

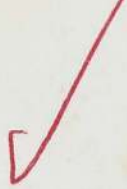
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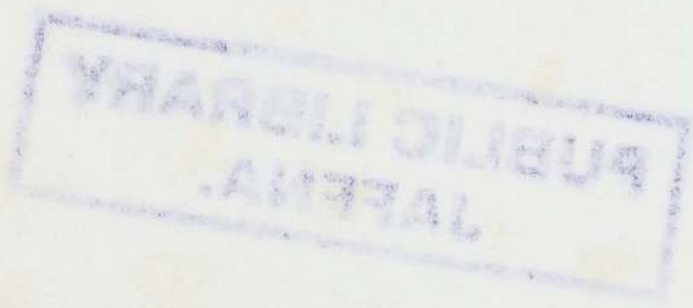
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**THE
LAWYER'S
HAND BOOK**



BY

KALINGA INDATISSA



THE
LAWYER'S
HAND BOOK

BY
KALINGA INDATISSA

Published by:
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No. 65, Station Road,
Mount Lavinia,
Sri Lanka.
Tel: (94)-1-738155
e-mail: kalinga@eureka.lk



First Published: 1999

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ISBN 995-97767-1-1

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OTHER BOOKS BY THE AUTHOR

1. Digest of Case Law on Section 66 of the Primary Courts Procedure Act 1986
2. Digest of Case Law on the Forest Ordinance 1987
3. Digest of Case Law on Bail 1989
4. Law Relating to Bail in Sri Lanka 1997
5. Handbook on Criminal Drafting 1999
6. Civil Procedure in Sri Lanka – Volume I 2000
7. Role of a Provincial High Court 2000



*Dedicated to the Memory
of
Mr. S. Shanmugalingam
(Shan)
Former Registrar of
Sri Lanka Law College*

*Who dedicated more than 50 years
of his life
For the Institution*

Message from the author

Unlike in other jurisdictions, in Sri Lanka, handbooks, which assist the practitioners and students of Law, are very rare. A young entrant to the profession would be compelled to seek assistance from their colleagues who too may not be able to assist such an entrant offhand.

In 1997-1998 when I functioned as the Chairman of the Junior Bar Committee of the Bar Association of Sri Lanka, a booklet was published called a "Hand Book for a New Entrant" this was handed over to all those young Attorneys who were admitted to the Bar in 1997.

I had an encouraging response from the senior members of the Bar and the juniors who requested me to develop on the booklet. "The Blue Book" comes out as a result of such encouragement.

I take this opportunity to thank Hon. Sarath Silva (PC) the Attorney General who has been my mentor and a sincere friend of the Bar through its good and bad times. I thank him for his guidance from time of my student days at the Law College. I also thank Mr. Upali Goonaratne the President of the BASL (1999-2000) for his support.

I also thank Mr. Saman de Silva, Mr. Ruwan Pathirana, Mr. Viraj Premasinghe, Mr. Lalith Abeysiriwardena, Mr. Sandun Gamage, Ms. Gaya Jayalath, Mr. Lahiru Senaratne, Ms. Anusha Nandasena, Ms. Chammika Dayaratne, Mr. Sampath Hewapathirana, Mr. Mahin Wijesekera, Ms. Sudeshna Ranmuthugala, Mr. Dinoo Dharmaratne, Mr. Chameel Perera, Mr. Muditha Abeyratne, Ms. Lasanthi Daskon, Ms. Subhashini Dissanayake, Ms. Geethani Wijesinhe, Mr. Sampath Warnapala Attorneys –at –Law and Ms. Dinusha Ratnasinhe, Ms. Anjali Wijayasinhe, Ms.

Taniya Goonesekera and Ms. Sandra Ebert, apprentices who assisted me in the publication of this book. I also wish to thank my wife Samantha for all her encouragement and tolerance.

The material contained in this book would only operate as guideline and the contents are by no means exhaustive.

*No. 65 1/1, Station Road
Mount Lavinia*

*Kalinga Indatissa
(Attorney-at-Law)*

PREFACE TO THE SECOND EDITION

The First Edition to the Handbook was published in 1999. It was well received by my colleagues in the profession and by the law students. Almost all the copies were sold out within a few months.

I was encouraged to bring out the Second Edition mainly due to the positive response I had from the members of the profession. The Second Edition comes out in a different style. I have attempted to separate the general areas relevant to the profession from the specific areas of expertise.

I am thankful to those attached to my chambers for assisting me in the publication of the Second Edition. I wish to thank Mr. Sanath Perera, Ms. Lasanthi Daskon, Mr. Chameel Perera, Mr. Ranil Samrasooriya, Ms. Geethani Wijesinghe, Mrs. Dinusha Perera, Mr. Indika Karunajeewa, Mr. Rasika Weeratunga, Mr. Sampath Mendis, Miss. Niluka Weragoda, Mr. Seevali Delgoda, Miss. Dilini Wimalsekera, Mr. Shanaka Amarasinghe, Mr. Miran Fernando Attorneys-at-Law for their efforts.

I also thank Mr. Asanga Boderagama, Miss. Upamalika Liyanage and Miss. Ashran Akbar apprentices for their assistance.

I also thank Ms. Sanara de Soysa for her contribution.

I welcome any criticism relating to the contents of this book.

Kalinga Indatissa

July 2003

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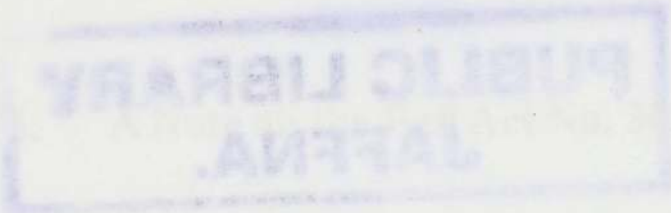
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THE PROFESSION



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Chapter 1

GENERAL

THE PROFESSION

The Legal Profession is one which has developed over the last several years based mainly on the traditions which have been accepted through generations. The history of the Legal Profession in Sri Lanka, as it is known today, dates back to 1801. The profession in our country has been greatly influenced by British concepts and traditions.

Unfortunately, a large number of the members of the profession have noted a serious decline in the standards and the ethical concepts relating to the profession. The reason appears to be lack of knowledge on the part of those who join the profession as “new entrants”. The objective of this chapter is to highlight some of the good practices in the legal profession.

1.1 SOME HINTS TO BECOME A SUCCESSFUL PRACTITIONER

1. Face any situation with confidence.
2. Develop the habit of reading.
3. Treat clients with respect.

4. Treat every brief alike irrespective of the fee.
5. Be self disciplined.
6. If you are faced with a problem you have not experienced before, ask senior practitioners.
7. Respect the traditions of the bar. Do not question traditions
8. Develop the ability to draft.
9. Develop the ability to speak.
10. Do not become emotionally or personally involved in the problems of the client.

1.2 YOUR DUTIES

1. TOWARDS THE CLIENT

- Give a full hearing to the client.
- Do not discuss matters revealed to you by the client with anyone else.
- See Sections 126 and 127 of the Evidence Ordinance.
- Do not hesitate to tell the client that his case is weak when even it is so.

- Do not promise the client that you would somehow get the judgment in his favour.
- Inform the client that your fee is not for the outcome of the case.

2. TOWARDS COURT

- Remember that you are an Officer of the Court.
- Do not mislead Court.
- Respect the Judge and the Judiciary as an institution.
- Do not turn your back to court.
- Do not interrupt the Judge if he is talking.
- See the Judge in his Chambers if you have a problem, which you cannot discuss in court. However, it may be unethical to discuss the facts of a case if the opposing Counsel is also not present in the Chambers.
- Be properly attired.
- Be respectful when addressing court.
- Never leave the court empty. If you are the last lawyer at the bar table remain seated until court adjourns.

3. TOWARDS THE PROFESSION

- Do not pass personal remarks at the opposing Counsel.
- Do not get involved in cross talk with him.

- Offer your seat to the seniors if you find them standing.
- Do not disturb him when he is on his feet.
- Do not criticize the opposing counsel or the judge before the client.
- Respect the senior members of the Bar.

1.3 ATTIRE

1. See Supreme Court Rules (Conduct of and Etiquette for Attorneys-at-Law) 1988, Published in Gazette Extraordinary No. 535/7 of 7/12/1988.
2. Please see Attire of Judges and Attorneys-at-Law, Rules published in the Gazette Extraordinary No. 1/4 dated 7/09/1978.
3. Try to comply with the dress code stipulated under the provisions of the said Gazette.
4. If you have to represent your client outside Courts such as at an inquiry at a Police Station etc. ensure that you are properly dressed and sport a tie.

1.4 ADDRESSING COURT

Language that is used in Court is an art in its own right. Please keep the following matters in mind;

1. If you are addressing an Arbitrator or an Inquiring Officer exercising Statutory Powers please address him as “SIR”.
2. Magistrates and District Judges are to be addressed as “YOUR HONOUR” or “SIR/MADAM”.
3. It would be appropriate to address the Judges of High Court as “YOUR HONOUR” or “YOUR LORDSHIP”.
4. Judges of the Supreme Court and the Court of Appeal have to be addressed as “YOUR LORDSHIPS” or “MY LORDS”. In the event of a female judge the correct term would be “Me Lady” or “My Lady”.

1.5 A FEW POINTS TO REMEMBER WHEN YOU ARE IN COURT

1. Respect the Court and the fellow Practitioners.
2. Offer your seat to a Senior Practitioner if you find him standing.
3. When your case is called, make sure your coat is buttoned before you commence addressing court.
4. Address court clearly.
5. State your case clearly and in a concise form.
6. Never let your client or witness approach the Bar Table.

7. Never have a casual attitude while addressing court. Eg:
Hands in pockets.
8. Read your brief thoroughly before going to court (even on a calling date)
9. Do not disturb the Judge and your opposing counsel when they are talking.
10. If the opposing counsel disturbs you, politely remind him that you are on your feet and that you have not finished.
11. Never turn your back to court.
12. Never leave the court empty if you are the last lawyer at the Bar Table.
13. Be polite but fearless.
14. Be ready with a photocopy of every judgment that you may cite in the course of your submissions. This copy is to be handed over to the court.
15. Do not disturb the Court.
16. Do not encourage touting.

1.6 YOUR RIGHT TO APPEAR IN COURT AND REPRESENT THE CLIENT

Please read the following Provisions.

1. Article 13(3) of the Constitution.
2. Section 41 of the Judicature Act No. 2 of 1978.
Section 191, 193, 260, 393 and 400 of the Code of Criminal Procedure Act, No. 15 of 1979.

12. YOUR RIGHT TO APPEAR IN COURT UNASSISTED
THE CLIENT

1. Read your brief carefully and know what you are doing. Please read the following provisions:
A. Article 13(3) of the Constitution
B. Section 41 of the Judicature Act No. 2 of 1978
C. Section 191, 193, 200, 202 and 400 of the Code of Criminal Procedure Act, No. 15 of 1979.
2. If you are unable to read, you must have someone to read to you.
3. If you are unable to write, you must have someone to write for you.
4. Never leave the court empty if you are the last lawyer at the Bar Table.
5. Be polite but firm.
6. Be ready with a number of every judgment that you may cite in the course of your submissions. This duty is to be handed over to the clerk.
7. Do not drink or smoke.
8. Do not engage in any other activity during the trial.



IMPORTANT STATUTES FOR A
GENERAL PRACTITIONER

IMPORTANT STATUTES FOR A GENERAL PRACTITIONER

The following Acts are the ones which are in force in Ceylon. Generally the general provisions of every Act is applicable upon a field of their province. The following amendments have been introduced to the following Act from time to time:

- 01) Act No. 27 of 1929
- 02) Act No. 31 of 1931
- 03) Act No. 25 of 1932
- 04) Act No. 38 of 1933
- 05) Act No. 30 of 1933
- 06) Act No. 16 of 1939
- 07) Act No. 29 of 1951
- 08) Act No. 20 of 1951
- 09) Act No. 27 of 1958
- 10) Act No. 22 of 1959

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IMPORTANT STATUTES FOR A
GENERAL PRACTITIONER



Chapter 2

IMPORTANT STATUTES FOR A GENERAL PRACTITIONER

1. The Judicature Act No. 2 of 1978

The Judicature Act spells out the powers of the courts in Sri Lanka. Generally the general jurisdiction of every court is ascertainable upon a perusal of these provisions. The following amendments have been introduced to the Judicature Act from time to time;

- 01) Act No. 37 of 1979
- 02) Act No. 71 of 1981
- 03) Act No. 35 of 1983
- 04) Act No. 36 of 1983
- 05) Act No. 50 of 1985
- 06) Act No. 16 of 1989
- 07) Act No. 29 of 1991
- 08) Act No. 30 of 1991
- 09) Act No. 27 of 1998
- 10) Act No. 27 of 1999

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2. **The Primary Courts Procedure Act No. 44 of 1979**

3. **The Code of Criminal Procedure Act No. 15 of 1979**

As amended by;

- 01) Act No. 36 of 1979
- 02) Act No. 68 of 1979
- 03) Act No. 52 of 1980
- 04) Act No. 39 of 1982
- 05) Act No. 49 of 1985
- 06) Act No. 11 of 1988
- 07) Act No. 12 of 1988
- 08) Act No. 13 of 1988
- 09) Act No. 21 of 1988
- 10) Act No. 15 of 1989
- 11) Act No. 12 of 1990
- 12) Act No. 4 of 1993
- 13) Act No. 4 of 1995
- 14) Act No. 20 of 1995
- 15) Act No. 19 of 1997
- 16) Act No. 28 of 1998
- 17) Act No. 47 of 1999
- 18) Act No. 12 of 2002

4. **The Civil Procedure Code**

As amended by;

- 01) Act No. 53 of 1980
- 02) Act No. 79 of 1988
- 03) Act No. 2 of 1990
- 04) Act No. 6 of 1990
- 05) Act No. 9 of 1991
- 06) Act No. 6 of 1993
- 07) Act No. 14 of 1993
- 08) Act No. 11 of 1995
- 09) Act No. 12 of 1996
- 10) Act No. 14 of 1997
- 11) Act No. 38 of 1998
- 12) Act No. 34 of 2000
- 13) Act No. 20 of 2002

5. **The Constitution**

The Constitution will spell out the powers of the Supreme Court and Court of Appeal. Article 154P would indicate the powers of the Provincial High Courts.

6. **High Court of the Provinces (Special Provisions) Act No. 19 of 1990**

7. **Gazette Notifications issued under the Judicature Act**

The following Gazette Notifications have been issued since 1979;

- 01) Gazette No. 43/3 dated 02/07/1979
- 02) Gazette No. 716/5 dated 26/05/1992
- 03) Gazette No. 849/8 dated 14/12/1994
- 04) Gazette No. 892/9 dated 10/10/1995
- 05) Gazette No. 945/2 dated 15/10/1996
- 06) Gazette No. 973/10 dated 01/05/1997
- 07) Gazette No. 1025/12 dated 30/04/1998
- 08) Gazette No. 649/2 dated 11/02/1991
- 09) Gazette No. 785/21 dated 25/09/1993
- 10) Gazette No. 885/2 dated 21/08/1995
- 11) Gazette No. 1013/17 dated 06/02/1998

8. The Penal Code

As amended by;

- 01) Act No. 32 of 1991
- 02) Act No. 22 of 1995
- 03) Act No. 29 of 1998
- 04) Act No. 12 of 2002

9. The Evidence Ordinance No. 14 of 1895

- 01) Act No. 33 of 1995
- 02) Act No. 32 of 1999

10. **The Evidence (Special Provisions) Act No. 14 of 1995**
11. **The Notaries Ordinance No.01 of 1907**
12. **The Industrial Disputes Act No. 43 of 1950**

As amended by;
Act No. 12 of 1983
13. **Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971**

As amended by;
Act No. 51 of 1988
14. **Workmen's Compensation Ordinance No. 19 of 1934**

As amended by;
Act No. 15 of 1990
15. **High Court of the Provinces (Special Provisions) Act, No 10 of 1996.**

RECOMMENDED COLLECTION OF BOOKS

1. Legislative Enactments of Sri Lanka - Unofficial Edition (1980).
2. The New Law Reports.
3. The Sri Lanka Law Reports.
4. The Ceylon Law Weekly.
5. Digest of the New Law Reports - J. Ajantha Coorey.
6. Digest of the Code of Criminal Procedure - J. Ajantha Coorey.
7. Digest of the Civil Procedure Code - J. Ajantha Coorey.
8. Digest of the Evidence Ordinance - J. Ajantha Coorey.
9. The Supreme Court of Sri Lanka, the first 185 years - Dr. A.R.B. Amarasinghe.
10. Professional Ethics - Dr. A.R.B. Amarasinghe.
11. Digest of the Sri Lanka Law Reports - M.H.M Hussain.

For a Criminal Practitioner;

1. Archbold on Criminal Pleadings, Evidence and Practice.
2. Criminal Procedure - Ratnalal and Dhirajlal.

3. Gour on the Penal Law of India.
4. A Complete Digest of case Law under the Criminal Procedure Code of Ceylon - E.P. Wijetunge.
5. A Complete Digest of case Law under the Penal Code - E.P. Wijetunge.
6. Commentary on the Criminal Procedure Code - R.F Dias.
7. Offences under the Penal Code - G.L Peiris.
8. Criminal Procedure in Sri Lanka - G.L Peiris.
9. Law of Crimes - Ratnalal and Dhirajlal.
10. General Principles of Criminal Liability - G.L Peiris.
11. Handbook on Criminal Drafting - Kalinga Indatissa.

