

# **E:**

## **CIVIL**

This part generally describes the civil jurisdiction of the Island Court.  
It:

- sets out the extent of your civil jurisdiction;
- describes the processes, from pre-trial to determination;
- explains the burden and standard of proof in civil cases;
- introduces the law relating to contract and tort;
- provides best practice guidance in the conduct of civil proceedings;
- provides a guide to the orders you may make.



## **1 Introduction**

A civil suit is where an individual, brings a claim against another individual (or sometimes a business or group of individuals), either for a breach of contract or a tort claim.

The person bringing the claim is called the plaintiff.

The person responding to the claim is called the defendant.

The plaintiff will ask the Court to:

- make a declaration of who is legally right; and
- make an order for damages.

## **2 Civil Jurisdiction**

*See s5 and Schedule 1 Island Courts Act (Cap 3).*

Island Courts may hear claims in:

- contract (agreements made between two or more persons), including debts; and
- tort (civil wrongs to persons and property).

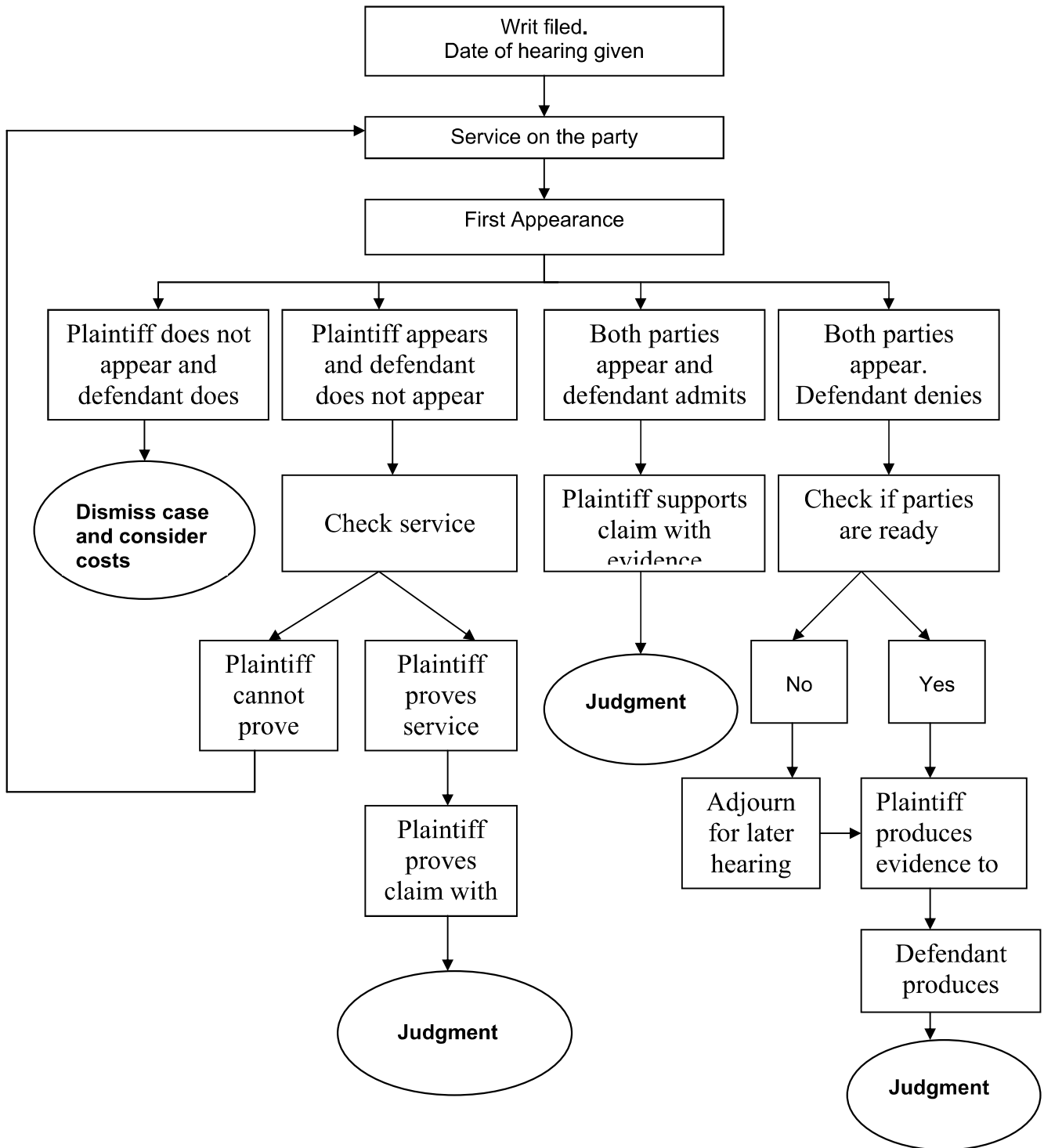
The value of the property, debt or damage claimed must be under \$60.

