ARTICLES

Setting Aside Default Judgments, Assessment of Damages and Negotiated Settlements

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Introduction

When acting for the State where a matter has been entered into default judgment against the State, the task of a State lawyer is to determine whether:

(1) there are grounds to set aside the default judgment; and

(2) if there are no grounds to set aside the default judgment, what arguments can be raised to limit the State's liability in the Court's assessment of damages.

It is therefore, important to know and understand the way damages are assessed in the circumstances of a default judgment and the different types of damages that are available.

What is a default judgment?

What is a default judgment? It is a judgment entered in favour of the plaintiff when the defendant defaults in either entering an appearance or in filing a defence. Division 3 of O12 of the *National Court Rules* (NCR) deals with default judgements. Default judgments only apply to proceedings commenced by a writ of summons (O12 r24). This rule does not apply to matters commenced by originating summons or any other type of initiating process.

When is a defendant in default?

Order 12 rule 25 of the NCR sets out three circumstances in which a default judgement may be entered. It does this by specifying the circumstances in which a defendant shall be in default. These circumstances are:

1. where the originating process bears a note under O4 r9 (that is, the defendant must file a notice of intention to defend in the prescribed form or otherwise he shall be liable to suffer judgement or an order against him), and the time for the defendant to comply has expired (but the defendant has not given the notice); or
2. where he is required to file a defence and the time for him to file his defence has expired (but he has not filed his defence); or
3. where he is required under O8 r24 to verify his defence (that is, to file an affidavit verifying his defence to a claim for a liquidated demand) and the time for him to verify his defence in accordance with that rule (that is, within the time allowed for filing his defence) has expired (but he has not so verified his defence).

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What are the terms of a default judgment?

Once a defendant is in default, the plaintiff may then apply for default judgment. The terms of that judgment will depend upon the type of claim that the plaintiff has filed. Most actions against the State seek damages as a remedy. Where a matter enters into a default judgment, a separate trial is usually held to determine the assessment of damages. Most claims against the State are for unliquidated damages as opposed to liquidated damages[1] (that is, there is not an express amount of debt claimed only in the Statement of Claim). The court has no power to make a default judgment that also determines the quantum of damages payable unless the claim is for a debt only. Section 12(3) of the *Claims By and Against the State Act* 1996 provides that:

> Where in a claim against the State the State is in default within the meaning of the National Court Rules, then notwithstanding that a plaintiff's claim for relief is for a liquidated demand, judgement shall not be entered against the State for the sum claimed unless the claim relates to a debt only, and in all other cases judgement shall be entered for damages to be assessed and, where appropriate, for costs.[2]

If a default judgment has been entered against the State for a sum of money and also for the further assessment of damages, the party must seek to have the default judgment either corrected through the exercise of the court's powers under O8 r59(1) of the NCR or set aside for irregularity.[3] Unlike the rules under O12 r31, it is not possible for a default judgment to be entered against the State for a mixed claim, that is, partly assesses the amount of damages and partly leaves damage to be assessed.[4]

What action can be taken to set aside a default judgment?

Order 12 rule 35 gives the court a very wide discretion in deciding whether to set aside a default judgment. The provision reads:

> The Court may, on such terms as it thinks just, set aside or vary a judgment entered in pursuance of this Division.

Principles for setting aside default judgments

In considering whether to set aside a default judgment, there is a distinction to be made between[5]:

- a default judgment entered regularly;
- a default judgment entered irregularly in acting under a rule; and
- a default judgment obtained irregularly independent of the NCR (a nullity)

The case law on how to distinguish between the different circumstances in which a default judgment may have been entered, is confusing and, is not a settled area of law in PNG, notwithstanding the various attempts by the courts to clarify the position.

The importance of making this distinction, is in how, counsel can argue, the court should dispose of the default judgment. Regularly entered default judgments, and default judgments entered irregularly

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1 For the Supreme Court's consideration of the meaning of liquidated damages see the case of *Dempsey v Project Pacific Ltd* [1985] PNGLR 93.

2 Order 12 rr 27, 28, 29 of the NCR govern the scope of the Court's power to make awards of damages in default judgments generally in matters where the State is not a party.

