
REFLECTIONS ON THE ROLES OF APEX AND INTERMEDIATE COURTS IN NEW ZEALAND

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Abstract

The Supreme Court of New Zealand replaced the Privy Council as New Zealand's final appeal court in 2004. Appeals to the Privy Council in the general civil jurisdiction lay as of right, but all appeals to the Supreme Court were to be by leave. The legislature chose not to change appellate structures and pathways which had long been designed to limit the number of appeals by leave. Rather, it was hoped that the Supreme Court's broader jurisdiction and accessible location would allow it to meet its objectives as a final appellate court.

The Supreme Court has done much to develop law for New Zealand conditions. But the number and quality of leave applications constrain its substantive output, which has apparently stabilized at a level substantially lower than was predicted in 2004. The underlying causes can be located in appellate structures and pathways which constrain demand and also affect the Court of Appeal.

This paper examines those constraints and the Supreme Court's attempts to address them. It identifies consequences for the distribution of law development and supervision of precedent as between the Supreme Court and Court of Appeal. The paper is a call for dialogue rather than a prescription for reform, but it does suggest that consideration should be given to adjusting pathways to improve the range and quality of work decided by panels of three and five judges. It argues that courts in an appellate hierarchy must pursue a collaborative approach if

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law is to be developed in a reasonably timely and cost-effective way in the common law case-by-case tradition, and it suggests that is best done through appellate restraint and conservative application of the rules of precedent.

Keywords: appellate courts; distribution of responsibility for precedent; appeal pathways and leave criteria.

[A] OUTLINE

This paper is divided into six parts. Part B surveys the legislative history to identify important policy choices and assumptions that were made when the Supreme Court was established and which still underpin complex appellate pathways. Part C considers demand for the Supreme Court's services in practice and how the Court has responded to it. Part D argues that the causes of limited demand are structural, and that they also affect the Court of Appeal. Part E addresses judicial policy towards law development and stewardship of precedent in New Zealand's appellate hierarchy. Part F offers some observations about reform and an invitation to dialogue. Part G concludes.

[B] POLICY CHOICES ABOUT APPELLATE STRUCTURES AND PATHWAYS

The Supreme Court established

Arguments for and against abolition of Privy Council appeals were examined in 1994 by the Solicitor-General, John McGrath QC. He observed that most countries with a second appeal court are federations in which the apex court resolves differences among lower courts and delivers consistency in the law, and he recommended a single right of appeal, arguing that with some modifications the Court of Appeal was capable of handling the law development function of a final court. Pointing to the modest number of Privy Council appeals, the Solicitor-General identified a risk that a specialist second appeal court might find itself short of work (McGrath 1995: 70, 18). He did not examine the implications, beyond recognizing that judicial talent would be wasted if the country's most senior judges were underutilized.

In the 1999 general election the Labour Party campaigned for a domestic Supreme Court. In a discussion paper issued the following year the Attorney-General, the Hon Margaret Wilson, identified the rationales

as sovereignty and responsiveness to New Zealand values and needs (Office of the Attorney-General: 2000):

Ending the right of appeal to the Privy Council represents an important next stage in the development of our national independence. It provides us with an opportunity to create an indigenous justice system, which truly represents our values and meets our needs. Our focus must be on an inclusive and enduring appeal structure that will provide access to justice for all New Zealanders.

It will be seen that the Supreme Court was to be no mere substitute for the Privy Council, which originally assumed judicial functions to contribute to political cohesion within the British Empire and had come to defer to the Court of Appeal on questions of policy (Shapiro 1980: 639).

The paper emphasized that the Privy Council heard few New Zealand appeals—just 91 in the years 1990 to 1999—and identified the cost of such appeals as a major barrier. It identified several options, one being simple abolition with the Court of Appeal as the final court, and invited comment on the central question whether New Zealand needed two tiers of appeal (Office of the Attorney-General 2000: para 3 ‘Introduction’). It recognized a risk, inherent in any two-tier structure, that the final appellate judges might be underutilized (Royal Commission on the Courts 1978: para 298).¹

The political decision to establish a Supreme Court having been taken, the Attorney-General commissioned an Advisory Group to advise on the Supreme Court’s purpose, structure, composition and role. The Advisory Group reported in 2002 (Ministry of Justice 2002). It identified what were later described as the overarching objectives of the Supreme Court Bill: the Supreme Court would offer improved accessibility, cover a wider range of matters and better respond to local conditions. The Advisory Group recommended a minimum of two opportunities for appeal from all substantive court proceedings. The Supreme Court should hear appeals over ‘the full range of case’ even if that meant a third appeal (Ministry of Justice 2002: para 65). That was necessary if the Supreme Court was to focus on ‘judicial clarification and development of the law’ within the limits of judicial decision-making; that is, by deciding particular cases. The Supreme Court should have jurisdiction to remedy serious miscarriages of justice whether arising from factual or legal error.

The Advisory Group concluded accordingly that appeals should be general appeals by way of rehearing, meaning the Supreme Court could

¹ The impact of population size on a two-tier appeals system was considered in Royal Commission on the Courts (1978: 298). The Commission predicted that a second appellate court which replaced the Privy Council would hear 5-10 appeals per annum.

resolve factual issues and hear evidence in exceptional cases (Ministry of Justice 2002: para 134). All appeals should be by leave of the Supreme Court itself, and the leave criteria should not unduly limit the scope of its work. The recommended criteria were: a significant Treaty of Waitangi or tikanga Māori issue; a matter of general or public importance; a matter of commercial significance; a need to resolve differences of opinion between courts, or within a court; a substantial miscarriage of justice; and the interests of justice (Ministry of Justice 2002: para 153). It was thought unlikely that the Supreme Court would permit second appeals against concurrent findings of fact below.

The Advisory Group predicted that the Supreme Court would hear between 40 and 50 appeals per year (Ministry of Justice 2002: para 73). It attributed the predicted increase over the Privy Council's New Zealand caseload to the Supreme Court's greater breadth of jurisdiction, its relative accessibility, and future legal developments in fields such as human rights. The number was said to be similar to the workload of final courts in Australia, Canada and the United Kingdom (UK). The Advisory Group thought the risk of underutilization was low, drawing attention to the output of the Court of Appeal, which determined 593 appeals in 2001 and sat Full Courts in 48 of them (Ministry of Justice 2002: paras 73-77).

The Advisory Group recommended that five judges should suffice to handle the Supreme Court's workload, meaning that all would sit on every appeal (Ministry of Justice 2002: para 85). At that time the Court of Appeal sometimes sat as a Full Court comprising all seven permanent members.² Recognizing that the number of judges customarily increases at each level in a court hierarchy, the Advisory Group recommended that

*Table 1: Volume of leave applications to final appellate courts**

Final appellate court	Year	Leave applications filed	Leave applications decided	Leave granted
Supreme Court of Canada	2002	523	498	48
House of Lords United Kingdom	2002	253	274	94
High Court of Australia	2001-2002	497	353	80
Supreme Court of the United States	2001-2002	7,924	8,023	88

* Source: Justice and Electoral Select Committee (2003), Table 5

² At that time the Judicature Act 1908 permitted a maximum of seven judges, though the seventh was sometimes seconded from the High Court: see section 57(2). The Chief Justice was also a member but did not usually sit.

practice should cease. However, the Court of Appeal should remain able to sit as five:

the group wishes to retain a strong Court of Appeal as it would continue to be, in practical terms, New Zealand's primary appeal court (Ministry of Justice 2002: para 182).

Controversy had always attended proposals to replace the Privy Council with a domestic court, partly from fear of judicial activism.³ This may explain why debate during the legislation's passage did not focus closely on whether appellate pathways would deliver enough quality work. The Justice and Electoral Select Committee did draw comparisons with other final appellate courts. It stated that these courts heard between 60 and 80 appeals annually and noted the substantial number of leave applications filed (see Table 1).⁴

The Select Committee estimated that the Supreme Court would deal with 140 'matters raised' per year. This evidently referred to the number of leave applications. It compared this estimate with the same overseas jurisdictions (see Table 2).⁵

*Table 2: Number of matters raised annually in selected final appellate courts**

Country	Year	Number of matters	Population (million)	Number of matters per million people	Appeal judgments per million people
Australia	2001/02	922	19.8	46.6	3.2
Canada	2002	608	31.5	19.3	2.8
United Kingdom	2002	360	58.8	6.1	1.2
United States of America	2001/02	8,024	290.8	27.6	0.3
New Zealand					
• Proposed Supreme Court	n/a	140	4.0	35.0	10.0
• Privy Council	2002	17	4.0	4.3	3.0
• Court of Appeal	2002	665	4.0	141.3	118.0

* Source: Justice and Electoral Select Committee (2003), Table 6

³ The flavour was captured by Richard Cornes (2004).

⁴ Justice and Electoral Committee (2003) at 43. Tables 1 and 2 in this article are reproduced from the report.

⁵ In these jurisdictions it appears from annual reports of the courts concerned that the Select Committee's term 'matters raised' corresponded to leave applications and appeals decided plus appeals as of right, constitutional references, applications for removal and electoral matters. Hence the total of leave applications and substantive decisions is less than the total 'matters raised' for these courts.