For a Civil Practitioner

1. Civil Procedure in Ceylon - E.B. Wickramanayake.
2. Civil Procedure in Ceylon - K.D.P. Wickremesinghe.
3. Case Law on Civil Procedure - Wijedasa Rajapakse.
4. Law of Property in Sri Lanka - Wijedasa Rajapakse.

5. The Law of Delict - R.G. McKerron.
6. Law of Contracts - C.G. Weeramanthry.
7. Law Relating to Civil Procedure in Sri Lanka – Kalinga Indatissa.
8. Law of Property in Sri Lanka - G. L. Pieris.

Books on Evidence

1. The Law of Evidence - E.R.S.R. Coomaraswamy.
2. Sarkar on Evidence.
3. Monir on Evidence.
4. The Law of Evidence - Ratnalal and Dhirajlal.
5. Benchbook on Evidence.
6. Cross on Evidence.

Law Dictionaries

1. Black's Law Dictionary.
2. Stroud's Judicial Dictionary.
3. Law Lexicon of British India.



4. Wharton's Law Lexicon.

Interpretation of Statutes

1. Bindra on Interpretation.
2. Maxwell on Interpretation.

Administrative Law

1. Administrative Law - Wade and Forsythe.
2. Chaudry on the Law of Writs.

Fundamental Rights

1. Fundamental Rights in Sri Lanka - Justice S. Sharvananda.
2. Decisions of the Supreme Court of Sri Lanka.
3. Fundamental Rights – Dr. Jayampathy Wickramaratne.

Cross Examination

1. Aiyar and Aiyar on Cross Examination.
2. Malik on Cross Examination.



4	Winson's Law Edition	4
5	Interpretation of Statutes	5
6	Law of Contract - C. J. Vinogradoff	6
7	Law of Property in Sri Lanka - G. L. Peiris	7
8	Maxwell on Interpretation	8

<u>Administrative Law</u>		
1	Administrative Law - Wade and Forsyth	1
2	Chandry on the Law of Writs	2
3	Administrative Law - C. J. Vinogradoff	3
4	Administrative Law - Wade and Forsyth	4

<u>Fundamental Rights</u>		
1	Fundamental Rights in Sri Lanka - Justice S. Shimvendra	1
2	Decisions of the Supreme Court of Sri Lanka	2
3	Fundamental Rights - Dr. Jayampathy Wickramaratne	3
4	Fundamental Rights - Justice S. Shimvendra	4

<u>Cross Examination</u>		
1	Atiyas and Atiyas on Cross Examination	1
2	Atiyas and Atiyas on Cross Examination	2
3	Atiyas and Atiyas on Cross Examination	3

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HANDLING A CASE

1. Interview the complainant and get a clear picture of the facts of the case.
2. Check the facts of the case.
3. Collect all documents.
4. Get the names of the witnesses.
5. Check what provisions of the law apply to the case.
6. Draw up a charge sheet and file it.
7. Specify witnesses and their statements.
8. Advise the complainant of the next steps.

Important material to collect / questions to ask at a consultation in a divorce case

1. Marriage Certificate
2. Birth Certificates of children if any
3. In the case where the cause of action is adultery - letters, photographs or other documents in proof of same.

HANDLING A CASE

Chapter 3

HANDLING A CASE

Meeting the Client / Consultation / Conference

1. Let him do the talking.
2. You do the listening.
3. Where you feel that he is going out of track, cut him short with polite questions.
4. Collect all instructions.
5. Collect all documents.
6. Get the instructions in writing.
7. Check what position the other party could take.
8. Witnesses – Collect names and address.
9. Specific incidents – Collect information.
10. Ascertain the capacity to pay.

Important material to collect / questions to ask, at a consultation in a Divorce case

1. Marriage Certificate.
2. Birth Certificates of children if any.
3. In the case where the cause of action is adultery – letters, photographs or other documents in proof of same.

4. Police complaints, if any.
5. Complaints to other authorities – Grama Sevaka etc.
6. Proof of Defendant's income.
7. Medical Reports-in case of cruelty.
8. Bank Account, Income tax extracts.

Question on the following areas

1. What does the client want, Divorce only? Divorce and Custody? Access?
2. Instructions in writing?
3. Cause of Action? Detailed evidence.
4. Can the other party make any allegations against you?
5. Income of the client? Financial stability?
6. About the children – Age, School, With whom are they?
7. Maintenance Action filed?
8. Other factors – adultery etc.
9. Incidental applications, Custody, Access, Alimony, Alimony pendente lite, Security for costs.

Important factors to be considered at a consultation in a contract case.

1. Nature of business of the Plaintiff and Defendant.
2. Details about previous transactions.
3. What was the contract about?
4. Undisputable areas – Contract price etc. Suitability?
5. Total contract price?
6. Contract in writing or oral?
7. What are the conditions?
8. Has the Plaintiff satisfied all the obligations?
9. Has the defendant a liability to pay?
10. Arbitration Clauses?
11. Nature of damages.
12. Documents necessary;
 - a) Contract
 - b) Novation of a Contract
 - c) Correspondence between parties
 - d) Claims forwarded by the parties

Important factors to be considered at a consultation in an accident case.

1. Owner/Driver of the vehicle?
2. Place of Accident?
3. Vicarious liability.
4. Date of Accident?
5. Damages/ General/Special?
6. Loss suffered?
7. Injuries?
8. Loss of employment?
9. Notice under Section 106 M. T. A.
10. Insurance?
11. Proceedings in the Magistrate Courts.

RULES OF PROCEDURE

Important factors to be considered as a guide in the following cases.

1. Owner/Driver of the vehicle?
2. Place of Accident?
3. Vicarious liability?
4. Date of accident?
5. Damages Claimed/Specified?
6. Loss suffered?
7. Injuries?
8. Loss of employment?
9. Notice under Section 106 M. T. A.
10. Insurance?
11. Proceedings in the Magistrate Courts

RULES OF PROCEDURE



Chapter 4

RULES OF PROCEDURE

A successful lawyer ought to know the important procedural provisions well.

4.1 CIVIL PROCEDURE CODE

1. Regular Actions

- Requirements of a Complaint – Sections 33, 39-51.
- Service of Summons – Sections 55-71.
- Filing of answer – Sections 72-78.
- Replication – Section 79.
- Trial – Sections 80-83
- Lists of Witnesses and Documents – Sections 121 and 175
- Admissions and Issues – Sections 146-149
- Appeals – Section 753 onwards

Case Law;

- 1) **Achchikudy vs. Krishnar 69 NLR 520**
- 2) **Arunachalam vs. Ramanathan 9 SCC 190**
- 3) **Botheju vs. Rajanadan 1986 1 CALR 385**

- 4) **DFO vs. Sirisena 1990 1SLR 44**
- 5) **Blue Diamond vs. Rotterdam Bank MV. 1993 2SLR 249**
- 6) **Deerasooriya vs. Van der Pooten 63 NLR 226**

2. Summary Actions

- Requirements of a Petition – Sections 373-374
- Oral evidence where necessary – Section 376
- Order Nisi – Section 377(a)
- Order Interlocutory – Section 377(b)
- Default of Respondent in appearing – Section 383
- Proper Trial – Sections 384-385

3. Summary Procedure on Liquid Claims

- Filing of Complaint – Section 703
- Leave to Appear and Defend – Section 704
- Leave to Appear and defend obtained – Section 706
- Leave refused – Section 704(1)

Case Law;

- 1) **CW Mackie vs. Translanka Investments 1995 2SLR 6**
- 2) **Fernando vs. Ceylon Petroleum Corporation 1997 1SLR 141**
- 3) **Amarasekara vs. Amarasinghe 1998 3SLR 253**
- 4) **Anamalai vs. Allien 2 NLR 25**
- 5) **Rengasamy vs. Pakeer 14 NLR 190**

4.2 SPECIAL AREAS

1. EXPARTE TRIALS

- Section 84-88 of the Civil Procedure Code.
- Papers to be filed to vacate an ex-parte order:- Petition and Affidavit
- Time limit:- Within 14 days of the service of the ex-parte judgment.

2. ACTIONS DISMISSED ON DEFAULT OF APPEARANCE BY PLAINTIF

- Sections 84-88 of the Civil Procedure Code
- Papers to be filed to vacate an Order of dismissal :
Reasonable time
- No Appeal lies

Case Law;

- 1) **Fernando vs. Ceylon Breweries 1998 3SLR 61**
- 2) **Wimalawathie vs. Thotamuna 1998 3SLR 1**
- 3) **Sirimavo Bandaranaike vs. Times of Ceylon 1991 1SLR 263**
- 4) **ABN Amro Bank vs. Canmix 1996 1SLR 8**
- 5) **Rajasingham vs. Seneviratne 1995 2SLR 69**

3. INJUNCTIONS

- See Sections 662-669 of the Civil Procedure Code. Also see Section 54 of the Judicature Act No. 2 of 1978.

4. AMENDMENT OF PLEADINGS

- Section 93 of the Civil Procedure Code

Case Law;

- 1) **Don Alwis vs. Village Committee Hiripitiya 54 NLR 225**
- 2) **Bank of Ceylon vs. Ramasamy 1986 1 CALR 481**
- 3) **Grindlays Bank vs. Mckinnon Mckenzie 1986 2SLR 276**

- 4) **Audiappan vs. Indian Overseas Bank 1995 2SLR 131**
- 5) **Gunasekara vs. Abdul Latiff 1995 1SLR 225**
- 6) **Colombo Shipping Company vs. Chirayer Clothing Ltd. 1995 2SLR 97**

4.3 CODE OF CRIMINAL PROCEDURE ACT, NO. 15 OF 1979

1. Non Summary Procedure – Sections 145-156
2. Summary Trials Procedure – Sections 182-191
3. Non Jury Procedure – Sections 196-203
4. Jury Trials Procedure – Sections 204-254

4.4 PRIVATE PLAINTS

Section 136(1) (a) of the Code

1. The Complaint must set out the nature of the violation.
2. Charge Sheet must be filed with the Complaint.
3. It has to be signed by the complainant and where drawn up by a pleader the pleader must countersign it.

CASE LAW

1. **Khan Vs. Sinnethamby 1938 3 CLJ 201**
2. **Sediris Vs. Judris 3 NLR 121.**
3. **Fernando Vs. Cornelis Appu 5 CWR 293**
4. **Abey Suriya Vs. Jayasekera 22 NLR 377**
5. **Malani Gunaratne Vs. Abeysinghe 1994 3 SLLR 196.**

Note - Section 135 (1) (F) repealed by Act No. 12 of 2002

CIVIL PROCEDURE

WARRIOR

1. N. Hanu V. State 1938 3 C.L.J. 201

2. Debraj Ch. Jaiswal 1 N.L.R. 221

3. P. Srinivas V. State 1951 1 C.L.J. 177

CIVIL PROCEDURE

4. Abeyaratne V. Jayaratne 22 N.L.R. 377

5. Madag. Government V. Abeyaratne 1994 3 S.L.R. 156

Note - Section 135 (1) (F) repealed by Act No. 12 of 2002

Chapter 5

CIVIL PROCEDURE

The following statutes govern the procedure in respect of Civil Litigation:

- (01) Civil Procedure Code.
- (02) Primary Courts Procedure Act, No. 44 of 1979.
- (03) Mediation Boards Act, No. 72 of 1988.
- (04) Arbitration Act, No. 11 of 1995.

The CPC regulates the procedure in the District Court. Mainly, there are two (2) types of procedures that are adopted and followed by the District Courts. They are:

- (01) Regular Procedure.
- (02) Summary Procedure.

In addition, Section 703 of the CPC introduces a special remedy available to a party whose claim is a liquid claim and arising out of a Bill of Exchange, Promissory Note or similar instrument. 703 Procedure should not be compared with the Summary Procedure as that would lead to confusion.

For a litigant to go before Court and invoke its jurisdiction there ought to be a “cause of action” accrued in his favour. This term is defined in Section 5 of the CPC.

Once a litigant feels that another person has violated his civil rights he could file an action within the meaning of Section 5 of the CPC.

At the point of instituting an action the following matters have to be borne in mind;

- (a) Identification of the of the cause of action.
eg: Whether it is Contractual or Delictual etc.

- (b) Identification of the Court where the action has to be filed (territorial jurisdiction) see Section 9.

- (c) Identification of the prescriptive period.
eg: Divorce : no prescriptive period.
Custody : no prescriptive period.
Accident : two (2) years.
Damages : two (2) years.
Oral Agreement : three (3) years.
Written Contract : six years (6) years.
Sale of Goods : one (1) year.

- (d) Identification of the parties to a suit.
eg: (a) whether the Plaintiff is a natural or a legal person.

- (b) Action for or against a Company –
Company name.
- (c) Action for or against a partnership –
Names of Partners.
- (d) Action for or against the state – Name of
AG.

Requirements of a Plaintiff is set out in Section 33, 39-51 of the CPC.

Requirements of an answer are set out in Section 72-78 of the CPC.

5.1 PROCEDURE FOLLOWED IN A REGULAR PROCEDURE ACTION

1. Cause of Action arises (Section 8).
2. Letter of Demand to be sent where necessary.
3. Filing proxy through a Registered Attorney.
Filing of Plaintiff (Section 23-30, 39-51).
4. Service of Summons on the Defendant (Section 55-71).
5. Filing of Answer by the Defendant along with a Proxy (Section 72-78).
6. Filing of Replication by the Plaintiff where there is a claim in reconvention (Section 79).

7. The case is fixed for trial (Section 80-83).
8. Fifteen (15) days before the date fixed for trial list of witnesses and documents of both parties to be filed in Court (Section 121 and 175).
9. Trial begins by recording admissions (Section 146).
10. Framing of Issues (Section 146 (a) - 149).
11. Recording of Evidence (Section 150-183).
12. Written Submissions.
13. Judgement (Section 184-187).
14. Decree (Section 188).
 - 14.a. application for Execution of Decree.
 - 14..b. Notice of Appeal within 14 days (Section 754).
 - 14.c. Petition of Appeal within 60 days (Section 755).
15. Inquiry where necessary.
16. Issue of Writ.

Note : If the evidence involved consists of computer evidence, see the time limits set out in Act No. 14 of 1995

5.2 SUMMARY PROCEDURE ON LIQUID CLAIMS

1. Filing of Proxy and Plaintiff (Section 703) along with an affidavit + the Original Document.
2. Defendant has no right to intervene. He has to obtain leave of Court to Defend (Section 704).
3. Summons served on the Defendant.
4. Defendant obtains leave to defend (Leave will be granted where the Defendant pays in to Court the whole sum claimed as a deposit Section 706).
5. Leave is also given when the Defendant reveals a sustainable defence.
6. Where leave is refused, Decree entered (Section 704(1)).
7. If leave is granted the normal steps would apply as in a regular action (See steps 4-14 in the note relating to regular actions).

5.3 SUMMARY PROCEDURE ACTIONS

1. Filing of proxy And Plaintiff along with an affidavit (Section 373-374).
2. Recording of Oral Evidence where the Court thinks necessary (Section 376).

3. If the Court is satisfied that the Petitioner has a prima facie case;
 - (a) Issue of Order Nisi (Section 377(a)), or
 - (b) Issue of Interlocutory Order (Section 377(b))
4. Order 3 (a) or 3 (b) to be served on the Respondent.
5. On the day fixed by Court where 3(a) has been issued, if the respondent fails to appeal, the order nisi is made absolute (Section 383).
6. Respondent permitted to file objections and other documents.
7. Respondent commences the case on the day fixed (Section 384-385).
8. Petitioner permitted to adduce evidence, where the Court thinks same is necessary (Section 386).
9. Final Order.
10. a. Order discharged or;
- 10.. b. Order made absolute (Section 388)
11. Appeal (Section 754 and 755)

EVIDENCE

6.1 RULES RELATING TO DOCUMENTARY EVIDENCE

EVIDENCE

- a) The document must be marked before evidence is led.
- b) If the original is in the possession of the opposing party, prior notice has to be given under Section 66 of the Evidence Ordinance to the opposing Registered Attorney.
- c) No oral evidence in support of a fact which is contained in a document is admissible without marking the document in evidence.
- d) Documents has to be produced through a proper source or custody.

6.2 MATTERS TO BE CONSIDERED WHEN LEADING EVIDENCE OF A WITNESS

1. Analyze the educational background of the witness.
2. Ascertain whether he has a personal relationship to either of the parties in the case.
3. Analyze his character.

3. [Faint text]
4. [Faint text]
5. [Faint text]
6. [Faint text]
7. [Faint text]
8. [Faint text]
9. [Faint text]
10. a. [Faint text]
10. b. [Faint text]
11. [Faint text]

EVIDENCE

Chapter 6

EVIDENCE

6.1 RULES RELATING TO DOCUMENTARY EVIDENCE

- a) The document must be marked before evidence is led.
- b) If the original is in the possession of the opposite party, prior notice has to be given under Section 66 of the Evidence Ordinance to the opposing Registered Attorney.
- c) No oral evidence in respect of a fact that is contained in a document could be led without marking the document in evidence.
- d) Document has to be produced through a proper source or custody.

