

Civil Procedure

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I Introduction

Since my last review of Civil Procedure in 2023 there have been various significant developments in this area. In part II, I provide an overview of the recent far-reaching changes to the High Court Rules 2016 contained in the High Court (Improved Access to Civil Justice) Amendment Rules 2025. Part III deals with the revival of the Commercial List in the High Court at Auckland and the relevant 2025 Practice Note. Progress with the *Te Au Reka* Digitisation of Courts Initiative is the subject of part IV. Part V discusses some recent legislative changes which are relevant to civil procedure. A selection of recent civil procedure cases is the subject of part VI. Last but not least, part VII consists of a fairly detailed treatment of the implications of the use of Gen AI in the civil procedure and civil litigation areas.

II Overview of the High Court (Improved Access to Civil Justice) Amendment Rules 2025

A Background to the new rules

The amendments to the High Court Rules which are the subject of this part of the review (the new rules) contain far-reaching changes to High Court civil procedure. They have been the subject of a lengthy and detailed paper by the New Zealand Law Society (NZLS) presented at a CLE seminar held on 13 October 2025.¹ It is not possible in the space available in the present review to deal with the new amendments in detail, so this section will set out to provide an abbreviated outline of the changes, though this narrative may inevitably lose something in the telling given the complexity of the changes which have been made. For more detailed reference and analysis, recourse should be made to the Rules Committee online material on the subject,² the NZLS seminar material and the text of the amending rules themselves, which took effect on

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1 New Zealand Law Society “A New Regime for High Court Civil Proceedings” (NZLS CLE seminar, 13 October 2025).

2 See the Rules Committee section of the Courts of New Zealand website <www.courtsofnz.govt.nz>.

1 January 2026.³

It should also be noted that the new rules apply only to ordinary High Court civil proceedings. They do not apply to other forms of High Court civil proceeding, such as those commenced under pt 18 or pt 19 of the High Court Rules or to judicial review proceedings or to appeals.⁴ At the time of writing the new approach also does not extend to District Court civil proceedings.

B *The Overriding Objective*

There are significant changes made in this area. The previous r 1.2 dealing with the objective of the High Court Rules has been replaced by a new rule. The new r 1.2 refers to proportionality and sets out three relevant criteria in sub-r 2 dealing with its application.

A new r 1.2A contains a general duty to co-operate. In particular, under r 1.2A(3), this duty arises in relation to specific steps in the proceeding, including the Judicial Issues Conference.

C *An “Evidence First” approach near the beginning of a High Court civil proceeding*

The new approach requires more comprehensive initial disclosure,⁵ verified by affidavit and mandating service of a bundle of documents, including all documents mentioned in the pleading, any further principal documents and all “adverse documents”. As discussed in part F below, experience shows that defining and agreeing the boundaries of this latter category, even with the mandated consultation between counsel, is an area which may be likely to give rise to controversy.

New standard directions⁶ apply to applications for specific interlocutories, being adding and removing parties, security for costs, protest to jurisdiction, summary judgment and strike out. These interlocutories have to be notified within 10 working days from the last pleading, with application to be made within a further 15 working days, being 25 working days in total.⁷ Even with the best will in the world and the involvement of competent and experienced counsel these time limits are likely to prove challenging in practice, especially

3 The amending rules provide in Sch 1, paragraph 4(1), (2) and (3), that the pre-existing High Court Rules 2016 will continue to apply to proceedings filed before 1 January 2026 unless the Court directs otherwise. Presumably any request for such directions might be one of the items which could be dealt with at the Judicial Issues Conference.

4 See new r 7.1AA of the High Court Rules 2016 [HCR].

5 See HCR, new r 8.4. The same requirements apply to both plaintiffs and defendants.

6 For the general requirements relating to standard directions, see HCR, rr 7.4(1) and (2).

7 See HCR, new rr 7.4(3) and 7.4(8).

if there are perceived deficiencies in the initial disclosure which has been made. They will be even more daunting, if not nearly impossible, for self-represented parties to meet.

The “evidence first” regime then arises, for plaintiffs, within 25 working days from the last pleading or the resolution of the specified interlocutories, if any. These new requirements require service of factual witness statements (with the emphasis being on the word *factual*), a draft chronology of events and facts in the prescribed form and any further documents referred to but not previously disclosed.⁸ Corresponding requirements then apply to defendants.⁹ When these steps have been completed the Registrar schedules a Judicial Issues Conference.¹⁰

The stringency of the above procedures and time limits should not be underestimated. They are also likely to front-end load significant additional cost onto the commencement stage of an ordinary High Court proceeding. While there is inevitably a conflict between what may be termed pursuing a Rolls-Royce approach to civil litigation and ensuring the fair and relatively expeditious determination of pre-trial procedures, and of the trials themselves, the new rules certainly provide for a quite fundamental restructuring of these procedural aspects.¹¹

D *The Judicial Issues Conference (JIC)*

The JIC is the subject of some quite detailed new requirements, both in relation to preparation for and participating in it.¹² The plaintiff is required to file a detailed position paper 10 days prior to the JIC with the defendant to file a paper 5 days beforehand.

The JIC itself will be scheduled for half a day (the proposed timing being from 11.45am to 3.30pm to allow the presiding judge time to prepare for the conference) and is to be attended by the parties in person with their counsel. As the Rules Committee puts it:¹³

8 See HCR, new rr 7.4(4)(a) and 9.7, and Form G41. Further disclosure procedures and requirements arise under HCR, rr 8.2, 8.4A and 8.18.

9 Under the HCR, new rr 7.4(4)(c) and 7.5, and Form G41.

10 Under HCR, r 7.4(11).

11 The Rules Committee website paper *High Court Rules civil changes* (summary of the reforms by Justice Francis Cooke) refers at [3] to the purpose of the “evidence first” model in the following terms: “The intention of these changes is to encourage the fuller understanding of the case of each side, the earlier identification of the key issues, and to reduce disproportionate procedural arguments.”

12 In terms of preparation for the Judicial Issues Conference, see HCR, rr 7.5(3) and 7.5B.

13 The Rules Committee website paper *High Court Rules civil changes* (summary of the reforms by Justice Francis Cooke) at [4].

This substantive appearance (to be scheduled for half a day) is intended to be a comprehensive engagement with a Judge in relation to the case. Client representatives are likely to be required to attend. Parties will be expected to be able to fully discuss the case with the Judge, and to address the relevant issues, including whether mediation or other form of settlement has been or ought to be attempted, and if so, when. Directions for trial, such as directions for expert evidence and conferencing will be made at this conference.

At the JIC the judge is empowered to order further disclosure,¹⁴ the issues, and the position of the parties on them, will be identified¹⁵ and remaining directions, including timetabling up to the trial, will be issued.¹⁶ The JIC is a fundamental pre-trial step and will require detailed preparation by the parties and their counsel.

E *Changes to preparation for trial procedure*

Prior to the trial date remaining pre-trial steps are to be completed. These may include provision of any further required disclosure, resolution of remaining interlocutorys and exchange of expert witness statements. The expectation is that there will be one expert witness from each party on each required issue and an expert witness conference may be held.¹⁷

Further trial preparation requires preparation of a final common bundle index and final chronology, with the co-operation of counsel. Leave of the court is required to include documents in the bundle which have not been previously disclosed. The new rules deal with the status of documents in the common bundle and objections to the admissibility of documents in the bundle.¹⁸ Service of the common bundle and chronology is then effected.¹⁹

The plaintiff then files opening submissions 10 working days before trial.²⁰ The defendant's submissions are due 5 working days before trial.²¹

In terms of procedure at trial, new requirements as to the allowable contents of lay and expert witness statements are set out in some detail.²² Evidence in

14 See HCR, rr 8.4A(4), 8.19 and 8.21.

15 See HCR, rr 7.5(4) and 7.5A(a).

16 See HCR, r 7.5A.

17 In relation to expert witnesses, see HCR, rr 9.1A, 9.36AAA, 9.43 and 9.44.

18 See HCR, rr 9.5 and 9.5A.

19 See HCR, rr 8.18, 9.2(1), 9.2(2), 9.2(3), 9.4 and 9.9.

20 See HCR, r 9.16(1).

21 See HCR, r 9.16(2).

22 See HCR, r 9.7.

chief may be taken as read and supplemented orally if the court so permits or requires.²³ Finally, the perceived effect of the rule in *Browne v Dunn* as to whether a party's whole case needs to be put to a witness in cross examination is now expressly modified.²⁴ A party may now raise the required extent of counsel's cross examination duties with the court for guidance on this aspect.²⁵

F *Some notes of caution*

Lest the following comments be misinterpreted, let me say at the outset that considerable planning and intellectual effort have obviously been applied by the Rules Committee and the proponents of the new rules to their design and implementation. Nevertheless, at least for this author and for others, some residual reservations linger. In a review of this kind this author has the luxury of airing these from the relatively dispassionate standpoint of a litigation practitioner.

