This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

NEW ZEALAND

Responses submitted by:
Name: Robert Gapes
Law Firm/Company: Simpson Grierson
Location: Auckland, New Zealand

1. Would your jurisdiction be described as a common law or civil code jurisdiction?

New Zealand is a common law jurisdiction. Historically New Zealand relied heavily on English common law and statutes. Over time New Zealand law and English law have increasingly diverged.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

New Zealand Courts generally use adversarial adjudication methods. Aside from specialist courts and tribunals, there are four tiers of courts in New Zealand: the District Court, the High Court, the Court of Appeal, and the Supreme Court (in order of lowest to highest). These courts adopt an adversarial approach. Some specialist courts, administrative tribunals and commissions of inquiry incorporate elements of the inquisitorial method.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

Most civil court cases are determined by judges only. Whilst not strictly prohibited, for practical purposes, civil jury trials are generally limited to defamation actions. Judges are appointed by the Governor-General after advice from the Attorney-General (rather than elected) and must be lawyers with at least 7 years of experience. Juries are randomly selected from a jury roll which is based on the electoral roll. Disputes Tribunal matters are usually adjudicated by referees appointed by the Governor-General based on their personal attributes, knowledge and experience.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

Yes. New Zealand has the following specialist Courts for example: Coroner's Court, Disputes Tribunal, Employment Court, Environment Court, Family Court (a division of the District Courts), Immigration and Protection Tribunal, Maori Land Court, Tenancy Tribunal, and the Youth Court (a division of the District Courts). These specialist courts are established and governed by various statutes.

5. Is arbitration an option and when? If so, what rules are typically used?

Arbitration is available when the parties agree (either orally or in writing) to submit to arbitration, provided that the arbitration agreement is not contrary to public policy and the dispute is capable of determination by arbitration. The Arbitration Act 1996 sets out the procedural framework governing arbitrations, but the parties are free to vary some of the statutory requirements by agreement. The arbitrator(s) may be appointed by the parties, the Court or an appointing

authority. The arbitrator(s) can grant any relief that would have been available to the High Court had the dispute been argued in that jurisdiction. An arbitral award is final and binding on all parties. A party can apply to the High Court to have the award enforced as a judgment. There are limited grounds on which an arbitral award can be challenged, such as where the capacity of the parties, the validity or scope of the arbitration agreement, or the conduct of the proceeding is in question, or where the award is considered to be plainly wrong in law.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Yes, on request. Where a Court is asked to consider a matter that is the subject of an arbitration agreement, a party can apply to the Court to stay the proceeding and refer the matter to arbitration. Any application of this kind must be made prior to that party submitting to the Court their first statement on the substance of the dispute. The Court must then stay the proceedings and refer the matter to arbitration, unless the agreement is found to be null and void, inoperative or incapable of being performed, or if the dispute does not relate to matters agreed to be referred to arbitration.

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

Mediation is generally a voluntary process in New Zealand. Parties will however be bound by any contractual arrangement to refer certain disputes to mediation (or an alternative dispute resolution forum) in the first instance. Further, the Court may, upon an application by one or both parties, make orders directing the parties to attend mediation (or an alternative dispute resolution forum), even though Court proceedings have commenced.

Whilst it is not mediation per se, many District Court claims will be allocated a judicial settlement conference at which a Judge will endeavour to secure agreement on a settlement.

8. What is the process for pre-hearing fact discovery (if any)?

(a) Are there provisions for mandatory document disclosures?

Yes. Each party must sufficiently describe and disclose copies of key documents well before any trial or hearing. The procedural rules governing disclosure are contained in the High Court Rules 2008, the District Courts Rules 2009 (for certain proceedings commenced prior to 1 July 2014), and the District Courts Rules 2014 (for some proceedings commenced before and all proceedings commenced on or after 1 July 2014).

In both High Court and District Court proceedings, initial disclosure usually occurs simultaneously with the serving of the first pleading. Here, parties must disclose 'all the documents referred to in their pleading' together with 'any additional principal documents in that party's control that have been used when preparing the pleading and on which that party intends to rely at the trial or hearing'.

In addition to these initial disclosure requirements, the High Court Rules and District Courts Rules contemplate more particularised pre-hearing discovery orders being made by the Court in appropriate circumstances. The scope of any

discovery orders will depend on a number of factors including the nature of the claim, the parties involved, the extent of documentation available, etc.

(b) Is there provision for oral examinations of the parties or others?

Ordinarily, oral evidence is adduced only at the trial or hearing, so that the judge can assess the credibility of the witness and hear the evidence. Where this is not possible (perhaps due to reasons of costs, inability to attend the hearing, locality etc), a party can apply to the Court for an order allowing examination of specific witnesses before the hearing. Whether an order will be made at all is a matter of discretion.

