonable doubt. It is very important to assess the underlying reasons for the adoption of the general principle that the prosecution must prove the guilt of the accused beyond reasonable doubt by many countries' legislations. The concept ' beyond reasonable doubt' is not adopted by Ethiopian laws despite practical adoption by judges in many cases. Coming back to the underlining rational for the requirement of high standard of proof in criminal proceeding is that:

1. The existence of presumption of innocence
2. The unbalanced position of the parties in criminal cases unlike that of civil cases
3. The irreversible grave nature of criminal punishment, if once erroneously executed i.e. in order not to punish innocent.

The constitutions of many countries enshrine the individuals’ rights to be presumed innocent until proven guilty and the right not to incriminate one self. That is the right to remain silent.

Many legislations which are enacted to protect the conviction of innocent people, accept the “beyond reasonable doubt” proof standard. In this regard Uglow asserts: “The standard of proof beyond reasonable doubt is seen as the cornerstones of the presumption of innocence.” Thus the beyond reasonable standard of proof is to be born by the government (prosecution) to prove the guilt of the accused. Some lawyers assert that releasing 100 criminals is more justifiable than convicting one innocent person. The fifth amendment (America) states that: - “No person shall be compelled in any criminal cases to be a witness against himself.”

Even though there is no the clear concept of proof beyond reasonable doubt in Ethiopia, the same protection for the accused is provided under Art 20(3) of the FDRE constitution and Art 19(2 &5) of the same in relation to arrested persons. This implies that the constitution is inline with
the requirement of the concept of proof beyond reasonable doubt. That is meant by presumption of innocence imposes on the prosecution the burden of proving elements of the crime beyond reasonable doubt. Likewise, the right to remain silent brings about the fact that the prosecution, not the defendant, has to prove the guilt of the accused.

The other reason is that the position of the parties in ability to produce persuading evidence is not the same in criminal cases. The prosecution is the government institution with all its machineries while the accused is an individual person facing all possible constraints in defending himself.

Unless due care is taken in admitting and weighing evidence, innocent people may be convicted and punished, and the criminals may be escaped under the shadow of unduly convicted innocents. If innocent people once punished erroneously, the grave nature of criminal punishment is irreversible. All these makes high standard of proof justifiable.

For example, if the defendant (D) is charged with murder, the prosecutor (P) bears the burden of proof to show the jury that D did murder someone.

- **Burden of proof:** P
  - **Burden of production:** P has to show some evidence that D had committed murder. The United States Supreme Court has ruled that the Constitution requires enough evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. If the judge rules that such burden has been met, then of course it is up to the jury itself to decide if they are, in fact, convinced of guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979). If the judge finds there is not enough evidence under the standard, the case must be dismissed (or a subsequent guilty verdict must be vacated and the charges dismissed).
    - e.g. witness, forensic evidence, autopsy report
• Failure to meet the burden: the issue will be decided as a matter of law (the judge makes the decision), in this case, D is presumed innocent
  o Burden of persuasion: if at the close of evidence, the jury cannot decide if P has established with relevant level of certainty that D had committed murder, the jury must find D not guilty of the crime of murder
• Measure of proof: P has to prove every element of the offence beyond a reasonable doubt, but not necessarily prove every single fact beyond a reasonable doubt.

In other countries, criminal law reverses the burden of proof, and there is a presumption of guilt.

However, in England and Wales, the Magistrates' Courts Act 1980, s.101 stipulates that where a defendant relies on some "exception, exemption, proviso, excuse or qualification" in his defence, the legal burden of proof as to that exception falls on the defendant, though only on the balance of probabilities. For example, a person charged with being drunk in charge of a motor vehicle can raise the defence that there was no likelihood of his driving while drunk.[3] The prosecution have the legal burden of proof beyond reasonable doubt that the defendant exceeded the legal limit of alcohol and was in control of a motor vehicle. Possession of the keys is usually sufficient to prove control, even if the defendant is not in the vehicle and is perhaps in a nearby bar. That being proved, the defendant has the legal burden of proof on the balance of probabilities that he was not likely to drive.

Similar rules exist in trial on indictment. Some defences impose an evidential burden on the defendant which, if met, imposes a legal burden on the prosecution. For example, if a person charged with murder pleads the right of self-defense, the defendant must satisfy the evidential burden that there are some facts suggesting self-defence. The legal burden will then fall on the prosecution to prove beyond reasonable doubt that the defendant was not acting in self-defence.

In 2002, such practice in England and Wales was challenged as contrary to the European Convention on Human Rights (ECHR), art.6(2) guaranteeing right to a fair trial. The House of Lords held that such burdens were not contrary to the ECHR.[4][5]

• A mere evidential burden did not contravene art.6(2);
A legal/persuasive burden did not necessarily contravene art.6(2) so long as confined within reasonable limits, considering the questions:

- What must the prosecution prove to transfer burden to the defendant?
- Is the defendant required to prove something difficult or easily within his access?
- What is threat to society that the provision is designed to combat?

en.wikipedia.org/wiki/Burden_of_proof retrieved on 29/06/08
Summary

Burden of proof constitutes burden of production (evidentiary burden) and burden of persuasion (legal burden). The former refers to making available of sufficient amount of evidence at the disposal of the court. On the other hand, burden of persuasion is to mean the obligation to persuade the court to the standard required by the nature of the case using the evidence produced by either party.

As to up on whom the burden of production and persuasion lie, almost all jurisdictions accept that the one who asserted cause of action should able to prove the existence of the alleged claim. To state in different language, the one who is going to take risk of failure to produce evidence and persuade the court has burden of proof of his case.

In general, the plaintiff and public prosecutor in civil matters and criminal proceeding respectively bear burden of proof. The justification for this rule is because in most cases it is believed that positive assertion is easier than negative disclaim in proving one’s innocence. In addition, in criminal matters the underlying reasons for the adoption of the general principle that the prosecution must prove the guilt of the accused is because many courtiers including Ethiopia enshrine in their constitution, individuals’ rights to be presumed innocent until proven guilty and the right not to incriminate one self realizing the right to remain silent. Defendants in criminal proceeding are not duty bound to defend them selves/ to testify against themselves/ and are entitled to remain silent through the trial.

Notwithstanding the application of the general rule, in some exceptional situations the burden of proof may shift to the defendant both in civil and criminal proceedings. In civil matter this happens where the defendant admitted the claim of the plaintiff and raised affirmative defense.
In criminal matters on the other hand, the burden of proof shifts to the accused when proof by the public prosecutor is difficult but easier for the accused to produce evidence.

The standard of proof required in persuading the court differs in civil and criminal litigations. In civil suit, the evidence which could show a happening of a fact to be more probable than to be improbable is enough establish the occurrence of the alleged fact. Here, the rule is preponderance of evidence; the court could decide in favour of the one who has produced evidence weighed more than of the other party.

But, in criminal charge in order to convict an accused, the guilty of the latter must be proved beyond reasonable doubt. This shows that in criminal cases there is a need of high degree of proof for various reasons as stated above.
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