3 See *State v Josiah* (2005) SC792 and *Rose v State* (2007) N3241.

4 Supra.

5 For the principles of setting aside default judgments see the following PNG cases: *Hannet and Hannet v ANZ Banking Group (PNG) Ltd* (1996) SC505; *Yamanka Multi Services Ltd v National Capital District Commission* (2010) N3904; *Megeria v Romanong, Provincial Administrator, Southern Highlands* (2001) N2131; and the UK cases of *Anlaby v Praetorius* (1888) 20 QBD 764 and *Re Pritchard decd. Pritchard v Deacon and Ors* [1963] Ch 502.

in acting under a rule, are subject to the court's discretion as to whether they should be set aside. The discretion is exercised in both cases in accordance with the same general considerations, but there is arguably a distinction in the starting point for the court:

- for regularly entered default judgments, there is a heavy onus on the defaulting party to demonstrate why the default judgment should be set aside; and
- for default judgments irregularly entered in acting under a Rule, the defaulting party seeks to set aside the judgment *ex debito justitiae* (as of right). But O1 r8 has the effect of giving the court the discretion to maintain the default judgment where the interests of justice would be served.

A default judgment obtained irregularly independent of the NCR ***must*** be set aside by the court as the proceedings are a nullity.

Judgment entered regularly

A judgment entered regularly is a judgment that has been entered in accordance with the NCR and, arguably, within the court's jurisdiction. Where there has been a regularly entered judgment there should arguably be that there is no question that the court had jurisdiction to enter the default judgment. The party in whose favour default judgment has been awarded has complied with all relevant rules and procedural laws.

There are a large number of cases that have consistently set out the considerations the court must take into account in setting aside regularly entered default judgments.[6] The matters that an applicant must show for the court to exercise its discretion to set aside a regularly entered default judgment are:

- there must be an affidavit stating facts showing a defence on the merits;
- there must be a reasonable explanation why judgment was allowed to go by default; and
- the application to set aside the default judgment must be made promptly and within a reasonable time.

There is judicial commentary that the first consideration is the principal consideration[7], but it seems quite settled that a court is to take into account the other factors to determine whether, in the interest of justice, the default judgment can be set aside. In other words, no one criteria is given precedence over the other. However, it is essential that there exists a defence on the merits. Even though a party may be able to establish a defence on the merits, a delay in bringing the application to have a default judgment set aside without reasonable excuse or no reason for letting a matter go into default will likely result in the court refusing the application.

Judgment entered irregularly in acting under a rule

A judgment can be entered irregularly under the NCR in non-compliance with a rule or court procedure. The irregularity normally occurs where the party seeking the default judgment has made an error in complying with the NCR prior to seeking the default judgment, which in turn, may have resulted in the other party being in default.

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[6] See *Green & Co. Pty Ltd v Green* [1976] PNGLR 73; *Barker v The Government of Papua New Guinea & Ors* [1976] PNGLR 340; *The Government of PNG & Davis v Barker* [1977] PNGLR 386*; George Page Pty Limited v Malipu Bus Balakau* [1982] PNGLR 140; *Provincial Government of North Solomons v Pacific Architecture Pty Ltd* [1992] PNGLR 145; *Hannet and Hannet v ANZ Banking Group (PNG) Ltd* (1996) SC505*; Leo Duque v Avia Andrew Paru* [1997] PNGLR 378; *Smith v Ruma Constructions Ltd* (2002) SC695; *Totamu v Small Business Development Corporation* (2009) N3702 and *Yamanka Multi Services Ltd v National Capital District Commission* (2010) N3904.

[7] See for example *Tomatu v Small Business Development Corporation* (2009) N3702.

For example, a plaintiff may fail to effect proper service against the defendant, such as by personally serving the wrong representative of the defendant. If the respondent fails to file a defence in time, the court may still enter a default judgment. The default judgment entered is done so irregularly, but under the NCR. Notwithstanding the plaintiff's error under the NCR, the default judgment stands until such time that action is taken to set it aside.

Where the irregularity is because of non-compliance with a rule, O1 r8 has the effect of not invalidating the proceedings. Order 1 r8 provides:

> Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void, unless the Court so directs, but the proceedings may be set aside, either wholly or in part, as irregular, or may be amended or otherwise dealt with, in such a manner, and on such terms, as the Court thinks fit.

The courts have consistently found that because O1 r8 does not void any proceedings commenced in accordance with the NCR notwithstanding that a procedural error was made under the NCR, any consequent irregular default judgment can only be overturned in the circumstances provided by O1 r9. Order 1 r9 provides:

> An application to set aside any proceeding for irregularity shall not be allowed unless it is made within a reasonable time, or if made after the party applying has taken any fresh step with knowledge of the irregularity.[8]

For a judgment that has been obtained irregularly where the irregularity falls within O1 r8 of the NCR, the considerations for the court are:

- the applicant asking for the judgment to be set aside must show a defence on the merits (adopting the opinion of Greville-Smith J in *Page Pty Ltd v Malipu Bus Balikau*[9] that the practice in relation to judgments obtained regularly should apply to judgments obtained irregularly);
- the applicant must not have taken a fresh step in the proceeding with knowledge of the irregularity (a requirement of O1 r9);
- the application is made within a reasonable time (O1 r9); and,
- the several objections intended to be insisted on as to the irregularity must be stated in the notice of motion seeking to set aside the default judgment (O1 r10).

