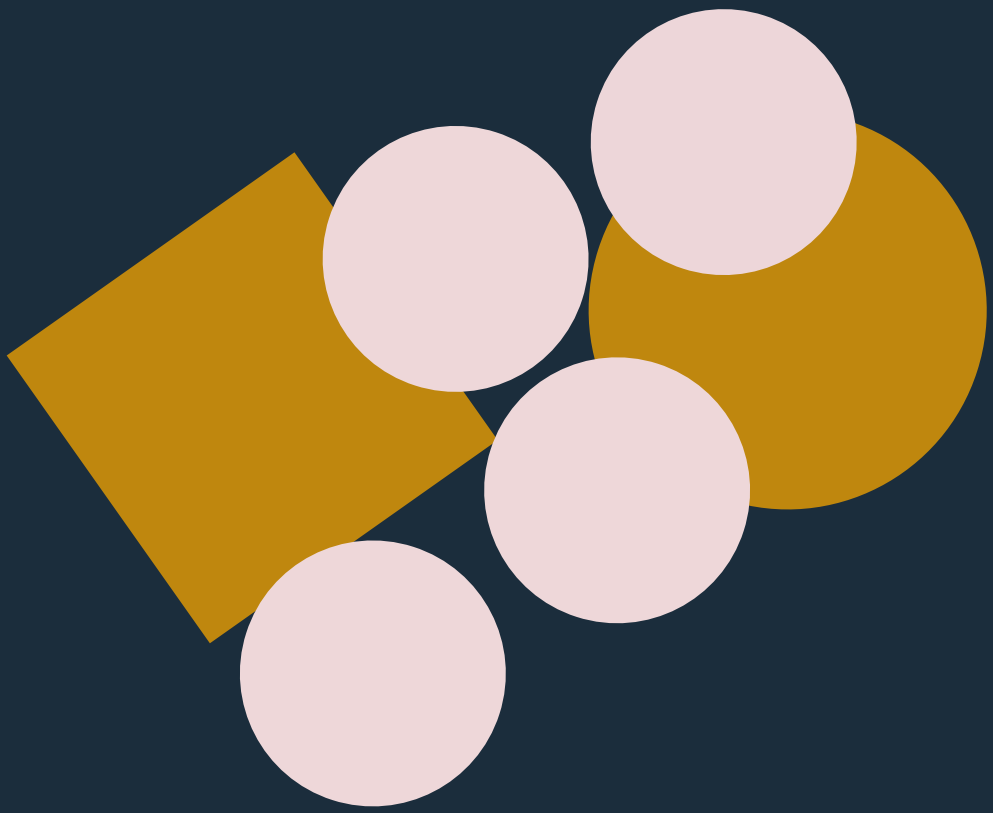
Litigation newsletter.

April 2026



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Fictional case law generated by AI program – the Supreme Court sends a strong message

