

NEW ZEALAND COUNCIL OF LEGAL EDUCATION
NEW ZEALAND LAW AND PRACTICE EXAMINATION

PRESCRIPTION FOR 2023 EXAMINATIONS
(Revised to state the law at 31 October 2022)

PART I NEW ZEALAND LEGAL SYSTEM

(Revised to state the law at 31 October 2022)

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The examination for this Part is open book. (Hard copies of statutes, cases and notes may be brought into the exam room; but no electronic materials or devices.)

INCLUDES: Sources and Development of the Constitution; Fundamental Principles; Treaty of Waitangi; Institutions of the State; Judicial Review; Domestic Incorporation of International Law; New Zealand Bill of Rights; Officers of Parliament; Official Information and Human Rights and Protected Disclosures; Statutory Interpretation

This prescription covers the New Zealand Legal System. This includes the principles and workings of the New Zealand Constitution, the institutions of government, relations between the citizen and the state, and some of the controls on the exercise of public power.

The coverage is broad and comprehensive. While individual aspects of the New Zealand Legal System may be similar to those in some other countries, the system as a whole is unique to New Zealand and needs to be studied in its entirety. It is fundamental to the operation and practice of law in New Zealand. Therefore, a reasonable knowledge of these laws, policies and their operation is required. This prescription sets out all of the examinable material and candidates are not expected to go beyond it.

Materials

The textbook by Philip Joseph, *Constitutional and Administrative Law in New Zealand* (5th, Thomson Reuters, Wellington, 2021) is the recommended reading for this Part. It provides a comprehensive coverage of the topics prescribed.

The Joseph text is generally more comprehensive than is required for the purposes of this Part. Therefore, in order to provide some focus for study and the examination, the topics below have been separately identified, along with the most important primary materials.

Another useful book is Grant Morris *Law Alive: The New Zealand Legal System in Context* (4th ed, Thomson Reuters, 2019). This is an introductory text which covers some of the topics in this Part, though much less comprehensively than Joseph. It is most helpful as an accessible general background to the New Zealand legal system. Candidates may want to read the relevant chapters of *Law Alive* before moving onto Joseph.

Candidates are also encouraged to read the NZ Cabinet Manual 2017 which can be found at <https://cabinetmanual.cabinetoffice.govt.nz/>.

1. Sources and Development of the Constitution

Readings:

Joseph, chapters 2, 6, 7 and 10

2. Fundamental Principles of the Constitution

A. Rule of Law

Statutes and Cases:

Covid-19 Public Health Response Act 2020

Transport Ministry v Payn [1977] 2 NZLR 50 (CA)

Attorney-General v Dotcom [2014] NZCA 19

Readings:
Joseph, chapter 8

B. Separation of Powers

Readings:
Joseph, chapter 9

C. Parliamentary Sovereignty

Statutes and Cases:
Bill of Rights 1688
Fitzgerald v Muldoon [1976] 2 NZLR 615 (SC)
Westco Lagan Ltd v AG [2001] 1 NZLR 40 (HC)

Readings:
Joseph, chapter 16

3. Treaty of Waitangi and Tikanga Māori

Statutes:

Treaty of Waitangi Act 1975
Treaty of Waitangi Amendment Act 1985
Marine and Coastal Area (Takutai Moana) Act 2011

Readings:

Joseph, chapters 4 and 5

Specific Cases:

Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] NZLR 590 (PC)
New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641
New Zealand Maori Council v Attorney-General [2013] NZSC 6 (SC)
Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680
Attorney-General v Ngati Apa [2003] 3 NZLR 643
Takamore v Clarke [2012] NZSC 116
Port Nicholson Block Settlement Trust v AG [2012] HC 3181
Ngati Whatua Orakei Trust v Attorney-General [2018] NZSC 84
Ngati Whatua Orakei Trust v Attorney-General [2022] NZHC 843
Ellis v R [2022] NZSC 114

4. Institutions of State:

A. Parliament

Statutes:
Electoral Act 1993
Electoral (Integrity) Amendment Act 2018

Readings:
Joseph, chapters 12 and 14

Specific Case:
Prebble v Television NZ Ltd [1994] 3 NZLR 1 (PC)
Make it 16 Inc v Attorney-General [2022] NZSC 134

B. Courts

Statutes:

Constitution Act 1986, ss 23-24

District Court Act 2016

Declaratory Judgments Act 1908, sections 2, 3, 4 and 7

Imperial Laws Application Act 1988

Senior Courts Act 2016

Readings: Joseph, chapter 21

Specific Cases:

Simpson v Attorney-General [1955] NZLR 271

Ashby v Minister of Immigration [1981] 1 NZLR 222

Tavita v Minister of Immigration [1994] 2 NZLR 257

Tangiora v Wellington District Legal Services Committee [2000] 1 NZLR 17 (PC)

C. Governor-General

Statutes:

Constitution Act 1986, ss 2-5, 16-18

Letters Patent Constituting the Office of the Governor-General of NZ, SR 1983/225

Readings:

Joseph, chapter 19

D. The Executive: Cabinet, Prime Minister and the Executive Council

Statutes:

Constitution Act 1986, section 6

State-Owned Enterprises Act 1986

Public Finance Act 1989

Public Service Act 2020

Readings: Joseph, chapter 20

NZ Cabinet Manual 2017

Specific Case:

CIR v Medical Council of NZ [1997] 2 NZLR 297

5. Judicial Review

Legislation:

High Court Rules, Part 30

Judicial Review Procedure Act 2016

New Zealand Bill of Rights Act 1990, sections 22, 23, 27

Readings:

Joseph, chapters 22-26.