6.2 MATTERS TO BE CONSIDERED WHEN LEADING EVIDENCE OF A WITNESS

1. Analyse the educational background of the witness.
2. Ascertain whether he has a personal relationship to either of the parties in the case.
3. Analyse his confidence.

6.3 POINTS TO REMEMBER WHEN MAKING AN ORAL SUBMISSION

1. State the case clearly to Court.
2. State the facts of the case.
3. Analyse the law.
4. Cite authorities wherever necessary.
5. Combine the facts of the case to the legal principles.
6. If you are citing authorities have photocopies ready to be tendered to court.
7. If an unreported authority is to be cited have a certified copy of the authority in your possession.

6.4 GROUNDS ON WHICH A LAWYER CAN OBJECT TO EVIDENCE IN CHIEF

1. If it is a leading question.
2. If the witness is being questioned on something said to him by another person, ask the counsel whether he intends calling the original person as a witness. If he does not, you can object on the basis of hearsay.

(This rule does not apply to facts stated to the witness by a party to the case.)

3. If a document is sought to be produced, find out whether the witness is competent to produce the document. If not, object on the basis that the evidence could be admitted subject to proof. (Subject to calling the competent person to give evidence)
4. If oral evidence is sought to be led on matters contained in a document, object to such evidence being led, until the document is produced.
5. Remember that no evidence relating to the character of an accused could be led unless the character itself is in question.

See Section 52-55 of the Evidence Ordinance and Read

R vs. Pauline de Croos 71 NLR 169

Nilcopotha vs. Gunawardena 14 NLR 213

Rex vs. Pila 15 NLR 453

Rex vs. Jayawardena 51 NLR 25

Rex vs. Kotelawela 42 NLR 265

6. See whether the document or the witness is listed.

6.5 EXAMINATION, CROSS-EXAMINATION AND RE-EXAMINATION OF WITNESSES

The Law of Evidence plays a vital role in the administration of justice. One has to remember that it is through evidence led before Court that the violation of substantive law rights are proved. Therefore, a lawyer should develop one's ability to grasp the basic principles contained in the Evidence Ordinance.

Preliminary Matters to be Remembered.

1. Remember that evidence can be led only in respect of facts in issue and relevant facts (Section 6 to 55)
2. Evidence of bad character cannot be led unless the character itself is in issue.
 - (a) **Rex vs. Kotelawala** **42 NLR 265**
 - (b) **Rex vs. Pauline de Croos** **79 NLR 169**
 - (c) **Rex vs. Pila** **15 NLR 45**
 - (d) **Rex vs. Jayawardena** **51 NLR 25**
 - (e) **Somapala vs. Queen** **69 NLR 25**



2. Hearsay evidence cannot be led. However, If a witness utters a statement told to him by another who is also a witness, such evidence can go down subject to proof.
 - (a) **Subramaniam vs. DPP (1956) 1 WLR 965**
 - (b) **Ratten vs. Regina 56 CRIMINAL APP. REP 18**
3. When leading documentary evidence, the provisions of Section 61 to 66 has to be considered.
4. Always remember that any evidence other than evidence of a fact in issue or relevant fact has to objected to.
 - (a) **Rex vs. Sodige Singho Appu 62 NLR 112**
 - (b) **Charles Perera vs. Motha 65 NLR 295**
5. See previous of Act No. 14 of 1995 regarding computer evidence.

6.6 MATTERS TO BE REMEMBERED IN CROSS - EXAMINATION

1. Basically there are two types of cross examinations. They are **“Subtle cross-examination”** and **“Brow beating cross-examination”**. Before you adopt any method you will have to observe the witness and then take a decision.

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2. The purpose of cross-examination is to break down the evidence of the witness and make the Court disbelieve him. This could be done either by impeaching the credit of the individual witness or by attacking his memory regarding the incident.
 3. One cannot cross-examine without getting prepared. You would have to collect material regarding every witness, his character, credibility and capacity to testify.
 4. Select the areas of the testimony of the witness that you want to cross-examine.
 5. Please remember the contents of Section 143, 145, and 146.
 6. No question can be asked without a reasonable ground. Section 149.
 7. Indecent and scandalous questions cannot be asked.
 8. Insulting questions cannot be asked Section 152.
 9. Please remember as to how you could impeach the credit of a witness. Section 155.
 10. Generally in criminal cases marking contradictions or omissions impeaches the credit of a witness.
 11. Remember the previous of section 145 of the Evidence Ordinance.

12. One has to be extremely careful when the witness to be cross-examined is a Public Servant or an expert witness. A careful study of his areas of expertise is absolutely necessary before the witness is cross-examined.
13. Avoid marking contradictions in respect of trivial matters in the testimony of a witness.
14. Do not ask questions for the sake of asking questions.

6.7 RE-EXAMINATION

1. The purpose of re-examination is to rebuild the areas of a witnesses' evidence, which has been affected as a result of the cross-examination.
2. In re-examination new matters cannot be introduced to the record. Your re-examination has to be limited to the areas cross-examined by the opposing party.
3. Read Section 138 of the Evidence Ordinance.

6.8 HOW TO MARK A CONTRADICTION

1. Be familiar with the statements previously made by the witness. (section 145 of the Ordinance)

2. First analyse the evidence given by him in court under oath.
3. Thereafter see whether he has made a different statement on the identified area which is contained in a document. (e.g. Police Statement, Letter of Evidence at a Non – Summary Inquiry)
4. Ensure that the contradiction sought to be marked has a bearing on the case. E.g. If the contradiction is in respect of the colour of the shirt (dark yellow or light yellow) such a contradiction may not be vital.
5. First draw the attention of the witness to the evidence he gave in court and ask him whether that is the truth.
6. Next ask him whether he made a previous statement either to the Police or at a former judicial proceeding by way of a letter.
7. Thereafter identify the difference in the statement made previously and ask him precisely whether he made a statement to that effect.
8. If he says “No” or denies having made such a statement suggest it to him that he had in fact made such a statement by repeating the exact words used in the previous statement. Thereafter mark it as a contradiction.

9. After marking the contradiction you have to prove the contradiction by calling the police officer who recorded the statement, recipient of the letter or the Registrar of the Court to go through the previous statement in writing and getting him to inform the Court that such a statement has been made.
10. Give a reference number to the contradiction.

6.9 OMISSIONS

1. Marking of an omission arises in a situation where a witness comes out with a statement for the first time in Court without having made any reference to the same in a Previous statement.
2. In the case of an omission, first you draw the attention of the Court to the omission. There is no marking in the form of a reference number.
3. If the omission relates to a statement made to the police, question the police officer and ask him whether he recorded the statement of the particular witness. Then ask him whether the statement contains what the witness said in court.

After making the requisition you have to prove the con-
dition by calling the police officer who recorded the state-
ment recipient of the letter or the Registrar of the Court in
front of the court through the existing statement of witness and require him
to inform the Court that such a statement has been made.

10. Give a reference number to the requisition.

6.3 : OMISSIONS

4. In the case of an omission, there is a situation where a wit-
ness comes out with a statement for the first time in Court
without having made any reference to the same in a previ-
ous statement.

5. In the case of an omission, there is no mention in the form
of a reference number.

3. If the omission relates to a statement made to the police,
then in such a case the police officer and ask him whether he recorded
the statement of the witness. Then ask him whether
the statement contains what the witness said in court.

8. In the case of an omission, there is no mention in the form
of a reference number.

IMPORTANT DECISIONS

7.1. ... who is ... It is ... evidence to ... what is sought ... fact that ... Silva in ...

1. ...
2. ...
3. ...
4. ...
5. ...

IMPORTANT DECISIONS



IMPORTANT DECISIONS

7.1. RULE OF HEARSAY

The evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is proposed to establish. If what is sought to be established is not the truth of the statement but the fact that it was made. Then it is not hearsay. Per L. M.D. De Silva in **Subramaniam vs. D.P.P. (1956) 1 WLR 965 at 970.**

1. Also see **Ratten vs. Regina 56 CRIMINAL APPEAL REPORTS 18.**
2. **Korossa Rubber Company vs. Silva 20 NLR 65**
3. **Livera vs. Abeywickrama 25 NLR 1**
4. **Eliyatambi vs. Eliyatambi 27 NLR 369**
5. **State vs. Somasiri 75 NLR 172**

7.2. CIRCUMSTANCIAL EVIDENCE

- 1. Punchimahattaya vs. State 76 NLR564**
- 2. Mc. Greevy vs. The Director of Public Prosecution 57 CRIMINAL APPEAL REPORTS 424 (1973).**

House of Lords – It was held that in a case of circumstantial evidence in which the case for the prosecution or any essential ingredient thereof depends as to the commission of the act wholly on circumstantial evidence, no duty rests upon the judge in addition to giving the usual direction that the prosecution must prove the case beyond a reasonable doubt or to give a further direction in express terms that this means that they must not convict on circumstantial evidence unless they are satisfied that the fact proved are :

- a) Consistent with the guilt of the accused.
 - b) Exclude every possible explanation other than the guilt of the accused.
- 3. Queen vs. Santin Singho 65 NLR 445**
 - 4. Ilangatilake vs. Republic of Sri Lanka (1984) 2 SLR 38**
 - 5. Rex vs. Kularatne 71 NLR 529**
 - 6. Rex vs. Ebert Silva 50 NLR 457**
 - 7. Rex vs. Lord Cochrane and others 1814 GURNEY'S REPORTS 264 (Ellenborough Dictum)**

8. **Queen vs. Sumanasena 66 NLR 350**
9. **Prematillake vs. Republic 75 NLR 506**
10. **Rex vs. Gunaratne 47 NLR 145**
11. **Karuppiyah Servai vs. King 52 NLR 227**

7.3. SECTION 27 - EVIDENCE ORDINANCE - STATEMENTS

- Queen vs. Albert 66 NLR 543**
- Queen vs. Piyadasa 72 NLR 434**
- Queen vs. Ramaswamy 66 NLR 265**
- Attygala vs. A.G. (1986) 1 SLR 390**
- Nandasena vs. Republic of Sri Lanka (1978-79) 2 SLR 235**
- Nallathamby vs. Muthukrishnan 74 NLR 95**
- Queen vs. Tennekoon 60 NLR 313**
- Edin Signo vs. Queen 69 NLR 353**
- Petersignham vs. Queen 73 NLR 537**

7.4. CONFESSIONS

- King vs. Ranhamy 42 NLR 221**
- Jayaneththi vs. Mithrasena 71 NLR 385**
- Queen vs. Gnanasiha Thero 73 NLR 154**
- Rex vs. Vasu 27 CLW 16**

Vivekanandan vs. Selvaratnam 79 NLR 337 (VOL 1)

King vs. Francis Appuhamy 42 NLR 553

Queen vs. Buddharakkita Thero 63 NLR 433

Rex vs. Abbadas 66 NLR 152

King vs. Weerasamy 43 NLR 152

Rex vs. Batcho 57 NLR 100

7.5. VIEW OF THE SCENE BY THE JURY

Sections 224 of the Criminal Procedure Code.

Queen vs. Rathinam 71 NLR 13

Fernando vs. Queen 76 NLR 160

Queen vs. Aladin 61 NLR 7

7.6. HOSTILE WITNESSES

Section 154 and 155 Evidence Ordinance.

Queen vs. Fernando 70 NLR 73

Albert Signo 74 NLR 368

Queen vs. Jayasinghe 70 NLR 287

7.7. OMISSIONS

**Queen vs. Raymond Derrando 66 NLR 1, was not followed in
Muthubanda vs. Queen 73 NLR 8**

7.8. ACCUSED TO GIVE EVIDENCE FIRST

Queen vs. Tennekoon 60 NLR 313 at 328

7.9. DOCK STATEMENTS

Queen vs. Kularatne 71 NLR 529

Sugathadasa vs. Republic of Sri Lanka 78 NLR 495

King vs. Vallayan Sitambaram 20 NLR 257

Queen vs. Buddharakkita Thero 63 NLR 433

Gangananda vs. State (1995) 2 SLR 373

**Hildon vs. Munaweera (1997) 3 SLR 220 - Section 150 of the
Criminal Procedure Code**

Somasiri vs. A.G. (1983) 2 SLR 225

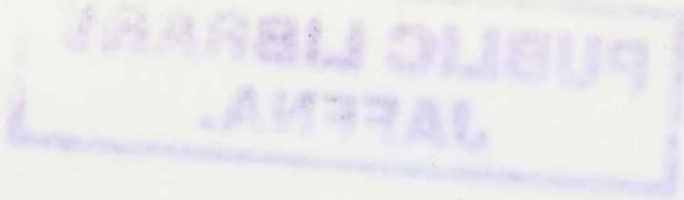
Gunapala vs. Republic (1994) 3 SLR 180

Kathubdeen vs. Republic of Sri Lanka (1998) 3 SLR 113

7.10. WITNESSES IN REBUTTAL

Section 223, Criminal Procedure Code.

Sediris vs. Queen 74 NLR 224



7.11. ALIBI

Damayanu vs. Queen 73 NLR 61

Punchibanda vs. State 76 NLR 293

Lional vs. Republic 1988 1 SLR 4

Mannar Mannan vs. Republic CA – (1987) 2 SLR 94

SC – (1990) 1 SLR 285

Ananda vs. State 1990 2 SLR 265

7.13. IDENTIFICATION PARADES

C.M Perera vs. State 77 NLR 224

Abeysekera vs. A.G. (1998)1 SLR 376

A.G. vs. Aloysius (1992) 2 SLR 264

7.14. SECTION 127 OF THE CRIMINAL PROCEDURE CODE

Queen vs. Gnanasinghe Thero 73 NLR 154

Muttiah vs. Queen 74 NLR 313

Rex vs. Ralahamy 42 NLR 221

Rex vs. Martin Singho 66 NLR 392

Queen vs. Kalimuththu 69 NLR 349

PRIMARY COURTS' PROCEDURE ACT NO. 44 OF 1979

1. Section 68 applications are very common and most often would be the first motion application that a judge would be called upon to handle during the initial period at the Bar.
2. Read Section 67 and 68 of the Administration of Justice Law No. 44 of 1979 to know the history behind this concept.
3. Read the provisions of Sections 66 - 72 of the Primary Courts Procedure Act, No. 44 of 1979 to understand the current law.
4. The main area behind such an application is possession. In other words, where a breach of the peace is likely to arise in view of a dispute relating to the possession of a land, a reference could be made to the Primary Court under Section 68 of the Act.

7.11. A.I.B.I.

Damayanti vs. Queen 73 NLR 61

Panchikonda vs. State 76 NLR 293

Lionel vs. Republic 1988 1 SLR 4

Manny Manan vs. Republic Co. (1987) 1 SLR 11

PRIMARY COURTS, PROCEDURE

SLR 1987 11

ACT NO. 44 OF 1979

7.13. IDENTIFICATION PARADES

C.M. Porech vs. State 77 NLR 134

Aberkane vs. A.G. (1981) 8LR 376

A.G. vs. Alaynis (1991) 2 SLR 264

7.14. SECTION 117 OF THE CRIMINAL PROCEDURE CODE

Queen vs. Gasnaloghe Thero 71 NLR 154

Mutlah vs. Queen 74 NLR 313

Rex vs. Babany 43 NLR 221

Rex vs. Maria Sughu 66 NLR 392

Queen vs. Kalimuchha 69 NLR 347

Chapter 8

PRIMARY COURTS' PROCEDURE ACT NO. 44 OF 1979

8.1 INSTITUTION OF PROCEEDINGS UNDER SECTION 66 OF THE PRIMARY COURTS' PROCEDURE ACT.

1. Section 66 applications are very common and most often would be the most common applications that a junior would be called upon to handle, during the initial period at the Bar.
2. Read Section 62 and 63 of the Administration of Justice Law No. 44 of 1973 to trace the history behind this concept.
3. Read the provisions of Section 66 – 72 of the Primary Courts Procedure Act, No. 44 of 1979 to understand the current law.
4. The main area behind such an application is possession. In other words when a breach of the peace is likely to arise in view if a dispute relating to the possession of a land, a reference could be made to the Primary Court under Section 66 of the Act.

5. Reference should be made either through the police or privately. In the latter an affidavit has to be filed informing the court of the dispute, naming the parties.
6. In dealing with an application under Section 66, the Court would make Order in favour of the person who was in possession of the land on the day that the information was filed. However, where there is evidence of forcible dispossession, the court would grant possession to the person who was in possession within the period of two months prior to the date of filing such information.
See: **Ramalingam v. Thangarajah (1982) 2SLR 693 at 698**
7. In a proceeding under Section 66 the parties have to establish that they were in possession and not ownership. Hence, the jurisdiction can be interpreted as quasi-criminal and quasi-civil and of a preventive nature.
8. Therefore it is necessary for a lawyer to advise the client even at the stage of making Police complaints.
9. When you are called upon to establish the possession of your client your Affidavit has to be padded with all documentary evidence which establishes the possession.