Jones v Family Court at Whangarei [2026] NZSC 1

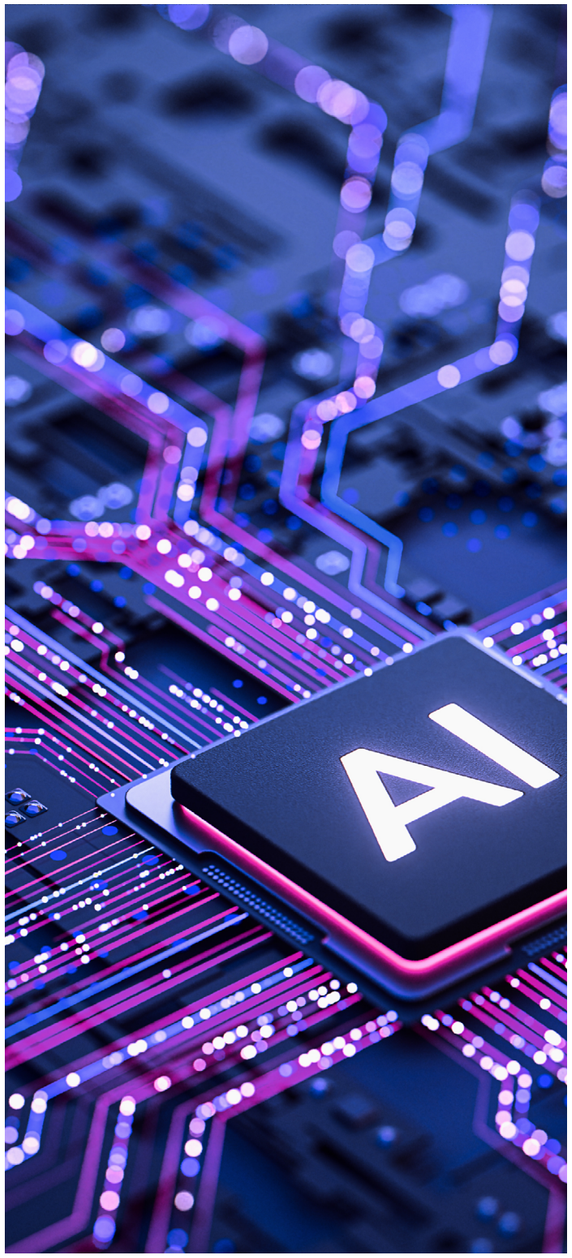
New Zealand's Supreme Court recently indicated that courts should consider charges of contempt for litigants misusing AI tools. This decision is the first decision from New Zealand's highest court addressing hallucinated authorities but it likely won't be the last.

Mr Jones was a self-represented litigant who sought judicial review of a Family Court decision. The High Court declined the application for judicial review. A subsequent appeal and recall application to the Court of Appeal were also declined.

Undeterred, Mr Jones sought leave from the Supreme Court where his legal submissions "[had] cited several authorities which appear to have been hallucinated by an AI application". The Supreme Court held that the misuse of AI in legal proceedings has serious implications for the administration of justice and public confidence in the justice system. It also commented that the applicant's practice is a clear breach of a party's obligations to ensure all authorities referred to are genuine and correctly cited when filing any document with the Court.

Worldwide, lawyers and judges are grappling with the use of AI in legal documents. This area is fast developing. The English Courts have also issued similar warnings to self-represented parties and lawyers who have inappropriately used AI in legal submissions. In *Taiwo v Homelets of Bath Ltd* [2025] EWHC 3173 (KB), the applicant cited a reference to an AI generated case. In response, the Court issued a similar warning that "the reliance upon false citations is just as unsatisfactory when presented to the Court by a litigant in person (or Litigation Friend), although of course the sanction for having done so may not necessarily be the same as those applicable if a registered lawyer is responsible for the submission".

The rise of free AI resources coupled with access to justice issues means we will see more lay applications and submissions. Lawyers and litigants will be watching with interest any developments in this area, including whether the threat of contempt will be enforced in the future.



A class action for ineffective nasal decongestants

Gielen v Johnson & Johnson (New Zealand) Ltd [2026] NZHC 758

Background

In this case the plaintiffs brought claims under both the Consumer Guarantees Act 1993 (**CGA**) and the Fair Trading Act 1986 (**FTA**), alleging that a range of cold and flu products containing phenylephrine (**PE**) did not effectively relieve nasal congestion despite being marketed to do so. The two plaintiffs, supported by a litigation funder, sought to represent a broader class of consumers who had purchased the medication over the past 20 years.

Findings

Representative orders granted for CGA claims on an opt-out basis

The Court granted representative orders in respect of the CGA claims, permitting the plaintiffs to represent a class of consumers on the basis that reliance on the representations is not an element of a CGA claim. The Court declined representative orders for FTA claims relating to products combining PE with other medication, finding the proposed class was too broadly defined and that individual reliance issues could not be resolved on a representative basis. The representative orders for FTA claims were limited to products where PE was the sole active ingredient.