Specific Cases:

Council of Civil Service Unions v Minister for the Civil Servants [1985] 1 AC 374

University of Auckland v Tertiary Education Commission [2004] 2 NZLR 668 (HC)

Attorney-General v Ahmed Zaoui [2005] NZSC 38; [2006] 1 NZLR 289 (SC)

Lab Tests Auckland Ltd v Auckland District Health Board [2009] 1 NZLR 776 (CA)

Christiansen v Director-General of Health (2020) NZHC 887

Borrowdale v Director-General of Health (2020) NZHC 2090

6. Domestic Incorporation of International Law

Readings:

Cabinet Manual (2017). Relevant paragraphs:

- 5.77 - 5.81 (International treaties and Cabinet);
- 7.65 - 7.66 (Compliance with international obligations);
- 7.123 - 7.125 (Examination of international treaties by the House).

Specific Cases:

Ashby v Minister of Immigration [1981] 1 NZLR 222 (CA)
Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA)
Puli'uvea v Removal Review Authority (1996) 2 HRNZ 510 (HC)
NZ Airline Pilots' Association v AG [1997] 3 NZLR 269
Sellers v Maritime Safety Inspector [1999] 2 NZLR 44 (CA)

7. New Zealand Bill of Rights

Statute: New Zealand Bill of Rights Act 1990

Readings: Joseph, chapter 28

Specific Cases:

R v Jefferies [1994] 1 NZLR 290
Simpson v Attorney-General ["Baigent's Case"] [1994] 3 NZLR 667
Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA)
R v Pora [2001] 2 NZLR 37 (CA)
R v Shaheed [2002] 2 NZLR 377 (CA)
Hansen v R [2007] NZSC 7 (NZSC)
Ministry of Health v Atkinson [2012] NZCA 184
Attorney-General v Taylor [2018] NZSC 104
Attorney-General v Smith [2018] NZCA 24
Grounded Kiwis v Minister of Health [2022] NZHC 832
Make it 16 Inc v Attorney-General [2022] NZSC 134

8. Officers of Parliament

Statute: Ombudsmen Act 1975, sections 5, 20 and 28

Readings: Joseph, chapter 13

9. Official Information and Human Rights and Protected Disclosures

Statutes:

Official Information Act 1982
Human Rights Act 1993
Protected Disclosures Act 2022
Privacy Act 2020

Readings: Joseph, chapter 11

10. Statutory Interpretation:

Statutes:

Interpretation Act 1999
Legislation Act 2012/Legislation Act 2019

PART II LAW OF CONTRACT

(Revised to state the law at 31 October 2022)

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The Examination for this Part is closed book.

New Zealand contract law is in general based upon English common law, but there are significant differences because of New Zealand legislation and case law developments.

Much of New Zealand's statutory contract law can be found in the Contract and Commercial Law Act 2017 (CCLA). This Act consolidated a number of older Acts without changing substantive aspects of the law. There is a table of equivalent provisions appended to the CCLA, which may be helpful when referring to older case law and texts.

The focus of the examination is on the key principles of the legislation and its application in practice as demonstrated by case law. Candidates should know the key elements of the relevant statutes. Candidates should understand New Zealand specific terminology and be able to give evidence of their understanding of key principles by their application to fact situations.

Candidates are expected to read and understand all of the statutes/provisions/cases below, and be prepared to answer questions on them. An illustrative case is provided in some sections to guide candidates' understanding of the type of issues they may encounter.

The text for general reference for commentary on principal cases and legislation is Burrows, Finn and Todd *Law of Contract in New Zealand* (7ed, LexisNexis, Wellington, 2022). Candidates are encouraged to read more widely and deepen their understanding by referring to leading text books and cases.

1. Contractual Privity

CCLA, ss 10-20 (formerly Contracts (Privity) Act 1982)

Illustrative case: *Laidlaw v Parsonage* [2009] NZCA 291; [2010] 1 NZLR 286

2. Contractual Mistakes

CCLA, ss 21-32 (formerly Contractual Mistakes Act 1977)

Illustrative case: *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33 (CA)

3. Contractual Remedies

CCLA, ss 33-59 (formerly Contractual Remedies Act 1979)

Illustrative case: *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90; [2010] 3 NZLR 805

4. Frustrated Contracts

CCLA, ss 60-69 (formerly Frustrated Contracts Act 1944)

Illustrative case: *Planet Kids Ltd v Auckland Council* [2013] NZSC 147; [2014] 1 NZLR 149

5. Illegal Contracts

CCLA, ss 70-84 (formerly Illegal Contracts Act 1970)

Illustrative case: *Harding v Coburn* [1976] 2 NZLR 577 (CA)
Prostitution Reform Act 2003

6. Minors' Contracts

CCLA, ss 85-117 (formerly Minors' Contracts Act 1969)

7. Consumer Contracts

Fair Trading Act 1986

Consumer Guarantees Act 1993

Credit Contracts and Consumer Finance Act 2003

Illustrative case: *Nesbit v Porter* [2000] 2 NZLR 465 (CA)

8. Sale of Goods

CCLA, pt 3 (formerly Sale of Goods Act 1908, and
Sale of Goods (United Nations Convention) Act 1994)

9. Electronic Transactions

CCLA, pt 4 (formerly Electronic Transactions Act 2002)

10. Deeds & Formalities

Property Law Act 2007, ss 9-27A

11. Contract Interpretation

Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5; [2010] 2 NZLR 444

Gibbons Holdings Ltd v Wholesale Distributors Ltd [2007] NZSC 37; [2008] 1 NZLR 277

PART III CRIMINAL LAW

(Revised to state the law at 31 October 2022)

[INCLUDES GENERAL PRINCIPLES OF LIABILITY; OFFENCES AGAINST THE PERSON AND AGAINST PROPERTY; OTHER ENACTMENTS; GENERAL AND SPECIAL DEFENCES]

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This prescription sets out all of the examinable material. Candidates should concentrate on the following:

1. General principles of liability

Mens rea, fault and strict and absolute liability, consent, burden of proof: *Millar v Ministry of Transport* [1986] 1 NZLR 660; *R v Anderson* [2005] 1 NZLR 774; *Cameron v R* [2018] 1 NZLR 161; *Epiha v Tauranga City Council* [2017] NZAR 1664 (CA); *Shark Experience Ltd v PauaMAC5 Inc* [2019] 1 NZLR 791; *K (CA106/2020) v R* [2020] NZCA 656

Complicity: Crimes Act 1961, sections 66, 70 and 311(2); *Larkins v Police* [1987] 2 NZLR 282; *R v Hartley* [2007] 3 NZLR 299; *Ahsin v R* [2015] 1 NZLR 493; *Kumar v R* (2016) 28 CRNZ 32; *Brunsell v R* (2018) 28 CRNZ 543

Attempt: Crimes Act 1961, sections 72 and 311(1); *R v Donnelly* [1970] NZLR 980; *R v L* [2006] 3 NZLR 291 (SC) beginning at 306; *R v Harpur* (2010) 24 CRNZ 909; *Ah-Chong v R* [2016] 1 NZLR 445; *Johnston v R* [2016] 1 NZLR 1134

Threatening and Conspiracy: Crimes Act 1961, sections 306-310; *R v Gemmell* [1985] 2 NZLR 740; *R v Sanders* [1984] 1 NZLR 636; *R v Richards* (1992) 9 CRNZ 403; *R v Morris* [2001] 3 NZLR 759

2. Offences against the person

Crimes Act 1961, sections 150A-210A.

Homicide: *R v Kirikiri* [1982] 2 NZLR 648; *R v Piri* [1987] 1 NZLR 66; *R v Aramakutu* [1991] 3 NZLR 429; *R v Harney* [1987] 2 NZLR 576; *R v Lee* [2006] 3 NZLR 42; *Shadrock v R* [2011] 3 NZLR 573; *K (CA106/20) v R* [2020] NZCA 656

Assault: *R v Nazif* [1987] 2 NZLR 122; *R v Kerr* [1988] 1 NZLR 270; *R v Mwai* [1995] 3 NZLR 149; *R v Barker* (2009) 24 CRNZ 308; *S (CA338/2016) v R* (2017) 28 CRNZ 422

Sexual Crimes: Crimes Act 1961, sections 127-144C; *R v A* [2003] 1 NZLR 1; *Y (SC40/2013) v R* [2014] 1 NZLR 724; *LM v R* [2015] 1 NZLR 23; *Christian v R* [2018] 1 NZLR 315; *Rowe v R* [2018] 1 NZLR 875

3. Crimes against rights of property

Crimes Act 1961, sections 217-305; *Boese v R* [2014] 3 NZLR 16; *Cullen v R* [2015] 1 NZLR 715; *Dixon v R* [2016] 1 NZLR 678; *Bublitz v R* [2019] 3 NZLR 533

4. General and special defences

Mistake and intoxication: Crimes Act 1961, section 20; *R v Kamipeli* [1975] 2 NZLR 610; *R v Metuariki* [1986] 1 NZLR 488; *R v Tihī* [1990] 1 NZLR 540; *Herewini v R* (2013) 26 CRNZ 666 (CA)

Self-defence and defence of property: Crimes Act 1961, sections 48 and 56; *R v Wang* [1990] 2 NZLR 529; *R v Bridger* [2013] 1 NZLR 636; *McNaughton v R* [2014] 2 NZLR 467; *Afamasaga v R* (2015) 27 CRNZ 640

Insanity: Crimes Act 1961, section 23; *R v Macmillan* [1966] NZLR 616; *R v Green* [1993] 2 NZLR 513; *R v Yesler* [2007] 1 NZLR 240; *R v Dixon* [2008] 2 NZLR 617; *Tu v R* [2019] NZCA 632; *Brackenridge v R* [2019] NZAR 932 (HC)

Compulsion: Crimes Act 1961, section 24; *R v Raroa* [1987] 2 NZLR 486; *R v Neho* [2013] NZAR 464; *Hay v R* [2015] NZAR 1426; *R v Taiaroa* [2015] NZHC 2401; *Holland v R* (2016) 28 CRNZ 716

Necessity: Crimes Act 1961, section 20; *Kapi v Ministry of Transport* (1991) 8 CRNZ 49 (CA); *Police v Kawiti* [2000] 1 NZLR 117; *Akulue v R* [2014] 1 NZLR 17; *Leason v Attorney-General* [2014] 2 NZLR 224

Automatism: Crimes Act 1961, section 20; *R v Cottle* [1958] NZLR 999; *R v Campbell* (1997) 15 CRNZ 138; *Burnskey v Police* (1992) 8 CRNZ 582; *R v Stone* [1999] 2 SCR 290; *De Roo v R* [2019] NZCA 504; *C v R* [2021] 3 NZLR 152

5. Other enactments (to be aware of; no need to know the detail of)

Criminal Procedure (Mentally Impaired Persons) Act 2003

Family Violence Act 2018

Harmful Digital Communications Act 2015

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

New Zealand Bill of Rights Act 1990 (especially ss 21-29)

Sentencing Act 2002

Summary Offences Act 1981

6. Useful texts and reference material

Simester and Brookbanks, *Principles of Criminal Law* (5 ed, Thomson Reuters, Wellington, 2019)

France (ed), *Adams on Criminal Law - Offences and Defences* (Thomson Reuters, on-line, or 2023 student edition, paperback)

Annual criminal law updates in the New Zealand Law Review (available on-line)

PART IV PROPERTY

(Revised to state the law at 31 October 2022)

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The Examination for this Part is closed book. However, a list of the cases and legislative provisions referred to in this prescription (appearing under the same headings) will be appended to the examination paper.