A plaintiff may reduce the claim in order to bring it within the jurisdiction of the Island Court.

Claims may be brought by:

- private individuals;
- businesses; or
- Kaupule.

### 3 Civil Procedure



### 3.1 Commencing Proceedings

In order to pursue a civil claim in an Island Court:

- the circumstances of the claim should arise on the island itself; or
- if it is a contract that was made elsewhere, the breach of the contract should occur on the island where the claim is being made; or
- if it is an action or omission which occurred elsewhere, the damage happened on the island where the claim is being made.

To commence any action, the plaintiff (the person who brings the action) may apply to the Island Court with a Writ of Summons (Form 9). The summons should state:

- who is making the claim;
- who the claim is against; and
- the particulars of the claim and what it is for.

The writ shall be signed by the plaintiff and the President. The claim is then filed with the Court Clerk, who is responsible to setting a date for hearing the claim: *reg 19 Island Courts Regulations (Cap 3)*.

Once a claim has been filed, a copy of the writ should be given to the person that the suit is against (the defendant): *reg 18 Island Courts Regulations (Cap 3)*.

The plaintiff, or someone on his or her behalf, shall serve the copy of the writ of summons on the defendant personally. If for any reason it cannot be personally served, the Island Court may direct that the writ of summons be left with someone other than the defendant.

To do this, the Court must be satisfied that:

- the writ cannot be personally served, from proof brought by the plaintiff;
- the defendant is within the island and under the jurisdiction of the Court; and
- if the summons is left with another person, the defendant will learn of the contents of the writ: *reg 19 Island Courts Regulations (Cap 3)*.

When a hearing date is given, ensure that not less than 14 days notice is given. That will enable the defendant to prepare his or her case, obtain documents, and take legal advice.

### 3.2 Subpoenaing Witnesses

Either party to the action may want to call witnesses. To do this, they may obtain a subpoena (Form 10) from the Island Court to call a witness to give evidence at the hearing.

Upon a request for a subpoena of a witness, the Court should grant such a request: *reg 19(2) Island Courts Regulations (Cap 3)*.

### **3.3 Non-Appearance of the Parties**

If the **plaintiff** does not appear on the day stated in the writ of summons for the hearing, the Court may dismiss the claim and order the plaintiff to pay the defendant and his or her witnesses for their time and their effort of attending: *reg 23 Island Courts Regulations (Cap 3)*.

If a **defendant** does not appear on the day stated in the writ of summons for the hearing, the Court may:

- consider the evidence produced by the plaintiff and, if the claim is proved, make an order as to the claim; and
- order the defendant to pay for the plaintiff's, and his or her witnesses', time and effort: *reg 24 Island Courts Regulations (Cap 3)*.

The Court may only make such orders when the plaintiff provides proof that the defendant was given a copy of the writ of summons.

### **3.4 The Hearing**

Once the Court has heard the writ of summons, the Court will cause the substance of the claim to be stated to the defendant and then ask whether he or she is "indebted" or liable.

#### **Indebted/liable**

If the defendant admits to being "indebted" or liable, the plaintiff will give details of the claim, together with any documents in support.

It is the plaintiff's job to prove the claim and he or she must provide evidence to do this.