Opt-out approach preferred for large consumer classes

The Court confirmed that an opt-out approach was appropriate given the large potential class size, and a key factor was consumer inertia. If the proceeding were opt-in and required a consumer to take active steps to take part in the litigation, the case was unlikely to proceed at all. The Court rejected Johnson & Johnson's argument that an opt-in or registration process should occur at this stage.

Aggregate damages: an open question, but not a barrier to representative orders

The Court acknowledged there is an unresolved legal question as to whether aggregate damages can be awarded under the CGA and FTA in New Zealand. This uncertainty did not prevent the making of representative orders. The Court expressed a preliminary view that it may be appropriate for the question of the availability of aggregate damages to be determined at an earlier stage of the proceeding.

Common fund order granted at an early stage

The Court held it was appropriate to make a common fund order (**CFO**) binding the members of the class to the agreement between the litigation funder and the plaintiffs, which in turn permits the cost of the litigation to be shared across the class. The Court found that uncertainty about class size was not a material factor against making an early CFO, and that any concerns about the funding arrangement could be addressed through the court's power to review the CFO at the time of settlement or judgment.

Practical implications

This decision shows New Zealand courts' liberal approach to grant opt-out representative orders and early common fund orders in large-scale consumer claims, even where questions about damages remain unresolved. Supported by litigation funders, representative actions (commonly referred to as class actions) are likely to become a regular feature of the New Zealand legal landscape.

Injunctions against anonymous cyber-attackers

Manage My Health Ltd v Unknown Defendants [2026] NZHC 2, *McKay Ltd v Unknown Defendants* [2026] NZHC 295 and *Medi-Map NZ Ltd v Unknown Defendants* [2026] NZHC 389

In three recent judgments, the High Court granted urgent without notice interim injunctions against unknown defendants following ransomware and data exfiltration attacks. The judgments form a developing body of jurisprudence on obtaining injunctions against anonymous cyber-attackers and any person who may come into possession of stolen data.

In all three cases, the Court was satisfied that the data in question plainly carried the necessary quality of confidence, had been obtained unlawfully, and there was a real and imminent threat of further publication or dissemination. The Court granted interim injunctions restraining all persons from accessing or dealing with the stolen data, including storing, broadcasting, publishing, sharing, disclosing or using any information taken from the stolen data.

A key feature in all three cases is that, given the hackers had concealed their identities, it was not possible or practicable for the applicants to name individual respondents as would normally be required. The Court confirmed it is both possible and appropriate to make orders against unknown defendants, and any such orders can be made in terms directed to any person who may have, or gain, possession or control of stolen data. However, the Court declined to grant permanent injunctions on a without notice basis without hearing arguments and submissions on this point, and in *McKay Limited* the judge noted that any permanent confidentiality orders were expected to be narrowed to specific sensitive information.

Why these cases are relevant

There are obvious challenges with enforcing the injunctions by virtue of the defendants being anonymous, likely located overseas, and beyond the jurisdiction of the New Zealand courts. Despite these challenges, the decisions provide a basis for takedown requests to providers who host stolen data. Importantly, the decisions preserve natural justice by reserving leave to any person affected to apply for a variation of the interim injunctions on short notice.

The judgments demonstrate that there is a remedy available to those targeted by such attacks, to prevent further dissemination of private and confidential information. However, due to the nature of the attacks, the damage may have already been done by the time the matter comes before the courts.

Enforcement of arbitration agreement

Galbraith v Global Metal Solutions Limited [2026] NZHC 382

In this case, a dispute between a landlord and tenant under a lease proceeded to arbitration but no agreed list of issues was provided to the arbitrator. The arbitrator issued an award to resolve the pleaded claims. However, a new dispute later arose as to whether, without the applicant's consent, the respondent could dig the applicant's land to convert the drainage system as required by resource consent. The arbitrator determined that he had jurisdiction to determine this new dispute, and did determine it. The applicant sought a declaration from the High Court that the arbitrator did not have jurisdiction to determine any matters already determined, or any issues arising during the remainder of the lease.