The new rules are predicated in large measure on the need for a change of attitude on the part of litigation lawyers. Long experience at the coal face of litigation, both in New Zealand and in overseas jurisdictions – approaching 50 years in the case of the present author – teaches that for defendants especially, and irrespective of advice from their lawyers to the contrary, the turkeys are not inclined to vote for an early Christmas, as the saying goes.

Defendants facing a potentially crippling claim, which they may not have the resources to meet after a trial judgment is delivered, are often inclined to employ every available strategy to delay or impede progress to a hearing. Certainly they may not be inclined to accept legal advice which contradicts their (often well ingrained) view of the merits of their dispute. While a general change of attitude to litigation may well be a desirable goal to aim for and achieve, it also attracts the lingering suspicion that it may depend upon a rather utopian vision of the litigation process.

This attitude can often be seen to increase in intensity in the case of self-represented litigants, who are generally not constrained by legal advice in any event. Indeed, in at least some cases, one suspects that this is why they are inclined to run their cases without lawyers anyway, not solely for reasons of avoiding legal costs.²⁶ It must also be said that for defendants seeking to delay the evil day this is not a difficult task, in Auckland at least, where hearing dates for civil trials of even moderate length are currently being assigned two years or more in the future. There are also delays, not as great but still measured in a

23 See HCR, r 9.12.

24 *Browne v Dunn* (1893) 6 R 67 (HL).

25 See HCR, r 9.15.

26 As Heath J observed in *Brown v Sinclair* [2016] NZHC 3196 at [4], the motivations of self-represented litigants may vary widely and may not be solely based on financial issues.

significant number of months especially in Auckland, in disposing of summary judgment applications and more complicated interlocutory hearings.

Apart from these issues, there are also litigation practitioners, who become known to their peers and to the court by reputation, who regard compliance with timetable orders and the filing of affidavits and witness statements in a timely fashion, as being an optional obligation to be undertaken when pressure of other work permits. The judges unfortunately often tend to take an accommodating attitude to these lapses, and in fact will be inclined to enquire of the other party whether that party has suffered any prejudice arising from the default in meeting timetabling requirements.

Given the increased emphasis on the central importance of the Judicial Issues Conference under the new rules, and the documentation required to be filed in advance of that conference, it is not out of order to suggest that a change in attitude may be called for not only on the part of litigation practitioners. Even if the interests of justice do not call for a claim by a defaulting party to be debarred, greater use of mechanisms such as wasted costs orders would seem to be called for.

Given the pressing workload of the judges and associate judges in civil and other cases, particularly in Auckland, it will also be necessary to ensure that sufficient judicial resources are made available to provide for the proper functioning of the various up-front requirements imposed by the new rules. This is particularly the case with the proper implementation of the detailed requirements attaching to the new JIC procedure, without the system collapsing under its own weight. Time will tell whether this can be accomplished in an era of constrained funding for justice requirements, as is unfortunately often the position.

The new rules draw heavily on the contemporary New South Wales experience. The NZLS seminar on the new rules, held online and in person on 13 October 2025, featured an informative video interview with the Chief Justice of New South Wales, the Honourable Andrew Bell, who was formerly a senior silk in Sydney when at the NSW Bar. While the comparable procedures in New South Wales appear to have functioned well for a number of years, some caution needs to be applied in translating the New South Wales experience to New Zealand conditions.

Compared with New South Wales, New Zealand has a similar total population, though it is more geographically dispersed. In general terms New Zealand is, by comparison with New South Wales, a low wage economy. While much High Court civil litigation in New Zealand is conducted by the independent Bar, particularly in the main centres, a good deal of it is also undertaken entirely by solicitors and firms of solicitors and increasingly by self-represented litigants. In contrast, New South Wales, as in England and Wales, has a divided legal profession. The NSW Bar, which is experienced

in procedural matters in civil cases, undertakes the bulk of litigation in the superior courts in that state.

The imposition, under the regime established by the new rules, of extensive up-front requirements on litigants seeking to commence High Court civil proceedings gives rise to the lingering suspicion that this may in fact end up impeding, rather than facilitating, access to justice. This author is not in fact alone in expressing these reservations, because they appear to be shared by the country's senior practising silk, Dr James A Farmer KC, who has expressed his views in the following terms:²⁷

However, the latest amendments to the High Court Rules provide for documents and evidence to be filed and served at an early stage rather than in the period before trial, the effect of which is to front-end load the costs of all litigation and at a time when the issues may not have been clarified.

Some of the submitters to the Rules Committee have expressed similar reservations. Alan Galbraith KC stated in his submission:²⁸

... the causes of the present complexities and costs are not organic to litigation but have been imposed by the system. The ever-increasing complexity of the Rules of Court, the requirement for written material at every step of the way, the introduction and failure to police written briefs and the rules of evidence are all significant causes. In my view the proposals risk exacerbating not moderating the existing causes.

The firm of Bell Gully also expressed reservations about certain aspects of the proposals in its submission to the Rules Committee:²⁹

The sequencing of witness statements before discovery is likely to lead to higher costs and greater inefficiencies in the management of civil cases.

The Bell Gully submission also made detailed comments about the New South Wales practice. In particular, that firm's submission drew attention to the fact that the practices in the NSW Equity Division appeared to be being followed less rigorously than the text of its own Practice Note would suggest.³⁰

27 James Farmer KC "New Silks Appointed" (10 October 2025).

28 Alan Galbraith KC "Submission to the Rules Committee on Improving Access to Civil Justice" (1 July 2021) at 1.

29 Bell Gully "Submission to the Rules Committee: Improving Access to Justice" (24 February 2023) at [3.2(a)].

30 Bell Gully "Submission to the Rules Committee: Improving Access to Justice" (24 February 2023) at [3.3(d)] and [3.4]–[3.13].

That firm's submission also expressed reservations about the practicality of requiring discovery at the initial stage of a proceeding of all adverse documents as well as the provision of a draft chronology:³¹

As we submitted at paragraph 3.3(b) above, having two stages of discovery is likely to be costly and inefficient, and may increase the number of disputes about initial disclosure. It may also be practically difficult for companies filing defences to conduct a quasi-discovery exercise in the 25 working day period between the receipt of the statement of claim and the filing of the defence.

Experience also suggests that identifying the scope of discoverable adverse documents gives rise to frequent disputes about relevance at the boundaries. Applications for further and better discovery which lead to defended interlocutory applications not uncommonly result in some categories of further discovery being allowed and some being disallowed. It is therefore doubtful, in this author's view, the extent to which prescribing discovery of adverse documents at an early stage will avoid or reduce subsequent arguments about the adequacy of such discovery, which would tend to render the two-stage discovery procedure somewhat counter-productive.

It may well be in due course that, with adequate resourcing and scheduling, combined with the hoped for change in professional attitudes on the part of litigation practitioners, the above reservations will prove to be less of an issue in practice. As always, time will tell.

III Commercial List in the High Court at Auckland

A *Background to the Commercial List Practice Note 2025*

This section of the review deals with the Commercial List Practice Note 2025 dated 8 September 2025, which took effect on 6 October 2025.³² Before examining the effect and implications of the Practice Note, it may be useful to summarise briefly the relevant legislative background and the previous case law, as these sources may continue to be of relevance to the interpretation of the new provisions.

Litigation practitioners of a certain vintage may recall pt IIIA of the former High Court Rules, which introduced the original Commercial List rules with

31 Bell Gully "Submission to the Rules Committee: Improving Access to Justice" (24 February 2023) at [4.2].

32 Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua 2025 *Practice Note: Auckland High Court: Commercial List* (8 September 2025) at [2].

effect from 1 April 1987.³³ The statutory basis for these rules was contained in the former Judicature Act 1908.³⁴

Commercial List judges could be appointed pursuant to the 1908 Act.³⁵ The original rules provided for entry on the Commercial List by endorsement on the statement of claim or the statement of defence³⁶ or by an order made on application.³⁷

Interlocutory applications could be filed and served by “post, facsimile, telex, or other written communication”,³⁸ which is in itself a vision of a bygone age. Where a proceeding was entered on the Commercial List, an application for directions was required to be made³⁹ and a Commercial List judge had wide powers to make directions.⁴⁰

A proceeding could be removed from the List, a power generally exercised on jurisdictional grounds.⁴¹ A Commercial List judge was also granted various additional powers⁴² and there were specific provisions regarding Commercial List proceedings concerning the construction, status or application of a contract or document.⁴³

A body of case law arose concerning Commercial List jurisdiction and procedures and some or all of this may prove to be of continuing contemporary relevance under the 2025 Practice Note. Interim injunction applications were discouraged on the Commercial List unless exceptional circumstances applied, on the (possibly optimistic) basis that commercial parties could be expected to agree on suitable holding measures.⁴⁴ Applications for the issue of interrogatories or the filing of full and complex interlocutory applications were frowned upon.⁴⁵ Judicial review proceedings were generally considered to be inappropriate for inclusion on the List.⁴⁶

33 These provisions were set out in rr 446A to 446Q, inserted by r 2 of the High Court Amendment Rules 1987 (SR1987/29).

34 See in particular ss 24A, 24B and 24C of the Judicature Act 1908. The Act has now been replaced by the Senior Courts Act 2016.