Once satisfied that the amount claimed is correct, interest and Court costs should be considered. The successful party is entitled to reimbursement of the fee paid, and to interest.

#### **Not indebted/not liable**

If the defendant pleads "not indebted" or not liable, the Island Court hears all of the plaintiff's evidence and any other evidence the Court wishes to hear. Copies of all documents which are used as evidence should be supplied for the defendant.

The defendant then has the right to ask the plaintiff, or any of his or her witnesses, questions: *reg 20(1) Island Courts Regulations (Cap 3)*.

Then the defendant presents his or her evidence, and calls any witnesses, to support his or her case. The plaintiff will have the right to ask questions of any of the defendant's witnesses, or question the defendant him or herself, if they were a witness: *reg 20(2) Island Courts Regulations (Cap 3)*.

During the hearing, the Court Clerk shall take full notes of all the evidence given. You also should take notes, to assist in making your decision.

### **Adjournment**

If the claim is not admitted, the matter may be adjourned so that any witnesses or other evidence to be called can be gathered, if they are not available for the first hearing: *reg 20(1) Island Courts Regulations (Cap 3)*.

If an adjournment is granted, ensure that the parties and witnesses will be available for the date of the next hearing. It is a common problem that parties leave their islands and this delays matters.

If either party or both parties do not appear at the next hearing, the Court may proceed with the case as if the parties were there: *reg 21(2) Island Courts Regulations (Cap 3)*.

If there are no other witnesses other than the parties themselves, the Court may deal with the case immediately.

## **4 Evidence**

See Part A: 5 Evidence.

### **4.1 Burden of Proof**

The person who bears the burden of proving any civil case is the plaintiff. This means that it is up to the plaintiff to provide evidence to support the law they are claiming in the case.

### **4.2 The Standard of Proof**

The standard of proof is on the "balance of probabilities". This means that the plaintiff has to prove that the version of events/facts that he has given is more likely than not to be correct.

The plaintiff must bring sufficient evidence on the facts in issue to justify the claim.

## **5 Judgment**

Once all the evidence has been given, the Magistrates will need to make a judgment based on the evidence presented to them and in a manner that would seem just for the case.

The decision should be by agreement of the three Magistrates, or if there is disagreement, by a majority (2 out of 3): *s10 Island Courts Act (Cap 3)*.

The decision is to be made by the Magistrates. Although help as to meaning of the law can be sought from textbooks and legal counsel, the decision cannot be made by anyone else.

### **5.1 Principles Governing Decision Making**

See Part C: Criminal, 8.1 for a discussion of the principles of good decision making.

### **5.2 Deliberations**

At the end of the hearing, the panel discusses the evidence produced by parties and makes their decision. The panel may retire to discuss the matter if necessary.

This is the last important opportunity for the members of the Court to ensure absolute adherence to the underlying judicial principles of conducting a fair hearing, and ultimately to arrive at a just and lawful decision.

The President will lead discussions.

Magistrates must work in partnership and with understanding and open minds. No one Magistrate should overpower or force his/her opinion on others.

### **5.3 A Structured Approach to Making a Decision**

Decision making is a process of applying particular facts to the relevant law.

You must not reach a conclusion before all the evidence and arguments have been heard. The way to do this is to employ a structured approach.



There are three tasks involved:

**1. To be clear with what the Court is being asked to do.**

In civil cases, this is the plaintiff's claim as set out in the writ of summons. For the plaintiff's claim to succeed, he or she must provide evidence to support that claim, and satisfy the Court on the balance of probabilities, that is, it is more likely than not.

**2. To determine what the facts of the case are – what happened; what did not happen.**

To determine the facts, you will need to assess the credibility of the witnesses and the reliability of their evidence. Often, there will be documents to support the claim.

Credibility: “Is the evidence believable?” “Can it be believed?” “Is the witness being honest?”

Reliability: “Should I believe the witness?” “Is the evidence accurate?” “Could the witness be mistaken?” “How good is their memory of what happened?”

When considering oral evidence, take into account not only what has been said but also how it has been said. How you assess the demeanour of a witness can be a valuable aid in judging his or her credibility and reliability.