The following documents would be useful in such an exercise :

- a) Affidavits from all the neighbours.
- b) If the client is a professional, Affidavits from his clients.
- c) Water Bills.
- d) Electricity Bills.
- e) Rate receipts
- f) Rent or Lease receipts
- g) Lease Agreements and other Deeds.
- h) Electoral Register
- i) Grama Sevaka Certificate
- j) A Certificate from the Post Master
- k) A certificate from the Police where necessary.
- l) Photographs and other connected documents

10. Procedure followed in 66 cases :

1. Filing of information/Affidavit
2. Affixing of notices.
3. Filing of the Affidavit of the Respondent/s.
4. Filing of Counter-Affidavits.
5. Filing of Written Submissions
6. Inspection of the site if necessary
7. Order.

8.2 IMPORTANT DECISIONS IN SECTION 66 MATTERS

1. **Sili Nona vs. Silva and others (1992) 1 SLR 195**

Sarath Silva J – The time limit of 3 weeks in Section 66(3) is mandatory – Application of Actus Curiae Neminum Gravabit.

2. **Velupullai vs. Sivanathan (1993) 1 SLR 123**

Ismail J – Under Section 66(1)(a) the decision whether a breach of peace is threatened or likely is a decision for the police. However, when the application is originated under Section 66(1)(b) the Magistrate should cautiously inquire whether there exists such a breach – the scope of the inquiry is purely preventive and provisional.

Kanagasabe vs. Mylvaganam 76 NLR 280 distinguished. Held further in keeping with **78 NLR 280** and **Ramalingam vs. Thangarajah (1982) 2 SLR 693**, that the function of the Court is not to investigate into title or right to possess.

3. **Punchi Nona vs. Padumasena (1994) 2 SLR 117**

Ismail J – Section 68(3) is applicable only where the Judge comes to the finding that some other party had been forcibly dispossessed.

4. **Ramalingam vs. Thangarajah (1982) 2 SLR 693**
The function of a judge in an inquiry under Section 66.
5. **Loku Banda vs. Ukku Banda (1982) 2 SLR 704**
Right to possess and other rights.
6. **David Appuhamy vs. Yassassi Thero (1987) 2 SLR 253**
Jurisdiction of a Primary Court.
7. **Epa vs. Weerasinghe 1986 CALR 503**
In an Inquiry under Section 66 a document not filed with the Affidavit but referred to therein is applicable under Section 72(b)
8. **Mutukumaraswamy vs. Nannitamby 1 Sris Kantha LR 55**
Application for an Interim Order – Grounds on which such an Order ought to be made.
9. **Vettivelu vs. Kanapathipillai 2 Sris Kantha LR 33**
Handing over keys is not sufficient to prove physical possession.
10. **Ratnayake vs. De Silva (1990) 2 SLR 191**
Failure to affix notices in the land is not a fatal irregularity.

11. Punci Nona vs. Padumasena (1994) 2 SLR 117

Distinction between section 66 (1) (a) and 66 (1) (b) discussed.

12. Weerasinghe vs. Sepala (1996) 2 SLR 229

Scope of Section 68 and 69 discussed.

13. Tudor vs. Anulawathi & others 1999 3 SLLR 235

The Objectives of sections 68 & 69 discussed.

14. Ali vs. Abdeen 2001 1 SLLR 413

Duty of Court to attempt to settle the dispute is a prempatory duty.



CRIMINAL PRACTICE

CRIMINAL PRACTICE

Any Attorney's in Courts... Criminal practice could...
the court... Criminal Appeals and Revisionary Jurisdiction...
1958 the Court of Appeal enjoyed an exclusive jurisdiction to hear such cases. After the
11th Amendment to the Constitution, the Appellate and Revisionary jurisdic-
tion arising in respect of orders of Magistrate Courts and Primary
Courts are now heard by the respective Provincial High Courts. As a
result the Court of Appeal continues to hear appeals from High Courts
in respect of civil & other matters apart from the conclusion of an original crimi-
nal proceeding. The Court of Appeal also has power under Article 154(1)(c)
to hear appeals from orders made by the High Court in the exercise of its
Revisionary Jurisdiction.

An original criminal practitioner has to be mindful of the provi-
sions of the Code of Criminal Procedure Act No. 15 of 1979. Some of the
more important provisions are discussed below.

- D) What happens when a crime is committed?
When a crime is committed, all citizens who have knowledge of
the crime being committed have a duty to report the occurrence



11. ...
 12. ...
 13. ...
CRIMINAL PRACTICE
 14. ...
 15. ...

Chapter 9

CRIMINAL PRACTICE

Any Attorney who elects to develop a criminal practice could either confine himself to an original court practice or be involved in handling Criminal Appeals and Revision Applications. Prior to 1988 the Court of Appeal enjoyed an exclusive jurisdiction to hear such cases. After the 13th Amendment to the Constitution the Appellate and Revisionary jurisdiction arising in respect of orders of Magistrates Courts and Primary Courts are now heard by the respective Provincial High Courts. As at present the Court of Appeal continues to hear appeals from High Courts in respect of convictions entered upon the conclusion of an original criminal proceeding. The Court of Appeal also has power under Article 154P(6) to hear appeals from orders made by the High Court in the exercise of its Revisionary Jurisdiction.

An original criminal practitioner has to be mindful of the provisions of the Code of Criminal Procedure Act No. 15 of 1979. Some of the more important provisions are discussed below.

1) **What happens when a crime is committed?**

When a crime is committed, all citizens who have knowledge of the crime being committed have a duty to report the commission

of the offence to the Police. Such information can either be given orally or in the form of a document. If the value of the crime falls within the Schedule of offences listed under the Mediation Boards Law No. 72 of 1988, no legal proceedings could take place without first having referred such fact for mediation. If not the Police would commence an investigation under Chapter 9 of the Criminal Procedure Code.

2) Chapter 9 of the Criminal Procedure Code.

Sections 108 - 125 are contained in this Chapter. Under these provisions the Police have a duty to commence and continue a criminal investigation. The original complaint will be recorded under Section 109 and other statements of witnesses recorded under Section 110. In the exercise of their powers under this Chapter, the Police are expected to collect any available evidence and also to apprehend offenders.

3) How long can the investigation proceed?

Ordinarily an investigation is expected to be completed within 24 hours. But this is practically impossible. Where the investigation cannot be completed within this time the Police are expected to submit a report along with the summary of statements to the Magistrate. If a suspect is available he too should be produced. This

report is commonly referred to as a 'B' Report. If further investigation is necessary the Police can move for such time. In such an instance the Court would order the remand of the suspect for a period not exceeding 15 days. (Now, under the Bail Act, the period of remand could extend upto 1 year)

4) What happens on the 15th day?

Under Section 115(2) the Police have a duty to institute proceedings on the 15th day. Section 115(2) should be read with Section 120(1), (2) and (3). If further time is required for the investigation the Police are entitled to move court for a further period of time. However the Police must show what investigations were done during the first 15 days, and what remains to be done. If the Police cannot justify their application and if no proceedings are instituted on the 15th day, Counsel for the defence can move for a discharge. Provisions of the Bail Act No, No. 30 of 1997 will apply regarding Bail.

5) What is the effect of Section 115(3)?

Section 115(3) was amended by Act No. 68 of 1979. Originally as the Section stood even after the amendment where the suspect before court faced an allegation under Section 114, 191 or 296 of the Penal Code the court could not grant Bail for a period of 3

months. However the effect of this Section has been removed in view of Section 13 of Bail Act No. 30 of 1997 which requires Bail to be obtained from the High Court.

6) Impact of Section 122 and 123

These Sections empower the Police to obtain medical reports, medical examinations, fingerprints, palm or footprints, specimen of saliva, urine, hair, fingernail or scraping from fingernails. DNA tests are also obtainable under these Sections.

7) What is the impact of Section 124?

This is a very useful Section for the Prosecution. Under this Section, orders to examine Bank accounts, freeze Bank accounts, and holding Identification Parades can be done.

8) What is an Identification Parade?

The purpose of a Parade is to establish the identity of an offender. It is an accepted principle that Dock Identification is undesirable. A Parade is held to obtain evidence of identity immediately after the commission of the crime. Section 124 was amended by Act No. 11 of 1998, which provided for identification from a concealed position.

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9) **What is the role of a lawyer at an Identification Parade?**

If suspects have been shown to the witnesses after their arrest and before the Parade, an objection should be raised. Similarly if the correct ratio of 1:7 is not available that too is a ground for an objection. If the parties are known to each other before the incident Counsel must bring it to the attention of the court and have it recorded that the parties are known.

9.1 **IMPORTANT CASE LAW**

1. **Investigations**

1. **A.G vs. Sepala Ekanayake** 1SRIKANTHA LAW REPORTS 41
2. **Gunapala vs. OIC Galewela** (1993) 1 SLR 61
3. **A.G vs. Siripala** (1990) 2 SLR 141
4. **Nanayakkara vs. Henry Perera** (1985) 2 SLR 375
5. **Muttusamy vs. Kannangara** 44 CLW 33
6. **Kumaresu vs. DRO Vavuniya** 54 NLR 37
7. **A.G vs. Jayasinghe** 50 NLR 202

8. **Thomas vs. IP Kottawa** 47 NLR 42
9. **Mohideen vs. IP Pettah** 59 NLR 217
10. **Mahanama Tillekeratne vs. Bandula
Wickramasinghe** 1999 ISLLR 372

2. Identification Parades

Dock Identification

1. **Rex vs. Cartwright** 10 Criminal Appeal Reports 219
2. **Rex vs. Fergus** 1992 Criminal Law Review 363 CA
3. **Rex vs. Hunter** 1969 Criminal Law Review 262
4. **Rex vs. Howick** 1970 Criminal Law Review 403
5. **Rex vs. Turnbull** 1965 Criminal Appeal Reports 132
6. **Rex vs. Keane** 1965 Criminal Appeal Reports 248
7. **Rex vs. Bentley** 1991 Criminal Law Review 620 CA
8. **Rex vs. Weeder** 1971 Criminal Law Reports 228
9. **Perera vs. State** 77 NLR 224
10. **Abeysekara vs. A.G.** (1981) 1 SLLR 376
11. **A.G. vs. Aloysius** (1992) 2 SLLR 264

12. Fernando vs. Nelum Gamage (1994) 3 SLLR 190

9.2 YOUR ENTITLEMENTS UNDER THE CODE OF CRIMINAL PROCEDURE ACT NO. 15 OF 1979.

A young lawyer ought to be aware of his rights under the above law in pursuing justice for his client. Some important sections are listed below.

1. Section 110 (4)

The proviso to the above section entitles an accused to apply for statements of witnesses that have been recorded up to that point in the case of an offence which is inquired into at a preliminary inquiry. (Please see **A.G. vs. Jayalath 1986 1 SLR 205, Arumugam vs. OIC Mirihana 72 NLR 301.**)

2. Section 124

This section authorises the prosecution to make orders assisting investigation. (eg. Holding of identification parades, seizure of bank accounts etc.)

3. Section 158

After the conclusion of the non summary inquiry if the accused has been committed to stand trial you could apply within a reasonable time for a certified copy of the record and certified copies of statements to the police by witnesses who had testified before the magistrate or any statements made to the police by the accused. Please read the above section along with Section 162.

4. Section 162

This section states what documents the defence is entitled to receive at the stage of receiving the indictment.

5. Section 260

The right of an Attorney to appear for an aggrieved party.

6. Section 443

The right of an accused to obtain certified copies of proceedings of a case. See **A.G.v.Jayasinghe 50 NLR 207.**

7. Section 444(1)

Under this section the accused or his attorney is entitled to a certified copy of the first information and to any statement made by the person against whom or in respect of whom the accused is alleged to have committed an offence.

8. Section 444(3)

This section is applicable only for summary trials before a magistrate. Under this section the magistrate may make available to the accused for perusal in open court any statement of any witness whose evidence is relied on by the prosecution.

9.3 CLAIM INQUIRIES UNDER THE CRIMINAL PROCEDURE CODE

1. A claim inquiry arises in two situations. (Please read Sections 425 and 431 of the Code)
2. Section 425 applies upon the conclusion of an inquiry or trial. Read **De Alwis vs. De Alwis. (1978/79) 2 SLR 017**

Meegahapola vs. O.I.C. Harbour police (1992) 1 SLR 58
Thirunayagam vs. I.P. Jaffna 74 NLR 161

3. Section 431 applies to all other cases.

Costa vs. Pieris 35 NLR 326

Mariyadasan vs. Rose 71 NLR 164

Chandrasiri vs. A.G. 3 SRI SKANTHA LAW REPORTS 101

Viking Tours vs. The Finance 1981 ? SLR 116

Piyadasa vs. Punchibanda 62 NLR 307

Sugathapala vs. Thambiraja 67 NLR 091

Jayasuriya vs. Warnakulasuriya 61 NLR 189

Punchi Nona vs. Hinni Appuhamy 60 NLR 518

William vs. Si/va 22 NLR 403

Perera vs. Fernando 36 NLR 380

Ranasinghe vs. Justin 51 NLR 518

Maris Appu vs. Ratvatte 66 NLR 330

Kathat vs. Meera 3 NLR 90

**Thambipillai vs. Ramaswamy 4 BALASINGHAM LAW RE-
PORTS 89**

Jayasinghe vs. Mercantile Credit (1982) 1 SLR 495

Silva. vs. O.I.C Thambuttegama (1991) 2 SLR 83

**9.4 MATTERS TO BE CONSIDERED WHEN ARGUING A
MAGISTRATE'S COURT APPEAL (Defence point of view)**

**1. IS THE CONVICTION BASED ON A PLEA OF GUILT OR
A FINDING OF GUILT AFTER FULL TRIAL?**

- Where the accused had pleaded guilty; the conviction cannot be challenged but the sentence (if illegal) could be challenged.
(See Section 317 the Code of Criminal Procedure)
- If the conviction is based on a finding of guilt reached upon the conclusion of trial, then both the conviction and the sentence could be challenged.
(See Section 317 of the Criminal Procedure)

2. HAS THE CHARGE BEEN FRAMED OR READ OVER TO THE ACCUSED?

- Section 182 of the Criminal Procedure Act,.
- *Case Law:*
Fernando vs. A.G. 2 SRI KANTHA LR 74
State vs. Piyasena 3 SRI KANTHA LR 86
Abdul Sameem vs. Bribery Commissioner (1991) 1 SLR 76
Sunil Godage vs. O.I.C. Kahawatte (1992) 1 SLR 54

3. IS THE ORDER OF CONVICTION BASED ON ADMISSIBLE EVIDENCE?

- Section 5 of the Evidence Ordinance
- *Case Law*
Rex vs. Sodige Singho Appu 62 NLR 112
Charles Perera vs. Motha 65 NLR 295
Mendis vs. Paramaswamy 62 NLR 302

4. LOOK FOR CONTRADICTIONS ON MATERIAL POINTS

**5. SECTION 283 OF THE CODE – SEE WHETHER THE
MAGISTRATE HAS PROPERLY EVALUATED
THE EVIDENCE**

- **Case Law**
- **S. I. Divulapitiya vs. Fernando 71 CLW 80**
Ibrahim vs. I. P. Rathnapura 59 NLR 235
Karunadasa vs. O. I. C. Nittambuwa
King vs. Tholis Silva 39 NLR 367

**6. DOES THE CHARGE CONTAIN ALL THE RELEVANT
PRATICULARS**

- **Section 164 and 165 of the Code**
- **Case Law**
Appuhamy vs. Ekanayake 48 NLR 71
Perera vs. Perera 59 NLR 64
Bazeer vs. Perera (1978-79-80) 2 SLR 185
Rex vs. Cooray 53 NLR 73

THE ROLE OF A DEFENCE
COUNSEL IN P.T.A CASES

THE ROLE OF A DEFENCE COUNSEL IN P.T.A CASES

Introduction :

The Prevention of Terrorism Act No. 48 of 1979 is a law which was passed by Parliament with the specific purpose of curbing unlawful activities and acts of terrorism. A close examination of this law and the subsequent amendments of 1982 reveals that the intention of the legislature was to tighten the safeguards for those who are involved in the commission of acts which are regarded as offences under the statute. The preamble and the object of the present law clearly demonstrate the draconian nature of the law and the intention of those who enacted the law.

Offences :

The following Sections of the P.T.A create offences under the statute.

- 1) Section 2
- 2) Section 3
- 3) Section 4

SECTION 161 OF THE CODE - SEE WHETHER THE
MAGISTRATE HAS PROPERLY EVALUATED
THE EVIDENCE

- Case Law

**THE ROLE OF A
DEFENCE COUNCIL IN
P.T.A CASES**
Kannan v. U. L. C. Nizamabad
King v. Thobli 35 NLR 367

DOES THE CHARGE CONTAIN ALL THE RELEVANT
PARTICULARS

- Section 164 and 165 of the Code

- Case Law

Appiah v. State 45 NLR 71

Pir v. State 59 NLR 85

Baker v. State 117 NLR 155

Rex v. Coorey 31 NLR 71

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Chapter 10

THE ROLE OF A DEFENCE COUNSEL IN P.T.A CASES

Introduction :

The Prevention of Terrorism Act No. 48 of 1979 is a law which was passed by Parliament with the specific purpose of curtailing unlawful activities and acts of terrorism. A close examination of this law and the subsequent amendment of 1982 reveals that the intention of the legislature was to tighten the consequences for those who are involved in the commission of acts which are considered as offences under the statute. The preamble and the recital to the parent law clearly demonstrates the Draconian nature of the law and the intention of those who enacted the law.