Where a party is aware that there is a procedural irregularity in the way proceedings have been brought against the State under the NCR (to meet the requirements of O1 r9) it is prudent for State counsel to:

- immediately bring a motion to have the matter set aside or struck out; and
- not proceed any further with the substantive matter until such time as the issue of the irregularity is resolved.

Judgment obtained irregularly independent of the Rules

In the *Hannet* case[10], the Supreme Court relied on the UK Court of Appeal decision in *Re Pritchard*[11] to arguably confine default judgments that are a nullity to circumstances where there was no ability for the proceedings to have been commenced by the plaintiff – for example, the plaintiff was dead or non-existent at the time of commencing the claim. In drawing this conclusion, the court emphasized the effect of O1 r8 of the NCR and the broad discretion to correct defective proceedings under the NCR.

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[8] See cases in n7.

[9] Supra.

[10] Followed by the National Court in *Yamanka* case, supra.

[11] See n5, supra.

The *Hannet* case does not clearly identify what circumstances amount to a nullity as opposed to an irregularity acting under the NCR. The court in *Hannet* quoted the minority judgment of Denning LJ in *Re Pritchard*, which is misleading as the leading judgment in *Re Pritchard* was that of Upjohn LJ (with Danckwerts LJ agreeing).

A real question is raised by proceedings that are infected with errors for non-compliance with a legislation that governs court procedure rather than the NCR. This is particularly the case for claims against the State, which are governed by both the *Claims By and Against the State Act* 1996 (CBASA) and the NCR. For example, a plaintiff may fail to effect proper service against the State in accordance with section 7 of the CBASA. This would also include matters where no notice has been given in accordance with section 5 of the CBASA), but default judgment has been entered. It is well settled that a section 5 notice is a condition precedent to the commencement of proceedings against the State.[12]

Other legislation can give rise to procedural errors in the commencement of proceedings where the action is commenced after the expiration of statutory limitations.[13] For example, a party may commence proceedings outside the statutory time limits dictated by section 16 of the *Frauds and Limitations Act*. Notwithstanding the statutory time limits, the party still has the ability to commence the proceedings in accordance with the relevant NCR. Even though the claim was brought outside the statutory time limits, the claim itself is still "alive". The defendant is entitled to either plead in a defence that the court had no jurisdiction because of the statutory time limit or make an application to strike out the matter on the basis that no reasonable cause of action was disclosed (again because of the statutory time limit). If the defendant fails to take either course of action, the court may enter default judgment in accordance with the NCR.

However, does the plaintiff's failure to comply with the statutory procedural requirements – that is, to make a claim before the statutory limitation - render the proceedings a nullity? It is arguable both ways. The claim itself was made within the NCR and if a default judgment is made within the NCR, it is arguably a regularly entered default judgment. However, it is also arguable that such a default judgment was made irregularly acting outside the NCR and contrary to a procedural law and is therefore a nullity. Due to the failure to file the claim within the statutory limitation, the proceedings should and could never be brought.

In the *Re Pritchard* case, Upjohn LJ distinguished between defects in proceedings which could and should be rectified by the court and those which were so fundamental that they made the whole proceedings a nullity. Upjohn LJ identified that the classes of nullity are:

- Proceedings which should have been served but have never come to the notice of the defendant at all (not including cases of substituted service, service by filing in default or where service has properly been dispensed with);
- Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; and
- Proceedings which appear to be duly issued but fail to comply with a statutory requirement.[14]

Based on Lord Upjohn's assessment of the classes of nullity, there are strong arguments that a plaintiff's failure to comply with a *statutory* procedural requirement (as opposed to a rule) renders the proceedings a nullity and the State should have a right to have any default judgment set aside.

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[12] *Tohian, Minister for Police and the State v Tau Liu* (1998) SC566. See also *Uriap v Tokivung* (2008) N3444 for an example of where the National Court dismissed proceedings because of the plaintiff's failure to file a section 5 notice. Similar arguments can be raised that the proceedings are a nullity and any default judgment entered must be set aside as of right.

[13] For example, section 16 of the *Frauds and Limitations Act* 1988 and section 84 of the *Workers' Compensation Act* 1978.

[14] *Re Pritchard case*, n5, supra, at pp523-524.

Assessment of Damages

If there are no arguments that can be raised for setting aside a default judgment, a party's task is to either:

1. negotiate down a reasonable settlement amount and make a recommendation to the Attorney-General to settle the matter by way of consent judgment; or
2. defend a trial on the assessment of damages.