(c) Are there limits on the length of oral examinations?

No.

(d) Are witness statements or summaries to be provided before the hearing?

Yes. Although evidence is usually delivered orally at the hearing, witness statements or summaries (usually in the form of will-say statements, affidavits, or briefs of evidence) are almost always exchanged prior to the hearing. Strictly speaking, a written brief will not be considered evidence, until it is read by the witness at the trial. This preserves a party's right not to call evidence at trial. The High Court Rules and District Courts Rules govern the format of the evidence, prescribe the various time frames for filing and serving the evidence, and set out any consequences for failing to comply with the relevant procedural requirements.

9. What is the process for pre-hearing expert disclosure (if any)?

(a) Are expert reports or written summaries required to be exchanged?

Yes. Where a party intends to call expert evidence to support its case, the expert is required to prepare and give evidence in accordance with the provisions contained in the Evidence Act 2006 and the High Court Rules 2008. The expert's overriding duty is to assist the court impartially on relevant matters within the expert's area of expertise. The expert is not an advocate for the party who engages the witness. Amongst other things, any expert witness must confirm that he or she has read the code of conduct for expert witnesses prescribed by the High Court Rules, and agrees to comply with it. A failure to do so means that the expert's evidence may only be heard with the Court's permission. As with other types of witness statements, expert reports are usually exchanged prior to the hearing.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

As is the case with other types of witnesses, where an expert witnesses is not able to give his or her evidence at the trial itself (perhaps due to reasons of costs, inability to attend hearing, locality etc), a party can apply to the Court for an order allowing examination of that witness before the hearing.

NEW ZEALAND

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

The Court may (on its own initiative or on the application of a party to the proceeding) direct expert witnesses to confer and try to reach agreement on matters in issue. The Court can also require the parties to prepare and sign a joint witness statement setting out the areas of agreement and disagreement with reasons. If necessary, and provided the parties agree, the Court can appoint an independent expert witness of its own accord to convene and conduct the expert witness conference. The expert witness must exercise independent and professional judgment. He or she cannot withhold or avoid agreement on the basis of instruction/direction from any other person.

10. Are there other notable discovery rules?

In 2012, the High Court discovery regime in New Zealand was overhauled. The objective was to reduce the time and expense associated with discovery and promote tailor-made discovery orders that are proportionate to the proceeding through party led co-operation and consultation. One key change is the presumption that all discovery will be exchanged electronically, unless the Court directs or the parties agree otherwise. Also of notable interest is the requirement for every party (or prospective party) to, as soon as a proceeding is reasonably apprehended, take all reasonable steps to preserve documents that are, or are reasonably likely to be, discoverable in the proceeding. This extends to potentially discoverable documents in electronic form which must be preserved in readily retrievable form even if they would otherwise be deleted in the ordinary course of business.

In 2009, the District Courts Rules underwent a major reform with a view to making the litigation process more user friendly and accessible to laymen. One notable development meant that parties to District Court proceedings needed only disclose documents that that party intended to rely on. Accordingly, parties were entitled to withhold documents that would be harmful to their case (unless the Court ordered otherwise). The reformed District Court regime underwhelmed practitioners and others. As a result, the Rules Committee revised the 2009 regime again and the District Court Rules 2014 (which came into force on 1 July 2014) now realign many of the District Court practices and procedures (including in relation to discovery) with the High Court.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

In defended High Court proceedings, a case management conference will usually be convened shortly after the 25th working day from the date the statement of defence was filed. The conference is held before a judge. The parties are expected to convene prior to the conference with a view to reaching agreement (or justifying their independent views) on all matters for discussion at the conference. The case management conference is intended to cover all pre-trial matters including (but not limited to) the form and adequacy of the pleadings, the terms on which further discovery ought to be provided, the resolution of any interlocutory matters, the timing for the exchange of evidence, trial duration, the requirement for any special resources at trial and/or the suitability of any alternative dispute resolution. Complex cases are likely to require more than one case management conference.