Introduction

The focus of analysis and assessment is the basic principles and rules of common law and statute that make up the particular areas of real property law in New Zealand identified below, with special reference to how New Zealand law differs from the law of other jurisdictions. This includes (a) the land transfer system under the Land Transfer Act 2017 and Land Transfer Regulations 2018 (with reference to pre-existing case law decided under the Land Transfer Act 1952); and (b) the general principles of property law as restated and altered by the Property Law Act 2007; (3) Māori land issues.

While the general principles of New Zealand's land transfer system has not changed by the replacement of the Land Transfer Act 1952 with the Land Transfer Act 2017, candidates should be familiar with the key differences brought by the new legislation and the rationales of such changes.

This prescription describes all the main topics that will be assessed. It also provides a list of some key cases; this list is not exhaustive because the basic principles of New Zealand law are found in many cases through the years, as well in the key statutes. It is these principles, also stated in textbooks, which are most important.

The examination will be comprised of essay and/or problem style questions which require the demonstration of knowledge and understanding of the principles and key cases and statutory provisions, as well as the ability to accurately and clearly answer theoretical or practical questions.

Note: for the purposes of this examination you do not need to consider the impact of the COVID-19 Response (Urgent Management Measures) Legislation Act 2020, the COVID-19 Response (Further Management Measures) Legislation Act 2020, or any other COVID response legislation on the relevant law.

Materials

Starting points for candidates should be either of the following text books:

- Toomey (ed) *New Zealand Land Law* (3 ed, Brookers, Wellington, 2017).
- Campbell et al *Principles of Land Law in New Zealand* (3 ed, LexisNexis, Wellington, 2020).

Those with access to legal databases will find the following online loose-leaf texts useful:

- DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis NZ)
- Burrows (ed) *Land Law* (online looseleaf ed, Thomson Reuters Westlaw).

Additional materials that may be of use:

- Candidates may find the Law Commission's report on *A New Land Transfer Act* Report 116 (Wellington, 2010) useful background to the Land Transfer Act 1952 and the introduction of the new Land Transfer Bill

<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R116.pdf> .

- Further useful background is provided in the issues paper *Review of the Land Transfer Act 1952* (Wellington, 2008, 2 vols)
<http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20IP10.pdf> .
- Another useful book focussing specifically on the Property Law Act 2007 is Jody Foster *Property Law Act 2007 - A Practitioner's Guide* (2ed, LexisNexis, 2014).

Candidates will be expected to know the following topics:

The Land Transfer System

You need to know the workings of the land transfer system, especially the consequences of land registration as contained in the Land Transfer Act 2017 and relevant case law, most notably the indefeasibility of title and exceptions to indefeasibility. In particular, the concepts of indefeasibility, Land Transfer Act fraud, in personam and manifest injustice; the law on conflicts between the Land Transfer Act with other statutes, in particular the conflicts between the Land Transfer Act and Te Ture Whenua Māori/Māori Land Act; the issues of protecting unregistered interests, such as trusts, Māori interests in land, in personam claims, and caveats.

Some relevant cases include:

- *Assets Co Ltd v Mere Roihi* [1905] AC 176 (PC);
- *Harris v Fitzmaurice* [1956] NZLR 975;
- *Bunt v Hallinan* [1985] 1 NZLR 450;
- *Housing Corp v Māori Trustee* [1988] 2 NZLR 662;
- *Duncan v McDonald* [1997] 3 NZLR 669;
- *Landco Albany Ltd v Fu Hao Construction Ltd* [2005] NZCA 293;
- *Nathan v Dollars & Sense Ltd* [2007] 2 NZLR 747 (CA)
- *Nathan v Dollars & Sense Ltd* [2008] 2 NZLR 557 (SC);
- *Regal Castings v Lightbody* [2008] NZSC 87;
- *Warin v Registrar-General of Land* [2008] NZHC 2669;
- *Westpac v Clark* [2009] NZSC 73;
- *Philpott v Noble Investments Ltd* [2015] NZCA 342;
- *Mau Whenua Inc v Shelly Bay Investments Ltd* [2019] NZHC 3222;
- *Infinity Enterprises NZ Limited v Kinara Trustee Limited* [2020] NZCA 309;
- *FM Custodians Ltd v R* [2020] NZCA 285;
- *North Shore Aero Club Inc v Black River Trustees Ltd* [2020] NZHC 3070.

Interests in Land

(a) The legal nature of mortgages, including that set out in the Land Transfer Act and the Property Law Act 2007 (especially Part 3. Relevant cases include:

- *Downsview Nominees Ltd v First City Corp Ltd* [1993] 1 NZLR 513;
- *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA);
- *Westpac v Clark* [2009] NZSC 73;
- *GE Custodians v Bartle* [2010] NZSC 146;
- *Burgess v TSB Bank Ltd* [2015] NZCA 361.

(b) The legal nature of leases, and the creation and registration of leases under the Land Transfer Act; provisions relating to leases under the Property Law Act 2007 (especially Part 4). Relevant cases include:

- *Kalmar Property Consultants Ltd v Delicious Foods Ltd* [1974] 2 NZLR 631
- *Nordern v Blueport* [1996] 3 NZLR 450;
- *Fatac Ltd (In Liq) v Commissioner for Inland Revenue* [2002] 3 NZLR 648;
- *Tram Lease Ltd v Croad* [2003] 2 NZLR 461, [2003] NZCA 77;

- *Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Ltd (in rec and lip)* [2015] NZHC 2647, (2015) 17 NZCPR 43;
- *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] NZLR 48.