On a per millions of population basis, the predicted number of ‘matters raised’ was 35. This estimate was not explained. The Committee referred obliquely to appeal pathways, cautioning that comparisons with other final appellate courts were difficult because the Court of Appeal served as both an intermediate and a second appellate court. That suggests concern about demand for the Supreme Court’s services. But the Committee did not examine appeal pathways. Nor did it develop the assumption, apparent from Table 1, that the Supreme Court would grant about 30% of leave applications.⁶ Lastly, it did not draw attention to its estimate that the Supreme Court would decide about 40 substantive appeals per year, which is both a smaller total number and a far higher rate per million of population than the corresponding figures for other final courts. In a media release accompanying the Bill the Attorney-General predicted that the Supreme Court would decide about 55 appeals annually.

The leave criteria which emerged from the legislative process are found in section 74 of the Senior Courts Act 2016 (carried over from section 13 of the Supreme Court Act 2004):

74 Criteria for leave to appeal

- (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal.
- (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—
 - (a) the appeal involves a matter of general or public importance; or
 - (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
 - (c) the appeal involves a matter of general commercial significance.
- (3) For the purposes of subsection (2), a significant issue relating to the Treaty of Waitangi is a matter of general or public importance.
- (4) The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.
- (5) Subsection (2) does not limit the generality of subsection (1); and subsection (3) does not limit the generality of subsection (2)(a).

⁶ This percentage assumes that successful leave applications and the resulting appeals are decided in the same year.

Under these criteria the Supreme Court must decline leave unless satisfied that it is in the interests of justice to decide the appeal, and it is in the interests of justice to do so if the appeal meets the criteria in subsection (2). There are in substance two grounds: a matter of general or public importance or a substantial miscarriage of justice. A significant treaty issue or matter of general commercial significance is deemed to be of general or public importance.⁷ As the Supreme Court recognized in an early decision, *Junior Farms Ltd v Hampton Securities Ltd (in liq)* (2006), the substantial miscarriage ground allows it to remedy an error of fact or law which is not of general or public importance, but that does not mean that the Supreme Court is free to engage in general error correction; to justify leave the error should be ‘of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case’ (*Junior Farms* at para 5). The subsection (2) criteria do not limit the jurisdiction in subsection (1), but it must be a rare case in which the interests of justice would require leave for a second or third appeal which presented neither an issue of general or public importance nor a miscarriage of justice.⁸

The Court of Appeal continued

The Court of Appeal now comprises the President and no fewer than five nor more than nine other judges, collectively known as the Permanent Court. The complement is currently 10. The Court of Appeal normally sits in divisions of three, and most cases are heard in divisional courts comprising one permanent member and two High Court judges appointed for a specified period, usually two weeks. In 2019 22 High Court judges sat in this capacity, together amounting to three full-time equivalents.

The Court of Appeal has long retained the power to overrule its own decisions, a practice which it justified following the Supreme Court’s establishment on the ground that it remains the court of last resort in most cases (*R v Chilton* 2006: para 98).⁹ It is, of course, bound by Supreme Court decisions, but it shares with that court an important characteristic: freedom to depart from its own decisions when necessary to develop law (*Ardern* 2018: 69).

⁷ The proposed inclusion of the application of *tikanga* in law was resisted by groups representing Māori interests and not pursued.

⁸ Section 237 of the Criminal Procedure Act 2011 provides that a second appeal court may give leave to appeal against conviction where the appeal raises a question of general or public importance or there may have been a miscarriage of justice. This does not preclude an appeal to the Supreme Court that is otherwise in the interests of justice—see section 213(1)—but it is consistent with the proposition that there are in substance only two grounds.

⁹ The Court attributed its last resort status to ‘restrictive leave requirements’.

Significant appeals are usually heard by three permanent members, though it is sometimes necessary to assign them to divisional courts. Very occasionally a Full Court of five is convened. A protocol states that the decision to sit a Full Court is that of the President, who will normally convene one only if the case concerns a sentencing guideline or ‘involves issues of evidence, procedure or practice of general application, or some other issue ... of major significance to other cases, particularly if there is no right to apply to the Supreme Court for leave to appeal’ (Court of Appeal nd).

Because a Full Court is now limited by statute to five judges, the entire Permanent Court cannot sit, nor can it conduct *en banc* review of divisional decisions. This presumably explains why the Advisory Group recommended in 2002 that the Supreme Court’s leave criteria should include resolution of differences of opinion within a lower court. In practice the Court of Appeal’s workload means that the judges deal regularly with common issues, and its processes for proofing judgments and circulating them before issue also reduce the risk of conflict. It is more likely that divergent opinions will emerge from lower courts and be reconciled by the Court of Appeal, which stands at what Sir Jack Jacob called the point of crucial convergence in courts’ structure (1987: 217).

The Advisory Group also contemplated that the Supreme Court would reduce the need for the Court of Appeal to sit Full Courts, allowing a reduction of one in the permanent complement of seven.¹⁰ However, the expectation that the Supreme Court would reduce the burden on the Court of Appeal was mistaken. The complement dropped to six for a period of months in 2006 but was increased to nine in 2007 and to its present level in 2010.

Legislative policy choices about appeal rights

Appeal rights are creatures of statute, intended to strike a balance between accuracy of outcomes and expediency in a system that is funded by the state. The statutes have much to say about where the legislature has struck the balance and the role that each court is expected to play.

One appeal as of right

One appeal ordinarily lies to the next court in the hierarchy. The appeal is on the merits, and the objective is error correction. The appeal lies of right, though the longstanding rule in the Court of Appeal is that, having had the first instance judgment to which they are entitled, an

¹⁰ The Chief Justice was also a member, *ex officio*.

appellant in civil proceedings must ordinarily pay security for costs to protect the respondent.¹¹ All second appeals are by leave, meaning that the uncertainty, delay and expense they occasion must be justified.

Resources devoted to appeals

An appellate hierarchy is normally an inverted pyramid in which an appeal from a single trial judge is heard by three judges and a second appeal, where permitted, is heard by five or more. Louis Blom-Cooper QC described the inverted pyramid as a philosophy of ‘good, better, best’; not only are appellate judges promoted for seniority and merit, but they also ‘present a phalanx of combined expertise numerically sufficient to overrule (where necessary) the judgment below’ (Blom-Cooper 1971). The decision to allow the Court of Appeal to sit as five, the same number as the Supreme Court, evidences a legislative expectation that it may have the last word in some areas.

Civil appeal pathways in New Zealand follow the inverted pyramid model for cases tried in the High Court, but not for those originating in the high-volume lower courts. Appeals from judgments of the District Court and specialist tribunals lie to a single judge of the High Court (District Court Act 2016, section 124), and a second appeal lies to the Court of Appeal by leave (Senior Courts Act 2016, section 60). Some second appeals are confined to a question of law.¹²

Criminal appeal pathways split first appeals between the Court of Appeal and the High Court. In the Criminal Procedure Act 2011 a decision was made to classify offences into four categories. In brief summary, category one offences are those not punishable by imprisonment, and category two comprises those punishable by a maximum term not exceeding two years’ imprisonment. Category three comprises those offences punishable by two years or more that could be tried in the High Court or the District Court and for which the defendant might elect jury trial, while category four comprises High Court-only offences. Conviction appeals lie to the Court of Appeal against decisions of the High Court or District Court for offences where jury trial was elected, and sentence appeals lie to the Court of Appeal from sentences passed by the High Court or by the District Court if the defendant elected jury trial and the sentence was imprisonment for a term exceeding five years (Criminal Procedure Act 2011, sections 230 and 247). In the result, much judge-

¹¹ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at paras 3-6.

¹² See, for example, Accident Compensation Act 2001, section 163; Resource Management Act 2009, section 308; Human Rights Act 1993, section 124; and Immigration Act 2009, section 246.

alone trial and sentencing work attracts a right of appeal to a single judge of the High Court rather than the Court of Appeal.

This approach was adopted to prevent the Court of Appeal being overburdened. The legislature retained existing pathways to preserve the Court of Appeal's supervisory function, but it was to remain a second rather than a first appeal court for less serious criminal work. The Law Commission recognized that the threshold of five years' imprisonment would limit Court of Appeal oversight of sentencing for common and socially important offences (for example, those involving workplace safety or environmental pollution), but there was no appetite for a more significant overhaul. Appellate pathways were deferred for future consideration (New Zealand Law Commission 2012: para 11.1).

The Court of Appeal may be bypassed in exceptional circumstances

The Supreme Court has jurisdiction to hear an appeal from a court other than the Court of Appeal in certain circumstances, but under section 75 of the Senior Courts Act 2016 it may not do so unless there are 'exceptional circumstances that justify taking the proposed appeal directly' to the Supreme Court. So, the legislation permits 'leapfrog' appeals which bypass the Court of Appeal but envisages that they will be rare. In every other case the pathway to the Supreme Court runs through the Court of Appeal. Circumstances might be exceptional where the appeal challenges a judgment of the Supreme Court that the Court of Appeal must follow, or raises an issue which is already before the Supreme Court in another case.¹³

A strict approach to leave for second or third appeals

As explained above, the grounds for a second or third appeal to the Supreme Court may be reduced to a substantial miscarriage of justice or an issue of general or public importance. Legislation conferring second appeal jurisdiction on the Court of Appeal is generally to the same effect,¹⁴ though in some instances an appeal is confined to a point of law.¹⁵

¹³ See, for example, *Taylor v Jones* [2006] NZSC 104 (granting leave to appeal) and *Taylor v Jones* [2006] NZSC 113 (explaining the reasons for granting appeal). Leave has also been granted where the same issue is to be argued in another case: *Commerce Commission v Vodafone New Zealand Ltd* (2010) (granting leave to appeal) and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at paras 4 and 49, explaining the reasons for granting leave to appeal.