For defended claims commenced in the District Court on or after 1 July 2014, a case management conference will also usually be convened shortly after the 25th working day following the date when the statement of defence is filed. The

agenda for the conference includes the adequacy of particulars of pleadings, the scope of intended discovery, the joinder of any more parties (if any), and costs categorisations, with the primary function being to decide whether or not the case is appropriate for a short trial. Short trials are intended for claims where the case can come to a hearing quickly, where the issues are relatively uncomplicated, a modest amount is at stake and/or the trial time is not likely to exceed one day. If a short trial is appropriate, the Court will allocate a trial date. For all other claims that are not suitable for a short trial, the Court will allocate a judge led judicial settlement conference in the first instance. Where a judicial settlement conference does not result in a settlement, the judge will adjourn the proceedings to a second case management conference with a view to progressing the case towards a trial.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

Where appropriate, a party can apply for summary judgment. The application is usually (but not always) made at the time of filing the statement of claim or statement of defence. In the case of a plaintiff applicant, the Court must be satisfied that the defendant has no defence to the claim. In the case of a defendant applicant, the Court must be satisfied that there is no possibility of success in the plaintiff's cause(s) of action. It is possible for the Court to award summary judgment as to liability only, with quantum being determined by way of a full hearing.

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

A party who wishes to challenge the admissibility of a brief of evidence (including expert evidence) must notify the other party of that challenge, within 20 working days of receiving the brief. If the admissibility issues are not resolved between counsel in a further 10 working days, the challenging party must notify the Court of the admissibility issue. The High Court Rules 2008 are silent as to the consequences of not giving notice within the prescribed time. The Court may choose not to entertain any late notification.

The most prudent approach to challenging the admissibility of evidence and seeking a pre-hearing ruling is to file an interlocutory application with the Court. The application may be made on various grounds including grounds of privilege, relevance, confidentiality, hearsay, non-expert opinion evidence, reliability, improper obtainment etc. Both parties will likely be given an opportunity to be heard in respect of the contentious evidence, before the judge makes a final pre-hearing ruling. In some cases, the Court may prefer that the trial judge address any admissibility issues at the trial itself, rather than in a separate, pre-trial hearing.

14. What is the standard for admissibility of expert evidence?

The Evidence Act 2006 prescribes when expert evidence will be admissible. The general rule under the Evidence Act is that an expert opinion is only admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding. However, it should be noted that an expert opinion is not inadmissible simply because it is about an ultimate issue to be determined in a proceeding or a matter of common knowledge.

NEW ZEALAND

Further, for expert evidence to be admissible, the expert must comply with the code of conduct for expert witnesses set out in the High Court Rules 2008. In any evidence given by an expert witness, the expert witness must:

- acknowledge that the expert witness has read the code of conduct and agrees to comply with it;
- state the expert witness qualifications as an expert;
- state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise;
- state the reasons for the opinions given by the expert witness;
- specify any literature or other material used or relied on in support of the opinions expressed by the expert witness; and
- describe any examinations, tests or other investigations on which the expert witness has relied and identify, and give details of the qualifications of any person who carried them out.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

In a proceeding that is to be tried by a judge alone, and in which a question for an expert witness arises, the Court may at any time, on its own initiative or on the application of a party, appoint one (or more) independent experts to inquire into and report upon any question of fact or opinion not involving questions of law or construction. A Court expert must, if possible, be a person agreed upon by the parties. Failing agreement, the Court must appoint the Court expert from persons named by the parties and the question to be submitted to the Court expert must be settled by the Court. An expert may be cross-examined by the parties at the trial or before an examiner.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Yes. The Evidence Act 2006 expressly confers privilege on certain types of communications. There are two main types of privilege in civil proceedings: legal professional privilege (which includes legal advice privilege and litigation privilege); and without prejudice privilege. Legal advice privilege protects communications a person makes with their legal advisor which are intended to be confidential and are made in the course of or for the purpose of obtaining professional legal services. Litigation privilege protects communications or information made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding. The without prejudice rule protects communications (ie negotiations) made in the course of a dispute, with the intention of settling that dispute.

Other protected privileges which may be relevant to civil proceedings include privilege for communications with ministers of religion and privilege against self-incrimination (which is not absolute).

NEW ZEALAND

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

The Evidence Act 2006 also protects disclosure of confidential information. However, the Court has an overriding discretion to order disclosure of confidential information if the judge considers that the public interest in the disclosure is outweighed by the public interest in preventing harm to a person about whom the information relates; or preventing harm to the particular relationship in which the information was exchanged.

The Privacy Act 1993 also places limits on the disclosure of personal information. Relevantly, an agency that holds personal information shall not disclose the information unless the agency believes on reasonable grounds, that the disclosure is necessary for the conduct of proceedings before any Court or tribunal (being proceedings that have been commenced or are reasonably in contemplation).

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

Disputes about privilege and confidentiality are generally determined by the Court in which the proceeding is filed. In some cases the issue can be resolved prior to trial. In other cases, the issue may be resolved by the trial judge at the outset of the trial or during the trial.

Complaints about interference with privacy are generally investigated by the Privacy Commissioner.