35 Judicature Act 1908, ss 24C(1) and 24C(2).

36 See the former r 446C.

37 See the former r 446D.

38 See the former r 446G(2).

39 See the former r 446H.

40 See the former r 446J.

41 See the former r 446K.

42 See the former r 446O.

43 See the former r 446P.

44 *Telecom New Zealand Ltd v Clear Communications Ltd* (1997) 10 PRNZ 622 (HC).

45 *Forest Park Partnership v Lombard Insurance Co Ltd* [1987] 2 NZLR 637 (HC).

46 *Clear Communications Ltd v Commerce Commission* (1996) 9 PRNZ 678 (HC); *Glaxo New Zealand Ltd v Attorney-General* (1991) 4 TCLR 170 (HC).

In terms of the entry of a proceeding on the former Commercial List, the classes of eligible proceedings were set out in the Judicature Act 1908.⁴⁷ The detailed wording of these categories had quite a respectable pedigree, dating back to the recommendations of a committee established by the Bar and the Law Society in England in 1892, which preceded the establishment of the English Commercial Court.⁴⁸ These categories under the 1908 Act were refined in New Zealand by judicial interpretation to require that a case possess a distinctive “commercial flavour”, exceeding that present in normal commercial litigation.⁴⁹

The original Commercial List regime offered the undoubted advantages of an expedited regime for the determination of interlocutory applications. However, one of the persistent criticisms was that, after the close of pleadings, litigants had to take their turn to be granted a trial date in the ordinary list and the trial might not necessarily be held before a commercially experienced judge.

This tended to negate the initial advantages offered by the Commercial List procedures. This debate is part of the wider discussion as to commercial specialisation among the High Court judges, on which varying opinions continue to be expressed.⁵⁰ This drawback in the operation of the earlier Commercial List procedures has been addressed in the 2025 Practice Note by arranging for the presiding Commercial Panel judges to also undertake the substantive trials themselves.

With the advent of a more comprehensive case management regime in the High Court in the early part of the 21st century, the popularity of the Commercial List tended to decline.⁵¹ In due course, the Senior Courts Act 2016 instituted a Commercial Panel of the High Court in place of the Commercial List.⁵² The previous pt 29 of the High Court Rules 2016 relating

47 See s 24B(1), which included in subparagraph (i) “the ordinary transactions of persons engaged in commerce or trade or of shippers” and in subparagraph (iii) “the construction of commercial, shipping or transport documents”. As Scrutton LJ put it in *Merchants Marine Insurance Co Ltd v North of England Protecting and Indemnity Association* (1926) 26 Ll L Rep 201 (CA) at 203, “One might possibly take the position of the gentleman who dealt with the elephant by saying he could not define an elephant but he knew what it was when he saw one.”

48 *Law Times* (January 1892) vol xci at 432. See Anthony D Colman *The Practice and Procedure of the Commercial Court* (3rd ed, Lloyd’s of London Press Ltd, London, 1990) at 29. The early history of the English Commercial Court is described in F MacKinnon “The Origin of the Commercial Court” (1944) 60 LQR 324.

49 *Insignia International Ltd v Gulf Star Products Ltd* (2000) 14 PRNZ 357 (HC) at 359.

50 See William Steel “Judicial Specialisation in a Generalist Jurisdiction: Is Commercial Specialisation within the High Court Justified?” (2015) 46 VUWLR 307.

51 As was noted by Williams J in *Insignia International Ltd v Gulf Star Products Ltd* (2000) 14 PRNZ 357 (HC).

52 Senior Courts Act 2016, s 19(1).

to the Commercial List was revoked with effect from 1 March 2017,⁵³ and replaced by a new pt 29 dealing with the Commercial Panel.

Commercial Panel Judges were to be High Court judges assigned to the Commercial Panel by the Chief High Court Judge.⁵⁴ Other parts of the High Court Rules, including the case management rules, would continue to apply to proceedings dealt with by a panel judge.⁵⁵ The types of commercial proceeding to which a panel judge was assignable were updated and defined with more precision with effect from 1 September 2017.⁵⁶

B *Analysis of the 2025 Practice Note*

The 2025 Practice Note has already been the subject of professional seminars and commentary in Auckland.⁵⁷ The essential features of the Practice Note are as follows:

- Various definitions now refer to the Commercial List and related terms.⁵⁸
- The Practice Note deals with the Commercial List case management practices, which are designed to expedite the hearing and resolution of Commercial List proceedings.⁵⁹
- Two dedicated Commercial List judges will manage cases on the list through pre-trial proceedings and up to and including the substantive trial.⁶⁰

53 See s 183(a) of the Senior Courts Act 2016 and r 4 of the High Court Rules 2016 (Commercial Panel) Amendment Rules 2017.

54 Pursuant to s 19(4) of the Senior Courts Act 2016.

55 See r 29.6 of the High Court Rules 2016, now to be read in conjunction with Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua *2025 Practice Note: Auckland High Court: Commercial List* (8 September 2025) at [14].

56 See Senior Courts (High Court Commercial Panel) Order 2017 at [5].

57 See Mahvash Ikram “Fast-track Commercial list to be re-established in High Court at Auckland” (3 June 2025) Law News <<https://lawnews.nz>>; Justice Sally Fitzgerald “New Auckland Commercial List expected to change commercial litigation” *LawTalk* (New Zealand Law Society, Issue 962, Winter 2025) at 13; NZLS Commercial List Seminar (Bell Gully Auckland, 13 August 2025).

58 Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua *2025 Practice Note: Auckland High Court: Commercial List* (8 September 2025) at [3]. A Commercial list judge is a judge assigned to the commercial panel by the Chief High Court Judge under s 19(4) of the Senior Courts Act 2016.

59 Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua *2025 Practice Note: Auckland High Court: Commercial List* (8 September 2025) at [4] and [6].

60 Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua *2025 Practice Note: Auckland High Court: Commercial List* (8 September 2025) at [5] and [7].

- In terms of entry onto and removal from the Commercial List, the jurisdictional limit of \$2 million has been reduced to \$1 million but the other existing categories in the 2017 Order remain in force.⁶¹ The Practice Note sets out other more detailed provisions as to entry and removal of proceedings.⁶²
- There are detailed provisions as to applications and directions.⁶³ In-person attendance of counsel is expected at preliminary hearings.⁶⁴ The Commercial List procedures are designed to reduce delays in the hearing and determining of interlocutory applications. Hearings for disputed applications are expected to be short, normally of no more than an hour, and requiring concise and focused submissions. Counsel are expected to fully co-operate, including in relation to agreeing on draft directions.

As the Chief High Court Judge has discussed in her LawTalk article,⁶⁵ the design of the 2025 Practice Note has drawn heavily on the procedures of the Commercial List of the Supreme Court of New South Wales, with suitable modifications designed to accommodate New Zealand conditions. That List has been in operation since the early part of the 20th century and is noteworthy for the wide procedural discretion which it confers on its judges.⁶⁶ Similar Commercial Lists are in operation in the Supreme Courts of Victoria and Queensland.

The New Zealand initiative has obviously involved considerable effort and planning on the part of the Chief High Court Judge, Justice Sally Fitzgerald, and the other inaugural Commercial List Judge Justice Ian Gault and merits the support and continuing involvement of commercial litigation practitioners.

61 Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua 2025 Practice Note: Auckland High Court: Commercial List (8 September 2025) at [8].

62 Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua 2025 Practice Note: Auckland High Court: Commercial List (8 September 2025) at [9] to [13].

63 Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua 2025 Practice Note: Auckland High Court: Commercial List (8 September 2025) at [14] to [19].

64 Hon Justice Sally Fitzgerald, Chief High Court Judge – Te Kaiwhakawā Matua 2025 Practice Note: Auckland High Court: Commercial List (8 September 2025) at [14(d)], [15] and [22].

65 Justice Sally Fitzgerald “New Auckland Commercial List expected to change commercial litigation” *LawTalk* (New Zealand Law Society, Issue 962, Winter 2025) at 8.

66 As discussed in *Stanley-Hill v Kool* [1982] 1 NSWLR 460 (CA) and in *Challenge Bank Ltd v Raine & Horne Commercial Pty Ltd* (1989) 17 NSWLR 297 (SC).