¹⁴ Criminal Procedure Act 2011, sections 237 and 253; and *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764.

¹⁵ See note 12 above.

Most leave applications invoke the general or public importance ground. The standard is traced to the 1922 judgment of Salmond J in *Rutherford v Waite* (1923). At that time the Judicature Act 1908 provided simply that a second appeal to the Court of Appeal was by leave of the High Court.¹⁶ Salmond J held that leave should be granted only on ‘good cause shown’; that followed because the requirement for leave was based on the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that there be an end to litigation) (ibid 35):

It is in the public interest not merely that the administration of justice shall be free from error, but also that it shall be cheap and speedy. Appellate jurisdiction is established to secure the first of these purposes; but restrictions are imposed on that jurisdiction for the purpose of securing the second. In exercising discretionary authority to permit an appeal the Court must weigh these conflicting purposes against each other and determine which of them is entitled to prevail in the individual instance.

It followed that on an application for leave the Court of Appeal must be satisfied that ‘the appeal will raise some question of law or fact which is capable of *bona fide* and serious argument’ (ibid 35). It was not enough to point to a substantial question of fact for which there was much to be said on both sides; the applicant must show that ‘there is some interest in the case, public or private, to outweigh the cost and delay that would result from further proceedings in the Court of Appeal’ (ibid 35). Something more was needed than ‘the mere direct interest of the appellant’ in the case (ibid 36):¹⁷

The interest which justifies the grant of leave to appeal must, I think, be some interest, public or private, beyond the more direct interest of the appellant in the subject-matter of the litigation. ... The appeal, for example, may involve some question of law the proper determination of which is a matter of general and public importance. Or the action may be a test case on the issue of which other claims or disputes of the same nature between different parties are dependent. Or the decision appealed from may be one which affects the appellant’s reputation and not merely his pecuniary interest. Or it may be of such a nature as to affect his business generally, and not merely his pecuniary interest in the subject-matter of the particular action: as, for example, a decision adverse to an insurance company as to the meaning of a clause in its standard form of policy.

The language of general or public importance found its way into the Summary Proceedings Act 1957, as part of the test for a second appeal to the Court of Appeal in judge-alone criminal proceedings (Summary

¹⁶ Section 67 (as enacted from 4 August 1908 to 31 March 1980).

¹⁷ To the same effect see *Snee v Snee* (1999).

Proceedings Act 1957, section 144). The same test was adopted for second civil appeals in what is still the leading authority, the Court of Appeal's 1998 judgment in *Waller v Hider* (1998).¹⁸ The court emphasized that on a second appeal it is not engaged in the general correction of error; its primary function is to clarify the law and determine whether it was properly applied below. Nor is every error of law of such public or private importance as to justify a further appeal in litigation which has already been twice ruled upon. An issue of fact is seldom of public importance, but it may be of private importance where, for example, the amount at stake is very substantial or the decision reflects seriously on the character or conduct of the would-be appellant or has serious consequences for them, such as insolvency. Even then, leave cannot be assured in the face of concurrent findings of fact in the courts below. The Court of Appeal undertook a cost-benefit analysis, estimating the costs of the second appeal and weighing them against the amount at stake.

[C] THE SUPREME COURT'S CASELOAD AND RESPONSES TO IT

In this section I survey the size and quality of demand for second and third appeals from the Court of Appeal and examine the implications. I emphasize that to find that demand is limited is not to suggest that the Supreme Court has been unable to meet its objectives; as I note in section E, it has done much to develop New Zealand law. Rather, I contend that there is a correlation between limited demand and the standard of appellate review, that modest demand has affected the distribution of responsibility for law development and supervision, and that there is some misalignment of leave practice as between the Supreme Court and Court of Appeal.

Leave applications constrain the court

Figure 1 records numbers decided by the Privy Council in the 15 years preceding the Supreme Court's establishment, and by the Supreme Court since 2004. The average for the nine years between 2010 and 2019 is 22.¹⁹

¹⁸ Second appeals were brought under section 67 of the Judicature Act 1908, which provided for leave but did not specify the test.

¹⁹ Data for the Supreme Court's first decade is found in Stockley & Littlewood (2015: 24). The annual average for that period was also 22. I exclude the years before 2009 because the court was in an establishment phase and the number of leave applications exceeded 100 for the first time in 2009. Note that not all leave applications lead to a decision; a few are withdrawn.

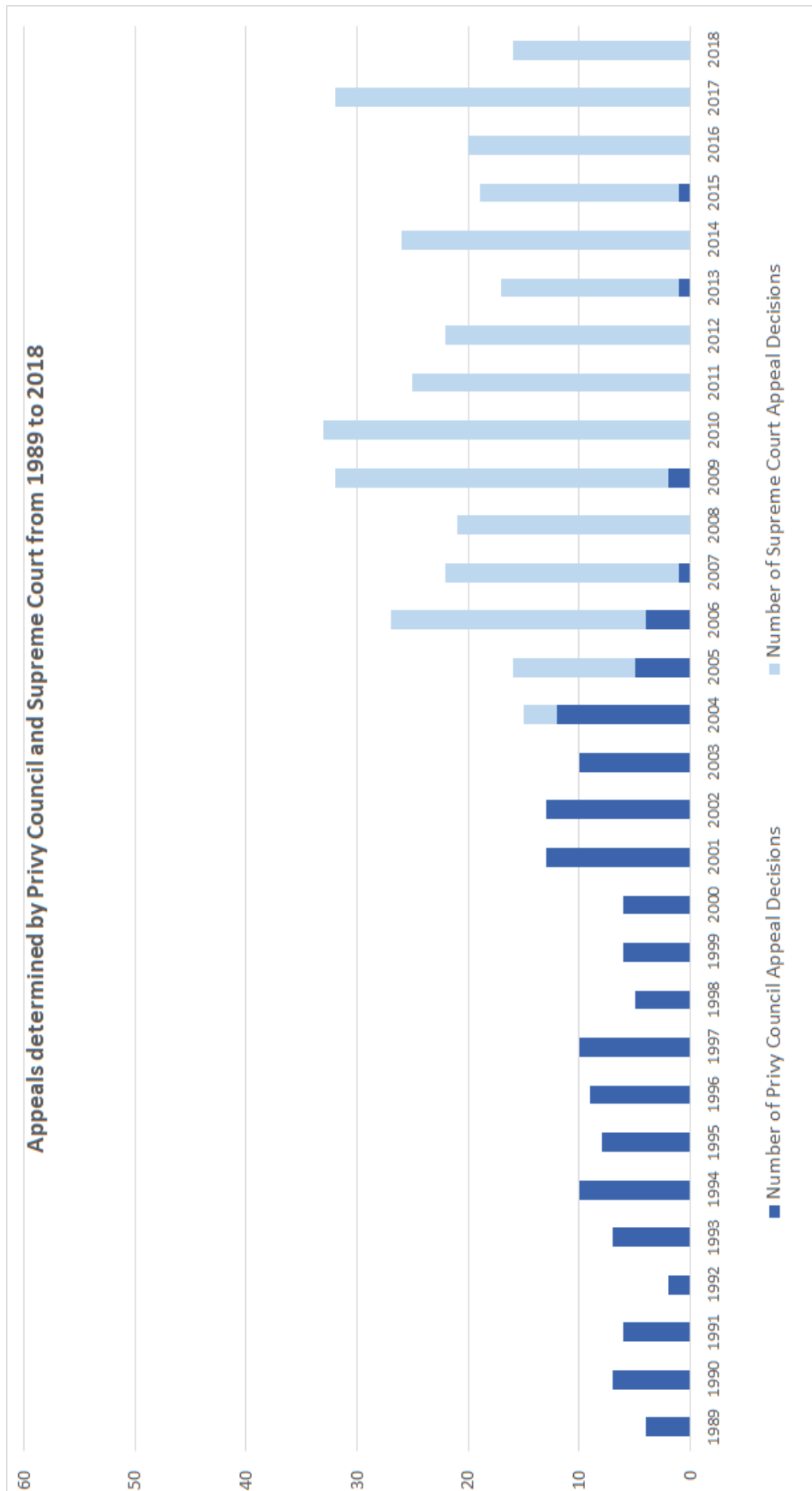


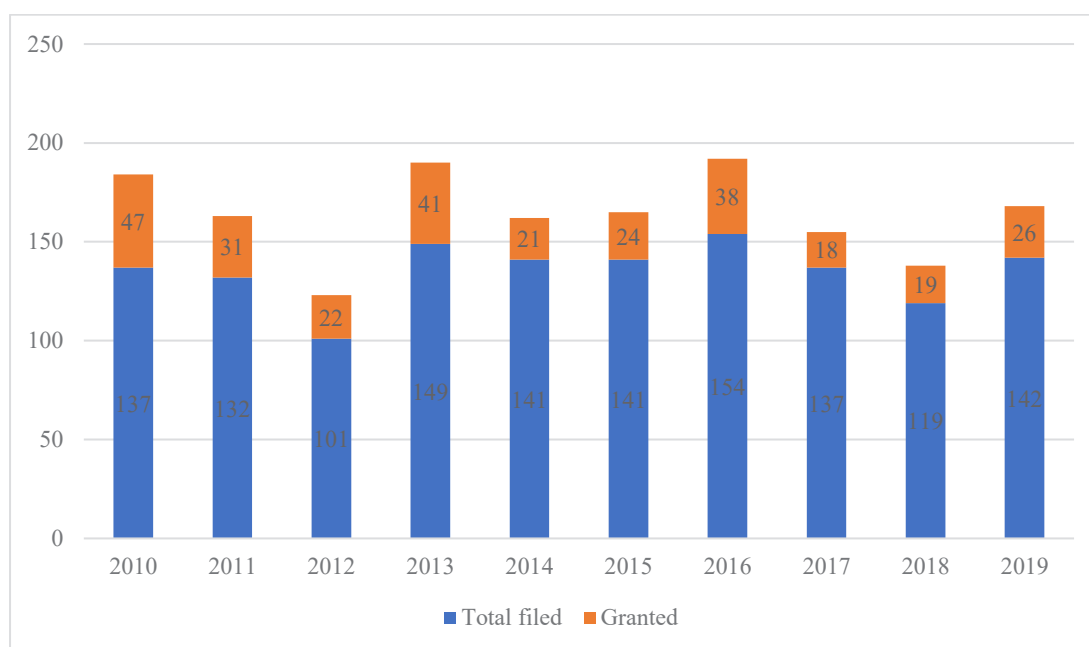
Figure 1: Appeals determined by Privy Council and Supreme Court from 1989 to 2018