The Court considered whether a term to that effect was implied in the agreement, and concluded it was not reasonable to assume that the arbitrator's jurisdiction was broader than issues identified in the pleadings. The parties intended the issues to be defined through the pleadings, which confirmed the arbitrator's jurisdiction, costs and time required. This was consistent with business efficacy. While leave reserved for the second partial award was clearly defined, this did not extend to a dispute that arose later in time. The Court accordingly concluded that the arbitrator did not have jurisdiction to determine the new issue.

Why this case is important

This decision is an important reminder that procedural steps for arbitration are critical, and initial administrative steps for any proceeding are essential and must not be overlooked. The scope of an arbitrator's appointment must be carefully considered and documented. Failure to do so may result in an appeal on jurisdictional issues.

For clients in commercial arrangements facing disputes, this case is a good reminder that the drafting of the agreement appointing the arbitrator requires careful attention.

Court of Appeal asked to intervene in transgender health regulations

Professional Association for Transgender Health of Aotearoa v Minister of Health [2026] NZCA 8

The Medicines (Restriction on Prescribing Gonadotropin-releasing Hormone Analogues) Amendment Regulations 2025 (**Regulations**) prohibit new prescriptions for puberty blockers to treat gender dysphoria or gender incongruence in children and adolescents. The Professional Association for Transgender Health Aotearoa Inc (**PATHA**) commenced a judicial review in the High Court challenging the validity of the Regulations.

PATHA sought interim orders directing the Minister of Health to suspend the Regulations. The Court declined to make interim orders because:

- The circumstances were not so exceptional for the orders to be justified
- The orders would likely be ineffective given the Minister cannot direct the Governor-General to suspend the Regulations (the Minister can only make recommendations to the Executive Council, who in turn advises the Governor-General)
- The order may not be constitutional because it would potentially pit the Court against the Executive Council.

Instead, the High Court declared that the Crown should take no steps to enforce the Regulations pending determination of the judicial review application (**Declaration**).

PATHA appealed and argued the Declaration was not sufficient to preserve its position. PATHA argued that as the Regulations technically remained in force, there remained the possibility of a medical professional receiving a complaint or being the subject of a private prosecution if they issued new prescriptions while the Regulations were subject to the Declaration. However, the Court considered this risk to be low, as it would be extraordinary for a public body to facilitate a complaint in light of the Declaration, and a private prosecution must be approved by a Registrar or District Court judge, who would act consistently with the Declaration. The Court found that the Declaration was effective to preserve PATHA's position and accordingly dismissed the appeal.

Commentary

This case confirms the relevant standard for granting interim relief for judicial review proceedings and reiterates important constitutional principles. While the Crown is not subject to injunctions as a matter of constitutional form, it is expected to act consistently with court declarations.

The Court also confirmed that the delegation of the power to make regulations by Parliament to the Governor-General in the Executive Council does not impede the Court's responsibility to ensure that any regulations were made according to law through judicial review proceedings.

However, the Court of Appeal did not express a view on whether the court has the power to "suspend" regulations as part of interim relief, for example by declaring them to be of no legal effect for a temporary period, but upheld the High Court's approach as preserving PATHA's position.

The trust as a defendant in a health and safety prosecution

RH & JY Trust v WorkSafe New Zealand [2026] NZCA 12

Tragically, in September 2020, a six-year-old was fatally injured when his jacket became caught in a mechanical backing gate at a farm owned and operated by RH & JY Trust (**the Trust**). WorkSafe New Zealand brought criminal charges under the Health and Safety at Work Act 2015 (**the Act**) against the Trust by its trustees collectively, raising the key question of whether a trust could be prosecuted as a duty holder under the Act.