IV Progress with Te Au Reka – Digitisation of Courts Initiative

In my 2023 review of civil procedure I drew attention to the above initiative,⁶⁷ which was embodied in a report from the Office of the Chief Justice dated 29 March 2023.⁶⁸ As I set out in my previous review,⁶⁹ the proposed initiatives carry with them various implications from a civil procedure perspective, including the need for various changes to the High Court Rules and the rules of procedure in other civil courts and tribunals.

The *Te Au Reka* initiative has been progressing as a joint initiative between the Ministry of Justice and the Judiciary.⁷⁰ Justice David Goddard has described the initiative in the following terms:⁷¹

Te Au Reka will make a significant difference to all those who access and participate in our courts and tribunals, by establishing trusted, modern, and responsive digital case and court management capability. It will move courts away from manually intensive, paper-based processes to modern and proactive digital case management. This will make it easier to engage with the courts, reduce uncertainty, improve the effectiveness of the court, and support access to justice.

The availability of a secure digital ePortal will conceivably enable various online tasks to be carried out when the system is fully integrated and operational. These are likely to include online filing and service of documents, convenient accessing of documents on the court file, promoting ease of liaising between counsel and facilitating tasks such as the preparation of trial and hearing bundles.

The initiative's objectives will also be consistent with the more extensive obligations of co-operation imposed on counsel under the amendments to the High Court Rules discussed in part II of this review. The judiciary and support staff will be able to work from a digital platform which is comprehensive and up to date, knowing that all documents filed are instantly available to them in digital format. In due course the system ought to further assist counsel with making electronic submissions in court.

It is proposed to roll out the new platform for new cases in the Family Court

⁶⁷ John Turner *Civil Procedure* [2023] NZ L Rev 373 at 373–376.

⁶⁸ Office of the Chief Justice *Digital Strategy for Courts and Tribunals* (29 March 2023).

⁶⁹ John Turner *Civil Procedure* [2023] NZ L Rev 373 at 374.

⁷⁰ See Justice David Goddard and Victoria McLaughlin, Deputy Secretary, Te Au Reka, Ministry of Justice “Modernising our courts to improve access to justice: Te Au Reka” *LawTalk* (New Zealand Law Society, Issue 962, Winter 2025) at 8.

⁷¹ Justice David Goddard and Victoria McLaughlin, Deputy Secretary, Te Au Reka, Ministry of Justice “Modernising our courts to improve access to justice: Te Au Reka” *LawTalk* (New Zealand Law Society, Issue 962, Winter 2025) at 8.

from the middle of 2026. Design work for extending the platform to both civil and criminal proceedings in the High Court is under way with a view to having the system in place there from the middle of 2027. This will then be followed by the rollout of the system in the appellate courts and in other courts and tribunals from 2028 onwards.

As is always the case with new IT systems and procedures, there will no doubt be a steep learning and training curve ahead for all participants in the court system, particularly from a civil justice standpoint, and various procedural amendments will need to be put in place. However, the new system does promise to offer great advantages from an efficiency and operational perspective.

V Legislative Changes relevant to Civil Procedure

There have been several recent legislative developments affecting civil procedure issues. These are as follows.

A *Increase in Disputes Tribunal jurisdiction*

The jurisdiction of the Disputes Tribunal has recently been increased from \$30,000 to \$60,000.⁷² Claims of \$30,001 or more will now attract a higher filing fee of \$468. Modelling by the Ministry of Justice estimates that this change will benefit an additional 2,000 claimants per year.⁷³ Given the current delays, especially in Auckland, in the determination of civil disputes in the District Court this ought to prove to be a popular alternative route for claimants whose claims fall within the new jurisdictional limit.

B *Proposed statutory adjudication system for disputes involving businesses*

In August 2025 the Ministry of Justice issued a consultation document inviting public submissions on a proposed Adjudication Act designed to provide an adjudication mechanism for the fast resolution of disputes involving New

72 Disputes Tribunal Amendment Act 2025. This Act took effect on 24 January 2026.

73 Hon Paul Goldsmith, Minister of Justice “Civil disputes to become quicker and cheaper” (Ministerial press release, 23 October 2025), issued on the day the Amendment Bill passed its third reading in Parliament.

Zealand businesses.⁷⁴ Consultation on the new proposal closed in September 2025 and the submissions received are now under consideration by the Ministry of Justice.

The proposed statutory adjudication process is a voluntary one, so that the parties to the dispute need to agree to participate. It draws upon the similar regime in force under the Construction Contracts Act 2002 (CCA) in relation to construction disputes. The process would be confidential unless the parties agree otherwise.

The proposal has three key aspects. The first of these is speed of determination. The proposed regime is quite transparent in its objective of benefitting “those who value certainty and timeliness over the finer legal distinctions.”⁷⁵

The second key aspect is termed “pay now argue later” and is again modelled on aspects of the CCA legislation. The third key aspect is that the process gives rise to a final and enforceable result unless the parties wish to challenge the outcome through other means of dispute resolution, including by court action.

The Ministry’s 27-page consultation document on the proposed Adjudication Act contains 28 questions which intending submitters are invited to consider. Some of the most pertinent questions in the document seem to this author to be as follows (in paraphrased form):

- Should the proposed scheme be restricted to disputes involving businesses?⁷⁶
- Should the scheme be entirely voluntary or could a court, for example, order compulsory adjudication?⁷⁷
- Should there be a financial threshold applicable to participation in the scheme and if so what should this be?⁷⁸

74 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025). The details of the proposed new regime are conveniently set out in diagrammatic form on page 11 of the Consultation document. See also Ministry of Justice *New private statutory adjudication for New Zealand – submissions sought* (press release, 8 August 2025).

75 Ministry of Justice *New private statutory adjudication for New Zealand – submissions sought* (press release, 8 August 2025).

76 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025) at question 4.

77 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025) at questions 6 and 7. This reflects the contemporary debate on whether the court should have power to direct compulsory alternative dispute resolution processes such as mediation. See John Turner, *Review of Civil Procedure* [2023] NZ Law Review 373 at 391–394. An example of this process is found in s 145 of the Trusts Act 2019.

78 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025) at question 8.

- How should the scheme deal with an adjudicator's power to award costs?⁷⁹
- Should adjudication determinations be immediately binding upon the parties?⁸⁰
- Should restrictions be placed on a party's ability to challenge the determination of an adjudicator?⁸¹
- How should adjudication determination be enforced?⁸²
- What if any additional incentives should be put in place to ensure prompt payment once an adjudication determination is issued?⁸³

Some of these questions, such as compulsory referral to statutory adjudication and the finality of an adjudicator's determination, raise issues of a constitutional nature, such as whether or not it is appropriate to bar a party's access to the courts. It will be interesting to see how Parliament approaches these issues in terms of any legislation which is introduced to the House.

It seems to this author that several reservations or potential areas of difficulty arise from the consultation proposals. First of all, business disputes may vary greatly in terms of their urgency, complexity and the degree to which the parties value speed of resolution over a detailed consideration of the legal and factual merits of the dispute (or at least think that they do). Experience shows that commercial parties may be wedded to the idea of a fast dispute resolution process which can prioritise speed in resolving a substantial dispute at the expense of exploring legal niceties, until such time as they are the losing party to the dispute resolution process. At that point they often become much more interested in investigating their legal avenues to challenge the determination.

Even if the proposed adjudication process is an entirely voluntary one, it is quite foreseeable that some parties may embark on it without fully considering the implications of the stringent time limits involved. They may then very soon discover that they are involved in presenting the intricacies of a dispute involving many millions of dollars for adjudication within a greatly compressed

79 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025) at question 16.

80 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025) at question 17.

81 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025) at question 18.

82 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025) at question 19.

83 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (August 2025) at question 20.

time frame,⁸⁴ and which does not involve the normal pre-trial processes such as discovery or trial procedures such as cross examination of witnesses and submissions by counsel in person.

This process is then likely to lead to a determination on the papers by the adjudicator without the above procedural advantages. All of this may not produce an outcome which reflects what the parties (or at least the losing party) had hoped for. These considerations would seem to this author at least to support the desirability of restricting the monetary value of disputes which are to be subject to the new process.

In order to maintain confidence in the process, selection of suitably experienced and fair-minded adjudicators will also be crucial. For disputes involving relatively complex legal or financial issues experienced lawyers (such as retired judges or legally qualified arbitrators, for example), or accountants or finance professionals, would seem to be desirable choices of adjudicator. An independent certification or appointment process for adjudicators would also ideally be called for.

While the CCA adjudication process has apparently yielded beneficial results for the effective resolution of disputes in the construction industry, it seems to this author that some caution needs to be exercised in assuming that the CCA adjudication experience can readily be translated to the satisfactory resolution of more general commercial and business disputes. Construction disputes often proceed within a relatively narrow compass, based on the terms of the written construction contract in question and any applicable variations to it, and factual aspects of contractual performance including issues of timeliness and delay. The factual narrative is often supported by detailed documentation, which may largely be undisputed, such as site diaries or records, invoices and delivery sheets, and site photographs showing progress with the work.