By way of comparison, in 2019 the United States (US) Supreme Court delivered 69 substantive decisions, the UK Supreme Court 68,²⁰ the Supreme Court of Canada 72, and the High Court of Australia 61.²¹ The difference is less substantial than it might seem, because these courts have larger complements than the New Zealand Supreme Court and some sit in divisions to hear substantive appeals. They must also devote resources to hearing devolution or other constitutional cases.

Civil appeals have not increased much in number from those decided by the Privy Council, to which most lay as of right (the leave requirements were formalities). Sir Peter Blanchard estimated that of the 53 appeals heard by the Privy Council in the five years preceding the Supreme Court's establishment, 17 would not have been given leave under the Supreme Court's criteria (Blanchard 2015: 58). Put another way, in each of those years the Privy Council heard about 11 appeals of which about seven merited leave. In the years 2015-2019, the Supreme Court granted an average of 15 leave applications in civil proceedings.²²

Leave applications have averaged 135 per year since 2010. On average the Supreme Court granted 25% of them over the same period. The bar graph in Figure 2 records leave applications since 2009.

Figure 2: Leave applications since 2009



²⁰ The Court's 12 judges hear about the same number of cases when sitting as the Privy Council.

²¹ Where sittings span two years, these numbers are for the 2018-2019 sitting year.

²² This represents leave applications actually granted in each of those years. Where more than one appeal was given leave in the same proceeding, they have been treated as one.

Table 3: Leave applications to apex courts

Court	Leave applications in 2019	Leave granted in 2019	Appeals decided in 2019
US Supreme Court	6442	73 (1%)	69
UK Supreme Court	201*	59 (29%)	68
Supreme Court of Canada	542	36 (7%)	72
High Court of Australia	565	43 (8%)	61

* Numbers in England and Wales are restricted by pathways which sometimes require a lower court's approval

Other apex courts typically receive more leave applications and grant a smaller proportion of them, as the data from 2019 in Table 3 demonstrate.²³

The overall quality of leave applications is low. Anyone whose appeal has been dismissed by the Court of Appeal may ask the Supreme Court for leave. An applicant need not first apply in the court below or have that court certify an issue worthy of further appeal. About 25% of leave applications between 2009 and 2013 were brought by lay applicants. That pattern has continued; in 2019 40 of the 142 leave applicants were self-represented. Few such applications are found to merit leave. A substantial proportion are procedural in nature and some challenge decisions made by a single judge of the Court of Appeal, such as refusals to waive filing fees. In 2020 the Supreme Court decided 86 leave applications from substantive decisions of the Court of Appeal. Lastly, many leave applications are brought in the Supreme Court's criminal jurisdiction (in 2019 42% were in crime). Making the point that few of these cases merit a second appeal, Sir Peter Blanchard wrote that 'human nature being what it is, no doubt a large proportion of those persons whose appeals were unsuccessful continue to regard themselves as having suffered from a substantial miscarriage of justice' (2007: 5-6).

Approach to jurisdiction

The Supreme Court has sometimes taken what it has described as a 'reasonably expansive' approach to jurisdiction (*J (SC93/2016) v Accident*

²³ This table collates data from various annual reports for the relevant courts. Where the reports are issued according to the financial year, the data is from the 2018-2019 financial year. The report for the US Supreme Court refers to appeals argued, not leave granted, so the number should be treated as an approximation.

Compensation Corporation 2017: at 9). Generally, legislation provides that a decision of the Court of Appeal to decline leave is final, in both civil and criminal proceedings (Senior Courts Act 2016, section 68; and Criminal Procedure Act 2011, section 213(3)). The Supreme Court has held that it may entertain ‘leapfrog’ appeals from the High Court in such circumstances, though the jurisdiction is rarely exercised.²⁴ It has also granted leave to bring an appeal against conviction where the appellant’s conviction had been quashed in the Court of Appeal.²⁵ The Supreme Court also held that section 67 of the Judicature Act 1908, which deemed final a decision to refuse leave for a second appeal to the Court of Appeal, was confined to substantive appeals; that is to say, it did not preclude a further appeal to the Supreme Court against an interlocutory decision of the High Court.²⁶ This led the legislature to affirm that appeals against interlocutory decisions of the High Court also require leave.²⁷

Appellate review now facilitates intervention on second appeal

Appellate practice in New Zealand has long rested on a series of institutional norms. I describe them as such, although some are found in legislation and rules of court, because they are largely within the control of the judiciary. They are by no means unique to New Zealand.²⁸ In his comparative analysis of appellate justice in England and the United States Robert J Martineau remarked that, although they differ in many ways, intermediate appellate courts in the two jurisdictions had adopted remarkably similar practices (Martineau 1990: 239). They were examined in a detailed study, published by Thomas Y Davies of the California Court of Appeal for the First Appellate District (1982) and discussed by Sir Jack Jacob in his Hamlyn lectures (1987). Some can be traced to the common law’s ancient hostility to appeal and deference to the jury.²⁹ To the extent that they are of more modern origin, they likely respond to pressure of

²⁴ See, for example, *Sena v Police* (2018).

²⁵ *C (SC29/2021) v R* (2021).

²⁶ *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309. This led the legislature to specify, when enacting the Senior Courts Act 2061, that appeals against interlocutory decisions of the High Court also require leave.

²⁷ See Judicature and Modernisation Bill 2014 (178-2), explanatory note.

²⁸ New Zealand practice is traceable to the Supreme Court of Judicature Acts 1873-1875 (UK).

²⁹ Appeals began in English law as proceedings in error, brought against the judge, in which the question was not what the true judgment ought to be but whether the judge had erred: *Sunderland* 1930: 485.

business experienced by intermediate appellate courts, including New Zealand's.³⁰

The first group of norms relate to the nature and scope of an appeal. The decision under appeal is treated as presumptively correct and the appellant must show that it was wrong (*Rangatira Ltd v Commissioner of Inland Revenue* (1997) at 139). The appellate court does not actually rehear the evidence, notwithstanding that many appeals are formally by way of rehearing (Senior Courts Act 2016, section 56). Rather, it rests its decision on the trial record. New evidence is presumptively inadmissible on appeal, in both civil and criminal proceedings: the test is the interests of justice but a party is expected to put up their best case at trial, so new evidence is screened for freshness, credibility and cogency.³¹ A related norm is that the court entertains with reluctance a point not taken below³² or an amendment to pleadings.

The second group concerns the standard of review. An appellate court traditionally paid a substantial degree of deference to the finder of fact. The court would not interfere if there was substantial evidence for the finding reached by the trial court, even if that court relied on evidence that did not sustain it (Jacob 1987: 234). The trial court was given significant latitude on decisions characterized as discretionary.³³ And the appellate court would excuse errors that it considered harmless.

A third group of norms concern effectiveness, especially in supervision of trial practice. The Court of Appeal seeks to dispose of criminal appeals expeditiously. It requires written submissions which permit relatively brief hearings and processes much of its criminal business in divisional courts, producing short decisions many of which were once delivered orally or within a very few days of the hearing.³⁴

The Supreme Court has modified some of these norms. In *Austin, Nichols v Stichting Lodestar*,³⁵ it held that an appellate court must form its own

³⁰ The number of judgments delivered by the Court of Appeal increased from 78 in 1960 to 458 in 2000: Richardson 2009: 307.

³¹ In civil proceedings, the traditional test was found in *Drageicevich v Martinovich* (1969), applying *Ladd v Marshall* (1954). See also *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* (1998) at 193 per Tipping J and *Sturgess v Dunphy* (2014) at para 15. In criminal proceedings, see *Bain v R* (2004) and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at para 120.

³² *Attorney-General v Horton* [1999] UKPC 9, [1999] 2 NZLR 257.

³³ *Shotover Gorge Jet Boats Ltd v Jamieson* (1987) at 440-441; *May v May* (1982) at 169-170; and Jacob (1987: 234).

³⁴ Sir Ivor Richardson noted that around 70% of decisions were of no more than 10 pages and in the years 2000 and 2007 only about 4% exceeded 30 pages (2009: 308).