Offences :

The following Sections of the P.T.A creates offences under the statute.

- 1) Section 2
- 2) Section 3
- 3) Section 5

An examination of these Sections clearly reveals that the draftsmen of the Act depended a lot on the interpretations placed in the Penal Code hence it is very clear that primarily the prosecutor is expected to prove the ingredients of those offences where the language of the Penal Code has been imported.

eg: Sections 2(1)(c), 2(1)(d), 2(1)(e), 3

As much as the above Sections contain the language of the Penal Code directly there are certain other Sections which create new offences.

eg: Sections 2(1)(f), 2(1)(g), 2(1)(l), 2(1)(i), 2(1)(j), 5

A close examination reveals that some of the Sections require proof of the mental element of the offence whereas some do not.

In these circumstances, any counsel defending an accused under the P.T.A would primarily have to analyse whether the offence with which the accused is charged, is one which requires proof of the mental element, or otherwise.

One important judgement in this regard is the case of **Perera vs. Munaweera 56 NLR 433**. This case is authority for the proposition that, "When an act under a statute is an absolutely prohibited or restricted act, all that the prosecution has to do is to prove the commission of the physi-

cal act. However this does not deny the opportunity to the accused to lead a defence based on Mens Rea.”

Therefore, after having analysed whether the offence requires proof of the mental element, the defence counsel should then be mindful of the ingredients of the offence. One can think of a defence only after identifying the facts of the case and the ingredients of the offence.

Confessions :

Sections 16 and 18 of the law introduced the concept of admissibility of statements. Under the P.T.A a confession made to a person above the rank of an A.S.P becomes admissible in law unless it is irrelevant under Section 24 of the Evidence Ordinance. In my experience, most of the cases under the P.T.A are based on confessions made by suspects. However, Section 16(2) of the law shifts the burden of proving the irrelevancy under Section 24, to the person asserting it to be irrelevant (therefore the suspect). In this context, a counsel for the defence in receipt of an indictment has to be careful whether the case is based on a confession or not. If it is, the counsel must be cautious to ensure that the confession does not become part of the record.

Generally, the prosecutor would call the A.S.P to produce the confession. This is the point at which the counsel should raise an objection to his evidence and the confession. One must remember that the only basis for

objection is if and only if the confession becomes irrelevant under Section 24 of the Evidence Ordinance. Therefore, one has to carefully examine and be mindful of the provisions of Section 24 of the Evidence Ordinance.

Charge Sheet :

Since the law is a strict piece of legislation, a defence counsel may have to be mindful of any technical objections that are possible. One area where a lot of caution has to be exercised is the area relating to Charge and Indictment. In this regard the counsel will have to be mindful of Sections 164 and 165 of the Criminal Procedure Code. These Sections lay down the contents of a valid charge. The following case law may be important in this regard.

- | | | |
|----|---------------------------------------|-------------------|
| 1. | Sivasampu vs. Juan Appu | 36 NLR 369 |
| 2. | Appuhamy vs. Ekanayake | 48 NLR 71 |
| 3. | Perera vs. Perera | 59 NLR 64 |
| 4. | Bazeer vs. Perera (1978/79/80) | 2 SLLR 185 |
| 5. | Wilbert vs. Newman | 75 NLR 138 |
| 6. | Kandasamy vs. Nadarajah | 45 NLR 545 |
| 7. | Rex vs. Cooray | 63 NLR 73 |
| 8. | A.G. vs. Moonesinghe | 70 NLR 241 |

9.	Rupasinghe Perera vs. Queen	60 NLR 505
10.	Wickremesinghe vs. Chandradasa	67 NLR 33
11.	Amarasekara vs. Rex	29 NLR 33
12.	Seneviratne vs. Deen	50 NLR 392
13.	Weeranatchiar vs. Marikkar	41 NLR 319
14.	Queen vs. Senanayake	20 NLR 83
15.	Don Wilbert vs. S.I Chilaw	69 NLR 448
16.	Piyasena vs. A.G.	2 SLR 388
17.	Tillekeratne vs. A.G.	C/A 149/152/84

9	Ronasinghe Perera vs. Queen	60 NLR 508
10	Mickensinghe vs. Chandrasekera	67 NLR 33
11	Amunathasinghe vs. Rajasinghe	58 NLR 501
12	Senewiratne vs. Deen	50 NLR 303
13	Weerasinghe vs. Marikar	41 NLR 319
14	Queen vs. Senanayake	50 NLR 83
15	Don Wilbert vs. S.I. Chitaw	69 NLR 448

16. *Perera vs. A.C.* 2 NLR 388

17. *Tilakaratne vs. A.C.* 2 NLR 388

18. *Chandrasekera vs. A.C.* 2 NLR 388

19. *Chandrasekera vs. A.C.* 2 NLR 388

20. *Chandrasekera vs. A.C.* 2 NLR 388

21. *Chandrasekera vs. A.C.* 2 NLR 388

22. *Chandrasekera vs. A.C.* 2 NLR 388

23. *Chandrasekera vs. A.C.* 2 NLR 388

24. *Chandrasekera vs. A.C.* 2 NLR 388

25. *Chandrasekera vs. A.C.* 2 NLR 388

26. *Chandrasekera vs. A.C.* 2 NLR 388

27. *Chandrasekera vs. A.C.* 2 NLR 388

28. *Chandrasekera vs. A.C.* 2 NLR 388

29. *Chandrasekera vs. A.C.* 2 NLR 388

30. *Chandrasekera vs. A.C.* 2 NLR 388

1.	<i>Stranage vs. Jaja Appa</i>	36 NLR 369
2.	<i>Appahamy vs. Ezanayaka</i>	48 NLR 71
3.	<i>Perera vs. Perera</i>	59 NLR 66
4.	<i>Raoor vs. Perera (1978/79/80)</i>	2 NLR 185
5.	<i>Wilbert vs. Newman</i>	75 NLR 133
6.	<i>Kandasinghe vs. Nadarajah</i>	45 NLR 545
7.	<i>Rex vs. Cooray</i>	63 NLR 73
8.	<i>A. Chya Mounasinghe</i>	70 NLR 241

POWERS OF COURTS (APPELLATE JURISDICTION)

MAGISTRATE COURT ORDERS

POWERS OF COURTS

Appeal-

Appeal to the Provincial High Court - established by Article 134 B of the Constitution - within 14 days (28 days if by Attorney General) See section 318 of the Criminal Procedure Code.

Revision-

Also the Provincial High Court within a reasonable time (day court rejects the application). Article 134 F (1) (b) of the Constitution.

PRIMARY COURT (SECTIONS 33-34 OF THE PRIMARY COURT PROCEDURE ACT)

Appeal-

No appeal in 66 cases. In all other cases the appeal is to the Provincial High Court within 14 days.

Revision-

Also to the Provincial High Court

POWERS OF COURTS

Chapter 11

POWERS OF COURTS (APPELLATE JURISDICTION)

- **MAGISTRATE COURT ORDERS**

Appeal-

Appeal to the Provincial High Court – established by Article 154 P of the Constitution-within 14 days. (28 days if by Attorney General) See section 318 of the Criminal Procedure Code.

Revision-

Also the Provincial High Court within a reasonable time. (delay could negate the application). Article 154 P (3) (b) of the Constitution.

- **PRIMARY COURT (SECTIONS 53-64 OF THE PRIMARY COURT PROCEDURE ACT)**

Appeal-

No appeal in 66 cases. In all other cases the appeal is to the Provincial High Court within 14 days.

Revision-

Also to the Provincial High Court.

• DISTRICT COURT

Appeal-

Appeal depends on the nature of the Order. If the Appeal is against a “judgement” or a “final order”, a notice of appeal has to be filed within 14 days in the same Court followed by a Petition of Appeal which has to be filed within 60 days addressed to the Court of Appeal. If the Appeal is against an “interlocutory order”, then the applicant will have to obtain Leave to Appeal within 14 days of the order. Papers will have to be filed in the Court of Appeal. See Sections 754 – 759 of the Civil Procedure Code.

Case Law:

- 1) **Brooke Bonds vs. Stassen Exports 1990 1SLR 61**
- 2) **Fernando vs. Fernando 1996 2SLR 169**
- 3) **Nachchiduwa vs. Mansoor 1995 2SLR 273**
- 4) **Kithsiri vs. Weerasena 1997 1SLR 70**
- 5) **Peter Singho vs. Costa 1992 1SLR 49**
- 6) **Lebbe vs. Ameer 1990 2SLR 168**
- 7) **Martin vs. Suduhamy 1991 2SLR 279**
- 8) **Keerthiratne vs. Jayasekara 1990 2SLR 273**
- 9) **Nanayakkara vs. Warnakulasuriya 1993 2SLR 289**
- 10) **Dias vs. Karawita 1999 1SLR 98**

- **ORDERS MADE BY LABOUR TRIBUNALS**

Appeals-

Appeals to the Provincial High Court within 30 days. See Section 3 of Act No. 19 of 1990.

Case Law:

- 1) **Swastika Textile Industries Ltd. vs. Dayaratne 1993 2SLR 348**
- 2) **Weragama vs. Eksath Lanka Wathu Kamkaru Samithiya 1994 1SLR 293**
- 3) **Coconut Research Board vs. Fernando 1994 1SLR 219**
- 4) **Kumarasinghe vs. State Development and Construction Corporation 1994 3SLR 204**
- 5) **Siriyawathie vs. Superintendant Hapugastenna Estate 1997 1SLR1**

Revision-

To the High Court.

Writ-

To the Court of Appeal.

- **AGRICULTURAL TRIBUNALS**

Appeals-

Appeals within 30 days of the communication of the decision to the High Court.

- **WORKMENS COMPENSATION TRIBUNAL**

Appeals-

Appeal within 30 days of the Commissioner's order to the High Court.

- **RENT ACT**

From the Rent Board to the Board of Review within 21 days of the communication of the order.

- **LAND ACQUISITION ORDERS**

From the Chief Valuer's award to the Land Acquisition Board of Review within 21 days of receipt of notice of award.

- **INLAND REVENUE ACT**

From assessment to C.G.I.R. within 30 days of notice of assessment from C.G.I.R. to Inland Revenue Board of Review within 1 month of receipt of determination.

- **CEILING ON HOUSING PROPERTY LAW NO. 1 OF 1972**

From the Commissioner's Order to the Board of Review – within 1 month from the date of communication.

NEGLIGENCE

1.1.1. SOME DEFINITION OF NEGLIGENCE IN NEGLIGENCE CASES

1. The duty of care is the primary element in negligence. It is a legal duty to take reasonable care to avoid causing harm to others. The standard of care is that of a reasonable person in the same circumstances.

2. Damages are the second element in negligence. They are the loss or injury suffered by the claimant as a result of the defendant's breach of duty. Damages are not awarded for pure economic loss or for psychiatric injury unless it is a foreseeable consequence of the defendant's negligence.

3. The third element in negligence is causation. It is necessary to show that the defendant's breach of duty caused the claimant's loss or injury. The test is whether the loss or injury was a foreseeable consequence of the defendant's negligence.

4. The fourth element in negligence is remoteness. It is necessary to show that the loss or injury was not too remote from the defendant's negligence. The test is whether the loss or injury was a foreseeable consequence of the defendant's negligence.

5. Negligence is a tortious wrong. It is a breach of a legal duty to take reasonable care to avoid causing harm to others.

6. The duty of care is a legal duty. It is a duty to take reasonable care to avoid causing harm to others. The standard of care is that of a reasonable person in the same circumstances.

7. Damages are the loss or injury suffered by the claimant as a result of the defendant's breach of duty. Damages are not awarded for pure economic loss or for psychiatric injury unless it is a foreseeable consequence of the defendant's negligence.

8. The third element in negligence is causation. It is necessary to show that the defendant's breach of duty caused the claimant's loss or injury. The test is whether the loss or injury was a foreseeable consequence of the defendant's negligence.

9. The fourth element in negligence is remoteness. It is necessary to show that the loss or injury was not too remote from the defendant's negligence. The test is whether the loss or injury was a foreseeable consequence of the defendant's negligence.

• **APPEALS TO THE APPELLATE COURT**

• **APPEALS**

Appeal which may be filed with the Appellate Court

• **APPEALS**

From the Appellate Court within 30 days of the date of the judgment

• **LAND ACQUISITION ACT**

From the Appellate Court within 30 days of the date of the order of the Board of Review

• **LAND REVENUE ACT**

From the Appellate Court within 30 days of notice of assessment from C.G.L.R. to the Revenue Board of Review within 1 month of receipt of determination

• **CEILING ON HOUSING PROPERTY LAW NO. 1 OF 1971**

From the Commissioner's Order to the Board of Review within 1 month from the date of communication

Chapter 12

NEGLIGENCE

12.1 SOME IMPORTANT JUDICIAL DECISIONS IN NEGLIGENCE CASES

- 1. Phillips vs. London South Western Railway Company 1879-90**
QBD C.A. 78 – Factors that a Court should take into consideration before awarding damages.
- 2. Domsalla vs. Barr (1969) 2 AER 487** – Special damages should be separately pleaded and would be awarded only if proved.
- 3. Ilkiw vs. Samuel & Sons (1963) 2 AER 879** – Special damages if not pleaded will not be awarded as part of general damages
- 4. Burden on the Plaintiff in an accident case :-**
 - i. Sandler vs. Wholesale Coal Suppliers (1941) AD 194**
 - ii. Union Gvt. vs. National Bank of South Africa (1921) AD 121**
 - iii. Kotz vs. Johnson (1920) AD 438**
- 5. W. H. Bus Company vs. Smaranayaka 55 NLR 182** - Plaintiff's liability to prove loss of income

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6. **Peter vs. Parapathi 69 NLR 525** – Computation of damages
 7. **Nadarajah vs. Ceylon Transport Board 79 NLR 48** – Assessment of damages
 8. **(1979) 2 SLR 521** – Effect of an admission made by an accused in the Magistrate's Court.
 9. **Ghaffoor vs. Wilson (1990) 1 SLR 142** – Loss of Support caused by death of child.
 10. **Punchi Singho vs. Bogala Graphite 73 NLR 66** – Res ipsa Loquitur.

12.2 SOME MATTERS TO REMEMBER IN AN ACCIDENT CASE

Any type of an action for damages has to be filed within a period of 2 years. Hence any registered attorney or counsel drafting pleadings would have to be mindful of the prescription period involved. The jurisdiction of the court is determined either on the basis of the residence of the Defendant or on the basis of the place where the cause of action arose (Place of Accident)

Sometimes the person who meets with the accident would survive. In such an instance he could file the action in the relevant District Court. The Plaintiff in such a case must necessarily contain the following matters;

1. Place of accident and the liability of the defendant/s.
2. Particulars relating to the vehicle.
3. Several acts of negligence of the Defendant to be described.
4. Injuries and the losses suffered by the Plaintiff has to be defined.
5. A description of the financial status of the Defendant.
6. The effect of each injury.
7. Special damages and general damages must be separately pleaded.

In some cases the person who meets with the accident may not survive the accident. In such an instance, the dependants of the deceased could file the action for damages against the Defendant.

Notice which is required under Section 106 of the Motor Traffic Act, has to be given to bring on the liability of the insurer.

Prior to the filing of the action, the attorney would be required to send a letter of demand to the prospective defendant.

Where the accident has arisen as a result of a vehicle belonging to the State, then a notice of action has to be sent to the relevant driver of the vehicle and the Attorney-General in terms of Section 461 of the Civil Procedure Code (One months' notice)

One has to be mindful of the provisions of the following statutes too.

1. Contributory Negligence and Joint Wrong doers Act, No. 12 of 1968. (Volume V Legislative Enactments of Sri Lanka 1980 Revision)
2. State (Liability in Delict) Act, No. 22 of 1969 (Volume V Legislative Enactments of Sri Lanka 1980 Revision)

LAW OF INJUNCTIONS

INJUNCTIONS

Section 5 of the Civil Procedure Code defines the term "action" as a proceeding for the prevention or redress of a wrong. When one analyses the meaning of the aforesaid term, necessarily the arguments contained in the above interpretation suggests that a civil action could be filed either where a civil wrong is already committed or where there is an imminent danger of a civil wrong being committed.

The concept of making available a judicial remedy for the prevention of a civil wrong was initially recognized under the equity principles of the English legal system. These principles have now become deeply ingrained into our system of law.

Section 54(1) of the Judicature Act No 2 of 1978 contains the legal principles through which the courts in this country are empowered to issue injunctions. Section 54 reads as follows:

Section 54(1): "Where in any action instituted in a High Court, District Court, or a Magistrate's Court a person

One has to have a...

- 1. ...
- 2. ...
- 3. ...

INSTRUCTIONS

Chapter 13

LAW OF INJUNCTIONS

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The concept of making available a mechanism to prevent the commission of a civil wrong was initially recognized under the equity principles of the British legal system. These principles have now become deeply ingrained into our system of law.

