

Tuvalu Island Courts Bench Book

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INTRODUCTION

This Handbook has been prepared for the Island Magistrates and their Clerks on the islands of Tuvalu to assist them to have more understanding of their work. It has followed two Workshops in December 2001 and May 2002 aimed at capacity building and in particular, addressing the training needs that the Magistrates have.

By creating this Handbook, it is hoped that there will be an improvement in both understanding and in the quality of justice to the benefit of all those who live in Tuvalu. It is designed to ensure that all Courts follow procedures and ensure that there is greater confidence in the Judicial system.

This Handbook is based on the knowledge of various people who work within the legal system of Tuvalu and through the years that I have worked as Peoples Lawyer from April 1999 to January 2004. It reflects the law as it is although it accepts that there is much that needs to be done and that practice and procedures will change as law in Tuvalu develops. It has been designed in loose leaf form to enable those changes to be made and incorporated within the Book as they arise. The law is as stated and accurate to the 1st January 2004.

This version has been prepared with the support of others, particularly the National Judicial Education Committee and the Pacific Judicial Education Programme (PJEP) based in Fiji. The support of PJEP has been invaluable both for their time and commitment to this Book – special thanks need to be given to Kim Stanford Smith, Peter Boshier and Vere Bakani (for her patience in typing the script). I acknowledge further the assistance of Crystal Reeves who has checked the relevant law and ensured the accuracy of the final version as far as possible.

Further thanks need to be given to Tina Pope for the editing, revision, and formatting which has helped to create the final version. Her considerable skill and professionalism have contributed greatly to ensuring the published Book will be accessible and widely used by Magistrates, and all Court users.

In Tuvalu, thanks needs to be given to the National Judicial Education Committee of His Honour Chief Justice Gordon Ward, Afele Kitiona – now Senior Magistrate (since September 2003) and formerly Crown Counsel, and the former Resident Magistrate Saloa Tauia, now sadly deceased, for their support, help and comments and for checking and proof reading the English version. I also acknowledge the patience and understanding of my family for the time that I have had to spend away from them in the preparation of this Book.

This work owes a special debt to Tagaloa Enoka Puni, Coordinator of the Pacific Judicial Education Programme. Without his help and his knowledge of Tuvalu neither the Workshops

nor this Book would be as effective as they have been. To him, personal thanks are given and I hope that he and PJEP will continue to support the development of the judiciary of Tuvalu.

Finally, this Book recognises the financial contribution of the Canada Fund in providing funds for the Workshops and the production and printing of this Book as well as for the research of Crystal Reeves. Such funding has enabled this project to be realised and it is hoped that they will continue to support such projects in the future in Tuvalu and within the Pacific. Without their assistance neither the Workshops nor this Book would have taken place.

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SUVA
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Pacific Judicial Education Programme

BENCHBOOK PROJECT 2003/2004

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A:

THE LEGAL CONTEXT

This part generally describes the legal context in which you work. It:

- explains the Constitutional and Court structure in Tuvalu;
- describes the Island Court;
- describes the different types of law that you apply;
- outlines the types of evidence and important rules relating to evidence; and
- explains certain legal terms.

1 The Constitutional Framework of Tuvalu

1.1 Tuvalu's *Constitution*

The 1986 *Constitution* and the *Laws of Tuvalu Act 1987* state that:

- the *Constitution* is the supreme law of Tuvalu;
- any other law that is inconsistent with the *Constitution* is invalid, either in whole or in part to the extent of the inconsistency; and
- all other laws are to be interpreted and applied subject to the *Constitution* and, as far as practicable, in such a way as to conform with the *Constitution*.

The *Constitution* details the basic elements of Tuvalu's system of government by defining:

- fundamental human rights;
- the organisation and structure of the legal system; and
- the roles, responsibilities and powers of the Executive, Parliament and the Judiciary.

The *Constitution* is based on and gives effect to the doctrine of the Separation of Powers.

The doctrine of the separation of powers

This doctrine states that there should be three distinct and separate branches of government:

1. the Executive: administrator and policy maker;
2. the Parliament (Legislature): law maker; and
3. the Judiciary: interpreter of law.

Each branch of government checks the roles and functions of the other branches. This checking maintains the balance of power between the three branches and does not allow the Executive to gain too much power. See *Kamuta Latasi v R, ex parte Attorney-General* (High Court 3/02) and *Kamuta Latasi v Attorney-General* (High Court 1/03), where the High Court ruled that Cabinet (the Executive) had acted unconstitutionally and *ultra vires* (outside the law) in making certain appointments and directives.

The **independence of the Judiciary** is an important element of the doctrine of Separation of Powers and is vital for maintaining the balance of power.

Independence of the Judiciary

Although Parliament makes laws and the Executive allocate funds, premises, supporting staff and services for the Judiciary, nevertheless the Judiciary must be independent and free from all political or other influence in carrying out its duties in making decisions.

The independence of the Judiciary is protected by:

- the *Constitution*;
- the Rule of Law;
- the process of appointment and removal of judicial officers, and their conditions of appointment; and
- immunity from civil actions.

Rule of law

There are three principles:

- Society should be free from arbitrary power;
- All are equal before the law;
- The *Constitution* is part of the ordinary law of the land.

The Rule of Law provides checks and balances for the Executive and Legislative branches of government. A legal system with fair, transparent and effective judicial institutions is essential to the protection of citizens against the arbitrary use of state authority and for maintaining the Rule of Law.

1.2 The Branches of Government in Tuvalu

The Head of State

The Head of State is:

- Queen Elizabeth II of the United Kingdom;
- represented in Tuvalu by a Governor General.

The Governor General is:

- appointed by, and may be removed by, the Sovereign, acting with the advice of the Prime Minister. The Prime Minister is required to consult with Parliament about any such appointment or removal.

The Governor General must be:

- a citizen of Tuvalu;
- eligible to be elected a Member of Parliament; and
- at least 50 years old but not older than 65.

The Governor General has the power to summon, prorogue and dissolve Parliament.

No bill becomes law until assented to by the Governor General.

The Executive

The role of the Executive is to formulate and implement government policy. The Executive effectively runs and controls the affairs of the country.

The Executive and Parliament are distinct even though they have many people and positions in common.

The Executive comprises:

- the Head of State (represented by the Governor General); and
- the Cabinet of Ministers.

The Cabinet:

- is headed by a Prime Minister, elected by the members of Parliament from among themselves;
- is collectively responsible to Parliament for the performance of the executive authority of government; and
- comprises a number of Ministers, as determined by the Head of State acting in accordance with the advice of the Prime Minister.

The Head of State (acting on the advice of the Prime Minister) allocates which government departments are looked after by each Minister. This includes the Minister that looks after the Justice Department and the Judiciary.

The Parliament (the Legislature)

Parliament consists of a single chamber. It:

- has not less than 15 members elected by popular vote;
- serves a four year term; and
- must sit not less than once every 12 months.

Parliament's role is to make laws for the governance of Tuvalu. The laws may:

- have effect outside Tuvalu;
- apply retrospectively;
- define or detail any matter in the *Constitution*.

It is these laws that the Courts apply when dealing with charges, complaints and disputes that are brought before them.

The *Constitution* gives immunity to members of Parliament. No civil or criminal proceedings can be instituted against a member of Parliament for:

- words spoken in or included in a report to Parliament or a committee of Parliament; or
- any other matter or thing brought by the member of Parliament or a committee.

The Judiciary

The Judiciary is the third branch of government in Tuvalu. It:

- is an **independent** body which is responsible for interpreting and applying Parliament's laws;
- develops and interprets case law;
- solves disputes of fact and law between individuals, and between individuals and the State.

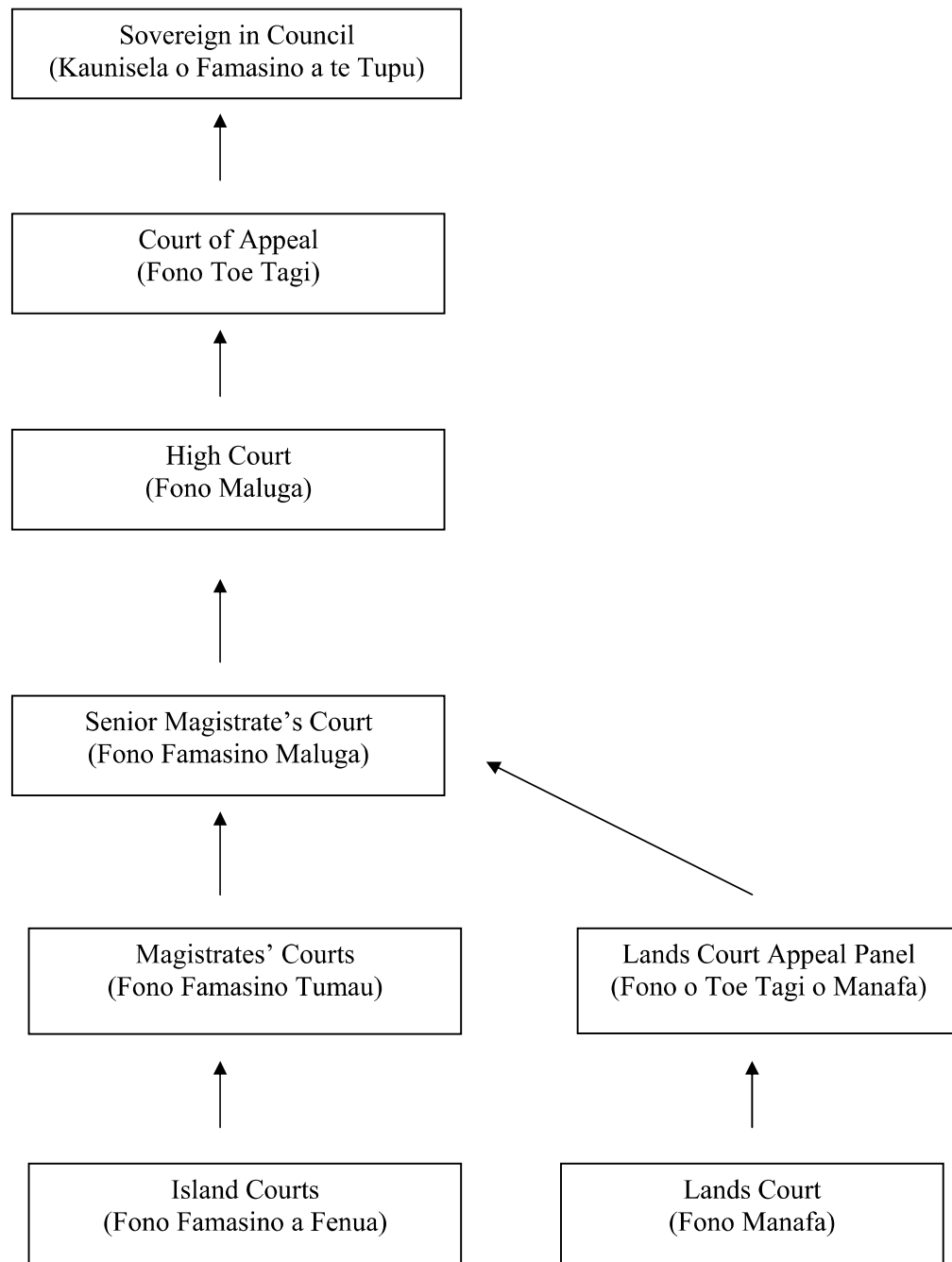
The Judiciary comprises:

- Island Courts Magistrates;
- Justices of the Lands Courts;
- members of the Lands Appeal Panel;
- Magistrates from the Magistrates' Courts;
- the Senior Magistrate;
- the Chief Justice;
- Justices of the Court of Appeal; and
- the Sovereign in Council (acting by and with the advice of the Judicial Committee of the Privy Council).

2 The Tuvalu Court System

2.1 The Structure of the Tuvalu Court System

Figure 1 The Structure of Tuvalu Courts



2.2 General Characteristics of the Tuvalu Court System

The Tuvalu Court system has **two branches** (see Figure 1).

One branch deals specifically with customary matters, including:

- customary land disputes;
- customary wills;
- customary succession;
- customary adoption; and
- customary fishing rights.

The Courts in this branch are:

- The Lands Courts; and
- The Lands Court Appeal Panel.

The other branch deals with civil and criminal matters and matters relating to the *Constitution*.

The Courts in this branch are:

- The Island Courts;
- The Magistrates' Courts;
- The Senior Magistrate's Court;
- The High Court;
- The Court of Appeal; and
- The Sovereign in Council.

The Tuvalu Court system is **hierarchical** (see Figure 1):

- This hierarchy is essential to the **Doctrine of Precedent**, meaning that decisions of a Court higher in the hierarchy are binding on the lower Courts. See 4.4 below.
- The hierarchy also provides an appeal system which allows decisions to be checked by more senior Courts. This helps prevent inconsistency within the Courts and provides a check and balance system.

2.3 Jurisdiction

“Jurisdiction” is the power and authority to hear or determine a particular matter.

Each of Tuvalu’s Courts has its own jurisdiction. Courts may only act within their jurisdiction, as defined by law. For example, the sub-ordinate Courts, such as the Island Courts and Magistrates’ Courts, are only permitted by law under specific statutes to deal with certain cases at certain levels.

If a Court hears a case or makes a decision that it has no authority or power to make, then it acts outside its jurisdiction. Consequently, the decision and any orders it makes are not lawful and therefore invalid.

It is very important that the Court be satisfied that it has authority to hear the matter before it proceeds.

An example where a Court would be acting outside its power would be if the Island Court heard a case for murder. The Court that has jurisdiction to hear this type of case in Tuvalu is the High Court and not the Island Court.

The Courts derive their jurisdiction or authority from the *Constitution* and the following statutes:

The Sovereign in Council	<i>Constitution</i>
The Court of Appeal	<i>Constitution</i>
The High Court	<i>Constitution</i>
The Senior Magistrate’s Court	<i>Magistrates’ Courts Act (Cap 2)</i>
The Magistrates’ Courts	<i>Magistrates’ Courts Act (Cap 2)</i>
The Island Courts	<i>Island Courts Act (Cap 3)</i>
The Lands Court Appeal Panel	<i>Native Lands Act (Cap 22)</i>
The Lands Courts	<i>Native Lands Act (Cap 22)</i>

The Governor General, on the advice of the Chief Justice, may make such amendments as are necessary to the jurisdiction of:

- the Senior Magistrate’s Court;
- the Magistrates’ Courts; and
- the Island Courts.

2.4 A Brief Description of the Courts

The Island Courts

There are eight Island Courts, regulated by the *Island Courts Act (Cap 3)*.

The Island Courts are:

- sub-ordinate Courts;
- Courts of summary jurisdiction within the island on which each is situated;
- where most cases in Tuvalu are heard.

Each Island Court has three lay Magistrates sitting together, with the President and the Vice-President sitting with an ordinary member.

Every criminal and civil proceeding must be heard and determined by the three members sitting together. Decisions of the Court are by a majority.

See 3.5 below for a detailed description of the jurisdiction of the Island Courts.

The Land Courts/Land Court Appeals Panel

A separate system of Land Courts has been established under the *Native Lands Act* to determine:

- customary land disputes;
- customary wills;
- customary succession;
- customary adoption; and
- customary fishing rights.

Each island has a Land Court, with six members.

Appeals from the decisions of a Land Court lie in the first instance to a Land Court Appeals Panel, with three members. Further appeals are heard by the Senior Magistrate's Court.

The Magistrates' Courts

The Senior Magistrate's and Magistrates' Courts are established under the *Magistrates' Courts Act (Cap 2)*.

The Magistrates' Courts may hear and determine:

- all civil matters, except those under the jurisdiction of a Land Court;
- matrimonial proceedings that have not already been commenced in an Island Court;

- criminal offences for which the maximum penalty does not exceed imprisonment for one year, a fine of \$200, or both.

The Magistrates' Courts may review any judgment, sentence or order of any Island Court within the district in which the Magistrate's Court is situated.

The Senior Magistrate's Court may hear and determine:

- criminal offences for which the maximum punishment does not exceed 14 years' imprisonment or a fine of \$1,000, or both;
- appeals from civil and criminal decisions of a Magistrate's Court.

The Chief Justice has power under the *Magistrates' Courts Act (Cap 2)* to invest the Senior Magistrate's Court and any Magistrates' Courts with jurisdiction to try summarily any offence that would otherwise be beyond its jurisdiction.

The High Court

The High Court is established under Part VII of the *Constitution* and consists of the Chief Justice.

The Head of State has power, upon the advice of Cabinet, to appoint additional Judges.

The High Court has jurisdiction:

- in relation to the fundamental rights guaranteed by Part II of the *Constitution*;
- in relation to questions as to membership of Parliament;
- in relation to the interpretation or application of the *Constitution*;
- to hear appeals from the lower Courts.

The Court of Appeal

The Court of Appeal is established under *ss134 and 135* of the *Constitution*, and is to be regulated by an Act of Parliament. This has not yet been enacted. When it has, the Court of Appeal will hear appeals from decisions of the High Court.

The Sovereign in Council

Appeals from decisions of the Court of Appeal may be made to the Sovereign in Council, but only:

- in cases involving the interpretation or application of the *Constitution*;
- appeals relating to the enforcement of the Bill of Rights; and
- final or interlocutory decisions of the Court of Appeal which, in the opinion of the Court of Appeal, are of public importance.

The Sovereign in Council is the Queen of the United Kingdom, acting by and with the advice of the Judicial Committee of the Privy Council.

The Sovereign in Council is commonly called the “Privy Council”.

3 Tuvalu Island Courts

The Island Court:

- is a the Court where most of justice is administered in Tuvalu; and
- is established under the *Island Courts Act (Cap 3)*.

3.1 The Relevant Legislation

Procedures

- *Island Courts Act (Cap 3)*;
- *Island Courts Regulations (Cap 3)*;
- *Criminal Procedure Code (Cap 7)*;
- *Rehabilitation of Offenders Act 1991*;
- *Enforcement of Judgments (Payments from Wages) Act (Cap 94)*.

Criminal

- *Penal Code (Cap 8)*;
- *Public Order Act (Cap 9)*;
- *Dogs Act (Cap 46)*;
- *Traffic Act (Cap 71)*;
- *Public Health Act (Cap 35)*;
- *Alcoholic Drinks Act (Cap 69)*;
- *Falekaupule Act 1997*.

Family

- *Maintenance (Miscellaneous Provisions) Act (Cap 4);*
- *Marriage Act (Cap 29);*
- *Custody of Children Act (Cap 20);*
- *Matrimonial Proceedings Act (Cap 21).*

Civil

- *Workers Compensation Ordinance (Cap 83);*
- *Sale of Goods Act 1991;*
- *Employment Act (Cap 84).*

3.2 Composition of the Court

Island Courts have not more than 5 members: one will be President, one will be a Vice-President, and three other ordinary members.

Each Court sitting must have 3 members, with the President and Vice-President sitting together with an ordinary member: *s9 Island Courts Act (Cap 3).*

There is a Court Clerk attached to each Island Court, who attends all sittings. The Court Clerk's role is largely administrative, and his or her duties are to:

- record evidence and judgments, convictions and orders of the Court;
- complete all Court documentation for signing by the President;
- issue civil processes;
- receive fees, fines and penalties; and
- perform such other duties as may be required: *s12 Island Courts Act (Cap 3).*

3.3 Appointment

The Governor General appoints “fit and proper persons” to be members of each Island Court:

- in accordance with the advice of the Public Service Commission; and
- subject to the approval of the Chief Justice or his or her representative: *s9(2) Island Courts Act (Cap 3).*

The following people may **not** be appointed Island Magistrates:

- a member of a Kaupule;
- a member of a Lands Court; or
- a member of the Lands Courts Appeal Panel.

3.4 Removal from Office

The Governor General may remove an Island Magistrate from office:

- in accordance with the advice of the Public Service Commission; and
- subject to the approval of the Chief Justice or his or her representative: *s9(2A) Island Courts Act (Cap 3)*.

3.5 Jurisdiction

The jurisdiction for Island Courts is provided for in *s5* and *Schedules 1 and 2 Island Courts Act (Cap 3)*.

Territorial extent

Every island of Tuvalu has its own Island Court, excluding Niulakita (which is administered by Niutao). An Island Court can hear any matter provided it arose on the island, or alternatively one of the parties is resident on the island.

Criminal

See *ss5 and 6 and Schedule 2 Island Courts Act (Cap 3)*.

Island Courts can only hear and determine summary offences punishable by a maximum sentence of:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

Additionally, Island Courts may hear and determine the specific offences listed in *Schedule 2*, provided that the sentence passed by the Island Court does not exceed:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

Civil

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. An applicant 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.

Family

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

Island Courts can consider:

- a petition for divorce under the *Matrimonial Proceedings Act 1984 (Cap 21)*;
- an application for custody under the *Custody of Children Act (Cap 20)*;
- an application for maintenance under the *Maintenance (Miscellaneous Provisions) Act (Cap 4)*;
- an application for a marriage licence: *s11 Marriage Act (Cap 29)*.

These must be brought by private individuals, one of whom must reside on the island.

No jurisdiction

No Island Court can hear any case that should be heard by a Lands Court: *Schedule 1, para 2 Island Courts Act (Cap 3)*. This includes any claim concerning:

- money or compensation arising from use of the land; and
- paternity.

3.6 Procedures

Procedures establish how:

- an offender is brought to Court;
- an individual brings his or her claim against another; and
- a case is dealt with.

For the Island Court, procedures are found in the *Island Courts Act (Cap 3)*, and the *Island Courts Regulations (Cap 3)*.

Where the Act or Regulations are silent on how something is done, refer to the *Criminal Procedure Code (Cap 7)*, which governs practice and procedure in the Magistrates' Courts and High Court.

3.7 Language

The language of the Island Court is Tuvaluan. The process is in Tuvaluan and English. This is to make the Court accessible to all members of the public.

Where a witness or party speaks a different language, the Court may appoint any suitable person as an interpreter: *s15(2) Island Courts Act (Cap 3)*.

4 The Law

4.1 Sources of Law in Tuvalu

The laws of Tuvalu are found in:

- the *Constitution*;
- legislation;
- case law decided by the Courts (known as common law);
- applied laws; and
- customary law.

4.2 The *Constitution*

Effective from 1 October 1986, the *Constitution* is the **supreme law** of Tuvalu.

Any other law that is inconsistent with the *Constitution* is invalid, either in whole or in part, to the extent of the inconsistency.

All other laws are to be interpreted and applied subject to the *Constitution* and, as far as practicable, in such a way as to conform with the *Constitution*.

However, it is Judges who interpret or decide the meaning of certain provisions in the *Constitution*, so the *Constitution* is affected by developments in the common law.

The *Constitution* can only be amended by an Act that has been:

- approved by 2/3 of the total number of members of Parliament; and
- circulated to all Kaupules for consideration and comment before the final reading.

4.3 Legislation

Legislation is law passed or authorised by Parliament.

There are two types of legislation:

- Statutes, which are Acts of Parliament; and
- Delegated legislation, which is made by a body other than Parliament. Parliament must have given authority to that body. These may be called regulations, orders, notices, by-laws or rules.

If legislation is inconsistent with the *Constitution*, it can be declared void.

Legislation is interpreted by Judges and Magistrates, and may be affected by developments in the common law.

Statutes in Tuvalu are made by a majority of the members of Parliament present voting in favour of a bill. A bill becomes law after it has passed three readings in the Assembly and been assented to by the Head of State, on the advice of the Prime Minister.

Legislation can be found in the *Laws of Tuvalu Revised 1990* and, from 1991, in the statutes themselves.

Regulations made under statute are found in the *Laws of Tuvalu Revised 1990* after the relevant Act.

Any statute or regulation passed after 1990 will be available from the Office of the Parliament and published in the *Tuvalu Gazette*. Copies of the *Gazette* should be distributed to the Kaupules on each island annually. A copy should be made available to the Island Magistrates by the Clerk.

Understanding and interpreting legislation

The Island Court interprets and applies legislation, such as the *Penal Code (Cap 8)*. All legislation is in English (and not Tuvaluan), which can make this difficult.

It is your job to interpret and apply the legislation. Generally, statutes contain a section at the start which defines the meaning of certain words and phrases. If the word or phrase is not defined, then it may be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- any relevant definitions in the *Interpretation Act*;
- a dictionary;
- how it has been used in the particular Act and section (i.e. the context it has been used in); and
- what purpose Parliament had in passing the law.

When an Act says the Court “may” do something, that means the power may be exercised or not, at your discretion.