³⁵ [2007] NZSC 103, [2008] 2 NZLR 141.

view of the merits in a general appeal. The court may make appropriate allowances for the trial court's advantages, but if it forms a different view it must act on that view. In *Kacem v Bashir*³⁶ a majority extended this rule by markedly reducing the number of first instance decisions that are considered discretionary and hence warrant deference so long as the outcome was reasonably available to the trial court: 'the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary' (at para 32).

These decisions were controversial. The former Chief Justice, Dame Sian Elias, considered *Austin, Nichols* no more than a restatement of existing law,³⁷ while an academic commentator said that the case 'meant that the thinking regarding appellate intervention changed fundamentally' (Beck 2011: 269-270). In my view *Austin, Nichols* was a restatement—a warning shot across the bows of lower courts—so far as it concerned the standard of review for decisions that are not considered discretionary.³⁸ Its significance is rather that to require fuller reasons of a first appellate court to facilitate a second appellate court's search for error in that court's decision on further appeal.³⁹

Bashir did effect substantive change, making New Zealand law significantly more receptive to appeals. The UK Supreme Court declined to follow it in *Re B (A Child) (Care Proceedings: Threshold Criteria)* (2013: para 38), describing *Bashir*'s use of an evaluative standard in care proceedings as 'interesting' but adhering to the 'conventional' view that because there is a range of available outcomes such decisions are discretionary.⁴⁰

These decisions have changed appellate practice, arguably for the better. To require fuller reasons of a lower court is to improve the overall quality of justice. But they encourage appeals without necessarily affecting outcomes.⁴¹ Appellate courts have jettisoned discretionary reasoning for

³⁶ [2010] NZSC 112, [2011] 2 NZLR 1.

³⁷ *Austin, Nichols* note 35 above, at para 6, describing the approach to appellate review set out in the judgment as 'well established'.

³⁸ The Supreme Court held that the decision under appeal was not discretionary: see para 17. The rule that an appellant is entitled to the benefit of the appellate court's opinion was essentially a restatement of what had been said in *Shotover* (1987). The principle is traceable to English authority: see *The Glanmbanta* (1876) at 288. But see Rodriguez-Ferrere (2012) arguing for a richer understanding of deference to the trial court.

³⁹ Blom-Cooper (1971: 372). The Supreme Court's decision in *Sena v Police* (2019) is to similar effect in judge-alone criminal trials.

⁴⁰ Australian law appears to take a similar approach; see Prince (2022: 213).

⁴¹ It is unclear what effect additional reasons have had on productivity in intermediate courts.

evaluative review in many areas following *Bashir*,⁴² and there must have been cases which were decided differently in consequence. But there is no evidence that rates of reversal have risen as one might expect had the standard of review been lowered. There may be two reasons for that. Other appellate norms survive, as the Supreme Court was at pains to emphasize in *Austin, Nichols*; in particular, allowances are still made for the trial court's advantages, and the rule that an appellant must show that the court below was wrong is routinely invoked when dismissing an appeal on the merits.⁴³ And appellate judges were always expected to review the record and decide whether the decision below was wrong. If persuaded that it was, they would likely intervene: if not, they would dismiss the appeal shortly. That is what happened in *Austin, Nichols* itself; the Court of Appeal spoke of deference to the first instance decision-maker but it acted on its own briefly expressed view of the merits, and for that reason its decision was upheld.

A liberal approach to the statutory leave criteria

There is evidence that the Supreme Court followed the traditional approach to leave in its early years. Sir Peter Blanchard, who was among the first appointees and had written the judgment of the Court of Appeal in *Waller v Hider*, remarked that 'public and general importance is a well-understood test that excludes disputes that are largely factual or involve construction of unique documents' (Blanchard 2015: 66). He explained that the Supreme Court had tried to maintain a consistent approach to leave applications. In other extrajudicial writings, he referred approvingly to *Waller v Hider* and stated that, unless a case will serve as 'a precedent generally', the Supreme Court is unlikely to grant leave, and added that 'second level review of facts is undesirable', citing Privy Council practice (2007: 4). He remarked, however, that the case most likely to get leave is one that will 'give the Supreme Court the opportunity' to clarify the law in a particular area (2007: 5).

However, the Supreme Court has not adopted *Waller v Hider*. Indeed, it does not appear to have cited that decision or its antecedent, *Rutherford v Waite*.⁴⁴ The Supreme Court always gives brief reasons when refusing

⁴² See, for example, *Taipeti v R* [2017] NZCA 547, [2018] 3 NZLR 308, in the context of bail. This resulted in a minor spate of bail appeals but (because for bail the first instance judge is usually better able to assess and monitor risk between arrest and trial) little change in outcomes.

⁴³ See *Austin, Nichols* note 35 above at para 13. This approach has been adopted by the Supreme Court in later decisions: see, for example, *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at paras 58-60.

⁴⁴ Based on a database search of the Supreme Court's decisions.

leave. It tends to cite the statutory criteria without elaboration. Those criteria leave unstated considerations that were traditionally taken into account on a second appeal and still are when the Court of Appeal weighs a grant of leave on a second appeal: whether the proposed appeal is genuinely arguable, whether the appeal turns on the question that is said to be of general importance, and whether the appeal justifies the additional costs and delay of hearing. I do not mean to suggest the Supreme Court has discarded these considerations. On the contrary, it routinely refuses leave on the ground that the proposed appeal is not seriously arguable. The point rather is that these considerations do not appear to be integral to the test for leave, needing always to be made out if the principle that finality should prevail after one merits appeal is to yield.

The Supreme Court's rules provide that an applicant must justify leave against the leave criteria but do not state that the Supreme Court itself must identify a specific question of general or public importance, or a substantial miscarriage of justice, when granting leave (Supreme Court Rules 2004, rule 15). In recent years it has adopted a practice of granting leave in the broadest terms; the approved question is whether the Court of Appeal was right to allow or dismiss the appeal, as the case may be. The number of appeals for which this is the stated question of general or public importance increased steadily from one (out of the total of 22 granted leave) in 2015 to 11 (out of 28 granted) in 2019.

It seems accordingly that the Supreme Court's approach to leave is sometimes, though not always, more liberal than the traditional test. This may be necessary if the Supreme Court needs more cases to deliver on its objectives. In that case, the Court of Appeal presumably ought to take the same approach in cases that come to it by leave, if only to open the pathway to the Supreme Court.

[D] CAUSES AND CONSEQUENCES

A problem of structure

The number of substantive decisions delivered by the Supreme Court remains reasonably constant. In 2020 it delivered 21 substantive judgments. That the causes are structural can be seen when the Supreme Court of Appeal's work is analysed.

The Court of Appeal delivers about 700 judgments annually. It does not follow that there is a large pool of cases in which a further appeal to the Supreme Court is both warranted and likely, for several reasons. First,

many judgments of the Court of Appeal are interlocutory in nature. The Supreme Court hears a substantial number of pretrial appeals in criminal proceedings.⁴⁵ In 2020 the Supreme Court delivered 424 final judgments, 331 in crime and 93 civil. Second, these were almost all first appeals, many of which involve the application of settled law to facts. They include 111 sentence-only appeals, which seldom raise issues of principle. Third, the Court of Appeal itself hears few second appeals. In 2020 it received just 64 applications and granted 14 of them.⁴⁶ Finally, there remain a substantial number of cases which are intrinsically significant or raise some issue of general importance, but the losing party may not think the issue on which leave is sought will change the outcome on further appeal, and some will not be sufficiently motivated or able to bear the associated expense and delay.

Consequences for the Court of Appeal's law development function

The Court of Appeal has always seen law development and stewardship of precedent as integral to its work. In all but a very small number of cases its decision is in practice final. But the Court of Appeal's law development function has been circumscribed by the Supreme Court's approach to its own jurisdiction. With the caveat that it can be difficult to categorize judgments, a substantial proportion of the Supreme Court's output comprises 'system administration' cases, by which I mean evidence and process. I estimate that 25% of Supreme Court judgments delivered in 2014-2019 fell into this category, with 14% comprising evidence cases. System administration cases can raise important issues, but the Court of Appeal exercises supervisory jurisdiction over these fields and relevant rules are sometimes found in that court's own processes.⁴⁷

To some extent this development may be explained by pressure on the Court of Appeal. When the Evidence Act 2006 was enacted the Court of Appeal's workload precluded assigning all significant cases to the

⁴⁵ The volume of interlocutory appeals in criminal cases was noted in an issues paper: New Zealand Law Commission (2018: paras 1.15-1.16). The Law Commission questioned the value of pretrial evidence admissibility appeals. In its final report the Commission noted that in 2015-2016 'a quarter of all appeals related to the Evidence Act' (2019: note 67). At the time of writing some 36% of criminal appellate filings concern pretrial rulings. Many rely on grounds which would not likely succeed on appeal on the evidence actually led at trial, and they are often brought when trial is imminent.

⁴⁶ Unfortunately, court systems do not record this data consistently. This is the most accurate estimate available. In 2021 the corresponding numbers were 51 and 10.