The payment regime under the CCA involves the submission of detailed payment claims in the prescribed statutory form by the construction firm in question, which are required to be met by way of timely responses in terms of a payment schedule to be submitted by the liable party.⁸⁵ In the absence of strict compliance with this procedure, the liable party can find that its rights to challenge a payment claim have been severely compromised.

A “pay now argue later” approach in the construction industry context affords protection to more vulnerable parties such as smaller subcontractors and enables large, ongoing construction projects to proceed in an orderly fashion. Cashflow can be preserved with disputes being resolved relatively

84 Ministry of Justice *Fast dispute resolution – Consultation on a new statutory adjudication framework* (Ministry of Justice, August 2025) envisages, at 23, a similar time frame to the Construction Contracts Act 2002 adjudication process, with disputes being resolved in less than two months.

85 See Construction Contracts Act 2002, ss 19–24.

speedily while progress with the project continues. Such considerations may not necessarily apply in the context of more general business and commercial disputes.

Some reflection illustrates that there are a wide variety of commercial and business disputes which may not readily lend themselves to fair and effective resolution by adjudication on the papers. One example might be a dispute based on an oral contract or arising from oral representations or discussions between the parties, where the merits have to be determined by assessing the credibility of the opposing witnesses and their performance under cross examination at trial. Another example might be a complex economic, technical or scientific dispute. In such cases the merits can depend heavily on arcane opposing expert evidence which needs to be evaluated and clarified through compulsory conferencing between the respective experts, again followed by skilled cross examination at trial. Other instances readily come to mind.

In brief, the proposed statutory adjudication regime would appear to offer advantages for the expeditious resolution of certain business and commercial disputes, but may not be inherently suitable in terms of breadth of application for determining all such disputes. It may be, however, that if the proposal proceeds to legislation in due course, some of the above issues can be resolved in the course of the Parliamentary process.

C Judicature (Timeliness) Legislation Amendment Act 2025

The above Act received its assent on 19 December 2025 and took effect on 1 February 2026. From a civil procedure perspective, the Act makes various useful amendments to the Senior Courts Act 2016, with a view to achieving the efficient utilisation of judicial resources.

The relevant changes which embody civil procedure implications are as follows:

- The number of High Court judges is to be increased from 55 to 60.
- A single judge of the High Court, Court of Appeal or Supreme Court is empowered to strike out a civil proceeding if the judge is satisfied that it is an abuse of process.
- The Act imposes additional controls on restraining litigants with a prior history of filing vexatious proceedings.

VI A Selection of Notable Recent Cases on Civil Procedure

A *Cases on striking out for abuse of process*

There have been some notable recent cases on the courts' power to strike out proceedings for abuse of process.⁸⁶

In *Anura Ltd v Sealegs International Ltd* an issue arose as to whether the respondent should have brought a breach of patent claim in conjunction with its earlier claim for breach of copyright.⁸⁷ The Court of Appeal held that in accordance with the principle in old English authorities this amounted to bringing a claim by instalments, which was oppressive to the appellants and also wasted scarce judicial resources. The respondent's subsequent breach of patent claim was accordingly struck out on appeal as amounting to an abuse of process.

The decision of the Court of Appeal in *McKenzie v ASB Bank Ltd* concerned an appeal by the appellant against a High Court decision striking out the appellant's claim as being an abuse of process contrary to r 5.35B of the High Court Rules 2016.⁸⁸ The High Court Judge held that the claim improperly sought to use the Court's processes to raise complaints against the bank of a trivial and frivolous nature. The Court of Appeal upheld the High Court decision striking out the appellant's claim as an abuse of process.

B *Application of striking out principles to climate change litigation*

The recent decision of the Supreme Court in *Smith v Fonterra Co-operative Group Ltd* is noteworthy from several perspectives.⁸⁹ In that case, Mr Smith in his capacity as a tribal elder and spokesperson for a national forum of tribal leaders had brought a claim against seven respondents. It was claimed that those respondents were either emitters of greenhouse gases or suppliers of products which emitted greenhouse gases as part of the process of their combustion. Mr Smith further claimed that the respondents were making a material contribution to the climate change crisis and were causing damage of a cultural and related nature to him and his whanau.

The claims were based on three causes of action in tort, being public nuisance, negligence and a new tort based on a legal duty to cease materially contributing to damage arising from the adverse effects of climate change. The first two causes of actions were struck out by the High Court. On appeal,

86 For a more detailed treatment of this topic see John Turner *Civil Procedure* [2020] NZ L Rev 415 at 423–426.

87 *Anura Ltd v Sealegs International Ltd* [2024] NZCA 538, (2024) 181 IPR 286.

88 *McKenzie v ASB Bank Ltd* [2025] NZCA 493.

89 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134.

the Court of Appeal struck out all three causes of action, holding that it was not appropriate to pursue the relief sought by way of common law claims in tort and that addressing the adverse effects of climate change called for a co-ordinated regulatory response both nationally and internationally.

On further appeal, the Supreme Court held that the common law should lean in favour of the acceptance of such a claim at the striking out stage. It was appropriate to fully evaluate the merits of the claim at trial rather than apply pre-emptive elimination to it.

The Court also stated, in relation to the application of the principles of tikanga to the case:⁹⁰

It is important to keep to the fore that the specific loss pleaded by Mr Smith in this case is in part tikanga-based. Since that form of loss is an essential fact, in addressing this part of the claim the trial court will be required to engage with tikanga. Apart from any more conceptual impact tikanga may be argued to have on the framing of particular causes of action, that engagement will need to consider the potential effect of tikanga on any special damage requirement in public nuisance (if in fact special damage is required) and, with regard to all causes of action, whether tikanga-related harm is a cognisable form of loss.

The case will now proceed to examination of the merits of the claim at trial, which will involve an analysis of some novel and complex issues of tort law, causation, remoteness of damage and the application of the principles of tikanga.⁹¹

C *Protest to jurisdiction*

An interesting recent case on a protest to jurisdiction point is found in the decision of the Court of Appeal in *Grant v Arena Alceon NZ Credit Partners LLC*.⁹² In that case the liquidators of two New Zealand property development companies had issued notices under the Companies Act 1993 seeking the provision of information from overseas financiers who were not directors of the respondent companies.

Those parties declined to provide the requested information and were served with High Court proceedings by the liquidators at their overseas addresses. The respondents protested the jurisdiction of the High Court of New Zealand,

90 *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [182].

91 On 12 May 2026 the Government announced that the Climate Change Response Act 2002 would be amended to prevent findings of tort liability of this kind in both current and future proceedings. See “Government brings certainty to climate change tort law” (Press Release, Hon Paul Goldsmith, Minister of Justice, 12 May 2026).

92 *Grant v Arena Alceon NZ Credit Partners, LLC* [2024] NZCA 366, [2024] 3 NZLR 204.

contending that the Companies Act provisions relied on by the liquidators did not have extraterritorial effect and that the respondents had not submitted to the New Zealand jurisdiction. The respondents' protest to jurisdiction was upheld in the High Court and the liquidators then appealed, seeking to set aside the protest to jurisdiction.

The liquidators' appeal was allowed by the Court of Appeal which set aside the respondents' protest to the jurisdiction. The Court held that the provisions in question did have extraterritorial application, at least to some extent, as a matter of necessary implication in order for those provisions to be effective, and the provisions were also consistent with New Zealand's international obligations.

D *Application for a stay pending appeal*

In *Tomar v Khatri* the High Court had, in the exercise of its inherent jurisdiction, restrained the appellant from persisting with High Court litigation unless a substantial costs award made in favour of the respondent had first been paid.⁹³ The appellant unsuccessfully applied for a stay of the High Court order pending the hearing of the appeal.

The judgment of the Court of Appeal contains some useful observations on the role of counsel assisting the court. Counsel assisting has the role of providing independent and impartial assistance to the court. However, that does not mean that counsel assisting must be neutral or has to refrain from advancing any stance on the matter so long as counsel's views are based on an objective legal analysis of the position so as to provide effective legal assistance to the court.

VII Civil Procedure Implications Arising from the use of Gen AI

A *Some general observations*

Last but certainly not least in the range of civil procedure topics in this review is the increasing influence and importance of Gen AI applications, in terms of the resulting implications for developments in the field of civil procedure.