When an Act says you “shall” do something, this means you must. You have no choice.

4.4 Common Law

Common law is the law that is made and developed by the higher Courts. It is also called case law.

The higher Courts can make and develop law:

- where no legislation exists to deal with matters in that case; or
- by interpreting existing legislation.

Judges will often uphold or reject certain provisions in existing legislation when determining a case.

The development of the common law does not mean that Judges can make arbitrary decisions. They must follow the **Doctrine of precedent** and give reasons for their decision.

Doctrine of precedent

Judges and Magistrates must follow decisions of higher Courts, unless the material facts in the case are different. This means cases of similar type should be decided in the same way, making the law certain.

It is through this process of making decisions based on previous decisions that the body of common law has been built up.

The Island Court is bound to follow decisions of the Resident Magistrate, Senior Magistrate, High Court and Appeal Courts.

The Chief Justice and the Senior Magistrate will, from time to time, issue Practice Directions that explain how the law is to be applied in particular cases. These bind the Island Courts.

As there is little developed case law in Tuvalu, this makes it difficult for the Island Courts to know what decisions to follow. If in doubt, guidance should be sought from the Resident Magistrate, and the Senior Magistrate.

Some cases have been included in Appendix 4.

When there is no relevant Tuvaluan decision, then English cases may be considered. You might do this if the wording of the legislation you are considering is the same or similar to legislation that English cases have considered. This is common for offences under the *Penal Code (Cap 8)*.

4.5 Applied Laws

Applied laws are defined in the *Laws of Tuvalu Act 1987* as “those imperial enactments which have effect as part of the law of Tuvalu”. The Attorney General may effect amendments to any applied law that appear necessary or expedient for bringing the law into conformity with the *Constitution*, and Act of Parliament or customary law.

4.6 Customary Law

See *s5* and *Schedule 1* of the *Laws of Tuvalu Act 1987*.

Custom is the customs and usages of the natives of Tuvalu.

The principles of the *Constitution*, which are set out in the Preamble, specifically refer to the Tuvaluan values and culture, and the need to respect and preserve these.

Custom shall have effect as part of the law of Tuvalu, except to the extent that it is inconsistent with an Act or Regulations: *s5 Laws of Tuvalu Act 1987*. So where an Act says something that is different from custom, then the Act prevails.

Customs must be taken into consideration in every case before the Court. They must be considered in criminal, civil and family matters, and must be assessed by the Island Court on the facts of each and every case. However, if enforcing customary law will result in injustice or is not in the public interest, do not enforce it.

Different rules apply to the recognition of customary law in criminal and civil/family cases. See *Schedule 1 of the Laws of Tuvalu Act 1987*, which details where customary law applies in relation to various cases.

How customary law is determined

Schedule 1 Laws of Tuvalu Act 1987 sets out how customary law is determined and recognised. It is up to the Court to determine the existence and nature of customary law in relation to a matter, and how it is applied in any particular case.

Consider any submissions by the parties. You may also make any inquiries into the question, by adjourning to find out more, if necessary. Any inquiries you make will be part of the proceedings. You are not bound to observe strict legal procedure or apply technical rules of evidence and you can call any evidence or opinions as you think fit.

If the Court has discussed customary practice then this should form part of the decision.

5 Evidence

5.1 What is Evidence?

Evidence is the facts placed before the Court to prove or disprove the allegation at issue.

Rules have been established to assist the Court as to what is evidence and what the Court may (or may not) consider.

5.2 Types of Evidence

Oral evidence

This is evidence that is made by the parties and witnesses in front of you. Oral evidence should be given on oath.

Documentary or written evidence

This is evidence in writing or on paper or tape, such as:

- receipts and invoices;
- photographs;
- agreements;
- tape recordings;
- maps;
- licenses; and
- drawings.

The original should be produced, wherever possible.

Real evidence

These are material objects or items, such as:

- a knife;
- pieces of clothing;
- damaged bicycle; and
- alcoholic drink.

Exhibits

When documentary or real evidence is introduced in Court, it becomes an exhibit.

You should ensure that:

- the witness has seen the item and is able to identify it to the Court;
- the party introducing the item asks the Court that it becomes an exhibit; and
- the exhibit is clearly marked. Usually, prosecution exhibits are numbered 1, 2, 3 etc and defence exhibits are letters A, B, C, etc.

Once the item has become an exhibit, the Court has the responsibility to preserve and retain it until the trial is over.

The Court must ensure that:

- proper care is taken to keep the exhibit safe from loss or damage; and
- if the Police are entrusted to keep the item, the defence is given reasonable access to it for inspection.

5.3 The Important Rules of Evidence

The important rules of evidence are:

- evidence must be **relevant** to the issues before the Court;
- the **best** evidence must be produced;
- **hearsay** evidence is not admissible; and
- statements of **opinion** cannot be given unless that person is an expert.

Evidence must be relevant

As a general rule, only evidence of the facts in issue between the parties is admissible.

In criminal cases, they are those facts which the prosecution must prove to obtain a conviction or which the accused must deny or prove to obtain an acquittal.

In civil and family cases, they are those matters relevant to the particular claim.

Best evidence

This rule relates to documents and means that:

- the original document must be produced, and explained by the person who created it, if possible;
- if the original has been lost or destroyed, a copy may be produced as that is the best evidence available.

Hearsay evidence

Evidence given by a person who did not see or hear the original matter is called hearsay evidence.

An example of hearsay evidence would be a witness telling the Court what his friend told him about what she saw the accused do. The witness did not see the accused do anything. It was his friend who saw it, and who should give evidence.

Hearsay evidence is generally inadmissible because:

- when a person gives evidence of what another person told them, the evidence is not what they saw or heard directly, but what someone else saw or heard;
- the other person's statement is not given on oath; and
- the other person cannot be cross-examined.

Statements of opinion

The opinion of a witness is irrelevant. Their duty is to tell what was seen, heard and done. They must only state the facts, not what they think or believe.

The exception is where an expert is giving evidence on things within their expertise. An expert is a person who has acquired a skill in a particular subject by training, experience or study.

5.4 Refreshing Memory

In certain criminal cases a Police officer may refer to notes taken at the time of the incident. For example, by looking at his or her notebook, but only if the Police officer wrote down what took place immediately at the time of going to the incident.

On outer islands, this may cause a problem given the role of the Police officer as Prosecutor in criminal cases. This may create a conflict.

In civil cases, a witness may refer to a document that he or she has made or verified and which has been produced to the other party in advance.

5.5 Evidence from Children

If a young child is a witness, or a party to an action, the Court must decide if he or she is capable of giving evidence. Such evidence can be sworn on oath or not.

The general rule is that the younger the child, the less likely it will be that they can give evidence. Any evidence that they give should be in the presence of their parent(s).

The Court has to decide the level of understanding of the child and what reliance (if any) is to be placed on what they said.

5.6 Evidence of a Spouse

In criminal cases, an accused's husband or wife:

- may give evidence for the prosecution, but does not have to;
- may give evidence for the defence.

5.7 Self – Incrimination

A witness cannot be asked a question which, if they answer it, may result in them admitting that they committed an offence.

For example, X has been prohibited from drinking alcohol for 6 months. If his best friend A has been charged for possession of an alcoholic drink and X is called as a witness to say he was drinking with A, then by admitting that, X would admit possession, and be guilty of the same offence.

5.8 Jointly Charged Accused

Anything that an accused says to the Police or anyone else that incriminates a co-accused cannot be used as evidence unless accepted by the co-accused.

5.9 Identification of the Accused

Proof of identification of an accused as the person who committed the crime alleged is an essential element in every prosecution.

Failure to satisfactorily identify the accused as the offender must result in an acquittal.

For example, if the accused disputes that it was him the witness saw commit the particular offence, and the prosecution is unable to prove it beyond reasonable doubt, then the prosecution fails.

Sometimes the accused does not dispute identification and accepts it has been proved.

The Court must be sure that any eye-witness evidence identifying the accused as the person who committed the offence is accurate and reliable. Mistakes have been made by honest and genuine witnesses.

Always examine the circumstances in which the identification was made, particularly:

- How long did the witness observe the accused?
- At what distance?
- In what light?
- Was there anything that might make observation difficult, e.g. passing traffic or many people?
- Had the witness ever seen the accused before? How often?
- If the witness did not know the accused, was there any special reason for remembering him or her?

5.10 Credibility and Reliability

Credibility and reliability in a witness is the quality of deserving to have his or her evidence believed. Factors affecting this are the witness’:

- knowledge of the facts;
- apparent honesty – were they genuinely trying, in your view, to tell the truth; and
- apparent reliability – you might ask how good and reliable is their memory of events.

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 his or her credibility.

5.11 Lies

Accused lies

If it is established that an accused has lied, then that is relevant to his or her credibility as a witness. It does not necessarily mean that they are guilty of the offence charged. Lies can be told for a variety of reasons and not necessarily to avoid a guilty verdict.

Witness lies

Where it is shown that a witness has lied, this is relevant to their credibility.

6 Legal Terms

The table on the following pages gives basic definitions for some legal terms you will encounter.

Term	Meaning
Adjournment	When a case is put off to another date.
Balance of probabilities	This is the standard of proof required in civil and family cases. The person bringing the claim has to prove the case on the balance of probabilities. This means whatever is being claimed happened “more likely than not”.
Beyond reasonable doubt	This is the standard of proof required in criminal cases. The prosecution has to prove all the elements of the offence beyond reasonable doubt. This means you are left in no real doubt at all that the person is guilty.
Burden of proof	This means who has the responsibility to prove something. In a criminal case, the prosecution has the burden of proving the accused is guilty, beyond reasonable doubt. In a civil case, it is the person bringing a claim who must prove it, on the balance of probabilities.
Cause of action	In civil cases, the ‘cause of action’ is the type of claim brought by a person against another person, and which explains why that other person should pay money or do something.
Charge	In a criminal case, this is the allegation which the Police make against the accused.
Child	Someone aged under 14.
Civil wrong	An act or omission which gives rise to a dispute between individuals or companies. Not a crime.
Common law	Law developed by the Courts through their decisions.

Contested or defended hearing	<p>In a criminal case, a hearing in front of a Magistrate, where the prosecution tries to prove the accused is guilty. A defended hearing follows on from a not guilty plea.</p> <p>In a civil case, a hearing in front of a Magistrate, where the applicant tries to prove their claim. It follows on from the other party not admitting the claim.</p>
Contract	An agreement between two or more people. It can be oral or written.
Crime	An act forbidden by the laws of Tuvalu.
Custody of a child	In a family case, means an order you may make, saying who is to care for a child.
Customary law	Cultural practice which is relevant to an issue before you.
Decision	The formal process of saying, at the end of the case, what the result is, and what your reasons are.
Discharge	When someone is guilty of a charge, but you do not want to enter a conviction.
Divorce	A formal order you may make, declaring that a marriage is at an end.
Fine	A sum of money you may order an offender to pay in a criminal case, and this must not be more than \$100 on a particular charge.
Hearsay evidence	Indirect, usually second hand evidence.
Identification	The formal process of showing that the person before the Court is the correct person.

Impartial/Impartiality	Being free of any interest or bias in a case.
Interim hearing	Usually in a family case, is the first time you make an order, with a view to making another order later.
Jurisdiction	The lawful power to hear a case, and act.
Lawful justification or excuse	A defence to having done a crime, which is allowed for in statute or the common law.
Legislation	Law passed by Parliament, called statutory law, Acts, or Statutes.
Litigant	A person who is involved as a party to the case before you.
Maintenance	In a family case, means money you order a parent to pay for a child, or the other parent.
Matrimonial property	This is the property that a husband or a wife own, as a result of their marriage, and which you may divide.
Pecuniary interest	A financial interest.
Plea	In a criminal case, the formal statement as to whether the person admits or denies the charge. Will be either guilty or not guilty.
Plea in mitigation	The speech given before sentence, by an offender, or by the offender's lawyer, in which they will give reasons to try to justify a lesser sentence.
Precedent	Previous decisions of the higher Courts which are binding.

Previous convictions	When, at an earlier time, an offender has been found guilty and been convicted of a charge.
Regulations	These are passed by Ministers with the authority of Cabinet, and are binding in much the same way as legislation.
Right of appeal	In any case you hear, and after your decision has been given, the right a person has to come before a higher Court and have the matter reconsidered.
Sentence, and sentencing	The penalty that an offender must pay or do. You pass sentence after you have either found someone guilty, or that person has pleaded guilty. Usually a fine or imprisonment.
Special licence	In family cases, when you are asked to permit marriage to occur.
Standard of proof	In criminal cases, the standard of proof is beyond reasonable doubt. In civil cases, the standard of proof is on the balance of probabilities (more likely than not).
Statutory law	Law passed by Parliament.
Summary offences	Lower type of offences, usually heard by Island Courts.
Summons	A formal document advising someone to come to Court.
To convict	The formal process of recording the guilt of the accused after either a guilty plea or decision of guilt by you.

Tort	A wrong committed by one person toward another, where they are responsible for it and other person may make a claim for damages.
Writ of summons	In civil cases, is the way in which a person who is taken to Court is told about it.
Young person	In a criminal case, a person aged 14 years or above, but under 17.

B:

JUDICIAL CONDUCT

This part sets out what being a Magistrate in the Island Court requires, and describes expected behaviour in and out of Court. It:

- sets out your judicial oath and describes the well-established ethical principles applying to all judicial officers;
- gives guidance on managing proceedings;
- outlines the roles of Chair and panel members.

1 Ethical Principles

As a Magistrate of the Island Court, you have sworn the following oath on appointment:

“I swear by Almighty God that I will well and truly serve Our Sovereign Lady Queen Elizabeth, her Heirs and Successors, as a Judicial Officer and I will do right to all manner of people after the laws and usages of Tuvalu, without fear or favour, affection or ill will. So help me God.”

The judicial role is a public one and your conduct will be under public scrutiny. The respect and confidence of the public in the justice system requires that Judges and Magistrates respect and comply with the law, and conduct themselves in a manner which will not bring themselves or their office into disrepute.

The Oath can be divided into parts to illustrate a number of well-established ethical principles of judicial conduct.

1.1 “Well and Truly Serve”

Diligence

You should be diligent in the performance of your judicial duties.

This means you should:

- devote your professional activity to your judicial duties, which include not only presiding and sitting in Court and making decisions, but other judicial tasks essential to the Court’s operation;
- bring to each case a high level of competence and be sufficiently informed to provide adequate reasons for each decision;
- take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for your role;
- not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

Decisions should be delivered as quickly as circumstances permit. Always try to do this immediately. This means you must:

- be familiar with common offences, jurisdiction and procedure; and
- prepare before sitting in Court.

1.2 “Do Right”

Integrity

You should strive to conduct yourself with integrity so as to sustain and enhance public confidence in the Judiciary.

This means you should:

- make every effort to ensure that your conduct is above reproach in the view of reasonable, fair-minded and informed persons; and
- encourage and support your judicial colleagues to observe this high standard.

1.3 “All Manner of People”

Equality

You should conduct yourself and proceedings before you so as to ensure equality according to the law.

This means you should:

- carry out your duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination;
- strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnical background;
- avoid membership in any organisation that you know currently practices any form of discrimination that contravenes the law; and
- in the course of proceedings before you, disassociate yourself from and disapprove of clearly irrelevant comments or conduct by Court staff, counsel, or any other person subject to your direction. Improper conduct can include sexist, racist, or discriminatory language or actions which are prohibited by law.

1.4 “After the Laws and Usages of Tuvalu”

Lawfulness

You should act within the authority of the law.

This means you should:

- not take into account irrelevant considerations when making your decisions - the exercise of judicial discretion should only be influenced by legally relevant considerations;
- not abdicate your discretionary powers to another person – it is for **you** to decide; and
- defend the constitutionally guaranteed rights of the Tuvaluan people.

1.5 “Without Fear or Favour, Affection or Ill Will”

Judicial independence

An independent Judiciary is indispensable to impartial justice under the law. You should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

This means you must:

- exercise your judicial functions independently and free of irrelevant influence;
- firmly reject any attempt to influence your decisions in any matter before the Court outside the proper process of the Court;
- encourage and uphold arrangements and safeguards to maintain and enhance the independence of the Judiciary;
- exhibit and promote high standards of judicial conduct so as to reinforce public confidence, which is the cornerstone of judicial independence.

Impartiality

You must be, and should appear to be, impartial with respect to your decisions and decision making.

This means you should:

- strive to ensure that your conduct, both in and out of Court, maintains and enhances confidence in your impartiality and that of the Judiciary;
- not allow your decisions to be affected by:
 - ⇒ bias or prejudice;
 - ⇒ personal or business relationships; or
 - ⇒ personal or financial interests;
- as much as reasonably possible, conduct your personal and business affairs so as to minimise the occasions on which it will be necessary to be disqualified from hearing cases; and
- review all commercial, social and political groups you are a member of, or have an interest in, and ask yourself, “could this involvement compromise my position as Magistrate?”

You must not only be impartial, but you must be seen to be impartial. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

This principle touches several different areas of your conduct.

a) Judicial demeanour

While acting decisively, maintaining firm control of the process and ensuring cases are dealt with quickly, you should treat everyone before the Court with appropriate courtesy.

b) Civic and charitable activity

You are free to participate in civic, charitable and religious activities, subject to the following considerations:

- Avoid any activity or association that could reflect adversely on your impartiality or interfere with the performance of your judicial duties.
- Do not solicit funds (except from judicial colleagues or for appropriate purposes) or lend the prestige of the judicial office to such solicitations.
- Avoid involvement in causes and organisations that are likely to be engaged in litigation.
- Do not give legal or investment advice.

c) Political activity

You should refrain from conduct which, in the mind of a reasonable, fair-minded and informed person, would undermine confidence in your impartiality with respect to issues that could come before the Courts.

All partisan political activity must cease upon appointment. You should refrain from conduct that, in the mind of a reasonable, fair-minded and informed person, could give rise to the appearance that you are engaged in political activity.

You should refrain from:

- membership in political parties and political fundraising;
- attendance at political gatherings and political fundraising events;
- contributing to political parties or campaigns;
- taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the Courts, the independence of the Judiciary or fundamental aspects of the administration of justice; and
- signing petitions to influence a political decision.

Members of your family have every right to be politically active. Sometimes this may adversely affect the public perception of your impartiality. In any case before the Court where there could reasonably be such a perception, you should not sit.

d) Conflict of interest

You must disqualify yourself in any case in which you believe that you will be unable to judge impartially.

You should also disqualify yourself if a reasonable, fair-minded and informed person would have a personal suspicion of conflict between your personal interest (or that of your immediate family or close friends or associates) and your duty.

Never preside over a case where the accused or witness:

- is a near relative;
- is a close friend;
- is an employer or employee; or
- has a close business relationship with you.

In Tuvalu, family relationships are a major problem. Decide how closely that person is related to you. Kinship to first cousin and closer (for both you and your spouse) may provide a guideline.

Do not preside over a case where you may have or appear to have preconceived or pronounced views relating to:

- issues;
- witnesses; or
- parties.

For example, if you witness an accident, do not preside over any case arising out of that accident. You may prefer your recollection to the evidence produced in Court.

Given that individual islands are so small, you should also be careful not to let person or local knowledge affect your judgment.

Disqualification is not appropriate if:

- the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification;
- no other Magistrates are available to constitute a Court to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

2 Conduct in Court

2.1 Preparing for a Case

Ensure you have studied and understood the files you will be dealing with.

Make sure you have the relevant legislation at hand.

Criminal

Consider the offences – make sure you know what elements must be proved.

Civil/family

Study the file, affidavits, etc.

Identify the issues in dispute and the relief sought.

2.2 Principle that Affected Parties have the Right to be Heard

It is a well established principle evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before the decision is made.

This principle focuses on the *procedural* steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

To give effect to this principle, you have to consider what has to be done to allow a person to be heard. This extends to allowing the person sufficient notice to prepare their submissions, to collect evidence to support their submissions and to rebut or contradict the other party's submissions.

Note that a person may be heard but the view they have expressed does not have to prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of the information is to be determined by you.

There are three aspects to the principle:

Prior notice

- You should be satisfied that adequate notice has been given, as prescribed by law.
- If the defendant or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.

- For criminal matters, you will need proof of service of the warrant or summons. For civil and family matters, you will need proof of service of the writ with particulars of the claim.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow them more time.

Fair hearing

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with a new and relevant issue.
- It always requires you to ensure you have all the relevant facts and materials before deciding.

Relevant material disclosed to parties

- Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account.

Before a hearing is concluded, you should ask yourself, “has each party had a fair opportunity to state his or her case?”

2.3 Courtroom Conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the Judiciary:

- Be courteous and patient.
- Be dignified.
- Be humble:
 - ⇒ If a mistake is made you should apologise - there is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper:
 - ⇒ The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.

- Never make fun of a party or witness:
 - ⇒ A matter which may seem minor to you, may be very important to a party or witness.
 - ⇒ Remember there are no unimportant cases.
- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the Bench that criticises features of the law:
 - ⇒ Your duty is to uphold and administer the law, not to criticise it.
 - ⇒ If you believe that amendments should be made, discuss the matter with either the Senior Magistrate or Chief Justice, who may be able to help you.
- Never say anything or display conduct that would indicate you have already made your decision before all parties are heard.
- Do not discuss the case or any aspect of it outside of the panel. This includes other Magistrates who are not sitting on the case.

2.4 Maintaining the Dignity of the Court

Ensure that all people appearing before the Court treat it with respect by:

- keeping order in Court; and
- being polite and respectful and expecting the same from them.

Deal effectively with unruly defendants, parties, witnesses and spectators by:

- decisiveness and firmness;
- dealing promptly with interruptions or rudeness; and
- clearing the Court or adjourning if necessary.

2.5 Communication in Court

Speaking

- Use simple language without jargon.
- Make sure you know what to say before you say it.
- Avoid a patronising and or unduly harsh tone.
- Generally, do not interrupt counsel or witnesses.

- Always express yourself simply, clearly and audibly. It is important that:
 - ⇒ the party examined and every other party understands what is happening in the Court and why it is happening;
 - ⇒ the Court Clerk is able to hear what is being said for accurate note-taking; and
 - ⇒ the public in the Courtroom are able to hear what is being said.

Listening actively

- Be attentive and be seen to be attentive in Court.
- Make accurate notes.
- Maintain eye contact with the speaker.

Questioning

Criminal

- The criminal justice system is based on an adversarial procedure, which requires the prosecution to prove the case. Your role is not to conduct the case for them, but to listen and determine.
- You should not ask questions or speak while the prosecution or defence are presenting their case, examining or cross-examining witnesses.
- You may ask questions at the conclusion of cross-examination, but only to attempt to clarify any ambiguities appearing from the evidence. If you do this, you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised.
- Never ask questions to plug a gap in the evidence.

Civil and family

- You may ask questions. If parties are unrepresented, you might do this to indicate what is needed to satisfy you and clarify what they are saying.
- Be careful to be neutral when asking questions – your questions must not show bias to either side.
- Avoid interrupting during submissions. If possible, wait until the party has finished their submissions.

Dealing with parties who do not understand

You may frequently be confronted with unrepresented defendants and parties who do not appear to understand what the proceedings are about.

It is your responsibility to ensure that the defendant or parties understand:

- the charge faced (criminal) or matters in issue (civil and family); and
- the procedures of the Court.

Criminal

When dealing with unrepresented defendants, you should explain to them:

- the nature of the charge;
- the procedure and formalities of the Court;
- the legal implications of the allegations.

At any stage in the proceedings, you may take the time to satisfy yourself that the defendant knows:

- why he or she is appearing in Court;
- what his or her rights are;
- what the Court is doing; and
- why the Court is following that course.

Civil and Family

You may need to be more attentive to an unrepresented party's needs. Take care to explain:

- the nature of the hearing and what will occur;
- what is expected when the party comes to speak; and
- to an applicant that they have to tell you what they want and why.

Dealing with language problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem. Often, however, one is not available. In this case:

- explain the nature of the charge or issues as slowly, clearly and simply as possible;
- if you are in any doubt about whether the defendant or a party properly understands what is happening, adjourn the hearing to enable an interpreter to be obtained.

3 Working as a Panel

Each Court sitting must have three members, with the President and Vice-President sitting together with an ordinary member. Decisions are by agreement and, if there is no agreement, by majority (2 out of 3): *s10 Island Courts Act (Cap 3)*.