Principles for assessing damages

The Supreme Court ruled in *Mel v Pakalia*[15] that where default judgment is granted, for damages to be assessed on a given set of facts *as pleaded* in a statement of claim, the evidence must support the facts *pleaded*. No evidence will be allowed in support of facts that are not pleaded. A party cannot obtain relief which has not been requested or sought in the pleadings.[16]

The Supreme Court's decision in the Mel case[17] sets out the following principles that apply to a trial on assessment of damages following entry of default judgment:

1. The judgment resolves all questions of liability in respect of the matters pleaded in the statement of claim. Once default judgment is entered, the facts *as pleaded* and their legal consequences in terms of establishing the cause of action *as pleaded* must be regarded as proven.
2. Any matter that has not been pleaded but is introduced at the trial is a matter on which the defendant can take an issue on liability.
3. The plaintiff has the burden to produce admissible and credible evidence of his alleged damages and if the court is satisfied on the balance of probabilities that the damages have been incurred, awards can be made for the proven damages.
4. A plaintiff is only entitled to lead evidence and recover such damages as may be pleaded and asked for in his statement of claim.

The Supreme Court also elaborated on these key principles with the following important considerations which may give rise to good arguments for limiting the State's liability or avoiding liability altogether:

1. The plaintiff has the onus of proving his or her loss on the balance of probabilities. It is not sufficient to make assertions in a statement of claim and then expect the court to award what is claimed. The burden of proving a fact is upon the party alleging it, not the party who denies it. If an allegation forms an essential part of a person's case, that person has the onus of proving the allegation.[18]
2. Corroboration of a claim is usually required and the corroboration must come from an independent source.[19]
3. The principles of proof and corroboration apply even when the defendant fails to present any evidence disputing the claim.[20]

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[15] (2005) SC790.

[16] See also *MVIT v Tabanto* [1995] PNGLR 214; *Waima v MVIT* [1992] PNGLR 254; *MVIT v Pupune* [1993] PNGLR 370; *Tabie Mathias Koim and 28 Others v The State and Others* [1998] PNGLR 247; *Pokau v Wettie* (2010) N4086.

[17] Adopting and expanding on the principles enumerated in *Coecon Ltd (Receiver/Manager Appointed) v National Fisheries Authority* (2002) N2182.

[18] See *Yooken Pakilin v The State* (2001) N2212.

[19] See *Albert Baine v The State* (1995) N1335, and *Kopung Brothers Business Group v Sakawar Kasieng* [1997] PNGLR 331.

[20] See *Peter Wanis v Fred Sikiot and The State* (1995) N1350.

4. The same principles apply after default judgment is entered and the trial is on assessment of damages – even when the trial is conducted ex parte. A person who obtains a default judgment is not entitled as of right to receive any damages. Injury or damage suffered must still be proved by credible evidence.[21]
5. If the evidence and pleadings are confusing, contradictory and inherently suspicious, the plaintiff will not discharge the onus of proving his losses on the balance of probabilities. It is conceivable that such a plaintiff will be awarded nothing.[22]
6. Where default judgment is granted, for damages to be assessed on a given set of facts as pleaded in a statement of claim, the evidence must support the facts pleaded. No evidence will be allowed in support of facts that are not pleaded.[23]
7. The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages. Where precise evidence is available the court expects to have it. However, where it is not, the court must do the best it can.[24]

When deciding on damages to be assessed, the affected party must produce primary evidence of injuries sustained, for example, hospital admission records and medical treatment records; information that will go towards determining the injuries sustained at the date of the accident and treatment rendered. It is not sufficient for a party to produce secondary materials, for example medical reports prepared some years after the incident describing injuries received at the date of the incident.[25]

Non-compliance with Rules as to pleading of damages

It is also important to note that Order 8 Division 2 of the NCR sets out the requirements for pleading particulars in certain circumstances. As regards particularising damages, O8 rr33 and 34 are the only rules that specify requirements for particularising damages and they relate to claims for damages in tort, or breach of statutory duty in respect of death or personal injuries (O8 r33), or a common law claim for damages relating to out of pocket expenses (O8 r34).

In addressing arguments that damages needed to be particularized when claimed in judicial review proceedings, the National Court in *Sausau v Kumgal* held that:

> Except as expressly stipulated in respect of specific type of cases in O8 Div. 2, there is no requirement for a person claiming damages in tort or contract to plead in a Statement of Claim particulars of damages. If such were intended, the rules would have expressly said so as is the case with r33 and r34. Particulars of damages are normally supplied in response to a request for particulars or upon order for particulars under r36, made upon application by a party or on the Court's own motion.[26]

Where a case falls within O8 rr33 and 34 and the plaintiff has failed to particularise his damages in accordance with the NCR, it is arguable that the plaintiff is not entitled to have those damages assessed. The exception to this is if the plaintiff can establish that they meet the circumstances of O8 r35(2), which removes the need for the plaintiff to plead particulars in the Amended Statement where:

- the necessary particulars of debt, expenses or damages exceed three folios;

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[21] See *Yange Lagan and Others v The State* (1995) N1369.
[22] See *Obed Lalip and Others v Fred Sikiot and The State* (1996) N1457.
[23] See the cases in n16, supra.
[24] See *Jonathan Mangope Paraia v The State* (1995) N1343.
[25] See *Pokau v Wettie*, supra. Note the pleading requirements for special damages as identified in *Papua New Guinea Banking Corporation (PNGBC) v Tole* (2002) SC694 (discussed below under "Special Damages").
[26] (2006) N3253.

- the necessary particulars of debt, expenses or damages have, before the date on which the pleading is filed, been given to the party on whom the pleading is required to be served; and
- the pleading shows the date on which the particulars were given.

Types of damages

There are five main types of damages that can be awarded:

- Nominal damages;
- Special damages;
- General damages;
- Aggravated damages; and
- Exemplary damages.

Nominal damages

The purpose of nominal damages is not to compensate the plaintiff, but to record the fact that their rights have been infringed. For example, a trespass to a person or trespass to property may not result in any loss or damage. As the plaintiff has not suffered any loss that requires compensation in such a case, it is inappropriate to award compensatory damages. The court awards a small, nominal sum as damages to record the fact that the defendant infringed the plaintiff's rights.

Special damages

Special damages are a form of compensatory damages. Special damages are awarded where monetary loss has been suffered and expenditure has actually occurred. Special damages compensate for losses that can be proved with relative precision. They are also referred to as liquidated damages because they are damages that are capable of arithmetic calculation.

The loss is only calculated up until the actual date of verdict and the loss must be able to be precisely calculated. For example, if a plaintiff is seeking damages in a civil claim as a result of being punched in the face by a police officer, the plaintiff may have had his or her glasses broken in the assault. If the glasses have been replaced by the time of the trial, the cost of the replacement glasses would be an item of special damage. Medical expenses incurred as a result of the assault would also fall within special damages that would be claimed. The plaintiff should be able to prove in evidence exactly how much money he or she has spent on replacement glasses or hospital or medical expenses between the assault and the date of the trial. If not, the defendant must argue that the award of special damages is nil. As observed by the Supreme Court in *PNGBC v Tole*:

> It is clear law that, where a plaintiff's claim is special in nature, such as a claim for loss of salaries or wages, they must be specifically pleaded with particulars. Unless that is done, no evidence of matters not pleaded can be allowed and relief granted. That is apparent from the judgements in the *James Pupune* and *John Etape* cases. These cases adopted and applied the principles enunciated in those terms in authorities such as *Ilkiw v Samuel* [1963] 2 All ER 879, per Diplock L J at pp. 980-891 and *Pilato v Metropolitan Water Sewerage and Drainage Board* (1959) 76 WN (NSW) 364, per McClemens J at 365. This follows in turn from the fact that, our system of justice is not one of surprises but one of fair play. Reasonable opportunity must be given to each other by the parties to an action to ascertain fully the nature of the other's case so that, if need be, a defendant can make a payment into court.

In the abovementioned case, the plaintiff pleaded that as a result of his unlawful termination, he had been deprived of salary, allowances and benefits, of which "particulars would be provided after discovery and prior to trial." The failure to properly plead the particulars of the special damages and consequently not amending the Statement of Claim prior to the entry of default judgment resulted in the court assessing damages of K0. The court held that:

> The onus remained with Mr Tole to properly plead and then prove what was in fact pleaded by way of damages. The moment he stepped outside the pleadings he went outside what was resolved by the default judgement. The Court in my view was therefore, left with only one of two options to take. The first was to proceed to assess damages and grant such relief as was properly pleaded for which default judgement was entered. The second was to allow an amendment to the pleadings and then adjourn the hearing to allow Mr Tole to notify PNGBC of the additional claims and give PNGBC the opportunity either to admit or deny liability for that….
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> It is the duty of a plaintiff to plead his claim with sufficient details or particulars. It is a breach of the Rules and it complicates claims unnecessarily by practices such as, was the one adopted by Mr Tole in paragraph 6 of his statement of claim. There he pleads in a way making it necessary for PNGBC to seek discovery or better particulars by pleading "*Particulars will be provided after discovery and prior to trial*." Such a pleading gives no advantage to a plaintiff, since he cannot add to his statement of claim without an actual amendment to his statement of claim. Also, such a pleading casts no onus or obligation on a defendant to clarify or enlarge a plaintiff's case and it simply has no foundation in the Rules.[27]

A default judgment can be entered against the State that specifies an amount of special damages only without proceeding to a separate trial for assessment of damages.[28] A default judgment against the State cannot have a mixed amount of special damages and also order the further assessment of other damages.[29]

For personal injuries or death cases, including medical negligence, by a public hospital or a trespass to a person (assault) by the police, O8 r33(1)(g) of the NCR requires the special damages claimed to be particularised. For claims involving money or a debt which has been paid or is liable to be paid, the details of the money paid or debts owing up to the date of the trial must be particularised in the plaintiff's Statement of Claim (O8 r34).