The lower courts reached different decisions. The District Court held that only individual trustees could be charged under the Act whereas the High Court concluded that trustees could collectively be prosecuted as a "body of persons". The majority of the Court of Appeal decided the trustees acting collectively can be a "person" for the purposes of the Act and that the trustees can comprise a "body of persons" within the Act's definition of a "person".

The majority found support for its view in the Act and held that once the body of persons acting collectively is recognised as the "person conducting a business or undertaking" (**PCBU**), the question of whether to name "the Trust" or "the trustees collectively" is only semantic. This means either label may be used, provided the trustees are not named in any individual capacity.

Justice Whata dissented, agreeing that a group of trustees may be described as a "body of persons" but holding that, in the absence of express words, Parliament should not be taken to have intended to derogate from the well-established law relating to trusts and trustee liability.

An important decision

The Court of Appeal's decision is significant because it confirms that trustees operating businesses in New Zealand are not shielded from prosecution under the Act by virtue of their legal form. The decision will have material consequences for the many New Zealand farms and businesses owned and operated through trust structures. However, the split decision in the Court of Appeal signals that this remains a contested area, and there may be further developments in the future.

Enforceability of alternative dispute resolution section in trust dispute

Gatfield v Hinton [2026] NZCA 17

The beneficiaries of a testamentary trust involved in legal proceedings were directed by the High Court to attend mediation in accordance with section 145 of the Trusts Act 2019, to resolve their long-standing dispute. If mediation was not successful, the High Court directed the parties to resolve their dispute by arbitration. Two of the beneficiaries appealed, with the focus on the Court's order that the dispute should be resolved by arbitration if mediation failed.

The Court held that, on the plain wording of section 145 of the Trusts Act, read together with the provisions of the Arbitration Act 1996, the Court has the power to require binding arbitration in the absence of an arbitration agreement. The Court rejected the argument that this involved an unjustified limit on the right of access to the courts for trust disputes. There are clear threshold requirements that must be met before such an order can be made, including the fact that the matters in dispute must be "internal" to the trust. Disputes about the validity of the trust are excluded from the scope of the section, but this case was a clear example of an internal dispute as it concerned the sale of the family holiday home. A right of appeal to the High Court on questions of law under the Arbitration Act was sufficient to address the concern that the Court maintained some supervisory jurisdiction.

The appeal was dismissed and the referral to arbitration was upheld.

Commentary

The dismissal of the appeal indicates that, while the courts retain discretion over referring disputes to alternative dispute resolution, this discretion will be exercised in clear cases where the dispute concerns internal matters for the trustees and beneficiaries, and there are clear benefits in terms of cost, confidentiality, speed and finality.

Alternative dispute resolution will not be suitable for every case, for example where there has been family violence and little utility would be gained by referral to mediation (as was the case in *S v N* [2021] NZHC 2860) or where there are significant complexities and a necessity to resolve the trustee dysfunction sooner rather than later to enable the trust to be properly administered (see *Gallagher v Gallagher-Dekker* [2025] NZCA 421).

Fraudulent calumny, a new cause of action in New Zealand?

Lowe v Ngan [2026] NZHC 519

This case concerns siblings who were in dispute over the estate of their late half-brother. One brother alleged that the sister falsely told the testator that the brother had been defrauding him, causing his removal from the will. The disappointed brother raised "fraudulent calumny" as a reason for the will being invalid. Here, the elements of the cause of action that were relied upon were:

- A false representation was made to the testator
- The person making it knew it to be untrue or was reckless as to its truth
- It was made with the intention that the testator act on it
- The testator acted in reliance on it
- The claimant suffered loss as a result.