The President

The role of the President is to manage the proceedings. From the perspective of the public and all before the Court, he or she is in charge of the Courtroom. This involves:

- handling all procedures;
- issuing all summonses, warrants, orders, convictions and recognisances;
- making all pronouncements;
- recording the evidence if the Court Clerk is not present;
- ensuring all before the Court understand what is going on and are treated with respect;
- structuring and guiding any panel discussions out of Court, and ensuring the discussions are purposeful and relevant; and
- ensuring that all other members of the Bench have the opportunity to be heard in panel discussions.

The President should know the members' strengths and weaknesses and make the most of their strengths and expertise whenever possible. He or she should ask the opinions of each member, listen to them and treat each contribution as important.

The President may ask other members to undertake specific tasks, for example:

- note taking;
- referring to legislation and this benchbook;
- ensuring observation of the rules of evidence.

Other members

The role of the other members involves:

- appropriately drawing the President's attention to particular matters of significance or procedure;
- listening attentively;
- undertaking tasks as required by the President; and
- working in partnership with the Chair and other Bench members to decide the case.

C: CRIMINAL

This part describes the criminal jurisdiction of the Island Court. It:

- sets out the extent of your criminal jurisdiction;
- lists the range of offences you may hear and determine;
- describes the processes, from pre-trial to acquittal or sentence;
- provides best practice guidance in the conduct of criminal proceedings;
- provides a guide to decision making;
- provides a guide to sentencing;
- sets out the rights of appeal; and
- provides guidance for dealing with children and young people.

1 Criminal Jurisdiction of the Island Court

See *ss5 and 6 and Schedule 2 Island Courts Act (Cap 3)*.

Island Courts can only hear and determine summary offences punishable by a maximum sentence of:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

Additionally, Island Courts may hear and determine the specific offences listed in *Schedule 2* to the *Island Courts Act (Cap 3)*, provided that the sentence passed by the Island Court does not exceed:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

In practice, the Police will decide which Court will hear the more serious cases.

2 Offences

Certain offences are more frequently before the Island Court, particularly offences involving:

- alcohol;
- driving; and
- sanitation.

You need to know and understand the most common offences very well. They are contained in the following Acts, which you should study:

- *Penal Code (Cap 8)*;
- *Public Order Act (Cap 9)*;
- *Alcoholic Drinks Act (Cap 69)*;
- *Traffic Act (Cap 71)*;
- *Public Health Act (Cap 35)*.

Interpretation

These Acts contain definitions of key words in *s2* (except for the *Penal Code (Cap 8)*, which has definitions in *s4*). See Part A, 4.3 for guidance on understanding and interpreting legislation. If you have any doubt about the meaning of any section or words in these Acts, ask the Resident Magistrate, who can provide guidance. You should only seek help from a member of the Judiciary or a lawyer appearing before you.

The following table lists the offences within the jurisdiction of the Island Court.

Act	Section	Description
<i>Penal Code (Cap 8)</i>	<i>s60</i>	Spreading false rumours, etc
	<i>s82</i>	Challenging to fight a duel
	<i>s83</i>	Threatening violence
	<i>s115</i>	Offences relating to judicial proceedings (where the Court or proceeding is before an Island Court)
	<i>s117</i>	Resisting arrest and escape
	<i>s133</i>	Indecent assault on a female
	<i>s167</i>	Idle and disorderly persons (except proviso)
	<i>s169</i>	Offences in public ways, etc
	<i>s170</i>	Drunk and incapable
	<i>s171</i>	Shouting, etc in town, etc
	<i>s172</i>	Polluting or obstructing watercourses
	<i>s173</i>	Posting on walls without consent of owner
	<i>s174</i>	Inciting dogs to attack
	<i>s181</i>	Endangering property with fire, etc
	<i>s182</i>	Criminal trespass
	<i>s183</i>	Sorcery
	<i>s223</i>	Unlawful wounding
	<i>s237</i>	Common assault
	<i>s238</i>	Assault causing bodily harm
	<i>s240</i>	Assault punishable with 2 years' imprisonment
	<i>s254(1)</i>	Simple larceny

Act	Section	Description
<i>Penal Code (Cap 8)</i>	<i>s268</i>	Larceny of dog
	<i>s269</i>	Larceny of creatures not subject of larceny at common law
	<i>s270</i>	Larceny of fish
	<i>s272</i>	Larceny of trees (where value of trees does not exceed \$50)
	<i>s273</i>	Larceny of fences (where value of fence does not exceed \$50)
	<i>s274</i>	Larceny of fruit and vegetables (where value of food does not exceed \$50)
	<i>s275</i>	Damaging fixtures, trees etc with intent to steal (where value of property does not exceed \$50)
	<i>s285</i>	Unlawful use of vehicle
	<i>s306</i>	Receiving (where value of property does not exceed \$50)
	<i>s307</i>	Receiving goods stolen outside Tuvalu (where value of goods does not exceed \$50)
	<i>s318</i>	Injuring animals
	<i>s319(1)</i>	Malicious damage (where value of property does not exceed \$50)
	<i>s322</i>	Removing boundary marks with intent to defraud
	<i>s323</i>	Wilful damage, etc to survey and boundary marks
<i>Dogs Act (Cap 46)</i>	<i>s5</i>	Dog attacking person or animal on public road
	<i>s10</i>	Non-registration of dog
	<i>s13</i>	Falsely describing dog
<i>Traffic Act 1983 (Cap 71)</i>	<i>s13</i>	Driving without a licence
	<i>s14</i>	Breach of provisional driving licence
	<i>s17</i>	Failure to produce licence within 48 hours

Act	Section	Description
<i>Traffic Act 1983 (Cap 71)</i>	<i>s20</i>	Careless driving
	<i>s22</i>	Taking vehicle without authority
	<i>s23</i>	Driving under influence of alcohol or drugs
	<i>s24</i>	Disqualification in certain cases
	<i>s25</i>	Disqualification
	<i>s30</i>	Traffic Regulations
<i>Alcoholic Drinks Act 1984 (Cap 69)</i>	<i>s81</i>	Offences relating to sour toddy licences
	<i>s84</i>	Drinking by prohibited person
	<i>s92</i>	Selling alcohol without licence
	<i>s93</i>	Sale outside permitted hours /keeping licensed premises open/ drinking on licensed premises outside hours
	<i>s98</i>	Drunkenness on licensed premises
	<i>s99</i>	Persons drinking under age
	<i>s105</i>	Possession of weapon under influence of alcohol
	<i>s118</i>	Drinking in a prohibited area
	<i>s120</i>	Refusal to leave licensed premises
<i>Public Order Act (Cap 9)</i>	<i>s15</i>	Disorder in public places
	<i>s16</i>	Possession of offensive weapon at public meeting or procession
	<i>s25</i>	Going armed in public
	<i>s28</i>	Fighting
	<i>s29</i>	Proposing violence at public gatherings
	<i>s34</i>	Possession of offensive weapon in public place

Act	Section	Description
<i>Marriage Act (Cap 29)</i>	<i>s12(6)</i>	Wilful objection to marriage without sufficient and proper cause
<i>Public Health Act (Cap 35)</i>	<i>s3</i>	Breach of Regulations for protecting and advancing public health
<i>Falekaupule Act 1997</i>	<i>s53</i>	By-laws for regulating matters such as sanitation, pig pens and as may be necessary from time to time

Guidance for some of the common offences is included in Part D Common Offences.

3 Criminal Procedure

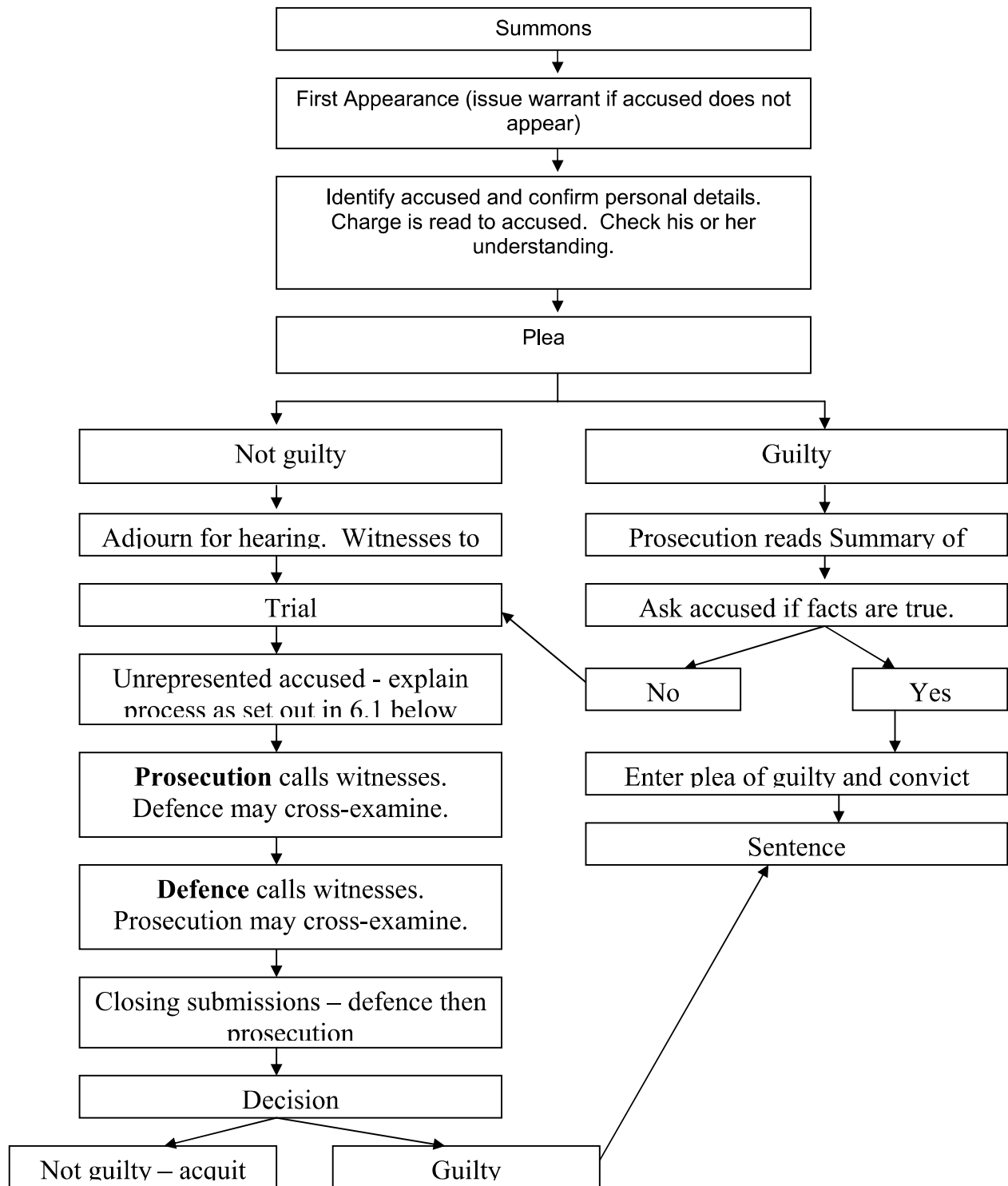
Procedures establish how an offender is brought to Court and how the case is dealt with in Court.

For the Island Court, procedures are found in the *Island Courts Act (Cap 3)*, and *Regulations*.

Where the *Act* or *Regulations* are silent on how something is done, refer to the *Criminal Procedure Code (Cap 7)*, which sets out the practice and procedure in the Magistrates' Court and High Court: *reg 50 Island Courts Regulations*.

The diagram on the next page shows the steps in a criminal case.

Criminal Procedure



4 How a Case Gets to Court

Criminal proceedings (known as a prosecution) are normally filed by the Police on behalf of the Crown against a person alleged to have committed an offence. Other authorities like the Kaupule may also file charges against people for alleged offences, such as under the *Public Health Regulations*.

4.1 The Charge

Before a criminal case proceeds to Court, the President of the Court will be asked to sign a charge (Form 1). The charge is prepared by the Police or Kaupule.

The charge gives the name of the person who is accused of an offence, details of what the Police allege that the accused has done, and the law the Police allege that the accused has breached. Remember that these are allegations which have to be proved or admitted and the **accused is innocent until proven guilty**.

Frequently, in the Island Court, the charge has details of when and where the charge will be heard. This is served as a summons. This can be separate or on the same document.

A charge must be brought not more than 6 months after the offence was committed: *reg13 Island Courts Regulations; s204 CPC.*

4.2 The Summons

A summons is a formal notice requiring a person to appear before the Court on the date and time stated in the summons.

The summons is prepared by the Court Clerk (Form 2).

The Court Clerk arranges for the Police to serve the summons on the accused in person.

Where the accused is off island, the charge and summons should be prepared and sent to where the accused is living.

- That is not a problem if on Tuvalu.
- If the accused is overseas, the case cannot proceed until he or she returns.

A case cannot be transferred from one island to another. It must be heard where the summons has been issued. Service can take place on another island for a person to attend on the other, provided that reasonable travel arrangements can be made by the accused.

5 The First Hearing

The accused should attend at the time and place where the case will be heard by the Court.

Where an accused does not appear in Court

- Establish that he or she has been served with the summons with sufficient time to comply. This may be done by Affidavit of Service (Form 3) or by the person who served the accused giving evidence of that fact.
- If service has been proved, issue an arrest warrant (Form 4).
- If the summons has not been served, adjourn the matter to allow service.

5.1 Unrepresented Accused

In the Island Courts, the accused has an automatic right to legal advice. However, as there is limited access to legal advice, this may not be available even if he or she may require help.

Make sure that legal advice is given if it is needed. Explain that the Peoples Lawyer can assist by telephone and consider papers on request, if necessary.

It is important that the accused understands the charge against him or her, and is able to respond to the allegation made.

In Nui, for example, a charge should be in either Tuvaluan, Nuian or Kiribati language, dependant on the person.

It is important that you clearly record what an unrepresented accused has been told and his or her responses: see *Tasi Togiga v R* (HC 8/03).

5.2 The Prosecution

On the islands, the Police officer is the investigating officer as well as the Prosecutor.

This can cause difficulties, as they are two separate roles:

- the duty of Police as Prosecutor is to present and argue the case for the prosecution;
- when a Police officer is giving evidence as a witness, they are in no different position from anyone else coming before the Court. Their evidence is judged by the same standards as evidence from other sources – it is no more or less credible.

In any case before the Court, the duty of the person prosecuting (the Police or Kaupule) is to the Court. They must not mislead or deceive the Court. They must:

- assist the Court to arrive at a conclusion which is in accordance with truth and justice; and
- place the case impartially before the Court, including all relevant facts.

If a charge has been filed after 6 months has passed since the offence took place, the case should be withdrawn by the Police.

5.3 Defence Counsel

A defence lawyer also has a duty to the Court. They must not mislead or deceive the Court, but remember that their interests are those of the accused, and they are under no duty to be impartial.

5.4 Arraignment and Plea

When a case is ready to proceed, begin by:

- identifying the accused; and
- confirming the accused's personal details - name and address.

The charge will be read to the accused by the Court, giving particulars and details of the offence.

In every case, you must be satisfied that:

- the accused understands what has been read; and
- he or she knows what is meant by guilty or not guilty. Although the facts may be true, the law may give a defence. Explain this to avoid any misunderstanding.

Never take for granted that the accused understands the charge. Unless the accused clearly understands the nature of the offence, he or she will not be able to work out if there is a defence and what to plead. If you are not satisfied that the accused understands, explain it in a way that he or she will. If the accused still does not understand, adjourn the hearing so that he or she can get legal assistance.

When that has been done, the accused will be asked whether he or she is guilty or not guilty (whether he or she admits or denies the offence).

If the accused enters a guilty plea, then the case may proceed on the same day. If not, the case should be adjourned for hearing.

Where an accused refuses to enter a plea, then the Court should enter a plea of not guilty. Record the plea clearly on the Court record.

5.5 Guilty Plea

When the accused pleads guilty, ask him or her to sit down.

Police Summary of Facts

Tell the accused to listen very carefully to the Summary of Facts. Explain that he or she will be asked at the end whether the facts are true.

The facts will be read out by the Prosecutor. The Prosecutor explains what happened, where, and the consequences.

Ensure that the facts given support the charge brought. The Prosecutor must present sufficient information to establish all the elements of the offence.

Ask the accused whether or not the facts read to the Court are true.

If the accused admits the truth of the charge, enter a plea of guilty, convict the accused and pass sentence.

However, if the accused admits the truth of the charge, but makes some comments, you must listen carefully because sometimes those comments indicate a possible defence. Where any comments made by the accused amounts to a defence, you must enter a plea of not guilty for the accused.

If the accused disputes any of the facts, consider whether the disputed facts are relevant to the offence. Remember that a plea of guilty is a plea to the **elements** of the offence, not necessarily acceptance of the Summary of Facts. If the facts that the accused disputes are not relevant to the elements, enter a plea of guilty, convict and pass sentence. If the disputed facts are relevant to the elements, you must enter a plea of not guilty for the accused.

5.6 Plea by Letter

In certain offences, a letter admitting the offence can be accepted by the Court, and the Court may excuse the attendance of the accused. This letter has to be signed and dated.

The letter will be read out to the Court and the plea entered. The Prosecutor will proceed to read out the facts, and any other relevant information.

The Court will sentence the accused in their absence and the Clerk will write to the accused to advise him or her of the decision made.

This should be done only where the offence is minor.

The person should be in attendance where the sentence is:

- an order disqualifying from driving; or
- imprisonment.

The case should be adjourned and the accused summoned for that purpose.

5.7 Not Guilty Plea

If the accused pleads not guilty, or the Court enters such a plea on behalf of the accused, the case should be adjourned for hearing. This enables and ensures:

- witnesses are called by both parties;
- disclosure of Police papers to the defence (on request); and
- legal advice to be given so that a fair trial can take place.

6 Trial

Prior to the defended hearing, all witnesses should be asked to attend Court. This is done by issuing a summons (Form 5) asking them to attend at a certain time and place.

Before the hearing begins, it is usual to confirm the plea. In some cases where advice has been given, the plea may change to guilty. If this happens:

- send any witnesses away, as there is no further need for their attendance; and
- continue as for a guilty plea (see 5.5 above).

6.1 Unrepresented Accused

Often an accused will appear without a lawyer. Most have little idea what is involved in a defended hearing.

You should begin by explaining:

- the elements of the charge that the prosecution must prove;
- how the case will proceed;
- their right to cross-examine witnesses and call their own witnesses, who will be cross-examined by the prosecution; and

- that they may give evidence, but do not have to, and if they do, they may be cross-examined by the prosecution.

It is most important that you record clearly what you put to an unrepresented accused and their response: see *Tasi Togiga v R* (HC 8/03).

6.2 Prosecution Case

The Police Prosecutor will present the case on behalf of the Crown. As one of two resident Police officers on the island, he or she is both investigating officer and Prosecutor. This means he or she will have prepared the case.

The Prosecutor calls the witnesses individually to give evidence. If there is more than one, the other witnesses must not be present in Court, nor able to hear what is being said.

The Court Clerk records this evidence (or the President if the Clerk is not present).

Take notes of the evidence presented, to assist in making your decision. One way to do this is to note each element on a separate piece of paper, and as the evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision, as well as ensuring every element has been proved.

Once the Police have finished with each witness, the accused can ask questions. This is called cross-examination.

The Police can re-examine that witness if they feel it necessary to do so.

When the Police have called their final witness, that concludes their case.

6.3 No Case to Answer

Once the prosecution case is closed, you need to be satisfied that the facts support the charge, and there is evidence of all the elements of the offence charged in relation to the accused.

If not, then the case should be dismissed and the accused acquitted.

Make a note on the Court record that there was no case to answer and the accused is acquitted.

If you are satisfied that the prosecution has presented evidence to prove all the elements of the offence charged in relation to the accused, then the accused or their lawyer will present the case for the defence.

6.4 The Defence

The defence does not have to prove anything.

The accused may give evidence, and call witnesses to support his or her case.

An accused is not obliged to give evidence if he or she does not want to do so. If they do, the Prosecutor may ask questions and re-examination may take place.

The Magistrates may ask any questions on the evidence that has been heard or to deal with issues that he or she feels need to be asked from the evidence that has been heard.

The defence case is then closed.

6.5 Conclusion of Case

The defence may summarise the facts and explain why the case has not been proved. This may include reference to the law.

The prosecution will respond, explaining how the case has been proved and the law that applies.

In both cases, they will explain how the evidence supports their case.

See *Lisale v R* [2003] TVHC 7, 1/03, where the Chief Justice makes it clear that the failure to give a closing speech would probably result in the conviction being quashed and referred back to the Magistrate.

7 Proving an Offence

7.1 Innocent Until Proved Guilty

One of the most important principles in criminal law is that the accused is innocent until proved guilty. Unless and until the prosecution proves that the accused is guilty of all the elements of the offence, he or she is innocent in the eyes of the law. You must always remember this.

7.2 Burden and Standard of Proof

The Prosecution has the burden, or responsibility, of proving their case. They must prove all the elements of the offence, beyond reasonable doubt.

If, at the end of the prosecution case, the prosecution has not produced evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed.

If the prosecution has succeeded at that stage, then the defence has a chance to present their case and then you must decide whether the prosecution has proved their case beyond reasonable doubt, taking into account what the defence has shown.

Remember that the defence does not have to prove anything. It is for the prosecution to prove all elements beyond reasonable doubt. If, after hearing the defence evidence, if any, you have a reasonable doubt on any of the elements, then the prosecution has failed.

Beyond reasonable doubt

This means you are sure the accused is guilty of the charge, and there is no doubt in your mind. If you are uncertain in any way, you must find the accused not guilty.

Lawful excuse

In some cases, once the prosecution has established facts to support all the elements, the burden of proof is then on the accused to satisfy the Court that he or she acted with lawful excuse, good reason or lawful justification. See 7.4 defences, below.

The standard of proof for the defence to prove is not as high as the prosecution. They have to prove this “on the balance of probabilities”, which means that what the defence is seeking to prove is more likely than not.

7.3 What Must be Proved

Elements

Every offence has a number of elements that must be proved for an accused to be convicted.

Every element must be proved.

All offences involve a physical act, and mental capacity.

Physical act (called the *actus reus*)

This is:

- the doing of an act not allowed by law; or
- the doing of something, the result of which is not allowed by law.

Mental capacity (called the *mens rea*)

Most offences require the prosecution to prove the accused had a particular state of mind in addition to the act and its consequences. Not all offences require this.

This could be:

- intention (meaning to do something, or meaning a certain result will happen);
- recklessness (taking an unjustified risk);
- knowledge (knowing something);
- belief (believing something); or
- carelessness or negligence (not taking enough care).

In most cases, the doing of the act will allow you to assume that there was the mental element.

7.4 Defences

The defence may raise a reasonable doubt about any of the elements that the prosecution has attempted to prove. In addition, there are a number of specific defences available to the accused.

These are set out in *Part IV* of the *Penal Code (Cap 8)*.

Some of the common defences are:

- Age: no child under 10 years old can be convicted of an offence, and no child under 14 years old can be convicted unless it is proved he or she had the capacity to know it was wrong: *s14 Penal Code (Cap 8)*;
- Insanity: if the person is known to be suffering from a mental illness it may make them incapable of understanding what they did (which means they will not have the necessary mental element): *ss11, 12 Penal Code (Cap 8)*;
- Intoxication: drunkenness is a defence only where the person is unaware that he has been drinking alcohol: *s13 Penal Code (Cap 8)*;
- Compulsion: where a person is compelled to commit an offence by the immediate threat of death or grievous bodily harm from a person who is present when the offence is committed, there is a defence if that person believes the threats will be carried out: *s16 Penal Code (Cap 8)*;
- Self-defence: a person is justified in using reasonable force to defend themselves, or another. This is common where two parties have been charged with fighting or common assault: *s17 Penal Code (Cap 8)*.

In certain cases, an offence itself may give the accused a defence. Some examples are given below. In these examples, the defences are in bold and once the prosecution has proved the elements of the offence, it is open for the defence to prove, on the balance of probabilities, the defence.

Trespass: s182(2) Penal Code (Cap 8)

‘Any person who enters, by night any house, ... **without lawful excuse.**’

For example, to prove trespass, the prosecution need to show that the person entered the house by night, without the permission of the owner or some other lawful excuse. However, the accused could establish that he had an excuse (for example, the son/daughter had invited him to the house), and would need to show that on the balance of probabilities.

Larceny: s251 Penal Code (Cap 8)

‘a person, who without the consent of the owner, ... takes and carries away ... **permanently to deprive the owner**’.

Here, if the accused can prove that she had the intention of returning the item, she has a defence.