Where the NCR require damages to be particularised (per either or both O8 rr33 and 34 as relevant to the particular case), it is possible that if a plaintiff fails to particularise those damages in the pleadings, the court's discretion to award those damages is excluded.[30]

General damages

General damages are also a form of compensatory damages. Some losses do not lend themselves to exact arithmetic calculation, but must be assessed by a court. General damages are awarded to compensate for losses that cannot be proved precisely and include compensation for loss of amenities, pain and suffering and future economic loss. A court must take into account all of the relevant facts and circumstances in making an award of damages.

There are a number of categories of general damages:

- **Loss or damage to part of the body:** This may be serious, such as loss of a limb or paralysis, or may be less serious, such as a scar.
- **Loss of function or use of the body:** This may take the form of an inability to walk, climb stairs, the inability to have sexual intercourse, brain damage or loss of sight.
- **Pain and suffering:** This takes many forms, for example, muscle pain, back pain, arthritis, headaches, etc.
- **Psychological injury:** Compensation for this form of general damage is available pursuant to section 36 of the *Wrongs Miscellaneous Provisions Act*.
- **Loss of amenities:** This refers to a diminishment in one's ability to enjoy life. It can take many forms, for instance, the inability to sleep through the night, the inability to enjoy a

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27 See also the National Court's decision in *Horope v Baki and Ors* (2011) N4423.
28 See section 12(3) of the CBASA.
29 Compare O12 r31 of the NCR which applies to default judgments made against parties other than the State.
30 See the *Sausau v Kumgal case*, supra.

hobby, the loss of the enjoyment of playing a sport or the inability to drive a car because of the effects of an injury.

- **Loss of expectation of life:** Where an injury results in the loss of expectation of life, that may be taken into account in awarding general damages.
- **Future loss of income or ability to earn an income:** This is something that commonly results from physical injuries that leave a permanent disability. Even a partial diminishment of an ability to earn an income is compensable. This type of loss may result from business or employment.
- **Other losses which will be incurred in the future:** This may include the cost of rehabilitation, medical care or other expenses which the plaintiff will incur in the future as a result of the defendant's wrong. In *Dingi v Motor Vehicles Insurance (PNG) Trust*[31], a claim pursuant to the *Wrongs Miscellaneous Provisions Act* by parents for the wrongful death of their daughter, the court included an award for loss of expected bride price according to custom.

The main objective in assessing general damages is to put the plaintiff in the position they would have been in if the contract had not been breached or the tortious action had not occurred.[32] One of the principles noted in *MVIL v Kol* is that courts often make reference to awards of general damages in cases of a similar nature. A counsel will need to research cases dealing with similar injuries to the one he or she is dealing with to determine a range of appropriate compensation and to either challenge the plaintiff's claim for general damages or assist the court to make an award.

Aggravated damages

Aggravated damages are also a form of compensatory damages. Aggravated damages may be used to compensate for injury to the plaintiff's feelings such as for fear, indignity, humiliation or public disgrace. These may be awarded, for instance, where the actions of a defendant amount to an unprovoked assault. In *PNG Aviation Services Pty Ltd v Somare,*[33] the Supreme Court said:

> Aggravated damages differ from other types of damages and exemplary damages. They are not designed to punish a defendant or to act as a deterrent. They are compensatory in nature. There are the normal or ordinary compensatory damages but there are those which are aggravated: see *Rooks v Barnard* (1964) AC 1129. Lord Devlin in that case said an injury done to the plaintiff may be exacerbated by the conduct of the defendant, thereby attracting higher compensatory damages. Where the conduct of the defendant has been "high handed, malicious, insulting or oppressive" the award may be at the highest of the range "that could fairly be regarded as compensation."…Furthermore, aggravated damages are awarded where the defendant's conduct has lacked bona fides or is somehow improper or unjustifiable: See *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) CCH Australian Torts Reports Case No. 728 pp. 69,220….[In this case] the Court held that:
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> 1. Aggravated compensatory damages are awarded where either the circumstances of both the publication or the defendants conduct then or subsequently make the injury to the plaintiff worse.
> 2. They are usually only awarded in relation to the injury to the plaintiff's feelings, but may also be awarded in respect of conduct which has the effect of increasing injury to the plaintiff's reputation.
> 3. Conduct relevant to the issue of aggravated damages must be capable of amounting to conduct which was in some way unjustifiable, improper or lacking in bona fides.