You may accept parts of the evidence of a witness and reject other parts.

A witness may be cross-examined for the sake of disproving their credibility.

**3. To make your decision, according to the law.**

This is done by applying the facts to the law.

You must make the decision. Under no circumstances should you ask anybody else to decide the matter.

In civil cases before the Island Courts, the law is mostly common law, that is, established principles made by the Courts. For example, the law relating to contracts and torts is not set out in legislation but is well established.

## **5.4 Orders**

Upon judgment for any sum of money, the Court may:

- order the sum to be paid right away and, in default of payment, order the defendant to be imprisoned; or
- order the sum to be paid in instalments and, in default of payment, order the defendant to be imprisoned.

If you order imprisonment for default of payment, the prison sentence must follow the scale below: *reg 26(1) Island Courts Regulations (Cap 3)*.

<b>Amount</b>	<b>Maximum sentence</b>
Not exceeding \$2	7 days
Exceeding \$2 but not \$4	14 days
Exceeding \$4 but not \$20	6 weeks
Exceeding \$20	2 months

You must not impose imprisonment unless it is proved that the person not paying the debt had the funds to do so, but refused or neglected to pay it: *reg 26(1) Island Courts Regulations (Cap 3)*.

Also, the *Enforcement of Judgments (Payment from Wages) Act (Cap 94)* gives you additional power to order direct deduction from a person's salary when they are working. This will be helpful in many cases and prevent imprisonment.

Note that going to prison for failing to pay the debt does not extinguish the debt to be paid: *reg 26(1) Island Courts Regulations (Cap 3)*.

## **5.5 Delivering Your Judgment**

Follow the format on the following page when making and delivering your decision. Remember that it is important to:

- consider all the evidence given and either accept it or reject it; and
- give reasons.

## ***Civil Decision Format***

### **Introduction**

What the case is about.

### **Summary of what is claimed by the plaintiff**

The plaintiff's claim, as set out in the writ of summons.

### **The law**

The common law rules relating to the particular claim. See 6 Contracts and 7.1 Negligence below.

Your jurisdiction in civil cases. See 2 above.

### **The facts not in dispute**

The facts that are accepted by the defendant.

### **The facts in dispute**

Your finding of the remaining facts, with reasons. Which evidence you prefer and why?  
For contract and negligence cases, see the checklists at 6.10 and 7.2 below.

### **Apply the facts to the law**

Apply the facts as you have found them to the relevant rules of law. Do the facts prove all the matters required to prove the claim?

You must be satisfied on the balance of probabilities, i.e. more likely than not.

### **Deliver your decision**

Structure your decision before delivering it. Make sure you give adequate reasons and that the parties understand what they must do. Record your decision on the Court record.

### **Orders**

## **6 Contracts**

### **6.1 What is a Contract?**

A contract can be defined as:

- a legally enforceable agreement between two parties; or
- a set of promises that the law will enforce.

Contracts can be made either orally or in writing.

One of the most common contract claims coming within your jurisdiction will be non-payment of debts.

### **6.2 The Elements of a Contract**

It is the Court's job to determine the circumstances in which a promise shall be legally binding on the person or persons making it.

In order to determine whether the promise or agreement is a contract, the law requires that three main elements exist:

1. Agreement;
2. Consideration;
3. Intention to create legal relations; and
4. Capacity.

Once you have determined that all of these elements exist, you have the existence of a contract.

### **6.3 Agreement**

Whether or not there is agreement is determined by the legal rules of offer and acceptance, and certainty. These rules answer four main questions:

- Has agreement been reached?
- When was agreement reached?
- Where was agreement reached?
- What was the express content of the Contract

## **Offer**

An offer in contract law is both:

- a clear statement of terms by which the person making the offer is prepared to be bound by the other person; and
- something which conveys an invitation to the other person(s) to accept the offer.

An offer may be oral, written or result from conduct or a gesture by a party. Sometimes there are negotiations before an offer is made. During any negotiation, a party may indicate that they wish to offer something. However, it is important to distinguish this intention during negotiations from a true offer.