⁴⁷ The Supreme Court has delivered judgments on procedural rules dealing with waiver of security for costs and extensions of time to appeal in the Court of Appeal: see *Reekie v Attorney-General* note 11 above and *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

Permanent Court or Full Courts. Most were decided in divisional courts, which left development of evidence law in the hands of the Supreme Court. Its work in that field has extended to hearing pretrial appeals. By contrast, when the Criminal Procedure Act 2011 was enacted, significant cases were assigned to the Permanent Court, and with one exception those decisions have proved final.⁴⁸

Change in the law development function of the Court of Appeal is most clearly seen in connection with Full Courts. A decision to sit as five is a statement that the Court of Appeal expects its decision will be final. In practice Full Courts are far less common than they once were⁴⁹ and much rarer than one might expect given the Court of Appeal's supervisory control of trial practice. They are convened when the Court of Appeal is establishing sentencing guidelines, that being a field which the Supreme Court has generally left to the Court of Appeal. They may also be used when the Supreme Court is reconsidering a precedent of its own.

To grant more leave applications would be counterproductive

To the Supreme Court's credit, it has resisted the temptation to fill its docket with the cases on offer. That would confront legislative policy and compromise the work of the Court of Appeal, as just explained. And a final appellate court cannot allow itself to become a court of error correction, for two reasons.

First, there is seldom a single correct outcome which the Supreme Court is more likely to discover than were the courts below. In most cases reasonable minds can differ. Lord Atkin remarked that about one-third of appeals are allowed at each level and there is no reason to suppose that the proportion would be any less if there were a still higher tribunal (Atkin 1927; Blom Cooper & Drewry 1969). Justice Jackson of the US Supreme Court put the point another way, saying that 'we are not final because we are infallible; we are infallible because we are final' (*Brown v Allen* 1959: at 540).

Second, to the extent that apex courts practise error correction, deciding individual cases on their factual and legal merits, their advantages are,

⁴⁸ *McAllister v R* note 14 above; *Hohipa v R* [2015] NZCA 73, [2018] 2 NZLR 1; *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482; and *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1. *Wiley* (dealing with the miscarriage of justice test for a criminal appeal) is the exception; the Supreme Court concurred in *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85.

⁴⁹ As noted earlier, 48 Full Courts sat in 2001. In 2019 the number was 1. Andrew Beck surveyed the decline in numbers in his 'The Five-Judge Court' essay (2009).

as Le Sueur and Cornes put it, inherently limited (Le Sueur & Richard Cornes 2000). On questions of fact, the Supreme Court is seldom better placed than was the intermediate court and may be at a disadvantage *vis-à-vis* the trial judge. Because it is final the court must also cultivate its authority (Ardern 2018: 72), which depends on it being seen to deliver a higher quality of adjudication.⁵⁰ The point can be illustrated using cases in which the outcome is determined by a minority of the judges to adjudicate upon it. *Brooker v Police* and *Bathurst Resources v L & M Coal Holdings*⁵¹ were not error correction cases—leave was granted on an issue of principle, and once granted the Supreme Court had to decide the outcome itself—but both were controversial partly because an overall minority prevailed in the result.⁵² The short point is that error correction attracts controversy of a kind that an apex court can do without.

Reform

To identify structural causes is to invite a structural solution. I discuss reform briefly in section E, but without offering specific proposals. There is a prior question about the resources New Zealand should devote to appeals, which I do not attempt to answer. The exercise would also require analysis, which I have not attempted, of the appellate work of the High Court and the types of work which merit a first appeal to a bench of three judges. Absent structural form, solutions are to some extent available to the judiciary, as I next explain.

[E] JUDICIAL POLICY TOWARD THE DEVELOPMENT AND STEWARDSHIP OF PRECEDENT

In this section I take existing appellate pathways and structures as given and address questions of judicial policy toward law development and the supervision of precedent, identifying a risk of inefficiency in an appellate hierarchy and arguing for restraint and a collaborative approach to mitigate that risk.

⁵⁰ Drewry (1968: 448) discussing *Blyth v Blyth* (1966).

⁵¹ *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] NZCCLR 17.

⁵² See Farmer (2015) and McLauchlan (2021).

Common law methodology in an appellate hierarchy

Judges make law by deciding cases. This has long been considered the virtue of the common law, which is thought to produce law of superior quality as the courts close in incrementally on a fully articulated rule. In the words of Lord Mansfield, the law ‘works itself pure’ case by case (*Omychund v Barker* 1744: at 23).

The fewer cases an apex court decides, the harder the court finds it to make law in the common law tradition. For this reason, Justice Scalia argued that final appellate courts ought to express their reasons in general terms (Scalia 1998). He reasoned that appellate courts which stick closely to the facts confer too much discretion on lower courts, and he argued that to adopt a general rule is to exercise restraint, because by adopting the rule the final court itself promises to abide by it. Some US courts have adopted a rule that a *ratio* extends to issues that were not necessary to the outcome but were germane and resolved after reasoned consideration (Tyler 2020). To similar effect, the High Court of Australia held that lower courts should follow ‘seriously considered dicta’ of the High Court (*Farah Construction Pty Ltd v Say-Dee Pty Ltd*;⁵³ see Chen 2021). The leading proponent of a broader approach in New Zealand is Professor Scott Optican, who argues that the Supreme Court focuses too much on case-by-case analysis and too little on policy, leaving important questions unanswered (Optican 2017: 432).

The contrary argument is that an expansive approach assumes both that law development is the apex court’s preserve and that the court is competent to decide on a wide range of controversies that are not before it. In his retirement address, Justice Keith Mason, President of the New South Wales Court of Appeal, characterized the High Court’s insistence on lower courts following its *dicta* as well-meaning but mistaken, calling it an attempt to monopolize development of the common law (2008). In New Zealand, Sir Douglas White, writing extrajudicially, argued that it would be an error were the Supreme Court to attempt to insist on its *dicta* being followed, observing that lower courts can be relied on to defer to seriously considered *dicta* to the extent appropriate (2019).

Restraint is best understood not as a promise that the court which pronounces a rule will abide by it but as a discipline that appropriately distributes power among courts, allowing those lower in the hierarchy to develop the law. There are good reasons to understand and exercise restraint in this sense.

⁵³ [2007] HCA 22, (2007) 230 CLR 89.

To begin with, because their opportunities to revisit the law in any given field are sometimes few and far between, apex courts may inhibit law development. *Hessell v R*⁵⁴ illustrates the point. The case concerned sentencing methodology, and specifically the way in which trial courts were to administer guilty plea discounts. The Court of Appeal had authorized discounts of one-third, following English practice, and set a scale under which the discount was reduced progressively as trial approached. The Supreme Court found this methodology an unwarranted constraint on the discretion of sentencing judges. However, it also stated that the discount could not exceed 25%, and by making that decision the Supreme Court set in stone an important component of sentencing methodology. The Supreme Court has not had the opportunity to revisit it. The Court of Appeal, which has ample opportunity and might wish to do so (*Moses v R*),⁵⁵ cannot.

Error may also be entrenched. At one time some law and economics scholars argued that the common law is efficient because an unsatisfactory rule of law is more likely to engender litigation (Rubin 1977). But this view of the law assumes mistakenly that a case which reaches court is typical of the class of disputes to be governed by any resulting rule, and further that future cases will remain representative; that is, the rule created at time A will not change the pool of disputes that reach trial at time B (Hadfield 1992). Once those assumptions are discounted, it can be seen that, far from working the law pure, judicial decisions may perpetuate error. The higher the level at which this happens, the harder it is to remedy.

Need we worry about this? Apex courts settle disputes which ought to have been refined in lower courts, their processes are deliberative, and they are staffed by leading judges who sit as a large panel. But there is a risk of error in the choice of reasons. It is the product of phenomena known, following the work of Professor Kahneman and others, as the availability heuristic,⁵⁶ anchoring⁵⁷ and issue framing.⁵⁸ Judges at all levels of the court hierarchy may too readily perceive the instant case

⁵⁴ [2010] NZSC 135, [2011] 1 NZLR 607.

⁵⁵ [2020] NZCA 296, [2020] 3 NZLR 583.

⁵⁶ The availability heuristic is a tendency to evaluate the frequency of events by availability ie by the ease with which relevant instances, including the case to hand, come to mind. It may lead the decision-maker to err by overestimating or underestimating the frequency with which an event will recur.

⁵⁷ Anchoring is a tendency to rely too heavily on initial information about a property of an event or thing. It may lead a decision-maker to assume that future instances will share that property.

⁵⁸ Issue framing is a tendency to emphasize a subset of potentially relevant considerations, leading later decision-makers to focus on that subset to the exclusion of other considerations.

as representative of a class, or as exceptional. Supreme Court processes seldom equip judges to know the characteristics of the class to be governed by a given rule, let alone the impact of their decision on the class. There are also cases in which the facts are highly salient, meaning that they may lead the court to choose a rule which leads to the right outcome on the facts (Schauer 2006: 899; Schauer & Zeckhauser 2009).

The literature suggests that final appellate courts are not immune. Professor Schauer offered examples, drawn from the US Supreme Court, of the availability heuristic leading to unsatisfactory rules (Schauer 2006: 901). His leading example was the 1964 decision in *New York Times v Sullivan* (1964), in which the court adopted an actual malice standard for liability in defamation. An Alabama jury had used a massive damages award to punish so-called northern agitators who published an advertisement condemning public officials for resisting desegregation. Schauer argued that but for these extraordinary facts the court might not have adopted so restrictive and unique a standard. Indeed, errors of this kind may be somewhat more likely in apex courts. The fewer a court's opportunities to revisit an issue, the greater may be the risk that it will find the case at bar a suitable vehicle for rule-making.

