FOREWORD

Sir Mari Kapi

In 2004, the writing and publication of a Bench Book for use by Judges of the National Court in Papua New Guinea was considered a priority project by the Judiciary. As Chief Justice, I commissioned a Working Group to write the Bench Book. I am pleased that the Working Group has completed its task and I am able to now provide this foreword for the first Bench Book.

The Book is in two parts. The first part is on criminal process and the second part is on civil process. The part on the criminal process contains a schedule which maps out the key steps in the criminal trial process. The part on the civil process contains a schedule which sets out comparable verdicts on personal injuries. The book is an extremely useful guide for Judges in administering the National Court's civil and criminal process.

This is the first Bench Book produced in PNG to assist Judges. This is a series of Bench Books prepared for use by Judges of the National Court in Papua New Guinea. It is because of this historical significance that the Working Group decided to publish the first issue of the book in book form. Subsequent issues will be published in loose leaf form.

The writing of the book was undertaken by the Bench Book Working Group consisting of Deputy Chief Justice Sir Salamo Injia as Chairman and members Justice Gibbs Salika, Justice Nicholas Kirriwom, Justice Ambeng Kandakasi, Justice Greg Lay, Dr. Eric Kwa and Mr. Joseph Yagi (now Justice Joseph Yagi). The Working Group was assisted by Sir Robert Woods. The funds for the project was provided by the Australian Government through AUSAID funding under the Law and Justice Sector Program.

I commend the Working Group and Sir Robert Woods in writing and publishing the book. I also thank the Australian Government for their funding support.

Hon. Chief Sir Mari Kapi KCMG GCL CBE CSI
Chief Justice of Papua New Guinea (retired)
31st October 2008

CIVIL

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CRIMINAL

CHAPTER 1 - PRELIMINARIES

RIGHT TO A FAIR TRIAL

Constitution Section 37.

(1) ….protection of the law…

(2) Except, subject to any Act of Parliament to the contrary, in the case of the offence commonly known as contempt of court, nobody may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law. (Thus a court can only impose a penalty provided by statute, therefore no power to impose a customary punishment.)

(3) A person charged with an offence shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court. (Refer here to *Criminal Code* s 552 and see *The State v Jeffrey Balakau*, (1996) N1528).

For the procedures for a fair trial see ss (4) and (5) which includes the presumption of innocence and which would, subject to specific exceptions, place the onus of proof on the prosecution. Proof beyond reasonable doubt. The accused does not have to prove his or her innocence.

BAIL - SEE CHAPTER 6

PRE TRIALING.

The *Criminal Practice Rules* 1987, Order 2 set out the Pre-Trial rules.
The pre-trial process commences upon receipt of the Notice of Committal from the District Court at the National Court Registry. The case is listed for first mention before a judge. The date of first mention is either fixed in the Notice of Committal or if no date is fixed, then on the date fixed by the Registrar. Application may also be made by the accused or his/her lawyer or the Public Prosecutor for the case to be first mentioned for pre-trial purposes; rule 1. Following the first mention, the case may be adjourned from time to time until the pre-trial process is completed and the case is fixed for trial.
At the first mention the judge may enquire into, amongst other things, the Notice of Committal, availability of depositions, whether the accused is committed to stand trial or for sentence, legal representation of the accused, and bail. The case is then fixed for directions hearing.
At the Directions Hearing the judge may, amongst other things, give directions as to the following: Legal representation, Registrar to furnish copies of depositions to all parties, lawyers to obtain full instructions from the clients and witnesses in preparation for pre-trial hearing, and fix a date for pre-trial hearing,

At the Pre-trial hearing the judge considers all the matters listed under Rule 6. Rule 6 (m) gives the Judge wide powers to consider 'any other significant matter which might affect the proper and convenient trial of the case.' Other matters considered significant include:

1. the charge(s) at the date of committal and the charge(s) to be actually preferred by the State in the indictment.
2. Statements of prosecution or defence witnesses to be tendered by consent.
3. Record of Interview and confessional statements and whether they will be contested and whether there is to be a voir dire.
4. Notice of voir dire.
5. Requirement of expert witnesses and nature of the evidence.
6. Need for interpreters.
7. Witnesses' summons.
8. In the case of a guilty plea or committal for sentence - a Pre-sentence report, Victim impact statement, evidence in mitigation.

Also note Rule 7 permits application by any party on any of the matters listed under Rule 6, amendment of or provision of better particulars of any count on an indictment, severance of any count on an indictment or accused, and provision of a transcript at the trial.

After the above matters are considered, the case is fixed for trial. A date is also fixed for a Status Conference to be conducted at least one week before trial to confirm the case is ready for trial.

These pre-trial procedures may have to be varied to suit the situation of a circuit.

ADJOURNMENTS IN THE CRIMINAL PROCESS

Refer to the material in the Civil Bench Book Chapter 2 on adjournments.
Similar principles apply. See *Ok Tedi v Niugini Insurance (No 1)* [1988-89] PNGLR 355 (N 750).

Just because the prosecution and the defence agree on an adjournment does not mean it is automatically granted. It is still a matter for the Court to grant an adjournment when a matter had already been listed and allocated hearing dates. Any late disruption causes further delay and disruption to court lists and the allocation of judicial time and then affects the trials of other accused persons.

Once the prosecution and the defence have agreed that the matter is ready for trial and have obtained dates for trial there must be special reasons why such should be vacated.

It is in the overall interests of justice that offenders are brought to trial as soon as possible and any mismanagement by lawyers in the preparation of matters for trial reflects

seriously on the whole justice system. That is why the procedures for listing and pre-trial management are important.

SOME LEGAL PRINCIPLES

Jus dicere et non jus dare - my duty is plain. It is to expound and not to make the law - to decide on it as I find it not as I wish it to be.

The conviction of the guilty is a just requirement of any society.

It is not up to the court to speculate about innocent explanations known only to the accused which he refused to disclose.

There were in the evidence of the witnesses for the prosecution some inconsistencies as would be expected of eye witnesses giving their recollections of a series of events occurring some time ago. Nevertheless the witnesses for the prosecution were in substance all telling the same story: *Mohan & Anor v RPC* [1967] 2 All ER 58 @ 60. This case also makes observations on the following:

a) Why should morbid sentimentality concern itself more with the welfare of the criminal than with consideration for the victim.

b) The unsafe character of demeanour as a guide to truth.

c) The lynx eyed judge who can discern the truth teller from the liar by looking at him is more often found in fiction or in appellate judgements than on a Bench.

CHAPTER 2 – TRIAL PROCEDURE

THE MAIN STEPS IN A CRIMINAL TRIAL

1**.** Prosecutor presents an indictment signed and presented by a duly gazetted State Prosecutor.
The accused should already be in the Dock.
An interpreter should be ready if required and sworn if not already a sworn interpreter.
Check that the indictment complies with the law and in particular that each of the elements of the offence is asserted. - Refer *Criminal Code* Section 528. If circumstances of aggravation are relied upon ensure they are pleaded. And for Joinder of counts see s.531 and s.532.

2. The Judge receives the indictment and then asks the Prosecutor to outline the brief facts of the offence to assist in understanding what it is about and under which section of the Code the offences refer. Compare the wording of the indictment with the section of the *Criminal Code* and *Criminal Practice Rules.*

3. The arraignment - the terms of the indictment (charge) is put to the accused person. See Section 557 (1). Strictly this can be done by merely reading the indictment. However where interpretation is required it is necessary for the Judge to put the strict terms of the offence into simpler language so that the interpreter understands it and can interpret it such that the accused understands the nature of the charge. This is why a recital of the brief facts behind the charge can be important so that the Judge can relate the charge to the offence as stated in the Code.
Where there is more than one accused, each accused is arraigned separately.

4. Accused is asked to plead guilty or not guilty – see S. 560, and S 562 standing mute. Where translation is required this may be interpreted to mean being asked if the charge is 'true' or 'not true'.

5. When the accused has pleaded then any appearance of a lawyer for the accused is noted and the lawyer confirms that the plea is in accordance with instructions. Note that the accused or his or her lawyer may apply to change the plea. (**See paragraphs on Change of Plea** and **Procedure on Plea of Guilty.)**

6. If plea of Not Guilty (or not true) then the trial proper commences. See Section 557(2)

7. The State is not obliged to open by outlining its case but if it does it may be bound by its opening. It then presents its evidence and witnesses.

8. Agreed facts or evidence. If any facts or evidence is agreed then this can be ascertained first. Note Section 589, an accused person may admit on the trial any fact alleged against him. And where appropriate the evidence or statements or affidavits if

consented to can be tendered and marked as Exhibits. See separate notes on 'uncontested evidence'.
In the State Case the exhibits are numbered alphabetically from Exhibit 'A'.

9. Exhibits should be marked appropriately and noted on an Exhibit list by the Associate.

10. The State calls its witnesses. Each witness must be sworn or affirmed. Where language is used then the language used should be noted.
Procedure is examination-in-chief, then cross-examination, then re-examination if necessary. Re-examination is not to raise anything fresh but to clarify anything raised in cross-examination. The Judge should not ask questions, it is up to the lawyers to ask questions. Where the Judge considers that certain evidence needs to be clarified a Judge may ask questions.
(See paragraphs - Evidence – Hostile witness – Admissions to Police)

11. Accused brings evidence in defence. Same procedure and principles apply as for State witnesses above. Defence exhibits are numbered numerically eg Exhibit '1' and so on.

12. State can bring rebuttal evidence in certain situations where defences are raised and no notice has been given of such defences.

13. There is an inherent power in a court for the court itself to call witnesses such as where counsel may have overlooked a certain matter. See the case *The State v Anis* (2002) N2236.

14. Submissions. Refer to Section 573 for order of addresses.

15. Judgement. Full judgement should be given. If adjournment required to prepare it then such should be taken. If ex tempore judgement given then it should be written or recorded as given immediately afterwards. Great care should be exercised if for any reason it is necessary to hand down a better or improved judgement later.

16. It is the Judge's duty to ensure the warrant of commitment is properly completed, and especially to ensure that any pre-trial custody is properly accounted for and that the details of any suspension of sentence are correct.

17. If acquittal then there should be an order for release immediately. But first check to ensure not being held in custody on any other outstanding charges or for any other sentence. If on bail then bail is to be refunded.

And see Criminal Trial Process Flow Chart at Schedule 1.

PRO FORMA OUTLINE FOR A CRIMINAL JUDGEMENT

1. Terms of the Indictment and the offence. Reference to the section in the Code.
2. Accused has pleaded not guilty.
3. The evidence. The witnesses for the prosecution.
   The witnesses for the accused.
4. Issues raised by the evidence, such as any admissions, identification, and defences.
5. The relevant law. The elements of the offence. The law as it applies to the issues.
6. Findings.
7. Verdict.

PROCEDURE ON A PLEA OF GUILTY

Following arraignment if the accused pleads guilty.

1. Note appearance of lawyer for accused. Confirm with the lawyer that no application is to be made in relation to the plea, in other words it is agreed for the court to accept the plea. If the plea of guilty is contrary to instructions to the lawyer then the lawyer may apply to change the plea. Sometimes the court may need to adjourn for a few minutes for the lawyer to consult with the accused on the plea. If the lawyer asks the court to change the plea then there must be good reason presented to the court. (**See paragraph on Change of Plea.)**

2. Judge notes the plea of guilty to the charge. In effect this is a provisional acceptance of the plea subject to the Judge reading the depositions and being satisfied.

3. State then either presents an agreed statement of facts, agreed to by the defendant, or presents the depositions for the Judge to read. Where there has been a plea to a lesser charge than originally envisaged then an agreed statement of fact should be used otherwise if the depositions suggest a more serious charge it is hard for the Judge to be satisfied on the plea to a lesser charge. Section 589 provides that an accused person may admit to any facts alleged against him.

There has been a divergence of opinion as to whether a Judge should read the depositions before the hearing if he has been told there may be a plea. The better and safer position is that a Judge should not look at the depositions until after an accused has pleaded guilty. The Judge must be satisfied on reading the depositions that the evidence does support the charge. Note carefully any evidence which may be a defence to the charge or which could mean the possibility of a lesser offence following a trial.
If satisfied then the Judge records that the court is satisfied on the depositions and finds the accused guilty.

4. Sentence procedure the same as following a trial. (See **Chapter 7 on Sentencing)**

Note that for sentence the court will usually act on the basis of the version of the facts which are most favourable to the convicted person. If the State wants the court to take account of circumstances of aggravation and there is some dispute over them then it may be necessary to go into evidence on those circumstances of aggravation.

PROCEDURE ON SENTENCE
(And see Chapter 7 on Sentencing)

1**.** State to present antecedent report. – especially if any prior convictions to be considered.

2. Allocatus - Section 593. This requires the Judge to ask the prisoner if he or she has anything to say about the punishment that should be considered.

3. Any evidence to be presented on sentence; eg on character.

4. Submissions.
Defence submits on personal circumstances and mitigating factors.

Then the Prosecutor may make submissions and refer to the relevant law and any sentencing guidelines or statistics or authorities.
Eg: *Criminal Law (Compensation) Act* 1991.
Criminal Justice (Sentences) Act 1986.
Probation Act Ch 381.

The Prosecutor should not recommend a specific sentence.

5. Judgement on Sentence.
See separate **Chapter 7 on Sentencing** for a recommended outline and for matters to be considered. Once sentenced and if on bail then bail to be refunded.

CHANGE OF PLEA

A person who has pleaded guilty on arraignment may change his or her plea at any time before sentence, but only by leave. Leave will be refused where, for example, the application is based on an ill-founded belief that a particular fact would give a defence at law. The central question in all cases is whether it has been shown - the onus lying on the applicant - that the plea was not really attributable to a consciousness of guilt.
In general leave will be granted if the application for leave shows that the plea did not arise from genuine recognition of guilty (whether because of misunderstanding of the facts or the elements of the charge, or because of pressure, or because of some other reason) and that there is a real question to be tried. (*see Australian reference to this principle R v Marchando* (2000) 110 A Crim R 337*)* And see Frost CJ in *Nai'u Limagwe*

& Os v The State [1976] PNGLR 382 for the case of an offender applying to change the plea.
But there may be cases where the onus is on the judge to consider a change of plea in the interests of justice. And this could arise in the following scenarios:

1. On arraignment where an accused pleads guilty but defence counsel was under instructions that it would be a trial. The Judge should always confirm with counsel that a plea of guilty on arraignment is in accordance with instructions, and if there is any doubt grant counsel time to confer with the accused.

2. Following a plea of guilty and after the depositions have been tendered and the Judge considers that on a perusal of the depositions there are inconsistencies or there may be a possible defence.

3. At the time of the allocatus on sentence when an accused states something which raises matters which may not have been tested or answered in the evidence or which suggests a possible defence that had not been considered.

In any of the above instances then the judge should apply the principles stated above and consider whether there may be a real question to be tried. And see the Supreme Court in *Kairi v The State* (2006) SC831 where matters were raised in the allocatus and the Court considered various cases which make it clear that once a trial judge finds something inconsistent with a guilty plea either from a perusal of the depositions or in the person's allocatus the plea should be changed to a not guilty plea.

ACCUSED ABSCONDS DURING THE TRIAL

If an accused person absconds during the trial, namely at any time after the plea has been taken, Section 557, and the trial has begun, then the trial can continue to resolution in his absence. He is deemed to have exercised his Constitutional right not to be present because the Constitutional right to be present during his trial works both ways. It is analogous to the principle where he has so acted as to make the continuance of proceedings in his absence impracticable or impossible. See *Constitution* section 37 (5), and *Criminal Code* Section 571.

If a person is found guilty and thereby convicted in his absence because he has absconded then the question will arise as to whether the trial should continue to sentence or should sentence be deferred until he is arrested and brought before the Court again. Note the relevance of the allocatus here, although the *Criminal Code* Section 593 validates a judgement where an allocatus is not given. So *Criminal Code* sections 571 and 593 may allow a convicted person to be sentenced in his absence. The question whether the trial judge should continue the trial until the conclusion of the sentence is not settled. For example what happens if sentence is deferred until he is arrested and in the meantime the Judge is not available through retirement? See the case *The State v Johnson & Os (No 2)* (2004) N2586 and *Kavali v Thomas HoiHoi* [1986] PNGLR 329.

ACCUSED IN PERSON

Whilst accused are usually represented by a lawyer from the Public Solicitor's Office or by a private lawyer there may be the exceptional circumstance of an accused having no lawyer. The duty of trial judge is to give an unrepresented accused such information and advice as is necessary to ensure that he has a fair trial. This may include if it becomes necessary an explanation as to the form in which questions should be asked but it is not to put the questions in that form for the party. The judge's duty includes in a criminal trial to ensure that an unrepresented accused is put in a position where he or she is able to make an effective choice as to the exercise of his or her rights during the course of the trial but it is not to tell the accused how to exercise those rights.

There is a duty on the Judge to advise a litigant in person how the court proceedings are run. First they are told where they can take their place in the courtroom, thus in a civil case it would be at the bar table. In a criminal case it is up to the discretion of the Judge as to whether they take their place at the bar table or have to present their case from the dock.
The course of the trial itself would be explained such as the order of the presentation of the evidence and when parties can address the court.
The litigant in person would be advised about the right to object to questions put by the other side to a witness however an objection is not made just because the party disagrees with the evidence. Objections can only be made on legal grounds, and if there is doubt the litigant would ask for clarification from the judge. The litigant in person would have to present their own evidence themselves in the witness box by way of a sworn statement from the witness box. They would then be entitled to call witnesses to support their case.

The right of cross-examination of witnesses should be explained, being questions which may help the litigant's case or which may weaken the opponents case. Such question can suggest the answers to the witness or can be used to test the reliability of the witness. However they must be questions and not merely statements or comments on the case or on the evidence.

There are limitations on an accused in person being able to cross-examine a complainant or witness in a sexual assault case. See *Evidence Act* s.37E.

INDICTMENTS

An indictment initiates the trial process of an accused person charged with a serious criminal offence triable before the National Court. The indictment must set out all the essential matters in Section 528 (1) of the *Criminal Code.*

Circumstances of aggravation. If circumstances of aggravation, not already an element in the offence, are to be relied upon in an indictment and therefore at the trial or on a plea

of guilty, such circumstances of aggravation must be specifically charged in the indictment. See section 528. Note that in a robbery charge the definition of robbery in section 384 already includes circumstances of aggravation.
Where no circumstances of aggravation are charged in the indictment the offender can only be convicted and sentenced for the offence committed simpliciter or without circumstances of aggravation. See *The State v James Yali* (2006) N3014.

Objection to an indictment. Section 558 sets out the procedure for a motion to quash the indictment.

A Declaration not to proceed. Section 525 sets out the procedure following committal for trial for an indictable offence. The Public Prosecutor may put the charge into writing in an indictment or decline to lay a charge. Thus a Declaration that the Prosecutor declines to lay a charge is the procedure before an indictment is prepared. Once a declaration is filed the accused is entitled to be discharged.

Nolle Prosequi. See Section 527. This is the procedure when the Prosecutor decides not to proceed with the charge after an indictment has been prepared. It means that the State has reserved to itself the right to present another indictment later. The Public Prosecutor has the power to present a Nolle Prosequi at any time whilst an indictment is pending before the Court. Presenting a Nolle Prosequi before the commencement of the trial does not amount to an abuse of the process of the court. See *The State v Peter Painke* [1976] PNGLR 210. But to present a Nolle after the trial has commenced raises other considerations such as double jeopardy and the right to a fair trial within a reasonable time: *Constitution* S 37 (3). See cases *The State v Jonah-Jakai* (1982) N391, *The State v Daniel Agai & Anor* [1990] PNGLR 318.
Once the Nolle is presented and accepted the accused is to be discharged from the indictment.

JOINDER IN CRIMINAL MATTERS

For joinder of charges see Section 531 where the broad principle is that an indictment must charge one offence only. See the case *Ombusu v The State* [1996] PNGLR 335. However exception where several distinct indictable offences are alleged to be constituted by the same acts or omissions or where there is a series of acts done or omitted to be done in the prosecution of a single purpose.
See the case *Mugining v R* [1975] PNGLR 352 *and The State v Kision* (1976) N 580. The question for the court is whether the accused person will be prejudiced by the joinder.
Thus a series of sexual assaults against the one victim can be joined in the one indictment.
A series of fraudulent incidents of false accounting or such like being done in the execution of a single purpose, thus the defrauding of a victim company, can be joined. This could include a number of counts of forgery and uttering false documents.

Section 532 covers the joinder of charges relating to stealing and general deficiency and misappropriation, and also receiving.
However a series of incidents against different victims/complainants would usually be contained in separate indictments although where the incidents are so closely connected such as in a multiple sexual assault against two or more persons with a close connection in time and place then it may be appropriate and in the interests of justice and the community to join them so long as any prejudice to the accused person has been considered. (Recently the Courts in Australia have grappled with this scenario and have allowed the joinder of counts involving multiple complainants in the one indictment.)

JUVENILES

Juvenile Courts Act 1991 but not gazetted until 2003.
A Juvenile is a person under the age of 18 years. The Juvenile Courts have jurisdiction where a juvenile is charged with an offence other than homicide, rape or other offence punishable by death or imprisonment for life.
It appears that the National Court may have no jurisdiction over juveniles apart from those offences involving life imprisonment.
Under s.18 where a juvenile is charged with homicide, rape or other offences punishable by death or imprisonment for life and subject to subsection (2) the trial shall be heard by the National Court. Section 18 (2) states that the provisions of the *Juvenile Courts Act* with respect to procedure shall have effect. The Section then goes on to state that the National Court may exercise the sentencing powers conferred by the Act on a Juvenile Court.
For procedure see sections 23 to 28. The main points about procedure are that the proceedings are to be conducted in camera, the requirements for the presence of a juvenile Court Officer, and restrictions on publication of proceedings.

However note Section 25 (1) (a) in all hearing under this Act a court shall allow proceedings to be conducted so as to receive all matters, facts and opinion into evidence and shall not be bound by the strict rules of evidence.

For the procedures on sentence and the sentencing powers see Part V11 of the Act. This part gives greater flexibility in sentencing a juvenile.
However note section 30 (3) which stated that the maximum sentence under the section that can be imposed on a juvenile is 3 years imprisonment. This does raise a question as to whether this does restrict the National Court when sentencing a juvenile for the serious offences over which the National Court has jurisdiction or does the National Court have an inherent jurisdiction to deal with a juvenile for murder or rape or robbery as if he was an adult for sentencing purposes. The reference to a 'Court' must by virtue of the Act include the National Court. Although does Section 30 (2) "Subject to this section, the Court may, in addition to any other powers under this Act or any other law." leave the National Court when dealing with a juvenile for a life imprisonment offence with its sentencing powers under the *Criminal Code*.

(It would appear that there are questions raised by the drafting of this *Juvenile Courts Act*. Most of these problems have been corrected by the proposed new *Juvenile Justice Act.)*

NO CASE SUBMISSION

A no case to answer submission arises at the end of the prosecution case when all the prosecution evidence has been presented to the court and the defence counsel submits that the evidence is such that there is no evidence in proof of any one or all the elements of the offence charged and there is no real weighing of the evidence required. See the case *The State v Paul Kundi Rape* [1976] PNGLR 96. This case also refers to the situation where the court considers that the evidence is so insufficient that the accused ought not to be called upon to answer it.

It is not the Judge's job to weigh the evidence, decide who is telling the truth and to stop the case merely because he thinks a witness is lying. A submission on this basis should only be entertained when the Judge really has no weighing to do. That is, it must be a very clear case where the State evidence is so dubious, or so tainted, or so obviously lacking in weight or reliability or has been so discredited in cross-examination, that it is clear that no reasonable tribunal could safely convict on it.

A general principle is that the court should not weigh up the evidence until the whole of the evidence is in – unless in what is clearly a hopeless case, where the State is intrinsically very weak or has collapsed badly.
See case *State v Roka Pep* (1983) PNGLR 287. per Kidu CJ. If, after the close of its case the State has failed to adduce evidence in support of one element of the offence charged there is no case for the accused to answer; and, there is a discretion in a trial Judge to stop a case even though there is some evidence adduced by the State in support of each element of the offence charged, and this discretion may be exercised in a case where there is a mere scintilla of evidence but the evidence is so lacking in weight and reliability that no reasonable tribunal could safely convict on it.
And per Pratt J. A Court in PNG should find there is no case to answer where there is no evidence to establish an element of the offence charged, or there is some evidence covering the elements but it is so tenuous or incredible or discredited that it amounts only to a scintilla and thus could not be accepted as persuasive by any reasonable person.

The proper time for a Judge to consider whether or not the State has discharged the onus of proving its case beyond reasonable doubt is either after the State has closed its case and the defence has indicated that it will not adduce any evidence at all, or after both the State and the defence have adduced evidence.

NON PUBLICATION ORDERS

There are two main areas where such are considered.

Firstly during the actual trial whether criminal or civil they can be considered to ensure that potential witnesses are not given the opportunity to hear what other witnesses have said and then to alter their own evidence to suit their own position.

Secondly they are considered in matters of sexual assault to protect the privacy and embarrassment of the victims.
Note the special provisions in the *Evidence Act*, Sections 37A and on, for complainants generally in sexual assault cases which provide for some privacy and provide for the closing of the court.

There is thus a practice whereby courts in managing the business of the courts and in the interests of justice do place restrictions on the publicising of matters which could embarrass or otherwise affect persons before the court. Such orders should be limited to an order that no matter should be published which could lead to the identification of the victim. In a normal rape case at the end of the case there should be no bar to the identification of the perpetrator once they are convicted and sentenced. But care should be taken in an incest case where the publication of the convicted person's name could identify the child victim.
With Juveniles the *Juvenile Courts Act* Section 23 requires that proceedings be heard in camera and this would mean a prohibition on publication of the proceedings.

And see *Criminal Practice Rules* Order 4 Division 4.

VOIR DIRE

Where the question of the admissibility of evidence depends on the proof of some preliminary but disputed fact it must in general in a jury trial be decided by the judge alone. This is done by a 'voir dire' which enables matters to be raised before the judge in the absence of a jury which will not necessarily become evidence in the matters in issue in the trial unless the judge so determines. This is often called a trial within a trial.
Voir Dire means to tell the truth. It is a sort of preliminary examination by the judge in which the witness is required to speak the truth with respect to the questions put to him or her when if incompetency appears from the answers the witness is rejected, and even if they are satisfactory the judge may receive evidence to contradict them or establish other facts showing the witness to be incompetent.

It usually arises in connection to the admissibility of the evidence of a confession by an accused. It is held to enable the judge to decide whether a confession should be admitted in open court, and not to determine whether it is true or false. A confession induced by threat or promise of a person in authority cannot be received in evidence; *Evidence Act* S 28.
A statement of the role of the voir dire can be found by the High Court of Australia in *McPherson v R* (1981) 37 ALR 81 & 88 "The judge presiding at a criminal trial is under an obligation to ensure that the trial is conducted fairly and in accordance with law. He must accordingly exclude evidence tendered against the accused which is not shown to be

admissible. Once it appears that there is a real question of voluntariness of a confession tendered by the Crown the judge must satisfy himself that the confession was voluntary, and if, as will usually be the case, this can only be done by holding a voir dire, he must proceed to hold a voir dire even if none is asked for. And the trial judge has discretion to keep examination and cross-examination of witnesses on a voir dire within reasonable bounds. Nevertheless the duty of the judge is to ensure that the confession is not admitted until the fact that it was voluntary has been established."
Pratt J in *The State v John Yambra Pai* (1986) N 535 outlined the procedure for a voir dire as follows: "There would normally by evidence from the interrogating police officer and his corroborator and perhaps other police officers who are concerned with the detention and or transport of the accused to the police station. Following the prosecution evidence the accused will normally go into the witness box and give his version of events and may call witnesses whose evidence is relevant to the issue of voluntariness or unfairness. At the conclusion of all that evidence the judge will then make his ruling."

Some principles:

The evidential onus is on the defence initially to prove that on the balance of probabilities the record of interview or parts thereof should be excluded.
Subject to that onus being satisfied the prosecution is then required to prove beyond reasonable doubt that the record of interview was conducted with the defendant voluntarily and/or fairly. See *State v Hapea* [1985] PNGLR 6.

The **voir dire in PNG.** The evidence adduced during a voir dire must be restricted to the issue to be determined, because in the situation in PNG where there is no jury and the evidence is presented before the Judge it is therefore before the court and the court then decides on its admissibility. The defendant should not be questioned as to his or her participation in the offence or the truthfulness of his or her answers in the record of interview. See *Gasika v the State* [1983] PNGLR.

Whilst the voir dire is usually used in relation to the admissibility of a confession, it can also be used in connection with the relevance and admissibility of other areas of evidence such as the admissibility of evidence of tendency and similar facts.

WITNESSES

CHILD WITNESS/VICTIM

What is a child? *Criminal Code* does not define a child, various sections refer to ages regarding offences against children, mainly in relation to sexual offences against children under the age of 16 years.
Under the *Juvenile Courts Act* a Juvenile is a person under the age of 18 years and the Juvenile Courts have jurisdiction where a juvenile is charged with an indictable offence other than homicide, rape or other offence punishable by death or imprisonment for life.

Section 30 of the Code refers to persons of immature age and states that a person under the age of 14 years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. Further the section states that a male person under the age of 14 years is presumed to being incapable of having carnal knowledge, but this presumption is rebuttable.

Under *Evidence Act* s.37A 'child' means a person under the age of 18 years.
When considering the manner of treating a witness as a witness or a victim who is under the age of 18 years the provisions for the special measures to be taken for vulnerable or intimidated witnesses as set out in the *Evidence Act* s 37B apply. This would also apply to an accused under the age of 18 years.

Also how to consider the evidence of a child and especially in relation to corroboration see the case *Morikawa v The State* (2000) SC656 but note this case is before the 2003 amendments to the *Criminal Code* Sections 229H and 352A.

The taking of an oath or affirmation is covered by the Oaths and Affirmations Act in particular section 5 of that Act applies. It is up to the Judge to consider whether the child is competent or understanding enough to take an oath or an affirmation. This can be done by the Judge asking the witness if they understand the importance of telling the truth and then enjoining them to promise to tell the truth: *Java Johnson Beraro v The State* [1988-89] PNGLR 562. Reference can be made to their understanding of what can happen if they break such a promise. And see cases *Schubert v The State* [1979] PNGLR 66, *State v John Sangam* [1994] PNGLR 308 and *Balbal v The State* (2007) SC860.
Note that the measures referred to in *Evidence Act* s.37B, 37C, 37D, 37E, and 37I that can be taken for a child witness could include the closing of the court to persons not involved in the case, use of a special screen, the use of closed circuit television for the giving of the evidence from another place, limitations on how a child witness can be cross-examined.

PRIVILEGE AGAINST SELF-INCRIMINATION

See *Evidence Act* Section 14 where a person charged with an offence is a witness he may be asked any question in cross-examination notwithstanding that to would tend to criminate him as to the offence.
And *Evidence Act* Section 15 - A person charged with an offence and called as a witness by virtue of this act shall not be asked or required to answer a question tending to show that (a) he has committed or has been convicted or been charged with any other offence or (b) he is of bad character, unless
(c) proof that he has committed or been convicted of the other offence is admissible evidence… or (d) he has personally or by his advocate asked questions of the witness for the prosecution with a view to establishing his own good character….

Section 26 Cross-examination as to credit. The judge has an obligation to warn a witness that he is not obliged to answer a question which is not related to the proceedings but which may injure his character. But the judge must have regard to whether the question is proper if it is of such a nature that of the imputation conveyed would seriously affect the opinion of the court as to the credibility of the witness. If the question related to matters so remote in time that may be of some relevance.

COMPLAINANTS AS WITNESSES IN SEXUAL ASSAULT CASES

Evidence Act ss.37A, 37B, 37C, 37E, 37G, 37H, 37I create special provision for complainants generally in sexual assault cases for how their evidence can be presented, and this covers adult complainants. This includes closing the court to persons not involved in the case, use of special screens, the use of closed circuit television for the giving of evidence from another place and limitations on the right to cross-examine. For Notice of Intention to Cross-examine Victim see case *The State v Angosiwen (No 1)* (2004) N2669.

Uncontested evidence. Note *Criminal Code* Section 589.
Parties can agree to tender uncontested facts, either from committal depositions and instructions or extraneous to committal depositions.
Parties can agree to all primary facts being tendered by consent and for submissions to be made on issues of law only. Often this procedure is used for technical evidence such as medical evidence. But care should be exercised before accepting the whole of the evidence of the witnesses in a serious charge. See *Epeli Davinga v The State* [1995] PNGLR 263; *Fred Bukoya v The State* (2007) SC 887 where such a procedure is recommended. Also see *The State v Hawa* [1999] PNGLR 483. By pleading not guilty, the accused, while he may not deny certain aspects of the statements of witnesses that are tendered, is still denying the offence and would be challenging the interpretation to be placed on the evidence of the witnesses and the whole circumstances of the incident. The judge has a duty of checking that witnesses' statements or affidavits are clear and raise no dispute.
A trial judge would not go wrong if affidavits or statements of evidence as a general rule are not admitted by consent in the case for the prosecution if :

a) the credibility of the witness is in issue;
b) the accuracy of the witnesses evidence is in issue;
c) the witness's evidence conflicts with other evidence relevant to the guilt or innocence of the accused;
d) the witness's evidence bears on a contested fact on the issue of guilt or innocence or upon inferences of such facts to be drawn by the Court in reaching its verdict.

Where a deposition is admitted by consent a trial judge should warn him or herself of the difficulties posed by accepting prosecution evidence from a person or persons whose evidence cannot be tested, in particular with respect to any point where the untested deposition is in conflict with oral evidence tested by cross-examination.

Calling of witnesses not on list of witnesses. There is no prohibition in respect of prosecution witnesses in principle on condition that proof of evidence is provided to defence.
Defence are not required to provide proof of witness statements to the prosecution and so technically can call any number of witnesses at any time. Although it is expected to name its witnesses at the pre-trial mention - failure to so indicate a defence witness may affect the weight of a surprise witness.

Calling of witness present in court during other evidence. There is no legal prohibition from calling such a witness to give evidence. The Court simply needs to be informed and the weight and credibility of the evidence becomes a matter for comment and assessment.
The normal practice is to ensure before the evidence commences that all potential witnesses remain outside the court until they are called to give evidence.

STATE NOT CALLING WITNESS ON INDICTMENT

The defence may call those witnesses and the State has a duty to make these witnesses available. See case *Titus v Wambun v The State* (1995) SC479.

CHAPTER 3 - EVIDENCE

ACCOMPLICE **or witness reasonably supposed to have been criminally concerned in the event.**

Where the State relies upon the evidence of a witness who it is asserted might reasonably be supposed to have been criminally concerned in the events giving rise to the charges, ie an accomplice, the Judge should warn him or herself that the evidence of such a person may be unreliable. Possible reasons are:

The witness may want to shift blame from himself or herself onto others, and to justify their own conduct. Thus the witness may construct untrue stories to play down their own part in the crime.
The witness may make false claims out of revenge or a feeling of dislike.
The witness may be motivated to give false evidence in order to qualify for a reduction in his or her own sentence.
See cases *The State v Wanu* [1977] PNGLR 152 *and The State v Fineko* [1978] PNGLR 262.

In the case *The State v Noel & Os* (2001) N 2253, a prosecution witness gave evidence in exchange for a nolle prosequi being filed in his matter, however there were so many inconsistencies that the evidence was found to be unreliable.

ADMISSIONS TO POLICE/CONFESSIONS

The common law principle has been well stated by Dixon J in *McDermott v R* [1948] 76 CLR 501*:* If the accused speaks because he is overborne, his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity or sustained or undue pressure it cannot be voluntary.

A Judge at a trial should exclude confessional statements if in all the circumstances the Judge thinks they have been improperly procured by officers of the Police Force. However the procedures laid down for such an interrogation are not absolute, they are a guide to the behaviour which the court feels is appropriate.

It must recognised that it is in the interest of the community that all crimes are investigated with the object of bringing malefactors to justice and such investigations must not be unduly hampered. However the Courts must not encourage improper police methods.

There must be choice given to the accused, a caution, the choice to speak or remain silent.

Note the requirements of the Constitution section 42 (2).
The main concern, and as the cases on the subject point out, it is whether the confession or record of interview was voluntary. See *R v Sulka & Ors* [1975] PNGLR 123 "Despite the occurrence of improprieties or illegalities, despite the lack of caution, confessional evidence may be admitted if it is established to have been given voluntarily"

Use of the Judge's Rules is not absolute, they are a means to enable the court to indicate to the police the kind of standard and practice and behaviour which the Judges think appropriate to be observed. In Papua New Guinea it is now a matter of looking at the requirements of the Constitution. See in particular *The State v Mana Turi* [1986] PNGLR 221, where McDermott J formulated the type of conduct expected of police officers in relation to obtaining evidence from persons questioned or in custody.
Simon Tanuma v The State [1999] PNGLR 475 N1872.