(c) The legal nature of easements, and the creation of easements and registration thereof under the Land Transfer Act; provisions relating to easements, especially their modification and extinguishment, under the Property Law Act 2007. Relevant cases include:

- *Barry v Fenton* [1952] NZLR 990 (SC)
- *Escrow Holdings Forty-one Ltd v District Court at Auckland* [2016] NZSC 167;
- *Davey v Baker* [2016] NZCA 313;
- *Okey v Kingsbeer* [2017] NZCA 625;
- *Schmuck v Opuia Coastal Preservation Inc* [2019] NZSC 118.

(d) The legal nature of freehold covenants, and the creation, enforceability (especially compared with common law and equity), modification and extinguishment of covenants under the Property Law Act 2007. Relevant cases include:

- *Big River Paradise Ltd v Congreve* [2008] NZCA 78, [2008] 2 NZLR 402
- *Omaha Beach Residents' Society Inc v Townsend Brooker Ltd* [2010] NZCA 413;
- *Macrae v Walshe* [2013] NZCA 664;
- *Green Growth v The QE2 Trust* [2018] NZSC 75;
- *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157.

(e) The law relating to entry onto neighbouring land, wrongly placed structures, and landlocked land: Property Law Act 2007 sections 319-331; sections 326A-B, Te Ture Whenua Māori Act. Some relevant cases include:

- *Kingfish Lodge (1993) Ltd v Archer* [2000] 3 NZLR 364 (CA);
- *Murray v BC Group (2003) Ltd* [2010] NZCA 163, [2010] 3 NZLR 590;
- *MacLaurin v Hexton Holdings* [2008] NZCA 570;
- *BA Trustees Ltd v Druskovich* [2007] NZCA 131;
- *Greenslade v Honeymoon Bay Holdings Ltd* [2014] NZCA 315;
- *Barry Park Investments Ltd v Johnson* [2019] NZCA 686.

(f) The doctrine of fixtures and the concept of tenants' fixtures. Some relevant cases include:

- *Whenuapai Joinery (1988) Ltd v Trust Bank Central Ltd* [1994] 1 NZLR 406;
- *Lockwood Buildings Ltd v Trust Bank* [1995] 1 NZLR 22;
- *Auckland City Council v Ports of Auckland Ltd* [2000] NZCA 190;
- *March Construction Ltd v Queenstown Carparking Ltd* [2010] NZHC 1537;
- *Lakes Edge Developments Ltd v Kawarau Village Holdings Ltd* [2017] NZCA 205;

(g) Co-ownership of land, and division of property (especially sections 47 and 48 Land Transfer Act 2017 and sections 339-343 Property Law Act 2007). Some relevant cases include:

- *Fleming v Hargreaves* [1976] 1 NZLR 123;
- *Bayly v Hicks* [2012] NZCA 589;
- *Madigan v McGuigan* [2020] NZHC 1686.

Basics of Māori Land Law

(a) The concepts of Crown land, Māori freehold land and Māori customary land as defined in Te Ture Whenua Māori/Māori Land Act 1993, and the general principles and aims of that Act; and the functions of the Māori Land Court. Some relevant cases include:

- *Registrar-General of Land v Marshall* [1994] NZHC 791;
- *Valuer-General v Mangatu Inc* [1997] NZCA 147;
- *Bruce v Edwards* [2002] NZCA 294;

- *Ngati Apa v Attorney-General* [2003] NZCA 117;
- *Jensen v Registrar General of Land* [2013] NZHC 3525.

(b) Māori customary interests in the foreshore and seabed:

- *Ngati Apa v Attorney-General* [2003] NZCA 117;

and the system of rights and interest recognition under the Marine and Coastal Area (Takutai Moana) Act 2011:

- *Re Tipene* [2016] NZHC 3199;
- *Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025.

PART V LAW OF TORTS

(Revised to state the law at 31 October 2022)

[INCLUDES ACCIDENT COMPENSATION; NEGLIGENCE; DEFAMATION, AND PRIVACY]

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This Part is examined by a *closed book* examination. However, a list of the cases and legislative provisions referred to in this prescription (appearing under the same headings) will be appended to the examination paper.

Candidates are not expected to go beyond this prescription for the purposes of the examination.

Introduction

It is essential to read and understand all the statutes and cases listed in this prescription. Particularly detailed understanding is required of cases marked with an asterisk (*).

The leading textbook in this area is: Todd (ed) *The Law of Torts in New Zealand* (8th ed, Thompson Reuters, Wellington, 2019) ('Todd on Torts').

Useful summaries of cases can also be found in:

- Atkin and McLay, *Torts in New Zealand: Cases and Materials* (6th ed, Oxford University Press, Auckland, 2019), and
- McLay, *Student Companion: Torts* (7th ed, LexisNexis, Wellington, 2015).

Candidates must be aware of key differences between New Zealand law and that of other common law jurisdictions.

A. Accident Compensation

New Zealand operates a no fault accident compensation scheme. The scheme is currently regulated by the Accident Compensation Act 2001 (ACA 2001). (Note that until 2010, the ACA 2001 was called the Injury Prevention, Rehabilitation and Compensation Act 2001.) Candidates must understand the key features of the scheme and have a general understanding of its legislative history. Understanding of the relationship between the Act and the common law is also essential.

Note that some cases in the prescription were decided under previous versions of the legislation. Candidates need to be vigilant to ensure that principles discussed in the case law are still applicable to the ACA 2001.