19. Briefly describe the trial process?

Other than the specialist forums, standard civil claims can be brought in the High Court, the District Court or the Disputes Tribunal. Each of these environments has a distinct trial process.

There is one trial process available in the High Court as prescribed by the High Court Rules 2008. Generally all evidence and submissions are presented at trial for determination by a judge (sitting without a jury).

There are three types of trials available in the District Court, each with different processes as set out in the District Courts Rules 2014:

- **Short trials** are intended for claims where the Court considers that the case can come to hearing quickly, the issues are relatively uncomplicated, there is a modest amount at stake, and/or the trial time is not likely to exceed one day. There are strict time limits prescribed for short trials.

- **Simplified trials** are intended for more complex claims, where the duration of the hearing is not likely to exceed three days, the amount of money involved is more than modest, and/or there is likely to be one or more expert witnesses giving evidence. Simplified trials are also subject to strict time limits.

NEW ZEALAND

- **Full trials** are intended for all other proceedings in the District Court, follow the High Court procedure, and are not subject to any prescribed time limits.

The Disputes Tribunal process is more informal and the parties cannot have legal representation at the hearing (although there is nothing preventing a party to a Disputes Tribunal dispute from seeking legal advice on that dispute).

(a) Are there opening submissions, in what form and of what length?

For all full trials in the High Court and District Court, the parties deliver their opening submissions orally in the courtroom. Typically, each party will file and serve a written synopsis of their opening submissions before the trial. The written synopsis will usually identify the factual and legal issues, outline the party's arguments in respect of them, and outline the evidence that the party intends to call. There is no limit on the length of the written synopsis or oral opening submissions for full trials.

For short trials and simplified trials in the District Court, the parties also deliver their opening submissions orally. The parties are not required to file and serve a written synopsis prior to the trial. Each party will have a total of 30 minutes to present their opening and closing submissions.

In Disputes Tribunal hearings, parties usually deliver their opening statements orally. Written submissions are generally not exchanged prior to the hearing. There are no set time limits on the length of any opening submissions.

(b) What is the order of presentation of witnesses?

Ordinarily, the plaintiff's witnesses (if any) are called first, after the plaintiff has presented opening submissions. The defendant's witnesses are called later, after the defendant has presented opening submissions.

(c) Who conducts examination and in what order?

The procedure for examination of witnesses in the High Court and District Court varies depending on the mode of trial. Once a witness gives evidence in chief (either orally or in affidavit form), the opposing party is entitled to cross-examine that witness. Under the Evidence Act 2006, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, in order to give these witnesses the opportunity to respond to that evidence. The witness may then be re-examined by or on behalf of the party for whom they are giving evidence, on matters arising during cross-examination.

For all full trials in the High Court and District Court, each witness is required to give evidence in chief by reading from their written brief of evidence (which would ordinarily have been filed and served prior to the trial itself). The evidence is led by the party calling the witness. Where the trial does not encompass written briefs, each witness will provide their evidence in chief orally, and be guided by the party calling the witness. There are no prescribed time limits.

For simplified trials in the District Court, evidence is proffered by affidavits which should have been exchanged prior to trial. A witness need only appear at a simplified trial if a party has served a notice to cross-examine the witness. Each party is limited to one expert witness per specialist discipline, unless the Court permits otherwise. In simplified trials, evidence in chief is limited to 20 minutes per witness. If a witness is being cross-examined on their affidavit evidence,

that cross-examination cannot exceed 60 minutes. The party who called the witness will then be entitled to a further 10 minutes to re-examine the witness.

For short trials in the District Court, evidence is also proffered by affidavits exchanged prior to trial. Evidence in chief is led from the witness orally (guided by the party who called the witness) and must not exceed 15 minutes per witness. The opposing party then has an opportunity to cross-examine the witness but is limited to 45 minutes per witness. The witness may then be re-examined by or on behalf of the party for whom they are giving evidence (10 minutes).

The Disputes Tribunal process is fairly informal. Both the referee and the parties are able to ask questions of any witness providing evidence in the hearing. There are no set rules regarding the order and examination of witnesses.

(d) What is the process for closing submissions?

Ordinarily, once the parties have presented their opening submissions and once all of the evidence has been proffered/tested, the defendant presents their closing submissions first, with the final word going to the plaintiff. However, if the defendant did not offer any evidence in support of his or her case, then this sequence is reversed. Closing submissions, where required, are usually presented orally. While there is no formal requirement to do so, it is becoming increasingly common for parties to file and serve a written synopsis of their closing submissions prior to presenting them to the Court.