It is well settled practice in this jurisdiction for a trial judge to peruse the confessional statement or the record of the interview on the voir dire to enable a decision to be made when assessing the credibility of the accused and the interviewer when its admissibility is challenged.

BROWNE V DUNN (1893) 6 ER 67

Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination.
Failure to cross-examine a witness who has given relevant evidence for the opposing side amounts technically to acceptance of the evidence in chief, which cannot then be impugned in the party's final address. A party giving evidence of matters which ought to have been, but were not, cross-examined upon, damages his or her credibility. See case *The State v Merriam* [1994] PNGLR 104. And the Supreme Court in the case *Jaminan v The State (No 2)* [1993] PNGLR 318 The failure to put the defence of alibi in cross-examination of the State witnesses and a delayed or belated alibi will reduce the weight to be given to the alibi as a defence.
The State v Simon Ganga [1994] PNGLR 323 N 1232.

CHARACTER

Character is raised by the accused's own evidence only where the evidence is given with the intention of establishing good character, in the sense of asserting that by reason of his or her character, he or she is unlikely to have committed the crime charged: *R v Fuller* [1994] 34 NSWLR 233.

For the relationship between the propensity limb and the credibility limb see Street CJ in the case *R v Murphy* [1985-86] 4 NSWLR 42 at 54 "*whilst the primary significance of evidence of good character is upon the likelihood of guilt, there is a corollary to the effect that evidence of good character can be used with reference to credibility of the accused in his denial of the charge and hence, the unlikelihood of his guilt."*

However good character does not provide the accused with some kind of defence. It is only one of the many factors which a Judge can take into account in determining whether he or she can be satisfied beyond reasonable doubt of the guilt of the accused. On the other hand if the State has led evidence of prior convictions that in itself does not prove that the accused is a person who is likely to have committed the crime. That evidence is merely another matter to be considered when assessing the whole of the evidence.
Note that character plays a part in sentencing - see under subject facts under Sentencing.

COMPLAINT IN SEXUAL ASSAULT CASES

At common law, evidence of recent complaint is admissible in sexual assault cases, this evidence going solely to the credit of the complainant upon the basis that such a complaint having been made at the earliest reasonable opportunity, to a person to whom the complainant might reasonably have been expected to complain, is the conduct expected of a truthful person who has been sexually assaulted. It is not admitted as evidence of the facts in issue. See *Kilby v R* [1973] 129 CLR.460. The principles set out in the *Kilby Case* were recognised by the Supreme Court in *Touramasong & Os v The State* [1978] PNGLR 337 where the court observed that the fact that there was no fresh complaint by a woman alleging rape is not evidence of consent.
At common law the requirement that the complaint be made at the earliest reasonable opportunity is interpreted with some flexibility. The question of reasonableness relates to the opportunity for the complainant to make a complaint. Thus for a child complainant his or her lack of knowledge that what was done was wrong, and therefore such as to give rise to a grievance, was relevant to the reasonableness of the child delaying the complaint until such time as he or she became aware that the conduct in question was wrong. In the case *The State v Merriam* [1994] PNGLR 104 the trial Judge noted factors which may inhibit complaint by child victims. Also see cases *The State v Moki Lepi* (2002) N2264 *and The State v Moki Lepi (No 3)* (2004) N 2734. And see the Supreme Court on the practice and procedure for witnesses of tender age in *Java Johnson Beraro v The State* [1988-89] PNGLR 562; *Balbal v The State* (2007) SC860.
On fresh complaint see *Townsend v Oika* [1981] PNGLR 12, *and Didei v The State* [1990] PNGLR 458.

Where there has been delay in the making of a complaint of a sexual assault a Judge should exercise a certain amount of caution especially where there has been a delay of a number of years between the date of the alleged assault and when the matter comes on for trial. Where there has been the passage of years it could be dangerous to convict on a complainant's evidence alone unless the Judge was satisfied of its truth and accuracy having scrutinised the evidence with much care.

However delay in making complaint does not necessarily indicate that the evidence of the complaint is false. It may indicate fabrication on the part of the complainant but does not necessarily do so. There may be good reasons why a person who has been sexually assaulted hesitates in making a complaint, such as shame, fear, whether she would be believed. A Judge must be aware of the effects on delay on the ability of an accused to defend himself by testing prosecution evidence to establish a reasonable doubt because of; the delay in instituting the prosecution, the possibility of distortion of human recollection; the nature of the allegations, the age of the complainant at the time of the allegations; and because the prosecution case is confined to the evidence of the complainant. See the principles in the Australian case *Longman v R* [1989]168 CLR 460 and again the cases referred to above.

CORROBORATION IN SEXUAL OFFENCE CASES

Previously corroboration was required in relation to the evidence of complainants in sexual assault cases. This is no longer required following amendment to the *Criminal Code* by Parliament. See Sections 229H and 352A of the *Criminal Code*. A judge is required not to warn him or herself that it is unsafe to find an accused guilty in the absence of corroboration. Of course the State still bears the onus of proving the elements of the offence beyond reasonable doubt. Note the Supreme Court in *Java Johnson Beraro v The State* [1988-89] PNGLR and *Balbal v The State* (2007) SC860 on uncorroborated evidence of tender aged children.

CIRCUMSTANTIAL EVIDENCE

Circumstantial evidence varies infinitely in its strength in proportion to the character and variety, the cogency, the independence, one of another of the circumstances; one might describe it as a network of facts cast around an accused person. It may be that, strong as it is in part, it leaves gaps and rents through which the accused is entitled to pass safely. But then conversely it may be so close, so stringent, so coherent in its texture that no efforts on the part of the accused can break through.

If we find a variety of circumstances all pointing in the same direction, convincing in proportion to the number and variety of those circumstances and their independence one of another, although each separate piece of evidence, standing alone, may admit of an innocent interpretation, yet the cumulative effect of such evidence may be overwhelming proof of guilt. The law does not say that we should act on certainties and certainties alone. In the passage of our lives, in our acts, in our thoughts, we do not deal with certainties. We ought to act, we do in fact act, on just and reasonable convictions founded upon just and reasonable grounds. If upon a grave and careful view of the facts any reasonable doubt assails one's mind, the prisoner is entitled to go free. The prosecution are bound so to allay such doubts as to convince the court of the truth of the accusations they bring.

See *Paulus Pawa v The State* [1981] PNGLR 498. The case against the accused is circumstantial. The judge must exercise great care in such cases and be aware that any inference drawn must be tested against the exclusion of any reasonable hypothesis that would indicate innocence. Fingerprint evidence is very strong retrospective circumstantial evidence as the court takes judicial notice of the fact that no two persons have identical fingerprints and they are sufficient evidence of identity on which to base a conviction

When a case against the accused person rests substantially upon circumstantial evidence there should be an acquittal unless all the circumstances are such as to be inconsistent with any reasonable hypothesis other than the guilty of the accused. See cases *The State v Morris* [1981] PNGLR 493 and *Koroka v The State* [1988-89] PNGLR 131.

And see the more recent Supreme Court case of *Maury v The State* (2001) SC 668.

CONSCIOUSNESS OF GUILT - LIES

Consciousness of guilt may in certain circumstances be inferred from the conduct on the part of the accused for example -

> Telling lies either in or out of court including setting up a false alibi,
> Absconding to avoid arrest or to avoid trial or during the trial,
> Bribery or attempted bribery of, for example, police or police witnesses.

If the prosecution seeks to rely on a lie then the lie must be concerned with some circumstance or event connected with the offence, that is, it must relate to a material issue. Thus it must have the appearance of a deliberate lie and must reveal a knowledge of the offence or some aspect of it and was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence charged.

However some people tell lies out of panic, or to avoid unjust accusation, to protect some other person or to avoid a consequence unrelated to the offence.

And see case *The State v Simon & Koroka* (1987) N600.

Lying or untruthful witnesses. Where a witness may be lying in their testimony in court the trial judge may be properly be guided or assisted by usefully examining:

(a) whether the story told by the witness is inherently probable or not;
(b) how it fits in with the prosecution case;
(c) how it fits in with the defence case;
(d) how it fits in with the evidence as a whole.

See case *The State v Mole Manipe & Os* (1979) N196.

Absconding could be because of some other matter not related to the offence.

ELECTION OF ACCUSED NOT TO OFFER AN EXPLANATION

An accused person may always give evidence in the trial but there is no obligation upon him or her to do so. The State bears the onus of satisfying the Court beyond reasonable doubt that the accused is guilty of the offence charged. The accused bears no onus. The accused is presumed to be innocent until the Court is satisfied by the State that he or she is guilty. The accused is entitled to say nothing and to make the State prove his or her guilt. A Court must not draw any inference adverse to the accused by reason of the fact that he or she has elected not to give evidence. There are many reasons why an accused may elect not to give evidence. The accused may fear that he or she will be confused by cross examination. The accused may simply be content to rely upon any weakness which may be perceived to exist in the State case. And a court must not treat an accused's election not to give evidence as being capable of filling in any perceived gaps in the State case.

Common sense must be a major factor in determining what significance is made of failure to give evidence.
Where an accused person fails to give evidence or to call witnesses to support his case, the court may draw inferences which properly flow from the evidence and reach its conclusion without being deterred by the incomplete state of the evidence or by speculation as to what the accused might have said had he or she testified. Where an accused person fails to give evidence or to call witnesses to support his or her case any inferences to be drawn and the weight to be attached thereto must be determined by common sense having in mind that:

(1) the failure of the accused is not an admission of guilt and no inference of guilt may be drawn therefrom.

(2) Failure to testify may, however, tell against an accused person in that it may strengthen the state case by leaving it uncontradicted or unexplained on vital matters.

(3) Failure to testify only becomes a relevant consideration when the State has established a prima facie case.

(4) The weight to be attached to failure to testify depends on the circumstances of the case. Significant circumstances include: whether the truth is not easily ascertainable by the State but probably well known to the accused; whether the evidence implicating the accused is direct or circumstantial; whether the accused is legally represented; whether the accused has before the trial given an explanation which the State has adduced in evidence. See case *The State v Tom Morris* [1981] PNGLR 493, *and Paulus Pawa v The State* [1981] PNGLR 498 and *Jaminan v The State (No 2)* [1983] PNGLR 318.

ELECTION BY STATE NOT TO CALL A WITNESS

Where it appears that there is a witness who you would expect to be called to give relevant evidence, but who has not been called, the Court is not entitled to speculate upon

what he or she might have said if he or she had been called. But where that witness is a person who, in the ordinary course, you would expect the State to call, and the Prosecutor offers no satisfactory explanation for its election not to call that witness, the Court is entitled to draw the inference that his or her evidence would not have assisted the Prosecution case. See *Paulus Pawa v The State* [1981] PNGLR 498.

HOSTILE WITNESS

See *Evidence Act* Ss 22 and 23. The right to examine and cross-examine a witness as to prior inconsistent statements is a discretionary one. In exercising the discretion to allow or disallow such examination or cross-examination the court should ascertain whether the prior inconsistent statement was made and the circumstances surrounding the making having regard to the principles applied in relation to the admissibility of admissions to police. See *The State v Nawa & Anor* [1991] PNGLR 76; *Jaminan v The State (No2)* [1983] PNGLR 318.

A State Prosecutor may discredit his own witness without having him declared hostile. Where a witness is declared hostile the State Prosecutor may not only contradict him by other witnesses but may also by leave of the trial judge prove that he has made inconsistent statements.

The effect of the witness being declared hostile is generally to render the witness unreliable. If he has given a prior statement which is inconsistent with his oral testimony both statements are rendered negligible and neither constitute evidence which can be relied upon.

On a prior inconsistent statement note the case of *Kandakason v The State* (1998) SC 558. In a case where a witness has made a previous inconsistent statement, there is an inflexible rule of law or practice that the Judge should warn himself or herself that the evidence may be unreliable.

IDENTIFICATION EVIDENCE

Identification evidence is defined generally as evidence of an assertion that the person charged was, or resembles (visually, aurally, or otherwise) a person who was present at or near a place where the offence charged was committed, where that evidence is based upon what the witness saw or heard at that place and at about that time.

Evidence that the accused merely resembles the offender is insufficient of itself to establish guilt beyond reasonable doubt.
Special caution is necessary before accepting identification evidence because of the possibility that even completely honest witnesses may have been mistaken in their identification. It has been the experience of courts over many years that sometimes

completely honest evidence of identification has been demonstrated to be wrong after innocent people have been convicted.

Trial Judges should therefore warn themselves that the reliability of an identification of a person depends upon the circumstances in which the witness observed the person who he or she has identified as the accused and any one of those circumstances may possibly lead to error. For example:

> How long was the period of observation.
> In what light was it made.
> From what distance was it made.
> Was there anything about the person observed which would have impressed itself upon the witness.
> Was there any special reason for remembering the person observed.
> How long afterwards was the witness asked about the person seen.
> How did the description then given compare with the appearance of the accused.
> Each of these matters must be considered in every identification case.

See *John Beng v The State* [1977] PNGLR 115 for principles. Trial Judge must advert to relevant principles before making findings of fact: *Biwa Geita v The State* [1988-89] PNGLR 153.

And see the confirmation of the principles in the Supreme Court case of *Ono v The State* (2002) SC 698 where the Court said that because of dangers inherent in eye witness identification evidence a trial judge should warn him or herself of the special need for caution in reliance on the correctness of identification, because for example even a convincing witness may still be mistaken and a number of witnesses could be mistaken.

Recognition is not the same as identification although the weight to be granted to it depends on the length and degree of prior acquaintance. Errors have also occurred where the witness has previously known the accused.

For identification and recognition see Case *John Beng v The State* [1977] PNGLR 115. For identification of suspects by community leaders see *The State v Anis Noki* [1993] PNGLR 426, *and The State v Kakas & Os* [1994] PNGLR 20, and the Supreme Court in *Piakali v The State* (2004) SC 771 where the principles were summarised and approved.

INTOXICATION

And see *Criminal Code* S. 29
Proof of a state of intoxication, whether self induced or not, so far from constituting itself a matter of defence or excuse, is at most merely part of the totality of the evidence which may raise a reasonable doubt as to the existence of essential elements of criminal responsibility. Such a doubt, if not removed by the Prosecution to the satisfaction of the tribunal of fact, will warrant an acquittal, not because the accused was intoxicated but

because the charge will not have been proved beyond reasonable doubt. (*See State v* Evara (1979) N201. and the Supreme Court in *Apo v The State* [1988] PNGLR 182. "The relevance of intoxication goes to the question of culpability. The rationale is that if an offender offends whilst under the influence of alcohol, the offender's self-control is affected and therefore the culpability may be diminished. However anyone who voluntarily gets himself drunk must know that his capacity to control himself will be impaired and it is no reasonable explanation by him after the event that his self-control was affected."

A state of drunkenness or intoxication can vary greatly in degree. A person may be intoxicated in the sense that his personality is changed, his will is warped, his disposition altered, or his self-control weakened, so that whilst intoxicated to this degree he does act voluntarily and intentionally which in a sober state he would not nor might not have done. His intoxication to this degree, though conducive to and perhaps explanatory of his actions, has not destroyed his will or precluded the formation of any relevant intent. Intoxication to the stated degree might have rendered an accused less aware of what he was doing, or of its quality, significance or consequence. But if voluntary, his acts remain his, and he intends to perform them. So long as will and intent are related at least to the physical act involved in the crime charged, and saving for the moment the case of a crime of so-called specific intent, the fact that the state of intoxication has prevented the accused from knowing or appreciating the nature and quality of the act which he is doing will not be relevant to the determination of guilt or innocence. See *R v O'Connor* [1980-81] 146 CLR 64.

ONUS AND STANDARD OF PROOF

In a criminal trial the trial Judge should at all times remind him or herself that the burden of proof of guilt of the accused is placed upon the State. That onus rests upon the State in respect of every element of the charge. There is no onus of proof on the accused at all. It is not for the accused to prove his innocence but for the State to prove his guilt and to prove it beyond reasonable doubt. This is the presumption of innocence.
The State does not have to prove however, every single fact in the case beyond reasonable doubt. The onus which rests upon the State is to prove the elements of the charge beyond reasonable doubt.

POSSESSION

A dictionary definition of possession would be to simply have that thing. The essence of the concept of possession at law is that, at the relevant time, you intentionally have control over the object in question. You may this control alone or jointly with some other person or persons. You and those persons, if any, must have the right to exclude other people from it. It is not necessary for you to have it in your hand, it can be at your home, and you do not need to own it, you can possess a thing temporarily or for some limited purpose.

With reference above to 'intentionally have control' means that if something had been for example slipped into your suitcase without you knowing you would not be regarded as having possession of it at law.
Possession can be one form of circumstantial evidence.

SIMILAR FACT EVIDENCE (TENDENCY)

1. No direct rule can be laid down as to the moment at which evidence of facts showing system becomes admissible. Roughly the moment is when its relevance appears clear to the presiding Judge
2. Direct evidence of the physical act constituting the crime is not necessary before evidence of system becomes admissible.
3. The introduction of such evidence tending to prejudice the accused is not permissible before an issue has been raised in substance if not in words to which it is relevant.
4. The evidence to be admissible must be, (a) to prove a course of conduct, or (b) to rebut a defence of accident or mistake, or (c) to prove knowledge by the accused of some fact.

Where similar fact evidence is admitted, it is admitted to show not that the defendant did the acts which form the basis of the charge but that if he did such acts he did them intentionally and not accidentally or inadvertently or innocently.

It seems clear that when the fact of the prisoner having done the thing he is charged with is proved and the only remaining question is whether at the time he did it he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts and thereby raising a presumption that he was not acting under a mistake.

See cases *The State v Daniel* [1988-89] PNGLR 580 and *The State v Kindagl* 1990 N846.

Propensity evidence and similar fact evidence is a special class of circumstantial evidence and its probative force is to be gauged in the light of its character as such. Because it has a prejudicial capacity of a high order a trial judge must apply the same test as a jury must apply when dealing with circumstantial evidence and ask whether there is a reasonable view of the evidence that is consistent with the innocence of the accused.
But then sometimes there may be such a striking similarity between two different acts that a court may be satisfied beyond reasonable doubt that the person who committed one set of acts must have committed the other. That is to say that the accused person has put his stamp upon the crime where it makes it easily recognisable that he or she must have committed both sets of crimes. However this could not be so if both sets of acts are such that they may be explained by coincidence. There must be such a close similarity, such a clear underlying unity between both sets of acts, as to make coincidence a very unlikely explanation of what happened.

CHAPTER 4 - OFFENCES

ASSAULT

The definition of assault is found in *Criminal Code* s.243. There a various offences of assault elsewhere in the Act, the main being in Sections 335 to 341.
An assault is any act, and not a mere omission to act, by which a person intentionally, or recklessly, causes another to apprehend immediate and unlawful violence. It is the fear which can be the gist of the assault.
There need be no intention or power to use actual violence, for it is enough if the complainant on reasonable grounds believes that he or she is in danger of it.

There are four elements which constitute an assault:

First where no physical force is actually applied:

1. An act by the accused which intentionally, or recklessly, causes another person (the complainant) to apprehend immediate and unlawful violence.

2. That such conduct of the accused was without the consent of the complainant.

3. That such conduct was intentional or reckless in the sense that the accused realised that the complainant might fear that the complainant would then and there be subject to immediate and unlawful violence and none the less went on and took the risk.

4. That such conduct be without lawful excuse.

Second where physical force is actually applied:

1. A striking, touching or application of force by the accused to another person (the complainant).
2. That such conduct of the accused was without the consent of the complainant.

3. That such conduct was intentional or reckless in the sense that the accused realised that the complainant might be subject to immediate and unlawful violence however slight as a result of what he or she was about to do, but yet took the risk that that might happen.

4. That such conduct be without lawful excuse.

For aggravated assault such as grievous bodily harm see Section 318 and for unlawful wounding see Section 322 of the Code.

ATTEMPT

The elements of attempt are set out in Section 4 of the Code.
(1) When a person intending to commit an offence -

(a) begins to put his intention into execution by means adapted to its fulfilment; and

(b) manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence,

He is said to attempt to commit the offence.

This section does not merely require that the intention be manifest by some overt act, it requires the commencement of the execution of the intention itself. So the act must be something more than mere preparation for the commission of the offence.

The case *R v Kopi-Kami* [1965-66] PNGLR 73 draws the distinction between a mere act of preparation and an act indicating the commencement of the intention.
Intent may be express or inferred from one's conduct or behaviour: *R v Joseph Kure* [1965-66] PNGLR 161.

There are a number of other Sections of the Code relating to attempt in relation to specific offences.
Sections 47 and 48 re oaths to commit offences.
Section 62 re attempted bribery.
Section 109 re attempt to violate secrecy in voting.
Section 136 attempt to pervert justice. See the case *The State v Kiliki* [1990] PNGLR 216, whether the conduct might lead to a miscarriage of justice, whether the act has that tendency.
Section 189 attempting to interfere with the telegraph.
Section 210 unnatural offences.
Section 304 attempted murder. Requires an obligation on the prosecution to prove an intent to kill. *Naibiri & Anor v The State* (1978) SC137.
Section 348 attempted rape. See *R v Joseph-Kure* [1965-66] PNGLR 161.
Section 439 attempt to set fire to crops.
Section 441 attempt to cast away ships.
Section 445 attempt to destroy property. Section 447 attempt to injure mines.
Section 476 attempt to procure unauthorised status.
Sections 509 to 513 refer generally to attempts to commit offences in connection with conspiracy to commit offences.

BREAKING AND ENTERING

The State must satisfy beyond reasonable doubt that:

1. The accused broke and entered the premises,

2. The premises, whether a dwelling house or a shop or whatever the building was.

Breaking and entering is an offence in itself under Section 396 of the Code.
Broke means forcibly gained access. It is not a breaking to walk through an open door. But 'forcibly' can include to turn a handle or unlatch a door.

There are then variations under the various sections. Firstly there is break and enter with intent to commit a crime. In this situation the State must identify the crime that was to be committed.

Break and enter and steal is the most common offence and thus adds the element of stealing. Thus need to prove that having entered the premises the accused stole something – identify what was stolen.
To steal someone's property means to take it away without consent and intending to deprive them of it permanently.
It need not be shown that the accused actually removed the property from the premises but it must be shown that the accused moved it to some extent, and that when the accused did so he or she had the intention of stealing it.

BRIBERY AND OFFICIAL CORRUPTION

The offence of bribery is constituted by the receiving or offering of an undue reward by or to any person in public office, in order to influence that person's behaviour in that office, and to incline that person to act contrary to accepted rules of honesty and integrity. The offence can be constituted by the mere offer of a corrupt inducement, even if the offer is rejected. And it can be for the person in public office to disregard their duty at some future time.
The essence of the offence of bribery is that there must be an offer which is known to the person sought to be bribed and which is capable of being rejected. What cannot be rejected is not an offer.

Relevant sections are:

Section 62 – Bribery of a Member of Parliament.
Section 87 – Official Corruption.
Section 97B – Bribery of member of Public Service.
Section 103 - Bribery at elections.
Section 119 - Judicial Corruption.
Section 120 – Official corruption relating to offences.
See case *The State v Toamaru* [1988-89] PNGLR 253 for discussion of the word corruptly.
Mond v Nape (2003) N2318 for bribery in an election petition.
The State v Pablito Michael (2002) N2338 on offering to bribe a tax officer.
Yabara v The State [1984] PNGLR 378 on establishing the element of giving in a case of judicial corruption.

The State v Makao (2005) N2996: Section 120 - police officer asking for and receiving a bribe to release a detainee: Section 120.
The State v Mataio (2004) N2531: Section 119 - judicial corruption by magistrate.

CONTEMPT OF COURT

The *Criminal Code Act* Section 5 provides that the Act or the Code does not affect the authority of any court of record to punish a person summarily for the offence commonly known as "Contempt of Court".
And note *Constitution* Section 37 (2):

> *"Except, subject to any Act of the Parliament to the contrary, in the case of the offence commonly known as contempt of court, nobody may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law."*

Traditionally contempt was divided between civil contempt and criminal contempt. Criminal contempt being regarded as consisting of words or acts obstructing or tending to obstruct or interfere with the administration of justice whereas civil contempt was of disobedience to a judgement, order or other process of the court. However because such civil contempt does itself involve an obstruction of the fair administration of justice it may accordingly be punished in the same manner as criminal contempt and therefore the distinction has become somewhat blurred and so the standard of proof required is the criminal standard.

The power to punish for contempt of court is therefore part of the inherent jurisdiction of the National and Supreme Courts.
The procedure for dealing with contempt is set out in the *National Court Rules* Order 14 Rules 37 to 50. It follows the criminal process and includes administration of the allocatus.

The summary jurisdiction of the court to punish for contempt is exceptional and should be exercised with restraint and only in a clear and serious case. This is especially so of the power of a trial judge to deal summarily for contempt in the face of the court on the judge's own motion. This procedure should rarely be resorted to except in those exceptional cases where the conduct is such that it cannot wait to be punished because it is urgent and imperative to act immediately to preserve the integrity of a trial in progress or about to start.

There is always the merit in obtaining independent advice where the judge is personally involved in the alleged contempt.

Where a Judge has formed the view that there has been a contempt in the face of or in the hearing of the court, he or she should consider whether there are alternatives bearing in mind the seriousness of the conduct and the degree of urgency involve; Such as

whether a warning or reprimand would be sufficient or whether in cases of disruption of proceedings, the person should be excluded from the court; and where a member of the legal profession is involved whether the conduct should be made the subject of a complaint to the Professional Body; or if a statutory offence has been committed whether the matter should be referred to the Public Prosecutor.

In the conduct of the summary hearing the trial judge may rely upon his or her own observations of the conduct, and upon hearsay evidence. It may be possible to call witnesses to give evidence of their observations. The person accused must be allowed a reasonable opportunity to be heard in his own defence, that is to say, a reasonable opportunity of placing before the court any explanation or amplification of his evidence and any submissions of fact or law, which he may wish the court to consider as bearing upon the charge itself or upon the question of punishment. See the case *The State v Mark Taua Re Awaita* [1985] PNGLR 179 for a discussion of the procedure to have the contemnor brought before the court and the care that must be taken in ensuring a fair hearing. This procedure was discussed by the Supreme Court in the case of *Robinson v The State* [1988-89] PNGLR 307. That case did suggest that because of the circumstances of the actual incident charged with contempt the matter should have been listed before another judge.
See also the cases *Kwimberi v The State* (1998) SC545 and *Reimann v The State* (2001) N2093.

For cases see *Bishop v Bishop Bros* [1988-89] PNGLR 533 which involved the assault of a person attempting to execute a court order and the Supreme Court discussed the procedures to be adopted when dealing with an alleged contempt. And see *Sikani v The State* (2005) SC 807 where the court stated that there must be clear evidence that an alleged contemnor was refusing or avoiding compliance with a court order.

There have been a number of cases involving difficulties created by lawyers and court staff in the operation of the courts and there have been a number of decisions. In some instances the act complained of was found not to be contempt of court. And see the case *Poka v The State* [1988] PNGLR 218.

Contempt of court is a common law offence and there is no maximum penalty. On penalty see the *Kwimberi case* above referred to and *Salo v Gerari* (2005) N2923, where the judge considered various cases that have come before the court.

DANGEROUS DRIVING CAUSING DEATH OR GRIEVOUS BODILY HARM

See Section 328.
Generally the State has to establish 3 issues:

1. That the death of or grievous bodily harm to the victim was caused by the driving of the vehicle.

2. That the accused was the driver of the vehicle which was involved in the incident.

3. That at the time of the incident the accused was driving the vehicle at a speed or in a manner dangerous to the public.

The test as to whether the conduct was dangerous is an objective one. The State does not have to establish that the accused knew or realised that driving the vehicle in the manner he did was dangerous. Thus a driver may have honestly believed that he was driving very carefully and yet may still be guilty of driving in a manner which is dangerous to the public whether through speed, especially if above the limit for the circumstances, or through consumption of alcohol.

The offence involves fault. See *The State v Dela Tami* [1977] PNGLR 57. "Fault involves a failure; a falling below the care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case. If the dangerous driving occurs, however as a result of some sudden overwhelming misfortune suffered by the driver for which he is in no way to blame - if for example he suddenly has an epileptic fit or passes into a coma or is attacked by a swarm of bees or stunned by a blow to the head from a stone - then he is not guilty of driving in a manner dangerous to the public."

And see case *Gamoga v The State* [1981] PNGLR 443.

FORGERY

There are a number of offences coming under forgery in Sections 459 to 482.
The basic elements are making a false instrument intending to use it to induce another person to accept it as genuine, and because of that acceptance, to do or not to do an act to his or her prejudice or to the prejudice of another.

The circumstances in which an instrument is false embraces instruments which purport to have been made, or to have been altered, by a person who did not in fact do so, or upon the authority of a person who in fact gave no such authority.

The circumstances in which an act or omission are to a person's prejudice, embrace:

1. That person's temporary or permanent loss of property, or the deprivation of an opportunity to earn or increase remuneration, or to gain some other financial advantage.

2. An opportunity for someone else to earn or increase remuneration, or to obtain some other financial advantage, from that person.

3. Acts or omissions which are the result of that person having accepted a false instrument as genuine in connection with the performance of a duty.

MISAPPROPRIATION - SECTION 383A

The elements are:

1. Dishonestly,
2. applies to his own use or the use of another,
3. property belonging to another.

The court must look into the mind of the accused and determine whether given his intelligence and experience he would have appreciated as right minded people would have done that what he was doing was dishonest. See *The State v Laumadava* [1994] PNGLR 291 and *Kindi Lawi v The State* [1987] PNGLR 183 and *Sing v The State* (2002) SC700.

MURDER

For Wilful Murder Section 299, the State must prove that it was the deliberate act of the accused that caused the death of the deceased, and that the act causing the death was done with the intention to kill the deceased.

For Murder Section 300, the State must prove that it was the deliberate act of the accused that caused the death of the deceased, and that the act causing the death was done either with intention to cause grievous bodily harm to the deceased or to some other person, or was done in the prosecution of an unlawful purpose and such act was of such a nature as to be likely to endanger human life.
See case *Simbago v The State* (2006) SC849 where death arose from reckless driving of a motor vehicle and appellant was not the driver but was an accomplice following a robbery. Appellant had been wrongly indicted for murder.

The act which is done in prosecution of the unlawful purpose is separate and distinct from the unlawful purpose. Thus the striking of the deceased with a weapon (the act) cannot also be the unlawful purpose. An unlawful purpose would be the commission or attempted commission of a robbery. And see *Pasi v The State* [1991] PNGLR 254 per Kapi DCJ.

Manslaughter Section 302 is when a person unlawfully kills another under such circumstances as not to constitute wilful murder or murder or infanticide. There is no element of intention here.

RECEIVING STOLEN PROPERTY

Elements. The State must prove:

a) that the property was stolen;
b) that the accused received the property;
c) that the accused knew the property was stolen.

It is not necessary to prove from whom the property was stolen.
The circumstances in which the property was received may in themselves be sufficient proof that the property was stolen. And see the case *Zimbin David v Yapu David* [1988] PNGLR 178.

ROBBERY

Robbery is an offence which contains elements of stealing and assault.
The elements are:

1. There must be an unlawful taking and carting away of property with the intention of permanently depriving the owner or person in lawful possession of the property. The property must be taken without the consent of the owner or person in possession, and consent obtained by force or by threat is no consent.
2. The property must be taken from the person of another.
3. The property must be taken by actual violence or by outing the owner or person in lawful possession in fear of actual violence.

RAPE - SECTION 347

Rape is the act of sexual penetration of a person without consent.
The elements are:

1. Sexual penetration is defined in *Criminal Code* s.6. This is deemed to have taken place on proof of penetration only, even the least degree of penetration is sufficient. The hymen need not be ruptured. Ejaculation is not necessary.

2. That the sexual penetration took place by force and without the consent of the person. The onus is on the prosecution to prove the woman did not consent.
Consent must be full and voluntary. Mere submission is not consent. Submission may be by threat or terror or by fraud.

A woman's consent to intercourse may be hesitant, reluctant, grudging or tearful but if she consciously permits it provided her permission is not obtained by force, fear, threats or fraud, it is not rape.
Consent obtained through threat or terror or force is not a consent to the act of intercourse but merely submission to it and the law does not require a woman to resist to the utmost of her strength.

Look at the particular circumstances - the place and time of the alleged offence, the nearness of friends, her own maturity and experience, require careful consideration. And other circumstances in which consent is not obtained are prescribed by Section 347A.

SEXUAL PENETRATION - S 229A

Note that in the offence in section 229A sexual penetration of a child, the element of sexual penetration is the main element along with the proof of the age but consent is not a relevant factor.
With respect to Section 229D 'persistent abuse of a child' note that the section requires the indictment to specify with reasonable particularity the period during which the offence occurred and must describe the nature of the separate offences alleged to have been committed. So merely to state in general terms that the offender did between certain dates commit persistent sexual abuse of a child is not enough. See the case *The State v Ogerem* (2004) N2780 and note the reference to S 528 "Form of Indictment' and the protection of Section 557.

SORCERY

See *Sorcery Act* Ch 274.
Whilst Section 5 provides that the existence of sorcery in a factual sense is not recognised, yet the belief, which generates such emotion and passion leading to the commission of serious offences such as killing, is a universal fact in PNG. See the Case *Kwayawako v The State* [1990] PNGLR 6. Note that this case was basically concerned with a consideration of the belief in sorcery as a mitigating factor in an offence under the *Criminal Code*
The *Sorcery Act* in Section 7 provides for the offence of doing an act of forbidden sorcery. For a case of this see *The State v Ani Obande* (1983) N444.
Note that the death of any victim may not be taken into account in sentencing for an act of forbidden sorcery - see the case *The State v Noah Magou* [1981] PNGLR 1.
In the offence of making an accusation of sorcery under S 10 the accusation must be made to a third person about an other, it does not cover an accusation to the alleged sorcerer himself. See case *Uari & Anor v Taurake* [1976] PNGLR 337.
The case *Balu Mau'u v Pare* [1973] PNGLR 64 goes into the procedure in a charge of sorcery where a plea of guilty was wrongly entered where the accused had said "Yes it is true, I did it to trick him".

The Courts have accepted that in certain circumstances sorcery can be a mitigating factor when sentencing under the *Criminal Code* for the offence of murder. See the case *Kwayawako v The State (above)* and the case *Baipu v The State* (2005) SC796. While the deterrence and punishment purposes of sentencing are relevant, rehabilitation should be emphasised: The *State v Boat Yokum* (2002) N2337.

As a corollary to the statement in *Kwayawako's Case above* that the existence of sorcery in a factual sense is not recognised there can be no offence of killing by sorcery under the *Criminal Code.*

STEALING

The essential elements of stealing are
1. That the property must belong to someone other than the accused;
2. It must be taken and carried away; and
3, the taking must be without the consent of the owner of the property.
4. The property must be taken with the intention of permanently depriving the owner of it;
5. The property must be taken without a claim of right made in good faith; and
6. The property must be taken dishonestly.
Elements 4, 5 and 6 relate to the accused mental state at the time of the taking. Element 4 the intention of permanently depriving the owner of the property, it does not amount to stealing if the property is only taken for a temporary purpose, unless the person taking the property realises that the result will be that in fact the owner is permanently deprived. Element 5 the claim of right made in good faith, the question will be whether the accused genuinely believed he had a legal right to the property. It is not enough to believe he had a moral entitlement.

CHAPTER 5 - DEFENCES

ALIBI

Is when the accused has tendered evidence intended to show that at the time the offence was being committed the accused was somewhere else and therefore could not have committed the offence.
When an accused puts forward an alibi the burden of proving the accused's guilt continues to rest on the Prosecution. The Prosecution must disprove the alibi.

Notice of alibi must be given by the accused to the prosecution of the evidence of the alibi to be adduced. See *Criminal Practice Rules* O 4 r 4. The accused requires leave from the Court to introduce alibi evidence if notice has not been given within the prescribed period. For relevant principles on exercise of discretion on leave, see *State v Robert Wer* [1988-89] PNGLR 444.

The Prosecution must establish beyond reasonable doubt that the accused was at the scene of the crime at the relevant time. The prosecution cannot do so if there is any reasonable possibility that the accused was at another place according to the alibi evidence. The prosecution must therefore remove or eliminate any reasonable possibility that the accused was at the place claimed in the alibi evidence.