Judicial law development ought to be efficient, by which I mean timely and reasonably free from error. For the reasons just given, efficiency in law development usually counsels restraint in appellate courts' choice of reasons, especially where their opportunities to return to the field may be few. It also invites a restrained approach to leave for second appeals, leaving law to be settled at a lower level unless there is reason to intervene. So, a second appeal court should not ordinarily grant leave on a significant point of law unless necessary to ensure lower courts behave consistently or there is reason to think the first court was wrong; that is to say, it should not take the case merely so the law may be settled by the second court itself. The second court should also take care not to restate governing law in a way which may inhibit future development by lower courts.

All of that said, reasons always invoke some rationale of wider application and a second appellate court must reason from policy if it is to develop law. Innovating to meet changing social conditions is one of the Supreme Court's objectives, to which I return below.⁵⁹ Its decisions may also be closely parsed for meaning by later courts seeking to extract

⁵⁹ That this was one of the objectives for the Supreme Court cannot be doubted. The extent to which it is permissible for a court to make law within the limits of judicial decision-making remains contentious; I do not engage with that argument, but rather contend that there is good reason to be conservative. See Watts (2001).

underlying policy reasoning; and if so, it may be better that the Supreme Court articulate any such reasons itself.

The common law manages the risk of error or over-reach through the rules of precedent. A *ratio decidendi* is a proposition of law that was necessary to the outcome of the case.⁶⁰ The *ratio* may be confined to the proposition that given facts A and B the law is X. It usually extends to any reason which the precedent court expressly or impliedly considered necessary to the outcome, and it excludes any reason given but for which the outcome would be the same (Cross & Harris 1991: 40, 56 and 72).

It is the *ratio* that binds subsequent courts, and they define it in the exercise of their duty to deliver a just outcome according to law in the case at bar. They must decide what a precedent stands for and whether, having regard to its material facts, it governs the case before them. If a precedent is unclear, a subsequent court need not spell out a *ratio* with great difficulty in order to be bound by it, for that is likely to generate the very confusion that the precedent ought to prevent (*Great Western Railway v Owners of SS Mostyn* 1928: at 73 per Viscount Dunedin; *Actavis UK v Merck & Co*,⁶¹ para 83). The subsequent court may decide that part of a precedent court's reasons did not bear the court's authority but was merely a proposition assumed correct to decide the case (*Baker v R* 1975: at 788 per Lord Diplock). More controversially, the precedent court's reasons need not be conclusive. A subsequent court may hold that the reasons were objectively non-dispositive. It may also find they were expressed more broadly than necessary; this because rarely can a precedent court examine the application of its reasons in all other cases.⁶² In the last resort a lower court may follow a binding precedent while offering its opinion that the precedent is wrong, so inviting an appeal to the precedent court (*Broome v Cassell* 1972: 874-875).

Underpinning all of these rules can be discerned a policy of the common law, to limit the binding force of judicial precedent by presuming that the precedent court attended less closely to matters not strictly necessary to the outcome.⁶³ It is appropriate to use the language of presumption. A subsequent court inquires into what the precedent court intended, seldom

⁶⁰ Garner (ed) 2019.

⁶¹ [2008] EWCA Civ 444, [2009] 1 WLR 1186.

⁶² Cross & Harris described this as a residual power to restrict the scope of a rule stated by a precedent court (1991: 74). See too MacCormick (1987: 180), Mason (1988), Gageler & Lim (2014: 546). The rationale was well expressed in *Cohens v Virginia* (1821) at 399.

⁶³ Sentencing guideline decisions are a notable and sometimes controversial exception; an attempt is made to gather a representative sample of cases which the Supreme Court uses to set guidelines of general—but not binding—application.

finding it necessary to go beyond expressed reasons. But where necessary the subsequent court may establish the *ratio* by deciding whether the reasons were necessary to the outcome. In this way the common law achieves three objectives: it distributes judicial power, ensuring that facts may continue to make law in trial courts; it manages the authority of the past over the present; and it recognizes limits to courts' institutional competence.

Of course, a subsequent court must act in what Jeremy Waldron described as a responsible spirit of deference; it must examine the precedent closely and employ it as a basis for decision to the extent applicable (Waldron 2012: 26).⁶⁴ From time to time a court which declines to follow a precedent may earn a rebuke from a higher court, as Lord Denning famously did in *Broome v Cassell* (1972).⁶⁵ But the subsequent court usually refines the precedent, recognizing its policy while narrowing or enlarging its scope. It is through engagement with its reasoning and scope, by commentators as well as judges, that a judicial opinion may find eventual acceptance as a rule of law. Viewed in this way, law development is not a series of authoritative pronouncements but a process which is essentially collaborative in nature.

The rules outlined here apply to horizontal precedent as well as vertical, hence 'precedent' and 'subsequent' court. But they are especially important in a hierarchy in which an appellate court has only occasional opportunities to revisit its decisions, and in which the possibility of error in law development is taken seriously. In such a world, restraint and a conservative approach to precedent—meaning a strict approach to ascertaining the *ratio*—can facilitate timely law development and also mitigate the occasional misstep. The responsibility for doing so is shared by all courts in the hierarchy.

Judicial dialogue about law development and stewardship of precedent

There has been little judicial dialogue, whether formal (meaning through judgments) or otherwise, about the approach that New Zealand courts ought to take to law development following the Supreme Court's establishment. Structural constraints on access to the Supreme Court have received little recognition. The Supreme Court is plainly conscious

⁶⁴ See also Lewis (2021) arguing that a court which is not obliged to follow a precedent may still have good reason to do so.

⁶⁵ In that case the Court of Appeal had flatly declined to follow a judgment of the House of Lords, *Rookes v Barnard* (1962) which it found unworkable.

of a need for caution. It evidently recognizes that to take on a case can be to assume ownership of the field. It has granted leave to settle a point of law only to decide, after full argument, that the point does not require decision on the facts.⁶⁶ It has also declined leave on the ground that it wants to see how cases develop in lower courts before entering the field.

With respect to precedent, the Supreme Court has made a commitment to *stare decisis* (the doctrine that earlier decisions must be followed), holding that it will ordinarily abide by its own decisions and those of the Privy Council before it (*Couch v Attorney-General (No 2)* (2010)).⁶⁷ It sometimes follows earlier decisions of the Court of Appeal. It has not asserted that its *dicta* are binding.⁶⁸ But commentators have pointed to cases in which it decided issues that did not strictly arise.⁶⁹ And its practice of not pinpointing a specific question when granting leave can make it harder to identify what the decision stands for.

For its part, the Court of Appeal has held that it need not follow a superior court's decision on a point of law that was essential to the outcome where the earlier court merely assumed the law was correct.⁷⁰ However, the point is rarely if ever taken in practice.

There is a cultural dimension to precedent which merits examination. Sir Anthony Mason, the former Chief Justice of Australia, drew attention to it when he suggested that Australian courts sometimes were too deferential, treating precedent as an 'attitude of mind' rather than a judicial policy, with the result that from time to time courts abdicated their function by applying non-binding decisions and *dicta*.⁷¹ By way of contrast, some English judges disapproved openly of the UK Supreme Court's occasional early practice of delivering multiple concurring judgments.⁷²

⁶⁶ See, for example, *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99, [2017] 1 NZLR 935 at para 28; and *Tauranga Law v Appleton* [2015] NZSC 3, [2015] 1 NZLR 814 at para 4.

⁶⁷ Lower courts continue to be bound by Privy Council decisions.

⁶⁸ Lord Halsbury's famous statement in *Quinn v Leatham* (1901) that every judgment 'must be read as applicable to the particular facts proved' and as 'only an authority for what it actually decides' was approved in *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at para 127, but in a minority judgment, and the precedent under discussion (*Simpson v Attorney-General (Baigent's Case)* (1994)) was a Court of Appeal decision predating the Supreme Court.

⁶⁹ Evans & Fern (2015: 57); Farmer (2015: 61) discussing *Gibbons Holdings v Wholesale Distributors* (2008) and *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444; and Watts (2021).

⁷⁰ *Combined Beneficiaries Union v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56 at para 49; and *Baker v R* (1975) at 788.

⁷¹ Mason (1988: 106).

⁷² *Birmingham City Council v Doherty* [2008] UKHL 57, [2009] AC 367; and *Grundy v British Airways plc* [2008] EWCA Civ 875, [2008] IRLR 815.

Courts seldom find it necessary to subject precedents to critical analysis with a view to distinguishing them. The *ratios* are usually narrow and uncontroversial. Nor does a busy intermediate court go in search of opportunities to distinguish precedent.⁷³ So evidence of absence is not evidence of deference. But there are examples of deference or caution which was arguably unnecessary or even unhelpful.