1. General reading:

- ACA 2001, s 3 (purpose)
- Ch 2, Todd on Torts (above)
- Ch 7, Atkin and McLay (above)
- Woodhouse Report (Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in New Zealand*, 1967) (see pp 569-573 in Atkin and McLay for extract)
- New Zealand Law Review ACC Special Issue (Issue 1 of 2008)
- Geoffrey Palmer "ACC, 40 Years On" [2013] NZ Law Journal 76

2. The scope of cover:

You should be familiar with the basic concepts in Part II ('cover') of ACA 2001, in particular:

- ss 20, 21 and 21B (cover, including cover for mental injury)
- ss 25-28 (accident, personal injury, mental injury, work-related injury)
- s 30 (work-related gradual process/disease/infection)
- s 32-33 (treatment injuries)
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A knowledge of these provisions is of crucial importance to understanding the sub-topics set out below.

a. Cover for Personal Injury by Accident

- *ACC v Calver* [2021] NZCA 211

b. Cover for Mental injury

Note that the concept of 'personal injury by accident' (which was central to the Accident Compensation Act 1982) was narrowed by the Accident Rehabilitation and Compensation Insurance Act 1992 and subsequent legislation. This means that effect of cases such as *ACC v E* [1992] 2 NZLR 426 (CA), which held that 'personal injury' included mental injury, has been reversed. ACC now covers mental injury in only limited circumstances. In other situations the common law on 'nervous shock' may be applicable: see parts A(3)(b) and B(4) below

- *Toomey v ACC* [2017] NZACC 44
- *W v ACC* [2018] NZHC 937; [2018] 3 NZLR 859

c. Treatment injury

Note that the concept 'medical misadventure' was replaced by 'treatment injury' in 2005. For a summary of the reforms and their effect, see Ken Oliphant "Beyond Misadventure: Compensation for Medical Injuries in New Zealand (2007) 15 Medical Law Review 357, 369-378.

- *ACC v Ng* [2020] NZCA 274; [2020] 2 NZLR 683

i. Causation

- *ACC v Ambros* [2007] NZCA 304; [2008] 1 NZLR 340

ii. Cover for Pregnancy

- **Allenby v H & Ors* [2012] NZSC 33; [2012] 3 NZLR 425
- *C v ACC* [2013] NZCA 590; [2014] 2 NZLR 373

3. The statutory bar and the right to sue at common law

- See especially ss 317, 318 and 319 ACA 2001

a. Compensatory damages

- *Attorney-General v B* [2002] NZAR 809 (CA)

- *Wilding v Attorney-General* [2003] 3 NZLR 787 (CA)

b. Nervous shock

- **Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA)
- *Sivasubramaniam v Yarrall* [2005] 3 NZLR 268 (HC)
- See also part B(4) below

c. Exemplary damages

- *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA)
- *Daniels v Thompson* [1998] 3 NZLR 22 (CA)
- *McDermott v Wallace* [2005] 3 NZLR 661 (CA)
- **Couch v Attorney-General (No 2)* [2010] NZSC 27; [2010] 3 NZLR 149

4. Entitlements under the ACA 2001

Candidates should be aware of the following forms of entitlements, how they might differ from each other, and when they might be available:

- first week and weekly (earnings related) compensation;
- medical expenses;
- lump sum compensation for permanent impairment;
- rehabilitation; and
- entitlements arising from fatal injuries

- See Ch 3, Todd on Torts (above)

B. Negligence

Candidates should be aware of the different approach to negligence taken by the English and New Zealand courts.

1. General approach to negligence

- *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA)
- *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA), esp [59]-[64]
- **Couch v Attorney-General* [2008] NZSC 45; [2008] 3 NZLR 725, esp [78]-[85]

2. Economic loss and negligent misstatement

- Ch 5.8, Todd on Torts
- Atkin and McLay, pp 394-436
- *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 (CA)
- *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL)
- *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA)
- *Attorney-General v Carter* [2003] 2 NZLR 160 (CA)
- *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95; [2017] 1 NZLR 78, esp [78]-[85]
- See also part B.3 below.

3. Public authority liability

a. Defective buildings

- Ch 6.4 of Todd on Torts (above)
- Atkin and McLay, pp 437-480
- *Anns v Merton London Borough Council* [1978] AC 728 (HL)
- *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL)
- **Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA)
- *Te Mata Properties v Hastings District Council* [2008] NZCA 446; [2009] 1 NZLR 460
- *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158; [2011] 2 NZLR 289
- *North Shore City Council v The Attorney-General (The Grange)* [2012] NZSC 49; [2012] 3 NZLR 341
- **Body Corporate No 207624 v North Shore City Council (Spencer on Byron)* [2012] NZSC 83; [2013] 2 NZLR 297

b. General

- Ch 6.6 of Todd on Torts (above)
- *Attorney-General v Prince* [1998] 1 NZLR 262 (CA)
- *B v Attorney-General* [2004] 3 NZLR 145 (PC)
- **Couch v Attorney-General* [2008] NZSC 45; [2008] 3 NZLR 725

4. Nervous shock

- Ch 5.7, Todd on Torts (above)
- Atkin and McLay, pp 252-281
- *Alcock v Chief Constable of the West Yorkshire Police* [1992] 1 AC 310 (HL)
- *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 (CA)

C. Defamation and Privacy

Candidates should understand the basic principles of the law of defamation and privacy and the key differences between English and New Zealand law. The relationship between the common law and the New Zealand Bill of Rights Act 1990 is also an important issue in this area.

1. Defamation

a. General principles:

- Defamation Act 1992
- Ch 16, Todd on Torts (above)
- Ch 8, Atkin and McLay

b. Qualified privilege:

- **Durie v Gardiner* [2018] NZCA 278

2. Privacy

- Ch 17, Todd on Torts
- Ch 9, Atkin and McLay

- **Hosking v Runting* [2005] 1 NZLR 1 (CA)
- *Rogers v TVNZ* [2007] NZSC 91; [2008] 2 NZLR 277, esp [23]-[33]
- **C v Holland* [2012] NZHC 2155; [2012] 3 NZLR 672
- *Hyndman v Walker* [2021] NZCA 25; [2021] 2 NZLR 686
- *Peters v Attorney-General* [2021] NZCA 355; [2021] 3 NZLR 191

PART VI EQUITY

(Revised to state the law at 31 October 2022)

NB: The Council takes no responsibility for, nor does it endorse examination preparation material or sold published by any other organisation or person.