See Supreme Court case *Jaminan v the State (No 2)* [1983] PNGLR 318
A defence of alibi is not to be treated as an excusatory defence within Ch 5 of the *Criminal Code*. A late alibi towards the end of the trial and not put in cross-examination of State witnesses will reduce the weight to be given to the alibi as a defence. A defence of alibi can only arise if there is some evidence in support thereof. An alibi given in evidence and found to be false may, depending on the circumstances, amount to corroboration on the charge. And see *The State v Hahuahori* (2002) N 2185. A defendant is under an obligation to give notice of any defence of alibi and put in cross-examination the existence of evidence that will directly contradict State evidence or completely exonerate him or her. Failure to do so may lead to it being treated as a recent invention and therefore unreliable.

CLAIM OF RIGHT

Criminal Code Section 23; Bona fide claim of right.
This defence is available for an offence relating to property if an act done or omitted to be done is done so in the exercise of an honest claim of right and without intention to defraud. The person invoking this right must have; **firstly,** an honest claim of right in the property, and
secondly, he must exercise his right free of fraudulent intention in respect of the property.

In *The State v Wonom* [1975] PNGLR 311 SC 86, the Supreme Court considered in the circumstances of a person encouraging the commission of an offence that where the defence is raised on the evidence the issue is not whether the person encouraged acted in the exercise of an honest claim of right, but whether the person charged believed that the person encouraged had acted in exercise of an honest claim of right.
The Supreme Court in *Sebulon Wat v Peter Kari (No 2)* [1975] PNGLR 339 SC 87 considered the tests to be applied when an honest claim of right is raised on the evidence.
In the case *R v Magalu* [1975] PNGLR 188 Frost ACJ noted that hoping forgeries made would not be discovered defeated any honest claim of right.
In *The State v Gorea* [1996] PNGLR 141 N 1450 a defence of an honest claim of right by an employee of an accountancy firm over some cheques was rejected.
In *Singo v The State* (2002) SC700 there was a claim over a cheque.

COMPULSION/DURESS

Section 32. Justification and excuse: Compulsion.
Note that the justification here does not operate as a justification for an act which would constitute an offence punishable by death or the offence of wilful murder or where there is an intention to cause grievous bodily harm.
Compulsion raises the question whether the accused was driven to act as he or she did because of a genuine belief that if they did not act in this way he or she would be killed or seriously injured. Must not confuse this defence with self-defence. The accused needs to explain the details of the actual duress and then the Prosecutor has to negative that duress, and satisfy the court that the accused was acting voluntarily. The Prosecution must eliminate any reasonable possibility that the accused acted under compulsion or duress.
The court needs to consider the response of a reasonable person to the threats. The test is an objective one that a reasonable person would not have acted otherwise under the same duress, the reasonable person being an average person of ordinary firmness of mind of like age and sex in like circumstances.
See Cases: *The State v Towavik* [1981] PNGLR 140 and *The State v Undamu* [1990] PNGLR 204.
And see case *Pagawa v Mathew* [1986] PNGLR 154 where the defence of extraordinary emergency and compulsion was discussed in a case of entering the country illegally under the *Migration Act.*
Also see case of extraordinary emergency Section 26 of the *Criminal Code.*
The State v Joseph Ampi [1988] PNGLR 116

MENTAL ILLNESS

Insanity under Section 28 is directed to the state of mind at the time of the alleged offence. There is a presumption of sanity, see Section 27, and the onus is on the defence to establish insanity on the balance of probabilities and then if such is made out section 592 applies.

To establish that the accused was mentally ill so as not to be responsible according to law for his or her acts the accused must show that as a result of a defect of reason from a disease of the mind he or she did not appreciate the nature and quality of that physical act or did not know that it was wrong. By disease of the mind the law requires that the accused state of mind must have been one of disease, disorder, or disturbance arising from some condition which may be temporary or of long standing, whether curable or incurable. Such a condition may have been caused by some physical deterioration of the brain cells.
See case *Tombil Goi v The State* [1991] PNGLR 161 SC405.
See case *Wesley v The State* [1999] PNGLR 452 on elements of defence of insanity and onus of proof on the defendant.

Diminished responsibility is not the equivalent of insanity and is not a defence under the Code.

AUTOMATISM

Criminal responsibility does not attach to an act done in a state of automatism, that is where the act is not done in consciousness of the nature of the act and in exercise of a choice to do an act of that nature. Proving that the defendant was in a state of automatism is on him because automatism is akin to insanity and further is a state exclusively within his knowledge.
There is a distinction between an underlying mental infirmity which is prone to recur, which deprives the accused of the capacity to control his or her act and which prevents him or her from appreciating its nature and quality (insane automatism); and a transient, non-recurring mental malfunction caused by external factors (whether physical or psychological) which the mind of an ordinary person would be likely not to have withstood and which produces an incapacity to control his or her acts (sane automatism). Examples of non-insane automatism may be sleepwalking, post traumatic loss of control due to heads injury, or an act done in a state of temporary or transient dissociation following severe emotional shock or psychological trauma which was not prone to recur. (See the Australian case of *R v Falconer* (1990) 171 CLR 30.

Doherty J in the case *The State v Hekavo* [1991] PNGLR 394 said "Automatism was defined in *Bratty's Case* as connoting the state of a person who, though capable of action, is not conscious of what he is doing …it means unconscious involuntary action and it is a defence because the mind does not go with what is being done."

In *The State v Salaiau* [1994] PNGLR 388 Doherty J said it is clear from the case law in PNG and in other countries that to raise automatism there must a proper basis. It involves two things; first that the person suffered from the mental incapacity from time to time, and second that he suffered it at that time the offence was committed. Further the Court must distinguish the genuine cases of automatism and the fraudulent. The layman cannot safely, without the help of medical or scientific evidence, distinguish the genuine from the fraudulent.

Accused person insane during the trial Section 590 is concerned with the state of mind of the accused person at the time of the trial.

Fitness to plead or want of understanding of accused person under Section 569 does not go so far as to a finding of insanity. But it can lead to the position that a person can be held in custody until a later time when a determination as to fitness to plead can be considered.

MISTAKE OF FACT

See *Criminal Code* Section 25.
If a person does or omits to do an act amounting to a criminal offence under an honest and reasonable but mistaken belief, he is absolved from criminal responsibility for his action or omission had the true situation been different.
The belief must not only be mistaken, it must be both honest and reasonable. If A kills B with a gun by firing into the direction where unbeknown to him B was also in that locality for whatever reason, this does not accord A reasonable defence of mistake of fact because his action albeit may have been honest and mistaken, it was not reasonable as he had a duty of care to make sure before firing his gun that his act or omission would not place in danger lives of other persons who might be in the area for the same reason as himself.

This defence is not applied in isolation. It is usually considered together with other competing factors such a duty imposed by law on persons in charge of dangerous things. Section 287 of the Code imposes one such duty on every person who has in his charge or under his control any thing, whether living or inanimate, moving or stationary, of such a nature that in the absence of care or precaution in its use or management, the life, safety or health of any person maybe endangered, to use reasonable care and take reasonable precautions to avoid that danger.

It is not an unqualified defence and often easy to raise but often difficult to overcome the onerous responsibility of the reasonableness of the dangerous act in different given circumstances. In *Beraro v The State* [1988-89] PNGLR 562 the Supreme Court held that this defence is not open to manslaughter by negligence.

On the other hand however, mistake of fact as a defence can in some circumstances be raised in sexual offence cases provided the accused can show that he honestly and reasonably believed that the prosecutrix was consenting to the act of sexual intercourse. See *The State v Yama* (1990) N817 where mistake of fact was raised but failed.
The defence was successfully held to apply in relation to an offence under S 158 of the *Criminal Code* in which the accused was charged with being in possession of a forged banknote. He argued that he believed it was good money when given to him and he used it to buy food and drink at a shop. The issue was whether his belief was reasonable or not. Accepting his unsophisticated background the court found that his

belief to be reasonable and upheld the defence. See *The State v Okun John* (2000) N1977 and the case *The State v Peter Wamna* (1995) N1342.

PROVOCATION

Section 267 provides for provocation to be a defence in a situation where assault is an element. And it requires that the force used is not disproportionate to the provocation and is not intended to cause and is not likely to cause death or grievous bodily harm.
Note that Section 303 provides a defence of provocation with reference to the heat of passion which can reduce wilful murder or murder to manslaughter. But note the case *Angitai v The State* [1983] PNGLR 185 which suggests that the defence of provocation under S 267 is not available to an accused charged with murder and found guilty of manslaughter by the application of s.303.

Provocation under s.267 requires the accused person to satisfy the court that:

1 He is deprived by the provocation of the power of self control,

2. acts on the provocation on the sudden,

3. before there is time for his or her passion to cool, and provided further that the force used by the person charged

4. is not disproportionate to the provocation; and

5. is not intended to cause death or grievous bodily harm; and

6 the force used is not likely to cause death or grievous bodily harm.

Once there is sufficient evidence to raise provocation, he onus is on the prosecution to negative that defence.
For provocation as a complete defence to manslaughter see *Principal Legal Adviser Request No 1 of 1980* [1980] PNGLR 326. and see *Angitai v The State* [1983] PNGLR 185 SC252.
For the purpose of provocation the loss of self-control is not an absolute loss of all control, but a loss related both to the degree of provocation and to the degree and form of retaliation. The reasonable man against whose reaction to the provocation the accused's action is to be tested is an ordinary man in the environment and culture of the accused, but the test is objective and care must be taken that it does not become subjective and that it does not take account of any fact personal to the accused. *R v Hand* [1963] PNGLR 9.

Payback killing as provocation. See *Public Prosecutor v Keru & Anor* [1985] PNGLR 78. SC289.

SELF DEFENCE AND DEFENCE OF DWELLING HOUSE

See *Criminal Code* s.269 - Self defence against unprovoked assault; and s.270 - Self defence against provoked assault. And s.265 Defence of dwelling house.

The law recognises the right of an accused person to act in self defence from an attack or threatened attack. The right arises where the person believes that the act in self defence was necessary in order to defend themselves and that what the person did was a reasonable response in the circumstances as the person perceived them.

Self defence is referred to as a defence, it is for the Crown to eliminate it as an issue by proving beyond reasonable doubt that the act of the accused was not done in self defence. It may do this by proving beyond reasonable doubt that the accused did not believe at the time of the incident that it was necessary to do what he she did in order to defend him or herself; or if it is reasonably possible that he or she did have such a belief, that nevertheless the act of the accused was not a reasonable response in the circumstances as he or she perceived them.

As to whether the accused may have personally believed that his or her conduct was necessary for self-defence the court must consider the circumstances as the accused perceived them to be at the time of the conduct. The circumstances should not be looked at with the benefit of hindsight but in the realisation that calm reflection cannot always be expected in a situation such as the accused found him or herself.
Meckline Poning v The State (2005) SC814.
And Section 271 covers the actions of a person aiding the person who is being threatened.

In relation to the defence of a dwelling house Section 265 also covers the actions of another person who assists the person in peaceful possession of the dwelling house.
The degree of force which it is lawful for the accused to use for the purpose of defence is set out in *R v Muratovic* [1967] Qd R. 15. “The person using force in self defence is entitled to use any force which is reasonably necessary to preserve himself from death or grievous bodily harm if (1) the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and (2) the person using the force by way of self-defence believes on reasonable grounds that he cannot otherwise preserve the person defended from death or grievous bodily harm”. And as referred to in *R v Kaiwor Ba* [1975] PNGLR 90. Also see *Tapea Kwapena v The State* [1978] PNGLR 316.

CHAPTER 6 - BAIL

See *Bail Act* Ch 340

PENDING TRIAL

An applicant for bail starts with a heavy presumption in his or her favour, as the *Constitution* and the *Bail Act* entitle an applicant to bail.
Refusal or delay by any judge or magistrate to bail any person bailable is at common law and by virtue of the Constitution an offence against the liberty of the subject.

The *Constitution* s.42 (6) provides that a person arrested or detained for an offence is entitled to bail at all times from arrest or detention and to acquittal or conviction unless the interests of justice otherwise require.
The *Bail Act* does not exist for the purpose of sentencing persons to be imprisonment prior to their trial. It provides for a system of conditional liberty to ensure certain objectives. They are to be gathered in particular from S 9; and include

for the protection of individuals in the community and the community,
to ensure that people attend their trial, and
to ensure that they commit no further offences whilst on bail.

See case *Keating v The State* [1983] PNGLR 133.
Section 9 on grant of bail before acquittal or conviction, states Bail not to be refused except on certain grounds.
Where bail is refused, the court shall at all times give the reasons in writing for its decision refusing bail. See Section 16. Once bail has been refused a person can apply again to the same or another judge but must show change in circumstances which must relate to reasons for earlier refusal: *Makus v The State* (1999) N1931
A person on bail is entitled to remain at liberty until he or she is required to appear before a court which at the latest is when the hearing commences. At that point the person's right to remain at liberty ceases and he or she is thereafter in the custody of the court.

BAIL DURING TRIAL

Once a trial has begun, the further grant of bail, whether during short adjournments or overnight, is in the discretion of the trial judge. It may be a proper exercise of this discretion to refuse bail during short adjournments if the accused cannot otherwise be segregated from witnesses.
An accused who was on bail while on remand should not be refused overnight bail during the trial, unless in the opinion of the judge there are positive reasons to justify this refusal. Such reasons are likely to be; that a point has been reached where there is a real danger that the accused will abscond, either because the case is going badly for him or for any other reasons; or that there is a real danger that he may interfere with witnesses.

BAIL AFTER CONVICTION

Section 10 Bail after conviction and before sentence is discretionary. Bail after a conviction and pending an appeal is a discretionary matter for which there must be exceptional circumstances. See the case *Jaminan v The State.* [1983] PNGLR 122.

Guarantors to bail

Ensure that any guarantor fully understands the obligation being placed on them and ensure that they personally sign the guarantee and are in a position to enforce the conditions of the bail.
When fixing the amount in relation to a guarantor the bail authority is required to take into account the financial means of the guarantor: s19.

CHAPTER 7- SENTENCING

OUTLINE OF SENTENCE JUDGEMENT

A pro forma outline for a sentence judgement.

1. The Prisoner has been found guilty to ….or has pleaded guilty to …

2. The offence comes under S…of the Criminal Code and attracts a maximum penalty of ….

3. The Facts are….(either as found by the Judge on the conviction following the trial, or as agreed by the Prosecution and Defence on the depositions for the plea of guilty.)

4. Admissions

5. Criminal History

6. Subjective matters / mitigating circumstances.
   Age
   Background
   Married? Family?
   Employment
   Co-operation
   Contrition - any
   Any compensation or restitution.
   References
   Guilty plea?

7 Extenuating circumstances, eg non-legal provocation.

8 Aggravating factors

9 Community attitude

10 Deterrence

11 Sentence - and refer to sentencing principles and precedents, and allow for any remand custody.

12 Totality if more than one count.

PURPOSES OF SENTENCING

Protection of the community - but this does not mean a long sentence just in case of re-offending. Cannot impose sentences of preventive detention.

General and specific deterrence - The community must know that offending will incur some punishment.
Rehabilitation - Note the *Probation Act.*
Retribution and denunciation of the behaviour.
Principle of equity and fairness. There must be consistency and parity in sentences for the same offence.
But totality where a number of offences are being considered - the need to strike a balance of imposing sentences for each offence without making the total too excessive. See separate heading under 'Totality".
Mercy and leniency for co-operation and plea of guilty and contrition and remorse.

SENTENCING OPTIONS

Criminal Code Sections 18, 19, 20.
Section 18 sets out the kinds of punishment which include full time imprisonment, fine, security to be of good behaviour, and restriction of movement. For security to be of good behaviour and restriction of movement utilise the provisions of the *Probation Act.*
Note Section 19 which provides further detail on the construction of the provisions of the Code as to punishments.
Section 600 provides further details on how to apply restriction of movements orders.
Section 601 provides for conditional suspension of punishment on first conviction and note reference in this section to restitution of property and compensation. And then note section 623A on *Restitution of Property Act***.**

Overall utilise the provisions of the *Probation Act* for all such orders and note the availability of various conditions in Sections 17 and 18 that may be imposed in Probation Orders.

SUSPENSION OF SENTENCE

Criminal Code Section 19 (6) enables a sentencing authority to suspend part of a sentence of imprisonment on certain conditions.
Section 601 provides for conditional suspension of punishment on first conviction where the offence incurs a sentence for a period of not more than three years.
The primary purpose of the power of suspension is to first of all convey the seriousness of an offence and the consequences of re-offending to an offender whilst also providing the offender with an opportunity to avoid those consequences by displaying good behaviour. Suspension is not an exercise in leniency.

The Supreme Court in the case *Public Prosecutor v Tardrew* [1986] PNGLR 91 stated certain principles relative to the suspension of a sentence under three categories:

1. Where suspension will promote the personal deterrence, reformation or rehabilitation of the offender.
2. Where suspension will promote the repayment or restitution of stolen money or goods.
3. Where imprisonment would cause an excessive degree of suffering to the particular offender, for example because of his bad physical or mental health.

In respect of young first offenders, 18 years and above suspension is not appropriate except where the offender is very young or where there are special circumstances. See *Gimble v The State* [1988-89] PNGLR 271.

In the case *The State v Welford* [1986] PNGLR 253 the Judge considered that a suspended sentence was inappropriate where there was a likelihood of the prisoner leaving the country and any recognizance to be of good behaviour would have little impact.

Consideration to suspend a sentence should only be given after a court has decided on the appropriate sentence. And before considering suspension the court should have ordered a pre-sentence report and have all material before it relating to the particular prisoner – *Probation Act* s.13.

In the case *Public Prosecutor v Hale* (1998) SC564, the Supreme Court considered a suspension which had been given in a robbery case and in quashing the suspension noted that the trial judge had no pre-sentence report nor any report from the community and sought no help from the community in the supervision of the suspended sentence. And see *Gima & Arnold v The State* (2003) SC730.

For suspension of minimum sentence for instance escape, see *State v Thomas Waim* [1998] PNGLR 360 and *Gima Arnold v The State* (2003) SC 730.

Suspension of a sentence must be considered and pronounced at the time the trial judge hands down the sentence. Ensure that the warrant is clear on the details of any suspension and that any recognizance is properly signed.

***Criminal Law (Compensation) Act* 1991 -** Compensation requires careful consideration. For compensation as a form of punishment, see *The State v Kauwa* [1994] PNGLR 503. If compensation has been paid or is to be paid, is it a mitigating factor without being seen as the cost of crime or a way of using a civil remedy as a way of avoiding a criminal sanction. Compensation should not be calculated as the equivalent of the civil remedy. For weight to be given to compensation, see *Manu Kovi v The State* (2005) SC 789. Also the Court has to consider who pays and receives the compensation, the actual perpetrator or the relatives or the victim.

Section 2 requires the Court to consider compensation when considering punishment. See *The State v Wena* [1993] PNGLR 168.
Compensation is not an appropriate punishment or mitigating factor where the victim is a child of tender age. *The State v Muma* [1995] PNGLR 161.

There is further legislation which should be considered namely the ***Proceeds of Crime Act* 2005.** Under the provisions of this Act the Public Prosecutor can make various applications to the court, namely restraining orders, forfeiture orders, and pecuniary penalty orders.
Under section 40 the Public Prosecutor can apply for a restraining order where a person has been convicted of, or has been charged with an indictable offence, or it is proposed that he or she be charged with an indictable offence. See Sections 38 and 39 and 41 and on for relevant considerations and requirements.
Under section 58 the Public Prosecutor can apply for a forfeiture order where a person has been convicted for an indictable offence and the property against which the order is sought is tainted property. Upon such an application the court can consider such factors as whether any hardship would be caused to any person, the gravity of the offence, and to what use the property was ordinarily made. There are time limits for the making of such an application and requirements for notice.
Under section 84 the Public Prosecutor may apply to the court for a pecuniary penalty order against a person where that person has been convicted of an indictable offence and has derived benefits from the commission of the offence.

PRACTICE AND PROCEDURE ON SENTENCING

Role of the State Prosecutor. The broad principle is that the Prosecutor is to assist the court to avoid appellable error. The performance of that duty to the court ensures that the prisoner knows the nature and extent of the case against him or her and so has a fair opportunity of meeting it.
A good reference to what is expected is the New South Wales Barristers Rules which state:

- A Prosecutor must not seek to persuade the court to impose a custodial sentence or a sentence of a particular magnitude.
- Must correct any error made by the opponent on the issue of sentence
- Must inform the court of any relevant authority or legislation bearing on the appropriate sentence
- Must assist the court to avoid appellable error on the issue of sentence.
- May submit that a custodial or non-custodial sentence is appropriate
- May inform the court of an appropriate range of severity of penalty including a period of imprisonment by reference to any appellate authority.
- Should provide statistics from any relevant judicial research system or the case law.

The Prosecutor should present the Court with any prior record of the prisoner.
The Judge should ensure the Allocatus is administered. Section 593.
Is there any Pre-Sentence report - note *Probation Act* S 13.
Is there a Victim Impact Statement. Section 21A
Refer to any statistics if they are available or any guidelines sentences - for parity and consistency .
Check whether there are any other offences to be taken into account -Section 603.

Role of the Defence Counsel. The role of the Prisoner's representative or lawyer includes to ensure - that the allocatus is administered, be aware of any prior offences that are to be brought to the Judge's attention, be aware of relevant sentencing statistics, consider whether there are any other offences that could be taken into account, and ensure that any subjective factors in favour of the prisoner are brought to the attention of the court.

OBJECTIVE FACTORS OF THE OFFENCE

Statutory maximum and worst category. The maximum is usually reserved for the worst category.
Aggravating factors - including those pleaded in the indictment and other factors such as drugs, alcohol and prior convictions.
Community attitudes to offence. See *Steven Loke v The State* (2006) SC836.
Effect on the victim - but see the victim impact statement if there is one.

SUBJECTIVE FACTORS FOR THE OFFENCE

Personal characteristics
Youth is a mitigating factor. Balance need for retribution with hope for rehabilitation before a young offender becomes too settled into criminal ways.
Intellectual and physical condition may lessen the need for general deterrence.

Conduct before offending
Has the prisoner abused conditional liberty while on bail.
Prior criminal record should not increase the sentence but can be a factor that influences any chance of leniency.
Prior good character is an established mitigating factor in the sentencing process however the weight that must be given to the prisoner's otherwise good character will vary according to all the circumstances of the case.

Good character does not warrant significant leniency where there has been an abuse of a position of trust which trust was an incident of the supposed good character, such as in offences involving sexual assault against young children.

EXTENUATING CIRCUMSTANCES

Extenuating circumstances relate to circumstances of the commission of the offence which reduce the gravity of the offence eg. de-facto provocation and lack of planning. They may also be regarded as mitigating factors but the latter usually refers to factors which are unrelated to the commission of the offence such as first offender, youth, prior good character, stable family, education or church background. Whilst both extenuating circumstances and mitigating factors have the effect of reducing the punishment, they must be considered separately and appropriate weight given. For a distinction between extenuating circumstances and mitigating factors and different weight to be given, see *Ume & Os v The State* (2006) SC836.

ALCOHOL - CONSIDERATION ON SENTENCE

Alcohol does not excuse an offence, it may provide an explanation for how an offence occurred and in a particular case may indicate that the offender has acted out of character, but when a person has a propensity for overindulgence in alcohol and knows the effect it can have on him it cannot be a mitigating factor on sentence that the offence was committed whilst under the influence of alcohol.
See case *Fletcher-Jones NSWCCA* (1994) 75 Aust Crim R 381, which referred to Hunt J in *Coleman* (1990) 19 NSWLR 467:

> *"The degree of deliberation shown by an offender is usually a matter to be taken into account, such intoxication would therefore be relevant in determining the degree of deliberation involved in the offender's breach of the law. In some circumstances it may aggravate the crime because of the recklessness with which the offender became intoxicated, in other circumstances it may mitigate the crime because the offender has by reason of that intoxication acted out of character".*

But in *Fletcher's case* the situation was that it was not out of character for the offender to become intoxicated as he admitted he had a drinking problem and he knew what effect alcohol could have on him. Furthermore he deliberately set out, as he described it, to get pissed and continued drinking even when asked by his wife to desist. In those circumstances if anything the voluntary ingestion of alcohol was an aggravating factor rather than a mitigating factor.
And see *Mase v The State* [1991] PNGLR 88 at 91. If people drink liquor, get drunk and commit crime, they must not expect leniency from the courts unless, of course, the intoxication is shown to have the effect of diminishing responsibility. Also the Supreme Court in *Apo v The State* [1988] PNGLR 182 and *The State v Morgan* (2001) N217

THE SENTENCE

Note the maximum determined by the legislation and then how it can be applied by S 19 and then apply all relevant considerations including any subjective and mitigating factors. Generally a sentence within a limited range of years may be appropriate. As sentencing involves a discretionary exercise based on an assessment of various factors, it is not possible to say that there is only one correct or appropriate penalty to the exclusion of any other penalty so consider the range of sentences as applied in other cases and in particular in any Supreme Court guidelines.
And note *Criminal Justice (Sentences) Act* Section 3. A sentence is to take effect from the beginning of the day on which it is imposed. And also note the reference to allowing for pre sentence remand custody.

PRINCIPLE OF TOTALITY

Supreme Court in *Mase v The State* [1991] PNGLR 88. In applying the totality principle to jointly charged offences, the Court:

a) must consider the appropriate sentence for each offence charged and then consider whether they should be concurrent sentences or cumulative sentences. See *Konis Haha v The State* [1991] PNGLR 205.

b) must, where the sentences are made cumulative, consider whether the total sentence is just and appropriate;
c) must, if the total sentence is not just and appropriate, vary one of more of the sentences to get a just total.

Then in determining whether the total sentence is just and appropriate the court:

a) may take into account the maximum penalties provided by law for each offence and whether or not each offence falls into the worst, most serious or less serious of its kind;

b) should ensure that the total sentence is not substantially above the normal sentence for the more serious (not the worst type) of the offence;

c) may have regard to the prevailing community perception of the relative seriousness of the different serious offences.

d) may have regard to the general sentencing ranges for other serious offences where totality of individual sentences for serious offences is obviously long;

e) must assure relativity between all the offences, their seriousness and criminal responsibility so that the sentences imposed reflect, in principle, the relative seriousness of the offences and their consequences.

CHANGE OF THE LAW - EFFECT OF

See *Criminal Code* section 11.

If there is a change in the law then the law to be applied is the law that applied at the time of the offence. This is of particular relevance when there has been a change in the maximum penalty to be considered. But note that if there has been a reduction in the penalty then an offender cannot be punished to any greater extent than is authorised by the new law. Thus even though the offender may have committed the offence when the penalty was harsher, if the penalty is reduced the offender gets the benefit of the reduced penalty. An example of this would be the reduction in the penalty for incest through the amendments in 2003.

SENTENCING - PARTICULAR OFFENCES

This section only includes some of the main offences.

ARSON - S 436

In the case *The State v Yomb* [1992] PNGLR 261 Doherty J discussed a number of factors to consider when considering sentence. And see *The State v Yeskulu* (2003) N2410 for a tariff guideline and suggested increases due.
Recent range of sentences:

Year 2003 1 year to 7 years
Year 2004 1 year susp to 5 years.
Year 2005 1 year to 4 years with part susp.
Year 2006 2 years to 5 years

DANGEROUS DRIVING CAUSING DEATH

Year 2000 1 year susp with Bond to 2 years susp with Bond.
Year 2004 1 year to 4 years.
Year 2005 3 years

ESCAPE

Escape is the only offence that prescribes a minimum sentence and can be dealt with both as a summary or as an indictable offence, respectively under s. 22 of the *Summary Offences Act* Ch 264 and s. 139 of the *Criminal Code***.** The Supreme Court in *Edmund*

Gima and Siune Arnold v. The State (2003) SC730 laid down a number of important principles which included relevant factors for consideration before arriving at a sentence, and without limiting the list include:

(a) receipt of information by the escapee of a retaliatory killing of a close relative supported by prison officers;

(b) any evidence of violent sexual attacks upon weaker and younger inmates by more aggressive ones in prison supported by prison officers;

(c) whether the escape is en mass;

(d) whether any weapons are used;

(e) where weapons are used whether any personal or property damage or injury has been occasioned;

(f) the expenses to which the State has been put to, to recapture the escapee;

(g) when and how the recaptured occurred; and

(h) whether there is a guilty plea but this has to be contrasted against the chances of a successful denial.

Note the definition of prisoner in *Gima's Case above* and affirmed in *Brian Laki v The State* (2005) SC783. For suspension of minimum penalty for escape, see SCR 1 of 1994 *The State v Aruve Waiba* (Unnumbered Judgment of Supreme Court dated 4th April 1996; *Gima Arnold v The State* (2003) SC730 and *State v Waim* [1998] PNGLR 360.

GRIEVOUS BODILY HARM AND WOUNDING

These offences cover a wide range of actual severity and therefore it is hard to find a common tariff. Each case will therefore depend on the actual circumstances. Wounding simpliciter S 322 incurs a maximum penalty of 3 years, Grievous bodily harm S 319 incurs a maximum of 7 years, however in S 315 acts intended to cause GBH can incur a maximum of life imprisonment. The general range of sentences has been:

Year 2003 9 months to 10 years
Year 2004 6 months susp and up to 5 years.
Year 2005 1 year susp up to 5 years.
Year 2006 1 year to 6 years

INCEST - S 223

This section was amended in 2003 and previously the penalty was a maximum of life imprisonment, but the penalty is now 7 years so note the effect of s.11 of the Code whereby an offender receives the benefit of the reduced penalty even though the offence may have been committed before 2003. The general range prior to the amendment was 7 years (see *Joel Samson v The State* (1998) SC575) to 10 years (*Dori Inara v The State* (2002) SC 688). The general range in recent years has been:

Year 2003 2 years to 7 years
Year 2004 2 years to 7 years
Year 2005 1 year to 7 years.
Year 2006 3 years

It is now possible in view of the new amendment with the reduced penalty that the prosecutors may indict what could be incest offences under s.229A in order to come under the heavier penalties under s.229A.

MISAPPROPRIATION- SECTION 383A

There is a guideline sentence of *Wellington Belawa v The State* [1988-89] PNGLR 496 however in recent years the courts have regarded the sentencing range suggested in that case as being outdated and no longer appropriate because of the frequency and the prevalence of misappropriation cases since then,
Recent range of sentences:

Year 2003 6 months to 7 years.
Year 2004 5 months to 6 years some with suspensions.
Year 2005 2 years to 4 years.
Year 2006 1 year to 3 years

MURDER - S 300

See the schedule of suggested tariffs in the Supreme Court case of *Kovi v The State* (2005) SC789.

Recent range of sentences:

Year 2003 1 year to life.
Year 2004 5 years to 21 years
Year 2005 9 years to life imprisonment.
Year 2006 6 years to 23 years

WILFUL MURDER

See the schedule of suggested tariffs in the Supreme Court case of *Kovi v The State* (2005) SC789. And see *Steven Loke v The State* (2006) SC836 for principles on imposition of the death penalty.

Recent range of sentences:

Year 2003 10 years to life.
Year 2004 6 years to death penalty.
Year 2005 7 years to life.
Year 2006 9 years to 39 years & life.

MANSLAUGHTER - S 302

Manslaughter covers a wide range of factual situations, and is often seen as an accidental killing.
The range of sentences is wide. But see the schedule of suggested tariffs in the Supreme Court case of *Kovi v The* State (2005) SC789.
The range of sentences in recent years:

Year 2003 5 months to 14 years
Year 2004 1 year to 13 years.
Year 2005 1 year to 5 years.
Year 2006 3 years to 14 years

ATTEMPTED MURDER – S 304

Attempted murder is potentially more serious than some crimes resulting in death because there is the intention or some deliberation to cause death whereas in some crimes resulting in death there may not have been an actual intention to cause death. And see the Supreme Court in *Naibiri & Apia v The State* (1978) SC137.

Recent range of sentences:
Year 2003 7 mths to 14 years.
Year 2004 8 years and 25 years (*The State v Ute* (2004) N2550.)
Year 2005 3 years.
Year 2006 20 years

RAPE - SECTION 347

Whilst the cases *Aubuku v The State* [1987] PNGLR 267 and *The State v Kaudik* [1987] PNGLR 201 did discuss guidelines for sentencing in rape cases with an 8 years starting point for rape and 12 years for gang rape, the Supreme Court in *Thomas Waim v The*

State (1996) SC 519 did say that those cases were decided 10 years ago and there has been an escalation in the prevalence and seriousness in the commission of rapes and multiple gang rapes over the period and that 12 years for gang rape is now inadequate and inappropriate and the Court noted that some recent decisions of the National Court have properly reflected the community's concerns and imposed sentences of 14, 15 and 16 years. The Supreme Court in this case suggested that a term of 25 years was a quantum leap and reduced that term to 18 years. See *Setep v The State* (2001) SC666 where a sentence of life was reduced to 25 years.
Recent range of sentences:

Year 2003 4 years to 16 years
Year 2004 3 years to 19 years
Year 2005 1 year to 14 years
Year 2006 4 years to 16 years

SEXUAL ASSAULT AGAINST CHILDREN - SECTIONS 229A AND FOLLOWING

These provisions set out a completely new penalty regime from the old Section 216 offence of unlawful carnal knowledge. The maximum penalty under the repealed s 216 was 5 years imprisonment. However the new regime of penalties up to life imprisonment indicate the intention of Parliament that sexual offences involving young persons are to be treated more seriously. So old sentencing guidelines have no relevance and it is necessary to consider the new maximum penalties.
An example of matters to be considered when sentencing is set out in the case *State v Mokei (No 2)* (2004) N 2635.

Matters to be considered include:

1. Is the prisoner a first offender.
2. Is there a guilty plea.
3. Age of the victim and the age of the offender.
4. Was there consent.
5. Was there any aggravated violence.
6. Was the offence part of a pattern of persistent abuse.
7. Was there a relationship of trust, authority or dependence.
8. Has the offender shown any remorse, apology or regret or sorrow.
9. Has the offender caused trouble for the victim or family.

In 1989 Brunton AJ in the case *The State v Apusa* [1988-89] PNGLR 170 referred to the factor of the age difference between an offender and the victim when sentencing and suggested that sexual intercourse between young lovers would be considered in the lower part of the sentencing range but the range would be higher where the offender is a mature man and also where there was a position of trust like in a teacher pupil situation. Section 229F specifically refers to the situation of abuse of trust or authority where the victim is between 16 and 18 years of age.

Range of sentences:

Year 2005 4 years and 16 years.
Year 2006 6 years to 18 years.

ROBBERY

There are three main offences here. **Robbery S 386 (1), Aggravated Robbery S 386 (2), and Attempted Robbery S 387,** however the main offence has been aggravated robbery, being robbery whilst armed with a dangerous weapon, and/or in company, and/or with violence.

In *Gimble v The State* [1988-89] PNGLR 271 the Supreme Court discussed some guidelines to be considered as appropriate to sentencing for aggravated robbery for which the maximum penalty is life imprisonment. These included: 1. On a plea of not guilty by young offenders carrying weapons and threatening violence, for robbery of a house a starting point of 7 years, for robbery of a bank a starting point of 6 years, and robbery of a store, hotel, club or vehicle a staring point of 5 years, and for a street robbery a starting point of 3 years. 2. Features of aggravation to consider would be the level of actual violence and the amount stolen. 3. A plea of guilty would justify a lower sentence.

However the Supreme Court in the case *Public Prosecutor v Hale* (1998) SC 564 considered that the range of sentences suggested in *Gimble's Case* may no longer be appropriate and considered that for example the starting point for a robbery of a home at night with the use of firearms should be 10 years. But in *Anis v The State* (2000) SC642 the Supreme Court suggested that *Gimble's Case* was still good law as far as categories are concerned but while the actual sentences recommended may be out of date the court should not increase sentences by leaps and bounds.

Recent range of sentences:

Year 2003 1 year probation to 10 years
Year 2004 1 year to 13 years.
Year 2005 2 years to 12 year
Year 2006 1 year to 19 years

CHAPTER 8 – APPEALS FROM MAGISTRATES

See *District Courts Act* Ch 40. And see *Appeal Rules* 2005 for Directions and Procedures for the hearing of an appeal.

TIME TO APPEAL

Section 219. Right of appeal by a person aggrieved.
State cannot appeal against the dismissal of an information. State can appeal against the sentence.
S 220. Appeal instituted by a Notice of appeal together with a recognizance. Appellant must give notice of intention to appeal within 1 month of the decision.
See above Sections generally for requirements.
Section 223. Appellant may be released from custody pending appeal. This is a bail discretion.
Section 226. Within 40 days of instituting appeal appellant to set appeal down for hearing – this is the Entry of Appeal. And note section 227 upon failure to set appeal down for hearing the Orders may be enforced.
On Section 226 and 227 Entry of Appeal is mandatory; see cases *Mote v Tololo* [1996] PNGLR 404 and *Andrew v John* (2001) N2031. The Entry of Appeal must be genuine in that the appeal must be ready for hearing. To enter an appeal for hearing within the required period when the appeal is not ready for hearing may amount to abuse of process: *Moses v Magiten* (1999) N 2023; *Haino v Sai* (2006) N3063.