Section 54 (1) of the Judicature Act No 2 of 1978 contains the legal principles through which the courts in this country are empowered to issue injunctions. Section 54 reads as follows:

Section 54 (1): Where in any action instituted in a High Court, District Court, or a Small Claims Court it appears:

- (a) from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act of nuisance, the commission or continuance of which would produce injury to the plaintiff or
- (b) that the defendant during pendency of the action is doing or committing or procuring or suffering to be done or committed , or threatens or is about to do so procure or suffer to be done or committed, an act or nuisance in violation of the plaintiff's rights in respect of the subject matter of the action and tending to render the judgement in effectual, or
- (c) that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with the intent to defraud the plaintiff, the court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient ground exist therefore, grant an injunction restraining any such defendant from
- i) committing or committing any such act or nuisance ,
 - ii) doing or committing any such act or nuisance,
 - iii) removing or disposing of such property.

54 (2): For the purpose of this section, any defendant who shall have by his answer set up any claim in reconvention and shall thereupon demand an affirmative judgement against the plaintiff shall be deemed a plaintiff, and shall have the same right to an injunction as he would have in an action brought by him against the plaintiff for the cause of action stated in the claim in reconvention, and the plaintiff shall be deemed the defendant and the claim in reconvention the plaintiff.

54 (3): Such injunctions may be granted at any time after the commencement of the action and before final judgement after notice to the defendant, where the objective of granting an injunction will be defeated by delay, and the Court may enjoin the defendant until the hearing and decision of the application for an injunction but for periods not exceeding fourteen days at a time.

It appears that the aforesaid section authorizes the court to issue an injunction whenever the court is of the view that the party named as the defendant is likely to commit or is likely to continue to commit a civil wrong or an act of nuisance. Accordingly it is relevant to note that the courts in this country are capable of restraining not only civil wrongs identified under a substantive law but also acts of persons which amounts to acts of nuisance.

Under the law of injunctions, injunctions can be classified as being either Prohibitory Injunctions or Mandatory Injunctions. In the former the court would restrain and prohibit commission or continuance of a civil wrong or act of nuisance. In the latter, the court would issue an order directing a party to do an act.

The procedural provisions relating to the granting of injunctions are contained in Sections 662-667 of the Civil Procedure Code. Sections 663 and 664 were amended through Act No 79 of 1988. The said sections read as follows:

Section 663 : (Amended by Act. No. 79 of 1988)

An injunction or an enjoining order granted by court on any such application may, in case of disobedience be enforced, by the Punishment of the offender as for a contempt of Court.”

Section 664

1. The Court shall before granting an injunction cause the petition of application for the same together with the accompanying affidavit to be served on the opposite party.
2. Where it appears to court that the object of granting an injunction would be defeated by delay. It may until the hearing and decision of the application for an injunction, enjoin the defendant for a period not exceeding fourteen days in the first instance, and the court may for sufficient reasons,

Which shall not be recorded, extend for periods not exceeding fourteen days at a time, the operation of such order. An enjoining order made under these provisions; Shall lapse upon the hearing and decision of the application for the grant of an injunction.

3. The court may, of its own Motion, or on an application made by any party, Suspend the operation of an enjoining order issued under Subsection (2), if it is satisfied that such order was obtained by suppression, or misrepresentation, of any material facts.

For the purpose of analysis, it could be said that an injunction could be asked for in two given situations.

1. At the commencement of a civil action, and
2. During the pendency of a civil action.

1. What are the papers to be filed?

Ordinarily, every application for an injunction shall be by way of Petition and Affidavit, except where the injunctions is prayed for in the Plaint itself. In this situation, the application is required to file a Plaint and Affidavit at the commencement of the civil case. Section 662 stipulates the above requirement.

2. Is an affidavit necessary?

In both cases, an affidavit becomes absolutely necessary. In drafting affidavits, counsel should bear in mind to comply with all rules relating to affidavits.

3. What should an affidavit contain?

The affidavit is considered to be the most vital document in every application for injunctive relief. Hence counsel should remember that a complete disclosure of all relevant material should be contained in the affidavit. Since injunctions are an equitable remedy, failure to reveal all material would constitute a ground on which alone the application for injunction could be dismissed.

4. Who could file the affidavit?

The affidavit could be filed either by the applicant or by any person having knowledge of the facts relating to the matter. The party which files the affidavit could refer to any other documentary evidence that may be relevant in establishing their claim, and the said documents ought to be produced along with the affidavit.

5. What if a person who receives an injunction violates the order of court?

Section 663 of the Civil Procedure Code specifically mentions that the

violation of an order of a court constitutes a contempt of court, and accordingly steps would be taken to prosecute him for contempt.

6. What is the relevant procedure?

Consequent to the amendment to Section 664 by Act No 79 of 1998, the procedure adopted by courts has now changed. Accordingly, as at present the court cannot issue an injunction when the opposite party is not in court. Generally an application for injunctive relief is an ex parte application. As stated before, such an application could be made either at the commencement of the action or during its pendency. Consequent to the amendment, when such an ex parte application is made, the court could only issue an enjoining order operative for a period of 14 days. (To be extended)

7. What happens on the fourteenth day?

On the fourteenth day, the respondent to the application should file his proxy and could object to the extension of the enjoining order. It is relevant to note that Section 664(1) requires that the applicant for injunctive relief should serve a copy of his application on the defendant. Counsel could either file a proxy and move for time to file objections, or could file his objections and proxy by the fourteenth day and object to extending the enjoining order as stated before. The court can extend the enjoining order on sufficient grounds being shown by the applicant. However, the reasons for such extension should be recorded.

8. What is the procedure after the Statement of Objections are filed?

Upon the filing of the Statement of Objections by the defendant, the court could fix the case for inquiry. The inquiry would be held in respect of the question whether an interim injunction should be issued. As a matter of practice, the parties are directed to file written submissions addressing the mind of court to the relevant issues. Thereafter, the court could, if the parties agree, make an order on the written submissions or hear counsel and make its order.

9. Can oral evidence be led at such an inquiry?

Leading of oral evidence can only be done if the parties agree to such procedure. Otherwise, the court would make an order based on the affidavits and the documents of the respective parties. Please read **Felix Dias Bandaranaike vs. State Film Corporation (1981) 2 SLR 287.**

10. What if you are dissatisfied with the order made by court after an inquiry?

Consequent to an inquiry, the court could either discharge, vary or set aside the enjoining order, or could convert the enjoining order into an interim injunction. If any party is dissatisfied with such an order, then such party could seek leave to appeal from the Court of Appeal within fourteen days of the said order.

11. Is it possible to vacate an enjoining order before fourteen days?

Section 664(3) of the Civil Procedure Code clearly states that if the enjoining order had been obtained through suppression of material or non-disclosure of material, the court could, either on its own motion or on the application made by a party to the proceedings, suspend an enjoining order previously issued by the court. Therefore, it is significant to remember that the application for injunctive relief should conform to the rule of *Uberrimae Fidei*.

12. What are the grounds on which an injunction would be issued?

In considering an application for injunctive relief, the court would exercise a discretion. In the exercise of the aforesaid discretion, the three following areas have been identified as areas for consideration by the English courts. The same test is adopted by our courts too.

1) Has the applicant made out a prima facie case?

The pleadings and the documents filed by the applicant should indicate that the plaintiff is entitled for judgement. In other words, the plaintiff must show that a legal right of his is likely to be violated and that he will probably succeed in establishing his right.

Basically, the applicant for injunctive relief must show that the material presented to court clearly demonstrates him being successful at the end of the case.

2) **Where does the balance of convenience lie?**

Once the above test is passed, the court must consider where the balance of convenience lies. Under this area, the court will consider the question as to which party would suffer more harm. In other words, the court would ask itself the following question: Will the harm that the defendant would suffer if the injunction is granted be greater than the harm the plaintiff would suffer if the injunction is refused? The court would call upon the plaintiff to prove the above position.

3) **Whether equitable considerations favour the parties of an injunction?**

If the plaintiff has made out a prima facie case and where the court holds that the balance of convenience favours the grant of injunction, then the court will consider whether equitable considerations warrant the issue of an injunction. Here, the court would observe the conduct and the dealings of the parties carefully.

4) **Can the court grant injunctions where damages are an adequate remedy?**

The initial thinking was that no injunction would lie where damages are an adequate remedy. This principle arose as a result of a statement made Lindley L.J in **London and Blackwell Railway v. Cross (1885) 31 Chancery Division pg.354**. The above was cited with approval by Dalton J. in **Jinadasa v. Weerasighe 31 NLR 33**. However, over the years, the think-

ing has changed and the courts at present would award injunctive relief even where damages may be an adequate remedy.

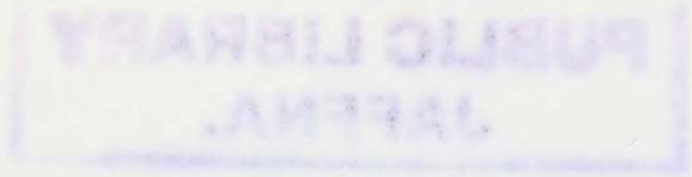
13.1 IMPORTANT CASE LAW

- 1. Felix Dias Bandaranaike vs. State Film corporation (1981)
2 SLR 287**
- Oral evidence can not be led at an injunction inquiry except with the consent of the parties, or when there is no objection.

- 2. Preston vs. Luck (1884) 27 Chancery 497**
- The nature of the “prima facie case” expected from the applicant.
Also - **Ghulamhussain vs. Cohen 1995 SLR 365**
Amarasekera vs. Mitsui Company Ltd - 1993 1 SLLR 22

- 3. Gouriet vs. Union of Post Office workers (1978) A/C 435.**
- A court would issue injunctive relief only to support a legal right of the plaintiff. Also see **Richard Perera v. Albert Perera 67 NLR 443** and **Gamane v. Minister of Agriculture and Lands 76 NLR 25.**

- 4. Yakkaduwe Sri Pragnarama Thero vs. Minister of Education 71 NLR 506**
- The nature of the test of balance of convenience.
Also see - **Subramaniam vs. Shabdeen 1984 1 SLR 48**



5. **Ceylon Hotels Corporation vs. Jayatunga 76 NLR 443**
 - The conduct and dealings of the parties would be considered by court before injunctive relief is issued.

6. **Collets vs. Commissioner of Labour (1989) 2 SLR 6**
 - An applicant for injunctive relief must place all correct material before court.
 - Also see - **Peoples Bank vs. Hewawasam 2000 2 SLLR 29**

7. **Mallawa vs. Keerthiratne (1982) 1 SLR 384**
 - An injunction will not be issued to dispossess another.
 - Also **WJ King & Sons Ltd - 1976 1 AER 770**

8. **Gnanamuttu vs. Bandarawela Urban Council and Otlzers 48 NLR 366**
 - The court has the power to issue a mandatory injunction.

9. **Mallika De Silva vs. Gaminia De Silva 1999 1 SLLR 85**
 - Defendant cannot ask for Interim Injunction unless there is a claim in reconvention.

10. **Alphonoso Appuhamy vs. Hettiarachchi 77 NLR 131**
Uberima - fide
Also see - **1987 1 SLR 5, 1997 1 SLR 293.**

11. **Pieris vs. Perera 2002 2 SLR 128**
mandatory injunctions.

Chapter 14

INSTITUTION OF PROCEEDINGS
UNDER SECTION 98 OF THE CODE

**INSTITUTION OF PROCEEDINGS
UNDER SECTION 98 OF THE CODE
OF CRIMINAL PROCEDURE ACT,
NO. 15 OF 1979.**

Section 121 of the Code of Criminal Procedure Act no. 15 of 1979 indicates a number of ways in which proceedings may be commenced in a Magistrate Court. Accordingly, such proceedings may be commenced in any one of the following ways:

1. On an oral or written complaint being made to a Magistrate Court that an offence has been committed which such court has jurisdiction either to inquire into or try.
2. On a written report in the like effect being made to a Magistrate of such court by an officer appointed by the Minister under Chapter 11 of this Code, or by a Peace Officer or by a Public Servant or a Servant of a Local Government Authority.
3. Upon the knowledge of suspicion of a Magistrate of such court that an offence has been committed in which the court has jurisdiction either to inquire into or try.

5. Ceylon Hotels Corporation vs. Jayaranga 70 MLR 482

- The creditors and dealings of the parties would be considered by court before injunctive relief is issued.

INSTITUTION OF PROCEEDINGS UNDER SECTION 98 OF THE CODE OF CRIMINAL PROCEDURE ACT.

7. Mahon v. ... NO. 15 OF 1979

- An information will not be issued or continued if the accused is also a shareholder in the company.

8. Guarananda v. ... 43 MLR 36

- The court has the power to issue a writ of habeas corpus.

9. ...

- ...

10. ...

- ...

11. ...

- ...

Chapter 14

INSTITUTION OF PROCEEDINGS UNDER SECTION 98 OF THE CODE OF CRIMINAL PROCEDURE ACT, NO. 15 OF 1979.

Section 136 of the Code of Criminal Procedure Act no. 15 of 1979 indicates a number of ways that criminal proceedings may be commenced in a Magistrate Court. Accordingly such proceedings may commence in any one of the following ways.

1. On an oral or written complaint being made to a Magistrate Court that an offence has been committed which such court has jurisdiction either to inquire into or try.
2. On a written report to the like effect being made to a Magistrate of such court by an inquirer appointed by the Minister under Chapter 11 of this Code, or by a Peace Officer or by a Public Servant or a Servant of a Local Government Authority.
3. Upon the knowledge of suspicion of a Magistrate of such a court that an offence has been committed to which the court has jurisdiction either to try or inquire into.

4. Upon any person being before a Magistrate of such court upon an allegation of having committed a similar offence.
5. Whenever the Attorney-General by a warrant under his hand directs a Magistrate to hold an inquiry regarding an offence which such court has jurisdiction to inquire into.
6. Whenever a complaint is being made to a Magistrate Court by another court in terms of section 135 of the Code of Criminal Procedure Act No. 15 of 1979.

The most common method of filing action in the Magistrate Courts is the manner set out in section 136(1) (b) of the code. To follow this procedure, initially the fact of an offence being committed has to be brought to the notice of the Police or other officers designated to the section. Once such information is brought to the notice of the Police, they are duty bound to commence an investigation immediately in terms of the provisions of Chapter 9 of the Code. Thereafter the provisions of sections 109 to 120 would apply and the procedure set out therein would be followed.

Section 136 (1) (a) introduces the concept of "Private Complaint". Accordingly, a litigant whose rights are violated by another and whose complaint to the police is not acted upon, has the right to act under this section and forward his grievance to the Magistrate court. This is done by way of an



information relating to the commission of an offence, which is commonly referred to as a “Private Complaint”.

The above two subsections are important inasmuch these sections contain the procedural provisions that are mostly resorted to by a complainant who has a grievance falling under Chapter 9 of the Code.

Chapter 9 of the Code of Criminal Procedure Act, No. 15 of 1979 deals with the procedural provisions relating to the control of “Public Nuisance”. The main provisions are to be found from sections 98 to 105. For the purpose of discussion this chapter could be divided into the following areas;

1. Orders for Removal or Abatement in case of nuisance.
2. Temporary orders in urgent cases of nuisance.

WHAT IS A PUBLIC NUISANCE?

The term Public Nuisance has not been interpreted anywhere in the Code. However, on a broad basis it could be defined as an act or illegal omission which causes some common injury, danger or annoyance to the public or the people in general, who dwell or occupy property in the vicinity or

which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

It is to be noted that a Public Nuisance is a crime and the law identifies the to be one. A distinction is drawn between a Public Nuisance and a Private one. In the latter the person who commits a private nuisance could be held liable in tort.

HISTORY OF THE LEGAL POSITION

Section 105 to 113 of the Old Criminal Procedure Code dealt with the provisions of law relating to Public Nuisance. Consequent to the repealing of the Criminal Procedure Code and the introduction of the Administration of Justice Law, No 44 of 1973, the procedural provisions are to be found in section 98 to 105 of the code.

EFFECTS OF SECTION 98

The category of Public Nuisances which comes within the purview of section 98, are identified under the said section. The 5 subsections from (a) to(e) of section 98 outlines a number of situations that the draftsmen of the Code thought fit to be included in this section.

The commencing point of a proceeding in a section 98 matter, would be at the point where any affected individual or individuals may complain

either to the Police or to any other relevant Authority that some person is committing an act of Public Nuisance. It is pertinent to note that the authority to whom the complaint is to be made has to be carefully selected by the individual concerned and it the duty of any lawyer representing the interests of any person affected, to advise the litigant correctly.

A Police complaint to the authorities is not an imperative step in the procedure. Such a complaint would have immense probative value as evidence in the matter. Such a complaint would show that the matter complained of is of a serious nature and would add weight to the application made to the court.

HOW DOES ONE COMPLAIN TO THE COURT? WHAT ARE THE DOCUMENTS INVOLVED?

The opening words of section 98(1) of the Code states that the Magistrate acquires jurisdiction upon the receipt of the report or an information. On a very narrow sense one could equate the report to a report filed under section 36(1)(a) of the Code. Upon such a construction it may ordinarily appear that those are the only two means by which an application could be made to a court under section 98 of the Code. In my view this thinking is wrong and such an application could be made in any one of the forms referred to in section 136 of the Code.

In **Forrest vs. Leefe (1910) 13 NLR 124** it was stated by Middleton J. that a Magistrate could even act on his own observations and cognizance of a matter falling under section 98 of the Code.

PRIVATE PLAINT SITUATIONS

In the wake of the interest for litigation in this area of law, one of the most common forms adopted by the individuals who are affected is to go before court by way of Private Complaint and file information before the court. Hence it is important to ascertain what matters should be borne in mind at the time of filing these applications.