The examination for this Part is closed book.

It covers the nature and operation of trusts, fiduciary obligations, trustees' duties and powers, charitable trusts, equitable remedies, and the law of testate and intestate succession.

This prescription describes all the main topics that may be assessed. It also provides a list of some key or illustrative cases; this list is not exhaustive because the basic principles of New Zealand law are found in many cases through the years, as well in the key statutes. It is these principles, also stated in textbooks, which are most important.

The Trusts Act 2019 came into effect on 30 January 2021. The Act in parts restates, and in other parts reforms, the law found in the 'common law' and the Trustee Act 1956. Candidates should focus on the Trusts Act 2019, but should consider how courts' decisions in relation to the previous legislation may indicate how they will interpret and use the new legislation. Recent textbooks and articles (such as Geoff McLay "How to read New Zealand's new Trust Act 2019" (2020) 13 Journal of Equity 325) will help candidates to understand the new law. The Departmental Report is also useful explanation of the purpose of the Act: https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/52SCJU_ADV_74746_JU59767/departamental-report-trusts-bill

The examination will be comprised of essay and/or problem style questions which require the demonstration of knowledge and understanding of the principles and key cases and statutory provisions, as well as the ability to accurately and clearly answer theoretical or practical questions.

Starting points for candidates should be the three main single-volume practitioner textbooks. Note, however, that all current textbooks and case law has been written before the Trusts Act 2019 came into force - although a new edition of *Garrow and Kelly* that discusses the Act is apparently forthcoming during 2021.

- Butler, ed, *Equity & Trusts in New Zealand* (2ed, Brookers, Wellington, 2009). (This textbook was written before a number of recent developments, but states the main principles; however, a new edition is listed as available in February 2023 on the ThomsonReuters website)
- Kelly and Kelly, *Garrow and Kelly Law of Trusts and Trustees* (8ed, LexisNexis NZ, Wellington, 2022).
- Breach *Nevill's Law of Trusts, Wills and Administration* (13 ed, LexisNexis NZ, Auckland, 2018). A new edition is listed as available in February 2023 on the LexisNexis website

Candidates will be expected to know the following topics:

Note that the cases listed below the topic heading are some of the important decisions in which the topic is discussed, and they are mostly accessible on <http://www.nzlii.org/> They provide a starting point for study, which must be supplemented by reference to the statutes below and textbook discussions of these areas. Some cases will discuss other topics as well as the one they are placed under.

- (a) The nature of a trust and fiduciary obligations, including: the legal effect of the existence of a trust; distinction between trusts and other legal relationships and institutions; the key types of trusts.

Boardman v Phipps [1967] 2 AC 46; *Day v Mead* [1987] NZCA 74; *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680; *Chirnside v Fay* [2006] NZSC 68; *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26; *Kain v Hutton* [2007] 3 NZLR 349; *Mark Moncrief Stevens v Premium Real Estate Ltd* [2009] NZSC 15; *Adlam v Savage* [2017] NZSC 11; *McIntosh v Fisk* [2017] NZSC 78; *Ruscoe v Cryptopia Limited (in liquidation)* [2020] NZHC 728; *D and E Limited v A, B and C* [2022] NZCA 430.

- (b) Creation of Trusts, including: the three certainties; constitution of trust property; formalities; capacity; perpetuities.

Paul v Constance [1977] 1 All ER 195; *McPhail v Doulton* [1970] 2 All ER 228; [1971] AC 424; *Re Baden's Deed Trusts (No 2)* [1972] 2 All ER 1304; *Re Beckbessinger* [1993] 2 NZLR 362; *Re Goldcorp Exchange Ltd* [1994] 3 NZLR 385;; *New Zealand Dairy Board v New Zealand Co-operative Dairy Co Ltd* [1999] 2 NZLR 355; *Choithram (T) International SA v Pagarini* [2001] 2 All ER 492; *Pearson v Lehman Brothers Finance SA* [2011] EWCA Civ 1544; *Clayton v Clayton* [2015] NZCA 30 and [2016] NZSC 29;; *Brkic v White* [2021] NZCA 670

- (c) Trustees' rights, duties and powers (and beneficiaries' rights), including: fiduciary duties; investment of trust property; provision of information; disposal of property; delegation and employment of agents; carrying on business; remuneration; review of trustee discretions, fraud on a power; indemnity.

- *Re Mulligan (dec'd)* [1998] 1 NZLR 481; *Re O'Donoghue* [1998] 1 NZLR 116; *Kain v Hutton* [2008] NZSC 61;; *Masters v Stewart* [2014] NZHC 2419; *McLaren v McLaren* [2017] NZHC 161; *Erceg v Erceg* [2017] NZSC 28; *LSF; Waho v Te Kōhanga Reo National Trust* [2018] NZHC 1935; *Pratley v Courteney* [2018] NZCA 436;; *Gavin v Powell* [2018] NZHC 2866; *Lambie Trustee Ltd v Addleman* [2021] NZSC 54; *McGuire v Earl* [2020] NZHC 3083; *Gavin v Powell* [2020] NZHC 3017; *Kain v Public Trust* [2021] NZCA 685. *Easton v New Zealand Guardian Trust Co Ltd* [2021] NZHC 2084; *FFP Trustee (NZ) Limited v Peng* [2021] NZHC 3507

- (d) The Court's powers, including: enforcement of trusts; powers of variation; remove and appoint trustees; give directions; allow deviation from trust terms; authorise transactions.