To begin with some general observations, Gen AI is proving to be an increasingly valuable adjunct to legal practice in New Zealand and elsewhere, including in the civil litigation area, but is also a phenomenon which is proving to have its fair share of controversial implications. This of course mirrors

93 *Tomar v Khatri* [2025] NZCA 126.

perceptions of the use of AI in society generally.⁹⁴

On the one hand, the most fervent proponents of the use of AI (who, it has to be said, appear to often be those who stand to benefit the most financially from its widespread adoption) regard it as a transformative mechanism. It has been said to parallel the development and use of the machines and inventions which formerly gave rise to the Industrial Revolution in 18th century England.⁹⁵

On the other hand, more sceptical commentators highlight the perceived negative effect of AI procedures, automation and robotics on employment levels in society,⁹⁶ and the more controversial military applications of AI processes. At the other end of the spectrum, reference has also been made to apocalyptic scenarios arising from the possible inability to prevent AI supercomputers from duplicating themselves in the future and taking a destructive dislike to their original human creators.⁹⁷ These debates are beginning to arise, somewhat less dramatically, in New Zealand in terms of the legal applications of AI.⁹⁸

It is obviously beyond the scope of this review to embark on any meaningful analysis of these broader issues, other than to state the somewhat obvious proposition that, in the legal context, the increasing use and popularity of AI techniques and applications appears to be here to stay. This has increasing implications for legal practice, including in the civil litigation and civil procedure area.

From a civil procedure perspective, the increasing use and popularity of AI processes in New Zealand gives rise to a number of issues. These include the following, which will be discussed further in the commentary below:

- Given that AI processes can and do generate fictitious results (euphemistically termed hallucinations), this has given rise to widespread

94 The implications of the interactions between humans and machines is not of course a new debate. Students of 20th century literature will recall the novel by HG Wells, *A Modern Utopia* (1905), and its critical response by EM Forster in his science fiction short story, *The Machine Stops* (The Oxford and Cambridge Review, November 1909). See also Samuel Butler *Erewhon, or Over the Range* (Trübner & Co, London, 1872) at chs 23–25 (“The Book of the Machines”).

95 See McKinsey & Company *Superagency in the workplace: Empowering people to unlock AI’s full potential* (Report, January 2025) at 2: “Artificial intelligence has arrived in the workplace and has the potential to be as transformative as the steam engine was to the 19th-century Industrial Revolution.”

96 Implications which may be far reaching in terms of employment opportunities for junior lawyers in the commercial, corporate and litigation fields, and for their training and development, which in turn has obvious implications for the future of legal practice.

97 See Eliezer Yudkowsky and Nate Soares *If Anyone Builds it, Everyone dies: why Superhuman AI would kill us all* (Little, Brown and Company, New York, 2025).

98 Steven Moe and Annemarie Mora “Why AI is a double-edged sword for lawyers” (20 September 2024) Law News <<https://lawnews.nz>>.

judicial and professional concern, both in New Zealand and elsewhere. This arises from the fact that the use of AI-generated false case references in legal research and in court submissions, without adequate accompanying checking and verification of this research, can undermine legal professional standards in the litigation area. It can also give rise to a loss of confidence as between the judiciary and counsel and in terms of public perception of the validity of the court process.

- A related concern is the fact that self-represented litigants may be (and already are) coming to regard reliance on AI techniques and applications as providing them with unjustified confidence in their ability to conduct complicated civil litigation without resort to legal advice. This can have obvious adverse implications for the efficient functioning of the court system and a consequent negative effect on thinly stretched judicial resources.
- From an access to justice perspective, many of the larger law firms in New Zealand, and some smaller ones as well, are increasingly adopting bespoke AI platforms of their own. This is likely to give those firms an even more pronounced advantage in terms of the conduct of civil litigation (particularly litigation on behalf of larger commercial clients), as opposed to less well-resourced parties or self-represented litigants.
- There is increasing recognition in New Zealand and elsewhere that a “one size fits all” approach to the use of AI techniques and applications in civil litigation and rules of civil procedure may no longer be appropriate. Legal professional standards bodies in New Zealand and overseas are coming to the realisation that excessive reliance on AI may not be appropriate in some aspects of civil litigation and procedure, such as drafting of affidavits involving personal knowledge of the deponent or expressions of expert opinion. Furthermore some areas of civil litigation may be better suited to AI applications than others.
- Confidentiality and privacy implications can also arise in relation to the use of publicly available AI providers, of which there are several well-known examples now in existence, particularly ChatGPT. Given that publicly available AI providers rely on accumulating large amounts of material from contributing users in order to refine their presumed accuracy, there is a question mark as to how confidential and private such individual contributions actually are. It is not uncommon nowadays for sensitive references in judgments in civil cases to be redacted or excised for various reasons. If the unredacted versions can be uncovered through issuing appropriate prompts to a publicly available AI platform this poses an obvious confidentiality and privacy risk. This is likely to be a greater risk in

criminal and family law cases, which can often involve name suppression and confidentiality issues, but similar issues can also arise in civil cases.

B *False AI-generated citations*

Expanding on the above categories, instances of AI-generated hallucinations (or egregious errors, to put the matter more bluntly) have arisen in civil litigation in all of the leading common law jurisdictions, which are based on case law precedents used for the formulation of arguments, submissions and judicial decisions in future cases. A selection of contemporary examples is included below.

To begin with the English courts and specialist tribunals, the leading case in this area is *R (On the application of Ayinde) v London Borough of Haringey*.⁹⁹ This case also contains a useful summary of the relevant recent authorities from various common law jurisdictions.

The English Divisional Court began by noting that the inherent jurisdiction of the Court extended to the regulating of its own procedures and to enforcing duties owed by lawyers to the Court.¹⁰⁰ The Court went on to make some general statements about the use of AI as a litigation tool, noting that it was one which had to be employed with certain accompanying safeguards.¹⁰¹

The Court stated:¹⁰²

In the context of legal research, the risks of using artificial intelligence are now well known. Freely available generative artificial intelligence tools, trained on a large language model such as ChatGPT are not capable of conducting reliable legal research. Such tools can produce apparently coherent and plausible responses to prompts, but those coherent and plausible responses may turn out to be entirely incorrect. The responses may make confident assertions that are simply untrue.

99 *R (On the application of Ayinde) v London Borough of Haringey* [2025] EWHC 1383 (Admin), [2025] 1 WLR 5147 judgment given on 6 June 2025.

100 *R (On the application of Ayinde) v London Borough of Haringey* [2025] EWHC 1383 (Admin), [2025] 1 WLR 5147 at [2], citing *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin), [2013] CP Rep 6; *R (DVP) v Secretary of State for the Home Department* [2021] EWHC 606 (Admin), [2021] 4 WLR 75.

101 *R (On the application of Ayinde) v London Borough of Haringey* [2025] EWHC 1383 (Admin), [2025] 1 WLR 5147 at [3]–[9]. The court stated at [5]: “Artificial intelligence is a tool that carries with it risks as well as opportunities. Its use must take place therefore with an appropriate degree of oversight, and within a regulatory framework that ensures compliance with well established professional and ethical standards if public confidence in the administration of justice is to be maintained.”

102 *R (On the application of Ayinde) v London Borough of Haringey* [2025] EWHC 1383 (Admin), [2025] 1 WLR 5147 at [6] (footnotes omitted).

They may cite sources that do not exist. They may purport to quote passages from a genuine source that do not appear in that source.

The case concerned a junior barrister who had included in her court documents various case references which were fictitious, apparently through the use of generative artificial intelligence tools, so that “the threshold for initiating contempt proceedings is met”.¹⁰³ However the Court decided not to initiate contempt proceedings, in part due to potential failings in terms of the training and supervision of the barrister in question.¹⁰⁴

There is a useful Appendix to the judgment which cites similar cases from courts and tribunals in various common law jurisdictions, including England and Wales, the United States, Canada, Australia and New Zealand.¹⁰⁵ It is noteworthy that in those cases where the parties in question were legally represented, the lawyers in question did not check the false citations given or seek to locate and read the actual cases which had been wrongly cited. In some of the cases in question the parties were self-represented and lacked the necessary skills to evaluate the accuracy of the AI-generated information.

Varying penalties have been applied by the courts in such cases. These have ranged from striking out the relevant proceedings as an abuse of process, wasted costs orders¹⁰⁶ and sanctions against the offending lawyers and their firms personally.¹⁰⁷

There have also been some recent New Zealand examples. In *Wikeley v Kea Investments Ltd*, the appellant, Mr Wikeley, was self-represented with assistance from a McKenzie friend.¹⁰⁸ He filed a memorandum which contained reference

103 *R (On the application of Ayinde) v London Borough of Haringey* [2025] EWHC 1383 (Admin), [2025] 1 WLR 5147 at [68].

104 *R (On the application of Ayinde) v London Borough of Haringey* [2025] EWHC 1383 (Admin), [2025] 1 WLR 5147 at [69].

105 *R (On the application of Ayinde) v London Borough of Haringey* [2025] EWHC 1383 (Admin), [2025] 1 WLR 5147 at [83]–[102].

106 In one recent example from Singapore, the High Court of Singapore on 29 September 2025 ordered a lawyer who had cited a fictitious AI-generated case reference to pay S\$800 personally by way of a wasted costs order: *Tajudin bin Gulam Rasul v Suriaya bte Haja Mohideen* [2025] SGHCR 33. At [3] the Court stated: “His actions may, in the eyes of the public, cast a shadow over the legitimacy and honour of the legal profession and its role as a custodian of justice in Singapore.”