Possession of weapon under the influence of alcohol: s105(1) Alcoholic Drinks Act (Cap 69)

‘A person who ... whilst under the influence of alcohol is, **without reasonable and lawful excuse**, in possession of any dangerous or offensive weapon.

If the accused can prove some reasonable and lawful excuse for possessing the weapon in the circumstances, he has a defence.

Driving under the influence of drink or drugs: s23(3) Traffic Act (Cap 71)

Where, in any proceeding for an offence in connexion with drink it is proved the accused drove or attempted to drive within 2 hours after consuming any liquid containing alcohol; and –

- the accused committed an offence through his driving; or
- was involved in an accident,

the Court shall presume the driver was impaired by drink, “**unless the contrary is proved.**”

Here, the accused will have a defence if he can prove that he was not impaired by drink.

8 Decision Making

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.

8.1 Principles Governing Decision Making

There are three principles which collectively translate into the general duty to act fairly:

- you must act lawfully;
- affected parties have a right to be heard;
- you must be free from bias.

The principles are intended to ensure:

- the fair, unbiased and equal treatment of all people;
- the exercise of any discretion only on reasoned and justified grounds.

Adhering to these principles does not guarantee that the Court has made a good decision. It does mean, however, that it is likely to have followed a process that is designed to introduce many of the relevant and critical factors, and exclude prejudice and irrelevant material and considerations.

You must act lawfully

This principle is concerned with what the governing legislation or rules require.

There are several aspects to the principle of lawfulness:

- you must act within the authority of the law;
- you must take into account all the relevant considerations and must not take into account irrelevant considerations; and
- you must not give away your discretionary power. Only the members of the panel can make the decision.

Ask yourself:

- “Does the Island Court have jurisdiction to hear and determine the matter?”
- “What are the considerations I must take into account?”
 - ≡ Look to the appropriate legislation to work out what you must be satisfied of.
 - ≡ Each element of the offence will point to the relevant considerations. Factors unrelated to those elements will be irrelevant.
- “Have I taken into account anything irrelevant?”

Affected parties have a right to be heard

Both the prosecution and defence must have a full and fair opportunity to be heard before the decision is made.

The purpose of this principle is to ensure that the Court considers all relevant information before making its decision.

Throughout the hearing process, ask yourself:

- “Am I giving each party a fair opportunity to state his or her case?”

You must be free from bias

You should not allow your decision to be affected by bias, prejudice or irrelevant considerations.

You must not have an interest in the matter from which it might be said you are biased:

- it is not necessary to show actual bias, the appearance of bias is sufficient; and
- bias might be inferred where there is a relationship to a party or witness, a strong personal attitude that will affect your decision, or a financial interest in the matter.

Ask yourself:

- “Is there any factor present which could amount to bias, or the perception of bias, if I hear this matter?”

Consequences of a breach of the principles

If these principles are not adhered to, your decision may be reviewed on appeal.

There are other consequences of breaching the principles. These include:

- a person being unlawfully punished or a guilty person getting off without punishment;
- expense, hardship and emotional turmoil;
- a loss of faith in the system of justice.

8.2 Deliberations

At the end of the formal hearing, the panel discusses the evidence produced by parties and makes their decision. It is good practice to retire to discuss the matter and reach a decision. The Clerk may only assist you if there is a point of law that you wish to be clarified.

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.

8.3 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 criminal cases, this is what the accused is charged with and all the essential elements of the offence. For the accused to be found guilty, every element of the offence must be proved beyond reasonable doubt.

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

In criminal cases, the accused is presumed to be innocent and the prosecution must prove that he or she is guilty. This is done by producing evidence.

To determine the facts, you will need to assess the credibility of the witnesses and the reliability of their evidence.

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.

Note that in a criminal case, if you accept the prosecution evidence, you must also reject the defence evidence on that matter. If there is a reasonable possibility that the defence evidence is true, and it relates to an essential element, there is reasonable doubt and the accused must be found not guilty.

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.

8.4 Delivering a Decision

Follow the format on the next 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.

Criminal Decision Format

Follow this format when making and delivering your decisions.

Introduction

What the case is about.

Summary of what is alleged

What is alleged by the prosecution.

The law

What must be proved beyond reasonable doubt.

The elements of the offence.

The facts not in dispute

The facts that are accepted by the defence.

The elements that those accepted facts prove.

The facts in dispute

Your finding of the facts, with reasons. Which evidence you prefer and why?

Apply the facts to the law

Apply the facts as you have found them to the elements of the offence. Do the facts prove all the essential elements?

You may convict the accused if you are satisfied beyond reasonable doubt that the prosecution has proved the essential elements of the offence.

If there is a reasonable doubt, your verdict must be not guilty.

Deliver your decision

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

Orders

9 Sentencing

After a guilty plea, or a finding of guilt, you pass sentence. The sentence explains the penalty that the Court will give, and its reasons.

The accused will be able to ask the Court to take his or her comments into consideration before passing sentence (known as a plea in mitigation).

Once that has been done, you can pass sentence on the offender. You must explain the sentence and your reasons for it, so that the accused understands what he or she needs to do.

Sentencing jurisdiction

You must not impose any sentence that the Island Court does not have authority to impose and where it has authority to impose, you must not exceed the maximum given.

The maximum sentence an Island Court may give is:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

Note that *s71 Interpretation Act* states that where a penalty is expressed in an offence, committing the offence makes the person liable to a penalty **not exceeding** the penalty expressed. This means that the penalties set out in the *Penal Code* and other Acts are the **maximum** penalties that may be imposed. You may, of course, sentence the offender to a lesser penalty.

Consistency

It is most important that you are consistent when sentencing. You must:

- treat similar cases in the same way;
- treat serious cases more seriously than less serious cases; and
- treat minor cases less seriously than serious cases.

9.1 Principles of Sentencing

It is the Court's task to represent the community by deciding on and imposing a sentence for criminal behaviour. There are a number of reasons for passing a sentence. These are called the principles of sentencing. They are:

- Punishment – the sentence is to punish the offender for their criminal behaviour;
- Deterrent – the sentence is to deter other people from doing the same thing;
- Prevention – the sentence is to prevent the offender from doing the same thing again;
- Restoration – the sentence serves to restore or repair the damage done to others;
- Rehabilitation – the sentence is to rehabilitate the offender.

When deciding which sentence to pass, you will have one or more of these reasons in mind. Ask yourself, which of the sentencing principles apply in this case?

9.2 Factors Influencing Sentence

There are a number of factors which will influence you when deciding what sentence to pass.

Such factors might include the offender's:

- age;
- character;
- community involvement;
- previous criminal record;
- employment;
- steps to make changes and repair the damage caused by the offending;
- plea of guilty; and
- other relevant personal information.

They will also include factors about the offence, such as:

- the seriousness of the offending;
- the impact on the victims or the community; and
- the seriousness with which the community views the offending.

Some factors will cause you to deal with the offender more harshly – these are called aggravating factors. Some factors will cause you to deal with the offender more lightly – these are called mitigating factors. You need to take all the factors into account when passing sentence.

Previous convictions

The prosecution will show the Court any previous criminal convictions that the accused has. This guides you in assessing the sentence by helping you to assess the previous character and the likelihood of the offender re-offending.

The Chief Justice in *Tasi Togiga v R* (HC 8/03) stated that it is fundamental that a Court should be told of any previous convictions before determining the appropriate sentence – it is vital that the Court is aware of the fact that the offender has no convictions when that is the case.

You must ensure that the list of convictions are shown to the offender.

- If the offender accepts these are correct, then you can proceed to consider them.
- If the offender disputes these, the prosecution will need to obtain evidence to support the conviction/s. It is the duty of the prosecution to provide that evidence – a Court can only pass sentence on the strength of the evidence produced. It cannot rely on evidence that they might know but has not been produced.

A particular problem in Tuvalu is the fact that a person may be known by more than one name. A careful check needs to be made to ensure that the record of convictions relates to the offender.

In assessing previous convictions you have to be aware of the result, and effect of a previous sentence. If, for example, a person is convicted of being drunk and disorderly and has a similar offence in 1986, this is a one-off as he or she has been of good behaviour for many years. This may reduce the sentence to be given.

If that person is involved in a similar incident later in the year, then the Court may deal with him or her with a greater penalty.

See also *Logologo Viliamu v R* [2003] TVHC 9, 2/03.

Rehabilitation of Offenders Act 1991

The *Rehabilitation of Offenders Act 1991* prevents a person from being punished twice for the same offence. It provides that when a certain time period has passed, these can be regarded as 'spent'. This means that the Court must not take notice or base their decision on these.

The Court should note whether there has been an incident in the past of a similar type, and if so, how long ago it was.

This is an extremely important rule and will apply where there are minor offences, such as alcohol-related crimes and traffic convictions.

Further, where disqualification from driving has taken place, a Court must disregard offences before the ban was imposed in assessing a further sentence.

You will need to identify which of the offences are spent (in the absence of legal assistance).

Customary considerations

Custom may assist in passing sentence. It is common in cases of trespass, for example, for an apology to be made to the owner of the property. Where that has been done, that will be considered to be important when sentence is given.

This is helpful, as the offender and the people affected by the offending have to continue to live together on the same island.

Plea of mitigation

Before sentence is given, ask the offender if he or she has anything to say on their own behalf. This is known as **mitigation**. This can be done by either the offender or, where legal representation is available, by a lawyer.

Further information and reports

Decide whether any further information or reports are necessary. These will give further background and are useful in assessing the sentence to be given.

See *Maluofenua Kalisi v R* [2003] TVHC 1, 6/02, and *Logologo Viliamu v R* [2003] TVHC 9, 2/03.

9.3 A Systematic Approach to Sentencing

You must develop a systematic method of working through each sentence. Make sure you have as much information as possible. If a Welfare Report is necessary, ask the Welfare Officer or Community Officer.

The format on the following page is a useful guide for you to work through.

Sentencing Format

Introduction

What the offender has been convicted of.

The relevant facts

If there was a defended hearing, refer to the evidence called.

If there was a plea of guilty, refer to the Summary of Facts.

The law

Statute:

Maximum sentence and any mandatory requirements, such as mandatory disqualification.

Common law:

What do the higher Courts say? See Appendix 4 for relevant sentencing cases.

Mitigating and aggravating features

Make sure you address any arguments that the accused or their lawyer has put forward.

Relating to the offence:

Aggravating factors, e.g. danger to the public, premeditated attack, major impact on the victim.

Mitigating factors, e.g. no harm to person or property, minor offence.

Relating to the offender:

Aggravating factors, e.g. personal information; previous convictions; lack of remorse.

Mitigating factors, e.g. personal information; age; good character; remorse shown; customary steps taken to restore the damage.

Relevant factors from reports

The Pre-sentence Welfare Report, particularly the recommendation.

Pronounce sentence

Make sure you explain the sentence so the offender understands. Using the headings in this checklist is a good way of covering your reasons. Record your sentence on the Court record.

Advise rights of appeal

When someone has been found guilty and sentenced following trial, or has pleaded guilty and is sentenced, explain their rights of appeal. See 10 below.

Where the sentence is imprisonment, suggest that the offender seeks legal assistance.

9.4 Types of Sentence

The Island Court may pass the following sentences:

- imprisonment for not more than 6 months; or
- a fine not exceeding \$100; or
- both; or
- a supervision or probation order for a period of not more than one year; or
- a discharge, either with or without conditions; or
- a suspended sentence. This means the sentence of imprisonment will only be served if the accused commits another offence within the period of supervision; or
- a compensation order for any loss or injury caused; or
- an order requiring the offender to give security for keeping the peace; or
- an order that the offender be taken to his or her home island; or
- an order prohibiting the offender from drinking or having alcohol in his or her possession, for not more than 12 months.

In addition, the Island Court may enforce fines by sentencing an offender to imprisonment if they fail to pay a fine: *s30(1) Penal Code 1978*. The term of imprisonment you may sentence for default on a fine is discretionary, but must not exceed the limits set out in the chart below.

Amount	Maximum Period
Not exceeding \$2	7 days
exceeding \$2 but not exceeding \$4	14 days
exceeding \$4 but not exceeding \$20	6 weeks
exceeding \$20 but not exceeding \$40	2 months
exceeding \$40 but not exceeding \$50	3 months
exceeding \$50 but not exceeding \$100	6 months
exceeding \$100 but not exceeding \$200	12 months

The imprisonment term for default on a fine shall terminate when the fine is:

- paid; or
- levied by the process of law: *s30(2) Penal Code 1978*.

See *Viliamu v R [2003] TVHC 9, 2/03* and *Lisale v R [2003] TVHC 8, 3/03*.

Where a person has 2 or more separate offences, the Court should sentence him or her on each offence.

Sentences may be either concurrent (they run together) or consecutive (they run one after another).

Directions may be given by the Chief Justice, Senior or Resident Magistrate on sentence, as may be necessary.

The following table has been designed to explain all the types of sentences, and when each may be used.

Types of Sentences

Type	Statute	Considerations
<p>Imprisonment</p> <p>Imposed as a last resort, to punish and deter.</p> <p>Used rarely.</p>	<p><i>ss6(1), (2), (3) Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> 1. Age; 2. Previous convictions – unless has significant convictions, rare to be imprisoned without a second chance being given; 3. Severity of the offence; 4. Custom.
<p>Fine</p> <p>The financial means of the offender should always be considered.</p> <p>Extremely common, and used widely.</p>	<p><i>s6(1) Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> 1. Age; 2. Employment – ability to pay a fine; 3. Previous convictions – if has some, and fines may be more appropriate than imprisonment; 4. Custom.
<p>Supervision</p> <p>Purpose is rehabilitative - to assist the person to become an active part of society.</p> <p>Very useful.</p>	<p><i>s6(7) Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> 1. Age - appropriate where offender is between 14 and 25; 2. Previous convictions – note if there is a common link to offences (such as alcohol); 3. Custom.
<p>Deferred Sentence</p> <p>Imposed where you believe offender is unlikely to re-offend, but wish to encourage good behaviour</p>	<p><i>s6(7), s7 Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> 1. Age; 2. Previous convictions - useful where there are few, and seems to be settled member of the community; 3. Custom.

<p>Discharge (Absolute)</p> <p>Imposed where the case has been proved but the circumstances are such that the matter is minor or trivial, so as not to justify a conviction being entered.</p>	<p><i>s7 Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> 1. Used widely for first-time offenders where the offence is seen as a one-off; 2. Previous good character; 3. Where offender is a student - often given because of age and lack of maturity.
<p>Disqualification from driving</p> <p>Compulsory where is a conviction under <i>ss21, 23(1) Traffic Act (Cap 71)</i>.</p>	<p><i>s25 Traffic Act (Cap 71)</i></p>	<ol style="list-style-type: none"> 1. Under <i>ss21 and 23(1)</i>, special considerations do not exist. Penalty is mandatory in serious cases. 2. In all other cases, disqualification is discretionary. Mitigation in standard form should be given. 3. See <i>Tianamo Savave v R</i> (with <i>Pita v R</i>) [2002] TVHC 4, 3/02 and <i>Logologo Viliamu v R</i> [2003] TVHC 9, 2/03.
<p>Security for keeping the peace, or to discourage other minor criminal behaviour</p> <p>Given where it is anticipated future offences may take place, to discourage this.</p>	<p><i>s40 Criminal Procedure Code (Cap 7)</i></p> <p><i>Schedule 2 reg 50 Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> 1. Special considerations detailed in the section itself.
<p>Prohibition order</p>	<p><i>ss82(1) and (2), 83 Alcoholic Drinks Act (Cap 69)</i></p>	<ol style="list-style-type: none"> 1. Special considerations detailed in the section itself. 2. See <i>Sele Lausavere v R</i> (Crim App Feb 03)

10 Appeals and Revisions

10.1 Rights of Appeal

Any person convicted in an Island Court and sentenced to:

- imprisonment;
- a fine of more than \$10; or
- imprisonment for more than 7 days in default of payment of a fine,

may appeal to a Magistrate's Court against the conviction or sentence: *s29 Island Courts Act (Cap 3)*.

They may not appeal against the sentence if it is one fixed by law: *s29 Island Courts Act (Cap 3)*.

If they pleaded guilty, they may not appeal against the conviction, but may appeal against the sentence: *s29 Island Courts Act (Cap 3)*.

Regardless of *s29*, in any case the Magistrate's Court may hear any appeal on any terms it thinks just: *s30 Island Courts Act (Cap 3)*.

10.2 Duties of Island Magistrate

When someone has been found guilty and sentenced following trial, or has pleaded guilty and is sentenced, you must explain their rights of appeal: *reg 30(2) Island Courts Regulations (Cap 3)*.

Explain that if they are not satisfied with the decision, they can appeal. They must do this within 21 days and they do this in writing on a form that the Court Clerk can give them (Form 11).

Explain that if there is a doubt, advice should be sought through the People's Lawyer.

Note if the appellant is not represented by a lawyer and declares an intention to appeal in Court, that has the same effect as a written notice of appeal. It is a good idea to ask the Court clerk to assist them in putting their grounds onto Form 11.

When a convicted person gives notice of appeal, the Island Court may decide to:

- grant bail to the offender if he or she is in custody; or
- order that the sentence be suspended pending the determination of the appeal: *reg 43 Island Courts Regulations (Cap 3)*.

The Magistrate's Court may direct the Island Court to take additional evidence for the appeal hearing. This shall be taken in the same way as it would in a trial: *s33 Island Courts Act (Cap 3)*.

When a case has been decided on appeal, the Island Court shall:

- make such orders to conform with the judgment or order of the Magistrate's Court; and
- take such steps as may be necessary to enforce that judgment or order.

10.3 Duties of Court Clerk when Appeal is Lodged

When an appeal is lodged, the Court clerk must:

- send particulars of the appeal to the nearest Magistrate's Court, by post or telegraph, not more than 24 hours after receiving notice of the appeal: *reg 33(1) Island Courts Regulations (Cap 3)*;
- within 7 days of receiving the notice of appeal, make up and complete a record of appeal, consisting of:
 - ≡ the pleadings, if any;
 - ≡ all documents admitted as evidence in the original proceeding;
 - ≡ all documents tendered as evidence and rejected in the original proceeding;
 - ≡ true copies of the notes of the evidence in the original proceedings;
 - ≡ the judgment or order of the Court;
- comply with any directions from the clerk of the Magistrate's Court regarding the Court record: *regs 33 and 34 Island Courts Regulations (Cap 3)*; and
- send any recognisance to the Magistrate's Court, if the offender has been released on bail.

10.4 Revision

Section 37 Island Courts Act (Cap 3) enables the Resident/Senior Magistrate to review the decisions of the Island Court in criminal cases. Decisions may be varied or modified if appropriate. In practice this seldom happens, and is subject to the right of appeal.

11 Dealing with Young People

11.1 Criminal Responsibility of Young Accused

A child under 10 years cannot be convicted of an offence: *s14(1) Penal Code (Cap 8)*.

A child under 14 years cannot be convicted of an offence unless the prosecution proves that, at the time of the offence, they had the capacity to know that what they were doing was wrong: *s14(1) Penal Code (Cap 8)*.

11.2 Young Accused in Need of Care, Protection or Control

Where a young accused under 16 years is in need of care, protection or control, the Court may:

- make an order committing them to the care of a fit person willing to take care them;
- make an order that a parent or guardian make contributions towards the maintenance of the young person (having regard to the means of the parent or guardian); or
- make an order that a parent or guardian enters into a recognisance (with or without sureties) to exercise proper care and guardianship over the young person: *s39 Penal Code (Cap 8)*.

Any such order and recognisance remains in force until the young person reaches 18 years: *s39(2) Penal Code (Cap 8)*.

The Court may consider contacting the Social Welfare Officer (on Funafuti) for assistance and the Community Worker attached to the Kaupule to assist with the young accused.

11.3 Guidelines for Dealing with Young Accused

The following guidelines may help if you are dealing with young people.

When a person appears before you, and looks as if they may be under 17 years, find out the age as the very first issue. The Police should know the person's age, as they will have been responsible for the investigation and the decision to charge. If not, then you will need to check the age and its implications. You should verify the age with the person's parents, or by birth records.

Dealing with a young person privately

If you can, deal with the young person a little more privately.

- When the case is called, you do not need to close the whole Court. This may create an impression that you are trying the case secretly.
- It is best to announce that as the case to be called is a young person case, the public will be excluded from the hearing. It should be made clear though that anyone connected with the case, or is part of the Court process, is able to stay.

Assistance for the young person

Usually, it is not wise to take a plea without the young person's parent or guardian being present. This is because:

- they can give useful advice to young persons; and
- they usually have valuable information on the young person's position – whether they are attending school, getting into trouble with the Police, and whether they are living at home.

It may be a good idea, when you have called the case, to ask the young person where his or her parents are.

If the young person is 15 or 16, and the charge is a simple theft, you may wish to deal with the case there and then. But often it is not as simple as that and offending is a sign that things are not well at home. Be careful about this.

Many Courts do not have lawyers who can assist young persons. It is best if a lawyer can be found to give advice and sometimes the case needs to be put off to allow this to happen.

What a young person should have (in view of age, and usually a poor understanding of the legal process), is the ability to talk to someone and to have someone speak on their behalf if this is what they want.

This could be a parent, other relative, social worker or some other official. It is worth finding out if someone like this is available to talk for the young person.

Remember that most criminal charges refer to offences that may be quite hard to understand, even in a young person's own language. Explaining what the charge is, is more important than just reading it out.

Taking a plea is also quite a frightening experience, and technical words are used in recording the plea. What you need to really know is whether the young person agrees or not with the charge. Is it admitted? If it is, then that is sufficient to record a guilty plea.

Use of simple language is the best practice, in order to make them understand what is going on.

Note that in *Simona v R* [2002] TVHC 1, 01/02, the Chief Justice stated that any child in the custody of the Police has the right to have a parent or guardian present unless that is impractical. If the Court is not satisfied that the Police advised the child of its rights to have a parent, guardian or legal adviser present but went ahead with questioning, any statements made by the child should be excluded.

Guilty plea

See 11.4 below.

Not guilty plea – defended hearing

If the young person says that they are not guilty, then the case will proceed as if they were an adult. In other words, a defended hearing will need to occur, for you to determine guilt or innocence.

However, consider asking what the young person has to say about why they believe they are not guilty. Sometimes they simply do not understand that what they have done amounts to a crime. An example might be a larceny where three young persons decide to steal some food, and one is given the task of being the lookout. Sometimes this person pleads not guilty, thinking that as they did not go inside, they have not actually committed the offence. But this may be quite wrong, as a matter of law.

Check why the young person has pleaded not guilty. Is it because they say the Police have charged the wrong person, or is it because they were somewhere else at the time, or is it because they did the crime, but did not intend to do it? Asking questions carefully may in fact resolve the whole case then and there.

You need to be very careful though. Do not give legal advice, and do not ask questions in a formal fashion. The young person may think that the trial has already started.

Is the defended hearing a normal one?

Be conscious that it may be the first time that the young person has ever been in a Court. Also, Courts can be intimidating for all of us, but especially for young persons.

The Police should present their evidence in the usual fashion. But you may help a young person, if there is no lawyer to help, in asking some questions of witnesses.

When it is time for the defence to give evidence, go out of your way to use simple language, and make sure everyone else in Court uses simple language too. You may need to help the young person give their evidence, by asking some questions which gets their story out.

Be careful about what questions you ask though. You have to keep them simple and straightforward by saying things such as:

- Tell me what happened?
- What happened next?
- Why do you say that?

The Police may ask questions in cross-examination, but you must make sure that they are reasonable questions, and that the young person understands. At times you may need to interrupt by checking with the young person if they do understand. One way to check if they understand, is to ask them to say the question back differently.

11.4 Sentencing Young Offenders

Particular considerations apply to any person who is either a child or a young person who is to be sentenced by the Court. These are set out in *s8 Island Courts Act (Cap 3)*.

A child is defined as any person who is under the age of 14 years. A young person is someone who has reached the age of 14 but is under the age of 17.

Child (under 14 years)

- No imprisonment shall be imposed: *s8(2) Island Courts Act (Cap 3)*.
- If fine/damages/costs are to be made, those must be paid by the parent or guardian of the child: *s8(5) Island Courts Act (Cap 3)*.
- The Court may order a parent or guardian to give security up to \$20 for the good behaviour of the child for any period up to a year: *s8(6) Island Courts Act (Cap 3)*.
- The Court may summon the attendance of a parent or guardian and issue a warrant if necessary to compel them to appear: *s8(7) Island Courts Act (Cap 3)*.
- Caning may be ordered as an alternative for boys: *ss8(8), (9) Island Courts Act (Cap 3)*.