[31] [1994] PNGLR 385.

[32] See the Supreme Court's discussion of the principles for assessing damages in *Motor Vehicles Insurance Limited v Kol* (2007) SC902. The assessment of general damages is often an imprecise "art".

[33] (2000) SC658

In considering an award for aggravated damages, the court must ensure that it does not duplicate elements of compensation contained in general damages. The assessment of the amount of aggravated damages is also done by looking at cases of a similar nature, taking into account the circumstances of the particular case.[34]

Exemplary damages

Exemplary damages are a form of punitive damages. They are to punish a defendant for high-handed disregard for the plaintiff's rights and to deter the defendant (and others) from repeating the action. The damages mark the condemnation of the court for the defendant's conduct.

Under section 12(1) of the CBASA, no exemplary damages may be awarded against the State unless it appears to the court that, regardless of the nature of the claim, there has been a breach of Constitutional rights so severe or continuous as to warrant an award of exemplary damages. Claims for exemplary damages against the State most often arise in claims involving the police, for example, where the plaintiff claims that the police raid was illegal. The courts have taken a consistent line in refusing to award these damages against the State[35].

In *Kolokol v Amburuapi,*[36] Cannings J, in the National Court said:

> Since the Supreme Court's decision in *Abel Tomba v The State* (1997) SC518, the courts have been reluctant to award exemplary damages against the State for abuse of police powers. The question to ask is whether the breach of the law by police officers is a technical breach or whether it involves a significant and unwarranted departure from the proper exercise of police powers eg where a police operation is unauthorised and individual police officers are not named as defendants. If the facts fit into the first category, exemplary damages may be payable by the State. If the facts fit into the second category of cases, exemplary damages are not payable by the State. A plaintiff is expected to seek such redress from the individual police officers who breached the law.

The exact same statement of the law was made again by Cannings J in the National Court case of *Kunnga v Independent State of Papua New Guinea*.[37] In *Pole v Independent State of Papua New Guinea*[38], the National Court said:

> As to the plaintiffs' claims for exemplary damages, the raids were unauthorised. Therefore, the raids were not done in the execution of the lawful duties of the six policemen. The State cannot be vicariously liable for those unlawful actions of the six policemen because they acted outside of their lawful duties.

Negotiated settlements

Where a State counsel conclude that the State is liable for a default judgment and that the matter should be settled, you must obtain the Attorney-General's instructions. If the counsel fails to get proper authority to settle a matter, he or she may be liable for disciplinary action under the *Public Services (Management) Act* 1995, which potentially includes dismissal. Deeds of settlement and consent orders permitting the applicant to enter a notice of discontinuance must not be agreed to

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[34] For the court's approach to awarding aggravated damages see *Kala v Kupo* (2009) N3677.

[35] Exceptions are *Lagan & 58 Ors v State* (1995) N1369 where Injia J. (as he then was) awarded, proportionate to the respective extent of loss, various amounts for each plaintiff ranging from K50, K200 and K300, and *Peter Kamane & 66 Ors v Police and State*, WS No. 233 of 1994 (unreported) where Kapi DCJ (as he then was) awarded K600 per plaintiff in exemplary damages. Both *Apa & Ors v Police & State* [1995] PNGLR 43 and *Lagan & 58 Ors v State* were decided prior to the Act coming into operation. In *Peter Kamane & 66 Ors v Police and State*, the award of exemplary damages was fixed by consent of the parties. Consequently, section 12(1) was never raised. Also, *Kim Pai v State* (2002) N2207 where Jalina, J awarded K5,000.00 as exemplary damages each for the plaintiffs in 2002. Kirriwom, J also awarded K2,000.00 as exemplary damages for each plaintiff in *Tony Wemin & or v State* (2001) N2134. In both cases the applicability of section 12(1) was not discussed - probably because it was not raised.

[36] (2009) N3571

[37] (2005) N2864.

[38] (2008) N3500. See *Able Tomba v The State* (1997) SC518.

unless the Solicitor-General acting on instruction from the Attorney-General agrees to that form of settlement.

Agreeing to enter into a deed of settlement (including without instruction from the Attorney-General) can be a breach of the *Public Finances Management Act* 1995 and offend the Supreme Court's rulings in *Polem Enterprise Ltd v Attorney General*[39]; *Independent State of Papua New Guinea v Gelu, Solicitor General*[40], and *National Capital District Commission v Yama Security Services Ltd*.[41]

In accordance with the decisions of the National Executive Council (NEC) in 2003 and 2006, **all settlements over K1 million** must be approved by the NEC. Any settlement below K1 million can be settled by the Solicitor-General with instructions from the Attorney-General. There are special rules for settling by way of Deed of Settlement.