107 In the United States some judges have resorted to novel sanctions against lawyers who cite fictitious AI-generated material to the court. See Sara Merken “Some judges move beyond fines to keep lawyers’ AI errors in check” (17 September 2025) Reuters <www.reuters.com>. A Nevada state judge, the Honourable David Hardy, gave two errant lawyers who had submitted non-existent AI-generated cases a choice. Either they could face personal disciplinary and financial sanctions or they could write personally embarrassing letters of contrition to their former law school deans and to their bar officials!

108 *Wikeley v Kea Investments Ltd* [2024] NZCA 609, [2024] 3 NZLR 901.

to AI-generated non-existent cases. Muir J, delivering the judgment of the Court of Appeal, stated:¹⁰⁹

We note Mr Wikeley's original memorandum in response dated 10 September 2024 which Mr Wikeley withdrew after the apparent use of generative artificial intelligence in its drafting was drawn to our attention by respondent counsel. The use of generative artificial intelligence was not initially disclosed by Mr Wikeley, but was evident from the references to apparently non-existent cases.

In a recent New Zealand employment law case, *LMN v STC*, the plaintiff, who was self-represented, was challenging a determination of the Employment Relations Authority and seeking a variation of a security for costs order made in favour of the defendant.¹¹⁰ The plaintiff referred in her submissions to an employment court judgment derived from AI which did not in fact exist and this was the subject of criticism by the court.¹¹¹

The New Zealand practice in civil cases under the High Court Rules is generally to provide copies of the authorities relied upon in an accompanying bundle of authorities. The risk of producing fictitious citations should therefore be considerably reduced, if not eliminated (at least in cases where parties are represented by counsel).

Apart from the issue of fictitious citations, there is also an issue about how up to date AI applications actually are. The information on ChatGPT for example is generally considered to be at least a year or so out of date, although this level of performance may well be steadily improving. However it may be some time before an AI application can compete with an astute and competent litigation lawyer reading of a contemporary case in a newspaper or in a legal publication.

C *Use of AI by self-represented litigants*

The use of AI by self-represented litigants in civil cases also poses its own problems. Essentially a self-represented litigant without any legal training or background, and who is relying to a considerable extent if not entirely on knowledge gained from the use of AI, is in effect endeavouring to compress much of the content of a four-year law degree into several pages of AI-generated

109 *Wikeley v Kea Investments Ltd* [2024] NZCA 609, [2024] 3 NZLR 901 at [199], fn 187.

110 *LMN v STC* [2025] NZEmpC 46.

111 *LMN v STC* [2025] NZEmpC 46 at [8]. The court stated: "However, no such case exists, and the plaintiff is reminded that information provided by generative artificial intelligence ought to be checked before being relied on in documents filed in court proceedings."

instructions.¹¹²

The obvious difficulty with this is that legal problems which progress to civil litigation inevitably entail an overlapping set of principles ranging across a variety of subjects. As the old saying goes, a little knowledge is a dangerous thing. In the present context, a little knowledge supplemented by impressive sounding principles derived from an AI provider, which may or may not cover all of the legal issues arising, either accurately or comprehensively, can be doubly dangerous.

A litigation claim involving an alleged breach of a property sale and purchase contract, for example, will often involve principles of property law, contract law, aspects of commercial law such as the application of the Fair Trading Act 1986 and possible limitation of action issues. There may be issues as to remedies such as specific performance or an account of profits and the calculation of damages. Issues may well arise concerning the relationship and interaction between legal and equitable principles, whether contractual provisions may amount to penalty clauses, principles of civil procedure such as the application of the summary judgment provisions, and various often quite complicated procedural issues and court documents, and the application of detailed rules of pleading.

The complexities arising in this area and the extent to which counsel, acting as officers of the court, may need to assist in clarifying opposing issues and submissions for the judge, are still being worked through. While the relevant general principles have been expounded in appellate authorities, their application in particular cases can lead to various difficulties and borderline cases.

Reliance on AI may assist self-represented parties in navigating the complexities of various issues of civil procedure and civil litigation. However there is also the accompanying danger that such parties may be led down extraneous rabbit holes, so diminishing the benefits to them of AI assistance. As the above examples of the use of false AI-generated citations by self-represented parties illustrates, finding references to legal cases is only half the battle, and perhaps much less than half. Checking that the cases actually exist and are relevant to the matters at issue involves rather more complicated considerations.

The latest United Kingdom guidance for the judiciary on AI issues makes this point:¹¹³

112 For a general discussion of contemporary issues arising in relation to self-represented litigants see John Turner *Civil Procedure* [2017] NZ L Rev 681 at 681–700.

113 Courts and Tribunals Judiciary *Artificial Intelligence (AI): Guidance for Judicial Office Holders* (updated version 14 April 2025) <www.judiciary.uk/wp-content/uploads/2025/04/Refreshed-AI-Guidance-published-version.pdf>, at [7], referred to in the context of false AI-generated case citations in *HMRC v Gunnarsson* [2025] UKUT 00247 (TCC) at [110].

AI chatbots are now being used by unrepresented litigants. They may be the only source of advice or assistance some litigants receive. Litigants rarely have the skills independently to verify legal information provided by AI chatbots and may not be aware that they are prone to error. If it appears an AI chatbot may have been used to prepare submissions or other documents, it is appropriate to inquire about this, ask what checks for accuracy have been undertaken (if any), and inform the litigant that they are responsible for what they put to the court/tribunal.

D *Access to justice considerations*

The issue of access to justice gives rise to its own particular difficulties in terms of the use of AI applications. While, as the old legal saying goes, “Justice is open to all – like the Ritz Hotel”,¹¹⁴ increasing technological sophistication in the area of AI may well increase the disparity in resources between the well-equipped litigant and the not so well-equipped. There are of course two sides to this argument. On the one hand it might be argued that access to publicly available AI applications will make it easier for lay, or less well resourced, litigants to bring or pursue their own legal cases, which they might otherwise be unable to do. The above discussion, however, shows that while this concept may be admirable in theory, its application in practice may well be rather more problematic.

What may well be more likely to occur, especially in relation to more complex cases, is that litigants who are represented by lawyers with access to more sophisticated AI tools will enjoy an increasing inequality of arms. While more substantial law firms have always enjoyed a litigation advantage in complicated civil cases, in the age of AI this advantage is likely to increase rather than decrease over time. This issue is likely to give rise to more questions than answers, but it will no doubt need to be grappled with in the near future.

E *Horses for courses*

The fourth point in my list of AI-related issues above, is whether AI fits neatly within a “one size fits all” approach. This issue has exercised the minds of lawyers, judges and legal regulatory bodies in various jurisdictions.

A recent speech in Scotland by Sir Geoffrey Vos MR has raised this issue:¹¹⁵

114 An aphorism attributed to an Irish judge Sir James Mathew in 1897, quoted in RE Megarry *Miscellany at Law* (Stevens, London, 1955) at 254.

115 Geoffrey Vos “Speech by the Master of the Rolls to the Law Society of Scotland” (Law and Technology Conference Online lecture, 14 June 2023) at [11].

One can envisage a rule or a professional code of conduct regulating whether and in what circumstances and for what purposes lawyers can: (i) use large language models to assist in their preparation of court documents, and (b) be properly held responsible for their use in such circumstances.

Regulators of the legal profession, along with the judiciary, in various jurisdictions have also grappled with this issue. In New Zealand, the Courts of New Zealand website has published Guidelines on 7 December 2023 in three parts relating to the use of Gen AI in courts and tribunals.¹¹⁶ These Guidelines relate first to judges, judicial officers, tribunal members and judicial support staff [*Guidelines for Judicial Officers*], secondly to lawyers [*Guidelines for Lawyers*] and thirdly to non-lawyers [*Guidelines for Non-Lawyers*].

In terms of the *Guidelines for Judicial Officers*, one interesting aspect is that they draw attention to the fact that AI material generally does not take account of specific New Zealand cultural values and practices.¹¹⁷ The guidelines also contain useful points on how to uphold confidentiality, suppression and privacy,¹¹⁸ ensuring accountability and accuracy¹¹⁹ and identifying and being aware of Gen AI use by others.¹²⁰

The *Guidelines for Lawyers* generally cover the same topics as the *Guidelines for Judicial Officers*. However they also stress that the existing professional obligations of lawyers continue to apply.¹²¹

The *Guidelines for Non-Lawyers* cover the same topics but with additional warnings as to the potential pitfalls of reliance on AI applications. For example, page 1 states “If you choose to use a GenAI chatbot to help you with a dispute or with a case in a court or tribunal, you should not rely on it as your sole or main source of legal information.” As the relevant cases on self-represented litigants illustrate, these well-meaning sentiments may unfortunately represent more of an exercise in futility than a guide to what is likely to transpire in

116 Ngā Kōti o Aotearoa | Courts of New Zealand *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals* (7 December 2023).