Young person (14 – 16 years)

- No imprisonment shall be imposed unless:
 - ≡ the young offender is over 15 years; and
 - ≡ the Court has considered information about the circumstances of the offence and the young offender's age and character (usually from a Welfare Report); and
 - ≡ the Court is of the opinion that no other method of dealing with the young offender is appropriate: *s8(3) Island Courts Act (Cap 3)*.
- If imprisonment is imposed, the term must not exceed 1 month.
- If fine/damages/costs are to be made, those may be paid by either:
 - ≡ the parent or guardian of the young person; or
 - ≡ the young person: *s8(5) Island Courts Act (Cap 3)*.
- The Court may order a parent or guardian to give security up to \$20 for the good behaviour of the young person for any period up to a year: *s8(6) Island Courts Act (Cap 3)*.
- The Court may summon the attendance of a parent or guardian and issue a warrant if necessary to compel them to appear: *s8(7) Island Courts Act (Cap 3)*.
- Caning may be ordered as an alternative for young males: *ss8(8), (9) Island Courts Act (Cap 3)*.

However, imposing just another sentence may not be very helpful either to the victim, or the young person. Sometimes it is essential to find out more information before you sentence, and this may be obtained from a social worker, a parent, a village elder, or church minister and if it is relevant, the school teacher.

Think about putting the case off, and asking either for a report from one or more of these people, or even asking them to come to Court.

See *Tuaga v R* [2003] TVHC 6, 3/02, where the Chief Justice said "... in the case of young offenders with few or no previous convictions, where the Magistrate considers immediate imprisonment is a possible sentence, he should always ensure he has full information about the offender before he decides."

Is a formal sentence necessary?

Remember that all of us make mistakes, and probably we make more when we are young. To enter a conviction and formal sentence may mark out a young person as a criminal forever.

You might think about putting the case off for a couple of months, and getting the young person to undertake an informal sentence. This might include some voluntary community work, paying some money over to the victim or to charity, or something similar. In this way you avoid a formal sentence, and give the young person another chance.

If you do decide to do this, make sure that you put the case off to allow the informal sentence to be carried out, and that you then recall the case later to make sure that the work has been done, or the money has been paid.

This type of approach is referred to as **diversion**, and it is designed to divert the young person away from formal sentences.

You may not feel that diversion is appropriate, if you have tried it previously with the young person and it has failed. They may have already been given this chance. Also, if the charge is quite serious, the Police may want a formal conviction and sentence.

Who else should you consult?

One very important thing in all crime, but more so with young persons, is that they must take responsibility for what they have done. Consider a case of theft of money from someone else, of assaulting another person. Both actions will have caused damage and distress to someone else.

Give the victim a say, and involve the victim in the outcome, if possible.

D:

COMMON OFFENCES

This part is a quick reference guide to some of the common offences you may encounter. It:

- outlines the elements of the offence;
- provides guidance on evidential matters and other material issues;
- details the maximum sentence you may impose.

It is **not** a replacement for the legislation. You must always go to the legislation and make your own decision.

The following offences are those that are commonly heard before the Island Magistrates' Courts, although on Funafuti these may be heard by the Resident or Senior Magistrate's Court. These are divided into the legislation that provides for the offence.

Penal Code (Cap 8)

Drunk and disorderly

Section *s167(d) Penal Code (Cap 8)*

Description Every person who is drunk and disorderly in a public place, or behaves in a riotous or disorderly fashion in any Police station or public place, and in any other place, who assembles together with others and behaves in a riotous or disorderly manner, is deemed an idle and disorderly person and convicted as such.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The person was either:
 - drunk and disorderly in a public place; or
 - behaving in a riotous or disorderly manner in a Police station or a public place; or
 - assembled together with other people and behaving in a riotous or disorderly manner in any place.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who was found drunk in a public place.

Drunk and disorderly in a public place

The prosecution must prove by evidence that the accused was drunk and disorderly. There must be evidence that the person was drunk and there must be evidence that the person was behaving in a disorderly way. There must be good evidence of what was done or said and by whom.

The behaviour must be of real concern to ordinary members of the public.

The prosecution must prove it was a public place that the accused was drunk and disorderly in. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature.

See the definition of a public place in *s4 Penal Code*.

Behaving in a riotous or disorderly manner in a Police station or a public place

The prosecution must prove by evidence that the accused was behaving in a riotous or disorderly manner. The accused does not need to have been drunk under this ground. There must be evidence that the person was behaving in a riotous or disorderly way. There must be good evidence of what was done or said and by whom.

The behaviour must be of real concern to ordinary members of the public.

The prosecution must prove it was a public place or a Police station. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved.

See the definition of a public place in *s4 Penal Code*.

Assembled together with other people and behaving in a riotous or disorderly manner in any place

For a charge under this ground, the prosecution must prove that the person was assembled together with other people. This means two or more other people in the same place at the same time. They must also prove that, while with these other people, the accused was behaving in a riotous or disorderly manner. The accused does not need to have been drunk under this ground. There must be evidence that the person was behaving in a riotous or disorderly way. There must be good evidence of what was done or said and by whom.

The behaviour must be of real concern to ordinary members of the public.

The prosecution does not need to prove it was a particular place under this ground.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$20 fine or 2 months imprisonment.

Threatening and abusive behaviour

Section *s169(n) Penal Code (Cap 8)*

Description Every person is guilty of an offence who uses threatening or abusive or insulting words or behaviour in a public place with intent to provoke a breach of the peace; or whereby a breach of the peace may be occasioned.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused used words or behaviour that were threatening, abusive or insulting;
 - This was done a public place;
 - Either:
 - the accused intended that the words or behaviour would cause anxiety or major concern to others such that they feel that harm may be caused to them or others; or
 - the situation was such the words or behaviour might cause anxiety or major concern to others such that they feel that harm may be caused to them or others.
-

Commentary Sometimes quite minor incidents are brought before the Court. There needs to be a real reason for arrest and bringing to Court. The prosecution must show that there was real concern for what might happen as a result of what was said or done.

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who used the words or behaviour.

Words or behaviour

There must be good evidence for what was said or done, and by whom.

Public place

The prosecution must prove by evidence that it was a public place. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature. See the definition of a public place in *s4 Penal Code*.

Breach of the peace

A breach of the peace means an incident that causes anxiety or major concern to one or more persons, such that they feel that harm may be caused to them or others.

Intention to provoke a breach of the peace

If this is the ground on which the charge is based, the prosecution must prove that the accused intended to provoke a breach of the peace by his or her words or actions. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances. Under this ground, the prosecution does not have to prove that there was or even might have been a breach of the peace.

Breach of peace may be occasioned

If this is the ground on which the charge is based, the prosecution must prove that the accused’s words or actions **might** have provoked a breach of the peace. The test is an objective one – would a reasonable person believe that the accused’s actions might have provoked a breach of the peace, in the particular circumstances?

Under this ground, the prosecution does not have to prove that the accused intended to provoke a breach of the peace or that there was in fact a breach of the peace.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

1 months imprisonment or \$10 fine

Drunk and incapable

Section *s170 Penal Code (Cap 8)*

Description Every person who is found in a public place drunk, so as to be incapable of taking care of him or herself, is guilty of an offence.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The person was found in a public place;
 - The person was drunk at the time;
 - The person was sufficiently drunk as to not be able to take care of him or herself.
-

Commentary This section should not be used by the Police to arrest and remove anyone who has been drinking in public and who is making a nuisance of themselves. It is aimed at alcoholics, vagabonds and others whose drinking is so excessive that they are a danger to themselves, and it is usually applied to people who are asleep on the road or runway.

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who was found drunk in a public place.

Found drunk as to be incapable of taking care of him or herself

The prosecution must prove more than just that the accused was affected by alcohol or had been drinking. They must prove that the accused was drunk and good evidence of drunkenness must be given. The effect of the drunkenness must be such as to mean that the person was not in control and could not manage.

Public place

The prosecution must prove by evidence that it was a public place that the accused was found in. Locating them later in a non-public place is not enough. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature.

See the definition of a public place in *s4 Penal Code*.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$20 fine.

Common assault

Section *s237 Penal Code (Cap 8)*

Description Every person who unlawfully assaults another person is guilty of an offence.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused wanted to use force on another person;
 - The accused intended that the person he or she wanted to use force on, was aware that he or she wanted to use force on them..
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who used physical force.

Definition of assault

An assault is any act by which a person intentionally causes another person to apprehend immediate unlawful violence.

The context is very important:

- What was the situation?
- Where did the alleged assault occur?

The intention of the accused is immaterial: *s9(2) Penal Code*.

If the person assaulted is injured, then a more serious assault charge might be more appropriate.

Legal excuse

The prosecution must prove that there was no lawful reason for the assault.

If the defence provides a reason for the assault, what is it, and does it have any merit?

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

6 months imprisonment (or \$100 fine: *s26 Penal Code*)

Larceny (theft) of a bird or animal

Section *ss269 and 251 Penal Code (Cap 8)*

Description Every person is guilty of an offence who steals a bird, beast or other animal ordinarily kept in a state of confinement or for a domestic purpose.

Section 251 defines stealing as, fraudulently and without claim of right made in good faith, taking and carrying away a thing capable of being stolen, without the consent of the owner and with the intent of permanently depriving the owner of the thing.

Elements

- The person named in the charge is the same person who is appearing in Court;
 - The accused took and carried away a bird or animal that did not belong to them;
 - The bird or animal is ordinarily kept in confinement or used for a domestic purpose;
 - The accused did this fraudulently and without claim of right in good faith;
 - The owner of the bird or animal did not consent to the taking;
 - The accused had the intention of permanently depriving the owner of the bird or animal at the time he or she took it.
-

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who stole the bird or animal.

Took and carried away

The prosecution must prove that the accused took the bird or animal and carried it away. See the definition of “takes” in *s251(2)(a)*. See the definition of “carries away” in *s251(2)(b)*.

Bird or animal did not belong to them

The prosecution must provide evidence of the bird or animal and prove the owner of it. See the definition of “owner” in *s251(2)(c)*.

Bird or animal is ordinarily kept in confinement or used for a domestic purpose

The prosecution must show evidence of this.

Fraudulently and without claim of right in good faith

The accused must have had an intention to defraud or steal and no good claim to the bird or animal. Consider why did the accused take it? Was there an honest intention? If the accused puts forward an explanation to show he or she honestly believed in their right to take the bird or animal, does their explanation have merit? Is their belief reasonable?

Owner did not consent

The prosecution must prove that the owner did not consent to the bird or animal being taken. This will be quite easy and is usually done by evidence from the owner of the bird or animal.

Intention of permanently depriving owner

The prosecution must prove that the accused had the intention of keeping the bird or animal and using it as his or her own. If the accused later sells or gives it away, they have used it as their own. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

The prosecution must show that the accused intended this **at the time he or she took the bird or animal.**

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$100 fine or 6 months imprisonment.

Larceny (theft) or destruction of fish

Section *ss270 and 251 Penal Code (Cap 8)*

Description Every person is guilty of an offence who takes or destroys, or attempts to take or destroy, any fish in water which is private property or where there is a private right of fishery.

Section 251 defines stealing as, fraudulently and without claim of right made in good faith, taking and carrying away a thing capable of being stolen, without the consent of the owner and with the intent of permanently depriving the owner of the thing.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused either:
 - ⊖ stole or destroyed fish that did not belong to them; or
 - ⊖ attempted to take or destroy fish that did not belong to them;
 - The fish was either:
 - ⊖ in water that was private property; or
 - ⊖ in water over which there was a private right of fishery;
 - The accused did this fraudulently and without claim of right in good faith;
 - The owner of the fish did not consent to the taking;
 - The accused had the intention of permanently depriving the owner of the fish at the time he or she took it.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who stole or destroyed the fish.

Took

If the charge is under this ground, the prosecution must prove that the accused took the fish. See the definition of “takes” in *s251(2)(a)*.

Destroyed

If the charge is under this ground, the prosecution must give evidence to prove that the accused destroyed the fish.

Attempted to take or destroy

See the definition of “attempt” in *s371 Penal Code*. Usually an attempt involves doing something to try and take or destroy the fish. It must be more than a mere preparatory act.

Fish did not belong to them

The prosecution must provide evidence of the fish and prove the owner of it. See the definition of “owner” in *s251(2)(c)*.

Fish was in water that was either private property or over which there was a private right of fishery

The prosecution must show evidence of this.

Fraudulently and without claim of right in good faith

The accused must have had an intention to defraud or steal or destroy, and no good claim to the fish. Consider why did the accused take or destroy it? Was there an honest intention? If the accused puts forward an explanation to show he or she honestly believed in their right to take or destroy the fish, does their explanation have merit? Is their belief reasonable?

Owner did not consent

The prosecution must prove that the owner did not consent to the fish being taken or destroyed. This will be quite easy and is usually done by evidence from the owner of the fish.

Intention of permanently depriving owner

If the charge is under this ground, the prosecution must prove that the accused had the intention of keeping the fish and using it as his or her own. If the accused later sells or gives it away, they have used it as their own. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

The prosecution must show that the accused intended this **at the time he or she took the fish.**

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$10 fine.

Larceny (theft) or destruction of trees, shrubs, etc

Section *ss272 and 251 Penal Code (Cap 8)*

Description Every person is guilty of an offence who steals, or cuts, breaks, roots up or otherwise destroys or damages with intent to steal, all or part of any tree, sapling, shrub or underwood worth more than 10 cents.

Section 251 defines stealing as, fraudulently and without claim of right made in good faith, taking and carrying away a thing capable of being stolen, without the consent of the owner and with the intent of permanently depriving the owner of the thing.

Elements

- The person named in the charge is the same person who is appearing in Court;
 - Either:
 - ⊖ the accused stole all or any part of a tree, etc, that did not belong to him or her; and
 - ⊖ the accused had the intention of permanently depriving the owner of the tree, etc, at the time he or she took it.
 - Or:**
 - ⊖ the accused cut, broke, rooted up or otherwise destroyed or damaged all or any part of a tree, etc, that did not belong to him or her; and
 - ⊖ the accused did this with the intention of stealing it;
 - The tree, etc, was worth at least 10 cents;
 - The accused did this fraudulently and without claim of right in good faith;
 - The owner of the tree, etc, did not consent to the taking, damaging or destroying.
-

Commentary

For any charge under this section:

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who committed the offence.

Tree, etc, did not belong to them

The prosecution must provide evidence of the tree, etc, and prove the owner of it. See the definition of “owner” in *s251(2)(c)*.

The whole or any part

Any part of the tree, etc, stolen or damaged is enough. It does not have to be the whole.

Fraudulently and without right of claim in good faith

The accused must have had an intention to defraud or steal or destroy, and had no good claim to the tree, etc. Consider why did the accused take or destroy it? Was there an honest intention? If the accused puts forward an explanation to show he or she honestly believed in their right to take or destroy the tree, etc, does their explanation have merit? Is their belief reasonable?

Owner did not consent

The prosecution must prove that the owner did not consent to the tree, etc, being taken or destroyed. This will be quite easy and is usually done by evidence from the owner of the tree, etc.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

For a charge of stealing:

Took and carried away

If the charge is stealing, the prosecution must prove that the accused took the tree, etc, and carried it away. See the definition of “takes” in *s251(2)(a)*. See the definition of “carries away” in *s251(2)(b)*.

Intention of permanently depriving owner

The prosecution must prove that the accused had the intention of keeping the tree, etc, and using it as his or her own. If the accused later sells or gives it away, they have used it as their own.

This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

The prosecution must show that the accused intended this **at the time he or she took the tree, etc.**

For a charge of damaging or destroying:

Cut, broke, rooted up or otherwise destroyed or damaged all or any part

If the charge is on this ground, the prosecution must prove that the accused damaged the tree, etc, in some way, or destroyed it.

With the intention of stealing

The prosecution must prove that the accused damaged or destroyed the tree, etc, with the intention of stealing it. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

Sentence

The section states that the accused is guilty of a misdemeanour but no penalty is specifically provided for this offence. *Section 42 Penal Code* states that where no punishment is provided for any misdemeanour, the penalty will be 2 years imprisonment and a fine.

Note *s275(b) Penal Code*, which states that the accused is guilty of a felony, and shall liable to imprisonment for 5 years if:

- the offence is committed in any place and the value of the tree, etc, is at least 10 cents, and the accused has 2 previous convictions under *s272*; or
- the tree, etc, was growing in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, and the value exceeds \$2; or
- the tree, etc, was growing in any place, and the value exceeds \$10.

As an Island Court Magistrate, the maximum fine you may impose is \$100 and 6 months imprisonment. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate’s Court for sentencing.

Larceny (theft) of or damage to fence

Section *ss273 and 251 Penal Code (Cap 8)*

Description Every person is guilty of an offence who steals, or cuts, breaks or throws down with intent to steal, any part of any live or dead fence, post, pale, wire or rail used as a fence, or stile or gate.

Section 251 defines stealing as, fraudulently and without claim of right made in good faith, taking and carrying away a thing capable of being stolen, without the consent of the owner and with the intent of permanently depriving the owner of the thing.

Elements

- The person named in the charge is the same person who is appearing in Court;
 - Either:
 - ☐ the accused stole any part of a fence, etc, that did not belong to him or her; and
 - ☐ the accused had the intention of permanently depriving the owner of the fence, etc, at the time he or she took it.
 - Or:**
 - ☐ the accused cut, broke, or threw down any part of a fence, etc, that did not belong to him or her; and
 - ☐ the accused did this with the intention of stealing it;
 - The accused did this fraudulently and without claim of right in good faith;
 - The owner of the fence, etc, did not consent to the taking, damaging or destroying.
-

Commentary **For any charge under this section:**

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who stole or damaged the fence, etc.

Fence, etc, did not belong to them

The prosecution must provide evidence that the thing stolen or damaged was a live or dead fence, post, pale, wire or rail used as a fence, or stile or gate fence, and prove the owner of it. See the definition of “owner” in *s251(2)(c)*.

Any part

Any part of the fence, etc, stolen or damaged is enough. It does not have to be the whole.

Place

It does not matter where the fence, etc was – just that it was owned by someone else. Of course, proving where it is may be relevant to ownership - if it is on a person’s land, that you may infer it belongs to them.

Fraudulently and without right of claim in good faith

The accused must have had an intention to defraud, steal, destroy or damage, and no good claim to the fence, etc. Consider why did the accused take, destroy or damage it? Was there an honest intention? If the accused puts forward an explanation to show he or she honestly believed in their right to take, destroy or damage the fence, etc, does their explanation have merit? Is their belief reasonable?

Owner did not consent

The prosecution must prove that the owner did not consent to the fence, etc being taken or damaged. This will be quite easy and is usually done by evidence from the owner of the fence, etc.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

For a charge of stealing:

Took and carried away

If the charge is stealing, the prosecution must prove that the accused took the fence, etc, and carried it away. See the definition of “takes” in *s251(2)(a)*. See the definition of “carries away” in *s251(2)(b)*.

Intention of permanently depriving owner

The prosecution must prove that the accused had the intention of keeping the fence, etc and using it as his or her own. If the accused later sells or gives it away, they have used it as their own. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

The prosecution must show that the accused intended this **at the time he or she took** the fence, etc.

For a charge of damaging:

Cut, broke, or threw down

If the charge is on this ground, the prosecution must prove that the accused damaged the fence, etc.

With the intention of stealing

The prosecution must prove that the accused damaged the fence, etc with the intention of stealing it. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

Sentence

The section states that the accused is guilty of a misdemeanour but no penalty is specifically provided for this offence.

Section 42 Penal Code states that where no punishment is provided for any misdemeanour, the penalty will be 2 years imprisonment and a fine.

As an Island Court Magistrate, the maximum fine you may impose is \$100 and 6 months imprisonment. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate’s Court for sentencing.

Larceny (theft) of or destruction/damage to fruit & vegetables

Section *ss274 and 251 Penal Code (Cap 8)*

Description Every person is guilty of an offence who steals, destroys, roots up or damages with intent to steal, any plant, root, fruit or vegetable production, used for specific purposes listed, that is growing in any garden, orchard, pleasure ground, green-house, conservatory or any land.

Section 251 defines stealing as, fraudulently and without claim of right made in good faith, taking and carrying away a thing capable of being stolen, without the consent of the owner and with the intent of permanently depriving the owner of the thing.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - Either:
 - the accused stole a plant, root, fruit or vegetable that did not belong to him or her; and
 - the accused had the intention of permanently depriving the owner of the plant, root, fruit or vegetable at the time he or she took it.
 - Or:**
 - the accused destroyed, rooted up or damaged a plant, root, fruit or vegetable that did not belong to him or her; and
 - the accused did this with the intention of stealing it;
 - The accused did this fraudulently and without claim of right in good faith;
 - The plant, root, fruit or vegetable was used for any of the listed purposes;
 - The plant, root, fruit or vegetable was growing in a garden, orchard, pleasure ground, green-house, conservatory or on any land;
 - The owner of the plant, root, fruit or vegetable did not consent to the taking or damaging.
-

Commentary

For any charge under this section:

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who stole, damaged or destroyed the plant, etc.

Plant, etc did not belong to them

The prosecution must provide evidence of the plant, etc and prove the owner of it. See the definition of “owner” in *s251(2)(c)*.

Place

The prosecution must prove that the plant, etc, was growing in a garden, orchard, pleasure ground, green-house, conservatory or on any land.

Use of plant, etc

The prosecution must prove that the plant, etc, was used:

- for the food of man or beast; or
- for medicine; or
- for distilling; or
- for dyeing; or
- for or in the course of any manufacture.

Fraudulently and without claim of right in good faith

The accused must have had an intention to defraud, steal, destroy or damage, and no good claim to the plant, etc. Consider why did the accused take, destroy or damage it? Was there an honest intention? If the accused puts forward an explanation to show he or she honestly believed in their right to take or destroy the plant, etc, does their explanation have merit? Is their belief reasonable?

Owner did not consent

The prosecution must prove that the owner did not consent to the plant, etc, being taken or destroyed. This will be quite easy and is usually done by evidence from the owner of the plant, etc.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

For a charge of stealing:

Took and carried away

If the charge is stealing, the prosecution must prove that the accused took the plant, etc and carried it away. See the definition of “takes” in *s251(2)(a)*. See the definition of “carries away” in *s251(2)(b)*.

Intention of permanently depriving owner

The prosecution must prove that the accused had the intention of keeping the plant, etc and using it as his or her own. If the accused later sells or gives it away, they have used it as their own. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

The prosecution must show that the accused intended this **at the time he or she took the plant, etc.**

For a charge of damaging or destroying:

Destroyed, rooted up or damaged

If the charge is on this ground, the prosecution must prove that the accused destroyed, rooted up or damaged the plant, etc.

With the intention of stealing

The prosecution must prove that the accused damaged or destroyed the plant, etc, with the intention of stealing it. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

Sentence

The section states that the accused is guilty of a misdemeanour but no penalty is specifically provided for this offence.

Section 42 Penal Code states that where no punishment is provided for any misdemeanour, the penalty will be 2 years imprisonment and a fine.

Note s275(c) Penal Code, which states that the accused is guilty of a felony, and shall liable to imprisonment for 5 years if he or she has a previous conviction under *s274*.

As an Island Court Magistrate, the maximum fine you may impose is \$100 and 6 months imprisonment. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Larceny (theft) of or damage to fixtures

Section *ss275 and 251 Penal Code (Cap 8)*

Description Every person is guilty of an offence who steals, or rips, cuts, severs or breaks with intent to steal any fixture, as listed.

Section 251 defines stealing as, fraudulently and without claim of right made in good faith, taking and carrying away a thing capable of being stolen, without the consent of the owner and with the intent of permanently depriving the owner of the thing.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - Either:
 - ⊖ the accused stole a fixture; and
 - ⊖ the accused had the intention of permanently depriving the owner of the fixture at the time he or she took it.
 - Or:**
 - ⊖ the accused ripped, cut, severed or broke a fixture that did not belong to him or her; and
 - ⊖ the accused did this with the intention of stealing it;
 - The accused did this fraudulently and without claim of right in good faith;
 - The fixture was:
 - ⊖ glass or woodwork belonging to any building; or
 - ⊖ metal or utensil or fixture fixed in or to any building; or
 - ⊖ something made of metal fixed in any land being private property, or as a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground;
 - The owner of the fixture did not consent to the taking or damaging.
-

Commentary**For any charge under this section:**Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who stole or damaged the fixture.