The Supreme Court's 2010 decision in *Vector Gas v Bay of Plenty Energy*⁷⁴ supplies the clearest illustration. The Supreme Court was unanimous in the result, which could have been reached without determining whether prior negotiations are admissible to interpret a contract. It chose to address that subject, but the judges wrote separately and they did not resolve the tension between expressed and intended meaning that is inherent in Lord Hoffman's well-known *Investors Compensation* principles.⁷⁵ It made sense not to distinguish *Vector* on the ground that what the Supreme Court had said about negotiations was *obiter*; the Supreme Court had spoken with care and presumably the judges would take the same views if presented with a case that did turn on that issue. But a lower court could not have been faulted for finding that the decision contained no binding *ratio*. None did so expressly. Rather, a variety of approaches emerged, most seeking to apply *Vector*.⁷⁶ Some chose to follow one of the five judgments, others attempted a synthesis.⁷⁷ A few ignored it. A strict approach to precedent would have led courts to *Boat Park v Hutchinson*, a 1999 case in which the Court of Appeal followed *Investors Compensation* (1997), so adopting the principle that negotiations are inadmissible. In hindsight, attempts to follow *Vector* likely did the law a disservice by delaying a remedy which only the Supreme Court could administer.⁷⁸ Eventually the Court of Appeal offered a restatement in *Bathurst*, holding that intention is not ascertained by looking at prior

⁷³ *Blackwell v Edmonds Judd* [2016] NZSC 40, [2016] 1 NZLR 1001 at para 54, where the Supreme Court held that the Court of Appeal ought to have distinguished an earlier Supreme Court judgment.

⁷⁴ *Vector Gas* note 69 above.

⁷⁵ The issues were surveyed by Dawson (2015: 233).

⁷⁶ The cases and commentary were gathered by Palmer & Geddis (2012: 303). The Supreme Court has since acknowledged that *Vector* left the law unsettled on this point: *Bathurst Resources Ltd v L & M Coal Holdings Ltd* note 51 above at para 74.

⁷⁷ As I did, writing for the Court of Appeal in *Malthouse Ltd v Rangatira Ltd* (2018).

⁷⁸ The Supreme Court did clarify the law of contractual interpretation in *Firm PI v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432, but that case did not concern the admissibility of pre-contractual negotiations, which was accordingly left for another day: Summary Proceedings Act 1957, section 144.

negotiations.⁷⁹ That led to the Supreme Court finally settling the law in 2020, a decade on from *Vector*, in favour of the intended meaning approach.

R v Te Huia (2006) was a hard case in which cautious use of precedent led the Court of Appeal to deliver an outcome which, as the Court of Appeal acknowledged with regret, was contrary to fundamental fairness.⁸⁰ The Court of Appeal was faced with a Supreme Court decision dealing with retrospective penalties and found itself unable to depart from an interpretation of a general prohibition on retrospectivity that had formed part of the Supreme Court's chain of reasoning.⁸¹ The prohibition was statutory and the Supreme Court had given the language a definitive meaning, hence the apparently insuperable obstacle. But as the Court of Appeal recognized, the Supreme Court had addressed a specific context (a prisoner's statutory release date) and could not have turned its mind to the quite different circumstances of the case at bar, which concerned eligibility for minimum periods of imprisonment.⁸² It may not be permissible for a lower court to find that a higher one was *per incuriam*,⁸³ but the higher court's failure to cite essential sources may be evidence that it was deciding a narrow issue and did not intend that its apparently general reasoning should extend to the circumstances of the case at bar.

In both examples a Supreme Court precedent caused difficulty for lower courts but their responses were not attributable to anything the Supreme Court had said about scope and force of precedent. Rather, courts chose to defer, with results which a more conservative application of the rules of precedent might have mitigated or avoided. They evidently did not think such an approach was open to them, which suggests shared understandings about precedent should be revisited to ensure they are fit for purpose in New Zealand's court system.

⁷⁹ *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2020] NZCA 113, [2020] NZCCLR 26 at paras 41 and 46.

⁸⁰ Although it is one of few cases dealing with the Court of Appeal's approach to Supreme Court precedent, the decision is unreported.

⁸¹ *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 (SC).

⁸² The Supreme Court had not referred to authority, including the Court of Appeal's own decision in *Chadderton v R* (2004) which, like *Te Huia* (2006), concerned eligibility for minimum periods of imprisonment. As the Court of Appeal also recognized, the Supreme Court had approached retrospectivity differently in yet another setting, eligibility for preventive detention: *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145.

⁸³ The rule states that a court's decision is not binding if given *per incuriam*: *Young v Bristol Aeroplane Co Ltd* (1944). In English law it applies only to decisions of the same court, for reasons given in *Miliangos v Frank (Textiles) Ltd* (1976) at 477-478 per Lord Simon.

[F] REFORM OPTIONS

As indicated earlier, reform proposals are beyond the scope of this paper. I sketch three broad options, not as proposals but to organize some observations. They should not be taken to express a preference, except for clarity of policy.

I preface them by summarizing the Supreme Court's purposes, as derived from the legislation and legislative history. They are: to make law, and to oversee its development and application by other courts; to innovate, modifying the law to meet changing social conditions in New Zealand; to decide significant issues regarding the Treaty of Waitangi; to remedy substantial miscarriages of justice; to decide the most important cases; and to oversee the operation of the court system.

The first of these is implicit in the leave criteria and the Supreme Court's position at the apex of the court system. The second was the principal justification, after sovereignty, for establishing a domestic court. The legislation expresses the third as a subset of the 'general or public importance' limb, but it is constitutional in nature and is lent emphasis by section 66(1) of the Senior Courts Act 2016, which continued the Supreme Court to hear 'important legal matters, including matters relating to the Treaty of Waitangi'. The fourth and fifth reflect the need to maintain public confidence in the court system. The final three recognize that pressure of business in trial and intermediate courts creates a rare risk of errors that are sufficiently important to require remedy on further appeal to a court whose deliberative processes are protected by a leave mechanism. Higher quality adjudication is sometimes included in a list such as this, but it is a second-order consideration; the Supreme Court sits as five and is permitted more deliberative processes so it may better deliver on its principal objectives.

Altering structures and pathways to increase the Supreme Court's caseload

The first option would involve changing appellate structures and pathways to increase the Supreme Court's substantive output to meet the original projections. It would allow the Supreme Court to reach more issues of substance and with greater frequency. Having regard to the output of the Court of Appeal, this likely would mean revisiting the allocation of first appellate court work between the High Court and Court of Appeal, assigning more of it to divisions of three judges and perhaps reducing the number of pretrial appeals to offset the increased workload. As noted

above, it is debateable whether many pretrial appeals are a good use of the Court of Appeal's time. That would result in more decisions of the District Court and specialist tribunals reaching the Supreme Court as second, rather than third, appeals and reduce the time such appeals sometimes take to reach finality.

Conservative application of leave criteria

A more traditional approach to leave might result in the Supreme Court delivering fewer substantive judgments than it does now, but given New Zealand's small population the Supreme Court should still be able to deliver substantially on its objectives regarding law development and innovation. The two books published to mark its first decade illustrate that the Supreme Court had already covered a good deal of ground.⁸⁴ Lacking federal or specific constitutional jurisdiction or the need to supervise multiple appeal pathways, it can focus on the general law.⁸⁵ In some areas—Bill of Rights methodology and relationship property, for example—it has developed the law extensively. Had it been left to the Court of Appeal, which cannot control its workload, some of these opportunities might not have been seized. The original estimate of 40-55 cases annually was evidently not based on any qualitative analysis of demand for second appeals. The risk that the Supreme Court would not face a full docket was recognized and deemed an acceptable cost of a two-tier appellate system.

A middle ground

Opportunities exist to enlarge appellate pathways to increase the amount of quality work available to the Supreme Court without modifying existing structures:

- a. There remain a few fields in which legislation provides that the Court of Appeal is final, though they are unlikely to generate many third appeals.⁸⁶
- b. There may be other, socially important fields in which a first appeal ought to lie to the Court of Appeal, or in which tightly controlled administrative processes might facilitate transfer of significant trials to the High Court, or appeals to the Court of Appeal.

⁸⁴ Russell & Barber (2015); and Stockley & Littlewood (2015).

⁸⁵ This point was made by the Advisory Group: Office of the Attorney-General (2000: 45).

⁸⁶ Accident compensation appeals are perhaps the leading example: see Accident Compensation Act, section 163(4).

- c. Second appeals to the Court of Appeal might receive some encouragement. In *McAllister v R*⁸⁷ the Court of Appeal stated that it would take the same approach to leave as the Supreme Court, but in practice it adheres to the traditional test (at para 32).⁸⁸ In 2020 the Court of Appeal granted 15% of second appeal leave applications.
- d. The Court of Appeal denies the Supreme Court jurisdiction by refusing leave to bring a second or interlocutory appeal to the Court of Appeal; the exercise of that power might be reviewed. In *McAllister* the Court of Appeal also said that to open the jurisdictional pathway to the Supreme Court it would sometimes elect to grant leave but dismiss an appeal.⁸⁹ It is unclear to what extent that practice is followed.

[G] CONCLUSION

Policy choices about courts' roles determine the nature and size of demand for their services, and caseload in turn influences their behaviour over time. New Zealand's recent history offers a case study in why that is so and how it can shape law in an appellate hierarchy that rests on common law methodology. Existing pathways deliver fewer second appeal-worthy cases than was anticipated in 2003. A review is timely. Independently of that, judicial policy toward law development in New Zealand's courts hierarchy merits attention. This paper is an invitation to dialogue on these questions.

Justice Forrie Miller (LLM, Toronto: BA/LLB (Hons), Otago) was appointed to the High Court of New Zealand in 2004, and to the Court of Appeal in 2013. A profile is available on the Courts of New Zealand [website](#).

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⁸⁷ *McAllister v R* note 14 above.

⁸⁸ The difference of approach is perhaps most clearly illustrated by *Downer Construction v Silverfield Developments* [2007] NZCA 355, [2008] 2 NZLR 591 at paras 36-37.

⁸⁹ *McAllister v R* note 14 above at para 39.

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