### Determining whether an offer has been made

The test to determine whether an offer has been made is that the offer must:

- be made to a particular person or to the public at large (as in an advertisement); and
- consist of a definite promise by the offerer of the promise to be bound if the terms of the offer are accepted. That is, the person who makes the offer must be prepared to carry out the promise.

## **Acceptance**

Acceptance is where the person who was offered the promise tells the person who made the offer (the offerer) that they:

- agree to the terms of the offer; and
- accept they are committing themselves to a contract on every one of the terms.

At the moment this offer is accepted, a contract comes into existence, as long as all the other essential elements are there.

Acceptance can be made in the form of words, writing or conduct.

### Determining whether acceptance has been given

There must be evidence of some words spoken or act done by the person accepting the offer in order for there to be acceptance. The fact that a person has decided in their own mind that they accept the offer is not enough. They must let the offerer know in some way.

See *Lomiata Niuatui v Elisaia Alesana* (HC 2/99) for a discussion on a contract to sell a computer.

## **Certainty**

The general rule is that for a contract to be binding, the main terms of the contract must be certain, that is, they must be clear and complete. A contract may not be enforceable if there is uncertainty as to what the parties have agreed to.

You must ask: “Did the parties understand what they were agreeing to?”

## **6.4 Consideration**

Even though you may have offer and acceptance, a contract will not exist unless there is something called “consideration”.

Consideration is:

- what one party gives or promises in exchange for what the other party is giving or promising; or
- one party agreeing not to do something in exchange for what the other party is giving; or
- a promise to do or not do something at some point in the future.

Something must have been given or promised in exchange for the thing offered.

## **6.5 Intention to Create Legal Relations**

In order for a contract to exist, the parties must have intended to bind themselves in a legally enforceable way. The law does not allow that a contract exists simply because there are mutual promises made between parties.

If dealing with commercial agreements, you can presume the parties intended to be legally bound by the agreement because of the nature of commercial agreements.

It will be more difficult to determine whether there was an intention to be legally bound by the agreement in cases where agreements were made between parties in everyday social life or between family members outside of a commercial context. In most cases, it was never the intention of the parties to turn to the Courts if the promises were broken or the agreement was not honoured.

The question you must ask yourself is:

- “At the time that the agreement was made, or when promises were exchanged, did the parties intend to turn to the Courts if the promises were not met or the agreement was not honoured?”

## 6.6 Capacity

A party must be able to enter into a contract. You should check:

- the age of the person; and
- that he or she is of sound mind.

## 6.7 Defects in a Contract that Make it Invalid

Once you have determined that a contract exists, you must determine whether there is any defect that would make the contract invalid. These defects are:

- misrepresentation; or
- illegality.

### Misrepresentation

Representations are statements of *fact* made by one party to another, either during the negotiation for the contract or in the terms of the contract, which convince the party to accept the contract.

If these statements of fact are false, this is misrepresentation and the contract will likely be declared invalid. A remedy may be available to the wronged party.

You must differentiate statements of fact from statements of law, intention or opinion because it is only false statements of *fact* which give rise to a remedy under contract law.

Example:

If you told a person who has agreed to buy your bicycle for \$10 and given you the money, that the bicycle is brand new, when in fact it is 5 years old, this is a misrepresentation.

### Illegality

An illegal contract or contracts made for illegal purposes are of no force or effect.

Example:

A contract to rent a house would be illegal if the contract was made for the purposes of conducting prostitution in the house. This contract would be invalid.

## 6.8 Breach of Contract

A breach of contract is behaviour which is inconsistent with or does not honour one of the terms of the contract.

A breach of contract can take many forms, including:

- one person verbally telling the other person that he will not perform his part of the contract; or
- one person doing or failing to do something that was their obligation under the contract.

A breach of a contract may happen at any time between the contract being entered into and it being completed. When one party tells the other party that they will not perform their obligations in the contract, the other party may:

- take action immediately by accepting the words of party refusing its obligations and bring the matter to Court; or
- act as if the contract will be performed and then, when it is not performed, take action at that time.

## **6.9 Remedies**

When a contract has been breached, the party who did not breach the contract is entitled to a remedy.