Fixture

The prosecution must prove that the item stolen or damaged was one of the types of fixtures listed. Note that the place that the fixture is attached to or in is important.

Fixture did not belong to them

The prosecution must provide evidence of the fixture and prove the owner of it. See the definition of “owner” in *s251(2)(c)*.

Fraudulently and without right of claim in good faith

The accused must have had an intention to defraud, steal or damage, and no good claim to the fixture. Consider why did the accused take or damage it? Was there an honest intention? If the accused puts forward an explanation to show he or she honestly believed in their right to take or damage the fixture, does their explanation have merit? Is their belief reasonable?

Owner did not consent

The prosecution must prove that the owner did not consent to the fixture being taken or destroyed. This will be quite easy and is usually done by evidence from the owner of the fixture.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

For a charge of stealing:

Took and carried away

If the charge is stealing, the prosecution must prove that the accused took the fixture and carried it away. See the definition of “takes” in *s251(2)(a)*. See the definition of “carries away” in *s251(2)(b)*.

Intention of permanently depriving owner

The prosecution must prove that the accused had the intention of keeping the fixture and using it as his or her own. If the accused later sells or gives it away, they have used it as their own. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

The prosecution must show that the accused intended this **at the time he or she took the fixture.**

For a charge of damaging:

Rips, cuts, severs or breaks

If the charge is on this ground, the prosecution must prove that the accused ripped, cut, severed or broke the fixture.

With the intention of stealing

The prosecution must prove that the accused damaged the fixture with the intention of stealing it. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

Sentence

The accused is guilty of a felony, and shall liable to imprisonment for 5 years.

As an Island Court Magistrate, the maximum fine you may impose is \$100 and 6 months imprisonment. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate’s Court for sentencing.

Public Order Act (Cap 9)

Going armed in public

Section *s25 Public Order Act (Cap 9)*

Description Every person is guilty of an offence, who goes armed in public without lawful authority or reasonable excuse, such as to cause terror.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused carried a weapon in a public place;
 - The accused had no lawful authority or reasonable excuse to carry the weapon;
 - The accused intended to cause terror in another person;
 - The manner in which the accused was armed did in fact cause terror in another person.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who was armed.

Armed

Armed is not defined. It will need to be proved that the person carried a weapon that was capable of causing terror in others. The weapon must therefore be capable of causing serious injury to others or to property.

In public

The prosecution must prove by evidence that it was a public place.

Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature.

See the definition of a public place in *s4 Penal Code*.

Lawful authority or reasonable excuse

The prosecution must prove that there was no lawful reason or reasonable excuse for the accused to be carrying the weapon.

They may do this by referring to people who are allowed to carry weapons, as set out in *s16 Penal Code*.

If the defence provides a reason, what is it, and does it have any merit?

Intention to cause terror

The accused must have intended to cause terror in another. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

Caused terror

Just carrying a weapon in public is not enough to create an offence under this section. The deliberate use of the words ‘cause terror’ means that it is the effect on another person that is important. There will need to be proof:

- of how the weapon was brandished; and
- that someone else saw the weapon; and
- as a result, they were terrified.

This last is a subjective test – the person/s will need to give evidence that in fact they were terrified.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The maximum penalty is imprisonment for 2 years and a fine of \$200. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment or \$100 fine. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Unlawful fighting

Section *s28 Public Order Act (Cap 9)*

Description Every person is guilty of an offence who takes part in an unlawful fight.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused took part in a fight with at least one other person;
 - The fight is unlawful.
 - The fight threatened public order.
-

Commentary Taking part in such a fight is also known as an affray.

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who was fighting.

Fighting

There needs to be clear evidence that the accused was a willing participant in the fight and not merely trying to defend him or herself against an attack.

Unlawful

The prosecution will need to prove that the fight was unlawful. Only boxing, wrestling matches and some other sports events would seem to amount to a lawful fight. Where two people agree to fight or one person challenges another to fight, then this will be unlawful if this threatens public order creating anxiety and fear in others, such that they believe that harm may be caused to them or others.

Place

The fight may be in a public place, such as a public bar or licensed premises, or it may be on private premises. However, if it is on private premises, the threat to public order needs to be shown.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

Self defence would be the most common defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$100 fine and 1 year imprisonment. As an Island Court Magistrate, the maximum term of imprisonment you may impose is 6 months. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Traffic Act (Cap 71)

Driving while unlicensed

Section *s13 Traffic Act 1983 (Cap 71)*

Description Every person is guilty of an offence who drives a motor vehicle on any public road and does not have a license to drive that vehicle, or who employs someone to drive who is unlicensed.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The person either:
 - drove a motor vehicle while unlicensed; or
 - employed another person to drive who was unlicensed;
 - The driving was on a public road.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who drove unlicensed or employed an unlicensed person to drive.

Public road

The driving must be on a public road. Usually evidence from the Police on the status of the road will be sufficient.

Drive

The prosecution must prove that actual driving took place.

Unlicensed

It is important for the prosecution to prove that the driver held no current license. This may include a person who has been disqualified from holding a license.

The prosecution may need to produce the result of a driver register search or obtain a proper admission from the driver.

Even if the driver has a license, it must be valid for the particular class of vehicle he or she drove. The prosecution may have to prove the class of vehicle driven, if the driver was in fact licensed but for another class of vehicle.

If a driver had a license and has failed to renew the license, then he or she does not have a valid license.

Note that *s13* is subject to *s14*, which allows a person to have a provisional license, which may have conditions. If the prosecution alleges that a driver was driving outside the terms of a provisional license, they will need to prove the terms of the license and show what the breach is..

Employed

If this is the ground on which the charge is based, the prosecution must prove that the accused did employ the unlicensed driver to drive. This may be admitted by the accused or the driver or another person may give evidence to show this.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

6 months imprisonment or \$100 fine: *s27 Traffic Act*. Note that you may also disqualify the accused from holding a driving licence: *s25(1) Traffic Act*. After 6 months, they may apply for their licence back under *s26 Traffic Act*.

See *Tianamo Savave v R* (in *Pita v R*) [2002] TVHC 4.

Breach of provisional driving license

Section *s14(3) Traffic Act (Cap 71)*

Description Any person who has a current provisional license and who does not comply with any of the conditions contained as part of that license is guilty of an offence.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The person has a provisional driving license;
- The person has not complied with one or more of the conditions on which the license was granted.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who did not comply with the conditions of their provisional license.

Provisional license

The prosecution must show that the accused had a provisional driving license.

Conditions of license

The conditions of the license are provided for within the *Traffic Regulations* as may be amended from time to time: *reg 15 Traffic Regulations*. The prosecution must provide evidence of the conditions of the accused's provisional license and that the accused did not comply with one or more of those conditions.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$100 fine and/or 6 months imprisonment.

Note that you may also disqualify the accused from holding a driving license: *s25(1) Traffic Act*. After 6 months, they may apply for their license back under *s26 Traffic Act*.

See *Tianamo Savave v R* (in *Pita v R*) [2002] TVHC 4, 3/02 and *Viliamu v R* [2003] TVHC 9, 2/03.

Careless driving

Section *s20 Traffic Act 1983 (Cap 71)*

Description Every person is guilty of an offence who drives a motor vehicle or bicycle without due care and attention, or without reasonable consideration for others.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused drove a motor vehicle or rode a bicycle;
 - The driving or riding was:
 - ⊖ without care and attention expected of a reasonably competent driver; or
 - ⊖ was inconsiderate to others.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who drove or rode.

Place

There is no express statement that the driving must be on a road. This appears not to be an essential element, so the driving or riding may be on private property. Most bad driving that comes to attention, however, will be from driving on a public road.

Nature of the driving or riding

The prosecution must prove that the nature of the driving or riding was well below the standard others expect.

It will usually only be careless or inconsiderate if there is some consequence, such as an accident, or someone is really put at risk of harm or put to inconvenience.

If inconsiderate driving or riding is alleged, the prosecution must prove that other road users were inconvenienced.

Ask, “was the driving or riding well below an acceptable standard?”

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

6 months imprisonment or \$100 fine. Note that you may also disqualify the accused from holding a driving licence: *s25(1) Traffic Act*. After 6 months, they may apply for their licence back under *s26 Traffic Act*.

Taking a vehicle without authority

Section *s22 Traffic Act 1983 (Cap 71)*

Description Every person is guilty of an offence who takes and drives away a vehicle without the consent of the owner or lawful authority.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused took the vehicle and drove it away;
 - Either:
 - the owner did not consent; or
 - the accused did not reasonably believe that the owner consented; or
 - the accused had no lawful authority to take and drive it;
 - The accused did not intend to permanently deprive the owner of the vehicle.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who took the vehicle.

Takes and drives away

It will usually be quite simple for the prosecution to prove that the vehicle was taken and driven away.

Without the owner's consent

The prosecution will need to prove who owns the vehicle and that they did not consent to it being taken by the accused.

Without lawful authority

Sometimes a person has lawful authority to take a vehicle, such as an agent of a company that is owed money and who has repossessed the vehicle. You would expect the Police to have investigated any such claim before bringing the case to Court.

The prosecution must prove that there was no lawful reason for the accused to take the vehicle. If the defence does not provide a lawful excuse, it would generally be enough for the owner to give evidence of that fact.

If the defence provides a reason, what is it, and does it have any merit?

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

If the accused can prove that he or she took the vehicle in the reasonable belief that he or she has lawful authority or that the owner would in the circumstances have given consent if asked, then that is a defence to the charge and the accused should be acquitted: *s22(2)*. The accused's belief must be reasonable in the circumstances. Listen to their story and see if it is one you can believe.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$100 fine and 6 months imprisonment.

You may also disqualify the accused from holding a driving licence: *s25(1) Traffic Act*. You **must** disqualify the accused from holding a driving licence if this was their second or subsequent conviction for taking a vehicle without authority: *s26(2)(c) Traffic Act*. After 6 months, they may apply for their licence back under *s26 Traffic Act*.

Driving while impaired by alcohol or drugs

Section *s23 Traffic Act 1983 (Cap 71)*

Description Every person is guilty of an offence who drives, or attempts to drive, or is in charge of a motor vehicle while his or her efficiency as a driver is impaired by drink or drug.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused drove, attempted to drive, or was in charge of a motor vehicle;
 - The driver had consumed drink or drug;
 - As a result of the drink or drugs, the driver was not able to drive to a standard expected of a reasonably competent sober driver.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who drove or attempted to drive or was in charge of a motor vehicle.

Place

There is no express statement that the driving must be on a road. This appears not to be an essential element, so the driving or attempted driving may be on private property.

Attempt to drive or in charge of

See the definition of “attempt” in *s371 Penal Code*. Usually an attempt involves any action taken in preparation for driving. Sitting in the driver’s seat with the key in the ignition may be sufficient.

Drink or drug

The prosecution must prove that the driver had consumed drink or drug. These are not defined, but you can assume that the offence relates only to drink and drugs that can affect a person's ability, like alcohol and narcotic substances.

Sometimes the police will obtain a statement that helps them establish this. Other times they can smell alcohol or marijuana on the person. Often a test is given at the station to determine whether or not a person is drunk and the level of drunkenness. The police officer will need to give evidence if this is the case.

Driver's ability impaired

The prosecution must prove more than the fact that the driver was affected by drink or drug. They must show that the driver's ability was impaired as a result.

Impaired means driving in such a manner that the driver's control of the vehicle is affected by the alcohol consumed. This may be evidenced by swerving the vehicle, driving very fast or other reasons. The police will need evidence to establish this.

Note *s23(3)*, which states that if a person drove within 2 hours of drinking alcohol and was involved in a driving offence or accident, you may presume that his or her driving ability was impaired, unless the accused proves otherwise, on the balance of probabilities. See *Lisale v R* [2003] TVHC 7, 1/03.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

1 years imprisonment and \$200 fine. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment or \$100 fine. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Note that you must also disqualify the accused from holding a driving licence: *s26(2)(b) Traffic Act*. After 6 months, they may apply for their licence back under *s26 Traffic Act*.

Speeding

Section *reg7(1), (2), (3) Traffic Regulations (Cap 71)*

Description Any person who drives a vehicle faster than the speed specified for that vehicle in *reg7(1)* or the maximum speed indicated by a traffic sign in an area is guilty of an offence.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The person must have either:
 - driven a vehicle above the specified speed for that vehicle; or
 - driven a vehicle above the speed indicated by a traffic sign in the area.
-

Commentary *Section 30 Traffic Act* allows the Minister to make regulations to carry out provisions of the Act for the purpose of prescribing speed limits.

All vehicles as described below cannot be driven on any road faster than the speed described below: *Reg7(1) and (2)*

- Private motor vehicle – 40 miles per hour;
- Public service vehicle – 30 miles per hour;
- Commercial vehicles – 20 miles per hour.

Any person who drives a vehicle above the maximum speed in an area where the maximum speed is indicated by traffic signs has committed an offence. *Reg7(3)*

All charges under *reg7(1), (2) and (3)*

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the accused who drove faster than the allowable speed.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Charges under *reg7(1) and (2)*

Type of vehicle

The prosecution will need to identify the vehicle the accused drove and the type of vehicle it was, i.e. personal, public service or commercial.

Specified speed

The prosecution must show what the specified speed is for the type of vehicle being driven by the accused.

Drove above the specified speed

The prosecution must prove that the accused drove faster than the specified speed.

Charges under *reg7(3)*

Vehicle

The prosecution will need to identify the vehicle the accused drove.

Indicated speed

The prosecution must be able to identify the area in which the accused drove and identify the maximum speed for that area as indicated by traffic signs.

Drove above the maximum speed

The prosecution must prove that the accused drove faster than the maximum speed for that area as indicated by traffic signs.

Sentence

\$50 fine.

Traffic Act offences where no special penalty is provided

Section *s27 Traffic Act (Cap 71)*

Description A general penalty is provided for offences under the *Traffic Act 1983* where no penalty has been provided.

Elements

- The person has been found guilty of an offence under the *Traffic Act*;
- The offence the person has been found guilty of, has no special penalty attached to it.

Commentary The *Traffic Act* has a number of offences which do not have specific sentences attached to them. Where an accused has been found guilty of such an offence, *s27 Traffic Act* applies.

Sentence \$100 fine and/or 6 months imprisonment.

Alcoholic Drinks Act (Cap 69)

Drunkenness on licensed premises

Section *s98 Alcoholic Drinks Act 1984 (Cap 69)*

Description (1) Every licensee is guilty of an offence who permits drunkenness or violent, quarrelsome, indecent or grossly disorderly or offensive conduct to take place, or who sells or supplies alcohol to or for a drunken person or a person guilty of such conduct, on licensed premises.

(2) Every person is guilty of an offence who procures or attempts to procure alcohol for a drunken person or a person guilty of such conduct, or who helps such a person to obtain or drink alcohol, on licensed premises.

Elements

- The person named in the charge is the same person who is appearing in Court;

Specific under s98(1):

- The accused is the holder of a publican's license;
- The accused either:
 - ⊖ permitted drunkenness or violent, quarrelsome, indecent or grossly disorderly or offensive conduct to take place on the licensed premises; or
 - ⊖ sold or supplied alcohol to or for a drunken person or a person behaving in a violent, quarrelsome, indecent or grossly disorderly or offensive manner on the licensed premises.

Specific under s98(2):

- The accused either:
 - ⊖ procured or attempted to procure alcohol for a drunken person or a person behaving in a violent, quarrelsome, indecent or grossly disorderly or offensive manner on licensed premises; or
 - ⊖ helped a drunken person or a person behaving in a violent, quarrelsome, indecent or grossly disorderly or offensive manner to obtain or drink alcohol, on licensed premises.

Commentary This section is aimed at requiring licensees to take steps to keep the licensed premises orderly, preventing drunk people from becoming more drunk and preventing some of the worse behaviours arising from drunkenness in check.

All charges under s98

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who did the alleged acts.

Licensed premises

The prosecution must prove that the premises were licensed (the license should be produced as an exhibit) and that the alleged behaviour happened on those premises.

A person who was drunk or behaving in a violent, quarrelsome, indecent or grossly disorderly or offensive way

The prosecution must prove that the other person was either drunk or behaving one or more of these ways.

If the ground is drunkenness, the prosecution must prove more than just that the accused was affected by alcohol or had been drinking. They must prove that the accused was drunk and good evidence of drunkenness must be given.

Note that any alleged disorderly or offensive conduct must be gross, that is, extreme.

There must be good evidence of what was done or said and by whom.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Charges under s98(1)

License holder

The accused must hold a publican's license. The prosecution should produce the license as an exhibit. It may not need to be the licensee personally who did the permitting or supplying – one of his or her employees may be sufficient.

Permitted

This means allowed. If the behaviour is occurring and the licensee has taken no steps to stop it or make the person leave, it can be inferred that they have permitted the behaviour.

Sold or supplied alcohol

Usually it may be inferred that someone on licensed premises who is drinking alcohol got it from the premises.

Defence

If the prosecution proves all the elements beyond reasonable doubt, then the accused may have a defence if they or their staff took all reasonable steps to prevent the behaviour. Ask yourself what steps were reasonable in the circumstances. The accused needs to prove this on the balance of probabilities, that is, their evidence must show it was more likely than not that they took such steps to prevent the behaviour.

Charges under s98(2)

A person

The accused does not have to be a licensee under this ground.

Procured or attempted to procure or helped the person to obtain alcohol

Under this ground, the prosecution must prove that the accused got or attempted to get alcohol, or assisted the other person to get alcohol in some way.

See the definition of "attempt" in *s371 Penal Code*. Usually an attempt involves doing something to try and get the alcohol for the other person.

Sentence

\$200 fine. As an Island Court Magistrate, the maximum fine you may impose is \$100. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Supplying a minor

Section *s99(1) and (2) Alcoholic Drinks Act 1984 (Cap 69)*

Description (1) Every licensee is guilty of an offence who sells or supplies alcohol to a person under 18 years, or permits it.

(2) Every employee of a licensee is guilty of an offence who knowingly sells or supplies any alcohol to a person under 18 years.

Elements

- The person named in the charge is the same person who is appearing in Court;

Specific under s99(1):

- The accused is the holder of a publican's license;
- The accused sold or supplied, alcohol to a person, or permitted it;
- the accused knew that the person supplied was under 18 years.

Specific under s99(2):

- The person named in the charge is the same person who is appearing in Court;
 - The accused is an agent or servant of a licensee;
 - The accused sold or supplied alcohol to a person;
 - The person supplied was under 18 years;
 - The accused knew that the person was under 18 years.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court, and provide evidence to prove that it was the accused who sold or supplied the alcohol or permitted it.

Place

The offence does not require that the selling or supplying happened in any place in particular, although most often this will be on licensed premises.

Sold or supplied alcohol

Usually it may be inferred that someone on the licensed premises who is drinking alcohol got it from the premises. In any case, the prosecution must prove that it was the accused who sold or supplied the alcohol or permitted it.

Permitted

This means 'allowed'. If the licensee knows that someone else is serving alcohol to a person under 18 years and takes no steps to stop it, they have permitted the behaviour. The licensee will need to have some control over the person supplying the alcohol, as is the case with a servant or agent.

Under 18 years

Proof of the age of the young person must be produced. This may be by producing birth records or evidence of someone who knows the age of the young person.

Agent or servant of licensee knowingly

For a charge under *s99(2)*, the prosecution must prove that the accused was an agent or servant of a licensee.

They must also prove that the accused **knew** that the person they were serving alcohol to was under 18 years. This may sometimes be implied in the circumstances, e.g. if it was obvious or common knowledge.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie more likely than not)

Sentence

\$200 fine. As an Island Court Magistrate, the maximum fine you may impose is \$100. If you think the circumstances of the case require a great penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Under age drinking on licensed premises or public place

Section *s99(3) Alcoholic Drinks Act (Cap 69)*

Description Any person under 18 commits an offence who:

- gets or tries to get any alcoholic drink on or from a licensed premises; or
- drinks or has in his or her possession any alcoholic drink on a licensed premises or in a public place.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The person must be under the age of 18 years at the time of the alleged offence;
- The person either:
 - obtained or tried to get an alcoholic drink from a licensed premises; or
 - had in their possession or drank an alcoholic drink on a licensed premises or in a public place.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who had or tried to have the alcohol.

Under 18 years

Proof of the age of the person must be produced. This may be by producing birth records or evidence of someone who knows the age of the young person.

Licensed premises or public place

The prosecution must prove that the premises were licensed (the license should be produced as an exhibit) and that the alleged behaviour happened on those premises.

or

The prosecution must prove it was a public place that the alleged behaviour took place in. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature.

Alcoholic drink

The prosecution will need to have evidence that the drink in question was alcoholic. See the definition of alcoholic drink in *s2 Traffic Act*.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$200 fine.

Note that you may also make an order to prohibit the accused from drinking or having in his or her possession any alcoholic drink for up to 12 months if the accused is convicted of the same offence twice in the last 12 months. You will need to follow the procedure outlined at *ss82 –83 Alcoholic Drinks Act*.

See *Lausaveve v R* [2003] TVHC 5; 5/02.

Refusal to leave licensed premises

Section *s101(2) Alcoholic Drinks Act (Cap 69)*

Description Any person commits an offence who drinks alcohol on any part of a licensed premises and does not leave the licensed premises after being asked by a representative of the licensed premises or by a police officer.

This offence does not apply to a genuine lodger or genuine guest of that lodger.

Elements

- The person named in the charge is the same person who is appearing in Court;
 - The person is not a genuine lodger or genuine guest of a lodger of the licensed premises;
 - The person must have been asked by a representative of the licensed premises or by a police officer to leave the licensed premises;
 - The person must have stayed on the licensed premises and continued drinking.
-

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who remained and continued drinking.

Licensed premises

The prosecution must prove that the premises were licensed (the license should be produced as an exhibit) and that the alleged behaviour happened on those premises.

Request to leave

The prosecution must have good evidence that the accused was asked to leave the licensed premises and that this was done by either a representative of the licensed premises or by a police officer.

The person asking the accused to leave will need to be identified and would usually give evidence of their status as representative of the licensed premises or police officer as well as the request.

Failure to leave and drinking alcohol

The prosecution must show that the accused was on any part of licensed premises and that he or she was drinking alcohol there after being asked to leave.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$200 fine.

Possession of a dangerous weapon on licensed premises

Section *s105(1)(a) Alcoholic Drinks Act (Cap 69)*

Description Any person commits an offence who, without a lawful excuse, has any dangerous or offensive weapon or instrument in his or her possession on licensed premises.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The person was on licensed premises;
- The person had a dangerous or offensive weapon or instrument.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who had the weapon or instrument while on licensed premises.

Dangerous or offensive weapon or instrument

The prosecution will need to provide good evidence that the weapon or instrument in the possession of the accused was dangerous or offensive. This offence would not apply to darts or other instruments used in games usually played on licensed premises.

On licensed premises

The prosecution must prove that the premises were licensed (the license should be produced as an exhibit) and that the alleged behaviour happened on those premises.

Injury not necessary

It does not matter whether the weapon or instrument was used or intended to be used to cause injury to another person.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have a defence if he or she can prove that he or she has a lawful and reasonable excuse for having the weapon while on licensed premises. The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$200 fine.

Possession of a dangerous weapon while under the influence of alcohol

Section *s105(1)(b) Alcoholic Drinks Act (Cap 69)*

Description Any person commits an offence who is under the influence of alcohol and has any dangerous or offensive weapon or instrument in his or her possession without a lawful excuse.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The person was under the influence of alcohol;
 - The person had a dangerous or offensive weapon or instrument.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who had the weapon or instrument while under the influence.

Dangerous or offensive weapon or instrument

The prosecution will need to provide good evidence that the weapon or instrument in the possession of the accused was dangerous or offensive.

Place

This can be either in a public or private place, such as a home. The conduct of the person in possession must be such that there is a fear that an offence may be committed by them by reason of their actions. This will vary according to the facts of each case.

Under the influence of alcohol

The prosecution must prove that the accused had consumed drink. Sometimes the police will obtain a statement that helps them establish this. Other times they can smell alcohol on the accused. The police officer will need to give evidence if this is the case.

Injury not necessary

It does not matter whether the weapon or instrument was used or intended to be used to cause injury to another person.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have a defence if he or she can prove that he or she has a lawful and reasonable excuse for having the weapon while under the influence. The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$200 fine.

Drinking alcohol in prohibited public place

Section *s118(2) Alcoholic Drinks Act (Cap 69)*

Description Any person commits an offence who drinks alcohol in any public place which has been declared to be a prohibited area, other than licensed premises.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The person drank alcohol;
 - The person was in a public place which had been declared by the Minister to be a prohibited area.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who drank in a prohibited public place.