HEARING OF THE APPEAL

Section 229. Evidence other than the evidence and proceedings before the Court by which the order or determination was made shall not be received on the hearing of the appeal except by consent of the parties or by order of the National Court. The hearing of the appeal is a hearing on the depositions before the Magistrate. Any fresh evidence is bound by the principles of fresh evidence.
The right of appeal from the District Court is created by Statute therefore the provisions must be complied with strictly. *Nikints v Rumints* [1990] PNGLR 123.

For the powers of the National Court on the hearing of the appeal see section 230.

For a concise outline of the procedures for an appeal see the case *Application of Linah Edwards* (2005) N2804.

AN APPELLANT IN PERSON

In Appeals from the District Court an appellant in person should be told how the appeal is to be heard and that it is not a matter of recalling all the witnesses again but that it means that the appellant in person has the onus of presenting their submissions to the Judge and explaining why they say that the Magistrate made a mistake. This has to be done by reference to the depositions and evidence that was before the Magistrate. The onus is first on the appellant to explain how and where the Magistrate erred. Then the other party in the matter would submit how the Magistrate was correct in the result of the case and that the case was heard correctly by the Magistrate.

RECOGNIZANCE

A recognizance should not be too onerous that it unfairly restricts the right of a party to appeal.
The failure to enter a recognizance as and when required by the Rules is a failure of a condition precedent to the right of appeal. See *Nikints v Runints* [1990] PNGLR 123 and *Application of Linah Edward* (2005) N2804.

FRESH EVIDENCE ON AN APPEAL

The granting of leave to call fresh evidence on an appeal is a matter guided by the principles of in the interests of justice, and there must be an explanation offered as to why the evidence was not called in the lower court. It may be that in the interests of justice an appeal court on its own volition may require a witness to attend and give evidence on an appeal where the court finds that it needs relevant testimony and that a person has not received a fair trial. So did the appellant receive a fair hearing in the lower court. One principle to be remembered on the hearing of an appeal is that there is an interest in keeping parties to the case which they ran at first instance.
In a matter of criminal justice with criminal sanctions it is not a matter of saying oh things did not go well therefore I should be able to start all over again. That is not in the interests of justice.

Fresh evidence may be presented on appeal only when that evidence could not with reasonable care have been discovered previously: *Aikaba v Tami* [1971-1972] PNGLR 155. Conduct of Counsel at trial in not presenting or explaining evidence, see *Busina Tabe v The State* [1983] PNGLR 10. For principles on fresh evidence on appeal given special circumstances and conditions of the country, see *James Neap v The State* (1982) SC 228. And see the Supreme Court on fresh evidence in *Ted Abiari v The State (No 1)* [1990] PNGLR 250 where in a matter before the Supreme Court, the test is, is it evidence that could not with reasonable means be ascertained, secured and admitted at the trial and does the justice of the case warrant the admission of the evidence the Appellant seeks to admit.

Fresh evidence in an adoption case – strict application of rules of evidence on fresh evidence to be waived where the paramount consideration is the interest of the child: *H & H v Director of Child Welfare* [1980] PNGLR 89.

STAY OF PROCEEDINGS AND BAIL

The filing of an entry of appeal for hearing automatically stays the execution of any order or decision from which the appeal is lodged. *Mote v Tololo* [1996] PNGLR 404. However this is only so long as the appellant files the entry of appeal and recognizance within the 40 days. And see *Andrew v John* (2001) N2031. The Entry of Appeal must be genuine otherwise it is an abuse of process: *Haina v Sai* (2006) N3063; *Moses v Magiten* (1999) N2023.

While there may be a stay, the matter of bail pending hearing of an appeal where an offence has been committed is still a discretionary matter subject to the *Bail Act.* See *Bail Act* Section 11. The *District Court Act* Section 223 provides that once a Notice of Appeal has been filed and a recognizance given or a sum of money deposited a court may release the appellant from custody. Whilst bail pending an appeal from the National Court will only be granted if exceptional circumstances are shown, see *The State v Yabara (No 1)* [1984] PNGLR 133 and *Enuma v The State* (1997) SC538 the above Section 223 of the *Districts Court Act* gives a wider discretion where the term of imprisonment may be shorter and there may be some time before the appeal can be heard.

CIVIL

CHAPTER 1 – TRIAL PROCEDURE

RULES OF COURT

The Rules are made by the Court for regulating and prescribing the practice and procedure. The Court has a general power to enforce compliance with the Rules and if any party fails to comply with any provision of the Rules the Court may make such order as it thinks just. The Court has a discretion in enforcing compliance with the Rules - as the justice and behaviour of the parties warrant. See *Burns Philp v George* [1983] PNGLR 55 and *PNGBC v Tole* (2002) SC694.

And see *Niugini Mining v Bumbandy* (2005) SC 804 - the Rules of Court are not intended as an end in themselves but a means to achieving a just resolution of the dispute between the parties. They are to be construed and applied flexibly to ensure that they serve the interest of justice.
The power is always discretionary, it is not absolute, the Court always has the discretion to act having regard to all the circumstances. Failure to follow the rules does not mean it is mandatory to apply sanctions.

LISTING AND PRE-TRIALING

Order 10 of *National Court Rules.*

Pre-trialing is conducted in respect of civil cases (see Listing Rules 2005). In respect of appeals, (see *Appeal Rules* 2005), and in respect of Judicial Review applications, (see *Judicial Review Amendment Rules* 2005), and Commercial cases, (see *Commercial List Rules* 2005.
Pre-trial is conducted by the Judge after close of pleadings and in respect of other proceedings at times as determined by the Registrar.
The process commences with a Notice of Directions Hearing in a prescribed form. The matters to be covered are set out in the notice form. The purpose of the pre-trial is to identify the issues that merit a trial and for the court to then issue directions for the parties to take the necessary steps to prepare the case for trial. Directions are issued in matters such as completeness of pleadings, identification of agreed and disputed facts, of issues, witnesses, filing of affidavits, filing of submissions, duration of trial, filing of pleadings book, fixing trial dates and enabling parties to negotiate and settle claims. Failing a settlement the pre-trial then allows for an expeditious disposition of the case.

ADR AND MEDIATION

The Court encourages parties to settle cases at any stages of the proceedings using alternate dispute resolution processes, particularly in the listings and pre-trial stages. In

2008, the *National Court Act* was amended and mediation was introduced: See *National Court (Amendment) Act* 2008, Act No 4 of 2008). The amendment is to be implemented in 2009.

COURSE OF TRIAL

And see O 10 and *National Court Listing Rules* 2005 and above notes on Pre-trialing. Note Rule 13. The Court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial, but otherwise the conduct of the trial shall be as set out in this rule.
Case is called. Appearances of or for parties is noted.
Plaintiff or plaintiff's lawyer will open the case by giving a general outline of what will be presented in evidence. This will inform the judge about the case and will highlight the issues and the questions between the parties that the Judge has to resolve. The outline should also draw attention to any points of law that may be involved. This opening should not extend to detailed argument on legal questions.
After the opening the plaintiff or lawyer will call the witnesses who will in turn be orally examined in chief, and cross-examined by the defendant and then re-examined by the plaintiff.
At the conclusion of the evidence the plaintiff or the lawyer will close the case.

At this point the defendant or defendant's lawyer may submit the defendant has no case to answer. If the defendant elects to call no evidence then the plaintiff or plaintiff's lawyer may make a closing speech whose object is to sum up the evidence and to stress the points of fact and law which should lead the judge to find for the plaintiff, and at the conclusion of this speech the defendant or defendant's lawyer will make the final speech in reply.
If the defendant or defendant's lawyer elects to call evidence he is entitled to open his case with an opening address if wanted. The defendant will then call witnesses who will in turn be examined and cross-examined and re-examined. At the conclusion of the defendant's case the defendant or lawyer will close the case and make a closing speech after which the plaintiff of plaintiff's lawyer will make a speech in reply.

The concluding speeches are very important as it is expected that they will clearly outline the way the judge should assess the evidence and draw the attention of the Judge to the relevant laws and principles applicable. The lawyers must bring all relevant authorities to the attention of the Judge. (Note that the slip rule should not be used to cover serious omissions of authorities and principles by the lawyer).

CHAPTER 2 – PRACTICE AND PROCEDURE

ADJOURNMENTS

General: Once a matter has been properly pre-trialed and listed it should not be readily adjourned.

The court has a general power to adjourn proceedings for the purpose of doing justice between the parties. However in determining whether an adjournment should be granted the court is not confined to applying the general traditional view that regard is only to be had to the interests of the litigants in the particular case, but should also take into account the competing claims of litigants in other cases awaiting hearing in the particular list, the working of the listing system of the court, and the importance of the proper working of that system of adherence to dates fixed for hearing. (eg see Australian High Court in *Sali v SPC* (1993) 67 ALJR 841)
The courts are becoming overloaded with business and the inevitable consequence has been delay. This in turn has brought an ever increasing responsibility on the part of judges to have regard in controlling their lists and the cases that come before them, to the interests of the community and of litigants in cases awaiting hearing, and not merely to the concern of the parties in the instant case. The days have gone when courts will automatically grant an adjournment of a case simply because both parties consent to that course, or when a decision to grant or refuse an adjournment is made solely by reference to the question whether the other party can adequately be compensated in costs.

The principle is that it is a matter for the discretion of the trial judge whether or not to grant an adjournment. Like all discretions it must be exercised judicially and not according to whim or fancy. Primarily, a case should proceed to be heard when it comes into the list for hearing. When a case has been specially fixed for hearing at a date some months in the future then it cannot be said when both parties are present with their witnesses that a judge is wrong in law in exercising his discretion to refuse an adjournment at the request of one of the parties unless to refuse an adjournment would prejudice that party to the point that it has been denied justice ….Equally an adjournment should not be granted that would prejudice the other party. *(See Watson v Watson* [1968] 2 NSWR 647.)
And see *Ok Tedi v Niugini Insurance (No 1)* [1988-89] PNGLR 355 (N750) where the following was stated: (1) The National Court has power to grant or refuse an application for adjournment of proceedings set down for trial. (2) An applicant for adjournment of proceedings set down for trial bears the onus of showing why a refusal to adjourn would result in injustice to him. (3) The applicant for adjournment should make the application promptly and must prove actual prejudice, not merely speculative prejudice. (4) The Court must also give consideration to the interests of the respondent to the application, that is, whether an adjournment would result in injustice to the respondent.

As the **Judge controls the trial** often when an adjournment is sought on account of some procedural defect of the other side such as late service of amended particulars or additional medical reports, an adjournment can be avoided by reserving the rights of the party not in default; as the case proceeds the adjournment often becomes unnecessary.

Short adjournments: Short adjournments such as for a matter of hours or until the following day may be granted where appropriate.

Unavailability of party or witness: Unavailability of a party or a material witness is usually a sufficient ground for an adjournment provided such unavailability is not the fault of the party whose interests will be prejudiced by the refusal of the adjournment or of his solicitor.

Indefinite adjournments: An adjournment ought not be granted for an indefinite period if this amounts to a refusal to hear the matter or a refusal to exercise the jurisdiction of the court.

Consent adjournments: The fact that both parties consent to the adjournment is not decisive. The court, not the parties, decides whether the case should be adjourned.

NB. In considering an adjournment an overriding consideration must be that unnecessary or continuous adjournments will always contribute to delay and backlog in the judicial system.

AFFIDAVITS

An affidavit is not a pleading but a statement of facts for the information of the judicial tribunal. Being a statement of facts such facts must be deposed to by the person asserting those facts or who has the first hand knowledge of those facts. Affidavits must set out facts and not arguments, submissions and/or opinions – arguments, submissions and opinions do not amount to facts. See *Duma v Hriehwazi* (2004) N 2526.

Affidavits by lawyers. A lawyer cannot assert to facts which are purely within the knowledge of the party, such an assertion of facts on the behalf of a party is in fact hearsay, unless the lawyer themself has that knowledge directly. And see *North Solomons Provincial Government v Pacific Architecture* [1992] PNGLR 145 (SC 422)

AMENDMENT

Generally the court may at any stage of any proceedings, on application by any party or of its own motion, order that any document in the proceedings be amended, or that any party have leave to amend any document in the proceedings, in either case in such manner as the court thinks fit. O 8 R 50. See *Komboro v MVIT* [1993] PNGLR 477 (N1186).

All necessary amendments shall be made for the purpose of determining the real question raised by or otherwise depending upon the proceedings, or of correcting any defect or error in any proceedings, or of avoiding multiplicity of proceedings.

The traditional view that a party should as a general rule be entitled to an amendment, even at a late stage in a trial to permit the real issues in dispute between the parties to be finally resolved should no longer be considered to reflect the contemporary approach. The contemporary approach reflects the view that the conduct of litigation is not merely a matter for the parties but is also one for the court. It also recognises the court should have regard to the need to avoid disruptions in the court lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard.

Matters tending against amendment. Would include that the amendment is so obviously futile that it would be struck out if it appeared in an original pleading, that it will require a further hearing after judgement has been reserved, that the application is made mala fide, that an order for costs is not sufficient to cure any prejudice to another party to the proceedings, and semble the increasing flow of litigation and pressure on the state of the lists.

Prejudgement interest. An amendment to the originating process so as to claim pre-judgement interest should normally be allowed.

Effective date of amendment. An amendment duly made, takes effect, not from the date when the amendment is made, but from the date of the original document which it amends and so originating process cannot be amended so as to add or substitute a new cause of action which did not exist at the date of the commencement of the proceedings.

AMENDMENTS TO PLEADINGS

Amendment without leave. Pleadings may be amended once without leave before pleadings are closed O 8 R 51. subject to being disallowed if the court would not have given leave if leave had been sought. O 8 R 52

Grounds for refusal of amendment. An amendment to a pleading will be refused if a party has deliberately framed his case in a particular way and the opponent may have conducted his case differently had the new issues been previously raised. A late application to add a limitation defence may be refused if the parties have until that stage fought the case on other grounds.

Amendment and limitation periods. Generally an amendment will not be allowed which sets up a cause of action which at the time of the amendment is barred by a statute of limitations, but amendment may be allowed within 14 days of the issue of the writ, or to amend a mistake in the name of a party if the mistake was not misleading, or to specify

the capacity in which the plaintiff is suing, or to add or substitute a new cause of action arising out of the same or substantially the same facts. See O 8 R 53.
Costs. When leave to amend is granted it is usually on terms that the party seeking leave pay the costs of the other parties occasioned by the amendment. This includes costs thrown away by the amendment and costs of any consequential amendments by the other parties.

AMENDMENTS TO JUDGEMENTS

The Court may on terms set aside or vary a direction for entry of judgement where notice of motion for the setting aside or variation is filed before entry of the judgement. O 12 R 8. For procedure for entry of judgement see Order 12 Division 2 Rules 10 to 20.
Otherwise after judgements and orders have been formally recorded or entered they can only be varied or discharged on appeal. "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and it is in substance … beyond recall by that court". *Bailey v Marinoff* (1971)125 CLR 529 at 530.
An application by a party to vacate a judgement where without fault on their part they had no opportunity to be heard would be an exceptional matter. See the discussion of that in the Australian case *Autodesk v Dyason* [1992-93] 176 CLR 300 where Mason CJ at page 301 stated that "the exercise of the jurisdiction to reopen a judgement and to grant a rehearing is not confined to circumstances in which by accident and without his or her fault the applicant has not been heard. The public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgement, it has pronounced on a misapprehension as to the facts or the law and where the Court's misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing." And note the majority of the Court in that case found that the matters raised in the application had however been canvassed in the proceedings.
Matters to consider when seeking to re-open a judgement were discussed by the Supreme Court in *Wallbank & Anor v The State* [1994] PNGLR 78 (SC472).

Slip rule. A clerical mistake in a judgement, order, or certificate arising from an accidental slip or omission may be corrected at any time. The slip rule is not meant to cover situations where a party claims that they were not afforded the opportunity to be heard on a material point. (see above)
For a consideration of an application of the slip rule see *Orogen Minerals v Commissioner General of Internal Revenue* (2003) N 2467 where the rule was applied where there was an omission to order interest on the sum to be refunded and the Court found this was an 'error, mistake or accidental omission' properly requiring the invoking of the slip rule. The Supreme Court discussed the slip rule in *SC Review 23 0f 2004 Application of Kakaraya* (2004) SC752 although the situation before the Court was more in the nature of the *Wallbank* situation above.

CONSENT ORDERS

Consent Orders which finally dispose of the proceedings cannot be revisited, see note above under Judgements. Where a consent order finally disposing of a proceeding is later challenged it can only be done so by fresh proceedings on the basis of the ground for the challenge, such as where there has been fraud. It would be by proceeding against the persons for the fraud alleged to have occurred.
Consent Orders which do not finally dispose of the proceedings can be brought before the Court for further order.

BIAS

The test for disqualification is the demanding one stated by the High Court in the Australian case of *Livesey v NSW Bar Association* [1983] 151 CLR 288. *"a Judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in the matter"*.

The apprehension of bias is that attributed to a reasonable bystander but the extent of the knowledge or understanding of the reasonable bystander comprehended by the statement of principle is not so clear.
Circumstances that may raise the question of bias include:

1. That the judge is related to a party, a witness, being situations which appear quite clear. Being related to one of the parties legal representatives is not necessarily a clear situation.

2. That the judge acted in a professional capacity in another matter for a party, although this would still depend on the precise circumstances.

3. That a judge has made a finding in other proceedings on the credibility of a party or a lay witness to be called.
4. That a judge has had a communication with a party, a witness or a legal representative at or about the time of hearing in the absence of or without the consent or approval of the other party.

5. That a judge has considered the matter in another capacity.

6. If during the trial the judge has expressed an opinion prior to the conclusion of the evidence and submissions, indicating that at that stage the Judge has formed a decided view.

7. Interference by a judge by for example questioning a party or witness in such a way that indicates to the reasonable bystander an adverse view of the party or witness.

8. Where a party is discourteous or abusive to a judge, where such has been prolonged, personal, insulting and defamatory and where a reasonable observer might be brought to a conclusion that no judge subjected to such vilification could sit in judgement unaffected, the proper administration of justice may sometimes require the withdrawal by that judge. But balance that against that a judge may not be driven from a case by a litigant being discourteous or abusive to a judge.
And see *Boateng v The State* [1990] PNGLR 342 (SC 391).

Application by a party to disqualify a Judge from a case must be made by Notice of Motion and supported by affidavit: *Peter Yama v Bank South Pacific and Others* (2008) SC921. A judge faced with an application to disqualify must weigh on the one hand the duty not to be driven from the judgement seat.
And of course never forget that a Judge under his judicial oath should not disqualify himself or herself merely because he or she does not want to sit on a particular case.

COMPANIES - AS PARTIES IN LITIGATION

A company may sue or be sued in just the same way as a natural person. Since a company is an artificial person it can act only through its agents. In the conduct of litigation a company can only act through a legal practitioner.
Must first establish the fact of the incorporation of a company. So long as a company remains on the register it may be party to litigation in the same way as a private individual.
Once a company is put into liquidation proceedings cannot be maintained against it unless the liquidator gives consent or the court gives leave for the purpose.

A company which has ceased to have any juristic existence cannot sue or be sued. A defunct corporation in the eyes of the law is no party at all but a mere name with no legal existence. A non-existent person cannot sue. When once the court is made aware that the plaintiff is non-existent, and therefore quite incapable of maintaining the action, it is bound to put and end to it.
See *Russian & English Bank v Baring* [1932] 1 Ch 435.

When proceeding against a company a plaintiff should not join Directors or particular officers of the company unless the plaintiff also has a specific cause of action against those officers personally, otherwise the plaintiff could be liable for any costs involved in such joining of parties. And see *Ome Ome Forests v Cheong* (2002) N2289 for the proper plaintiff in the case of a company.
Note the procedure for a Business Name in Order 5 rules 33 to 40.

CROSS CLAIM/COUNTERCLAIM.

Subject to the power or control by the Court, a defendant who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in any action in respect of any matter wherever or however arising may make a counterclaim in respect of those

matters instead of bringing a separate action. Thus if a defendant has any valid cause of action of any description against the plaintiff. Order 8 Rule 38
It is then a matter for the Court and the parties as to whether both actions can be tried together or separately. See Order 8 Rule 41.
Clearly no problem if the issues are related or the actions arose out of the same proceedings or the same dispute.

DEFAULT JUDGEMENT - REQUIREMENTS

See Rules of the National Court Order 12 rules 24 to 36.
Cannot proceed against a defendant in default unless the originating process bears the appropriate note under Order 4 rule 9.
Plaintiff seeking judgement by default must make application to the Court and such application must include a proof of service of the originating process and an affidavit on behalf of the plaintiff proving the default.
The default could be failure to file a defence within the time required, failure to verify the defence if such is required, failure to comply with any other relevant order of the court.
Upon application the court may direct entry of judgement as the plaintiff appears to be entitled.
If for a liquidated demand then judgement can be ordered for a sum not exceeding the sum claimed. See rule 27 with respect to interest on the amount claimed.

If for unliquidated damages then the court may enter judgement for damages to be assessed and for costs.
Note rule 30 where the claim is for possession of land.
There was a Practice Direction of 1987 requiring a plaintiff to forewarn the defendant or their lawyer of the intention to seek judgement by default and there was then a further Direction No 5 of 1997 setting out the procedures for seeking a default judgement which requires such to be made to a Judge by way of Motion and these Directions have been incorporated into the *Motions (Amendment) Rules* 2005, and see Rule 19 (3).
For an outline of this procedure see the cases *Mapmakers v BHP* [1987] PNGLR 78, and *Paraka & Os v Kawa & The State* (2000) N 1987, and *Kaluni v Warole* (2001) N 2114.
See the case *Giru v Muta* (2005) N 2877 for a checklist of 6 preconditions on an application for a default judgement. These are:

1. Proper form.
2. Service of Notice of Motion and Affidavits
3. Default
4. Warning.
5. Proof of service of writ
6. Proof of default.

The case *Kitipa v Auali & Os* (1998) N 1773 held that rule 34 gives the court a discretion in ordering a judgement by default. The judge held that a default judgement may still not be entered even where a proof of the due service of the writ has been given where the

effect of the default judgement would prejudice the rights of other co-defendants, or that the pleadings are so vague or do not disclose a reasonable cause of action or that the default judgement cannot be sustained in law. Other cases were considered in the case of *Kunton & Ors v Junias & Ors* (2006) SC 929. The Court there found that there were a wide and not closed range of considerations which could be taken into account including:

a) whether the Statement of Claim raises serious allegations of fraud or deceit, in which case the interests of justice may require those allegations to be proven by evidence in a trial, before judgment is given on the merits;
b) the extent of the default by the defendant;
c) whether the defendant appears to have a good defence;
d) whether the Statement of Claim amounts to an abuse of process;
e) whether the pleadings are vague ,ie whether the Statement of Claim discloses a reasonable cause of action;
f) whether the plaintiff has prosecuted his case diligently;
g) whether the entry of judgment would prejudice the rights of co-defendants;
h) whether the interests of justice would be served by the entry of default judgment.

In that case the Court held that as soon as it is argued that the judge's exercise of discretion is unreasonable the appellant bears the onus of showing unreasonableness under the *Wednesbury* principles as contained in the tests set out by the Supreme Court in *Ombudsman Commission v Peter Yama* (2004) SC 747 as follows:

It must be a real exercise of the discretion:

a) the body must have regard to matters which it is expressly or by implication referred to by the statute conferring the discretion;
b) it must ignore irrelevant considerations;
c) it must not operate on the basis of bad faith or dishonesty;
d) it must direct itself properly in law;
e) it must act as any reasonable person would act and must not be so absurd in its action that no reasonable person would act in that way.

That a very large sum of public money is involved or that the claim is a novel one and there is uncertainty as to its success, are other grounds on which judgment might be refused: *Morobe Provincial Government v The State* (2008) SC 943.

DISCOVERY

See Order 9.
Discovery is the title used to describe the process by which the parties to a civil cause or matter are enabled to obtain, within certain defined limits, full information on the existence and the contents of all relevant documents relating to the matters in question

between them. The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength and weakness of their respective cases, and thus to provide the basis for a fair disposal of the proceedings before or at the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made out by or against them, to eliminate surprise at or before the trial relating to documentary evidence and to reduce the costs of litigation. Discovery should not be confused with the process of obtaining further and better particulars, nor with the process of interrogatories, nor of subpoena duces tecum.

Discovery is therefore to help the parties and the court to obtain the proper examination of the issues, and a party is entitled to discovery of all documents that relate to the issues. A lawyer has a professional responsibility to ensure that his client gives complete discovery. Discovery is not a matter or bargaining or compromising or demanding an exact list of the documents sought. It is the obligation on a party to supply a list of all the documents which might have any bearing on the subject matter in dispute. See the case *Credit Corporation v Jee* (1988-89) PNGLR 11.
See Order 9 and the rules there under for the procedures and when discovery can be made. And see *Curtain Bros v UPNG* (2005) SC788.

INTERROGATORIES - SEE ORDER 9 RULES 17 TO 26

Interrogatories is another method of discovery of facts. The purpose is to secure admissions of evidence of material facts and to restrict issues to be proved at the hearing. See the rules for the procedures.

DISMISS OR STRIKE OUT

See *Listing Rules* 2005 and rule 15 'Summary Disposal'.
The Court has various powers to strike out pleadings or to dismiss actions.
Normally you **strike out** pleadings or an endorsement:

> If it discloses no reasonable cause of action or defence,
> If it is scandalous, frivolous or vexatious,
> If it may prejudice, embarrass or delay the fair trial of the action,
> If it is otherwise an abuse of the process of the court.
> See Order 8 Rule 27 and Order 9 Rule 15.

Where pleadings are struck out it is not mandatory to strike out the action. It is open to the Court on the material before it and where there appears to be a good cause of action or defence to give time for the party whose pleading has been struck out to plead again. Otherwise it may be open to the Court to **dismiss** the action, or enter judgement if appropriate and it is plain and obvious to do so. But always assess the whole circumstances carefully before dismissing an action or entering judgement because of a

default in pleadings as whilst the power is there do not overlook the overall requirement to do justice to the relevant parties.

Dismissal is used when the whole action is being considered, thus the Court may:

Dismiss an action for want of prosecution,
Or on default of service of a statement of claim,
Or on default in discovery or production,
Or on default in setting an action down for trial,
Or on failure to be ready for trial. Order 9 Rules 15 & 46.

Can also dismiss if:

There is no reasonable cause of action,
The proceedings are frivolous or vexatious,
The proceedings are an abuse of the process of the court.

Can also dismiss where there has been default following an order by the court prescribing a strict timetable for the future conduct of the action by the plaintiff.

For a case on the principles governing dismissal for want of prosecution see *Seravo v Bahafo* (2001) N 2078.
For Dismissal in the Supreme Court see SC Rules Order 7 rule 53 and see case *Public Curator & Os v Bank of South Pacific* (2006) SC 840.

Note that an order **dismissing** an action for want of prosecution is not a decision on the merits and does not operate as res judicata and accordingly unless the relevant time limit has expired the plaintiff may bring a second action upon the same facts against the same defendant.
Dismissal would also usually be used for **motions** that are not pressed or fail.
Alternatively **dismissal** of an action after a trial on the merits does not allow the plaintiff to try again.

Examples:

If parties fail to appear for a matter you may **dismiss** it presumably for want of prosecution, but as there has been no trial on the merits it is open to the plaintiff to file proceedings again so long as the plaintiff is still within any time limits that may apply. This can be done for the substantial matters as well as for motions.

There is a situation where a matter can be **dismissed** for default in failing to comply with peremptory orders of the court, and then, even though there has been no trial on the merits, the plaintiff may not be able to issue fresh proceedings if he does not provide any proper explanation for the failure to comply with the orders made in the earlier proceedings.

Note that in Election petitions the court may **strike out** grounds or allegations but would **dismiss** a petition, but generally see *Election Petition Rules* 2002.

ENFORCEMENT OF JUDGEMENTS

National Court Rules Order 13 and 14 provides for the various procedures that are available to enforce judgements.

For payment of money see Order 13 rule 2, which provides for levy of property or attachment of debts, or charging order or appointment of a receiver.

And in extreme cases by committal or sequestration, but see rule 7.
For possession of land see rule 3 which provides for a writ of possession.
For delivery of goods see rule 4 which provides for a writ of delivery.
Rule 13 provides a procedure for the attendance of a person to be orally examined or to produce documents to assist in the enforcement of a judgement. Rule 14 covers where the person bound by the judgement is a corporation. See further rules in Order 13 for the procedures for writs of execution and writ of levy.

Rules 53 to 65 cover garnishee proceedings for the recovery of monies owing under a judgement order. See case *Dumal Dibiaso v Kola Kuma & Os* (2005) SC 805 where monies are held on trust.
Before any enforcement steps are taken there must first be evidence of the order or judgement sought to be enforced being served on the person required to comply with the order.
Order 14 provides that the court can make orders for accounts and inquiries.

For enforcement against the State note the ***Claims By and Against the State Act*** Section 13. No Execution against the State.
Section 14 provides the procedure for satisfaction of judgement against the State, (which includes Provincial Governments). See cases *SCR 1 of 1998* (2001) SC 672 and *Asiki v Zurenuoc & The State* (2005) SC 797.
And note Section 14 (5) on limitations on contempt proceedings against an officer of the State unless there has been a failure to observe requirements of the Section. *Pansat v Vele & The State* (1999) SC 604.

Apart from Section 14 of the ***Claims by and Against the State Act*** contempt proceedings are not available as an enforcement tool where the order sought to be enforced is for a payment of money particularly where the order prescribes no time limit.

EXTENSION OF TIME

Under Order 1 rule 15 there is a general discretion in the Court to extend or abridge the time for the doing of any act required under the rules. See *Kipane v Anton & Anor* (2003) N 2429.

Extension of time can be by consent or the court can order it. *Tai v ANZ Bank* (2000) N 1979.

Never forget that in any application by way of motion, notice must be given by the party making the application, see Order 4 rule 38. Also note Order 7 rule 2. No step without notice of intention to defend. *PNG Pipes v Port Moresby Pipes* (1999) SC 634.

Often have an application for an extension of time to file a defence at the same time as an application for a default judgement. For a case on this see *Bomson v Hart* (2003) N 2428 where the Court acted on the basis of there being a good case to defend on the merits.

In the case of *Serave v Bahafo* (2001) N 2078, there was an application for extension of time to lodge an appeal. The court found there was no reasonable explanation for the delay and there was no reasonable case for any appeal.

For the power of the Supreme Court to extend time see case *Aihi v The State (No 1)* [1981] PNGLR 81, SC 195.

For a detailed analysis of extension of time in matters involving the MVIT, see the case *Rundle v MVIT* [1988] PNGLR 20.

For an analysis of extension of time under the *Claims By and Against the State Act*, see the case *Rawson Construction v The State* (2005) SC 777.

Extension of time questions arise in many different areas, as already noted above in connection with MVIT matter and Claims against the State. An example under the Land Act is in the case *Placer Holdings* [1982] PNGLR 326 (N 387).

INTERIM PRESERVATION OF PROPERTY

Order before commencement of proceedings. In an urgent case the Court may on the application of a person who intends to commence proceedings grant an injunction. See Order 14 Rule 9. The principles to apply would be the principles to follow in the granting of an interlocutory injunction.
Preservation of property during proceedings. See Order 13 rule 10.
For disposal of property during proceedings see rule 11, to be considered where the property is perishable or likely to deteriorate, or where there may be any other special reason.

This is an area where Orders known as the **Mareva Injunction** and the **Anton Piller Order** have relevance. See *Mauga Logging v S.P.Oil* [1977] PNGLR 80.

The Mareva Injunction is an order to prevent a defendant from disposing of assets in order to defeat a judgement.

The *Anton Piller Order* is to order a defendant to give permission to the plaintiff to enter premises under the control of the defendant for the purposes of inspecting documents or other articles or to take custody of documents or other articles, pending trial of the action, or in aid of execution.
And see a procedure for Mareva Injunction and the Anton Piller Order in the English practice direction in All England Law Reports [1994] 4 All ER 52.

INTERLOCUTORY ORDERS OR INJUNCTIONS - EX PARTE ORDERS

Order 4 Rule 38 and subsequent rules for the procedure and requirements for notice.
The position of this Court in relation to interlocutory injunctions has been succinctly put in *Robinson v National Airlines Corp* [1983] PNGLR 476 at 480:

"The purpose of an interlocutory injunction is to preserve the status quo until the hearing of the main action and as per Frost CJ in Mt Hagen Airport Hotel V Gibbs [1976] PNGLR 316 'where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo'. No real principles can be laid down as to when they should or should not be granted except they are granted when just and convenient and what falls within that description must differ substantially from case to case. As Lord Denning said in Hubbard v Vosper [1972] 2 WLR 389 at 396, 'In considering whether to grant an interlocutory injunction the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but let him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules".

The principles to be considered in an application for an interlocutory order were stated in *Employers Federation v PNG Waterside Workers* (1982) N393 which adopted the principles from the English case *American Cyanamid v Ethicon [1975] 1 All ER 504.*
These were:

1. Is the action not frivolous or vexatious. Is there a serious question to be tried. Is there a real prospect that the applicant will succeed in the claim for an injunction at the trial.

2. The court must then consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief.

3. As to the balance of convenience the court should first consider whether if the applicant succeeds he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory relief should normally be granted.

4. If damages would not provide an adequate remedy, the Court should then consider whether if the applicant fails, the defendant would be adequately compensated under the applicant's undertaking in damages, in which case there would be no reasons on this ground to refuse an interlocutory injunction.

5. Then one goes on to consider all the other matters relevant to the balance of convenience, an important factor in the balance should, other things being even, be to preserve the status quo; and
6. When all other things are equal it may be proper to take into account in tipping the balance the relative strength of each party's case as reviewed by the evidence before the Court hearing the interlocutory application.

These principles were approved by the Supreme Court in *Craftsworks Niugini Pty Ltd v Allan Mott* [1998] PNGLR 572 and followed in many other cases.

So what does all this mean? What the plaintiff must prove is that he has a serious not a speculative case which has a real possibility of ultimate success and that he has property or other interests which may be jeopardised if no interlocutory injunction were granted. Then it becomes a matter of seeing if, in all the circumstances of the case, the court should nonetheless exercise its discretion by declining to issue an interlocutory injunction. In order to determine that the court will have regard to such factors as the adequacy of damages, the possibilities of alternative remedies, whether there has been any laches and delay, the strength of the grounds of defence suggested by the defendant, what, if any, undertakings the defendant is prepared to give, and most importantly, hardship and the balance of convenience.
Any such application must be properly supported by an affidavit of the claimant not by an affidavit from the lawyer who can only state from their belief. - see affidavits by lawyers above.
As a matter of practice any such orders should have an early return date to enable interested parties to come to court as soon as possible. The applicant should give an undertaking as to damages. See *BCL v Collector of Taxes* (2007) SC853 .for latest statement of principles. And also see *Lee & Song Timber v Burua* (2005) N 2836 *and White Corner Investments v Haro* (2006) N 3089.

EX PARTE ORDERS

Motions (Amendment) Rules 2005. Rule 5 (2) (d).

The correct procedure is in the Notice of Motion the plaintiff must apply for and obtain an order dispensing with the requirement to serve the Motion on the defendant. Leave to proceed ex parte should not be granted unless evidence is given in the affidavit showing the urgency of the matter and the reasons why service of the Motion is not necessary and that it is impractical to serve the documents. Ex parte orders are essentially provisional in nature. The interim orders must not be the same as the substantive relief sought in the originating process. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given the opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying the original order.

An ex parte order should only be made to a specific date in the near future and then returnable before the judge who made it. Rule 5(2) (e). An ex parte order is never intended to continue to an open ended date. If nothing is done by the set date then it must expire unless specifically extended to another date or superseded by a permanent order in the main proceedings.

There should never be an appeal from an ex parte order without first giving the judge who made it the opportunity of reviewing it in the light of argument from the defendant and reaching a decision.

JOINDER - OF CAUSES OF ACTION AND PARTIES

See *National Court Rules* Order 5.

The broad principle is whether there is some common question of law or fact involved and the relief or rights claimed arise out of the same transaction or series of transactions.

The Rules are quite clear generally.
Problems may arise where parties are joined unnecessarily. This can have the effect of creating delay or even confusion and can incur costs penalties.
An example of this would be when a plaintiff sues a company and also joins the Directors and even officers of the company.

Rule 6 allows the court to act where there is inconvenient joinder.
A party can be joined or removed only while proceedings are on foot.
For a discussion of the rationale of the rule see the cases *AGC Pacific v Kipalan & Ors* (2000) N 1944; *Ken Norae Mondiai v Wawoi Guavi Timber Company Ltd* (2006) N3061.