117 Ngā Kōti o Aotearoa | Courts of New Zealand *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals* (7 December 2023) at 3: “GenAI chatbots generally do not account for New Zealand’s cultural context, nor specific cultural values and practices of Māori and Pasifika.”

118 Ngā Kōti o Aotearoa | Courts of New Zealand *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals* (7 December 2023) at 2.

119 Ngā Kōti o Aotearoa | Courts of New Zealand *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals* (7 December 2023) at 3.

120 Ngā Kōti o Aotearoa | Courts of New Zealand *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals* (7 December 2023) at 4.

121 Ngā Kōti o Aotearoa | Courts of New Zealand *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals* (7 December 2023) at 1.

actual practice.

The NZLS has also published a paper on the use of Gen AI in March 2024 which draws attention to managing risks and ethical issues arising from the use of Gen AI.¹²² From a civil procedure perspective the paper refers to the use of AI in undertaking e-discovery and conducting legal research,¹²³ the risks involved in entering legally privileged material into a publicly accessible AI tool¹²⁴ and cost implications.¹²⁵

It is also instructive to consider the AI usage guidelines which have been issued by the state supreme courts in Australia. This is particularly the case in New South Wales and Victoria, which have adopted rather different approaches to the topic in their particular jurisdictions.

The relevant New South Wales Practice Note issued by the NSW Chief Justice, Andrew Bell, took effect from 3 February 2025 and sets out the acceptable uses of AI in the courts of New South Wales.¹²⁶ There are various restrictions in the Practice Note on the use of Gen AI and these entail some quite far reaching procedural implications, as follows:

- Information subject to non-publications or suppression orders, information which is in discovered documents, produced under subpoena or subject to a statutory prohibition on publication, must not be entered into any Gen AI program unless it remains within a controlled technological environment and is subject to certain restrictions.¹²⁷
- There are various restrictions placed on the use of Gen AI in generating, modifying or editing the contents of affidavits, witness statements and related material, and requirements as to disclosure of the use of Gen AI by litigants.¹²⁸
- Where written submissions, summaries or skeleton arguments have been prepared with the assistance of Gen AI the author must verify in those documents (not solely through the use of a Gen AI program) that

122 NZLS *Lawyers and Generative AI* (March 2024).

123 NZLS *Lawyers and Generative AI* (March 2024) at 3.

124 NZLS *Lawyers and Generative AI* (March 2024) at 5 and 7.

125 NZLS *Lawyers and Generative AI* (March 2024) at 5 and 7.

126 AS Bell, Chief Justice of New South Wales *Supreme Court Practice Note SC Gen 23: Use of Generative Artificial Intelligence (Gen AI)* (28 January 2025).

127 AS Bell, Chief Justice of New South Wales *Supreme Court Practice Note SC Gen 23: Use of Generative Artificial Intelligence (Gen AI)* (28 January 2025) at [9A].

128 AS Bell, Chief Justice of New South Wales *Supreme Court Practice Note SC Gen 23: Use of Generative Artificial Intelligence (Gen AI)* (28 January 2025) at [10]–[15].

all citations used do in fact exist, are accurate and are relevant to the proceedings.¹²⁹

- Very significant provisions relate to the preparation of expert reports. Gen AI is not to be used in the drafting or preparing of an expert report without prior leave of the court and any application for such leave is governed by some quite detailed requirements.¹³⁰

By way of contrast, the Supreme Court of Victoria has issued somewhat less prescriptive requirements relating to the use of AI in litigation.¹³¹ The implications of the Victoria Guidelines from a civil procedure perspective are as follows:

- Legal practitioners in Victoria must comply with their ethical obligations in the conduct of litigation and with the requirements of the Civil Procedure Act 2010.¹³²
- Use of Technology Assisted Review (TAR) for large scale document review is permissible and is to be encouraged.¹³³
- Legal practitioners must exercise judgement and professional skill in reviewing material submitted to the court with AI assistance and remain responsible for the accuracy of the contents of such documents.¹³⁴
- Where Gen AI tools are used to assist with preparing affidavits, witness statements or related documents, those documents must be “sworn/ affirmed or finalised in a manner that reflects that person’s own knowledge and words”.¹³⁵
- In relation to expert evidence: “Similar considerations apply in the use and identification of such tools in compiling data in the preparation of

129 AS Bell, Chief Justice of New South Wales *Supreme Court Practice Note SC Gen 23: Use of Generative Artificial Intelligence (Gen AI)* (28 January 2025) at [16]–[18].

130 AS Bell, Chief Justice of New South Wales *Supreme Court Practice Note SC Gen 23: Use of Generative Artificial Intelligence (Gen AI)* (28 January 2025) at [19]–[25].

131 Supreme Court of Victoria *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (May 2024).

132 Supreme Court of Victoria *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (May 2024) at [4].

133 Supreme Court of Victoria *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (May 2024) at [6].

134 Supreme Court of Victoria *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (May 2024) at [8] and [9].

135 Supreme Court of Victoria *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (May 2024) at [10].

any expert reports or opinions, and compliance with the Expert Witness Code of Conduct.”¹³⁶

As in the case of New South Wales and Victoria, there are various implications of the use of AI from a procedural perspective in New Zealand which may well require changes to the High Court Rules or the issue of Practice Notes in due course. In order to overcome the problem of fictional AI-generated citations, lawyers engaged in litigation may be required to confirm that cases or legal authorities cited in court documents have been checked for authenticity and accuracy.

The scope of the verifying affidavit used for discovery purposes may need to incorporate reference to whether documents have been searched for and located using AI applications. References in affidavit evidence or in witness statements to a deponent’s knowledge and belief may need refinement to cover knowledge and belief derived from AI sources. This is particularly likely to be the case in relation to the presentation of expert evidence in civil cases.

The fact that the use of well-directed AI procedures in the civil litigation area can result in significant savings in time and cost in conducting litigation procedures is likely to result in a more refined approach to the scales of cost employed in the existing rules of civil procedure, such as the High Court Rules, in cases where AI applications have been employed. This may well require parties to disclose how much time has been saved on particular litigation tasks through the use of AI applications to enable a more accurate assessment of what time can be considered to be reasonable for steps in a proceeding.¹³⁷

The advantages of AI-based predictive coding for e-disclosure in terms of proportionality and efficiency of process, have been recognised in England and Wales since at least 2016.¹³⁸ Such Technology-assisted review (TAR) systems have been credited with helping to streamline the discovery process in large cases.

Consideration may well need to be given to whether the High Court

136 Supreme Court of Victoria *Guidelines for Litigants: Responsible Use of Artificial Intelligence in Litigation* (May 2024) at [10].

137 In terms of the principles in r 14.2 of the High Court Rules 2016. As an interesting aside in relation to this issue, recent international survey research by the legal services firm Axiom has shown that while the great majority (some 79 per cent) of law firms globally are using AI applications in their legal practices, the majority of them (some 58 per cent) are not crediting the significant resulting cost savings to their clients. See Law News (Premium) “Global survey finds lack of transparency among law firms when pricing AI-generated work” (October 13, 2025, with accompanying Axiom report). However, anecdotal evidence known to this author suggests that in New Zealand (and no doubt in other jurisdictions) astute inhouse counsel are now requiring their external law firms to identify areas of AI usage in their practices and to adjust the pricing of their legal services to take account of cost savings resulting from the use of AI applications.

138 See *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch).

Rules need to impose specific obligations on self-represented litigants. This is particularly the case given the increasing reliance by such litigants on AI applications.

F *Confidentiality and privacy issues*

Confidentiality and privacy issues also require consideration from a civil procedure standpoint, particularly where publicly available AI platforms and applications without enhanced security features are being used by litigants, either acting for themselves or through counsel. AI tools may adopt differing approaches to the storage and access to data on their systems. If data on a freely accessible AI system can be identified and accessed on an individual basis, so that the contributing authors can be identified and their input searched, then that carries obvious professional risks.

As one United Kingdom commentator has stated:¹³⁹

The biggest compliance concern with genAI is client confidentiality. Never use public-facing versions of ChatGPT or other free tools to process client data. Doing so risks breaching confidentiality and professional obligations.

As the above discussion shows, the use of AI applications can be a useful, if not indispensable, adjunct to legal professional practice, if properly employed. However regulation of their use is likely to involve some further regulatory and judicial controls and consequent changes to the existing rules of civil procedure.

Finally, in order to avoid any allegations of hypocrisy which might be directed at this author, no part of this review was compiled with the assistance of Gen AI!

139 Catherine Bamford “How can I use generative AI in my legal work?” (SRA Lawtech Insight, September 2025).