- *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88; *Gailey v Gordon* [2003] 2 NZLR 192; *Collinge v Kyd* [2005] 1 NZLR 847;; *CIR v Newmarket Trustees Ltd* [2012] NZCA 351;; *Chambers v SR Hamilton Corporate Trustee Limited* [2017] NZCA 131; *Re PV Trust Services Limited* [2017] NZHC 2957;; *Guest v Warner* [2018] NZHC 666; *Matheson v Clare Matheson Trust Limited* [2018] NZHC 1941; *Mason v Triezenberg* [2022] NZCA 138; *Oldfield v Oldfield* [2019] NZHC 492; *Turvey v Vance* [2022] NZHC 1167.

- (e) Liability and Remedies, including: trustees' and third parties' liability; tracing; relief from liability; injunctions; specific performance; equitable compensation; account; subrogation; estoppel.
- Westpac Banking Corporation v Savin* [1985] 2 NZLR 41; *Harvest Bakeries Ltd v Klissers Farmhouse Bakeries Ltd* [1985] NZCA 70; *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664; *Foskett v McKeown* [2000] 3 All ER 97; *Chirnside v Fay* [2006] NZSC 68; *Premium Real Estate Ltd v Stevens* [2009] NZSC 15; *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89; *Selkirk v McIntyre* [2013] NZHC 575; *New Zealand Māori Council v Foulkes* [2014] NZHC 1777; *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; *Hotchin v New Zealand Guardian Trust Company Ltd* [2016] NZSC 24; *McLennan v Livaja* [2017] NZCA 446; *Butterfield v Public Trust* [2017] NZCA 367; *McKay v Sandman* [2018] NZCA 103; *Sandman v McKay* [2019] NZSC 41; *Enright v Newton* [2020] NZCA 529; *Sain v Erceg* [2021] NZHC 761.
- (f) Resulting Trusts
- Re Gillingham Bus Disaster Fund* [1959] Ch 62; *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567; *Re Buckinghamshire Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 All ER 623; *Twinsectra Ltd v Yardley & Others* [2002] 2 All ER 377; *Graham v Arena Capital Limited (in liquidation)* [2016] NZHC 194; *Horsfall v Potter* [2017] NZSC 196; *Woolf v Kaye* [2018] NZHC 2191; *Reid v Castelton-Reid* [2020] NZHC 2313.
- (g) Constructive Trusts
- Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180; *Bevin v Smith* [1994] 3 NZLR 648; *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1; *Lankow v Rose* [1995] 1 NZLR 277; *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh* [1998] 3 NZLR 171; *Commonwealth Reserves I v Chodar* [2001] 2 NZLR 374; *Vervoort v Forrest* [2016] NZCA 375; *Almond v Read* [2019] NZCA 26; *Hamilton v Kirwan* [2020] NZHC 2149
- (h) Charitable Trusts
- Re McElroy Trust* [2003] 2 NZLR 289; *Re Queenstown Lakes Community Housing Trust* [2011] NZHC 617; *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105; *New Zealand Guardian Trust Company Limited v Presbyterian Support (Upper South Island)* [2016] NZCA 556; *Greenpeace of New Zealand v Charities Registration Board* [2020] NZHC 1999; *Attorney-General v Family First New Zealand* [2022] NZSC 80; *Young Men's Christian Association of Christchurch (Inc) Charitable Trust* [2020] NZHC 2027.
- (i) Wills, including testamentary capacity; making and revoking a will; construction; rectification; failure of testamentary gifts; intestacy.
- Re Gibson* [2013] NZHC 1524; *Woodward v Smith* [2009] NZCA 215; *Haldane v Haldane* [2015] NZHC 352; *Kirner v Falloon* [2015] NZHC 1873; *Green v Green* [2016] NZCA 486; *Wilson v Davidson* [2017] NZCA 468; *Loosley v Powell* [2018] NZCA 3; *Re Estate of Greenwood, Greenwood v Simpson* [2018] NZHC 845; *Marshall v Singleton* [2020] NZCA 450; *Kellerman v Kellerman-Thornton* [2020] NZHC 2297; *Re Estate of Olive Ruby Piper* [2021] NZHC 534; *In the Matter of the Estate of Mabel Florence Murray* [2021] NZHC 545.

- (j) Claims against estates, including under the Property Relationships Act, the Law Reform (Testamentary Promises Act), and the Family Protection Act.

Re Welch [1989] 2 NZLR 1; *Williams v Aucutt* [2000] 2 NZLR 479; *Auckland City Mission v Brown* [2002] NZCA 33; *Public Trust v Whyman* [2004] NZCA 327; *Henry v Henry* [2007] NZCA 42; *Samuels v Atkinson* [2009] NZCA 556; *Talbot v Talbot* [2016] NZHC 2382; *Blumenthal v Stewart* [2017] NZCA 181; *Hau v Hau* [2018] NZHC 881; *Dwight v Ross* [2018] NZHC 1764; *Kinney v Pardington* [2019] NZHC 317; *Carmont – Estate of El-Alamein Harawira* [2019] NZMLC 63; *Koroheke v Te Whau* [2020] NZHC 863; *Scott v Garnham* [2021] NZHC 592.

Required Statutory Material

Administration Act 1969

Charitable Trusts Act 1957

Charities Act 2005

Family Protection Act 1955

Law Reform (Testamentary Promises) Act 1949

Limitation Act 2010

Perpetuities Act 1964

Property (Relationships) Act 1976, Part 8

Simultaneous Deaths Act 1958

Te Ture Whenua Maori Act 1993, Part 12

Trustee Act 1956

Trusts Act 2019

Wills Act 2007

Additional textbooks that may be of use include:

Chevalier-Watt and Raman *Equity, Trusts, and Succession* (2 ed, Thomson-Reuters, 2022).

Patterson, *Law of Family Protection and Testamentary Promises* (5ed, LexisNexis NZ, Wellington, 2021).

The Law Commission's reports on the Law of Trusts are also important sources of commentary, particularly on the background to the Trusts Act 2019: <http://www.lawcom.govt.nz/our-projects/law-trusts>