

DEVELOPMENTS IN NEW ZEALAND JURISPRUDENCE

BY PROFESSOR MARGARET WILSON*

The Supreme Court Act came into force 1 January 2004. It would be fair to describe the reactions to the birth of the Supreme Court as mixed. While many welcomed the fact New Zealand finally had its own final court of appeal and an opportunity to develop its own jurisprudence, there was criticism that the new Supreme Court would be 'activist' and challenge the sovereignty of Parliament to make the law. There was also concern that there would be insufficient work for the new court and that the quality of judicial decision-making would suffer without the reference to the Privy Council. While it is too early to assess the contribution of the Supreme Court to the development of New Zealand jurisprudence, it is useful to review whether some of the early criticisms and fears have been realised to date.

Te Piringa – Faculty of School is developing a database to research the work of the Supreme Court in terms of the number, nature and type of appeals to the Supreme Court. A longer-term project will review and assess the decisions of the Supreme Court in terms of contribution to the development of a distinctive New Zealand jurisprudence. One of the arguments for the need for a final court of appeal was that many cases were statute barred from the Privy Council, such as employment cases, and most criminal and family law cases. There was also a concern that the Privy Council did not fully appreciate the legal and policy context within which legislation was enacted in New Zealand and therefore had difficulty providing decisions with sufficient precedent value to guide legal advice and behaviour.

In terms of the Supreme Court having enough work, there appears to be a pattern emerging in the number of applications received and the number of cases where leave is granted and proceed to a substantive hearing. All appeals to the Supreme Court are only heard if leave is granted by the Court. Between 2004 and 2010 the Supreme Court heard 604 applications for leave to appeal. Of these applications 236 (39 per cent) were successful and the matter proceeded to a substantive hearing, though in a few cases the case did not proceed to a full hearing. The applications have steadily increased from 23 in 2004 to 152 in 2010. On the raw figures it appears the Supreme Court is receiving plenty of work. The Supreme Court Act s 16 requires that the Court must give reasons for refusing to give leave to appeal to it and that the "reasons may be stated briefly, and may be stated in general terms only" (s 16 (2)). Section 13 sets out the criteria for leave to appeal. The general rule is stated in s 13(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."

This general rule is qualified by the specific criteria in s 13(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

* Professor of Law and Public Policy, Te Piringa – Faculty of Law, The University of Waikato.

- (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.

Section 13(3) states also that a significant issue relating to the Treaty of Waitangi is a matter of general or public importance.

In a review of the applications of leave during the Supreme Court's first two years, Andrew Beck concludes "the Court's attitude to the precise criteria has not quite jelled", and that "it is still difficult to predict the outcome of applications".¹ It may still be too early to identify any pattern in the reason for declining leave. A review of the cases would suggest that especially in criminal cases the absence of a miscarriage of justice (s 13 (2) (b)) is a principle ground for the decline in the application. It is also apparent that in most cases the Court gives extensive reasons for declining leave. In civil cases, however, the Supreme Court is more concerned with whether the case requires an issue of law that requires clarification or that the matter was of general or public importance.

While Andrew Beck also argues it would be more useful if the Supreme Court issued a written statement of the reason for declining the application, the Act only requires reasons to be stated briefly and in general terms. This provision was included in the Act to ensure the Supreme Court was not overburdened with written decisions when declining applications once the number of cases seeking leave to appeal increased in number. The challenge to the Court of Appeal issuing *ex parte* decisions² was considered when enacting the legislation and the policy compromise was to require written reasons but those reasons to be brief. A review of the Court's decision on applications for leave in criminal cases reveals the Court does give reasons and appears to strike a good balance behind giving a full judgment and explaining why leave was declined in that case.

An analysis of the type of cases seeking leave from the Supreme Court reveals the steady increase in the number of criminal cases. Although cases often involve more than one point of law, it does appear that criminal applications currently dominate the work of the Court. In 2004 there were nine applications involving criminal matters. This number increased to 29 in 2005, 34 in 2006, 36 in 2007, 46 in 2008, 54 in 2009, and 63 in 2010. The number of successful applications has also increased with 26 per cent successful applications in 2008 increasing to 35 per cent in 2010. An analysis of the criminal decisions in 2011 reveals that of the 21 successful applications for leave to appeal only five (23.8 per cent) resulted in the appeal being upheld, with one of those cases being an appeal by the Crown. If the total number of applications for leave in 2010 is considered, that is 63, then only in 7.6 per cent of the cases is the appeal upheld. It is apparent then that even if the initial test of being granted leave to appeal is successful, the chance of a successful appeal is still under 25 per cent.

One other matter of interest is that it appeared in three of the cases the applicant for leave appeared in person. In 2009 six applicants appeared in person, with an *amicus curie* appointed in a case where the applicant's mental state was uncertain. A question must be asked whether in the court of final appeal it is appropriate for unrepresented litigants. While the principle of access to justice is fundamental to the rule of law, it is also essential to recognise that justice needs competent representation, especially at the final court of appeal. This is an area that deserves further

1 Andrew Beck "Litigation – The Court of Final Appeal" [2006] NZLJ 17 at 20.

2 *R v Taito* [2002] 3 NZLR 577.

study to identify whether there is a trend to applicants representing themselves in person, the reasons for this trend and the consequences.

Although criminal cases have dominated the applications for leave over the past three years, it is interesting to analyse the other areas of the law that have come before the Supreme Court. When the Privy Council was the final court of appeal, the majority of cases dealt with commercial matters, including contract, taxation, insolvency, intellectual property, insurance, company and property cases. These matters continue to apply for leave to appeal to the Supreme Court. In 2008 commercial matters comprised 21.6 per cent of the applications; in 2009 22.8 per cent; and in 2010 30.9 per cent of all the applications for leave to appeal. Of these applications in 2008 60.8 per cent were granted leave; in 2009 59.2 per cent were successful; and in 2010 55.3 per cent were successfully granted leave to appeal. The success rate compared with criminal matters is considerably greater at this stage in the process. In terms of successful appeals the chances appear to be greater for commercial cases than criminal cases. In 2008 two appeals were successful while seven were allowed; in 2009 five appeals were allowed and five dismissed; while in 2010 six appeals were allowed seven appeals were dismissed.

Although criminal and commercial cases dominate the matters before the Supreme Court, a review of the cases reveals administrative law, family law, employment law, immigration and tort law issues have all been before the Court. Also Bill of Rights issues are raised in a variety of cases. The Supreme Court is attracting a variety of appeals on matters that previously would not have heard by the Privy Council. Whether the Supreme Court is developing through its judgments a distinctive New Zealand jurisprudence requires further in depth analysis. It takes time for final courts of appeal to develop their own distinctive character. The Supreme Court in its short life has started to imprint its authority on the law with precedent making decisions, including the recent decisions in *Haronga v Waitangi Tribunal*³ and *Penny & Hooper v Commissioner of Inland Revenue*.⁴

3 *Haronga v Waitangi Tribunal* [2011] NZSC 53.

4 *Penny & Hooper v Commissioner of Inland Revenue* [2011] NZSC 95.