The objective of a remedy in contract is to put the plaintiff in the same financial position he or she would have been in if the contract would have been performed.

The most common type of remedy is damages, provided the plaintiff proves the amount he or she is entitled to.

The Island Court can give damages of no more than \$60.

## **6.10 Making a Decision in a Contract Case**

The checklist on the following page provides a useful approach to considering claims in contract. You must first decide whether there is a valid contract, then whether it has been breached, and if so, what remedy you will award.



## **Contract Checklist**

### **Agreement**

**Is there an offer?**

Has the offerer given a clear statement of terms that he or she is prepared to be bound by and that invites the other person to accept the offer?

**Is there acceptance?**

Has the person who has been offered something said or done something to show they accept the offer?

Did they accept that they were committing themselves to a contract?

**Is there certainty?**

Are the terms of the contract clear and complete, so that the parties understood what they were agreeing to?

**If you have answered yes to all of these questions, then there is agreement.**

### **Consideration**

Did one party give or promise something, or promise not to do something, in exchange for the other party's promise?

**If you have answered yes, then there is consideration.**

### **Intention**

Did the parties, at the same time the promises were made, intend to create legally enforceable obligations which would allow them to turn to the Courts if the promises were broken?

**If you answered yes, then there is intention.**

**If you have answered yes to all of the above questions, then a contract exists.**

### **Capacity**

Do the parties have the capacity to enter into a contract? Are they of sound mind, and old enough?

**If you answered yes, then there is capacity.**

**If you have answered yes to all of the above questions, then a contract exists.**

### **Validity**

Is there any reason to make the contract invalid, such as misrepresentation or illegality?

**If you answered yes, then the contract is invalid and the claim should be dismissed.  
If you answered no, then the contract is valid and you can go on to consider whether there was a breach.**

### **Breach of contract**

Consider the terms of the contract and the words or actions of the defendant. Did he defendant fail to meet the terms set out in the contract?

**If you answered yes, then there has been a breach of the contract.**

### **Remedy**

If there has been a breach of the contract, next decide whether there should be a remedy and if so, what the remedy will be. This will usually be damages. Remember your jurisdiction allows you to award up to \$60 only.

If there was good reason for the breach, a remedy may not always be necessary. For example, the defendant may have refused to carry out the terms of the contract because the plaintiff had breached it first. Consider the arguments of the parties and the evidence presented.

## **7 Tort**

A tort can be defined as a wrong committed by one person (or legal entity) toward another person (or legal entity) for which the remedy is a claim for damages.

The wrong can be either intentional or because of carelessness.

Example:

A is an employee of the Kaupule. He is asked to go to a house to carry out an inspection. He uses the Kaupule's motor-cycle. On travelling to that house, A collides into B with the motor-cycle. B has a cut to his leg that is sore for 2 days. The collision was caused by A. B can pursue a tort claim against A for the harm caused in the Island Court, limited to \$60.

A person may be held responsible for the wrong committed, and be made to pay for the harm done, when it is shown that his or her conduct comes within the definition of:

- nuisance;
- assault and battery;
- negligence; or
- trespass.

## 7.1 The Tort of Negligence

The most common type of tort is negligence. As a tort, negligence is defined as the defendant's breach of their legal duty to take care of the plaintiff, either by:

- doing an action which causes harm to the plaintiff; or
- failing to do something which prevents harm to the plaintiff.

In order to determine whether the tort of negligence exists, three elements must be present:

- 1 The first element is that the defendant must owe the plaintiff a duty of care.
- 2 The second element is that the defendant must breach the duty of care that he or she owes to the plaintiff.
- 3 The third element is that the plaintiff must suffer damage or harm as a result of the defendant's breach of the duty of care.

### 1. Duty of care

The test for whether there is a duty of care is whether a person can reasonably foresee that his or her behaviour will cause damage or harm to someone.

If the answer is yes, then a duty of care exists towards that person or other people who fall in the same category as that person.

Example:

A driver of a vehicle would have a duty to take care for other vehicle users, people walking on the road, and children playing near the road not to hit those people with their vehicle.