As mentioned above, for short trials and simplified trials in the District Court, each party will have a total of 30 minutes to present their opening and closing submissions. There are no time limits in respect of Disputes Tribunal hearings, or full trials in the District Court or High Court.

20. Please identify any other notable trial procedures.

Not applicable.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

In civil proceedings, the plaintiff will ordinarily have the burden of proving, on the balance of probabilities, that the defendant caused the loss for which a remedy is being claimed. Where a defendant advances a counterclaim or affirmative defence, the onus shifts to that defendant to prove that positive defence, on the balance of probabilities.

If a plaintiff is seeking damages, he or she must not only prove that the loss is not too remote, but also quantify that loss. Where a defendant is alleging that a plaintiff failed to mitigate his or her loss, the onus shifts to the defendant to prove that failure to mitigate on the balance of probabilities.

This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

NEW ZEALAND

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

The main type of damages recoverable in New Zealand are compensatory damages. However, New Zealand's unique accident compensation scheme effectively abolishes the right to sue for most (but not all) types of personal injury suffered after 31 March 1974. Damages are generally only recoverable up to the amount of loss sustained by the plaintiff. The loss may arise from a restitution interest (ie the right to restoration of a valuable benefit conferred on the other party), a reliance interest (ie the right to compensation for loss due to steps taken by the innocent party), or an expectation interest (ie the right to compensation for the loss of bargain).

In exceptional circumstances, the plaintiff may also be awarded non-compensatory damages, for example exemplary/punitive damages (refer question 23 below).

Interest may be charged on part or all of the debt or damages for any duration between the date when the cause of action arose and the date of payment. Interest may not be charged upon interest already included in the debt sought. The rate and duration of any interest payable will depend on the agreement (if any) between the parties. In the absence of any agreement or other limiting provisions, the Court may award interest under the Judicature Act 1908 which provides a statutory right to claim post-judgment interest. While there is no statutory right to pre-judgment interest, the Courts are increasingly using their discretion to award interest on a money claim from the date when the debt became due to the date of judgment.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Punitive damages, known in New Zealand as exemplary damages, can be awarded in tort claims, but generally cannot be awarded in contract claims unless the conduct complained of also amounts to a tort; or where there is a breach of fiduciary duty. Exemplary damages are not awarded for recovery of loss. They are awarded to punish conduct or behaviour.

Exemplary damages are generally awarded when compensatory damages are an inadequate punishment for a defendant. For exemplary damages to be awarded, the defendant must have acted with outrageous, flagrant, high-handed or contumelious disregard for the plaintiff's rights. Accordingly, exemplary damages will not be awarded unless the defendant had a conscious appreciation of the risk of causing harm and had run that known risk. The value of any such award is at the discretion of the Court. Typically though, awards for exemplary damages in New Zealand have been low by international standards.

24. Are there time limits for bringing claims? Responding to claims? Please describe.

There are a number of different rules which apply to the commencement of proceedings. These can vary depending on the nature of the claim and when the relevant acts and/ or omissions take place.

This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

NEW ZEALAND

Limitation Act 1950

Limitation periods for contract and tort claims involving acts or omissions which occurred on or before 31 December 2010 are governed by the Limitation Act 1950.

The general rule under the Limitation Act 1950 is that claims in contract or tort must be brought within six years from the date on which the cause of action accrues. For contract claims, time usually runs from the date of the breach of contract. For tort claims, time will usually run from the date when the relevant damage occurred.

Where the action is for bodily injury, proceedings must generally be commenced within two years of the date on which the cause of action accrued (or later in some circumstances).

There is a "longstop" provision preventing any claim from being filed more than 15 years after the cause of action accrued.

Under the 1950 Act, the ordinary time limits may be extended for people under disabilities when the cause of action arose, in cases of concealment or fraud, in sexual abuse cases and/or where personal injury has been caused by a gradual process, disease, or infection.

Limitation Act 2010

The relevant time limits for contract and tort claims involving acts or omissions which occurred on or after 1 January 2011 are governed by the Limitation Act 2010. The Limitation Act 2010 introduced an umbrella provision for "money claims", which are claims for monetary relief, whether at common law, under an enactment or in equity. Money claims generally have a limitation period of six years from the date of the act or omission on which the claim is based. Limitation periods for other types of claims (ie not "money claims") vary between six and 60 years depending on the type of claim.