Public place

The prosecution must prove it was a public place that the alleged behaviour took place in. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature.

Prohibited area

The Minister may declare any part of Tuvalu to be a prohibited area. The prosecution will need to provide good evidence that the Minister had made such a declaration by notice.

At the time of writing, the following areas are prohibited within Tuvalu:

- on Funafuti – from the BP fuel tanks to the southern end of the runway;
- on Nui, the part of the island between Tabontebike and the pig fence; and
- on Vaitapu, that part of the island which is communal land comprising the main village bounded by an area 600 yards to the North and South of that communal land.

Not licensed premises

This offence does not apply to premises which were licensed to allow drinking at the time of the alleged offence. The prosecution must prove that the premises were licensed (the license should be produced as an exhibit) and that the alleged behaviour happened on those premises.

Drank alcohol

The prosecution must prove that the accused had consumed drink. The police will obtain evidence that helps them establish this. They must establish that the accused was seen drinking alcohol in a prohibited place. It is not sufficient to show that the accused was carrying alcohol or an open beer can, although that may suggest that the accused had been and intended to continue drinking.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

\$200 fine.

The following offences are usually heard by the Magistrate's Court although they are within the jurisdiction of the Island Magistrate's Court.

Criminal trespass

Section *s182 Penal Code (Cap 8)*

Description Every person is guilty of an offence, who:

(1)(a) enters another person's property with intent to commit an offence, or intimidate or annoy that person; or

(1)(b) having lawfully entered another person's property, unlawfully remains there with intent to intimidate, assault or annoy that person, or commit an offence; or

(1)(c) unlawfully persists in coming or remaining upon another person's property after being warned not to come on, or to leave; or

(2) enters another person's house or adjoining property, without lawful excuse at night.

Elements

Specific under s182(1)(a):

- The person named in the charge is the same person who is appearing in Court;
- The accused entered another person's property;
- The accused did this with the intention of:
 - ⊖ committing an offence; or
 - ⊖ intimidating or annoying the other person.

Specific under s182(1)(b):

- The person named in the charge is the same person who is appearing in Court;
- The accused lawfully entered another person's property;
- The accused unlawfully stayed there with the intention of:
 - ⊖ committing an offence; or
 - ⊖ intimidating, assaulting or annoying the other person.

Specific under s182(1)(c):

- The person named in the charge is the same person who is appearing in Court;
- The accused:
 - unlawfully continued to come onto another person's property after being warned not to; or
 - unlawfully remained upon another person's property after being warned to leave.

Specific under s182(2):

- The person named in the charge is the same person who is appearing in Court;
- The accused entered another person's house or adjoining property;
- The accused had no lawful excuse for entering the house or property;
- The accused entered the house or property at night.

Commentary **All charges under s182**

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who entered or remained.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Charges under s182(1)(a)

Property

Property includes a building, vessel or land.

Possession

This will include ownership and lease and any other kind of possession. The possession must be lawful.

You can infer that a person in possession of property includes family members or others who live there, even if they are not the person named on the title or lease.

Intent to commit an offence

If this is the ground on which the charge is based, the prosecution must prove that the accused intended to commit an offence. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

Under this ground, the prosecution does not have to prove that the accused actually committed an offence – intention to do so is enough.

Intention to intimidate or annoy

If this is the ground on which the charge is based, the prosecution must prove that the accused intended to intimidate or annoy the

other person. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

Under this ground, the prosecution does not have to prove that the accused actually intimidated or annoyed the other person – intention to do so is enough.

Charges under *s182(1)(b)*

Property

Property includes a building, vessel or land.

Possession

This will include ownership and lease and any other kind of possession. It does not have to be a legal possession under this ground. You can infer that a person in possession of property includes family members or others who live there, even if they are not the person named on the title or lease.

Lawful entering

The accused must have entered the property for a lawful purpose. This includes being invited onto the property by the other person, or entering the property to deliver something or some other good reason.

Unlawfully remaining

The prosecution must prove that there was no lawful reason for remaining.

If the other person asks the accused to leave and he or she does not, the accused is unlawfully remaining. If the lawful entering was something like making a delivery, as soon as that has been done, the accused should leave the property, otherwise he or she is unlawfully remaining.

If the defence provides a reason for remaining, what is it, and does it have any merit?

Intent to commit an offence

If this is the ground on which the charge is based, the prosecution must prove that the accused intended to commit an offence. This is a subjective test – it is the accused's intention that is important. You may have to infer this from the circumstances.

Under this ground, the prosecution does not have to prove that the accused actually committed an offence – intention to do so is enough.

Intention to intimidate, insult or annoy

If this is the ground on which the charge is based, the prosecution must prove that the accused intended to intimidate, assault or annoy the other person. This is a subjective test – it is the accused's intention that is important. You may have to infer this from the circumstances.

Under this ground, the prosecution does not have to prove that the accused actually intimidated, insulted or annoyed the other person – intention to do so is enough.

Charges under s182(1)(c)

Property

Property includes a building, vessel or land.

Possession

This will include ownership and lease and any other kind of

possession. Possession does not have to be lawful under this ground. You can infer that a person in possession of property includes family members or others who live there, even if they are not the person named on the title or lease.

Unlawfully persists in coming or remaining after being warned

The prosecution must prove that:

- the accused was warned not to come onto, or to leave, the property;
- he or she continued to come onto or remain on the property; and
- there was no lawful reason for coming onto or remaining on the property.

An example is where a person has been invited onto the premises for a purpose and then is asked to leave, but refuses to do so.

If the defence provides a reason for continuing to come onto or remain on the property, what is it, and does it have any merit?

Charges under s182(2)

Any dwelling-house, etc

For this ground, the prosecution must prove that the accused entered a house or its surroundings, that is:

- any verandah or passage attached to the house;
- any yard, garden or other land next to, or within the curtilage of the house.

By night

The prosecution must prove that it was night. Night is defined under s4 Penal Code as the period of time between 6-30pm and 6-30am the following morning.

Without lawful excuse

The prosecution must prove that there was no lawful reason for entering the house or its surroundings. It does not have to be proved that the accused was intending to commit an offence.

If the defence provides a reason for entering the house or property, what is it, and does it have any merit?

Sentence**Convictions under *s182(1)(a), (b) and (c)***

3 months imprisonment (or \$100 fine: *s26 Penal Code*). However, if the property entered was:

- a building, tent or vessel used as a human dwelling; or
- any building used as a place of worship or for custody of property,

then 1 years imprisonment. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment or \$100 fine. If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Convictions under *s182(2)*

1 years imprisonment. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment or \$100 fine. If you think the circumstances of the case require a greater penalty than you may impose then transfer the matter to the Magistrate's Court for sentencing.

Assault causing actual bodily harm

Section *s238 Penal Code (Cap 8)*

Description Every person who assaults another person and causes bodily harm is guilty of an offence.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused used physical force on another person;
 - The result of the assault must cause a reasonable injury.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who used physical force.

Definition of assault

An assault is any act by which a person intentionally causes another person to apprehend immediate unlawful violence. In this case, the person assaulted must be injured. This will require medical evidence to establish actual bodily harm. Bodily harm means any hurt or injury interfering with the health and comfort of the victim.

A severe punch or some kind of weapon may be involved. The injury caused need not be severe, but it must be more than just a bruise or soreness. The skin will be broken, or a bone may be broken. The context is very important:

- What was the situation?
- Where did the alleged assault occur?

The intention of the accused is immaterial: *s9(2) Penal Code*.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The maximum penalty is imprisonment for 5 years. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment (or \$100 fine: *s26 Penal Code*). If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Assault with intention to commit felony or resist or prevent apprehension or detention

Section *s240(a) Penal Code (Cap 8)*

Description Every person is guilty of an offence who assaults another person with intent to:

- commit a felony; or
- resist or prevent lawful apprehension or detention of him or herself, or another person, for an alleged offence.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The accused used physical force on another person;
- There was no legal excuse for the force being used;
- The accused did this with the intention of:
 - committing a felony; or
 - resisting or preventing the lawful apprehension or detention of him or herself or another person for an alleged offence.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who used physical force.

Definition of assault

An assault is any act by which a person intentionally causes another person to apprehend immediate unlawful violence.

Intention of committing a felony

The prosecution must prove that the accused intended to commit a felony. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

The accused must be shown to have decided to commit a **felony**. If, in the course of carrying out that felony, the accused assaulted someone, that amounts to an offence under this section.

The offence intended must be a felony. See definition in *s4 Penal Code*.

Intention of resisting or preventing the lawful apprehension or detention of him or herself or another person for any offence

The accused must have intended to resist or prevent someone lawfully apprehending him or her, or another person.

The apprehension or detention, or attempted apprehension or detention, must be lawful.

If, in the course of trying to resist apprehension or detention, the accused assaulted someone, that amounts to an offence under this section.

The assaulted person need not be the police officer or other official attempting to make the apprehension or detention.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The maximum penalty is imprisonment for 2 years. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment (or \$100 fine: *s26 Penal Code*). If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate’s Court for sentencing.

Assaulting, resisting or wilfully obstructing a police officer

Section *s240(b) Penal Code (Cap 8)*

Description Every person is guilty of an offence who assaults, resists or wilfully obstructs:

- a police officer who is duly executing his or her duty; or
- any person acting in aid of that police officer.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The accused:
 - used physical force on a police officer or person helping the police officer; or
 - resisted a police officer or person helping the police officer; or
 - wilfully obstructed a police officer or person helping the police officer;
- There was no legal excuse for the force being used;
- The police officer was duly executing his or her duty.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who assaulted, resisted or obstructed.

Definition of assault

An assault is any act by which a person intentionally causes another person to apprehend immediate unlawful violence.

The intention of the accused is immaterial: *s9(2) Penal Code*.

Definition of resist

To resist is to prevent the police officer from carrying out his or her duty by resisting.

The intention of the accused is immaterial: *s9(2) Penal Code*.

Definition of wilfully obstruct

If this is the ground for the charge, note that the obstructing must be wilful or deliberate. Therefore, the prosecution must prove that the accused intended to prevent the police officer from carrying out his or her duty, a person from helping the police officer.

Police duly executing duty

The prosecution must satisfy you that the police officer was acting in the course of his or her duty, that is, with proper authority.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The maximum penalty is imprisonment for 2 years. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment (or \$100 fine: *s26 Penal Code*). If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Assaulting, resisting or obstructing a person engaged in process or distress

Section *s240(d) Penal Code (Cap 8)*

Description Every person is guilty of an offence:

- who assaults, resists or obstructs any person who is engaged in the lawful execution of process or in making a lawful distress;
- with the intention of rescuing lawful taken property under such process or distress.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The accused:
 - ⇒ used physical force on a person who is engaged in the execution of process or in making a distress; or
 - ⇒ resisted a person who is engaged in the execution of process or in making a distress; or
 - ⇒ obstructed a person who is engaged in the execution of process or in making a distress;
- The execution of process or distress was lawful;
- The accused intended to rescue property taken under process or distress.

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who assaulted, resisted or obstructed.

Definition of assault

An assault is any act by which a person intentionally causes another person to apprehend immediate unlawful violence.

Definition of resist

To resist is to prevent the person from lawfully executing process or making lawful distress, by resisting.

Definition of obstruct

To obstruct is to prevent the person from lawfully executing process or making lawful distress by getting in their way or putting something in their way.

Intention

The intention of the accused is immaterial: *s9(2) Penal Code*.

Engaged in the execution of process or distress

The prosecution must satisfy you that the person was lawfully, that is, with proper authority.

With the intention of rescuing property taken under process or distress

The prosecution must satisfy you that the accused acted with the intention of rescuing the property.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The maximum penalty is imprisonment for 2 years. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment (or \$100 fine: *s26 Penal Code*). If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Assaulting any person in execution of lawful duty

Section *s240(e) Penal Code (Cap 8)*

Description Every person is guilty of an offence who assaults any person on account of any act done by him or her in the execution of any duty imposed on him or her by law.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused used physical force on another person;
 - That person was undertaking a duty imposed by law, and had the authority to do that act by reason of his or her position.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who used physical force.

Definition of assault

An assault is any act by which a person intentionally causes another person to apprehend immediate unlawful violence.

On account of any act done

The assault must have been prompted by the person acting in the execution of a lawful duty.

Execution of any lawfully imposed duty

The prosecution must prove that the person assaulted was acting in the course of a duty imposed on him or her by law.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The maximum penalty is imprisonment for 2 years. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment (or \$100 fine: *s26 Penal Code*). If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

Simple larceny (theft)

Section *ss251 and 254 Penal Code (Cap 8)*

Description Every person is guilty of an offence who steals something.

Section 250 sets out the things that are capable of being stolen.

Section 251 defines stealing as, fraudulently and without claim of right made in good faith, taking and carrying away a thing capable of being stolen, without the consent of the owner and with the intent of permanently depriving the owner of the thing.

- Elements**
- The person named in the charge is the same person who is appearing in Court;
 - The accused took and carried away a thing that did not belong to them;
 - The thing taken was capable of being stolen;
 - The accused did this fraudulently and without claim of right in good faith;
 - The owner of the thing did not consent to the taking;
 - The accused had the intention of permanently depriving the owner of the thing at the time he or she took it.
-

Commentary Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who stole.

Took and carried away

The prosecution must prove that the accused took the thing and carried it away. See the definition of “takes” in *s251(2)(a)*. See the definition of “carries away” in *s251(2)(b)*.

A thing capable of being stolen

The prosecution must provide evidence to identify the thing. The thing taken must be capable of being stolen. See *s250* for a list of the things that may be stolen.

Did not belong to them

The prosecution must provide evidence to prove the owner of the thing. See the definition of “owner” in *s251(2)(c)*.

Fraudulently and without claim of right good faith

The accused must have had an intention to defraud or steal and no good claim to the thing. Consider why did the accused take it? Was there an honest intention? If the accused puts forward an explanation to show he or she honestly believed in their right to take the thing, does their explanation have merit? Is their belief reasonable?

Owner did not consent

The prosecution must prove that the owner did not consent to the thing being taken. This will be quite easy and is usually done by evidence from the owner of the thing.

Intention of permanently depriving owner

The prosecution must prove that the accused had the intention of keeping the thing and using it as his or her own. If the accused later sells or gives it away, he or she has used it as his or her own. This is a subjective test – it is the accused’s intention that is important. You may have to infer this from the circumstances.

The prosecution must show that the accused intended this **at the time he or she took the thing**.

Jurisdiction

Remember that the jurisdiction of the Island Court under this section is limited to things worth \$50 or less: *Schedule 2 ICA*.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

The maximum penalty is imprisonment for 5 years: *s254 Penal Code*. As an Island Court Magistrate, the maximum you may impose is 6 months imprisonment (or \$100 fine: *s26 Penal Code*). If you think the circumstances of the case require a greater penalty than you may impose, then transfer the matter to the Magistrate's Court for sentencing.

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).

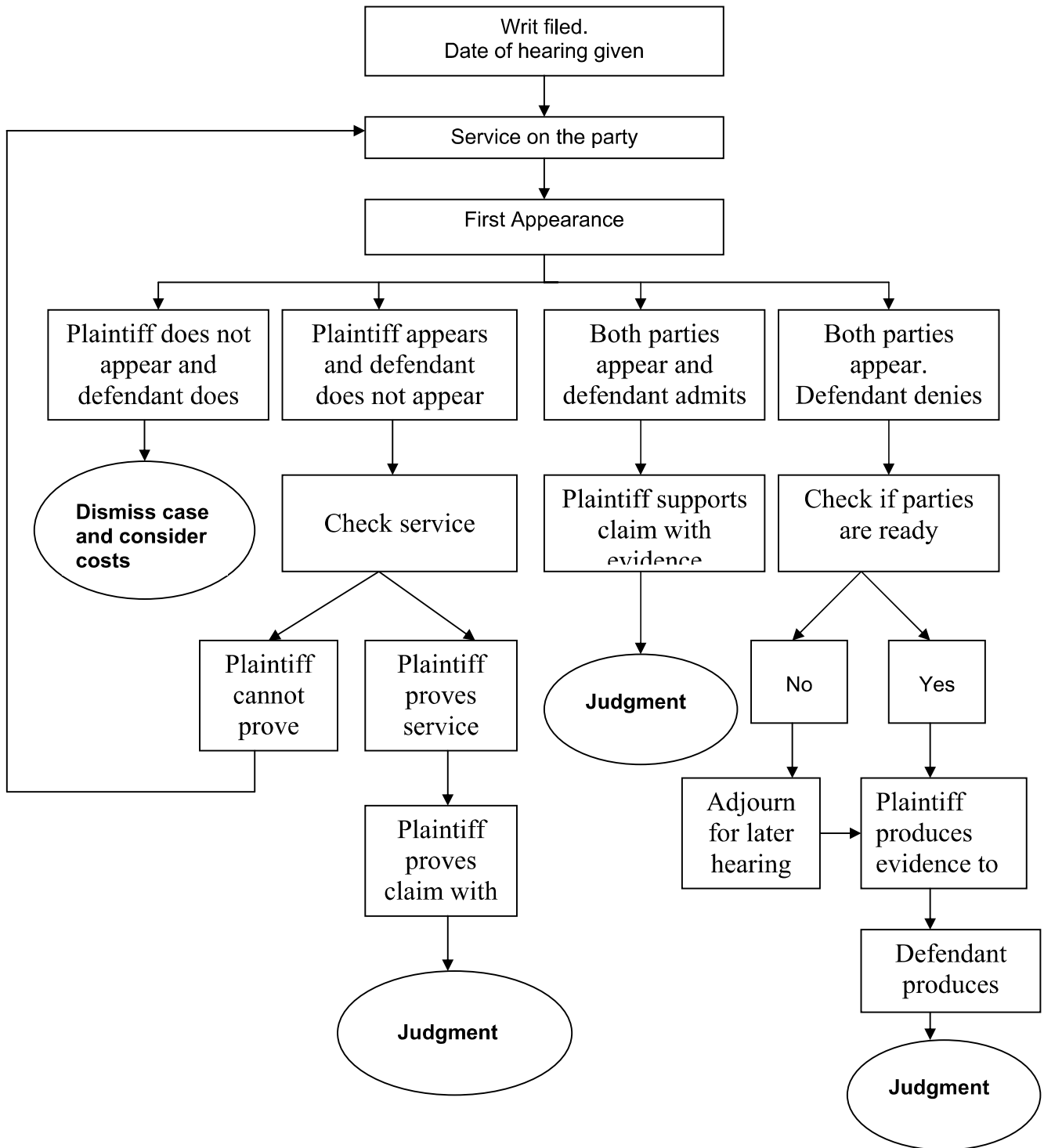
The value of the property, debt or damage claimed must be under \$60.

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)*.

Amount	Maximum sentence
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)*.

F:

FAMILY

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

- sets out the extent of your family jurisdiction;
- describes the processes, from pre-trial to determination;
- provides best practice guidance in the conduct of family proceedings;
- provides a guide to the orders you may make.

1 Family Jurisdiction

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

The Island Court has jurisdiction to deal with matters relating to the family, including:

- granting a **license to marry** in certain circumstances, as provided in *s11 Marriage Act (Cap 29)*;
- applications for **divorce** only where:
 - ≡ both parties to the marriage are citizens of Tuvalu; and
 - ≡ both parties consent after the commencement of the proceedings; and
 - ≡ the Court is satisfied there are no major problems related to associated proceedings of the divorce, like matrimonial property, maintenance and custody of children: *s5(1) Matrimonial Proceedings Act (Cap 21)*;
- any application for a **child custody** order under the *Custody of Children Act (Cap 20)*, subject to *s5* of that *Act*, or under *s12 Matrimonial Proceedings Act (Cap 21)*;
- applications for **matrimonial property** made under *s13 Matrimonial Proceedings Act (Cap 21)*;
- any application for **maintenance** order under the *Maintenance (Miscellaneous Provisions) Act (Cap 4)* subject to *ss4 and 7* of that *Act*.

These must be brought by private individuals, one of whom must reside on the island and the other must be resident somewhere in Tuvalu.

Family Jurisdiction

Matter	Authority	Powers of Island Court
Marriage See 2 below	<i>Marriage Act (Cap 29)</i>	To grant special licenses to marry (<i>ss8 - 12</i>)
Divorce and related proceedings See 3, 4, 5 and 6 below	<i>Matrimonial Proceedings Act (Cap 21)</i>	Where the parties agree, power to grant: <ul style="list-style-type: none"> • divorce; • custody; • maintenance. If the parties do not agree, the matter should be referred to the Magistrate's Court (<i>s5</i>)

<p>Custody See 4 below</p>	<p><i>Custody of Children Act (Cap 20)</i></p>	<p>On application by an interested party (such as parent, guardian, grandparent), power to grant:</p> <ul style="list-style-type: none"> • custody of any child; • access to any child; • property rights affecting children; and • such financial payment to such child as appropriate.
<p>Matrimonial property See 5 below</p>	<p><i>Matrimonial Proceedings Act (Cap 21)</i></p>	<p>In divorce proceedings, where the parties agree, power to adjust the property rights of:</p> <ul style="list-style-type: none"> • parties to a marriage; • children from the marriage; and • other affected people. <p>If the parties do not agree, the matter should be referred to the Magistrate's Court (s5)</p>
<p>Maintenance: (financial provision) See 6 below</p>	<p><i>Matrimonial Proceedings Act (Cap 21)</i></p>	<p>On application of any person who claims a legal or customary right of financial assistance, power to:</p> <ul style="list-style-type: none"> • make a maintenance declaration; and • order payment and/or shelter.

2 Marriage

The law on Marriage is found in the *Marriage Act (Cap 29)*. This Act provides for:

- the restrictions on marriage; and
- steps parties must take before, during, and after the marriage has taken place.

The *Marriage Act (Cap 29)* also gives the Island Court the specific power to authorise a marriage between two persons if they wish to marry at short notice. In this case, the Island Court grants a special license.

Prior to giving a special license, you should be aware of the restrictions on marriage.

2.1 Restrictions on Marriage

There are several restrictions placed on marriage which are set out in *Part II of the Marriage Act (Cap 29)*. It is important for you to know what the restrictions are and you should refuse any application which breaches these restrictions, or the marriage may be declared void.

Marriage within prohibited degrees

Two people cannot marry if they are second cousins or more closely related. *Schedule 1 of the Marriage Act (Cap 29)* sets out which persons a man or woman cannot marry.

Any marriage that takes place within a prohibited degree is void, and will be annulled.

This can be a problem where islands are small, and families share relatives in common.

Age restrictions

No person under 16 years shall marry. If a marriage is solemnised between persons, one or both of whom are under 16, the marriage shall be void: s5 *Marriage Act (Cap 29)*.

When either party to an intended marriage is under 21 years, the written consent of the natural father is necessary, unless the young person is a widow or a widower: s7(1) *Marriage Act (Cap 29)*.

If the father is dead, of unsound mind or overseas, the written consent of the mother is required. If both the father and mother are dead, are of unsound mind or absent, the guardian of the person under 21 is required: s7(1) *Marriage Act (Cap 29)*.

The Registrar-General may dispense with the consent if:

- there is no mother, father or parental guardian; and
- he or she has made an inquiry into whether the marriage is a proper one: *s7(1)(a) Marriage Act (Cap 29)*.

If consent is refused by those whose consent is required, the Registrar-General may dispense with consent if the refusal is unreasonable and if it is in the best interests of the party wanting to get married: *s7(1)(b) Marriage Act (Cap 29)*.

Marriage of person already married

No marriage can take place between persons who are already validly married. If such a marriage takes place it shall be void: *s6 Marriage Act (Cap 29)*. This may also be a criminal offence, known as bigamy.

2.2 Granting a Special License for Marriage

Notice must be given by one of the parties to the Registrar, 21 days prior to the Registrar issuing a certificate for marriage: *s8 Marriage Act (Cap 29)*. In many cases, marriage takes place on short notice with the couple often deciding to marry within 24 to 48 hours. In these cases, a special license must be granted by the Island Court. Most marriages in Tuvalu occur through the grant of a special license.

The Island Court shall only grant such license where it is satisfied that:

- there is no reason in law why it should not take place:
 - ⇒ Are they related to a prohibited degree?
 - ⇒ Are they lawfully married?
- necessary consents have been obtained:
 - ⇒ If either of the parties are under 21 years, has the father consented;
 - ⇒ If nothing is in writing, notify the father, or mother to attend Court before making a decision;
 - ⇒ Note that if the father agrees but the mother does not, there is nothing that the mother can do;
- the Secretary to Government has been informed by telegram of the application; and
- granting the application is reasonable in all the circumstances: *s11(2) Marriage Act (Cap 29)*.