At the outset, a lawyer would have to highlight the nature of the violation or the nuisance complained against and identify the exact violator. Then it is the duty of the lawyer to advise the client to ensure that all the relevant material is placed before Court. An "information" within the meaning of this section has to comply with the procedure set out under section 136 of the Code and the lawyer has to be mindful that those requirements are met with. Generally an information under section 136 of the Code merely informs the Court of the nature of the violation. The purpose of such an information is to ensure that the Court is notified of the commission of the offence. However, one has to bear in mind that in the event of

a decision being made to file an affidavit, all the requirements relating to affidavits also would have to be complied with. The filing of an affidavit could be a tactical advantage as well. Especially, if a number of documents are involved and a perusal of those documents is necessary to the making of the order and one feels that he has a reasonably good case, then an affidavit would be very useful.

SECTION 98 OF THE CODE

Section 98 introduces a number of subsections that may come within the ambit of the section. Section 98 (1) (a) outlines acts of obstruction or nuisance which are committed in respect of a “Public Place”, That forms the essence of liability under this section.

In **Andiris vs. Manuel (1909) 2 S.C.D. 69** it was held that there must be evidence that the place must be dedicated to the public. Similarly in **Sandrasagara vs. Sinnathamby 25 NLR 139** it was held that no order could be obtained under this subsection if the applicant fails to prove that the place was a Public Place.

However, where the information filed in court is under any one of the remaining subsections of section 98, then the requirements of proving that the place that the alleged violation took place was a public place, does not arise. The provisions of these sections are not referable to a “Public Place”, they mainly speak of acts of omissions.

In **Saram vs. Seneviratne 21NLR 190** it was held that “ a nuisance which affects only the neighbourhood and not the public in general may be the subject of proceedings.” However, this judgement cannot be applied blindly in respect of all the subsections of section 98. It has no application to situations, which fall, under section 98(1) (a).

Once the application is made to court, the Magistrate has a discretion in deciding whether to take evidence or not in respect of the application. This is where the filling of the affidavits could be made use to a tactical advantage. Once the Magistrate decides to have evidence and after the leading of such evidence, the court could make a conditional order requiring the person causing the obstruction or the nuisance as the case may be or carry on such trade or occupation or keeping any such building, substance, tree, tank, well or excavation to do any one or more appropriate things set out in section 98(1).

EFFECT OF A CONDITIONAL ORDER

Once the conditional order is made by the Court and the same is served on the Respondent, he could either perform the act directed by the order or appear in Court and move to have the order set aside or modified. If the Respondent does not do either of the two things above, he becomes liable to the penalty prescribed in section 185 of the Penal Code.

If the Respondent appears before the Court and moves to have the conditional order set aside or modified, then the law, as contained in section 101 of the code requires the Magistrate to take evidence in the matter. There appears to be a confusion as to the exact meaning of the term "take evidence in the matter". In **Jayantha vs. OIC Panadura (1986) 1SLR 334** it was held that at the time section 101 is resorted to, a conditional order already made under section 98 is in existence and that therefor the burden of leading evidence lies with the Respondent. In other words, the Respondent would have to lead evidence and show as to the conditional order should be vacated. This he can do by forwarding his defences.

WHAT ARE THE DEFENCES AVAILABLE TO A RESPONDENT?

- (01) Bona fide claim that he believed that the place is not a public place.
- (02) Act complained of was an act authorized by law.
Vaughan vs. Taff Vale Rye Co. (1860) 29 L.J Ex.247.
- (03) That the nuisance complained was done in order to protect the Defendant from an extraordinary danger.

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INVALID DEFENCES.

- (01) Prescription. See **13 NLR 119, 2 Curr L R 164**
- (02) That the public came to the nuisance.
Hole vs. Barlow (1858) 27 LJCP 208.
- (03) Absence of Mens Rea is no defence.
Chibnall vs. Paul (1881) 29 WR 536.
- (04) It is not a defence to show that all precautions were taken.
Pavell vs. Paul (1880) 5 QBD 597.

Once the evidence is led and where the Magistrate is satisfied that the order is not reasonable and proper he could either rescind the order or modify same. Where he decided to modify same to suit the requirements of the case, then the modified order would operate as an absolute order.

If the Magistrate is not satisfied, the conditional order already entered, and presently in force shall be made absolute.

IMPORTANT CASE DECISIONS ON ENVIRONMENTAL LAW

Statutes: Nuisances Ordinance
Sections 261, 283 and 284 of the Penal Code.
Section 98 - 104 of the Code of Criminal Procedure Act.
National Environmental Act

- (01) **Keang Nam Enterprises (Ltd) vs. Abeysinghe 1994 1 SLLR 1**
- (02) **Elal Jayantha vs. OIC Panadura 1986 1 SLLR 334** - Procedure to be adopted by a Magistrate.
- (03) **Greena Fernando vs. Teckla Saparamadu 1990 1 SLLR 270** - The Respondent has to lead evidence first.
- (04) **Ratlam vs. Vardhich AIR 1989 SC 1622** - Attitude of a Court.
- (05) **Municipal Commissioner vs. Mohammed Ali (1871) 7 Beng. LR 499** - No prescriptive right could be acquired - **13 NLR 119. 2 Curr LR 164**
- (06) **Weld vs. Horuby (1806) 7 East 195,199.**
- (07) **Bhusan vs. Ram 1918 Cal 515** - The occupier of the premises is liable and not the absent owner.
- (08) **Forrest vs. Leefe 13 NLR 124** - A Magistrate could even act on his own observations.
- (09) **Andiris vs. 1909 2 CSD 69** - The place must be dedicated to the public.
- (10) **Sandrasagara vs. Sinnethamby 21 NLR 139** - Place must be a public place.

- (11) **Saram vs. Seneviratne 21 NLR 190** - Nuisance that affects the neighbourhood could be the subject of proceedings.
- (12) **Saibo vs. Branha 2 NLR 302** - Conditional Order must state the conditions specifically.
- (13) **Silva vs. Appuhamy 4 NLR 179** - Power to grant injunctions.
- (14) **Vaughan vs. Taff Vale Rye Co. (1860) 29 LJ Ex247** - That the act complained of is an act authorized by Law is not a valid defence.
- (15) **Chibnall vs. Paul (1881) 29 WR 536** - That the public came to the nuisance is no defence.
- (16) **Pavell vs. Paul (1880) 5 QBD 597** - Not a defence to show that all precautions were taken.
- (17) **Gunaratne vs. Homagama Pradeshiya Sabhawa 1998 2 SLLR 11** - Provisions of the National Environmental Act discussed.
- (18) **Gnananathan vs. Premawardene 1999 3 SLLR 1.**

A NOTE ON THE BAIL ACT NO. 30 OF 1997.

The provisions of Law relating to Bail in Criminal cases is presently contained in the Cr.P.C. No. 2 of 1973. These provisions have replaced the earlier law provided in sections 101, 113, 402, 403, and 404 of the Code of Criminal Procedure Act No. 15 of 1973.

(01) APPLICABILITY OF THE ACT

There is a discrepancy between Section 2 of the Bail Act and Section 2 of the English Act. The meaning conveyed by the Bail Act is that except for a suspect or an accused charged or being involved in the commission of an offence under the Prevention of Terrorism Act No. 48 of 1979, and the Emergency Regulations in respect of whom special provisions have been made regarding the release on Bail, the Bail Act would apply to any other person suspected or accused of having committed an offence under any other law. This interpretation only excludes the PTA and the Emergency Regulations. However, in the English Act, the mean-

(11) *Saravali v. Saravali*, 11 N.S. 196 - The court held that the
relationship could be dissolved by mutual consent.

(12) *Saido v. Saido*, 2 N.S. 302 - The court held that the
relationship could be dissolved by mutual consent.

A NOTE ON THE BAIL ACT NO. 30 OF 1997

(13) *Yashwanth v. The State*, 1997 1 S.C.R. 1000 - The court
held that a law which is not validly enacted by Law is not a valid law.

(14) *Chinnai v. State*, 1997 2 S.C.R. 536 - That the public courts to
exercise their jurisdiction.

(15) *Pratt v. Attorney General*, 1997 1 S.C.R. 839 - The court held that
all provisions of the Constitution are valid.

(16) *Chunjab v. India*, 1998 2 S.C.R. 1 - The court held that the
H. P. Government is not a State for the purposes of the Act discussed.

(17) *Chunjab v. India*, 1998 2 S.C.R. 1 - The court held that the
H. P. Government is not a State for the purposes of the Act discussed.



Chapter 15

A NOTE ON THE BAIL

ACT NO. 30 OF 1997.

The provisions of Law relating to the granting of Bail in Criminal cases is presently contained in the Bail Act No. 30 of 1997. These provisions have replaced the earlier Bail provisions under Section 114, 115, 402, 403, and 404 of the Code of Criminal Procedure Act No. 15 of 1979.

(01) APPLICABILITY OF THE ACT.

There is a confusion between Section 3 of the Sinhala Act and Section 3 of the English Act. The meaning conveyed by the Sinhala Act is that except for a suspect or an accused suspected of being involved in the commission of an offence under the Prevention of Terrorism Act No. 48 of 1979, and the Emergency Regulations in respect of whom special provisions have been made regarding the release on Bail, the Bail Act would apply to any other person suspected or accused of having committed an offence under any other law. This interpretation only excludes the PTA and the Emergency Regulations. However, in the English Act, the mean-

ing is conveyed that the Bail Act would apply to all laws except to persons coming within the purview of the PTA, Emergency Regulations and under any other law for which specific provisions have been made by such law for the release of offenders under the said law. However, in view of Section 28 of the Act, the Sinhala version would have to be accepted. In fact the learned High Court Judge of the Western Province, holden at Negombo has held so in one such application.

(02) **POLICY OF THE ACT**

The policy as stated appears to be “Release of persons should be the Rule and remand the exception”. However, when one carefully examines the provisions it would appear that in certain Sections of the Act, this policy may have been ignored.

(03) **OFFENCES**

Mainly, the offences could be discussed as being eitherailable Offences or Non-ailable Offences. (See Section 29)

(04) **BAILABLE OFFENCES**

Ordinarily aailable Offence means an offence in respect of which you could demand as a matter of right to be released on Bail. This has been held to be so in **McLean vs. Appan 2NLR** and

Pathirana vs. OIC Nittambuwa 1988 1 SLLR 84. Earlier, the thinking was that any person suspected of a Bailable Offence has to be released mandatorily. No Order for remand could have been made. However, Section 14 of the Bail Act, has placed restrictions on this concept and has identified certain situations where a Court could even remand such a person.

(05) NON BAILABLE OFFENCES

Sections 5, 13 and 14 of the Act become relevant. In terms of Section 5, a Court exercises a discretion in granting Bail to a person who is produced before it upon an allegation of being involved in a Non Bailable offence. However, if the punishment for such an offence is either death or life imprisonment, the discretion could be exercised only by a Judge of the High Court as set out in Section 13. Section 14 commonly applies to Bailable and Non Bailable offences and speaks of the instances where a remand Order could be made.

The matters to be considered by a Court exercising a discretion regarding Bail have been set out in the following cases;

(01) Rex vs. Toussaint 12 NLR 65.

(02) Q vs. Liyanage 65 NLR 289

(06) **POLICE POWERS UNDER THE BAIL ACT**

Section 6 confers upon the Police very wide powers regarding the freedom of an individual. Section 6(1) empowers the Police to release a person who is alleged to have been concerned in a Bailable offence without producing him in Court.

(07) **APPLICATION OF SECTION 16**

Prior to the enactment of the Bail Act No. 30 of 1997, any person who is produced before Court in respect of a Non Bailable offence could have been remanded upto a period of 15 days (Section 115(2) of the Code of Criminal Procedure Act). Where the person is alleged to have committed an offence punishable under Section 114, 191 or 196 of the Penal Code, a Magistrate's Court could have remanded him for a maximum of 3 months without the filing of a Complaint (See **A.G. vs. Punchi Banda 1986 1 SLLR 40**). However, under the present Act a person suspected of being involved in a Non Bailable offence could be remanded upto a period of 12 months (See Section 16). The Judicial Supervision embodied in Sections 115(1), (2), (3) and 120 of the Code of Criminal Procedure Act, no longer exists.

(08) SECTION 19

This Section speaks of post-verdict Bail. Under this Section a Magistrates Court has the power to remand a person whether he is convicted or not. This is clearly contrary to the earlier provisions where upon the lodging of a Petition of Appeal, a convict was entitled to be released on Bail. (See Section 323 of the Code of Criminal Procedure Act No.15 of 1979)

(09) SECTION 20

This Section deals with Bail regarding persons convicted or acquitted by a High Court after Trial.

(10) ANTICIPATORY BAIL

Section 21 of the Bail Act has introduced the concept of Anticipatory Bail. This is one of the important changes effected by the statute. An Anticipatory Bail application could be made by any person who has reason to believe that he may be arrested in respect of a Non Bailable offence. You could apply to court by Petition and Affidavit with notice to the Officer-in-charge of the Police Station, that in the event of his arrest that he be released on Bail. An inquiry has to be conducted within 7 days of the application.

SECTION 19 (99)

This section speaks of post-verdict bail. Under this section a Magistrate Court has the power to remand a person whether he is convicted or not. This is clearly contrary to the earlier provisions which upon the lodging of a Petition of Appeal, a convict was entitled to be released on bail (See Section 323 of the Code of Criminal Procedure Act No. 15 of 1979).

SECTION 20 (99)

This section deals with bail regarding persons convicted or sentenced by a High Court. It states that a person who is sentenced to imprisonment for a term exceeding three years shall be entitled to apply for bail. (The number of years is not specified).

SECTION 21 (10) - ANTICIPATORY BAIL

Section 21 of the Bail Act has introduced the concept of Anticipatory Bail. This is one of the important changes effected by the Bail Act. An anticipatory bail application could be made by any person who has reason to believe that he may be arrested in connection with a Non-Bailable offence. You could apply to obtain a writ of Habeas Corpus from the High Court. The Officer-in-charge of the Police Station, that in the event of his arrest that he be released on bail. An inquiry has to be conducted within 7 days of the application.

APPLICATION TO THE SUPREME COURT IN RESPECT OF VIOLATIONS OF FUNDAMENTAL RIGHTS

The concept of Fundamental and Human Rights is based on the idea of justice, equality and equity. Though not given the prominence the concept has today, ideas of right and wrong were present in the human mind from the beginning of mankind.

But it is only after the atrocities committed during World War II that the world community came to realize the need for the appearance of a body to promote peace and respect for humanity. As a result of this, on 10th December 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights, and subsequently a number of other constitutions and treaties on Human Rights and civil liberties.

Principles of fundamental rights were first directly incorporated in India by Chapter 16 of the First Republic Constitution. But it did not provide expressly for violation of fundamental rights.

APPLICATION TO THE SUPREME
COURT IN RESPECT OF
VIOLATIONS OF
FUNDAMENTAL RIGHTS

Chapter 16

APPLICATION TO THE SUPREME COURT IN RESPECT OF VIOLATIONS OF FUNDAMENTAL RIGHTS

1. HISTORY :

The concept of Fundamental and Human Rights is based on the ideas of justice or right and wrong. Though not given the prominence the concept sees today, ideas of right and wrong were present in the human mind from the beginning of mankind.

But it is only after the atrocities committed during World War II that the world community came to realise the need and importance of a body to promote peace and respect for humanity. As a result of this, on 10th December 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights, and subsequently a number of other conventions and covenants on Human Rights and civil liberties.

Principles of fundamental rights were first directly introduced to Sri Lanka by Chapter 16 of the First Republican Constitution. But it did not provide a remedy for violations of fundamental rights.

In Chapter 3 of the present constitution (1978), Article 10 - 17 lays down the principles of fundamental rights and unlike the 1972 constitution, is deemed effective as it lays down the enforcement mechanism of such rights.

2. FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION

The following rights have been recognized by the constitution as fundamental rights;

Article 10 - Freedom of thought, conscience and religion.

Article 11 - Freedom from torture.

Article 12 - Right to equality.

Article 13 - Freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation.

- Article 14
- a. Freedom of speech.
 - b. Freedom of peaceful assembly.
 - c. Freedom of association.
 - d. Freedom to form and join trade unions.
 - e. Freedom of religious practices.
 - f. Freedom of cultural practices.
 - g. Freedom of employment.
 - h. Freedom of residence.
 - i. Freedom of returning to the country.

3. RESTRICTIONS ON FUNDAMENTAL RIGHTS

Article 15 contains the restrictions to fundamental rights.

Article 10 and 11 are absolutely entrenched provisions of fundamental rights. Therefore they are not subject to the restrictions laid under Article 15.

Articles 12, 13, and 14 are not absolutely entrenched provisions. Therefore the rights laid down in these Articles are subject to the restrictions of Article 15.

4. REMEDY

Article 17 and Article 126 of the Constitution indicate the remedial steps that could be taken by a person whose rights are violated. Initially it must be mentioned that the remedy available under Article 126 of the Constitution is applicable only in instances where the violation arises out of Executive and Administrative actions.

Any person whose rights are violated by such action could apply to the Supreme Court within a period of one month to obtain a declaration, and in appropriate instances compensation, or any other remedy the Supreme Court thinks fit.