The six-year period for a money claim may be extended under the "late knowledge" provisions of the Limitation Act 2010. Where a plaintiff does not discover their claim before the end of the relevant limitation period, they will be entitled to a further three years from the "late knowledge date" within which to file their claim. A claim's "late knowledge date" is the date on which the plaintiff gained or ought reasonably to have gained knowledge of the key facts/essential elements of the claim. These provisions are, however, tempered with a 15 year long stop (after the date of the act or omission) so as to avoid indefinite liability for money claims. Like its predecessor, the 2010 Act may extend the ordinary time limits in sexual abuse claims and claims for personal injury caused by a gradual process, disease, or infection.

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

The foundation of basic jurisdiction over a foreign defendant in the New Zealand High Court is proper service on the defendant. New Zealand proceedings can be served on a defendant in New Zealand as of right. New Zealand proceedings can also be served on a defendant overseas in various circumstances. Leave of the High Court is required in some

situations.

Leave of the New Zealand Court is not required for service overseas where there are prescribed circumstances connecting the defendant to the claim in New Zealand, including, for example: where the act or omission for which damages are sought was done in New Zealand; where the contract that is the subject of the claim was made in, or to be performed in, New Zealand, or was to be governed by New Zealand law; and where the subject matter of the dispute is land, stock or property situated in New Zealand (see Rule 6.27 High Court Rules).

Where leave is required, the High Court may grant leave for service overseas if the applicant establishes that: the claim has a real and substantial connection with New Zealand; there is a serious issue to be tried on the merits; New Zealand is the appropriate forum for the trial; and any other relevant circumstances support an assumption of jurisdiction in New Zealand.

Special rules apply as between New Zealand and Australia.

A defendant may object to or protest the jurisdiction of a Court to hear and determine a proceeding on the basis that there is a more convenient forum. To do so, the defendant will typically need to file first an appearance under protest to jurisdiction.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

Defendants may issue a notice of claim to third parties under the High Court Rules 2008. However, they can only do so for one or all of the following reasons:

- if the defendant is entitled to some contribution or indemnity from those third parties;
- if the defendant is entitled to some relief or remedy relating to the subject matter of the proceeding from the third parties and that relief is substantially the same as what the plaintiff is claiming from the defendant;
- if a question in issue in the plaintiff's proceeding ought to be determined with the third parties' involvement; or
- if a question or issue between the defendant and the third parties relates in some way to the subject matter of the proceeding that is substantially the same question or issue arising between the defendant and the plaintiff.

A third party claim notice must be issued within 10 working days after the expiry of the time for the defendant to file their statement of defence with the Court (a statement of defence generally must be filed and served within 25 working days of receiving a valid statement of claim). The leave of the Court is required to issue a third party notice in some circumstances involving summary judgment.

NEW ZEALAND

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

In civil proceedings the general rule is that a party who fails with respect to a proceeding or an interlocutory application should pay an amount towards the legal costs of the party who succeeds. All matters relating to costs are at the discretion of the Court. Where the parties have been unable to agree on costs, the Courts will usually award costs according to the scale prescribed by the High Court Rules and District Courts Rules. In certain circumstances, the facts may warrant an award of indemnity or increased costs.

Disbursements, which include Court fees, service fees and witness expenses, are also generally recoverable by the successful party from the unsuccessful party.

28. Are contingency fees allowed?

Conditional fee arrangements used to be regarded as being contrary to the torts of maintenance and champerty. They are now permissible in some circumstances by virtue of sections 333 and 334 of the Lawyers and Conveyancers Act 2006. Under these provisions, conditional fees are permitted if the resulting fee is:

- the normal fee which would have been charged for the service provided; or
- the normal fee accompanied by a premium, expressly provided for in the agreement, which is payable only if the outcome of the matter to which the agreement relates is successful and which:
- compensates the lawyer for the risk of not being paid at all;
- compensates the lawyer for waiting to be paid until proceedings have been concluded; and
- is not calculated as a proportion of the amount recovered by the proceedings.

Lawyers need to inform clients of any other appropriate funding arrangements (including legal aid where relevant) before they enter into a conditional fee arrangement. In accordance with Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, the total fee charged must be fair and reasonable.

The arrangement itself must be in writing and specify the method by which the fee will be determined. It must also outline the conditions for success and detail the incidence of the fees becoming payable. The agreement must also anticipate settlement or compromise, and set out what is to occur in the event the client goes against legal advice given. Lastly, the client may give notice cancelling the conditional fee arrangement within 5 working days after it has been entered into.