JUDGEMENTS

Date of effect. Pronouncement - time of. See Order 12 Rules 3 and 4.
Unless the Court otherwise abridges times for entry of judgement or order it takes effect after 14 days.
"Pronouncing judgement is not entering judgement; something has to be done which will be a record, and so the judgement that the Judge has pronounced is the judgement which is to be entered. ….the intention of the rule clearly is that, from the moment when the judge has pronounced judgement, and entry of the judgement has been made, the judgement is to take effect, not from the date of the entry, but from the date of its being pronounced; it is an effective judgement from the date when it is pronounced by the Judge in court." See Lord Esher MR in *Holtby v Hodgson* (1889) 24 QBD 103.
For example when on 20 October 1960 judgement was pronounced and solicitors failed to enter the judgement in *Vitous v Tuohill* [1964] VR 624 the Full Court held that although not filed until 22 Feb 1963 the judgement was properly dated 20 October 1960, and interest was payable from that date.
And see *Wood v Watking* [1986] PNGLR 88 (SC 315).
A judgement to do an act or to pay a sum of money should contain a time for compliance.

LIQUIDATED - UNLIQUIDATED

A claim is **liquidated** when it is ascertained or is capable of being ascertained by a simple calculation, as when there is no element of assessment or opinion. For example a claim on an account rendered for the supply of goods with a set value would be a liquidated claim. However a claim for damages or compensation for injuries caused or for a breach of a contract where there is no amount agreed in the contract and which require determinations of value and some assessment would be an unliquidated claim. See Supreme Court case *Dempsey v Project Pacific* [1985] PNGLR 93 and *Chapau v The State* (1999) N 1933. In the case *Barlow Industries v Pacific Foam* [1993] PNGLR 345, the Supreme Court discussed the situation of a mixed claim which included a claim for damages and a claim for a liquidated amount. And see the Supreme Court in *The State & Ors v Josiah & Ors* (2005) SC 792.
Where a claim is for relief against a defendant in default is for unliquidated damages only, the plaintiff may only enter judgement against the defendant for damages to be assessed and for costs: O12 r 28.

LITIGANTS IN PERSON

The duty of trial judge is to give an unrepresented litigant such information and advice as is necessary to ensure that he has a fair trial. This may include, if it becomes necessary, an explanation as to the form in which questions should be asked, but it is not to put the questions in that form for the party. The judge's duty includes in a criminal trial to ensure that an unrepresented accused is put in a position where he or she is able to make an

effective choice as to the exercise of his or her rights during the course of the trial but it is not to tell the accused how to exercise those rights.

There is a duty on the Judge to advise a litigant in person how the court proceedings are run. First they are told where they can take their place in the courtroom, thus in a civil case it would be at the bar table. In a criminal case it is up to the discretion of the Judge as to whether they take their place at the bar table or have to present their case from the dock.

The course of the trial itself would be explained such as the order of the presentation of the evidence and when parties can address the court.
The litigant in person would be advised about the right to object to questions put by the other side to a witness however an objection is not made just because the party disagrees with the evidence. Objections can only be made on legal grounds, and if there is doubt the litigant would ask for clarification from the judge. The litigant in person would have to present their own evidence themselves in the witness box by way of a sworn statement from the witness box. They would then be entitled to call witnesses to support their case.

The right of cross-examination of witnesses should be explained, being questions which may help the litigants case or which may weaken the opponents case. Such question can suggest the answers to the witness or can be used to test the reliability of the witness. However they must be questions and not merely statements or comments on the case or on the evidence.

In Appeals from the District Court an appellant in person should be told how the appeal is to be heard and that it is not a matter of recalling all the witnesses again but that it means that the appellant in person has the onus of presenting their submissions to the Judge and explaining why they say that the Magistrate made a mistake. This has to be done by reference to the depositions and evidence that was before the Magistrate. The onus is first on the appellant to explain how and where the Magistrate erred. Then the other party in the matter would submit how the Magistrate was correct in the result of the case and that the case was heard correctly by the Magistrate.

ORIGINATING PROCESS

National Court Rules. Order 4. Rule 1. By writ of summons or by originating process.

Rule 2. **Writ of Summons** being for any claim or relief sought for any tort, or where a claim is made based on fraud, or where damages is claimed for any breach of duty.

Rule 3. **Originating Summons** is appropriate where the principal or sole question at issue is one of a construction of an Act or any instrument, deed, will or contract and which there is unlikely to be a substantial dispute of fact and where the plaintiff is not claiming any damages. If proceedings are complex or seriously contested on the facts or the law the Court can order the matter to proceed by way of pleadings. Rule 35.

PLEADING THE GENERAL ISSUE

Order 8 Rule 28. A party shall not plead the general issue.
See the case *Akipa v Lowa* [1990] PNGLR 321 for what is the general issue, and Order 8 Rule 21(2)was referred to. *" I conclude from the cases I have referred to that pleading the general issue in defence is a plea which to use the words of Sugarman AP in the Rudenno case 'merely states a conclusion from denials which are not stated'. For example in an action for goods bargained and sold or sold and delivered, the plea in defence must deny the order or contract, the delivery of the amount claimed . To plead that the defendant is not liable or was never indebted is a conclusion which does not state the facts upon which such conclusion is reached. However where the statement of claim pleads facts upon which the cause of action is based such as existence of an order or contract, the delivery of the amount claimed in an action of goods bargained and sold or sold and delivered, a mere denial of these facts either generally or specifically is permissible under O 8 r 21(2) of the Rules. Such a plea in my view does not offend O.8 r.28."*

This statement on pleading the general issue was accepted by the Supreme Court in the case *MVIT v Nand Waige & Ors* [1995] PNGLR 202.

SERVICE OF DOCUMENTS

Rules of Court Order 6.

Note personal service may not be required unless the rules or an order of the Court specifically requires.
The main thing is that personal service is required for originating process. See Rule 2.

Rule 3 sets out how personal service is to be effected. Note that for service on a corporation the Companies Act may apply or the relevant Statutory Corporation legislation may apply.

Rule 4 sets out how to serve if personal service is not required.

Rule 7 sets out the requirements for an address for service.

Rule 12 sets out the procedure for obtaining an order for substituted service.

Rule 19 sets out the requirements for service outside Papua New Guinea and Rule 20 notes the requirement for leave of the court for such service. And Rules 24 to 31 cover the procedure for effecting such service outside the country.

Never forget the need for an **affidavit of service** in particular for originating process and where notice is required for the other party. In some situations there may be no specific requirement for such an affidavit however the court may need to be satisfied on service and this can only be done by such an affidavit which should have been prepared at the time of the service. See *Tima v Korohan* (2006) N 3045 proof of service is established by a proper affidavit of search.
For service on a company and need to show search for company address see case *Beecroft v Seeto* (2004) N 2561.

Non service of process can be waived. It is an irregularity which can be waived. See *Hannet v ANZ Bank* (1996) SC 505. And see *Pyall v Kabilo* (2003) N 2492 where once a notice of intention to defend has been filed then the originating service is taken to have been served on the defendant personally. *Niugini Mining v Bumbandy* (2005) SC 804 on how to apply the Rules of Court and where the delivery of the Writ of Summons to the respondent's lawyer is deemed sufficient service of the Writ of Summons. See *Pansat v Mai* (1995) N 1320 on service by putting it down in the presence of the person to be served.

SETTING ASIDE A DEFAULT JUDGEMENT

Order 12 Rule 35.

The Court may, on such terms as it thinks just, set aside or vary a judgement entered in pursuance of this Division.
The Court has an unfettered discretion to set aside a **regularly entered** default judgement. Whilst it is usual for a defendant to explain the delay and show a prima facie defence on the merits when applying to set aside a judgement, there is no hard and fast rule of law to that effect. See *Evans v Bartlam* [1937] AC 473. "since the power to set aside a default judgement as it is expressed in the rules is not surrounded with qualifications, the court should not qualify a discretion that is unfettered in the rules. Courts should not by laying down principles of law provide a fetter that the rules have not imposed".

The Court must consider all the circumstances of the case.
Thus it is proper to consider the following: the length of and reasons for the delay, and is there a prima facie defence on the merits. Normally a judgement is not set aside if no good purpose would be achieved.
The relevant considerations are: the defendant's reasons for failing to appear or plead, whether there has been a delay in applying for the setting aside of the judgement, and whether the plaintiff would be prejudiced in such a way that could not be compensated for in costs.

A lawyer's negligent conduct in allowing his client to suffer default judgment is not a valid reason for setting aside default judgment: *Leo Duque v Avia Andrew Paru* [1997] PNGLR 378.

The defendant should file an affidavit of merits, deposed to by the party and not by the lawyer, to put these matters before the court. See notes on 'Affidavits'. This affidavit should set out the facts which could constitute a defence on the merits - set out a statement of the material facts sufficient to satisfy the court that the defendant has a prima facie defence and that it is reasonable that the applicant should be allowed to raise that defence.
The filing by attaching a draft defence which merely denies the claims is not showing a defence on the merits. A mere denial is not sufficient, you must satisfy the judge that there is a reasonable ground for saying so. A party must 'condescend upon particulars'. And see cases: *Green & Co v Green* [1976] PNGLR 73 *and Govt of PNG & Davis v Barker* [1977] PNGLR 386 and *Lome v Kundi* (2004) N 2776.
In the case *Dempsey v Project Pacific* [1985] PNGLR 93 the Supreme Court set aside a judgement by default entered on the basis of an incurably defective affidavit of search filed prematurely.

A judgement **irregularly entered** may be set aside as of right (ex debito justitiae) regardless of a defence on the merits.
For a default judgement to be regular it must be strictly in conformity with the rules and be for the relief to which the plaintiff is entitled on the pleading.

Almost any failure to comply with the rules renders the judgement liable to be set aside. A judgement signed too soon, or for too much is irregular. A final judgement signed for a purported liquidated sum can be set aside because the claim was not in law liquidated. This applies to both originating summons proceedings and writ of summons proceedings. See *MVIT v Bure* (1999) SC 613.

SUMMARY JUDGEMENT

Order 12 r 38.

The case *Kappo & Hau v Wong* (1997) SC 520 reiterates the principles, where there is the admissions of owing a certain sum. See *Tsang v Credit Corp* [1993] PNGLR 112. The plaintiff must show, in the absence of any defence or evidence from the defendant, that in his belief, the defendant has no defence. If the defence was filed or evidence is given by the defendant the plaintiff must show that, upon the facts and or the law the defendant has no defence. The plaintiff will not be entitled to summary judgement if there is a serious conflict on questions of fact or law. Whether a case should go to trial on these issues will be determined on the facts of each case. However the authorities show that the summary jurisdiction should
only be invoked in a clear case. *Collector of Taxes v Field* [1975] PNGLR 144. In a clear case where there is no triable issue. These principles have been reiterated by the Supreme Court in *The State v Henshi Engineering* (1998) SC 594, *NCDC v Yama* (2003) SC 707, and *Prosec Security v Amalgamated General Workers Union* (2003) SC 714.

Kappo v Wong (above referred to) and *Kumagai Gumi v NPF* (2006) SC 837 both reiterate that summary procedure is not applicable on a claim based on fraud. And see rule 37 (b).
And for consideration of a summary judgement see the case *Kumul Builders v PTC* (1991) N 1000 and also the case *Rural Development Bank v Kuri* (2001) N 2099.

Order 12 rule 38 provides for two situations of summary judgement. One is where there may be no dispute over the subject of the claim or where the amount of the claim is certain. However rule 38 (2) also provides for a summary procedure for the entry of judgement for damages to be assessed.
This may lead to some confusion. If the summary judgement results in a sum certain so there is an actual order for a specific sum then that judgement would be considered a final judgement. However where the entry of judgement under rule 38 (2) is for damages to be assessed then it could not be said that the judgement is a final judgement. This has been discussed by the Supreme Court in the case *Daniel v Pak Domoi* (2004) SC 736 where the Court found that the declaratory orders over land were final but that the claim as to damages had still to be litigated and determined independently of the declaratory order and therefore that part of the summary judgement was interlocutory.
And see *Telikom v Tulin* (2004) SC 748 for distinction between summary judgement and default judgement.
And see the principles distinguishing 'liquidated' and 'unliquidated'.

WITHDRAWAL AND DISCONTINUANCE

Withdrawal. A party who has entered an appearance may withdraw the appearance at any time with the leave of the Court. There may be costs awarded.
Leave to withdraw is appropriate where it has been entered by mistake or where a lawyer acts without proper instructions. Order 8 Rule 60

Discontinuance. See Order 8 Rules 61, 64, 66.

May discontinue before the trial or hearing with consent of other parties or by leave. Discontinuance is only permissible before hearing. But once hearing has commenced there is no entitlement to discontinue.
The Court will normally allow a plaintiff to discontinue. Leave may be refused where the discontinuance would cause an injustice to the defendant, thus if it would deprive the defendant of an advantage that has already been gained in the litigation. But leave may be granted on terms. The usual terms is costs.
See *Twain Pambuai v Benjamin* (2005) N 2897.

CHAPTER 3 - EVIDENCE

BROWNE V DUNN. (1893) 6 R 67 (HL)

"It seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by questions put in cross examination showing that the imputation is intended to be made, and not to take his evidence and pass by it as a matter altogether unchallenged and then when it is impossible for him to explain .... to argue that he is a witness unworthy of credit. If you intend to impeach a witness you are bound, while he is in the box, to give him an opportunity of making any explanation which is open to him."

And as confirmed in Australia by Gleeson CJ in *R V Birks* [1990] NSWLR 677. "It is accepted as a rule of professional practice in this State that there is a general requirement, subject to various qualifications, that a cross examiner put to an opponent's witnesses the matters in respect of which, or by reason of which, it is intended to contradict the witness's evidence." For a adoption of rule in PNG, see *Awoda v The State* [1984] PNGLR 165.

JONES V DUNKEL PRINCIPLE. (1959) 101 CLR 298. FAILURE TO CALL EVIDENCE

Any inference favourable to the plaintiff for which there was ground in the evidence might more confidently be drawn when a person presumably able to put the true complexion on the facts has not been called as witness by the defendant and the evidence provides no sufficient explanation for his absence.
This was further explained by Kirby J in *Ghazal v GIO* (1992) 29 NSWLR 336. "The rule in *Jones v Dunkel* is one of common sense reasoning. It provides that an unexplained failure by a party to call a witness may, in appropriate circumstances, lead to an inference that the uncalled evidence could not have assisted the case of the party who might be expected to call the witness."
If the opposite party has it in its power to rebut evidence and facts and inferences by his own evidence, and yet offers none, then we have something like an admission that the prescription is just.
The rule has no application if the failure to call the witness is satisfactorily explained or readily understood.

For adoption and application of the principle in PNG, see *The State v John Bosco* (2004) N2777.

COMPANIES IN RECEIVERSHIP

1. A Receiver may be appointed by the Court or pursuant to some security, eg a Floating Charge.
2. A Receiver can only receive money etc. due to the company and may sell assets enabling him to discharge liabilities.
3. A Manager can carry on a business therefore Receiver/Manager can collect, sell, and carry on business.
4. Receivers are usually appointed as agents of the Company and therefore incur no personal liability.
5. Receivers are obliged to prepare a financial statement upon appointment and this will show the company's position.
6. The Receiver/Manager endeavours to trade out in a tight liquidity situation and his duties may expire upon satisfaction of his 'appointer's' debt.
7. People may be reluctant to trade with and extend credit to a company in receivership as it is seen as the first step to liquidation.
8. If the Company goes into liquidation;
    The contract may not be performed;
    The contract will have to be taken up with somebody else or the Company could seek further funds to complete the contract.
    There will be no warranty recourse.

LIMITATIONS

Limitations of 6 years in any cause of action founded on contract or tort from the date when the cause of action arose.
When the cause of action arose means from the date on which the wrongful action giving rise to the claim arose, and see case *MVIL v Kuri* (2006)
SC 825.
Wrongs Act Section 31. Any action for damages from a wrongful death must be commenced within 3 years of the death. See case *Ambo v MVIT* (2002) SC 681
Statute of Frauds and Limitations. It is enactment as to evidence and is only relevant in any action if it is specifically pleaded. See National Court Rules O 8 r 14.
Claims by and Against the State Act.
And note that there are similar provisions in the MVIT legislation.
Section 5 requires Notice to be given of intention to make a claim. Such notice of intention must be given within 6 months after the occurrence out of which the claim arose.
For application of Section 5 Notice see Supreme Court in *Asiki v Zurenuoc & The State* (2005) SC 797 which determined that the notice requirements of the Claims By and Against the State Act apply only to actions that are founded on contract or tort or breaches of constitutional rights and section 5 does not apply to actions seeking orders in the nature of prerogative writs commenced under Order 16 of the National Court Rules.

The mere fact that negotiations have taken place between the claimant and a person against whom a claim is made does not debar the defendant from pleading a Statute of Limitations even though the negotiations may have led to delay and cause the claimant not to bring his action until the statutory period has passed. Although contra if he has represented that he desires the plaintiff to delay proceedings and that the plaintiff will not be prejudiced by the delay.

UNDEFENDED DIVORCE

Specimen Findings for Notebook and File Endorsement Purposes.

1. FIND: Both Petitioner and respondent domiciled in PNG in accordance with common law or Section 14(6) Australian domicile plus 6 months residence, or Section 15 (2) deserted wife's domicile or Australian domicile by marriage.
2. FIND: That Petitioner and Respondent married at ….. on …. In accordance with…..
3. FIND: adultery between the Respondent and Co-Respondent proved

or FIND: parties to the marriage have been separated and thereafter separately apart for a continuous period of not less than 5 years immediately preceding the date of the petition and there is no reasonable likelihood of cohabitation being resumed.

4. THE COURT is satisfied that there are no children of the marriage to whom Section … rule 33 apples.

or FIND that I am satisfied that proper arrangements have been made for the welfare (education and advancement) of the children of the marriage.

OR

ORDERED that the Petitioner pay to the Respondent for the maintenance and support of each of the children of the marriage the sum of ……per week while they are residing with the respondent and continuing until each child attains the age of 16 or completes his or he education.

5. ORDERED that the petitioner pay the medical and educational expenses of the children of the marriage until each attains the age of 16 years or completes his or her education.
6. ORDERED that (Respondent) have the custody of the children of the marriage, with liberal access being granted to the Petitioner.
7. DECREE NISI on the grounds of …… dissolving the marriage.
8. ORDERED that (Respondent) pay the (Petitioner's) costs of an incidental to this suit to be taxed.
9. DISCRETION STATEMENT: Notwithstanding the facts and circumstances set out in the discretion statement I exercise my discretion in the (Petitioner's) favour to make the decree.
10. RESERVE liberty to either party to apply in respect of access to the children.
11. ABRIDGEMENT. (Where relevant) (I am satisfied that there are special circumstances which justify so doing and make an order reducing the period at the expiration of which the decree nisi will become absolute to ……).

UNTRUTHFUL WITNESSES

Where the court suspects that witnesses may be lying in their testimony before the court the trial judge may properly be guided or assisted by usefully examining:

(a) whether the story told by the witness is inherently probable or not;
(b) how it fits in with the prosecution case;
(c) how it fits in with the defence case;
(d) how it fits in with the evidence as a whole.

See *The State v Mole Manipe & Os* (1979) N 196.

Whilst the above is a criminal case the principles may equally be applicable in civil cases. See the case *Re Fisherman's Island – Claim by Bobby Gaigo v The* State [1979] PNGLR 202 at 210 (N 197).

CHAPTER 4 - OTHER

APPEALS FROM MAGISTRATES/TRIBUNBALS

See *District Courts Act* Ch 40 Part X. And see Appeal rules 2005 for Directions and Appeal Books and Procedures for the hearing of an appeal.
The Rules set out a comprehensive listing and pre-hearing conference procedure for directions to be issued for necessary steps to be taken by parties to prepare the appeal for hearing including the obtaining of the District Court depositions and the compilation of the Appeal Book and the filing of written submissions.
For appeals to the National Court from statutory tribunals or authorities the right of appeal may be provided under the respective legislation, some of which adopt the rules of the District Court which includes the Appeal Rules 2005. See case *Dirua v Law Society Statutory Committee* (2005) N 2905 where respective legislation is silent on procedure the National Court may develop procedures under the *Constitution* Section 185.

TIME TO APPEAL

S 219. Right of appeal by a person aggrieved.
State cannot appeal against the dismissal of an information except with the leave of the National Court in a matter of public importance.
State can appeal against the sentence.

Section 220. Appeal instituted by a Notice of appeal together with a recognizance.
Appellant must give notice of intention to appeal within 1 month of
the decision.

See above Sections generally for requirements.

Section 223. Appellant may be released from custody pending appeal. This is a bail discretion.
Section 226 . Within 40 days of instituting appeal appellant to set appeal down for hearing. And note section 227 upon failure to set appeal down for hearing the Orders may be enforced.

HEARING OF THE APPEAL

Section 229. Evidence other than the evidence and proceedings before the Court by which the order or determination was made shall not be received on the hearing of the appeal except by consent of the parties or by order of the National Court. The hearing of

the appeal is a hearing on the depositions before the magistrate. Any fresh evidence is bound by the principles of fresh evidence .

The right of appeal from the District Court is created by Statute therefore the provisions must be complied with strictly. *Nikints v Rumints* [1990] PNGLR 123.

For the powers of the National Court on the hearing of the appeal see section 230.

For a concise outline of the procedures for an appeal see the case *Application of Linah Edwards* (2005) N 2804.

AN APPELLANT IN PERSON

In Appeals from the District Court an appellant in person should be told how the appeal is to be heard and that it is not a matter of recalling all the witnesses again but that it means that the appellant in person has the onus of presenting their submissions to the Judge and explaining why they say that the Magistrate made a mistake. This has to be done by reference to the depositions and evidence that was before the Magistrate. The onus is first on the appellant to explain how and where the Magistrate erred. Then the other party in the matter would submit how the Magistrate was correct in the result of the case and that the case was heard correctly by the Magistrate.

RECOGNIZANCE

A recognizance should not be too onerous that it unfairly restricts the right of a party to appeal.
The failure to enter a recognizance as and when required by s.2 of the *District Courts Act* is a failure of a condition precedent to the right of appeal which invalidates an appeal. See *Nikints v Rumints* [1990] PNGLR 123 and *Dacany v Taia* (2002) N 2316 and *Application by Linah Edward* (2005) N 2804.

FRESH EVIDENCE ON AN APPEAL

The granting of leave to call fresh evidence on an appeal is a matter guided by the principles of in the interests of justice, and there must be an explanation offered as to why the evidence was not called in the lower court. It may be that in the interests of justice an appeal court on its own volition may require a witness to attend and give evidence on an appeal where the court finds that it needs relevant testimony and that a person has not received a fair trial. So did the appellant receive a fair hearing in the lower court. One principle to be remembered on the hearing of an appeal is that there is an interest in keeping parties to the case which they ran at first instance.

In a matter of criminal justice with criminal sanctions it is not a matter of saying oh things did not go well therefore I should be able to start all over again. That is not in the interests of justice.

Fresh evidence may be presented on appeal only when that evidence could not with reasonable care have been discovered previously. *Aikaba v Tami* [1971-1972] PNGLR 155. And see the Supreme Court on fresh evidence in *Rawson v Dept Works* (2005) SC 777 where in a matter before the Supreme Court, it is evidence that could not with reasonable means be ascertained secured and admitted at the trial and does the justice of the case warrant the admission of the evidence the Appellant seeks to admit.

STAY OF PROCEEDINGS AND BAIL

The filing of an entry of appeal for hearing automatically stays the execution of any order or decision from which the appeal is lodged. *Mote v Tololo* [1996] PNGLR 404. However this is only so long as the appellant files the entry of appeal and recognizance within the 40 days and it is genuine: *Moses v Magiten* (1999) N2023; *Haino v Sai* (2006) N3063.

While there may be a stay, the matter of bail pending hearing of an appeal where an offence has been committed is still a discretionary matter subject to the *Bail Act*. See *Bail Act* Section 11. The *District Court Act* Section 223 provides that once a Notice of Appeal has been filed and a recognizance given or a sum of money deposited a court may release the appellant from custody. Whilst bail pending an appeal from the National Court will only be granted if exceptional circumstances are shown, see *The State v Yabara (No 1)* [1984] PNGLR 133 and *Enuma v The* State (1997) SC 538 the above Section 223 of the Districts Court Act gives a wider discretion where the term of imprisonment may be shorter and there may be some time before the appeal can be heard.

ARBITRATION AND MEDIATION

Arbitration Act. Section 2 treats submissions of disputes to an arbitration clause in an agreement as having the force of an order of the Court.
Section 4 states that in an action commenced by writ or originating summons in breach of the arbitration clause, the National Court may stay the proceedings and order arbitration.
By section 12 the arbitration award may be enforced in the same manner as a judgment or order of the Court.
In section 13 there is power in a court to order that a matter or a question be tried before an arbitrator.
In section 11 the Court may set aside an award. Is this by way of fresh originating process or by notice of motion in the existing proceedings which is the subject of a stay order issued under S 4. See case *Brem Maju v Bee Constructions* (2006) SC 852.
See *Barclay Bros v The State* (2005) SC 813 where an arbitration clause was held to be non severable from a contract which had been declared null and void. This being the common law position prior to Independence.

Mediation is the main form of ADR. In 2008, the Parliament enacted *National Court (Amendment) Act* 2008 (Act No 4 of 2008) which introduced mediation in the National Court. The National Court is now preparing to implement the new law in 2009.

ASSESSMENT OF DAMAGES

General principles on how to approach.
Assessment of damages can only be for matters as pleaded and awards can only be made for matters pleaded and proven.
See *PNGBC v Tole* (2002) SC 694.

A. PERSONAL INJURIES

1. Recite it is an action for damages for personal injuries. Recite the names of the parties and the date and nature of the incident.
2. Liability admitted/or found after trial on liability. Once liability has been determined it cannot be raised in the actual assessment of damages.
3. The age of the plaintiff at the time of the incident and the details of the incident.
4. The nature of the injuries and the treatment accorded. Reference to hospital and medical reports.
5. The opinion of the doctors as to the results of the treatment, whether any ongoing injuries, any permanent injuries, and further treatment required.
6. The evidence from the plaintiff to support the nature of the injuries and the medical treatment and whether injuries healed or ongoing.
7. Subjective features of the plaintiff, age, education, marital status, occupation.
8. Whether suffered any loss of wages or missed out on education.
9. Assessment of plaintiff's current status bearing in mind the accident and how the accident has affected the plaintiff's current status.
10. Heads of damage as pleaded;
    a. General damages including pain and suffering, see similar cases on the particular injury, eg arm, back, eye, head, leg, paraplegic, dependency, etc.
    b. loss of amenities
    c. Loss of earnings to date
    d. Future loss of earning, or earning capacity, with reference to life expectancy table (see schedule 2), and apply the Luntz compound interest table (see schedule 3) and for cases on the use of these tables see *Guma v The State* (1980) N 262, *Ela v The State* [1988-89] PNGLR 653 and *Pagau v MVIT* (1992) N 1028. The appropriate discount rate is a matter of practice and has varied among judges. Note the table in schedule 3 which is from H Luntz Assessment of Damages for Personal Injuries and Death (3rd Ed.) which sets out interest rates at 3% to 7%. The 3 % rate is used in many cases but there are cases which have used the 5%, *Hassard v Bougainville Copper* [1981] PNGLR 182, and 6% *Kerr v MVIT* [1979] PNGLR 251, and even 4% and 8%. In *Pinzer v Bougainville Copper* [1985] PNGLR 160 the Supreme Court approved 3%. Subsequently in

Wallbank & Minife v The State [1994] PNGLR 78 the Supreme Court described the 3% rate used by the trial judge as a relatively low discount rate and one which is open to be disturbed. Until the appropriate discount rate is settled by the Supreme Court the 3% rate is the appropriate discount rate. Then note that usually there is a percentage reduction for contingencies.

e. Future needs because of accident/ future treatment based on medical reports.
f. Out of pocket expenses to date based on appropriate receipts.

11. Consider and refer the parties to comparable verdicts and note any statutory limitations. Refer to the Index of Comparable Verdicts for Personal Injuries in PNG in Schedule 4.

12. Interest.
    a. Interest on prejudgement amounts such as loss of wages and out of pocket expenses. Standard 8% from date of loss or 4% instead of weekly re-assessments.
    b. Interest on prejudgement apportionment for pain and suffering, usually assessed at 4% to cover that due on an ongoing accumulation.

Note any limitation on liability in the defendant. And note the status of interest in any limitation of liability situation where interest is not part of the liability in respect of bodily injury or arising out of the use of a motor vehicle but is compensation for being kept out of money for some time. See the case *Pinzer v Bougainville Copper* [1985] PNGLR 160. So any limitation on liability does not cover interest nor does it cover costs on the proceedings. *Kerr v MVIT* [1979] PNGLR 251.

B. PROPERTY DAMAGES CLAIM.

1. Recite it is an action for property damage. (Eg a police village raid, or a destruction of a trade store, or a loss of or damage to a motor vehicle). Recite the names of the parties and the date and nature of the incident.
2. Liability admitted/or found after trial on liability. Once liability has been determined it cannot be raised in the actual assessment of damages.
3. The details of the incident based on the admissible evidence. Just because liability is admitted does not mean that the circumstances and extent of the incident and damages are admitted without appropriate proof.
4. Details of the actual damage or loss as pleaded. Destruction of property requires appropriate valuations as at the time of the destruction, which could include the valuation at any sale or transfer, or the construction costs. Such could be supported by photographs of the property taken before and after the destruction.
5. If claiming loss of business activity then there needs to be relevant evidence of that business activity, such as appropriate licence or registration for the business activity, company returns, proper balance sheets to show the viable

operation of the business, tax returns or such like business returns to support the business turnover. If there are no tax returns or business activity statements and payment of VAT accounts then there is no evidence to support the viable operation of the business and therefore no evidence to support loss of profits. *Komaip Trading v Waugulo & The State* [1995] PNGLR 165 (N 1367).

6. There is a duty on a person who suffers property damage to mitigate any loss. Thus do the circumstances require a person to repair the damage within a reasonable time so as to be able to resume the business activity. Loss of profits must be limited to the time needed to repair the damage or resume the business. For example the damage to a motor vehicle, the plaintiff is required to have the repair done within a reasonable time, so the damage would be limited to the cost of any repairs and an assessment of the loss of profits for a reasonable period during which such repairs would be effected. See *Kopen v The* State [1988-89] PNGLR 659.

CLAIMS BY AND AGAINST THE STATE ACT

A claim within the meaning of Section 5 and pursuant to the meaning ascribed in Section 2 is a claim in tort or contract pursuant to Sections 57 and 58 of the *Constitution*.
Section 5 requires that notice of any such claim must be made within 6 months of the cause of action arising.
An application for Judicial Review under Order 16 is not a claim within the meaning of the Act, so does not come within the requirement for the 6 months notice. See *Asiki v Zurenuoc* (2005) SC 797.
Judicial Review. Section 8 of the Act requires a court hearing an application for leave to apply for judicial review in a matter in which the State is a defendant shall not grant leave unless the State has been afforded an opportunity to be heard. This must require adequate service of the application on the State.

CONTEMPT OF COURT

The Criminal Code Act section 5 provides that the Act or the Code does not affect the authority of any court of record to punish a person summarily for the offence commonly known as 'Contempt of Court'.
And note Constitution Section 37 (2) "Except, subject to any Act of the Parliament to the contrary, in the case of the offence commonly known as contempt of court, nobody may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law."

Traditionally contempt was divided between civil contempt and criminal contempt. Criminal contempt being regarded as consisting of words or acts obstructing or tending to obstruct or interfere with the administration of justice whereas civil contempt was of disobedience to the judgements, orders or other process of the court. However because

such civil contempt does itself involve an obstruction of the fair administration of justice it may accordingly be punished in the same manner as criminal contempt and therefore the distinction has become somewhat blurred and so the standard of proof required is the criminal standard.

The power to punish for contempt of court is therefore part of the inherent jurisdiction of the National and Supreme Courts.
The procedure for dealing with contempt is set out in the Rules of the National Court Order 14 Rules 37 to 50.
The summary jurisdiction of the court to punish for contempt is exceptional and should be exercised with restraint and only in a clear and serious case. This is especially so of the power of a trial judge to deal summarily for contempt in the face of the court on the judge's own motion. This procedure should rarely be resorted to except in those exceptional cases where the conduct is such that it cannot wait to be punished because it is urgent and imperative to act immediately to preserve the integrity of a trial in progress or about to start.

There is always the merit in obtaining independent advice where the judge is personally involved in the alleged contempt.
Where a Judge has formed the view that there has been a contempt in the face of or in the hearing of the court, he or she should consider whether there are alternatives bearing in mind the seriousness of the conduct and the degree of urgency involve; Such as whether a warning or reprimand would be sufficient or whether in cases of disruption of proceedings, the person should be excluded from the court; and where a member of the legal profession is involved whether the conduct should be made the subject of a complaint to the Professional Body; or if a statutory offence has been committed whether the matter should be referred to the Public Prosecutor.

In the conduct of the summary hearing the trial judge may rely upon his or her own observations of the conduct, and upon hearsay evidence. It may be possible to call witnesses to give evidence of their observations. The person accused must be allowed a reasonable opportunity to be heard in his own defence, that is to say, a reasonable opportunity of placing before the court any explanation or amplification of his evidence and any submissions of fact or law, which he may wish the court to consider as bearing upon the charge itself or upon the question of punishment. See the case *The State v Mark Taua Re Awaita* [1985] PNGLR 179 for a discussion of the procedure to have the contemnor brought before the court and the care that must be taken in ensuring a fair hearing. This procedure was discussed by the Supreme Court in the case of *Robinson v The State* [1988-89] PNGLR 307. That case did suggest that because of the circumstances of the actual incident charged with contempt the matter should have been listed before another judge.
See also the cases *Kwimberi v The State* (1998) SC545 and *Reimann v The State* (2001) N2093.
For cases see *Bishop v Bishop Bros* [1988-89] PNGLR 533 which involved the assault of a person attempting to execute a court order and the Supreme Court discussed the procedures to be adopted when dealing with an alleged contempt. And see *Sikani v The*

State (2005) SC 807 where the court stated that there must be clear evidence that an alleged contemnor was refusing or avoiding compliance with a court order.
There have been a number of cases involving difficulties created by lawyers and court staff in the operation of the courts and there have been a number of decisions. In some instances the act complained of was found not to be contempt of court. And see the case *Poka v The State* [1988] PNGLR 218.

Contempt of court is a common law offence and there is no maximum penalty. On penalty see the *Kwimberi case* above referred to and *Salo v Gerari* (2005) N2923 where the judge considered various cases that have come before the court.

COSTS

See Order 22.

Although in general the court has a discretion as to costs, no party is entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the court.
Normally the court orders the costs to follow the event except where it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs. See Rule 11.
Costs following the event are normally on a **party and party basis** (see *Karingu v PNG Law Society* (2001) SC 674) and are those costs as were necessary and proper for the attainment of justice or for enforcing the rights of the party in whose favour the such costs are ordered.
Solicitor and client costs are the proper remuneration payable by a client to a lawyer for legal work performed by the lawyer for the client. See *Polye v Sauk* (2000) SC 651.
(And see further discussion under taxation of costs)
In relation to interlocutory proceedings 'costs in the cause' mean that the costs of those proceedings are to be awarded according to the final award of costs in the action.
'Plaintiff's costs', or 'Defendant's costs', means that the plaintiff or defendant is to have the costs of the interlocutory proceedings without waiting for a final decision on the action.
'Plaintiff's costs', or 'defendant's costs' in any event means that no matter who wins or loses when the case is finally decided or settled the plaintiff or the defendant is to have the costs of those interlocutory proceedings, although it does not confer upon him a right to tax the costs until the event is finally decided or settled.
No order as to costs means that each party must bear its own costs.
Order 22 rules 11 to 22 cover various entitlements to costs. Note especially where a party seeks amendment, extension of time, non admissions of fact or documents, and on discontinuance.
And note rule 18 where payment into court and its effect on costs.

A party may ask the court for an order based on a letter offering to settle on certain terms, such letter having been delivered earlier in the proceedings. This is different to a payment

into court. For a consideration of how to approach this type of application which at common law is referred to as a **Calderbank letter** see the discussion of such a letter in the Australian case of *Messiter v Hutchinson* [1987] 10 NSWLR 525.

Note rule 25 where judgement for a small amount.

What is the costs situation where there are a number of parties in an action and a plaintiff succeeds against one or more defendants but one or more defendants are successful? So who pays the costs of the successful defendant? Does the successful plaintiff against the other defendants pay the costs of the successful defendant or should the unsuccessful defendants pay the costs of the successful defendant? In common law terms this is called a **Bullock Order** and for a discussion of such a situation see the Australian High Court case of *Gould v Vaggelas [*1983] 157 CLR 215.