### 2. Breach of the duty of care

In determining whether there has been a breach of a duty of care, you must ask:

- "Would a reasonable person recognise that their actions (or failure to act) may cause some damage and therefore take care to avoid doing (or not doing) it?"; and
- "Did the defendant fail to take the precautions a reasonable person would in the circumstances?"

It is important to remember that:

- the greater the potential harm to someone, the greater the precautions that are required; and
- it is not necessary that a reasonable person would foresee the exact type or the seriousness of the damage. It is enough that they recognise the risk that some damage may occur as a result of their actions (or failure to act).

### **3. Damage or harm as a direct cause**

In order for a person's conduct to amount to negligence, a breach of the duty of care must be found to be the **direct cause** of **damage or harm** to the plaintiff. There are two main principles:

- 1 The defendant's negligence must have caused the damage.
- 2 The damage the plaintiff suffered must not be too remote a consequence of the defendant's negligence.

In order to determine whether the defendant's conduct was the *direct* cause of the damage or harm, you can use the "but for" test. If the damage or harm would not have occurred *but for* the defendant's conduct, then causation is established.

## **7.2 Making a Decision in a Negligence Case**

The checklist on the following page provides a useful approach to considering claims in negligence. You must first decide whether there was a duty of care, then whether it has been breached, whether there was damage or harm to the plaintiff as a direct consequence of the breach of duty of care, and if so, what remedy you will award.

## ***Negligence Checklist***

### **Duty of care**

**Should the defendant have foreseen that his or her behaviour could cause damage or harm to someone?**

Would a reasonable person have foreseen it in the circumstances?

**If you have answered yes then a duty of care existed towards that person.**

### **Breach of duty of care**

Would a reasonable person recognise that their actions (or failure to act) may cause some damage or harm and therefore take care to avoid doing (or not doing) it?

Did the defendant fail to take the precautions that a reasonable person would in the circumstances?

**If you have answered yes to both questions, then there has been a breach of the duty of care.**

### **Damage or harm as a direct cause**

Did the defendant's breach of a duty of care actually cause damage or harm to the plaintiff?

Would that damage or harm not have occurred *but for* the defendant's breach of a duty of care?

**If you answered yes to both of these questions, then there was a close enough connection between the defendant's actions and the damage.**

### **Remedy**

If negligence has been proved, next decide what the remedy will be. This will usually be damages. Remember your jurisdiction allows you to award up to \$60 only.

## 8 Appeals and Revisions

### 8.1 Appeals

An appeal shall lie from any judgment or decision of the Island Court, whether it is final or otherwise, to a Magistrate's Court in any civil cause or matter, only in cases where the property, debt or damage comprising the subject matter of the claim is more than \$10: *s28 Island Courts Act (Cap 3)*.

Neither notice of appeal nor the appeal itself shall operate as a stay of execution of proceedings under the judgment appealed from, unless directed by:

- the Island Court which made the decision; or
- the Magistrate's Court which is hearing the appeal.

This direction may given with or without the application of either party: *s36 Island Courts Act (Cap 3)*.

### 8.2 Revision of Decisions

A Magistrate's Court may, on its own motion or on the petition of any person interested in the claim, call for the record of any civil cause or matter before an Island Court.

With or without seeing such record, and with or without hearing arguments, the Magistrate may:

- set aside any judgment, decision or order made by the Island Court and substitute any judgment, decision, or order that ought to have been made;
- direct the Island Court which made the decision, judgment or order to take further evidence either generally or on some particular matter;
  - ≡ the Magistrate's Court should order a stay of proceedings so the Island Court can take further evidence
- set aside the judgment and order a retrial before the Island Court which heard the original proceedings and made the decision, or before any other Island Court; or
- make any other order as justice may require and give any directions that are necessary to meet this order: *ss37(1), (3) Island Courts Act (Cap 3)*.

The Magistrate's Court shall not use the power of revision if the decision is being appealed against.

A decision, judgment or order of the Island Court cannot be revised if:

- 12 months have passed from the date of the decision, order or judgment of the Island Court; and
- no action has been taken by any Magistrate under the revision power of *s37 Island Courts Act (Cap 3)*.