This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

NEW ZEALAND

29. Is third party funding of claims permitted? Under what circumstances?

While the tort of champerty has yet to be abolished in New Zealand, judicial attitudes toward litigation funding by third parties seems to have changed albeit slowly. While still uncommon in New Zealand, the Courts appear to have more readily accepted that third party funding arrangements are a commercial reality. The Supreme Court issued a ruling in *Waterhouse v Contractors Bonding Ltd* [2014] 1 NZLR 91 in relation to claims by individual claimants (as distinct from class or representative actions) that the New Zealand Courts have no general role in regulating litigation funding agreements and there is no automatic requirement on a plaintiff receiving third party funding to provide a costs indemnity or security. The Court held that while there is no requirement to disclose the actual agreement itself in third party funded proceedings, the existence of the agreement should be disclosed where any funding arrangement may be relevant to an application (eg applications for stay on abuse of process grounds, for security for costs, or for costs).

Litigation funding arrangements can be challenged on grounds beyond those of traditional abuse of process. If a funding arrangement looks to be an assignment of a cause of action to a third party funder, the Court may consider that funding arrangement to be an abuse of process.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

Unlike England, the United States of America and Australia, New Zealand does not yet have detailed class action rules. However, the New Zealand High Court Rules do allow for one or more persons to sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding.

The Court of Appeal held in *Saunders v Houghton* [2010] 3 NZLR 331 that a representative action can be brought where each member of the class is alleged to have a separate cause of action, provided:

- the order may not confer a right of action on the member of the class represented who could not have asserted such a right in separate proceedings, nor may it bar a defence which might have been available to the defendant in such separate proceeding;
- there must be an interest shared in common by all members of the group; and
- it must be for the benefit of other members of the class that the plaintiff is permitted to sue in a representative capacity.

Proposals have been made for the introduction of detailed class action rules.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

Entities such as registered companies or incorporated societies that are recognisable by law as being a separate legal entity in and of their own right may commence claims on behalf of a group as a representative. Entities such as trusts or

unincorporated associations/societies, which do not have this separate legal entity from its members, trustees, directors etc may not.

The High Court Rules 2008 permit one or more persons to sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding provided consent of those other persons is obtained; or the Court has directed them to bring that representative proceeding.

The statutory role of the New Zealand Commerce Commission includes bringing actions on behalf of consumers in relation to breaches or infringements of the Fair Trading Act 1986. Businesses and other consumer groups may contact the Commerce Commission to inform the Commission about unfair or misleading trading practices, or anti-competitive behaviour by business.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

The duration between filing a civil claim and having that claim heard and determined is highly variable. Straightforward claims may be finally determined within a few months of the claim being commenced, for example where the parties, issues, scope of discovery and evidence is limited, and where the parties approach the litigation in a co-operative fashion. Other, more complex, claims may sometimes take years to come to a final hearing, for example where there are multiple parties, various issues, a substantial amount of evidence, significant pre-trial applications requiring disposal, and/or where the parties take an un-cooperative approach to the litigation. The following factors may affect the length of time between commencement and determination of a proceeding: the number of parties, the number of issues, the amount of evidence, the scope of discovery, the co-operation of each party in discovering all relevant/required evidence in a timely matter, the urgency required, the availability of witnesses, any pre-trial settlement/dispute resolution attempts, any interlocutory steps requiring resolution, the attitude of the parties and their lawyers, and the availability of Court hearing time.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Both interlocutory and final decisions are appealable. In some cases, a party may be required to seek leave before appealing from an interlocutory decision.

Decisions of the District Court are generally appealable to the High Court. In exceptional circumstances, decisions of the District Court can be appealed to the Court of Appeal or the Supreme Court with leave.

High Court decisions are appealable to the Court of Appeal. A party may be required to seek leave from the High Court or the Court of Appeal to appeal to the Court of Appeal. Again, in exceptional circumstances, High Court decisions may be appealed to the Supreme Court with leave.

Decisions of the Court of Appeal can only be appealed to the Supreme Court (New Zealand's highest Court), with leave of the Supreme Court. The Supreme Court must give leave to appeal only if it is satisfied that it is necessary in the interests of justice.

This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

NEW ZEALAND

Most civil appeals are heard and determined by judges (without juries). As mentioned above, judges are appointed by the Governor-General after advice from the Attorney-General and must be lawyers with at least 7 years of experience. Both the District Court and the High Court are generally presided over by a single judge sitting in the Courtroom. The New Zealand Court of Appeal consists of the President and eight other permanent appellate judges. The Court of Appeal usually sits in panels of three judges. The Supreme Court consists of the Chief Justice and four other permanent appellate judges and usually sits as a bench of five (although leave to appeal decisions are usually made by a panel of three judges without an oral hearing).