Costs awarded can be agreed or a party can apply for costs to be taxed; see rules 6 and 9 and Division 4 of Order 22.

SECURITY FOR COSTS

Order 14 provides in rules 25 to 27 for the procedure for a defendant to seek security for costs. See case *Odata v Ambusa* (2001) N 2106

Taxation of costs and Review thereof by the Court

A party liable to pay costs is entitled to have the costs prepared in a proper form, called a Bill of Costs, which sets out how the costs are calculated and made out, and to have them taxed by the taxing officer of the Court. Costs are referred to in two ways, either as **party and party costs** or as s**olicitor client costs**. Party and party costs are those costs as ordered by the court in favour of the successful litigant and are to be allowed on the basis of being all such costs as were necessary and proper for the attainment of justice or for enforcing the rights of the party in whose favour such costs are ordered.
Solicitor and client costs are the proper remuneration payable by a client to a lawyer for legal work performed by the lawyer for the client. These will include the disbursements necessarily and reasonably incurred by the lawyer on behalf of the client in the course of his employment.
If the parties do not agree on the Bill of Costs rendered by the lawyer then the party can ask for the Bill of Costs to be taxed by the taxing master. The taxing master will consider the costs according to the rules as laid down in Order 22.

If a party is not satisfied with how the taxing master has considered the Bill of Costs the party can seek a review before the National Court.
Is there a difference between the level of costs on a **party and party basis** and on a **solicitor client basi**s? This is not necessarily so, as for the same work there must be the same remuneration on which ever basis the taxation is had but there is much chargeable between the lawyer and the client which ought to be allowed as between party and party.

For the same work there should be the same remuneration. Although it may have been necessary to consider and try two or three different methods of carrying into effect the client's desire before it can be ascertained which is most likely to succeed, so all such costs should in ordinary circumstances be allowed against the client although they might not all be available against the opponent on a party and party basis. And see case *Coecon v Steele & Ors* (2004) N 2532.
There is a principle that a lawyer is expected to have a reasonable knowledge of his work and is not allowed to charge a client for work which is useless and is not allowed to charge a client for work performed by the lawyer in learning his business.

The Bill of Costs must contain particulars of the work done by the lawyer, his servants and agents and the costs claimed for the work done. It is expected that lawyers will keep a proper written record of the work done and the days and times upon which it was done, and such record must be made at the time the work is done. If a lawyer fails to keep such records it means that there is no evidence to support any later claim for costs of time spent.
See the case *Abai & Ors v The State* (1998) N 1762 and *Abai & Os v The State* (2000) SC 632.

The case *Karingu v PNG Law Society* (2001) SC 674 discussed the situation where the plaintiff was a litigant in person and acted for himself and whilst being trained as a lawyer did not have a practicing certificate as a lawyer. Whilst traditionally it appears that a litigant in person who does not use a lawyer has only been able to claim disbursements and not professional costs for the time spent in preparing and running the case, in this case the Court found that the plaintiff was able to include and claim for the time spent using his professional training and skill in preparing the matter.
Where a client agrees on an unreasonable amount it is still open to a taxing officer or a court to itself look at the agreement and consider the reasonableness of the amount charged.
And see cases *Mamando v Lumusa Local Level Govt Council* (1998) N1752, *Sankin & Ors v PNG Electricity Commission* (2002) N 2257, *and Patterson v Teachers Savings and Loan Society* (2004) N 2516.

FAIRNESS OF TRANSACTIONS ACT 1993 (IN FORCE 1998)

An Act ensuring fairness in any transaction which is entered into between parties whether for economic or other advantage.
See definition of transaction in S 3.
Section 5 gives a Court a power of review of a transaction to which the Act applies.
Section 11 Limitation of proceedings. Proceedings must be taken no later than 3 years after the date of the transaction.
See case *Negiso Investments v PNGBC* (2003) N2439

HUMAN RIGHTS APPLICATIONS

Constitution Sections 57 and 58 give the National Court jurisdiction to enforce infringements or threatened infringement of basic and fundamental rights guaranteed by the **Constitution**. The National Court has unlimited power to remedy breaches of Constitutional rights under Section 57: *Premdas v The State* [1997] PNGLR 329. The Court may exercise this jurisdiction on its own initiative or on an application by an aggrieved person or by 'any person who has an interest in its protection and enforcement'. Remedy includes declaratory orders, protective orders and damages. Interlocutory relief such as interim restraining orders pending trial of the substantive matter may also be granted.
For example of when a Court used its own initiative to protect a person's rights under S 57 see *The State v Kusap Kei Kuya* [1983] PNGLR 263.
For example of a Non-Governmental Human Rights Organisation which applied for declaratory orders and protective orders on a behalf of a young woman under S 57 see *Re Miriam Willingal* [1997] PNGLR 119.

In an application under Sections 57 and 58 notice of claim under Section 5 of the ***Claims By and Against the State Act*** is required.
In the absence of any rules of Court made by the Judges governing applications under sections 57 and 58 the National Court Rules apply. In the early 1990s the Registrar issued a Human Rights application form and 6 pro forma letters. These are found in the book entitled '*Practice Directions and Notes'* compiled by Injia DCJ dated 31 December 2004 at pages 84-89. This form has no founding in the National Court Rules or Practice Directions issued there-under.

INTERNAL REVENUE CASES

Taxation Prosecution. The Case *Chief Collector of Taxes v Dilon* [1990] PNGLR 414 SC 396 The Supreme Court considered the nature of the averment in the summons and found that it was sufficient to make it prima facie evidence of the matter and that there was thus sufficient evidence to require the court to proceed to the determination of the matter on its merits. Reference to s.333 of the *Income Tax Act.*

Status of notice of assessment. *BCL v Collector of Taxes* (2007) SC853 The notice of assessment is conclusive evidence of the due making of the assessment and of the amount thereof, and therefore the Chief Collector has pleaded sufficient facts to support the claim and need not respond to a notice to plead facts. Refer Section 329 of the Income Tax Act. And appeal does not operate as a stay of recovery of taxes. The principle is pay now and litigate later. Any challenge to a notice of assessment can only be by an appeal against the assessment and not otherwise.
Note the reference to Raine J in *Chief Collector of Taxes v T A Field* [1975] PNGLR 144 "*…the Chief Collector is placed in a more privileged position than is the ordinary plaintiff"*.

And see the case *Commissioner General of Internal Revenue v Douglas Properties* (2002) N 2192 for the similar status of an assessment under the Stamp Duties Act.

Income tax law precedents. *Barlow Industries v Chief Collector of Taxes* [1987] PNGLR 384 (N 647) Because of the paucity of decisions on the *Income Tax Act* and the body of case law in Australia, Australian authorities should be followed unless there is a good reason in principle why they should not be followed. Also *BCL case above referred, and Travelodge PNG v Chief Collector of Taxes* [1985] PNGLR 129 (N 513) where the court considering losses and outgoings as allowable deductions.

In *Chief Collector of Taxes v Folkes* [1982] PNGLR 257 (N 338) the Court was considering whether a sale of shares was an arrangement to avoid liability for tax.

Search provisions in Income Tax Act. The search provisions in Section 365 of the *Income Tax Act* was discussed in the Supreme Court case of *Special Reference No 1 of 1993* (1995) SC 482. The Court discussed the search provision in the light of the Constitution Sections 37 and 38 and held that the Income Tax Act did not have to comply with the requirements of
S 38 of the Constitution for the purposes of S 37 and S 44 rights. However whether the exercise of the powers is reasonable or not will depend on the circumstances of the particular case and thus when the power is exercised the officers of the Department must ensure that opportunity to claim privilege is given and privileged documents may not be obtained.
As Kapi DCJ said "the provision for full and free access to documents is itself reasonable. Anything short of this would completely hamper the work of the Chief Collector of Taxes. Similar provision can be found in the legislation of other countries. The problem is not the reasonableness of he provision but in the manner the right to access to documents is exercised."

Questions of harsh and oppressive application of tax legislation is referred to in the *BCL case* above referred to.
Appeals from assessment of Commissioner General of Internal Revenue (Chief Collector of Taxes) is by way of "rehearing" (and not hearing de novo or strict hearing) based on material before the commissioner plus any new material that the Court may allow by leave: *IRC v BCL* (2008) SC 920

Security for costs on appeals. In the matter of seeking security for costs on appeals the Chief Collector is in no different position to any other litigant. He must run the risk of incurring costs in any court proceedings just the same as any other litigant. If he were a defendant then he can just like any other defendant under Order 14 rule 25 apply for security for costs. In the case *Chief Collector v Dickson Panel Works & Ors* (1990) SC 390 the application by the Chief Collector was held to be totally misconceived - in these matters he was the appellant seeking security for costs.

Appeal from Income Tax Review Tribunal. See the case *Rayner v Chief Collector of Taxes* [1993] PNGLR 416 for an example of an appeal from the Tribunal.

CUSTOMS ACT

The principle of pay now and litigate later also applies to customs levies.
In *Manufacturers Council of PNG v Commissioner General* (2003) N2441 the court noted that s.176 of the *Customs Act* requires an importer to pay an assessment of duty before challenging the levy and the court referred to relevant authorities. However in that case the court found that the applicant, the Manufacturers Council, had no standing to act on behalf of the relevant companies.

Misima Mines v Collector of Customs (2003) N2497. Words used by Parliament in tax legislation must be given their plain and ordinary meaning. Importer or owner of goods which have passed entry and been released to the owner or importer is not required to pay an assessment under protest before issuing proceedings in court. Discussion of section 176 of the Customs Act which allows a party to pay under protest where an assessment is disputed.

In *United Trading v Commissioner of Customs* (1999) N1925, the court considered the role and power of the Collector to inspect and examine goods under section 122 and then to seize and forfeit under sections 125 and 126.

STAMP DUTIES ACT

The status of a document relating to property within PNG but executed overseas and held overseas but a copy brought into the country. Liability for stamp duty as an instrument under section 12 (b) of the *Stamp Duties Act*.
See case *Placer Pacific v Commissioner General* [1998] PNGLR 226.

JUDICIAL REVIEW

These are cases in which the decisions of public statutory tribunals or authorities exercising statutory powers vested by statute are questioned or challenged. The proper procedure to follow is by an application for judicial review under National Court Rules Order 16: *Attorney-General Gene v Hamidian-Rad* [1999] PNGLR 444. Judicial review is concerned with the decision making process. The circumstances in which judicial review is available are where the decision-making authority exceeds its powers, commits and error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers. *Kekedo v Burns Philp* [1988-89] PNGLR 122. And see the English Case of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

National Court Rules Order 16, as amended by *Judicial Review (Amendment) Rules* 2005, set out the procedure for Judicial Review.

Rule 3 sets out the requirements for leave. To be made by Originating Summons and is made ex parte. However note the *Claims By and Against The State Act* Section 8, leave for judicial review in a matter in which the State is a defendant shall not be granted unless the State has been afforded an opportunity to be heard. And also under s.7 of that Act Notice of Claim is required in any action to enforce a claim against the State. See cases *Ombudsman Commission v Donohue* [1985] PNGLR 348. *Peter v SP Brewery* [1976] PNGLR 537.
Application is made by Originating Summons supported by Statement in Support and Affidavit verifying Statement.

An applicant for leave must show four things: Must have sufficient interest, an arguable case, no undue delay, and have exhausted all other statutory avenues for appeal or review. Upon a quick perusal of the material before it the Court must decide whether the applicant has an arguable case that merits judicial review. The Court must not dwell on the merits of the case and attempt to resolve arguments on issues which require a hearing on the merits.

The principles applicable to an application for leave for judicial review are well settled in *NTN v PTC* [1987] PNGLR 70 *"Applications for leave for judicial review involve the exercise of discretion, such discretion must be exercised judicially. Once a court is satisfied that the applicant has sufficient interest it then exercises is discretion as to whether leave should be granted."*
"In exercising its discretion the court must consider whether the applicant has an arguable case. In Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses [1982] AC 617 Lord Diplock set out the principles upon which the Court should act and I respectfully adopt them - If on a quick perusal of the material the court (that is the judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for the relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

In determining whether the applicant has an arguable case, it is also relevant to consider the proposed grounds of review pleaded in the Statement filed under Order 16 Rule 3. They must be strictly scrutinised so that only clearly pleaded and meritorious grounds of review are allowed to proceed to a substantive hearing: *Asakusa v Kumbakor* (2008) N3303

Only clear cases of lack of standing should be dealt with by interlocutory applications or on the leave application. More difficult questions of standing should be left to the tribunal.
For sufficient interest in the matter for leave to be granted see *Valentine v Somare & Os* [1988-89] PNGLR 51.

Upon the grant of leave, the matter is fixed for directions hearing. At the directions hearing, directions are issued on various matters including as to filing and service of the application by way of Notice of Motion with supporting affidavit, written extract of submissions and Review Book. The application must be served on all persons who may be directly affected by the decision under review. *Yanta Development v Piu Land Group* (2005) SC 798. Subject to express provision in a statute, the provision of record of proceedings of the tribunal or decision making authority is a pre-requisite necessary for the proper conduct of a review. *Baida v Koboa* (2004) N 2634.
Upon full compliance with the directions the judge then fixes a hearing date of the application.

Also upon grant of leave, the Court determines any application for stay or interim injunctive orders. The Court has no jurisdiction to grant a stay or other interim relief before leave for review is granted: *Makeng v Timbers (PNG) Ltd* (2008) N3317. The grant of leave automatically operates as a stay of enforcement of the decision the subject of review unless the Court directs otherwise – See Order 3 (8). For principles to be applied see *Kambanei v NEC* (2006) N3064. Other interim relief maybe granted. The Motions rules as amended by *Motions (Amendment) Rules* 2005 also apply.

At the hearing of the application, the parties and the Court are restricted to the grounds and relief pleaded in the Statement except where they are amended by order of the Court. Upon hearing of the application a finding in favour of any of the grounds of review does not automatically entitle the applicant to the relief sought. The grant of appropriate relief is discretionary and may be refused on equitable grounds: *Tau Kamahuta v Sode* (2006) N3067; *Mao Zeming v The State* (2006) N 2998.

A claim for damages must be pleaded in the Statement. Particulars of damages are not required to be pleaded: *Sausau v PNG Harbours Board* (2006) N3253. The question of damages may be either litigated during the trial of the application or litigated after the grant of the application in which case the Court may issue direction for filing particulars, affidavits etc.

The judge assigned to this track deals with leave applications and other interlocutory applications by notice of motion, conducts pre-trial and hears the substantive application. The *National Court Rules* applicable to Motions as amended by *Motions (Amendment) Rules* 2005 apply.

SOME LEGAL PRINCIPLES

Ubi Jus Ibi Remedium - There is no wrong without a remedy.
Lex semper dabit remedium - Whenever the law gives anything it gives a remedy for the same.
Omnis inovatio plus novitiate perturbat quam utilitate prodest - Every innovation occasions more harm and derangement of order by its novelty than benefit by its abstract utility. Therefore stare decisis.

Jus dicere et non jus dare - My duty is plain. It is to expound and not to make the law – to decide on it as I find it not as I wish it to be.
Contra proferentum – where a clause has more than one meaning it will be interpreted against the interest of the person who proffered or put forward the clause.

There were in the evidence of the witnesses for the Prosecution some inconsistencies as would be expected of eye witnesses giving their recollections of a series of events occurring some time ago. Nevertheless the witnesses for the Prosecution were in substance all telling the same story…
Mohan & Anor v RPC (1967) 2 AER 58 & 60.

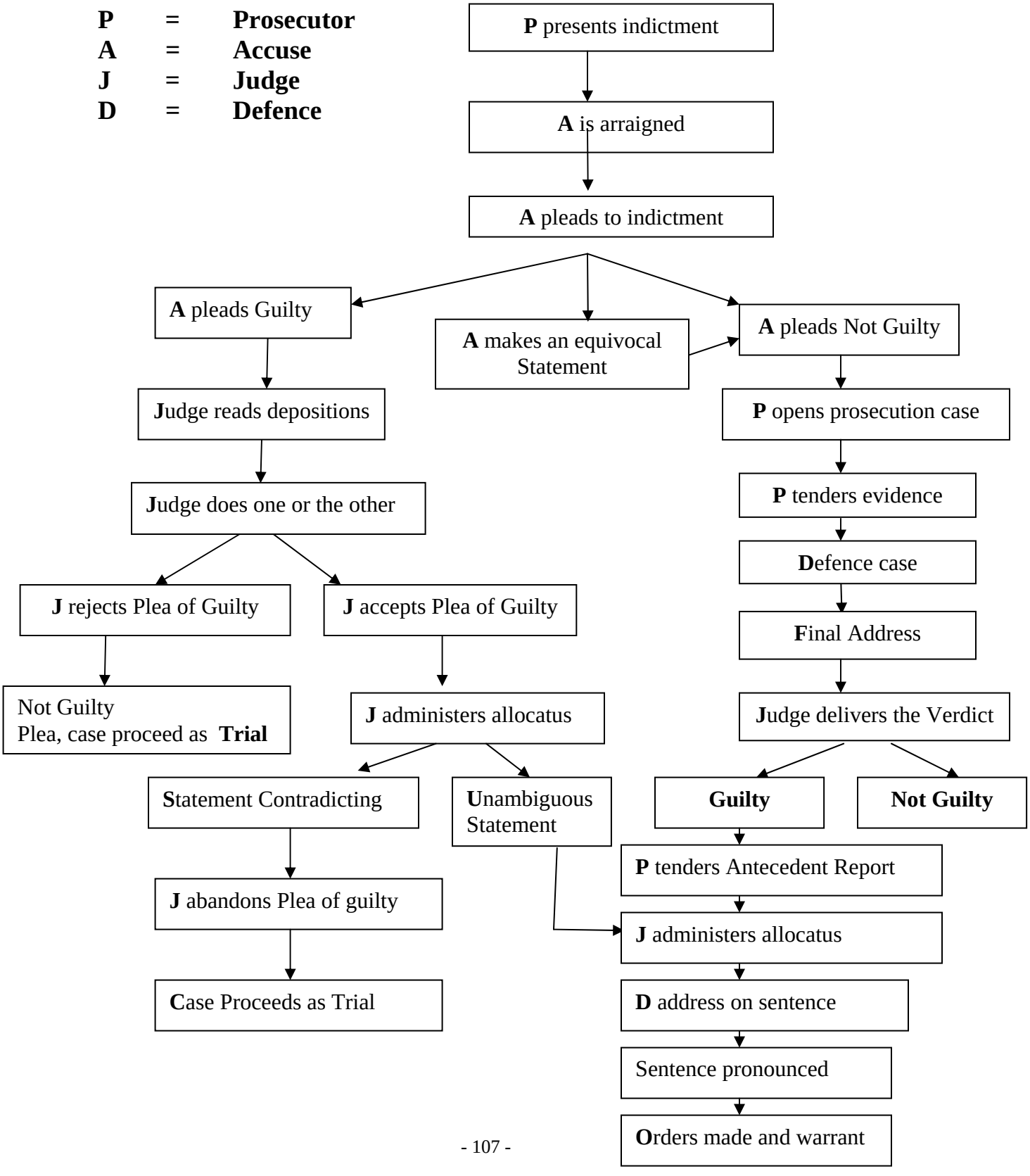
The unsafe character of demeanour as a guide to truth.

The lynx eyed Judge who can discern the truth teller from the liar by looking at him is more often found in fiction or in appellate judgements than on a Bench.

SCHEDULE 1

CRIMINAL TRIAL PROCESS

P = Prosecutor
A = Accuse
J = Judge
D = Defence



SCHEDULE 2

EXPECTATION OF LIFE – PAPUA & NEW GUINEA

1966/1971

Mean life expectation of life for age for males and females who were living between 1966 and 1971. This table is based on the mortality estimations of Van de Kaa (The Future Growth of Papua and New Guinea's population – U.P.N.G. Seminar on Population 1970) in which models are adapted from Coale and Demeny "Regional Model Life Tables and Stable Populations", Princeton University Press 1966.

For males are Model West Levels 13 and 14.

For females Model West Levels 12 and 13.

The expectation relates to all persons living in villages with aid posts or on a road system with free communication to an aid post of health unit without a doctor.

Persons living with free communication to qualified medical attention would have a higher expectation. In round figures this would be one year for middle aged males.

Persons living in villages without aid posts and not adjoining road systems would have a lower expectation. Tables can be provided but in round figures the former would be about three years less for persons aged 10 years and declining over this age.

Age	Male Expectation	Female Expectation
0	48.30	48.00
1	54.60	54.05
5	54.33	54.66
10	50.36	50.92
15	46.65	46.83
20	41.96	42.96
25	38.17	39.28
30	34.30	35.64
35	30.58	32.04
40	26.88	28.43
45	25.29	24.80
50	19.82	21.16
55	16.56	17.69
60	13.51	14.40
65	10.78	11.25
70	8.33	8.79
75	6.23	6.55
80	4.39	4.54

SCHEDULE 3

ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH (THIRD EDITION)

PRESENT VALUE OF $1 PER WEEK FOR n YEARS AT VARIOUS RATES OF COMPOUND INTEREST

NO ALLOWANCE FOR MORTALITY

N	**3%**	**5%**	**6%**	**7%**	**N**	**3%**	**5%**	**6%**	**7%**
	$	**$**	**$**	**$**		**$**	**$**	**$**	**$**
1	51	51	51	50	46	1,312	956	834	737
2	101	99	99	98	47	1,325	962	838	739
3	150	146	144	142	48	1,338	967	841	741
4	197	190	186	183	49	1,351	972	844	743
5	243	232	226	221	50	1,363	976	847	745
6	287	271	264	257	51	1,374	981	850	747
7	330	309	300	291	52	1,386	985	852	748
8	372	346	334	322	53	1,397	989	855	750
9	412	380	365	352	54	1,408	993	857	751
10	452	413	395	379	55	1,418	996	759	753
11	490	444	424	405	56	1,428	1,000	861	754
12	527	474	450	429	57	1,438	1,003	863	755
13	563	502	476	451	58	1,447	1,006	865	756
14	598	529	499	472	59	1,457	1,009	867	757
15	632	555	522	492	60	1,466	1,012	868	758
16	665	580	543	510	61	1,474	1,015	870	759
17	697	603	563	527	62	1,483	1,018	871	760
18	728	625	582	543	63	1,491	1,020	873	760
19	759	646	600	558	64	1,499	1,022	874	761
20	788	666	616	572	65	1,597	1,025	875	762
21	816	686	632	585	66	1,514	1,027	876	762
22	844	704	647	597	67	1,522	1,029	877	763
23	871	721	661	609	68	1,529	1,031	878	763
24	897	738	674	619	69	1,536	1,033	879	764
25	922	754	687	629	70	1,542	1,034	880	764
26	947	769	699	638	71	1,549	1,036	881	765
27	971	783	710	647	72	1,555	1,038	882	765
28	994	797	720	655	73	1,561	1,039	883	766

29	1,106	810	730	663	74	1,567	1,041	883	766
30	1,038	822	740	670	75	1,573	1,042	884	766
31	1,059	834	748	677	76	1,579	1,043	885	767
32	1,080	845	757	683	77	1,583	1,044	885	767
33	1,100	856	765	689	78	1,589	1,046	886	767
34	1,119	866	772	694	79	1,594	1,047	887	768
35	1,138	876	779	699	80	1,599	1,048	887	768
36	1,156	885	786	704	81	1,604	1,049	888	768
37	1,174	894	792	708	82	1,609	1,050	888	768
38	1,191	902	798	712	83	1,613	1,051	888	768
39	1,208	910	803	716	84	1,618	1,052	889	769
40	1,224	918	808	720	85	1,622	1,053	889	769
41	1,240	925	813	723	86	1,626	1,053	890	769
42	1,255	932	818	726	87	1,630	1,054	890	769
43	1,270	938	822	729	88	1,634	1,055	890	769
44	1,284	944	827	732	89	1,638	1,056	890	769
45	1,298	950	830	735	90	1,642	1,056	891	769

Harolds Luntz

Butterworths
1990

SCHEDULE 4

COMPARABLE VERDICTS
PERSONAL INJURY CASES IN PNG

Decided by the Supreme Court and the National Court

Between 1970 – February 2006

TABLE OF CONTENTS

Note: Cases listed under Chapters 1-26 are listed in the order of highest to lowest amount of awards.

1. ABDOMEN

1.1 *Kusa v Motor Vehicles Insurance (PNG) Trust* [2003] PGNC 138; N2328

Cuts on left calf, abdomen and thighs.
General Damages – K82,288.79.

1.2 *David Yala Pumbu v S/Const. Teta Tenker & The State* [1985] PNGLR 289

Abdominal injury - Affecting ability to perform all activities - 50% permanent disability.
General damages: K38, 000

1.3 *Gima Oresi v Chris Marjen and The State* (1998) N1784

Abdomen injury – negligence of surgeon – foreign objects left after operation, damages – trauma, pain and suffering, cosmetic disfigurement – reduced likelihood of pregnancy.
General Damages – K20,000.00.

1.4 *Kunjil On v State* [1986] PNGLR 286

Severe bruises and contusions on abdomen and pelvic area.
General Damages: K18,000

1.5 *Palga v MVIT* [1991] PNGLR 446.

Crush injuries to stomach, pelvis and left leg - Extensive surgery - Female aged seventeen (nineteen at trial) - Uneducated villager - Disability of 10 per cent for daily village activities.
General Damages: K18,000

1.6 *Maniz Wango v State* [1992] PNGLR 45

Spleen ruptured by kick and removed - plaintiff now prone to bouts of malaria.
General damages: K15,000.

1.7 *Peter Amini v The State* [1987] PNGLR 465

Removal of spleen - abdominal scar - pain in (L) pelvis - risk of infection - anaemia - malaria and eye problems.
General Damages: K12,000

2. BACK/SPINE

2.1 *Kerr v MVIT* [1979] PNGLR 251

Paraplegic - Dislocated fracture at T12 - Dislocated shoulder - Usual continuing problems - Keen sportsman and athlete - Salesman in agriculture and marketing area -

Married man aged twenty-six (twenty-eight at trial) - Employed as office manager at trial.
General Damages: K181,900

2.2 *Meddie Servie v The State* [1980] PNGLR 549

Paraplegic-dislocated fracture at T12 - Confined to wheelchair - Usual continuing problems - Correctional institutions officer - Male aged 20 - No possibility of re-employment without proper facilities.
General Damages: K106, 260

2.3 *Charles Pupu v Pelis Tomilate* [1979] PNGLR 251

Paraplegic - Spinal fractures at T12-L1 - Confined to wheelchair - National qualified aircraft maintenance engineer with real prospect of becoming first licensed aircraft engineer - Male aged (twenty-eight at trial).
General damages: K103, 940.

2.4 *Government of PNG v McCleary* [1976] PNGLR 321

Back and spinal injury - resulting in aggravation of pre-existing congenital condition - restricted agility - chronic low grade re-active depression - marriage breakdown due to sexual impotency - loss of earning capacity - K40, 000.00.
General damages substituted for award of K77,000.

2.5 *Lubbering v Bougainville Copper LTD* [1977] PNGLR 183

Traumatic amputation of forefoot - Arthrodesis on ankle joint necessary - Loss of 70% efficient use of leg - Initiation or aggravation of degenerative back condition - Continuing intermittent back pain and foot infection - Loss of ability to engage in active sports - Pre-injury employment permanently excluded - future employment limited to areas where can stand or sit as comfort demands - Single male aged 29 (32 at trial) employed as heavy duty fitter.
General Damages: $45, 500

2.6 *Dinogo v Motor Vehicles Insurance Ltd* [2005] PGNC 117; N2839

Fractured spinal process – Injury to back and iliac joint – disability of 30% attributed to spinal and other injuries.
General Damages – K25, 000

2.7 *Pinzer v Bougainville Copper Ltd* [1983] PNGLR 436

Back injury - Lumbar disc injury - Conservative treatment - Continuing pain - Fit for light work only - Male tunnel foreman in mining industry aged 36 - Difficulty in finding employment in Australia.
General Damages: K24, 000

2.8 *Andrew Caswell v National Parks Board* [1987] PNGLR 458

Fractured ® humerus - Fractured ® femur - Crushed fracture of L2 (lumbar vertebra) - Fractured ® pelvis (Bilateral calcareal fracture) - Partial right ulna nerve lesion - Internal fixation of right femur - **General Damages: K22, 000**

2.9 *Make Kewe v Thomas Kunjip & PNG* [1986] PNGLR 279

Bruising of thoracic and lumbar region - spinal and nerve root damage which affected back and legs - Highlands village man .
General Damages: K20,000

2.10 *Kamta Pupti v Thomas Kunjip & PNG* [1986] PNGLR 283

Spinal and arm injury - Fractured spine and fractured bones (both) bones in left forearms - 20% - 50% permanent disability - Village woman in thirties.
General Damages: - K20, 000

2.11 *Glenys Yarnold v The State* [1987] PNGLR 474

Back injury - Disc protrusion between 5th lumbar (L5) vertebrae and first sacrum (5.1) vertebrae - Risk back problems worsening during pregnancy - 15% disability of back function.
General Damages: K20, 000

2.12 *Stephens v MVIT* [1994] PNGLR 481

Back injury - Continuing pain - Retail supervisor - 20% - 25% permanent disability of spine.
General Damages: K20, 000

2.13 *Darvill v MVIT* [1980] PNGLR 548

Back injury - Fracture of first lumbar vertebra - Continuing psychological stress - Restricted ability - Married woman aged forty-one (forty-four at trial) - Part time bookkeeper.
General Damages: K19, 000

2.14 *Kunjil On v The State* [1986] PNGLR 286

Back - Pelvis and hip injury - fractured transverse process of 5th vertebra - fractured distal dibular - ankle confusion to the hip - severe bruises and contusions on abdomen and pelvic area - elderly village man - 80% permanent disability in performing normal duties and walking.
General Damages: K18, 000

2.15 *Wie Kuntu v MVIT* [1991] PNGLR 440

Injury to spine and wrist - Fracture of vertebra - Simple fracture of wrist requiring pinning - Loss of 5 per cent efficient use of wrist - Continuing disability and pain in

back - Permanent disability of 40 per cent - Village man (aged about twenty-five years) - Reduced ability of subsistence living.
General Damages: K18, 000.

2.16 *Kaum Joseph v MVIT* [1991] PNGLR 453

Damages – partial disability to back – Village woman.
General damages – Global award of K17, 000

2.17 *Margaret Oil v MVIT* **(**15th of October 1998)

Cuts to legs and internal bleeding as well as injuries to back – suffered some disability in mobility due to the leg and back injuries – The Judgment does not state the estimated percentage of loss she suffered – The Court awarded a global amount of K17,000.00.
Injury to lumbar spine - Bed rest - Continuing disability and pain with progressive deformity - Married village woman - Reduced ability for traditional work.
General Damages: K17, 000

2.18 *Kaum Joseph v Motor Vehicle Insurance (PNG) Trust* [1991] PNGLR 453

Damages - partial disability to back - Village woman.
General damages - Global award of K17,000.

2.19 *Pakau v MVIT* [1993] PNGLR 73

Back injuries - Elderly retired policeman - 25% - 35% permanent disability.
General damages: K15, 000

2.20 *Bonnie v MVIT* [1994] PNGLR 393

Minor back and hip injuries - Village woman.
General Damages: K13, 000

2.21 *Dami Walpe v MVIT* [1993] PNGLR 434

Villager - 40 years - Motor vehicle accident - Bruising and lower back pain - Compressed fracture of L3-L4 vertebrae - Some restriction of movement in the back - 40% permanent disability in efficient use of back - Possible exacerbation of pre-existing back injury.
General Damages: K12, 000

2.22 *Sipa Toa Are v MVIT* **[1991] PNGLR 456**

Superficial injuries to face and tender swelling of back - fractured dislocation of transverse process of third lumbar spine - 8 days in hospital - one year later sought medical assistance complaining of constant lower back pain - finding of compressed fracture vertebrae giving persistent pain and 15% permanent disability in performing his work in the village.
General Damages: K12,000

2.23 *Sipa Toa Are v Motor Vehicles Insurance (PNG) Trust* [1991] PNGLR 456

Injury to lumbar spine - Compressed fracture of vertebra - Conservative treatment – Continuing disability and pain - Permanent disability of 15 per cent - Village man (aged about twenty-five years) with capacity of casual labouring - Reduced ability for traditional work .
General Damages: K12, 000.00.

2.24 *Makai Tom v The Independent State of Papua New Guinea* (2001) N1932

Facial and back injuries – 40% functional disability:
General Damages K22,000
Special Damages: K3,184.00

3. CHEST/SHOULDER/CLAVICLE

3.1 *Sinclair Tom v The Independent State of Papua New Guinea* (2001) N2287

Injury to **hip and shoulder** – 20% diminution to hips because of hip replacement also require another replacement in seven to ten years – Loss of function of his upper limbs (that is the shoulders) is also in the nature of 20%.
General Damages – K50,000.00

3.2 *Dir v MVIT* [1991] PNGLR 433

Shoulder and leg injuries - 30 to 60 per cent disability - Widow in early forties - Dependent high school son - Self supporting subsistence gardener.
General Damages: K35, 000.

3.3 *Oni v Motor Vehicles Insurance (PNG) Trust* [2004] PGNC 16; N276**7**

Shoulder dislocation – 70% permanent disability.
General Damages – K32,000.00

3.4 *Costello v Talair Pty Ltd* [1985] PNGLR 61

Burns - Lacerations - Chest and shoulder injuries - Traumatic amputation of ear - Scarring - Fear of flying - Male aged 57.
General Damages: K18, 000

3.5 *Nali Matabe v State & MVIT* [1988] PNGLR 309

Fractured clavicle - Malunion of bones - Operation to remove a bony spur - 15% loss of efficient use of left arm.
General Damages: K10, 000

3.6 *Joseph Kepa v MVIT* [1991] PNGLR 424

Dislocated shoulder - Policeman - Proper treatment 15% permanent disability.
General damages: K8, 000.

3.7 *Kewa Nui v MVIT* (1992) N1044

Fracture of ribs on right side of chest - one week in hospital - Plaintiff in late 40's - 15% disability resulting from injuries.
General Damages: K6, 000

3.8 *David Wari Kofewi v The State & Ors* [1983] PNGLR 446. [1987] PNGLR 5

Police burnt lips with smoke, slapped on face, punched on chest, struck in the region of genitals with stick.
General Damages: K1, 800

3.9 *Jacob Paul v MVIT* **(1990) N896**

Simple (green stick) fracture of collar bone - One year old infant - No permanent injuries.
General damages: K1, 000.

3.10 *Woma Paul v Anton Kare & The State* [1988] PNGLR 276

Minor head, facial, chest and knees injuries - Boy aged 5 years at the time of accident.
General Damages: K800

4. EAR

4.1 *Costello v Talair Pty Ltd* [1985] PNGLR 61

Multiple injuries including Traumatic amputation of ear - Scarring - Male aged 57.
General Damages: K18, 000

4.2 *Nita Pyakalo v MVIT* (1992) N1092

Large perforations of ear drum persistent pain and discharge from ear - partial loss of hearing.
General Damages: K8, 000

4.3 *Kurvo Birim v Jovane Mohamed & PNG* [1981] PNGLR 545

Multiple injuries including severe lacerations to ears. 40 years old subsistence farmer who grows coffee.
General Damages: K6, 000

5. EYE

5.1 *Seke Opa v The State* [1987] PNGLR 469

Severe head injuries including blindness of the right eye
General Damages: K60, 000

5.2 *Lindsay Kivia v State* - WS 485 of 1991 by Salika, J.

Assaulted by police leading to loss of left eye in police assault - 38 yrs old Customs Officer- 100% loss of sight of left eye - 50% loss of total sight - severe pains until eye removed surgically and false eye inserted.
General Damages: K60, 000

5.3 *Rohrlachi v Lutheran Church Property Trust* [1985] PNGLR 185

School girl - Loss of eye as a result of stone fired by fellow student.
General Damages: K52, 000

5.4 *John Lukas Manda v Terry Akipe* (2001) N2117

Eye injury – 100% loss of left eye
General Damages K40,000.00

5.5 *Baduk v PNG* [1993] PNGLR 250

Primary school child - 100% loss of vision of right eye.
General Damages: K35,000

5.6 *Jack Lundu Yalao v Motor Vehicles Insurance (PNG) Trust* [1996] N1488

Injury to right eye - 95% visual disability in right eye - Some consequential effect on left eye - Adult male formerly employed as a Security guard.
General Damages: K30, 000.