If these four conditions have been satisfied, the special license may be granted. The minutes of the Court hearing must record and deal with all the conditions for marriage.

2.3 The Special License Hearing

This hearing is open to the public. Anyone who has an objection to the marriage is free to state his or her objections.

You should ask both parties to the intended marriage any questions, on oath, which will help you determine whether you should issue a special license.

Once you are satisfied that all the conditions have been met, you can issue a marriage license.

Once the license has been issued, it is likely that the marriage service, whether it is civil or in a Church, will take place on the same day.

2.4 Common Problems

Cases have arisen in the Island Courts where a special license has been given where:

- there has been a prohibited degree of relationship;
- one of the parties was married and had not been divorced;
- consents had not been given, either in writing or with the parent present;
- a parent was prevented from entering the Court by the Clerk during a sitting of the matter.

It is up to the Court to ensure that all the conditions for a marriage by special license are met and that the hearing is conducted in the proper manner.

3 Divorce

When a marriage relationship has broken down and the two parties feel that the marriage it is at an end, either party may apply for a divorce.

The law and procedure for divorce is detailed in the *Matrimonial Proceedings Act (Cap 21)*.

3.1 Jurisdiction of the Island Court

An Island Court can only hear matrimonial proceedings where:

- both parties are citizens of Tuvalu; or
- after proceedings have begun, both parties to the marriage consent; and
- the Court is satisfied there are no major problems relating to any matter (such as custody, maintenance or the divorce itself).

If one of parties is absent from Tuvalu when proceedings begin, the Court cannot hear the case unless that party consents in writing after the commencement of proceedings. This confirms that the party is aware of, and agrees to, the divorce petition and its terms. If a letter of consent is written before the proceedings commence, the other party must still be served and acknowledge they have received the petition.

You **must** transfer the proceedings to the Magistrate's Court if:

- you think there will or may be major problems associated with the matrimonial proceedings; or
- the parties do not consent.

3.2 Grounds for Divorce

The *Matrimonial Proceedings Act (Cap 21)* allows for divorce in only three cases:

- one party to a marriage has wilfully refused to consummate the marriage; or
- the marriage has been induced by fraud, duress, or mistake; or
- the marriage has completely broken down.

In the case of the first 2 grounds, the injured party is entitled to a divorce, subject to any associated proceedings under *Part IV* of the *Act: s8 Matrimonial Proceedings Act (Cap 21)*.

Where the ground is that the marriage has completely broken down, the Court must be satisfied from the evidence produced that the marriage has broken down. This evidence may include (but not be limited to):

- adultery; or
- desertion without reasonable cause; or
- cruelty; or
- that one party is certified by a medical officer as being of unsound mind and unlikely to recover; or
- that in the circumstances it would be unreasonable to expect the other party to continue in a marriage relationship: *s9(2) Matrimonial Proceedings Act (Cap 21)*.

3.3 How a Divorce Case Gets to Court

The *Matrimonial Causes (Magistrates' Court) Rules (Cap 21)* set out how procedures for divorce proceedings.

Proceedings are begun by petition. The petition will follow Form 1 and must identify:

- name /address of both parties;
- occupations of the petitioner;
- maiden name of wife;
- if relevant, the name, address and occupation of person whom the respondent is alleged to have committed adultery with;
- place of marriage;
- place of domicile;
- that the marriage has completely broken down;
- the facts, and the grounds upon which the parties are relying on to obtain a divorce;
- that there are no previous proceedings in relation to the marriage. Any previous proceedings, whether they have taken place in or out of Tuvalu, should be stated here: *rr5, 6 Matrimonial Causes (Magistrates' Court) Rules (Cap 21)*.

The petitioner shall then:

- sign and date the petition on the date that it is filed;
- present it for filing by the Clerk of the Court, along with 2 copies and the marriage certificate (or a certified copy): *r8 Matrimonial Causes (Magistrates' Court) Rules (Cap 21)*.

Once the petition has been filed, the Clerk of the Court will issue a summons for hearing of the petition, which sets out the time and place for the hearing.

A copy of the petition and the summons should be served personally on every party set out in the petition, through the Court, in not less than 8 full days before the hearing.

In exceptional cases the Court may:

- determine that it is not practical to personally serve the petition and summons and may order another method of service such as a newspaper advertisement: *r11(4) Matrimonial Causes (Magistrates' Court) Rules (Cap 21)*;
- dispense with the time limit.

If one party does not attend at the hearing, then proof of service will be necessary by the person who served the petition: *r14 Matrimonial Causes (Magistrates' Court) Rules (Cap 21)*.

3.4 Hearing

In order to proceed with a divorce, the petitioner at least must be present. As the Chief Justice stated in *Kesia Martin v Graeme Leigh Martin* Case No. 2/03:

“there is only one method of proof permitted in any matrimonial case and that is by evidence. Where the parties do not appear, there can be no evidence. A petition alone is not proof, it is simply a statement of the case the petitioner intends to prove.”

Even where the petitioner is present, the Court cannot hear the case unless the respondent is present or a proper affidavit of service has been filed.

Divorce proceedings in the Island Court **must be by consent**, so the documents should be checked for the consent of the parties to the proceedings.

- Where one of the parties is overseas, consent must be in writing. This has to be done after proceedings are begun and there should be a proof of affidavit of service (this confirms that the party is aware of, and agrees to the divorce petition and its terms).
- If a letter of consent is written before the proceedings, the other party must still be served and acknowledge that they have received the papers.
- The consent must be in writing where the other party is absent from the Court.

If there is a dispute, the Island Court cannot hear the matter and must refer the matter to the Magistrate’ Court.

The Court shall hear evidence on oath as to the grounds for the divorce.

Even though evidence may be presented to show the breakdown of the marriage, this does not relieve the Court from its duty to determine whether the marriage has completely broken down.

The Court must weigh all the evidence, on the balance of probabilities, in order to determine whether the marriage has broken down and a divorce order should be granted. This means that you must find that it is more probable than not that the fact exists.

If the parties need time to consider matters, then an adjournment may be granted. In this case, a hearing date will need to be set: *r17(2) Matrimonial Causes (Magistrates’ Court) Rules (Cap 21)*.

Reconciliation

When proceedings are brought on the basis of the complete breakdown of the marriage, the Court must, prior to giving judgment, adjourn the proceedings for at least three months, so that the parties can settle their differences. Then the Court may give judgment.

The Court may forego attempts at reconciliation if:

- it is of the opinion that attempts to reconcile will not succeed; or
- there are special reasons why a divorce should be granted immediately: *s10 Matrimonial Proceedings Act (Cap 21)*.

3.5 Granting an Order of Divorce

Once all the evidence has been heard and reconciliation has been attempted, you may grant a divorce if you are satisfied that the parties have met the legal grounds for divorce, as set out in the *Matrimonial Proceedings Act (Cap 21)*.

Welfare of children

In divorce proceedings where there are children (whether they be natural children, adopted children or stepchildren), the welfare of the children is of paramount importance, at least equal to that of the parties to the marriage: *s12(1) Matrimonial Proceedings Act (Cap 21)*.

For details on making orders about the welfare of children, see 4.1 below.

Even if both parties agree to the divorce, but do not agree on welfare arrangements, there is no reason why you may not grant a divorce order. However, you should order some interim welfare arrangements until the issues are resolved.

Once you have granted the divorce and made some interim welfare arrangements, the case must be transferred to the Magistrate's Court. On receipt of the case, the Magistrate will give directions as to how the case will be heard.

The divorce order

A divorce order must specify:

- the date on which the divorce has been made;
- the details concerning the children;
- any maintenance to be paid - how, and when.

A divorce order is effective from the date it is made.

Once the grant has been given, the Court shall forward a certificate of divorce to:

- the Registrar-General; and
- each of the parties, if they request it.

The Registrar-General shall then enter the certificate in the Register of Divorces: *s11 Matrimonial Proceedings Act (Cap 21)*.

3.6 Associated Proceedings

In any matrimonial proceedings under the *Matrimonial Proceedings Act (Cap 21)*, the Court may make any other orders. These may relate to:

- custody of the children (if any);
- matrimonial property; or
- maintenance.

For the Island Court to make any such orders, both parties must consent after the commencement of proceedings and the Court must be satisfied that there are no major problems relating to any of these associated proceedings. See *s5 Matrimonial Proceedings Act (Cap 21)*.

3.7 Divorce Checklist

The checklist on the following page provides a useful approach to considering divorces.

Divorce Checklist

Jurisdiction

Are both the parties citizens of Tuvalu?

If one of the parties is living overseas, they must have given consent in writing and proof of service must be shown

Have the parties agreed to the divorce?

You only have jurisdiction to hear the case if both parties consent.

Are there any associated proceedings, related to matrimonial property, custody of children or maintenance?

If yes, have the parties agreed on these proceedings?

Are these proceedings complex or might there be major problems relating to them?

You must refer the case to the Magistrate's Court if:

- **the parties do not agree to divorce or to the associated proceedings; or**
- **if the associated proceedings are complex or there may be major problems relating to them.**

Petition

Has the petitioner filled out Form 1 correctly and included all relevant information?

Has the petitioner included the marriage certificate or a certified copy?

If not, refer the petition back to the petitioner to complete.

Consent

Do the parties consent – if both are not present, do you have consent to all the issues in writing, dated after the commencement of the proceedings?

You only have jurisdiction to grant divorce where the parties consent.

Grounds for divorce

Have you been given evidence to satisfy you that the marriage is completely broken down?

You must be satisfied that the marriage has completely broken down.

Associated Proceedings

Do the parties agree on the arrangements for children, maintenance and property division?

Remember that the welfare of the children is of paramount importance.

You only have jurisdiction to make orders where the parties consent. If not, refer the case to the Magistrate's Court.

Conciliation

Is an attempt to reconcile the parties likely to succeed?
Are there special reasons why a divorce should be granted immediately?

Unless the Court certifies that no attempt to reconcile the parties is likely to succeed or there are special reasons for an immediate divorce, it must adjourn the proceedings for at least 3 months in order to allow the parties to settle their differences.

Orders

You may grant a divorce order and any other orders relating to custody, maintenance and property.

Right of appeal

3.8 Rights of Appeal

A right of appeal can be exercised by either party. This will be rare, as proceedings in the Island Court are only by consent.

4 Custody of Children

The Island Court may hear custody disputes under the *Matrimonial Proceedings Act (Cap 21)* or under the *Custody of Children Act (Cap 20)*.

Definition of child

Although the *Matrimonial Proceedings Act (Cap 21)* does not define who is a child for the purposes of maintenance or custody, in *Kesia Martin v Graeme Leigh Martin* Case No. 2/03, the Chief Justice defined “child” as anyone under the age of 18 years. This means that custody orders are only to be made for a child under the age of 18 years.

Birth certificates should be provided as evidence of the age of the children. If a birth certificate cannot be provided, the petitioner must ask the court for leave to proceed without it. Leave should only be granted when there is sufficient reason.

4.1 The *Matrimonial Proceedings Act (Cap 21)*

The *Matrimonial Proceedings Act* sets out how the Court should deal with the custody of children and related matters in the case of divorce. See above at 3.5.

If you are not satisfied that adequate arrangements have been or will be made for the welfare of the children, you should normally refuse to grant a divorce or defer the grant: *s12(2) Matrimonial Proceedings Act (Cap 21)*.

To assess whether adequate arrangements have been or will be made for the children, you should be given evidence of:

- the children's present situation;
- what new arrangements are proposed; and
- the feelings of the children as to custody, particularly if they are older.

Any orders that you make concerning the custody of children:

- shall not be inconsistent with any other law or any applicable Tuvaluan custom, and
- may include orders relating to:
 - ⇒ custody, guardianship and access to the children by one or both parties to the marriage;
 - ⇒ property rights which affect any children; and
 - ⇒ maintenance of any children: *s12(4) Matrimonial Proceedings Act (Cap 21)*.

4.2 The Custody of Children Act (Cap 20)

This Act provides that any person may seek an order concerning:

- the custody of any child; and
- the right of access to the child of his mother and father: *s3 Custody of Children Act (Cap 20)*.

An application can be made by "any person." This will usually be a father, or mother, grandparent, uncle or aunt, brother, or sister.

4.3 Considerations

Before making a custody order the Court shall:

- make a full enquiry into all the circumstances surrounding the case; and
- call for any evidence or report it may consider necessary in the interests of justice.

In deciding the application, the Court must assess what is in the best interests of the child, both now and in the future: *s3(1)(a) Custody of Children Act (Cap 20)*. This is the most important consideration for the Court: *s3(3) Custody of Children Act (Cap 20)*.

The Court must **not** consider whether from any other point of view the claim of the father is superior to the mother or whether the claim of the mother is superior to that of the father in custody hearings: *s3(1)(b) Custody of Children Act (Cap 20)*.

The Court may ask for a report to be prepared by the Welfare Officer. The Welfare Officer will conduct interviews with the parties, parents and extended family. The report will explain the background and history, and make recommendations for the future of the child.

The recommendations made in the Welfare Officer's report are very important. Those recommendations can assist the Court in order to assess what is in the best interests of the child. See *Lokega v Lokega (Tuvalu HC 1/95)* which emphasises the importance of the role of the Welfare Officer.

Also see *Faalo Liai v Puatalo Pasama (HC 39/03)*, which emphasises the importance of taking the time to make a full enquiry and assess the best interests of the child.

4.4 Culture and Child Custody

The role of culture is highly significant in assessing custody of children. The law provides that any application for child custody is subject to the *Native Lands Act (Cap 22)*.

A particular problem arises where the child is born to parents who are not married. In this case, if the child has attained a particular age, the child may be ordered to live with the father in accordance with custom: *s3(5) Custody of Children Act (Cap 20)*; *s20(2) Native Lands Act (Cap 22)*. At June 2004 an interpretation of *s20(2)* remains pending with the High Court of Tuvalu.

4.5 How an Application for Child Custody is Made

An application must be made on notice to the Island Court. This will state:

- who is making the application; and
- the names of the parties.

The application may ask for:

- an interim custody order to be made if it is necessary; and
- the Court or a Welfare Officer to prepare a report on the circumstances of the child, and give any recommendations.

Every interested party has a right to be served with the application and seek legal advice.

4.6 Interim Hearing

An interim-hearing must take place not less than 2 clear days after service on the parties of the application.

The purpose of an interim hearing is to:

- assess who the child should live with in the immediate time period, and until there has been a final hearing;
- give directions for future hearing; such as what evidence must be produced about the circumstances of the child by the parties and requesting a report from the Welfare Officer; and
- enable the wishes of the children to be heard, if they are old enough to do so.

4.7 Final Hearing

The purpose of the final hearing is to:

- hear evidence from the parties and/or witnesses;
- hear evidence from the children, if they are old enough; and
- consider the report prepared and its recommendations.

4.8 Orders to be Made

A child custody order may be made. This will set out who has custody of the child, and provide for access to the child by other parties.

Although custody must be clear, access can be flexible and agreed between the parties.

4.9 Custody Checklist

The checklist on the following page provides a useful approach to considering custody under the *Custody of Children Act (Cap 20)*.

Custody Checklist

If parties agree:

If both parties are not present, do you have consent to all the issues in writing, dated after the commencement of the proceedings?

Is it in the best interests of the child/children?

Is it according to culture?

Does it provide for access and maintenance of the children?

If yes to all, you may make the appropriate orders.

Parties do not agree:

Both parties must give evidence on oath.

Consider:

- the best interests of the child – check the wishes of the child if they are old enough;
- Welfare report;
- cultural factors that are not inconsistent with the law;
- does the *Native Lands Act* apply?

Do you require more evidence? If so, make an **interim custody order** and direct:

- who should look after the children until final hearing;
- that an enquiry into the circumstances of the child is made and reported to the Court;
- a date for final hearing be given.

Orders

You may make orders concerning:

- custody;
- access; and
- maintenance.

Right of appeal

4.10 Variation

Arrangements can be varied. If circumstances change, then either party may apply for a variation of a custody order. This may arise where a party remarries.

4.11 Appeal

A right of appeal to the Magistrate's Court. The application must be lodged within 21 days. The Court should explain this to the parties.

5 Matrimonial Property

In divorce proceedings, the Court may make all such orders as it thinks necessary or desirable to adjust the property rights of:

- the parties to the marriage;
- any children that are from the marriage (whether they are natural, adopted or step-children); or
- any other persons affected: *s13(1) Matrimonial Proceedings Act (Cap 21)*.

The parties must consent to all issues if an order is to be made by the Island Court under the *Matrimonial Proceedings Act (Cap 21)*. See 3.1 above.

5.1 How an Application for Matrimonial Property is Made

Applications are made in the petition for divorce.

The wording will be something like:

“The petitioner seeks the transfer the property known as on Nui to her for her lifetime, and thereafter to their children – A, B, and C.”

Before making an order, the Court must have received evidence of the financial means of both parties to the marriage.

5.2 Matrimonial Property Orders

The Court may make orders that are not unreasonable or inconsistent with any other law, or any applicable Tuvaluan custom.

The orders may include:

- the division of property; and;
- the transfer of property; and;
- the vesting of property; and;
- maintenance, whether of a party to the marriage or of a child or any other person affected: *s13(3)(b) Matrimonial Proceedings Act (Cap 21)*.

The order of the Court relating to property in a divorce proceeding will take effect:

- pending the determination of the proceedings; or
- on the grant of the divorce.

5.3 Variation

When there has been a change of circumstances, either party may apply for a variation order to adjust property rights to reflect these changes: *s15 Matrimonial Proceedings Act (Cap 21)*.

6 Maintenance

Maintenance can be sought for children and/or a spouse in 2 ways:

- as part of divorce proceedings under *s13(3)(b)(iv) Matrimonial Proceedings Act (Cap 21)*; or
- by an application of a person who claims that another person has a legal or customary obligation to do so under the *Maintenance (Miscellaneous Provisions) Act (Cap 4)*.

6.1 Under Divorce Proceedings

This is sought as an order in the divorce petition.

The Court must consider the financial status of both parties. The financial means of both parties should be given as either direct oral evidence or by affidavit, with the proper supporting documents included in the affidavit.

A party may agree to pay a sum of money to support the spouse and children.

The Court must still assess whether an order for maintenance is reasonable in the circumstances.

The Court will make such an order if there is an agreement between the parties as to maintenance. If there is no agreement, then the matter should be referred to the Magistrate's Court.

6.2 Maintenance (Miscellaneous Provisions) Act (Cap 4)

Any person may apply to the Court for a declaration that another person shall maintain that person where there is a legal or customary obligation.

This includes a party to a marriage, and their children, an unmarried mother and her children, a child, grandparent, or relative. Such a person must be neglected, that is, they must not be in receipt of money from those who are responsible for their upkeep.

6.3 How an Application for a Maintenance Declaration Under the *Maintenance (Miscellaneous Provisions) Act (Cap 4)* is Made

Application is made to the Court on notice (Form F3). The Court will serve the application on the other party and set a date for hearing.

6.4 Grounds for Making a Maintenance Declaration

The Court must first decide whether there is a legal or customary obligation to maintain the person: *s3(1) Maintenance (Miscellaneous Provisions) Act (Cap 4)*.

The Court must also make a full enquiry into all the circumstances surrounding the application. In particular, the Court must take into consideration:

- the age of the person for whose benefit the application is being made;
- the personal circumstances of every person concerned with the application; and
- any further evidence that is necessary: *s3(2) Maintenance (Miscellaneous Provisions) Act (Cap 4)*.

Once the Court has considered all the evidence, and determined that there is a legal and customary obligation to maintain the person, the Court may make a maintenance declaration.

6.5 Maintenance Checklist

The checklist on the following page provides a useful approach to considering maintenance under the *Maintenance (Miscellaneous Provisions) Act (Cap 4)*.

Maintenance Checklist

Legal obligation or customary obligation

Is there a legal or customary obligation for the defendant to maintain the applicant?

There must be a legal or customary obligation to provide maintenance.

Circumstances of the parties

What are the relevant circumstances of all the people involved? You will need evidence of this.

What is the age of the person for whose benefit the application is made?

What are the financial resources of the defendant?

Neglect

Has the defendant wilfully neglected to provide for or make proper contribution towards reasonable maintenance for the applicant ?

You must be satisfied that the defendant has neglected to provide reasonable maintenance.

Declaration

You may make a maintenance declaration – be clear about what the defendant must do or pay and to whom. It may be to provide shelter or money or both.

Right of appeal

6.6 Enforcing a Maintenance Declaration

Where a maintenance declaration has been made but has not been followed by the other party, the Court may make a maintenance enforcement order. To make such an order, the Court must take into account:

- the circumstances of the case; and
- the resources of the defendant: *s4(1) Maintenance (Miscellaneous Provisions) Act (Cap 4)*.

The Court may then order:

- payment by the defendant to the applicant or any other person on the applicant's behalf;
- that the defendant must provide shelter for the applicant; and
- any reasonable combination of money or shelter as the Court thinks fit: *s4(2) Maintenance (Miscellaneous Provisions) Act (Cap 4)*.

If the Island Court makes a maintenance enforcement order against a defendant who is resident outside the limits of the Court's jurisdiction, the order shall not have effect until the Magistrate's Court has confirmed it: *s4(2) Maintenance (Miscellaneous Provisions) Act (Cap 4)*.

6.7 Variation

The Court may vary a maintenance declaration at any time on the application of either party: *s6(1) Maintenance (Miscellaneous Provisions) Act (Cap 4)*.

6.8 Appeal

Either party may appeal within 21 days from the decision of the Court to the Magistrate's Court.

APPENDIX 1:
CRIMINAL FORMS

CRIMINAL FORMS:

1. Charge
2. Summons
3. Affidavit of Service
4. Warrant to apprehend person charged
5. Summons to Witness
6. Warrant of Commitment
7. Warrant to remand person charged
8. Recognisance (with and without sureties)
9. Warrant of commitment (on conviction and in default of payment imprisonment)
10. Notice of appeal

APPENDIX 2:
CIVIL FORMS

CIVIL FORMS:

- 11. Writ of summons**
- 12. Particulars of claim - Debt**
- 13. Particulars of claim - Negligence**
- 14. Affidavit of service**
- 15. Subpoena**
- 16. Notice of appeal**

APPENDIX 3:
FAMILY FORMS

FAMILY FORMS:

- 17. Divorce petition**
- 18. Notice of Application - Custody;**
- 19. Notice of Application - Maintenance;**
- 20. Summons**
- 21. Affidavit of Service**
- 22. Affidavit as to Marriage**
- 23. Answer**

APPENDIX 4:

CASES

CASES: High Court of Tuvalu

2002 and 2003

Family:

Divorce:

Kesia Martin v Graeme Leigh Martin 2/03 (April 2003)

Appeal:

Liteli Filipo v Manatu Pulel 26/03 (Sept 2003)

Custody:

Faalo Liai v Puatolo Pasama 39/03 (Sept 2003)

Criminal:

Constitution:

Manase Lotonu v R 24/03 (Sept 2003)

Anderson v R 5/03 (Sept 2003)

Appeals from Resident Magistrate:

Sentencing- Young Persons- Considerations:

Kalisi v R 6/02 (Feb 2003)

Tuaga v R 5/02 (Feb 2003)

Sentencing- Types:

Eti Opeta v R 4/02 (Aug 2002)

Pou v R 4/03 (April 2003)

Sentencing- Driving without a License:

Tianamo Savave v R (within *Pita v R* 2-4/02) 3/02

Melo / Vaito v R 1 @ 4/ 02 (Feb 2003)

Sentencing- Drink:

Lausaveve v R 5/02 (Feb 2003)

Sentencing – Driving – Previous Convictions:

Viliamu v R 2/03 (April 2003)

Sentencing- Rehabilitation:

Lisale v R 3/03 (April 2003)

Sentencing – Improper Default term:

Viliamu v R 2/03 (April 2003)

Lisale v R 7/03 (Sept 2003)

Appeal- Procedures on Conviction:

Tasi Togiga v R 8/03 (Sept 2003)

Appeal – Case time barred (Alcoholic Drinks):

Manumanu Fatiga v R 5/03 (Sept 2003)

Appeal – Drink and Driving – Principles - Procedures – No case to answer:

Lisale v R 1/03 (Feb 2003)

Contract:

Seafarer – Compensation according to contract - Workers Compensation:

Alpha Pacific Navigation Ltd v Administrator of Native Estates 30/03
(Sept 2003)