Minute to the Attorney-General from the Solicitor-General recommending settlement

To arrange settlement, the State counsel must draft a minute for the Solicitor-General's signature to the Attorney-General recommending settlement. The minute should set out:

- the reasons why the default judgment cannot be set aside,
- what a reasonable assessment of damages would be; and
- what the terms of the settlement should be.

The counsel must attach to the minute the proposed consent judgment to be made by the court and a covering letter of settlement to the plaintiff. For lawyers from the Solicitor General's Office, to assist them to obtain instructions, a template minute is saved in the shared precedents folder on the J: drive. This includes a template covering letter and consent orders.

Form of settlement

All negotiated settlements should be by way of a consent judgment made by the court following the filing of consent orders signed by both parties. The only exception to this is where the State counsel must have express approval from the Solicitor-General and consequent instructions from the Attorney-General to settle by way of deed, release or some other agreement.

Consent orders

The consent orders must separate out any agreement as to an amount in payment of damages, pre-judgment interest and costs. Separating out the agreement as to these heads of payments is very important so that post-judgment interest can be calculated in accordance with the *Judicial Proceedings (Interest on Debts and Damages) Act* 1962.

Pre-judgment interest

Section 1(1) of the *Judicial Proceedings (Interest on Debts and Damages) Act* gives a court the discretion to award interest on an award of damages (commonly referred to as pre-judgment interest). Pre-judgment interest is to be distinguished from post-judgment interest, which is payable as of right where the State fails to make payment of a judgment debt in the time prescribed by section 3 of the *Judicial Proceedings (Interest on Debts and Damages) Act*.

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[39] (2008) SC911.
[40] (2003) SC716.
[41] (2005) SC835.

The court's power to award pre-judgment interest is discretionary, and the discretion should be exercised only where the plaintiff has been kept out of money which ought to have been paid to him.[42] The discretion should not be exercised automatically by analogy with the normal rule that costs follow the event.[43]

As it is a discretion of the court in its assessment of damages payable, it is not appropriate nor in the State's interest for negotiations between the parties to be made on what pre-judgment interest could be awarded by the court. No settlement should be agreed to that includes a sum of pre-judgment interest without approval from the Attorney-General, which will need to be justified and explained through a written minute.

The base position for all settlements by the State is that an award of pre-judgment interest is a statutory discretion for a court and is not for the parties to negotiate. If the plaintiff wants to pursue a claim for pre-judgment interest, it will need to proceed to trial on assessment of damages. The State will seek to rely on any settlement offer it makes to dispute an award of costs (see Calderbank offers below).

Covering letter of settlement

The consent orders should be attached to a covering letter of settlement to the plaintiff. The letter of settlement to the plaintiff should succinctly put the State's offer to the plaintiff. Do **not** provide a detailed explanation for why the State is making the offer as it is (that is, do not go into the detail in the Solicitor-General's minute to the Attorney-General). To include those details risks waiving the State's right to claim legal professional privilege should settlement negotiations fail.

Calderbank offer

The covering letter of settlement must be in the form of a Calderbank offer and have "Without Prejudice Save as to Costs" at the top of each page. "Without Prejudice" communications between lawyers cannot normally be admitted into court. The exception is where a party has made a settlement offer on a "Without Prejudice" basis but has expressly identified in the offer that should the offer be rejected, the fact of the settlement offer may be used in court to dispute an award of costs.

These principles are derived from the English case of *Calderbank v Calderbank* [1976] Fam 93 and settlement offers in these terms are commonly referred to as "Calderbank offers". A Calderbank offer means that the court considers the offer as relevant to costs after the substantive issues are resolved. It is relevant only where the terms of the offer are more favourable or equal to what the successful party was awarded in a judgment. Any additional costs incurred after the rejection of the offer can be ordered ***against*** the ***successful*** party. A typical order would be that the unsuccessful party pay the costs up to the date of the offer and the costs incurred subsequently be paid by the other party.

The Calderbank principle has been adopted into PNG law in the case of *Kapi v Pacific Helicopters*.[44] The policy behind this is to encourage early settlement of matters. The principle is very important for the State in terms of reducing the award of costs made against it and potentially arms State counsel with good arguments for why an award of costs should be limited, if a settlement offer had been made by the State earlier in the proceedings, but rejected by the plaintiff's lawyers.

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[42] *London, Chatham and Dover Railway v The South Eastern Railway Company* [1893] AC 429 at 437 applied in *Jefford v Gee* [1970] 2 QB 130.

[43] *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741.

[44] (2002) N2275.