5.7 *Sale Dagu v The State* [1995] N1316

Injury to right eye - 90 - 95% permanent disability Male Security Officer.
General Damages: K20, 000

5.8 *Takie Murray v Korman Kinamur* [1983] PNGLR 446

Loss of eye - Middle aged married woman.
General Damages: K20, 000

5.9 *Administration of PNG v Carroll* [1974] PNGLR 265

Multiple injuries - including - double vision and affection of infra orbital nerve.
General Damages: $20, 000.

5.10 *Peter Amini v The State* **[1987] PNGLR 465**

Abdominal injury - resulting in inter alia, eye problems.
General Damages: K12, 000

5.11 *Jacqualine Kennedy v Jerry Nalau & PNG* [1980] PNGLR 543

Facial lacerations - including - Continuing aggravation of eye causing watering. Female child aged 8 years.
General Damages: K10, 600.

5.12 *Bradford v Bradford* **[1975] PNGLR 305**

Multiple facial injuries including - lacerated eyeball, twisted upper eyelid, etc.
General damages K8,000.

6. HAND/WRIST/FINGERS/ARM/ELBOW

6.1 *Kupo v Motor Vehucke Insurance Ltd (In Liquidation)* [2002] PGNC 55; N2282

Lacerations to face, elbow and foot.
General Damages – K80, 000

6.2 *Seke Opa v The State* [1987] PNGLR 469

Severe head injury - Blindness of the right eye - Total paralysis of the left forearm - Partial paralysis of the left leg - Decreased muscle power to the left side of the face.
General Damages: K60, 000

6.3 *Motor Vehicles Insurance Ltd v Let* [2005] PGSC 16; SC816

Grade 9 high school student at time of accident – Now an adult – permanent, serious injury to right elbow which put his right arm out of action for the rest of his life. K30,000.00 for future economic loss – K40,000.00 for general damages.

6.4 *Bepi Ambon v MVIT* [1992] N1116

Crush injury to left forearm resulting in amputation of left elbow.
General Damages: K35, 000

6.5 *Pangis Toea v MVIT* [1986] PNGLR 294

Leg and arm injury - Fractured (L) arm and (L) humorous, compound fracture of (L) wrist, fractured (L) femur, fracture and dislocation of left hip and a cut on her forehead - 3cm shortening of arm - 95% permanent disability of (L) arm 1 half inch shortening of (L) leg - Osteoarthritis of hip joint - 70% disability of hip.
General Damages: K35, 000

6.6 *Anna Endeken v State & MVIT* [1988] PNGLR 286

Nurse - Deformity and wasting of left arm rendering it permanently useless - Nurse - Also some brain damage.
General Damages: K35, 000

6.7 *John Etape v MVIT* [1992] PNGLR 191

Multiple injuries including injury to left arm.
General Damages: K27, 000

6.8 *Kaka Kopun v The State* [1980] PNGLR 557

Left arm injury - Fractures of lower arm and wrist - Permanent disability - Inability to grip etc - Pre-existing disability of right arm - Fit for light work - Highland villager - Near subsistence and part coffee farmer - Single man aged twenty-seven (thirty at trial).
General Damages: K25, 000

6.9 *Kerai Urigine v State & MVIT* WS. 937 of 1989 National Court, Mt. Hagen Woods, J.

Partial amputation of left forearm - Wasting of left shoulder due to amputation - Total loss of left hand due to amputation.
General Damages: K25, 000.

6.10 *Timson Noki v Fraser* [1991] PNGLR 260

Crush injury to right arm - Loss of 100 per cent efficiency - Unskilled male labourer aged twenty-seven (twenty-nine at trial).
General Damages: K25, 000.

6.11 *Smerdona v Rawuel* [1973] PNGLR 313

Paralysis of left arm - Closed head injury resulting in permanent impairment of intellect, disturbance of thinking process and emotional overlay.
General damages $22, 540.

6.12 *Barry Maurice Stamp v MVIT* [1979] N179

Leg injury - Right leg amputated through the knee - Graze on forearm and right hand - Pain & suffering and loss of enjoyment of left which included sexual life placing stress on marriage.
General Damages: K20, 000

6.13 *Kamta Pupti v Thomas Kunjip & PNG* [1986] PNGLR 283; N559

Spinal and arm injury - Fractured spine and fractured bones (both) bones in left forearms - 20% - 50% permanent disability - Village woman in thirties.
General Damages: K20, 000

6.14 *Wie Kuntu v MVIT* [1991] PNGLR 440

Injury to spine and Wrist (and spinal injuries) - Simple fracture of wrist requiring pinning - Loss of 5 per cent efficient use of wrist - Permanent disability of 40 per cent - Village man (aged about twenty- five years) - Reduced ability for subsistence living.
General Damages: K18, 000.

6.15 *Put Kunton v MVIT N997* [1991]

Arm (and pelvis) injuries - Village woman.
Global award of K15, 000 for general damages and economic loss.

6.16 *Catherine Fowler v Mova Fae* [1977] PNGLR 506

Multiple injuries including Arm injury - Fractured humerus - Subsequent operation to take up slack ligament - Loss of function 20% - Unsightly scar - Female aged 14 (20 at Trial and married).
General Damages: K15, 000

6.17 *George Pep v The State* [1987] PNGLR 485

Arm injury - comminuted fracture of left radius and alna, left forearm bones - 50% permanent disability of use of (L) arm.
General Damages: K15, 000

6.18 *Kokonas Kandapak v The State* [1980] PNGLR 573

Arm and hand injury - Fractured upper arm - Ulna nerve damages - Claw deformity of right hand - Highland villager - Near subsistence farmer - Marriage affected - Male aged twenty-five.
General Damages: K12, 150, including K500 for interference with marital relations.

6.19 *Tabanto v MVIT* [1995] PNGLR 214

Injury to left hand - 100% permanent disability.
General Damages: K12, 000.

6.20 *Kundia Paul v Anton Kare & PNG N659* [1988]

Laceration to arms and face - Left supra condylar fractured radius and ulnar of left forearm. Shortening of left arm - Girl aged two years.
General Damages: K10, 000

6.21 *Nali Matabe v State and MVIT* [1988] PNGLR 309

Market gardener - Fractured clavicle - Malunion of bones - Operation to remove a bony spur - 15% loss of efficient use of left arm.
General Damages: - K10, 000.

6.22 *Anna Pose v The State* [1981] PNGLR 556

Multiple head injuries including Leg and arm disability - Female child aged 2 (7 at trial).
General Damages: K9, 000

6.23 *Kosi Bongri v The State & Andrew* [1987] PNGLR 478

Arm injury - Comminuted fractured dislocation of ® elbow - Permanent disability - 100% efficient use of upper ® limb, 100% efficient use of elbow ® for purposes of heavy manual labour - Right elbow only for light work.
General Damages: K7, 500

6.24 *Makeu Hare v The State* [1981] PNGLR 553

Severe burns to various parts of body - deceased flexion in right wrist - Female child aged 5 (10 at trial).
General Damages: K7, 500

6.25 *Kurvo Birim v Jovane Mohamad & PNG* [1981] PNGLR 545 N289(L)

Multiple injuries including leg injury - the left arm and fractured neck to left femur - 40 years old. Subsistence farmer who grows coffee.
General Damages: K6, 000

6.26 Paine Aine v The State [1979] PNGLR 99

Arm injury-compound fracture of upper part of ® arm - Unconscious for 5 days 3 weeks - Right arm in sling for 6 months - Scar.
General Damages: K3, 000

7. HEAD/SKULL/BRAIN/FACE/LIPS

7.1 *Lewis v The State* [1980] PNGLR 219

Brain damage - Cervical injury likely to deteriorate - Confusion - Progressive memory disturbance - Lack of concern for own condition - Fits of uncontrollable laughter - Right sided tremor - Almost complete loss of vision on right side - Real risk of institutionalization at early age - Male airport ramp officer aged 24 (28 at trial).
General Damages: K125,000.

7.2 *Dinogo v Motor Vehicles Insurance Ltd* [2005] PGNC 117; N2839

5% dysfunctional disability such as loss of lower teeth, injury to lips. 50 year old man.
General Damages – K82,288.79

7.3 *Kupo v Motor Vehicle Insurance Ltd (In Liquidation)* [2002] PGNC 55; N2282

Lacerations to face, elbow and foot.
General Damages – K80,000.00

7.4 *Aspinal v Government of PNG* [1979] PNGLR 642

Brain damage - Fractured jaw - Fractured foot - Permanent intellectual impairment - Mild mental retardation - Special schooling required - Male child aged eight (thirteen at trial) - K57, 562.50.
General Damages: K76, 750

7.5 *John Francis Reading v MVIT* [1988] PNGLR 266

Brain damage - Permanent - 5 months old baby - K25, 000.00 (Pain & Suffering). Loss of amenities & future care. **General Damages: K62,000**

7.6 *Seke Opa v The State* [1987] PNGLR 469

Severe head injury - Blindness of the right eye - Total paralysis of the left forearm - Partial paralysis of the left leg - Decreased muscle power to the left side of the face.
General Damages: K60, 000

7.7 *Jerry Goria v Jerry Simewa* (2001) N2006

Brain Injury – 100% loss of function of both the **upper and lower lim**bs on the left side:
General Damages - K50,000.00

7.8 *Pangis Toea v MVIT* [1986] PNGLR 294

Multiple injuries including a cut on her forehead.
General Damages: K35, 000

7.9 *Basil Lam v Micca Walaun* [1979] PNGLR 637
Right sided haematoma - Brain damage and personality change - Impaired intellect - Slurred speech - Weakness with activity - Capable only of light work with minimal public contact - Male customs Officer.
General Damages: K32, 000.

7.10 *Eldik v MVIT* [1994] PNGLR 467

Severe head and facial injuries - Single woman - School teacher - Post-concussion syndrome 35% disability - Assessment.
General Damages: K28, 000

7.11 *MVIT v James Pupune* [1993] PNGLR 370

Minor brain injury - Loss of learning capacity - Local businessman - Method of calculating amount of damages - 100% loss of efficient use of left face and 50% general deficiency.
General Damages: K25,000 ex reduced on appeal to K7,333.34

7.12 *Koka v MVIT* [1995] PNGLR 294

Head injuries - Social and intellectual dysfunction - 15% permanent disability - Village businessman and leader - K15, 000.
General damages: K23, 000 for economic loss.

7.13(a) *Moka v MVIL* (2001) N2098

Comminuted fracture of left tibia and fibula and minor head injury with no disability – 40% estimate loss of efficient use of left leg – Male aged 32 – Security Guard – Assessed K23,000.00 for general damaged and K29,932.88 for economic loss before contributory negligence.

(b) *Moka v Motor Vehicle Insurance Ltd* [2004] PGSC 38; SC729

Motor vehicle accident – serious injuries – General damages for pain and suffering K35,000.00 – Future economic loss – K33,672.75. (Note increase of award from K23,000 for general damages: see Moka v MVIL (2001) N2098). **Total – K68,672.75.**

7.14 *Smeron v Kawuel* [1973] PNGLR 313

Closed head injury resulting in permanent impairment of intellect, disturbance of thinking process and emotional overlay.
General damages $22, 540.

7.15 *Administration of PNG v Carrol* [1974] PNGLR 265

Multiple injuries - Unconsciousness, head injuries, neck wound. Fractured left malar and mandible - Double vision and affection of infra orbital nerve - Compound fractured left tibia and fibula, fractured right tibia and femoral condyles.
General damages - $20, 000.

7.16 *Rock Kuri v MVIT* (19TH November 1998)
Head Injuries and multiple lacerations to the face and femoral fracture in the left leg – Loss of efficient use of the affected leg at 40%.
General Damages – K20,000.00.

7.17 *Catherine Fowler v Bradford* [1975] PNGLR 305

Head and facial injuries. Facial dysfunction - Severe anxiety state unlikely to continue after termination of litigation - Loss of aspirations of nursing as avenue of employment - Female aged 14 (20 at trial and married).
General Damages: K15, 000 (including K5, 000 for loss of aspiration of nursing).

7.18 *Coady v MVIT* [1985] PNGLR 450

Head and facial injuries - Scarring - Child aged four and a half. Further appeal to Supreme Court dismissed. See SC 331 (1987).
General Damages: K12,000

7.19 *Sipa Toa Are v MVIT* [1991] PNGLR 456

Superficial injuries to face (and back injuries).
General Damages: K12, 000.

7.20 *Sos v MVIT* [1995] PNGLR 249

Head injuries - Post-concussion syndrome - Young girl.
General Damages: K12, 000

7.21 *Guli v MVIT* [1994] PNGLR 304

Concussion, facial abrasions, fractured right tibia - Post-concussion syndrome - Villager -
- 40% overall permanent disability.
General Damages: K11, 000.

7.2 *MOKA v MVIL* (2001) N2098
Leg Injury – comminuted fracture of left tibia and fibula and minor head injury with no disability – 40% estimate loss of efficient use of left leg – General damages K11,500.00 – no award for past economic loss due to lack of evidence of such loss.

7.23 *Jacqualine Kennedy v Jerry Nalau & PNG* [1980] PNGLR 543

Facial lacerations - Scarring - Continuing aggravation of eye causing watering. Future - Female child aged 8 years.
General Damages: K10, 600

7.24 *Suzanne Fowler v Mova Fae* [1977] PNGLR 501

Fractured skull - Generalized head injuries - Fractured femur - Shortening of leg - Disfigurement of knee - Continuing pain in leg - Restricted mobility and ability - Functional tension overlay likely to conclude with termination of litigation - female aged 11 (17 at trial).
General Damages: K10, 000

7.25 *Susanna Undolpmaina v Talair Pty Ltd* [1981] PNGLR 559

Severe scalp laceration - Nervous shock - Death of father and sister in same accident - Continuing psychological instability and anxiety state - Female child aged 9 (11 at trial).
General Damages: K10, 000

7.25 *Kundia Paul v Anton Kare & PNG* (1988) N659

Fractured skull - laceration to arms and face - Girl aged two years.
General Damages: K10, 000

7.26 *Anna Pose v The State* [1981] PNGLR 556

Head injury - Hemiplegia - Good recovery - Leg and arm disability - Female child aged 2 (7 at trial). **General Damages: K9, 000**

7.27 *Sapa Landao v State* [1988] PNGLR 279

Head injury - hit on the head - 5 days unconscious - Permanent disability - Difficulty in walking long distances and keeping balance.
General Damages: K9, 000

7.28 *Bradford v Bradford* [1975] PNGLR 305

Multiple facial injuries sustained by infant – lacerated eyeball, extensive facial lacerations with skinloss and baring of bone, twisted upper eyelid, etc.
General damages : K8,000 not sanctioned by National Court.

7.29 *Makai Tom v The Independent State of Papua New Guinea* (1999) N932

Multiple facial injuries sustained by infant - lacerated eyeball, extensive facial lacerations with skin Loss and baring of bone, twisted upper eyelid, etc.
General damages K8, 000 not sanctioned by National Court.

7.30 *Kone Kim v PNG* [1984] PNGLR 232

Compound fracture of skull.
General Damages: K2, 500

7.31 *Gorua Tamarua v Alert Security Services* (2002) N2200

Assault – Bruises to left neck – swelling to left parietal area of head – clotted blood in left ear – mild hearing loss and 5% of efficient use of left ear.
General Damages – K2,000.00.

7.32 *David Wari Kofewi v The State & Ors* [1983] PNGLR 446; [1987] PNGLR 5

Assault while in Police detention - no serious injury - burnt lips with smoke, slapped on face, punched on chest, struck in the region of genitals with stick.
General Damages: K1, 800

7.33 Henry & Kathleen Latham v Henry Peri *(1995) N1463*

Minor injuries due to assault on mouth and face causing cut on mouth.
General damages: K1,500.

7.34 *Kongo Bomai v The State* [1979] PNGLR 125

Facial abrasions - Some confusion - Continuing pain with climbing - Inability to kick ball or participate in sport - Mountain village schoolboy aged twelve (sixteen at trial) - Assessment (before apportionment) of K1, 100 substituted for K300.
General Damages: K1,100

7.36 *Woma Paul v Anton Kare & PNG* [1988] PNGLR 276

Minor injuries - Lacerations and abrasions - Minor head, facial, chest and knees injuries - Boy aged 5 years at the time of accident.
General Damages: K800

8. HIP/PELVIS

8.1 *Sinclair v The Independent State of Papua New Guinea* (2001) N2287

Injury to **hip and shoulder** – 20% diminution to hips because of hip replacement also require another replacement in seven to ten years – Loss of function of his upper limbs (that is the shoulders) is also in the nature of 20%.
General Damages – K50,000.00

8.2 *Jeremiah O'Hello v Kagel Shipping Co. Pty Ltd* [1980] PNGLR 361

Pelvic and hip fractures - Ruptured urethra - Impotency - Six monthly dilations necessary - Some change of personality - Restricted mobility - Continuing discomfort with prolonged sitting etc. - Working life reduced to five years - Male marine maintenance engineer aged forty-four (forty-six at trial) married with six children.
General Damages: K42, 000

8.3 *Pangis Toea v MVIT & PNG* [1986] PNGLR 294

Leg and arm injury - fractured (L) arm and (L) humerus, compound fracture of (L) wrist, fractured (L) femur, fracture and dislocation of left hip and a cut on her forehead - 3cm shortening of arm - 95% permanent disability of (L) arm 1 half inch shortening of (L) leg - osteoarthritis of hip joint - 70% disability of hip.
General Damages: K35, 000

8.4 *John Etape v MVIT* [1992] PNGLR 191

Plaintiff suffered injury from collision with another vehicle - Multiple injuries including severe fracture dislocation of right hip and fracture of right humerus - 50% disability of right leg.
General Damages: K27, 000

8.5 *Paul Kuni v Samson Mapi, The Commissioner for Police and Independent State of Papua New Guinea* (2000) N1980

Pelvic injury – Gun shot wounds to the right pelvic area – Injuries permanent – functional loss of his affected leg at forty (40%).
General Damages – K27,000.00

8.6 *Dinogo v MotorVechels Insurance Ltd* [2005] PGNC 117; N2839

50 year old man – spinal injury – unable to walk properly – Permanent disability assessed at 30% efficient use of lower limb – disability of the lower limb to be 25%.

General Damages – K25,000.00

8.7 *Andrew Caswell v National Parks Board* [1987] PNGLR 458

Crushed fracture of L2 (lumbar vertebra) - fractured ® pelvis (Bilateral calcareal fracture) - Partial right ulna nerve lesion - internal fixation of right femur.
General Damages: K22, 000

8.8 *Edwards v Gordan Lighting* [1978] PNGLR 273

Multiple injuries - comminuted fractures of both heels - Fractures of pelvis and wrist - Permanent disabilities of feet and wrist - Restricted with activities involving climbing or sport - Probable future orthodesis - Male electrician aged 26 (34 at trial and retrained as technical trade teacher).
General Damages: K20, 000

8.9 *Nelson Uro v The Indeendent State of Papua New Guinea* (2001) N2056

Fractured right fermur – Male carpenter – 15% loss of function to the Right Knee joint. He has a 5% loss of function to the Right Hip joint.
General Damages K20,000.00

8.10 *Palga v MVIT* [1991] PNGLR 446

Fractured right fermur – Male carpenter – 15% loss of function to the **Right Knee joint**. He has a 5% loss of function to the **Right Hip joint**;
General Damages – K20,000.00

8.11 *Kunjil On v The State* [1986] PNGLR 286

Back - Pelvis and hip injury - fractured transverse process of 5th lumbar vertebra - fractured distal dibular - ankle contusion to the hip - severe bruises and contusions on abdomen and pelvic area - elderly village man - 80% permanent disability in performing normal duties and walking.
General Damages: K18, 000

8.12 *Lari v Motor Vehicles Insurance Ltd* [2004] PGNC 4; N2841

Adult female – Pelvic injury – 15% to 20% permanent disability in efficient use of lower limb.
General Damages – K18,000.00

8.13 *Bonnie v MVIT* [1994] PNGLR 393

Minor back and hip injuries - Village woman.
General Damages: K13, 000

8.14 *Peter Amini v The State* [1987] PNGLR 465

Abdominal injury - resulting in pain in (L) pelvis - risk of infection.
General Damages: K12, 000

8.15 *Joseph Nunts v MVIT & The State* (1990) N930

Hip injury - Estimated 15% disability - Male aged 32 years - Dental orderly.
General Damages: K8, 000

9. JAW/MADIBLE

9.1 *Aspinal v Government of PNG* [1979] PNGLR 642

Multiple injuries - Fractured jaw - Male child aged eight.
General Damages: K57, 562. 50 ($76, 750)

9.2 *Administration of PNG v Carrol* [1974] PNGLR 265

Multiple injuries, inter alia - fractured left malar and mandible.
General Damages: $20, 000

10. KNEE

10.1 *Kusa v Motor Vehicles Insurance (PNG) Trust* [2003] PGNC 138; N2328

Cut below left knee & both knees injured – constant pains and swellings in the knees.
General Damages – K82,288.79

10.2 *Walter Roth v OK Tedi Mining Ltd* **(**1998) N1788

Knee injury – affecting ability to squat, walk long distances & play sports – 15% loss of knee:
General Damages - K25,000

10.3 *Barry Maurice Stamp v MVIT* (1979) N179

Leg injury - right leg amputated through the knee - pain & suffering and loss of enjoyment of life which included sexual life placing stress on marriage.
General Damages: K20, 000

10.4 *Suzanne Fowler v Mova Fae* [1977] PNGLR 501

Fractured femur - Shortening of leg - Disfigurement of knee - Continuing pain in leg - Restricted mobility and ability - female aged 11.
General Damages: K10, 000

10.5 *Kay Wally v MVIT* (1992) N1029

Continual pain in left knee following leg injury which affected his walking - medical examination indicated low grade arthritis in leg with 15% permanent disability of use of left knee.
General Damages: K8, 000.

10.6 *Crane v Moresby Bus Servuce Pty Ltd* [1976] PNGLR 598

Leg injury - Haematoma under knee joint - Disfiguring scars - Limited movement in toes and knee - male journalist studying Law - aged 28.
General damages K6, 500.

10.7 *Woma Paul v Anton Kare & PNG* [1988] PNGLR 276

Minor head, facial, chest and knees injuries - Boy aged 5 years at the time of accident.
General Damages: K800.

11. LACERATIONS, ABRASIONS, BURNS & OTHER MINOR INJURIES

11.1 *Kusa v Motor Vehicles Insurance (PNG) Trust* [2003] PGNC 138; N2328

Lacerations and bruises to the body – require medication for the rest f her life.
General Damages – K82,288.79

11.2 *Kupo v Motor Vehicle Insurance Ltd (In Liquidation)* [2002] PGNC 55; N2282

Lacerations to face, elbow and foot.
General Damages – K80,000.00

11.3 *William Huandua v State* WS. 993 of 1988 Brown, J.

Teacher - assault by police by hitting in face with rifle butt - loss of five teeth in lower jaw - considerable pain - laceration at back of head requiring stitches - laceration on lower lip requiring three stitches - unconsciousness and loss of blood - required to be fitted with denture - pain and suffering K7, 500 general damages - K5, 000 - Loss of enjoyment of life - K10, 000 - exemplary damages.
General Damages: K22,500 (includes K10,000 for exemplary damages)

11.4 *Constello v Talair Pty Ltd* [1985] PNGLR 61

Head injuries and multiple lacerations to the face and femoral fracture in the left leg. Loss of efficient use of the affected leg at 40%.
General Damages – K20,000.00.

11.5 *Rock Kuri v MVIT* (19TH NOVEMER 1998)
Head Injuries and multiple lacerations to the face and femoral fracture in the left leg – Loss of efficient use of the affected leg at 40%.
General Damages – K20,000.00.

11.6 *Jacqualine Kennedy v Jerry Nalua and PNG* [1980] PNGLR 543

Facial lacerations - Scarring - Female child aged 8 years.
General Damages: K10, 600.

11.7 *Kundia Paul v Anton Kare & PNG* (1988) N659

Multiple injuries including - laceration to arms and face - Girl aged two years.
General Damages: K10, 000.

11.8 *Susanna Undolpmai na v Talair Pty Ltd* [1981] PNGLR 559

Multiple injuries including - Severe scalp laceration - Female child aged 9 (11 at trial).
General Damages: K10, 000.

11. 9 *Kay Wally v MVIT* (1992) N1029

Abrasions and contusions on leg - pain in left knee which affected his walking.
General Damages: K8, 000.

11.10 *Makeu Hare v The State* [1981] PNGLR 553

Severe burns to various parts of body - Gross scarring - Female child aged 5.
General Damages: K7, 500.

11.11 *David Wari Kofewi v The State & Ors* [1983] PNGLR 446 [1987] PNGLR 5

Assault while in Police detention - no serious injury - burnt lips with smoke, slapped on face, punched on chest, struck in the region of genitals with stick.
General Damages: K1, 800.

11.12 *Woma Paul v Anton Kare & PNG* [1988] PNGLR 276

Minor injuries - Lacerations and abrasions - Minor head, facial, chest and knees injuries - Boy aged 5 years at the time of accident.
General Damages: K800.

11.13 *Kumo Pokum v The State* [1990] N899

Lacerations and abrasions - 4 year old girl.
General damages K500 .

12. LEG/FOOT/ANKLE/TOE/THIGH, ETC

12.1 *Kusa v Motor Vehicles Insurance (PNG) Trust* [2003] PGNC 138; N2328

Cut below left knee & both knees injured – constant pains and swellings in the knees.
General Damages – K82,288.79.

12.2 *Kupo v Motor Vehicles Insurance Ltd (In Liquidation)* [2002] PGNC 55: N2282

Dislocated left ankle joint – injuries to right foot – 95% loss of efficient use of left foot – 30% loss of efficient use of right ankle – ugly scars on 75% of the right thigh – ugly scars on 90% of left leg.
General Damages – K80, 000

12.3 *Lumbering v Bougainville Copper Ltd* [1977] PNGLR 183

Traumatic amputation of forefoot - Arthrodesis on ankle joint necessary - Loss of 70% efficient use of leg - Single male aged 29 (32 at trial) employed as heavy duty fitter.
General Damages: $45, 500.

12.4 *Shelley Kupo v MVIT (In Liquidation)* (2002) N2282

Personal injuries – Particular awards of general damages – fracture of left tibia and fibula – **dislocated left ankle joint – injuries to right foot** – lacerations to face, elbow and foot – fractured limbs – trapped in cabin for several hours – distressed pain and suffering ferrous shock – 95% loss of efficient use of left foot – 30% loss of efficient use of right angle – ugly scars on 75% the right thigh – ugly scars on 90% of left leg – married working woman 36 years old – Award of K80,000 – considered appropriate – award of K48,056.40 for past economic loss – Award of K43,172.00 for future economic loss.

12.5 *Seke Opa v The State* [1987] PNGLR 469

Severe head injury - resulting in, inter alia, partial paralysis of the left leg.
General Damages: K60, 000.

12.6 *Richard Mandui v The State* [1996] N1425

Male Assistant Correctional Officer aged 28 years - Right leg - Amputated above knee.
General Damages: K40, 000.

12.7 *Rom Tinpul v Mt. Hagen Golf Club* [1996] N1648

Crush injury to upper tibia of right leg - Future amputation inevitable - Young village boy aged 21 years old with no fixed income.
General Damages: K40, 000.

12.8 *Rex Wangi v State* [1996] N1580

Amputation of left leg - labourer.
General damages K36, 000.

12.9 *Bosip Oka v MVIL* (2001) N2122

Severe leg injuries – 25% permanent disability – 30% loss of efficient function of the left lower limb and a 5% loss of efficient function in the right lower limb.
General Damages – K35,000.00

12.10 *Pangis Toea v MVIT & PNG* **[1986] N554**

Multiple injuries including 1 half inch shortening of (L) leg.
General Damages: K35, 000.

12.10 *DIR v MVIT* [1991] PNGLR 433

Leg (and shoulder), injuries - 30% - 60% disability - Subsistence gardener - widow in early forties - Self supporting subsistence gardener.
General Damages: K35, 000.

12.11 *Moka v Motor Vehicles Insurance Ltd* [2004] PGSC 38; SC729

Motor vehicle accident – serious injuries – General damages for pain and suffering K35,000.00 – Future economic loss – K33,672.75. (Note increase of award from K23,000 for general damages: see Moka v MVIL (2001) N2098). **Total – K68,672.75.**

12.12 *Moka v MVIL* (2001) N2098

Comminuted **fracture of left tibia and fibula and minor head injury** with no disability – 40% estimate loss of efficient use of left leg – Male aged 32 – Security Guard – Assessed K23,000.00 for general damages and K29,932.88 for economic loss before contributory negligence.

12.13 *George Kiak v Tora Enterprises & MVIT* [1986] PNGLR 265

Compound fracture of tibia and fibula - 75% loss of function - continuing disability - Male magistrate (35 years at trial).
General Damages: K29, 000.

12.14 *Terema v MVIT* [1994] PNGLR 304

Loss of leg - Amputation below knee - Married woman.
General damages of K26, 000.

12.15 *Deko Tommy v MVIT* [1991] N1023

Fractures to legs - Village man.
General damages to include economic loss K25, 000.

12.16 *Korrolly v MVIT* [1991] PNGLR 415

Leg injury - Below knee amputation - Artificial leg - Sporting activities eliminated - Male villager aged twenty-three - Grade 10 education.
General Damages: K25, 000

12.17 *Moka v MVIL* (2001) N2098

Comminuted fracture of left tibia and fibula and minor head injury with no disability – 40% estimate loss of efficient use of left leg – Male aged 32 – Security Guard –

Assessed K23,000.00 for general damages and K29,932.88 for economic loss before contributory negligence.

12.18 *Andrew Caswell v National Parks Board* [1987] PNGLR 458

Multiple injuries including fractured ® humerus, fractured ® femur - ® - internal fixation of right femur.
General Damages: K22, 000.

12.19 *Nelson Uro v The Independent State of Papua New Guinea* (2001) N2056

Fractured right fermur – Male carpenter – 15% loss of function to the Right Knee joint. He has a 5% loss of function to the Right Hip joint.
General Damages K20,000.00

12.20 *Rock Kuri v MVIT* (19th November 1998)

Head injuries and multiple lacerations to the face and femoral fracture in the left leg. Loss of efficient use of the affected leg at 40%.
General Damages – K20,000.00.

12.21 *Barry Maurice Stamp v MVIT* [1979] N179

Leg injury - right leg amputated through the knee - graze on forearm and right hand - pain & suffering and loss of enjoyment of life which included sexual life placing stress on marriage.
General Damages: K20, 000

12.22 *Alfred Moia v State* [1988] PNGLR 299

Fracture of tibia and fibula in both legs - Malunion of the bones.
General damages K20, 000.

12.23 *Caedmon Koieba v MVIT* [1984] PNGLR 365

Fracture of mid shaft of femur - Pinning and bone graft - Shortening of leg - Fifty percent loss of use - Continuing disability - Male Anglican priest aged forty (forty-six at trial) - Forced early retirement at forty-nine.
General Damages: K19,000.

12.24 *Palga v MVIT* [1991] PNGLR 446

Multiple Crush injuries including left leg - Extensive surgery - Female aged seventeen (nineteen at trial) - Uneducated villager - Disability of 10 per cent for daily village activities.
General Damages: K18,000.

12.25 *Margaret Oil v MVIT* (15th October 1998)

Cuts to legs and internal bleeding as well as injuries to back – suffered some disability in mobility due to the leg and back injuries – The Judgment does not state the

estimated percentage of loss she suffered – The Court awarded a global amount of K17,000.00.

12.26 *Make Kewe v Thomas Kunjip & PNG* [1986] PNGLR 279

Spinal injury affecting back and legs - Highlands village made - K20, 000.
Measure of general damages - K12,580.

12.27 *Koko Kopele v MVIT* [1983] PNGLR 223

Fractured femur - Permanent loss of mobility - Forced to give up employment - Male outdoor labourer aged 37.
General Damages: K12,000.

12.28 *Guli v MVIT* [1994] PNGLR 304

Fractured right tibia - Villager - Post-concussion syndrome - Assessment - 40% overall permanent disability.
General Damages: K11,000.

12.29 *Susanna Undolpmaina v Talair PTY LTD* [1981] PNGLR 559

Leg (and head injuries) - Fracture tibia and fibula - Severe scalp laceration - Nervous shock - Death of father and sister in same accident - Continuing psychological instability and anxiety state - Female child aged 9.
General Damages: K10,000.

12.30 Suzanne Fowler v Mova Fae [1977] PNGLR 501

Multiple injuries including - Fractured femur - Shortening of leg - Disfigurement of knee - Continuing pain in leg - Restricted mobility and ability - Functional tension overlay likely to conclude with termination of litigation - female aged 11.
General Damages: K10, 000.

12.31 *Tumunda Toropo v Jack Awabe* (2001) N2116

Broken fractured leg – Bruising – 10% to 15% loss of effective use of right leg.
General Damages – K9,500.00.

12.32 *Anna David v MVIT* [1993] PNGLR 356

Ankle and foot injuries - Partial disability.
General Damages: K9, 000

12.33 *Anna Pose v The State* [1981] PNGLR 556

Good recovery - Leg and arm disability due to herniplegia from head injury - Female child aged 2 (7 at trial).
General Damages: K9, 000.

12.34 *Kay Wally v MVIT* [1992] N1029

Abrasions and contusions on leg - pain in left knee which affected his walking - low grade arthritis on leg with 15% permanent disability of use of left knee.
General Damages: K8, 000.

12.35 *Bras Wisi v MVIT* [1992] N1040

16 year old boy - Suffered compound fracture of left leg and abrasions - Five weeks in hospital - Slight functional loss in leg and some scarring - Villager.
Award of K7, 000 for general damages.

12.36 *Crane v Moresby Bus Service Pty Ltd* [1976] PNGLR 598

Leg injury - fractured neck of ® fibula - Deep laceration to right foot with considerable soft tissue destruction and opening into joints of foot - Deep laceration to outer leg - Haematoma under knee joint - Disfiguring scars - Limited movement in toes and knee - Muscle hernia mid-leg - further surgery on ankle possible - Pain on exertion - male journalist studying Law - aged 28.
General damages: K6, 500.

12.37 *Kurvo Birim v Jovane Mohamed & PNG* [1981] PNGLR 545

Fractured neck of left femur - 40 years old. Subsistence farmer who grows coffee.
General Damages: K6, 000.

12.38 *Anis Wambia v The State* [1980] PNGLR 567

Leg injury - fractured right femur (without involvement of any joint) - subsistence farmer with coffee gardens.
General Damages: K5, 000.

12.39 *Kongo Bomai v The State* [1979] PNGLR 125

Fractured femur - Facial abrasions - Some confusion - Continuing pain with climbing - Inability to kick ball or participate in sport - Mountain village schoolboy aged 12.
General Damages: K1, 100 substituted for K300.

13. NECK

13.1 *Brown v MVIT* [1980] PNGLR 409

Neck injury - Dislocated fracture at C2 - C3 - Treated with callipers and skull traction occasional headaches - Sense of stiffness and tired feeling in neck - Inability of participate in sport or lift heavy objects - Male aged twenty-seven (twenty-nine at trial).
General Damages: K18, 000.

13.2 *Armiger v Government of PNG* [1978] PNGLR 516

Multiple injuries including hiplash neck - Continuing discomfort - Loss of golf as recreation - Male businessman manager aged 43.
General Damages: K8,500.

13.3 *Gorua Tamarua v Alert Security Services* (2002) N2200

Assault – Bruises to left neck – swelling to left parietal area of head – clotted blood in left ear – mild hearing loss and 5% of efficient use of left ear.
General Damages – K2,000.00.

14. NERVES/NERVOUS SHOCK

14.1 *Andrew Caswell v National Parks Board* [1987] PNGLR 458

Fractured ® humerus, fractured ® femur - crushed fractured of L2 (lumbar vertebra) - fractured ® pelvis (Bilateral calcreal fracture) Partial right ulna lesion- Internal fixation of right femur.
General Damages: K22, 000.

14.2 *Shelley Kupo v MVIT* (In Liquidation) (2002) N2282

Personal injuries – Particular awards of general damages – fracture of left tibia and fibula – **dislocated left ankle joint – injuries to right foot** – lacerations to face, elbow and foot – fractured limbs – trapped in cabin for several hours – distressed pain and suffering ferrous shock – 95% loss of efficient use of left foot – 30% loss of efficient use of right angle – ugly scars on 75% the right thigh – ugly scars on 90% of left leg – married working woman 36 years old – Award of K80,000 for general damages.

14.3 *Make Kewe v Thomas Kunjip & PNG* [1986] PNGLR 279

Bruising of thoracic and lumbar region - spinal and nerve root damage which affected back and legs - Highlands village man.
General Damages: K20, 000.