Fraudulent calumny had not been previously recognised as a cause of action in New Zealand. As a species of fraud, the essence of fraudulent calumny is that the representor must either know the aspersions are false or not care whether they are true or false. If a person genuinely believes they are telling the truth, the will is unlikely to be set aside on that ground alone, even if the statements are objectively untrue. The claim failed because the Court did not find any evidence the sister knew or was reckless as to the falsity of her representations, but had a genuine, albeit mistaken belief in telling the testator he had been defrauded.

Practical significance

Fraudulent calumny has been a recognised cause of action in English law for over 150 years, albeit with a recent resurgence of mostly unsuccessful cases. This judgment suggests similar considerations will be present in New Zealand. Fraudulent calumny may not become a frequently pleaded cause of action, but its recognition serves as an important reminder of the possibility of facing a claim if a beneficiary makes knowingly false statements about another beneficiary, intending for the testator to take action based upon those statements.

If you require advice or assistance please contact members of our national litigation team

Bridie McKinnon
Partner, Wellington

DDI • 64 3 371 3563
M • 64 21 0252 8460
bridie.mckinnon
@buddlefindlay.com

David Broadmore
Partner, Auckland

DDI • 64 9 358 7010
M • 64 21 0227 2994
david.broadmore
@buddlefindlay.com

Scott Barker
Partner, Wellington

DDI • 64 4 498 7349
M • 64 21 822 929
scott.barker
@buddlefindlay.com

Luke Sizer
Partner, Auckland

DDI • 64 9 363 1036
M • 64 27 297 0374
luke.sizer
@buddlefindlay.com

Kelly Paterson
Partner, Christchurch

DDI • 64 3 371 3547
M • 64 21 891 028
kelly.paterson
@buddlefindlay.com

Olly Peers
Partner, Christchurch

DDI • 64 3 371 3568
M • 64 21 881 463
olly.peers
@buddlefindlay.com

Peter Niven
Special Counsel, Wellington

DDI • 64 4 462 0434
M • 64 21 827 208
peter.niven
@buddlefindlay.com

Calina Tataru
Senior Associate, Auckland

DDI • 64 9 363 0695
M • 64 27 838 5646
calina.tataru
@buddlefindlay.com

Jane Maltby
Senior Associate, Wellington

DDI • 64 4 462 0845
M • 64 27 406 5505
jane.maltby
@buddlefindlay.com

Rowan Woods
Senior Associate, Christchurch

DDI • 64 3 371 3515
M • 64 21 254 4130
rowan.woods
@buddlefindlay.com

Cora Morrison
Senior Associate, Auckland

DDI • 64 9 363 0705
M • 64 21 0251 6741
cora.morrison
@buddlefindlay.com

Andrijana Milosavljevic
Senior Associate, Auckland

DDI • 64 9 363 0685
M • 64 22 169 7593
andrijana.milosavljevic
@buddlefindlay.com

Jacey McGrath
Senior Associate, Wellington

DDI • 64 4 462 0869
M • 64 21 752 239
jacey.mcgrath
@buddlefindlay.com

Graeme Dill-Russell
Senior Associate, Christchurch

DDI • 64 3 371 3573
M • 64 21 216 7033
graeme.dill-russell
@buddlefindlay.com

Celia Olds
Senior Associate, Christchurch

DDI • 64 3 353 5885
M • 64 27 358 8822
celia.olds
@buddlefindlay.com

A special thanks to contributors: Shereen Lee, Hannah Jacobsen, Harrison Nixon, Marli Booyens, Calina Tataru

BUDDLE FINDLAY

AUCKLAND
HSBC Tower, 188 Quay Street, PO Box 1433
Auckland 1140, New Zealand
DX • CP24024 P • 64 9 358 2555

WELLINGTON
Aon Centre, 1 Willis Street, PO Box 2694
Wellington 6140, New Zealand
DX • SP20201 P • 64 4 499 4242

CHRISTCHURCH
The Regent, 33 Cathedral Square, PO Box 322
Christchurch 8011, New Zealand
DX • WX11135 P • 64 3 379 1747

buddlefindlay.com