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

Yes. There are more than 40 courtrooms and hearing rooms that have audio-visual link facilities enabling people to participate remotely in a Court proceeding. Audio-visual links may be used in civil proceedings for the appearance of a participant in the proceeding if a judicial officer or registrar permits it, taking into account:

- the nature of the proceeding;
- the availability and quality of the technology that is to be used;
- the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including, the ability to assess the credibility of witnesses and the reliability of evidence presented to the Court; and the level of contact with other participants; and
- any other relevant matters.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

The use of electronic casebooks and electronic documents is becoming increasingly popular in New Zealand courtrooms, but is not mandatory. The rules relating to the discovery and exchange of documents have undergone a recent overhaul, with a new focus on electronic listing and exchange of documents. This is likely to see a further increase in the use of electronic trials.

Further, the meaning of "document" in the Evidence Act 2006 and the High Court Rules 2008 is intentionally wide to include any material that bears symbols, words, figures, images, sounds, graphs or drawings (not exhaustive). This means that parties are freely able to use graphics, computer animation, power point and the like in civil trials (including appeals).

NEW ZEALAND

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

A lawyer is typically admitted to the New Zealand bar as both a barrister and a solicitor, and is able to switch between these roles and act in both capacities as required. However, some lawyers choose to practise as a barrister sole. A barrister sole is typically instructed by a solicitor (who attends to most of the transactional work) and appears as counsel in Court upon the instructions of that solicitor.

Where a litigant is legally represented, they must have a qualified practising solicitor named on the Court record. A practising barrister sole cannot qualify to be named as the solicitor on the record. If a litigant changes lawyers part way through a proceeding, that litigant must file a notice of change of representation with the Court.

The trial lawyer may be different from the lawyer responsible for pre-trial procedures, provided that the lawyer appearing in Court is either:

- the solicitor on the record;
- a barrister appearing on the instructing solicitor's instructions; or
- another solicitor appearing as an agent for the instructing solicitor.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

Joint tortfeasors (those who commit the same tort) and several or concurrent tortfeasors (those who commit different torts, producing the same damage) are each liable for the entire loss caused.

The usual procedure, where there is more than one tortfeasor, is for the plaintiff to sue them all in one action, in which case contribution may be sought by one of the parties on application at the close of the plaintiff's action. Alternatively, a defendant who is sued may apply to join another potential defendant as a third party.

Section 17(1) of the Law Reform Act 1936 allows a tortfeasor liable in respect of damage suffered by a person as a result of a tort, to recover a contribution from another tortfeasor, who is, or would if sued in time, have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise. This statutory right to contribution does not affect any express or implied contractual right to contribution.

Notwithstanding the above, a plaintiff is free to bring successive actions against different defendants. However, if more than one action is brought in respect of the same damage, the sums recoverable under the judgments given in those actions may not in the aggregate exceed the amount awarded in the first. Moreover, in any action other than the first, the plaintiff is not entitled to costs unless the Court is of the opinion that there were reasonable grounds for bringing the action.

A defendant may plead contributory negligence in response to a claim. Where a plaintiff has negligently contributed to the loss it claims in respect of a tortious act, the Court may apportion the overall loss to the extent that the Court considers just.

This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

NEW ZEALAND

38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?

New Zealand is not a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. However, New Zealand is a party to numerous conventions on service, with a number of (mainly European) States. Where an applicable bilateral service convention exists, service of a foreign process in New Zealand must be carried out in accordance with that convention. If there is no applicable service convention, and subject to the requirements of the foreign Court concerned, service of a foreign process in New Zealand may be effected informally through private means. In this case, the ordinary rules of service, as prescribed by the High Court Rules 2008 apply.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

New Zealand is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (signed in 1970). Consequently, the New Zealand Evidence Act 2006 authorises the High Court to make orders for evidence to be obtained in New Zealand for civil proceedings in a foreign Court upon that foreign Court's request. The extent of the High Court's power to obtain evidence to this end is limited to the power it has in domestic civil proceedings. Furthermore, foreign requests must specify the particular documents they seek.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

Not applicable.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

Not applicable.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

Yes. There are various proposed reforms currently before Parliament or due to be introduced to Parliament later in 2014, which, if accepted, will see a substantial change to civil procedure across all Courts in New Zealand, including (not exhaustive):

- Changing the means of reviewing or appealing an interlocutory decision of the High Court;
- Restricting the ability to seek a trial before a judge and jury to civil cases for defamation, false imprisonment and malicious prosecution only;

NEW ZEALAND

- Providing for certain orders restricting persons from commencing or continuing civil proceedings that may have limited, extended or general effect;

- Amalgamating the 63 District Courts across New Zealand into a single District Court of New Zealand (with 63 registries);

- Increasing the jurisdiction of the District Court to hear and determine claims of up to $350,000 (compared with the current $200,000 threshold).