14.4 *Poabi v PNG Electricity Commission* (2004) N2511

Electrocution from falling on fractured live electricity wire – Nervous shock from near death experience upon witnessing instant death of friend from same electrocution. No physical injury from nervous shock – young high school student aged 14 at time of injury and aged 23 at time of trial - K20,000 for general damages.

14.5 *Kokonas Kandapak v The State* [1980] PNGLR 573

Fractured upper arm - Ulna nerve damages - Claw deformity of right hand - Highland villager - Near subsistence farmer - Marriage affected - Male aged twenty-five. Interference with marital relations.
General Damages: K12, 150.

14.6 *Susanna Undolpmaina v Talair Pty Ltd* [1981] PNGLR 559

Nervous shock - Compellable as part of pain and suffering - Death of father and sister in same accident - continuing psychological instability and anxiety state. Leg and head injuries – Fractured tibia and fibula - Severe scalp laceration - Female child aged 9 (11 at trial).
General Damages: K10, 000.

15. NOSE

15.1 *Lus Minjuk v The State* [1988] N676

Multiple injuries including injuries to nose - Scarring - Some permanent injury - Continuing pain - Fit only for light work.
General Damages: K15, 000.

15.2 *Peter Nangain Kol v Shorncliffe (PNG) LTD* (2001) N2121

Nose injury – Assessment of damages – Driver of motor vehicle injured – Nose injury – Awarded K9,500 for general damages.

15.3 *Pepa Mamando v Koi Goiya* [1992] N1066

Husband bit off top of her (wife's) nose - Operation performed to make new nose from forehead with good results - 50% cosmetic disability - Plaintiff now divorced and about 40 years of age.
General Damages: K4, 000

16. OSTEOARTHRITIS/ARTHRITIS

16.1 *Kusa v MVIL* (2003) N2328

Knee injury – cut below left knees and both knees injured – constant pain and swelling in the knees – Osteoarthritis in both knee joints – conditions will worsen in time.
General damages – K82,288.79

16.2 *Pangis Toea v MVIT & PNG* [1986] PNGLR 294

Multiple injuries including fracture and dislocation of left hip - osteoarthritis of hip joint - 70% disability of hip.
General Damages: K35, 000.

16.3 *Kay Wally v MVIT* [1992]N1029

Abrasions and contusions on leg - pain in left knee which affected his walking - Low grade arthritis in leg with 15% permanent disability of use of left knee.
General Damages: K8, 000.

16.4 *Rangend Paraka v MVIT* [1992]N1041

Plaintiff - 40 years old woman - osteoarthritis but court not satisfied with evidence that plaintiff had acquired that condition as a result of the accident.
General Damages: K1, 500.

17. PARAPLEGIC/QUADRIPLEGIC

17.1 *Kerr v MVIT* [1979] PNGLR 251

Paraplegic - Dislocation fracture at T12 - Dislocated shoulder - Usual continuing problems - Keen sportsman and athlete - Salesman in agriculture and marketing area - Married man aged 26- Employed as office manager at trial.
General Damages: K181, 900.

17.2 *Ann Kepa v Boi Gerek & The State* [1991] N961

Quadriplegic - Married woman aged 28 years.
General Damages: K140, 000.

17.3 *Kepa v Boi Gerek* [1991] PNGLR 424

Quadriplegic - Married woman aged 28 - Active in church and village affairs.
General Damages: K140, 000.

17.4 *Dillingham Corporation of New Guinea Pty Ltd v Diaz* [1975] PNGLR 262

Paraplegic - First class miner of 32 years - Expatriate Australian injured in PNG.
General damages: K109, 000.

17.5 *Meddie Serive v The State* [1980] PNGLR 549

Paraplegic-dislocated fracture at T12 - Confined to wheelchair - Usual continuing problems - Correctional institutions officer - Male aged 20 - No possibility of re-employment without appropriate facilities. **General Damages: K106, 260.**

17.6 *Charles Pupu v Pelis Tomilate* [1979] PNGLR 251

Paraplegic - Spinal fractures at T12-L1 - Confined to wheelchair - National qualified aircraft maintenance engineer with real prospect of becoming first national licensed aircraft maintenance engineer - Male aged (twenty-eight at trial).
General Damages: K103, 940.

17.7 *Aundak Kupil & Another v The State* [1983] PNGLR 350

Plaintiff No. 1: Paraplegic - Villager aged thirty with one wife – Active involvement in family vegetable gardens, coffee plots and sale of timber.
General Damages: K75, 000.

Plaintiff No. 2: Paraplegic - Confined to waterbed - Not motivated for activity or use of wheel-chair - Life expectancy - family vegetable gardens and sale of timber - Driver.
Award of K90, 000 General Damages.

17.8 *Pokowan Kandakasi v MVIT* [1992] N1074

Paraplegic - Village woman.
General Damages: K90, 000.

17.9 *Kusa v Motor Vehicles Insurance (PNG) Trust* [2003] PGNC 138;

Osteoarthritis in both knew joints – condition will worsen with time.
General Damages – K82,288.79

17.10 *Lemba Yosuwe v Kumren Behekona* [1971-72] PNGLR 457

Paraplegia - Urinary tract infection - Likelihood of chronic renal disease and renal failure.
General Damages: K22, 500.

18. PERSONALITY DISORDER/DEPRESSION/ANXIETY/INTELLECTUAL DISABILITY

18.1 *Lewis v The State* [1980] PNGLR 219

Head injuries - Brain damage - Cervical injury likely to deteriorate - Confusion - Progressive memory disturbance - Lack of concern for own condition - Fits of uncontrollable laughter - Right sided tremor - Almost complete loss of vision on right side - Real risk of institutionalisation at early age.
General Damages: K125, 000.

18.2 *Aspinal v Government of PNG* [1979] PNGLR 642

Head injuries - Brain damage - Permanent intellectual impairment - Mild mental retardation - Special schooling required - Male child aged eight.
General Damages: K57, 562.50 ($76, 750).

18.3 *Jeremiah O'Hello v Kagel Shipping CO. Pty Ltd* [1980] PNGLR 361

Pelvic and hip fractures - Ruptured urethra - Some change of personality - Male marine maintenance engineer aged forty-four.
General Damages: K42, 000.

18.4 *Government of PNG v McCleary* [1976] PNGLR 321

Back and spinal injury - Restricted agility - Chronic low grade re-active depression.
General Damages: K40, 000.

18.5 *Basil Lam v Micca Walaun* [1979] PNGLR 637

Head injury - Right sided haematoma - Brain damage and personality change - Impaired intellect - Slurred speech - Weakness with activity - Capable only of light work with minimal public contact.
General Damages: K32, 000.

18.6 *Smerdon v Rawuel* [1973] PNGLR 313

Closed head injury resulting in permanent impairment of intellect, disturbance of thinking process and emotional overlay.
General damages $22, 540.00.

18.7 *Takie Murray v Norman Kinamur* [1983] PNGLR 446

Woman-eye injury resulting in surgical removal of the eye - Disfigurement and psychological distress -
General damages K20, 000.

18.8 *Darvill v MVIT* [1980] PNGLR 548

Back injury - Fracture of first lumbar vertebra - Continuing psychological stress - Married woman aged forty-one.
General Damages: K19, 000.

18.9 *Catherine Fowler v Mova Fae* [1977] PNGLR 506

Head and facial injuries - Severe anxiety state unlikely to continue after termination of litigation - Female aged 14 .
General Damages: K15, 000.

Kusa v Motor Vehicles Insurance (PNG) Trust [2003] PGNC 138;

Knee injury – Osteoarthritis in both knee joints – condition will worsen with time.
General Damages – K82,288.79

18.10 *Susanna Undolpmaina v Talair Pty Ltd* [1981] PNGLR 559

Leg and head injuries - Fracture tibia and fibula - Severe scalp laceration - Nervous shock - Death of father and sister in same accident - Continuing psychological instability and anxiety state - Female child aged 9.
General Damages: K10, 000.

18.11 *Kongo Bomai v The State* [1979] PNGLR 125

Facial abrasions - Some confusion - Mountain village schoolboy aged twelve.
General Damages: K1, 100.

19. RIBS

19.1 *Kewa Nui v MVIT* [1992] N1044

Forty years old Plaintiff- Fracture of ribs on right side of chest - one week in hospital - 15% disability resulting from injuries.
General Damages: K6, 000.

20. SCARRING

20.1 *Costello v Talair Pty Ltd* [1985] PNGLR 61

Burns - Laceration - Chests and shoulder injuries - Traumatic amputation of ear - Scarring - Male aged 57.
General Damages: K18, 000.

20.2 *Catherine Fowler v Mova Fae* [1977] PNGLR 506

Arm injury - Fractured humerus - Subsequent operation to take up slack ligament - Unsightly scar - Also head and facial injuries.
General Damages: K15, 000.

20.3 *Peter Amini v The State* [1987] PNGLR 465; N618
Abdominal scar.
General Damages: K12, 000.

20.4 *Coady v MVIT* [1985] PNGLR 450

Head and facial injuries - Scarring - Child aged four and a half - Further appeal to Supreme Court dismissed. See SC 331 (4/05/87).
General Damages: K12,000

20.5 *Jacqualine Kennedy v Jerry Nalau and PNG* [1980] PNGLR 543

Facial lacerations - Scarring - Female child aged 8 years.
General Damages: K10, 600.

20.6 *Makeu Hare v The State* [1981] PNGLR 553

Severe burns to various parts of body - Gross scarring - Deceased flexion in right wrist - Female child aged 5.
General Damages: K7, 500.

20.7 *Bras Wisi v MVIT* [1992] N1040

Compound fracture of left leg and abrasions - Slight functional loss in leg and some scarring - Villager with no employment.
General Damages: K7, 000.

20.8 *Crane v Moresby Bus Service Pty Ltd* [1976] PNGLR 598

Leg injury - Deep laceration to right foot with considerable soft tissue destruction and opening into joints of foot - Deep laceration to outer leg - Disfiguring scars - Male journalist studying law - Aged 28. **General damages K6, 500.**

20.9 *Paine v The State* [1979] PNGLR 99

Arm injury compound fracture of upper part of ® arm - Scar .
General Damages: K3, 000.

21. SKIN

21.1 *Jecky Manios v Motor Vehicles Insurance (PNG) Trust* [1992] N1073

Severe degloving injury to left foot-skin grafting of wound - 15% loss of function of left foot.
General Damages: K16, 000.

21.2 *Bradford v Bradford* [1975] PNGLR 305

Multiple facial injuries sustained by infant - Lacerated eyeball, extensive facial lacerations with skin loss and baring of bone, twisted upper eyelid, etc.
General damages K8, 000.

22. SPLEEN

22.1 *Maniz Wango v State* [1992]N1039

Spleen ruptured by kick and removed - Plaintiff now prone to bouts of malaria.
General Damages: K15, 000.00.

22.2 *Peter Amini v The State* [1987] PNGLR 465

Abdominal injury - Removal of spleen - Abdominal scar.
General Damages: K12, 000.00.

23. SEXUAL IMPOTENCY/PREGNANCY COMPLICATIONS/MARITAL RELATIONS, ETC

23.1 *Government of PNG v McCleary* [1976] PNGLR 321

Back and spinal injury - Resulting in aggravation of pre-existing congenital condition - Restricted agility - chronic low grade re-active depression - Marriage breakdown due to sexual impotency - Loss of earning capacity.
General Damages: K40, 000.00.

23.2 *Gima Oresi v Chris Marjen and the State* (1998) N1784

Abdomen injury – negligence of surgeon – foreign objects left after operation, damages – trauma, pain and suffering, cosmetic disfigurement – reduced likelihood of pregnancy.
General Damages – K20,000.00.

23.3 *Barry Maurice Stamp v MVIT* [1979] N179

Leg injury - Right leg amputated through the knee - Graze on forearm and right hand - Pain & suffering and loss of enjoyment of life which included sexual life placing stress on marriage.
General Damages: K20, 000.00.

23.4 *Glenys Yarnold v The State* [1987] PNGLR 474

Back injury - Disc protrusion between 5th lumbar (L5) vertebrae and first sacrum (5.1) vertebrae - Risk back problems worsening during pregnancy - 15% disability of back function.
General Damages: K20, 000.00.

23.5 *Kokonas Kandapak v The State* [1980] PNGLR 573

Arm and hand injury - Fractured upper arm - Ulna nerve damages - Claw deformity of right hand - Highland villager - Near subsistence farmer - Marriage affected - Male aged twenty-five.
K12, 150 general damages including K500.00 for interference with marital relations.

23.6 *Pepa Mamando v Koi Goiya* [1992] N1066

Husband - bit off top of her (wife's) nose - Operation performed to make new nose from forehead with good results - 50% cosmetic disability - Plaintiff now divorced and about 40 years of age.
General Damages: K4, 000.00.

23.7 *David Wari Kofewi v The State & Ors* [1983] PNGLR 446 [1987] PNGLR 5

Assault while in Police detention - Struck in the region of genitals with stick.
General Damages: K1, 800.00.

24. TOOTH

24.1. *Dinogo v Motor Vehicles Insurance Ltd* [2005] PGNC 117; N2839

5% dysfunctional disability such as loss of lower teeth, injury to lips. 50 year old man.
General Damages – K82,288.79

24.2 *William Huanduo v State*, WS. 993 of 1998; Brown, J.

Multiple injuries - Teacher - Assaulted by Police by hitting in face with rifle butt - Loss of five teeth in lower jaw - Unconsciousness and loss of blood - Required to be fitted with denture - K7, 500 K10, 000 exemplary damages.
General Damages: K17,500 (includes K10,000 for exemplary damages).

25. RENAL/URINARY INFECTION

25.1 *Lemba Yosuwe v Kumren Behekona* [1971-72] PNGLR 457

Paraplegia - Urinary tract infection - Likelihood of chronic renal disease and renal failure, loss of amenities and earing capacity lost, capacity not fully exploited before injure - Provision for future needs.
General Damages: K22, 500.

26. UNCONSCIOUSNESS/CONCUSSION

26.1 *Administration of PNG v Carroll* [1974] PNGLR 265

Multiple injuries - head injuries, neck wound. Fractured left malar and mandible - Double vision and affection of infra orbital nerve - Compound fractured left tibia and fibula, fractured right tibia and femoral condyles - Unconsciousness.
General Damages: $20, 000.

26.2 *Guli v Motor Vehicles Insurance (PNG) Trust* [1994] PNGLR 304

Village man - Concussion, facial abrasions, fractured right tibia - Post-concussion syndrome - 40% overall permanent disability.
General Damages: K11, 000.00.

26.3 *Sapa Landao v State* [1988] PNGLR 279, N661

Head injury - Hit on the head - 5 days unconscious.
General Damages: K9, 000.00.

26.4 *Paine v State* [1979] PNGLR 99, N189

Compound fracture of ® arm - Unconscious for 5 days 3 weeks.
General Damages: K3, 000.00.

27. PRINCIPLES, PRACTICE, ETC

27.1 GENERAL PRINCIPLES

27.1.1 *Lemba Yosuwe v Kumren Behekone* [1971-72] PNGLR 457

Loss of amenities and earing capacity lost, capacity not fully exploited before injure - Provision for future needs - Method of calculation of damages.

27.1.2 *Smerdon v Rawuel* [1973] PNGLR 313

Principles for reviewing trial judge's assessment of damages for personal injuries on appeal - methods of assessing damages.

27.1.3 *Lubbering v Boungainville Copper Ltd* [1977] PNGLR 183

Traumatic amputation of forefoot - Loss of 70% efficient use of leg - Single male aged 29 (32 at trial) employed as heavy duty fitter - Loss of earning capacity - Difficulty in quantifying loss - Evidence - Principles discussed.

Mitigation of damages through medical help - principles discussed.

27.1.4 *Moka v MVIL* (2004) SC729

Increase in awards from awards made in 1988 necessary to reflect, inflation.

27.1.5 *Kerr v MVIT* [1979] PNGLR 251

Paraplegic - Dislocated fracture at T12 - Dislocated shoulder - Measure of damages - Loss of earning capacity - house keeping care - Tax - Loss of life expectation - conventional figure of K1,500.

27.1.6 *Hugh James Hassard v Bougainville Copper Ltd* [1981] PNGLR 182

Economic loss - Calculation of present value of future economic loss - Actuarial method preferred - Interest discount rate at 5% appropriate.

27.1.7 *Aundak Kupil v The State* [1983] PNGLR 350

Villager aged thirty with one wife - Appropriateness of lump sum awards - Common law vis-a-vis customary compensation discussed.

27.1.8 *David Yala Pumbu v S/Const. Teta Tenker & The State* [1986] PNGLR 289

Abdominal injury inflicted by policemen acting on duties - Duty of policeman owed to another policeman.

27.1.9 *Pangis Toea v MVIT & PNG* [1986] PNGLR 294

Negligence - Emergency - Those who have created danger should not be critical.

27.1.10 *George Kiak v Tora Enterprises & MVIT* [1986] PNGLR 265

S. 48, 49 of Motor Vehicles (Third Party Insurance Act) Ch. 295 - "Any person" under S. 54 does not include owner/driver. "Third Party Insurance Cover" considered generally.

27.1.11 *John Francis Reading v MVIT* [1988] PNGLR 266

Brain damage - Permanent - 5 months old baby - Assessment of general damages and Loss of earning capacity. Maximum amount under MVIT Act - does not include interest.

27.1.12 *Rangend Paraka v MVIT* [1992] N1041

Pre-existing physical condition not alterated by injury in accident - Assessment of evidence - Medical examination revealed osteoarthritis but court not satisfied evidence that plaintiff had acquired that condition as a result of the accident - Award based on injuries resulting from being knocked around from the accident - Award of K1, 500.

27.1.13 *Aspinal v Government of PNG* [1979] PNGLR 642

Head injury for infant 8 years - assessment of general damages and economic loss including future education.

27.1.14 *Kupo v Motor Vehicle Insurance Ltd (In Liquidation)* [2002] PGNC 55; N2282

Personal injury – Married working woman 36 years old – Principles of Economic loss. Past and Future Economic loss.

27.2 ECONOMIC LOSS-GENERAL PRINCIPLES

27.2.1 *Poabi v PNG Electricity Commission* (2004) N2511

Electrocution from falling on fractured live electricity wire – Nervous shock from near death experience upon witnessing instant death of friend from same electrocution. No physical injury from nervous shock – young high school student aged 14 at time of injury and aged 23 at time of trial - K20,000 for general damages and K21,498.00 for future economic loss.

27.2.2 *Lemba Yosuwe v Kumren Behekone* [1971-72] PNGLR 457

Paraplegia - loss of and hearing capacity not fully exploited before injury - Method of calculation of damages.

27.2.3 *Administration of PNG v Carroll* [1974] PNGLR 265

Economic loss of expatriate Australian living in PNG - Whether different level of material community standards in PNG to be taken into account.

27.2.4 *Lubbering v Bougainville Copper Ltd* [1977] PNGLR 183

Traumatic amputation of forefoot - Arthrodesis on ankle joint necessary - Loss of 70% efficient use of leg - Single male aged 29 (32 at trial) employed as heavy duty fitter. Loss of earning capacity - Evidence of - Difficulty of quantifying loss of earning capacity without evidence upon which assessment can be made - Desirability of adducing evidence of work which plaintiff may do and remuneration therefore.

27.2.5 *Kerr v MVIT* [1979] PNGLR 251

Paraplegic - Dislocated fracture at T12 - Dislocated shoulder - Loss of earning capacity - Tax position to be taken into account - English common law applied.

27.2.6 *Hugh James Hassard v Bougainville Copper Ltd* [1981] PNGLR 182

Personal injuries - Economic loss - Calculation of present value of future economic loss - Actuarial method preferred - Inflation not relevant to assessment - Inflation relevant to interest discount rate - National tax nil - Interest discount rate at 5% appropriate.

27.2.7 *Aundak Kupil v The State* [1983] PNGLR 350

Paraplegic - Life expectancy five years - Villager aged thirty with one wife - Active involvement in family vegetable gardens, coffee plots and sale of timber - Periodic payment for future economic loss and medical needs.

27.2.8 *Koko Kopele v MVIT* [1983] PNGLR 223

Personal injuries - Economic loss - Calculation of present value of future economic loss - Actuarial method adopted.

27.2.9 **C***aedmon Koieba v Motor Vehicles Insurance (PNG) Trust* [1984] PNGLR 224

Leg injury - Fracture of mid shaft of femur - Male Anglican priest aged forty (forty-six at trial) - Forced early retirement at forty-nine - Economic loss - Calculation of present value of economic loss - Economic loss commencing three years after trial - Discount factor - Appropriate rate five per cent.

27.2.10 *Pinzer v Bougainville Copper Limited* [1985] PNGLR 160

Personal injuries - Loss of earning capacity - Basis of calculation - To be calculated on net (after tax) figures.

Future loss - National tax - Inflation - To be taken into account - To be accounted for in discount rate - Proper discount rate 3 per cent.

27.2.11 *John Francis Reading v MVIT* [1988] PNGLR 266

Brain damage - Permanent - 5 months old baby - Assessment of damages for, loss of earning capacity - K116, 325.00.

27.2.12 *Bepi Ambon v MVIT* [1192] N1116

Crush injury to left forearm resulting in amputation of left elbow - No economic loss awarded in absence of evidence of such loss in the past or in the future.

27.2.13 *Government of PNG v McCleary* [1976] PNGLR 321

Back and spinal injury - Loss of earning capacity - Excessive damages principle discussed.

27.2.14 *Aspinal v Government of PNG* [1979] PNGLR 642

Head injuries - Brain damage - Male child aged eight - Potential capacity as semi-professional worker or businessman reduced to level of labourer or storeman - Measure of damages - Loss of earning capacity - K48, 000($64, 000 for reduced earning capacity.

27.2.15 *Motor Vehicles Insurance (PNG) Trust v Let* [2005] PGSC 16; SC816

Future economic loss or earning capacity – K30,000.00 for future economic loss – K40,000.00 for general damages

27.3. ECONOMIC LOSS- PERSON IN REGULAR EMPLOYMENT

27.3.1 *Lubbering v Bougainville Copper Ltd* [1977] PNGLR 183

- Traumatic amputation of forefoot - Loss of 70% efficient use of leg - Single male aged 29 (32 at trial) employed as heavy duty fitter - for reduced earning capacity and $500 for future replacement and repaid of surgical boots.

- Loss of earning capacity - Evidence of - Difficulty of quantifying loss of earning capacity without evidence upon which assessment can be made - Desirability of adducing evidence of work which plaintiff may do and remuneration therefore.

27.3.2 *Kupo v Motor Vehicle Insurance Ltd (In Liquidation)* [2002] PGNC 55; N2282

Personal injury – permanent damage physically & emotionally – award of K48,056.40 for past economic loss – K43,172.00 for future economic loss.
General Damages – K80,000.00

27.3.3 *Kusa v Motor Vehicles Insurance (PNG) Trust* [2003] PGNC 138; N2328

Personal injury – constant pains and severe swellings in knees – work performance affected – forced resignation.
General Damages – K82,288.79

27.3.4 *Aundak Kupil v The State* [1983] PNGLR 350

Personal injuries - Paraplegic - Driver - Periodic payment for future economic loss and medical needs.

27.3.5 *Anton Johan Pinzger v Bougainvillea Copper Ltd* [1983] PNGLR 436

Back injury - Lumbar disc injury - Fit only for light work - Male tunnel foreman in mining industry aged 36 - Difficulty in finding employment in Australia - Economic loss - Calculation of present value of future economic loss - Actuarial method.

27.3.6 *Catherine Fowler v Mova Fae* [1977] PNGLR 506

Arm injury and head injury - Loss of function 20/5 - Loss of aspirations of nursing as avenue of employment - Female aged 14 - K5, 000 for loss of aspiration of nursing.

27.3.7 *Basil Lam v Micca Walaun* [1979] PNGLR 637

Head injury - Right sided haematoma - Brain damage - Capable only of light work with minimal public contact - Male customs clerk with potential to become licensed customs agent - Aged nineteen $22, 000 for reduced earning capacity.

27.3.8 *Lewis v The State* [1980] PNGLR 219

Head injuries - Brain damage - Serious side effects - Male airport ramp officer aged 24 - K100, 000 for reduced earning capacity.

27.3.9 *Jeremiah O'Hello v Kagel Shipping Co. Pty Ltd* [1980] PNGLR 361

Pelvic and hip fractures - Ruptured urethra - Restricted mobility - Continuing discomfort with prolonged sitting etc. - Working life reduced by five years - Male marine maintenance engineer aged forty-four - K22, 000 for future loss of earnings.

27.3.10 *John Etape v MVIT* [1992] PNGLR 191

Injury to left arm, right hip and right foot - returned to work after 1 year but unable to work in former position due to injuries - given another job with reduced pay - Employer will be forced to terminate his employment - K62,000 for economic loss - reduced to K8,718 on appeal - General principle on assessment discussed: See Etape v MVIT [1994] PNGLR 596.

27.4 ECONOMIC LOSS - CASUAL LABOURER

27.4.1 *Koko Kopele v MVIT* [1983] PNGLR 223

Fractured femur - Permanent loss of mobility - Forced to give up employment - Male outdoor labourer aged 37 - K12, 000 general damages.

ECONOMIC LOSS – Casual Labourer

Moka v Motor Vehicles Insurance Ltd [2004]PGSC 38; SC729

Personal injuries – assessment of General damages for pain and suffering K35,000.00. Future economic loss – K33,672.75. Principles discussed.
Total – K68,672.75.

27.4.2 *Kosi Bongri v The State & Andrew* [1987] PNGLR 478

Arm injury - Comminuted fractured dislocation of ® elbow casual labourer - Permanent disability - 100% efficient use of upper ® limb, 100% efficient use of elbow ® for purposes of heavy manual labour - Right elbow only for light work assessment of economic loss - principles discussed - K7, 500 general damages.

27.4.3 *Timson Noki v Fraser* [1991] PNGLR 260

Crush injury to right arm - 100% Loss of efficiency - unskilled male labourer aged 20 - Future economic Loss - K38,448.20.

27.5 ECONOMIC LOSS – UNEMPLOYED/URBAN DWELLER/SUBSISTENCE FARMER/VILLAGER

27.5.1 *Anis Wambia v The State* [1980] PNGLR 567

Fractured femur - Highlands subsistence farmer - Coffee grower - K6,075 economic loss.

27.5.2 *Oni v Motor Vehicles Insurance (PNG) Trust* [2004] PGNC 16; N2767

23 year old subsistent farmer – 70% permanent shoulder disability.
General Damages – K32,000.00

27.5.3 *Dinogo v Motor Vehicles Insurance Ltd* [2005] PGNC 117; N2839

50 year old man – Permanent disability assessed at 30% efficient use of lower limb – Economic Loss – unemployed Urban Settler. **Damages - K**

27.5.4 *Kaka Kopun v The State* [1980] PNGLR 557

Left arm injury - Fit for light work - Highland villager - Near subsistence and part coffee farmer - Single man aged twenty-seven -K7, 000 for future loss of earning capacity - Global award of economic loss - Principles discussed.

27.5.5 *Kunjil On v The State* [1986] PNGLR 286

Back - Pelvis and hip injury - Elderly village man - 80% permanent disability in performing normal duties and walking - Measure of economic loss - K6, 184.

27.5.6 *Bepi Ambon v MVIT* [992] N1116

Plaintiff woman of 18 - Crush injury to left forearm resulting in amputation of left elbow - No economic loss awarded in absence of evidence of such loss in the past or in the future.

27.5.7 *Wie Kuntu v MVIT* [1991] PNGLR 440

Spinal and wrist injury - 5% Loss of use of left wrist - Villager - reduced ability for subsistence farming - K8,000 for future economic loss.

27.5.8 *Palga v MVIT* [1991] PNGLR 446

Multiple crush injury - pelvis injury - female aged 17 - uneducated villager - 10% reduced disability for daily village activities - K18,00 global award for general damages and future economic loss.

27.5.9 *Dami Walpe v MVIT* [1993] PNGLR 434

Villager - 40 years - Bruising and lower back pain - Compressed fracture of L3 - L4 vertebrae - permanent disability in efficient use of back - as global amount for economic loss.

27.5.10 *Kuruo Birim v Jouane Mohamad & PNG* [1981] PNGLR 545

Subsistence farmer and coffee grower - Suffered fractured femur - K3,100 for future economic loss

27.5.11 *Dir v MVIT* [1991] PNGLR 443

Female aged 17 - subsistence farmer - widow - leg and shoulder injuries - 30 - 60% disability - K10,000 economic loss.

27.5.12 *Deko Tommy v MVIT* (1991) N1023

Male villager - Fractured legs - Global around K25,000 for general damages and economic loss

27.5.13 *Korrolly v MVIT* [1991] PNGLR 413

Subsistence farmer engaged in cash crop farming - global award for general damages of K25,000 to include economic loss.

27.5.14 *Bras Wisi v MVIT* (1992) N1040

16 year old male villager - Global award of K7,000 for general damages and economic loss.

27.5.15 *Guli v MVIT* [1994] PNGLR 304

Villager - fractured right tibia - 40% overall disability - K2841 for future economic loss.

27.5.16 *Rom Tinpul v MT Hagen Golf Club* (1996) N1648

Young male villager - crash injury to upper right tibia - amputation heritable - K18,500 for economic loss.

27.5.17 *Make Kewe v Thomas Kunjip & PNG* [1986] PNGLR 279

Highlands village man with minimal education - Spinal and nerve root damage - K10,000.00 for economic loss - Principles discussed.

27.5.18 *Kama Pupti v Thomas Kunjip & State* [1986] PNGLR 283

Female villager - fractured spine - Global award of K20,000 for general damages and economic loss.

27.5.19 *Pokowan Kandalasi v MVIT* (1992) N1074

Village woman - Quadriplegic - K13,000 economic loss.

27.6. ECONOMIC LOSS - SELF-EMPLOYED BUSINESSMAN

27.6.1 *Aspinal v Government of PNG* [1979] PNGLR 642

Head injuries - Brain damage - Male child aged eight (thirteen at trial) - Potential capacity as semi-professional worker or businessman reduced to level of labourer or storeman - Measure of damages - Loss of earning capacity - K48, 000 ($64, 000 for reduced earning capacity).

27.6.2 *Kaka Kopun v The State* [1980] PNGLR 557

Left arm injury - Highland villager - Near subsistence and part coffee farmer - Single man aged twenty-seven - K7, 000.00 for future loss of earning capacity.

27.7 ECONOMIC LOSS -PROFESSIONAL PEOPLE LIKE LAWYERS, DOCTORS, ETC.....

27.7.1 *Crane v Moresby Bus Service Pty Ltd* [1976] PNGLR 598

Leg injury - Haematoma under knee - Male journalist study Law - Global award of K6,500 for General damages.

27.7.2 *Charles Pupu v Pelis Tomilate* [1979] PNGLR 251

Paraplegic - Spinal fractures at T12-L1 - National qualified aircraft maintenance engineer with real prospect of becoming first national licensed aircraft maintenance engineer - Loss of earning capacity - Male aged (twenty-eight at trial) - K58, 085 for future loss of earnings.

27.7.3 *Richard Tom Mandui v The State* (1996) N1425

Left leg amputated above knee - Male Correctional Officer studying Law - K21,650 for loss of earning capacity as a CIS officer only.

27.8. MEDICAL TREATMENT

27.8.1 *Lubbering v Bougainville Coper Ltd* [1977] PNGLR 183

Traumatic amputation of forefoot - reason - Reasonableness of Journey to Europe for medical treatment - Journey not proved reasonably necessary for purposes of medical treatment - Mitigation of damages - Failure to undergo surgery - Onus on defendant to show plaintiff's failure to undergo surgery unreasonable consequences and comparative value of surgery to be examined to ascertain whether failure unreasonable.

27.8.2 *Aundak Kupil v The State* [1983] PNGLR 350

Paraplegic - Periodic payment for future medical needs whether allowable.

27.8.3 *Lucian Vevehupa v MVIT* [1983] PNGLR 343

Measure of - Personal injuries - Medical and hospital case - Hospital treatment in Australia - Treatment under Repatriation Act 1920 (Aust.) - Treatment not free treatment - Liability for free treatment considered - Cost of medical treatment provided in Australia - Cost to be recouped in kind instead of money in foreign currency. For appeal result, see MVIT v Vehehrpa [1984] PNGLR 224.

27.9. HOME-HELP/HOUSE-KEEPER

27.9.1 *Kerr v Motor Vehicles Insurance (PNG) Trust* [1979] PNGLR 251

Paraplegic - Future nursing housekeeping care - Possibility of marriage breakdown relevant consideration.

27.9.1 *Glenys Yarnold v The State* [1987] PNGLR 474

Back injury - Award for home help for 10 years after accident - K1, 095.00.

27.10 INFANT SETTLEMENT

27.10.1 *Bradford v Bradford* [1975] PNGLR 305

Principles for sanctioning infant settlements (including expatriate infants) in personal injury cases discussed.

27.10.2 *Kone Kim v PNG* [1984] PNGLR 232

Infant suing by next friend - Compound fracture of skull. Practice and procedure in approving infant settlements.

27.11 CUSTOMARY COMPENSATION

27.11.1 *Aundak Kupil v The State* [1983] PNGLR 350

Personal injuries - Negligence - Common law system appropriate to PNG - Customary compensation - Enforceability - Value to be deduced from common law damages.

27.12. INTEREST

27.12.1 *Mealney v Hastings Deering (Pacific) Ltd* [1979] PNGLR 170

Interest - Personal injuries - Statutory discretion to award interest - Whether termination date is date of trial or date of judgment - Law Reform (Miscellaneous Provision) Act 1962, S. 42.

27.12.2 *John Cybula v Nings Agencies Pty Ltd* [1981] PNGLR 120

Interest on award - Damages for personal injuries - Discretionary power to award - Mode of exercise of power - Method of calculation - Apportionment of award for pre-judgment non-economic loss - Interest allowable at ordinary commercial rates - Law Reform (Miscellaneous Provision) Act, 1962 S. 42.

27.12.3 *Hugh James Hassard v Bougainville Copper Ltd* [1981] PNGLR 182

Economic loss - Calculation of present value of future economic loss - Actuarial method preferred - Inflation not relevant to assessment - Inflation relevant to interest discount rate - National tax nil - Interest discount rate at 5% appropriate.

27.12.4 *Anton Johan Pinzger v Bougainvillea Copper Ltd* [1983] PNGLR 436

Measure - Personal injuries - Back injury - Lumbar disc injury - Economic loss - Calculation of present value of future economic loss - Actuarial method - Interest discount rate of five percent adopted. Purpose of interest and rates and method of calculation of interest discussed in *Pinzer -v- BCL* [1985] PNGLR 160 on appeal (Reduced to 3%).

27.12.5 *Koko Kopele v MVIT* [1983] PNGLR 223

Fractured femur - Economic loss - Calculation of present value of future economic loss - Actuarial method adopted - Interest discount rate of 5 percent appropriate - National tax disregarded.

27,12.6 *Moka v Motor Vehicles Insurance Ltd* [2004] PGSC 38, SC729

Personal injuries – Duty of standard of care – assessment of General damages for pain and suffering K35,000.00 – Future economic loss – K33,672.75. Principles discussed.
Total – K68,672.75 with costs & interests.

27.12.7 *Kumbe v Motor Vehicles Insurance Ltd* [2005] PGNC110; N2860

Personal injury – young man in his final years at school – Interest and costs. See: Reading v MVIT [1988] PNGLR 26 – Interest of K11,103.20 awarded under the Judicial Proceedings (Interest on Debts and Damages) Act.
Damages – K150,000.00.

27.13. TAX

27.13.1 *Kerr v Motor Vehicles Insurance (PNG) Trust* [1979] PNGLR 251

Loss of earning capacity - Tax position to be taken into account - English common law applied.

27.13.2 *Hugh James Hassard v Bougainville Copper Ltd* [1981] PNGLR 182

Economic loss - Calculation of present value of future economic loss - Actuarial method preferred - Inflation not relevant to assessment - Inflation relevant to interest discount rate - National tax nil - Interest discount rate at 5% appropriate.

27.13.3 *Koko Kopele v Motor Vehicles Insurance (PNG) Trust* [1983] PNGLR 223

Economic loss - Calculation of present value of future economic loss - Actuarial method adopted - Interest discount rate of 5 percent appropriate - National tax disregarded.

27.13.4 *Pinzer v Bougainville Copper Limited* [1985] PNGLR 160

Loss of earning capacity - Future Loss - Basis of calculation - To be calculated on net (after tax) figures - inflation to be taken into account.

27.13.5 *Aspinal v Government of PNG* [1979] PNGLR 642

Head injuries - Loss of earning capacity - Tax position to be taking into account.

27.13.6 *Charles Pupu v Pelis Tomilate* [1979] PNGLR 251

Paraplegic - Spinal fractures at T12-L1 - Loss of earning capacity - Tax position to be taken into account - English common law applied.