5. MATTERS TO BE CONSIDERED BY AN ATTORNEY IN THE FILING OF A FUNDAMENTAL RIGHTS APPLICATION

- (1) The application has to be made within a period of one month from the alleged violation of the fundamental right. [However, since of late in certain instances the Supreme Court has overlooked situations where the application has been made after one month. Especially in cases concerning arrest and detention if the detainee has been held incommunicado the period of one month begins to run from the date he had access either to his relations or to his legal representative.]
- (2) The application is to be by way of Petition supported by Affidavit. [However, in recent times the Supreme Court has permitted a Petitioner to proceed where the information of the alleged infringement has been brought to the notice of the Supreme Court by way of a written letter/petition addressed to the Chief Justice.]
- (3) Ensure that all relevant documents are annexed to the Affidavit.
- (4) The application once filed will have to be supported by counsel on a suitable date.
- (5) If the Supreme Court decides to grant leave to proceed, the Supreme Court Rules would govern the procedure to be followed by Court and the parties.

- (6) Once leave to proceed is granted the Respondents would be required to file the objections.
- (7) Rule 44(3) of the Supreme Court Rules require the Registered Attorney of the Petitioner.
To tender the relevant number of notices for service on the Respondents within 2 working days.
- (8) The Attorney General is required to be made a party under Article 134(1) of the Constitution.
- (9) Once the case is fixed for hearing the parties are required to file their written submissions at least one week before the date fixed for hearing.
- (10) In appropriate instances the Petitioner could file counter objections replying to the objections of the Respondents.

- (1) Once the case is fixed for hearing the parties are required to file their written submissions at least one week before the date fixed for hearing.
- (2) In appropriate instances the Petitioner could file counter objections replying to the objections of the Respondents.
- (3) The Respondent could file counter objections to the objections of the Petitioner.
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- (20) The Respondent could file counter objections to the objections of the Petitioner.

PROCEDURE GOVERNING APPLICATION FOR WRITS

HISTORY

The concept of writs is a concept which is unique to a legal system. The concept of writs is a concept which is unique to a legal system. The concept of writs is a concept which is unique to a legal system.

Under Article 140 of the Constitution, the Court of Appeal was vested with the power of issuing writs in the nature of Certiorari, Prohibition, Habeas Corpus, Mandamus, and Quo Warranto. The writ of Habeas Corpus could be issued by the Court of Appeal under Article 141 of the Constitution.

However, consequent to the passing of the 13th Amendment to the Constitution, the High Court of the Provinces established under Article 146(2) was empowered with a limited writ jurisdiction. (Please see Article 146(2)(a) and 146(2)(b)).

PROCEDURE GOVERNING
APPLICATION FOR WILLS

PROCEDURE GOVERNING APPLICATION FOR WRITS

HISTORY :

The concept of writs is a remedy available under Public Law. To a large extent the British concepts have influenced our Courts and the legal systems in this area.

Under Article 140 of the Constitution, the Court of Appeal was vested with the power of issuing writs in the nature of Certiorari, Prohibition, Procedendo, Mandamus, and Quo warranto. The writ of Habeas Corpus could be issued by the Court of Appeal under Article 141 of the Constitution.

However, consequent to the passing of the 13th Amendment to the Constitution the High Court of the Provinces established under Article 154(P) was empowered with a limited writ jurisdiction.[Please see Article 154(P)(4)(a) and 154(P)(4)(b)]

MATTERS THAT AN ATTORNEY WILL HAVE TO BE MINDFUL OF WHEN DRAFTING A WRIT APPLICATION

1. Identify the nature of the violation or threatened violation.
2. Ascertain whether the subject matter falls under the Provincial Council List of Subjects.
[If the subject matter falls under this list then the writ would have to be sought from the respective Provincial High Court]
3. Name as Respondents all those persons who would be involved in the decision making process.
4. Remember the principles of the doctrine of ultra vires.
5. Remember the rules of Natural Justice.
6. The application will have to be by way of Petition and Affidavit.
[Please remember to annex all relevant documents to the Petition]
7. In the event interim relief is prayed for, copies of Petition and Affidavit along with all relevant documents are required to be sent to the Respondent's before the application is supported.
8. On the day that the application is supported if the Respondent after receiving notice has not appeared or where the notice was not possi-

ble in view of the urgency of the matter the court could issue interim relief for a period of two weeks.

9. After notice is issued the Respondents could file their objections and the Petitioners their counter objections.

Written submissions are due to be filed before the hearing.

10. Please see Supreme Court Rules of 1978 published in Gazette Extraordinary 9/10 of 08.11.1978.

pls in view of the urgency of the matter the Court could please direct the Respondents to file their affidavits and replies to the questions raised in the writ petition within a period of two weeks.

2. After notice issued the Respondents would file their affidavits and replies to the questions raised in the writ petition within a period of two weeks.

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IMPORTANT DECISIONS IN RESPECT OF WRIT JURISDICTION

1. *Nakkiahalli vs. Jayaraman* 1991 1 SLR 60
2. *Perumal vs. Jayaraman* 78 NLR 123
3. *Dudhappa vs. Perumal* 69 NLR 265
4. *Farber E. Waller vs. Mahalingam* 1998 2 SLR 378
5. *Peter Arinaminchilal vs. Peoples Bank* 1997 1 SLR 208
6. *Wenigama vs. Kirthi Wathu Kankaru Samithiya* 1994 1 SLR 293
7. *Violet vs. OIC Dickwella* 1994 3 SLR 377
8. *Kandy Omid Bus Co vs. Roberts* 56 NLR 293
9. *Wijesiri vs. Sriwardena* 1982 1 SLR 371
10. *Environmental Foundation vs. Land Commissioner* 1993 2 SLR 41
11. *Multinational Property Developers vs. UDA* 1996 3 SLR 51

RESPECT OF WRIT JURISDICTION
IMPORTANT DECISIONS IN

Chapter 18

IMPORTANT DECISIONS IN RESPECT OF WRIT JURISDICTION

1. **Nakuda Ali vs. Jayaratne - 1951 AC 66**
2. **Fernando vs. Jayaratne - 78 NLR 123**
3. **Duraiappah vs. Fernando 69 NLR 265**
4. **Forbes & Walker vs. Maligaspe 1998 2 SLR 378**
5. **Peter Athapaththu vs. Peoples Bank 1997 1 SLR 208**
6. **Weragama vs. Eksath Wathu Kamkaru Samithiya 1994
1 SLR 293**
7. **Violet vs. OIC Dickwella 1994 3 SLR 377**
8. **Kandy Omni Bus Co vs. Roberts 56 NLR 293**
9. **Wijesiri vs. Siriwardena 1982 1 SLR 171**
10. **Environmental Foundation vs. Land Commissioner
1993 2 SLR 41**
11. **Multinational Property Developers vs. UDA
1996 2 SLR 51**

12. **Karunaratne vs. Commissioner Co-operative Development 79 2 NLR 193**
13. **Rawaya vs. Chirman Press Council 2001 3 SLR 213**
14. **University of Ceylon vs. Silva 66 NLR 505**
15. **Trade Exchange Ceylon Ltd vs. Asian Hotels Co Ltd - 1981 1 SLR 67**
16. **Mawjood vs. Pussadeniya 1987 2 SLR 287**
17. **Nawaratnam vs. Sabapathi 71 NLR 566**
18. **Thajudeen vs. S. L. Tea Board 1981 2 SLR 471**

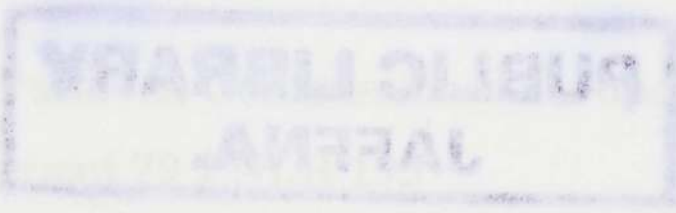


IMPORTANT DECISIONS IN
RESPECT OF JURISDICTION OF A

IMPORTANT DECISIONS IN RESPECT OF JURISDICTION OF A PROVINCIAL HIGH COURT

Jurisdiction of the High Court of the province to hear appeals from orders of Labour Tribunal - Section 31D of the Industrial Disputes Act as amended by Act No. 32 of 1990 - Articles 132, 133, 140, 141 and 138 of the Constitution - Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1980.

Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1980 read with Articles 111, 138 and 141 of the Constitution - Chapter 10 of the Industrial Disputes Act and revolutionary jurisdiction of the High Court in respect of orders of Labour Tribunal and Section 31D(2) of the Industrial Disputes Act as amended by Act No. 32 of 1990. Made that amendments necessary thereby giving effect to the provisions of the Constitution in that regard. These provisions were enacted in the exercise of the power conferred by the Constitution, and the question of compliance with Article 138 of the Constitution is not a matter for consideration.



- 12. ...
- 13. ...
- 14. ...
- 15. ...
- 16. ...
- 17. ...
- 18. ...

RESPECT OF JURISDICTION OF A
PROVINCIAL HIGH COURT

IMPORTANT DECISIONS IN RESPECT OF JURISDICTION OF A PROVINCIAL HIGH COURT

1. **Swasthika Textile Industries Ltd. vs. Tantrige Dayaratne (1993) 2 SLR 348**

Jurisdiction of the High Court of the province to hear appeals from orders of Labour Tribunals – Section 31D of the Industrial Disputes Act as amended by Act No. 32 of 1999 – Articles 82(6), 154P, 154P (3)(c) and 138 of the Constitution – Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Articles 111, 138 and 154P (3)(c) of the Constitution conferred concurrent appellate and revisionary jurisdiction on the High Court in respect of orders of Labour Tribunals; and Section 31D (3) of the Industrial Disputes Act as Amended by Act No. 32 of 1990, Made that jurisdiction exclusive (thereby taking away the jurisdiction of the Court of Appeal in that respect). Those provisions were enacted in the exercise of the powers conferred by the Constitution, and the question of compliance with Arti-

cle 82 did not arise nor were they inconsistent with the Constitution, and the question of compliance with between the provisions of those amending Acts and the Constitution, those provisions cannot, by any process of Interpretation be treated as inoperative or ineffective. In so far as the validity of those provisions is concerned, Article 80(3) precludes the Supreme Court from inquiring in to, pronouncing upon or in any manner calling in question, the validity of these provisions.

2. Gunaratne vs. Thambinayagam and Others (1993) 2 SLR 355

Appeal – Supreme Court jurisdiction – Judgement of High Court of a Province exercising revisionary jurisdiction – Constitution – Article 154P (3)(b) – Act No. 19 of 1990.

Section 9 of Act, No. 19 of 1990 does not give right of appeal to the Supreme Court from an order of the High Court in the exercise of its revisionary jurisdiction.

3. Weragama vs. Eksath Lanka Wathu Kamkaru Samithiya and Others (1994) 1 SLR 293

Certiorari and Mandamus – High Court of a Province – Jurisdiction to issue writs of Certiorari and Mandamus against the President of a Labour Tribunal – Constitution Article 154P (3) and (4) – High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Article 154P introduced by the Thirteenth Amendment did not confer on High Courts writ jurisdiction in respect of Presidents of Labour Tribunals.

Nor did Parliament by Law confer such a jurisdiction on High Courts under and in terms of Article 154P (3)(c).

If a law or a statute is covered by a matter in the (exclusive) Provincial Council List, the exercise of powers thereunder are subject to the writ jurisdiction of the High Court.

Article 154P (3) did not authorise Parliament, by ordinary law to confer the writ jurisdiction of the Court of Appeal under Article 140 (either exclusively or concurrently) in the High Courts.

Section 3 of the High Court of the Provinces (special Provisions) Act No. 19 of 1990, conferred on the High Courts, appellate and revisionary jurisdiction in respect of Labour Tribunals; the phrase "appellate and revisionary jurisdiction" has been used in Article 154P (3) in contradiction to the writ jurisdiction and hence the same phrase in Section 3 cannot be interpreted to include the writ jurisdiction.

4. Coconut Research Board vs. Fernando (1994) 1 SLR 219

Jurisdiction of the Provincial High Court in appeals from the Labour Tribunals – Constitution, Article 154P (3)(c) – Section 4 of the High Court (Special provisions) Act No. 19 of 1990.

Under Article 154P (3) of the Constitution, Parliament was empowered to confer additional jurisdictions and powers on the High Court for the Province. Under Act No. 19 of 1990 the High Court of the Province was granted appellate jurisdiction in respect of orders made by Labour tribunals within that Province. Section 4 confers the right on the party aggrieved by an order of the Labour Tribunal to appeal to the High Court for the province within which such Labour Tribunal is situated. Also the Industrial Disputes (Amendment) Act No. 32 of 1990 gives the right of appeal to the High Court for the province within which the Labour Tribunal concerned is situated. Thus the statutory provision refers to the province within which the tribunal is 'situate'

5. Kumarasinghe and Another vs. State Development and Construction Corporation (1994) 3 SLR 204

Appellate jurisdiction of the Provincial High Court – Article 154P (3)(c) and 170 of the Constitution – Section 2 and 4 of the High Court (Special provisions) Act No. 19 of 1990.

The appellate jurisdiction of a Provincial High Court over the orders of Labour Tribunals has been conferred upon it by Section 2 of Act No. 19 of 1990 (enacted pursuant to the provisions of Article 154P (3)(c) of the Constitution). The right of appeal to such court is conferred by Section 4 of the said Act and Section 31D(3) as amended by Act No. 32 of 1990, of the Industrial Disputes Act.

6. Sumanadasa vs. Hathurusinghe (1995) 2 SLR 17

Maintenance - Appeal to Provincial High Court - Order set aside - Appeal to the Court of Appeal - Jurisdiction of the Court of Appeal to hear such appeals - Thirteenth Amendment to the Constitution, Article 138(1), 154P (3), 154P (3)(b) and 154P (6) - Section 9 of the High Court (Special provisions) Act No. 19 of 1990.

On a proper constitution of Article 154P (3)(b), 154P (6) and 138(1), it is clear that a right of appeal to the Court of Appeal has been expressly created. Article 154P (3)(b) confers appellate and revisionary jurisdiction on the High Court and Article 154P (6) provides that any person aggrieved by a decision of the High Court in the exercise of its jurisdiction under paragraph 3(b) may appeal therefrom to the Court of Appeal in accordance with Article 138.

Article 154P (6) itself has not limited the right of appeal given by it to orders made by the High Court by way of appeal.

7. Sriyawathie vs. Superintendant Hapugastenne Estate and Others (1997) 1 SLR 1

Appellate and revisionary jurisdiction of the High Court over orders of a Labour Tribunal – Articles 105(1)(c), 111(1), 138, 154P and 125 of the Constitution – Appeal to the Supreme Court from High Court.

The High Court has jurisdiction to review orders of Labour Tribunals by way of appeal or revision in terms of the provisions of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Section 31D of the Industrial Disputes Act as amended.

8. Abeygunasekera vs. Sethunga and Others (1997) 1 SLR 62

Jurisdiction of the Court of Appeal to hear appeals from orders of a Provincial High Court made in the exercise of its revisionary jurisdiction – article 154P (3)(b), 154P (6) and 138(1) of the Constitution – Section 74(2) of the Primary Courts Procedure Act No.

The Appellate jurisdiction of the Court of Appeal under Article 138(1) read with Article 154P (6) of the Constitution is not limited to correcting errors committed by the High Court only



in respect of orders given by way of appeal. The Court of Appeal has jurisdiction to hear an appeal against a decision of the High Court whether given by way of appeal or revision.

Section 74(2) of the Act No. 44 of 1979 plainly prohibits an appeal from the decision of the Primary Court Judge. Such prohibition cannot affect the right of appeal to the Court of Appeal against a decision of the High Court.

9. Malegoda vs. Joachim (1997) 1 SLR 88

Jurisdiction of the High Court to entertain an appeal – Article 154P (3) (b) of the Constitution.

Article 154P (3)(b) of the Constitution only conferred forum jurisdiction to hear appeals but does not create a corresponding right in any person to invoke the appellate jurisdiction. A right of appeal is a statutory right and must be expressly created and granted by statute.

10. Abeywardena vs. Ajith de Silva (1998) 1 SLR 134

Appeal from an order of the High Court in the exercise of its revisionary jurisdiction – Article 154P (3) (b) of the Constitution - Sections 5 and 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 Of 1990.

A direct appeal does not lie to the Supreme Court from the order of the High Court in the exercise of its revisionary jurisdiction. An appeal from such an order should be made to the Court of Appeal.

11. Ceylon Tea Marketing Ltd. vs. Prepacked Exports (Pvt) Ltd. (1998) 2 SLR 146

High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 – Commercial High Court – Jurisdiction of other High Courts of the Western Province sitting in Colombo.

Under the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 every High Court of the Western Province sitting in Colombo has jurisdiction under this Act.

12. Brunswick Exports Ltd. vs. Hatton National Bank Ltd. (1999) 1SLR 219

Section 2(1) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 – First Schedule – Commercial High Court – Article 154P of the Constitution.

The Act, No. 10 of 1996 does not prescribe substantive law or procedure in respect of actions for the enforcement of Mortgage Bonds or any action of any nature whatsoever it merely vests jurisdiction in the Commercial High Court of hear and determine certain civil actions.

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