

A SHORT HISTORY OF APPEAL

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[1] Appeal rights are, at least today, exclusively the product of statute.¹ This address looks at the origins of appeal rights (and the battles fought to enlarge them — some of which continue today),² the institutions of appeal (focusing on New Zealand) and some current controversies playing out in the appellate courts of New Zealand. Some of them directly connect to historic limitations in appeals. In particular the more limited rights of appeal that exist from discretionary (as opposed to wholly evaluative) decisions at first instance.

Origins of appeal

[2] The common law had review: an arcane series of partly adjectival, partly statutory remedies for the correction of error in the common law courts, together with the prerogative writs for lesser entities than the King's Courts. Equity, on the other hand, evolved a true system of appeal: it had neither an obsession with the record nor juries to bother with, and review in Chancery was a rehearing on the merits — “an appeal in the wider sense”.³

* This paper was originally delivered at the Australia and New Zealand Law and History Society Conference in Christchurch in December 2017. It has now been updated to include discussion of a subsequent decision of the Court of Appeal on the scope of bail appeals: *Taipeti v R* [2018] NZCA 56. I express appreciation to my clerk, Sean Brennan, for his research assistance.

¹ *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA) at 441.

² See for example the discussion of bail appeals later in this paper.

³ John Baker *Introduction to English Legal History* (Oxford, Oxford University Press, 2007) at 141.

Common law “appeal” (civil)

[3] A moment ago I described the common law process of civil appeal before the organising reform statutes of the 1870s as “arcane”. The Judicature Commissioners in 1869 described the systems of appeal as “various and discordant”.⁴

[4] There were three primary mechanisms. The first was to apply to suspend or arrest judgment. The unsuccessful party might apply to the Court in banc (that is, to all four judges of the particular court concerned — it being said once that there were “twelve judges of England”).⁵ As Dr Manchester notes:⁶

He did this by applying to the Court in banc for a rule to be served on the other side to show cause why an order should not be made by the Court in his favour. If the Court granted the rule, the point was argued before the Court; if the Court accepted the argument, the rule was made absolute; if the Court rejected the argument, the rule was discharged. An arrest of judgment arose where some intrinsic cause which appeared upon the face of the record on which it rendered it erroneous and reversible.

[5] The second mechanism was to move for a new trial. That procedure grew particularly in the 18th century, although Theodore Plucknett cites examples from the preceding century.⁷ The third mechanism was the writ of error. This too concentrated upon a search for manifest error on the face of the record. But unlike motion for arrest or new trial it was at least directed to a superior court. In time that court became the Court of Exchequer Chamber, and from that court a further writ of error lay to the House of Lords.

[6] This tripartite appellate structure in common law produced inconvenience and great delay. The judges had little time after each term to hear appeals and errors. The constitution of the court kept varying by appeal. Whenever there was a difference of opinion the majority might yet be overruled by the minority.⁸

⁴ Judicature Commission: First Report No 4130 (1869) at 24.

⁵ Although in the reign of William IV a fifth judge was added to each. W J V Windeyer *Lectures on Legal History* (2nd ed, Law Book Co, Sydney, 1957) at 122.

⁶ A H Manchester *Modern Legal History* (Butterworths, London, 1980) at 172.

⁷ Theodore Plucknett *Concise History of the Common Law* (5th ed, Butterworths, London, 1956) at 135.

⁸ Manchester, above n 6, at 173.

Appeal in Equity

[7] The appellate approach in Equity was, unsurprisingly, less arcane and more robust. The unsuccessful party was entitled to petition the first-instance judge for re-hearing or appeal to have the cause reheard by the Lord Chancellor. Alternately, a right of appeal lay direct to the House of Lords. But in 1851 all this was altered. A Court of Appeal in Chancery was constituted. It comprised two Lords Justice and the Lord Chancellor. From that, further appellate jurisdiction lay to the House of Lords. In practice, the Court of Appeal in Chancery was split. The Lord Chancellor sat in one, but he did not always have a Chancery background and as Dr Manchester puts it delicately, “did not always enjoy the confidence of the profession”.⁹ In the other court sat the two Lords Justices.

[8] The Court of Appeal in Chancery conducted a rehearing of first instance orders, and had all the powers possessed by the first-instance court. It is little wonder therefore that procedure is said to be the foundation of the modern general right of appeal.

Nineteenth century reform

[9] The mid-19th century saw intensive attempts to “rationalise a hotchpotch of conflicting jurisdictions” through the creation of the Supreme Court of Judicature. The Judicature Commissioners, led by Lord Cairns, reported in a series of five reports beginning in 1869. These resulted of course in the Judicature Acts of 1873 and 1875. The Court of Appeal of England and Wales was progeny of the 1873 Act.

[10] This new Court of Appeal was made a superior court of record and had transferred to it the appellate jurisdiction of the Lord Chancellor and Court of Appeal and Chancery, and of the Court of Exchequer Chamber. Divorce followed in 1881, and prize appeals in 1891. The Lord Chancellor was the President; the Lord Chief Justice was an ex officio member and the permanent members were the Lords Justices of Appeal. Appeals from county and other inferior courts went to the Divisional Court, a throwback to the common law appeal in banc.

⁹ At 174.

[11] More interesting perhaps was the nature of the appellate powers of the Court of Appeal. The Equity approach was adopted: it had the powers of the High Court, appeal was to be by way of “rehearing” and the Court might “draw inferences of fact and to give any judgment and to make any order which ought to have been made”.¹⁰ The “rehearing” took place upon the written evidence below (with, in rare cases, further evidence admitted) together with the submissions of counsel. But where a civil appeal was against a jury verdict, appeal was more constrained and the common-law notions of review rather than general appeal re-emerge: the primary grounds available were misdirection or the absence of evidence to support the verdict (or that the verdict was contrary to the evidence).¹¹

[12] Professor Polden gives some idea of the tensions in this cobbled-together cross-divisional Court of Appeal:¹²

Cotton had to be allowed to confine himself to Chancery cases, Bramwell occasionally vented his robust dislike for Equity and Lush was palpably unhappy outside the common law.

The House of Lords’ appellate role almost abolished

[13] Only in 1844, in Daniel O’Connell’s failed appeal, did the House of Lords determine that Lords “unlearned in the law” should no longer vote upon judicial matters. The House concluded that “if noble Lords unlearned in the law should interfere to decide such questions by their votes instead of leaving them to the decision of the law lords ... the authority of this House as a court of justice would be greatly impaired”.¹³

[14] The Judicature Commissioners proposed retention of the House of Lords in its appellate jurisdiction. Lord Hatherley’s Appellate Jurisdiction Bill 1870 made exactly that provision. But Gladstone’s Whigs took a different slant. Lord Selborne’s Judicature Bill 1873 would have ended appeals to the House of Lords. The Court of

¹⁰ Rules of the Supreme Court 1883, r 4.

¹¹ J R Spencer *Jackson’s Machinery of Justice* (4th ed, Cambridge University Press, Cambridge, 1989) at 91–92.

¹² William Cornish and others *The Oxford History of the Laws of England* (Oxford University Press, Oxford, 2010) vol XI at 803.

¹³ *O’Connell’s Case* (1844) 17 LQR 369.

Appeal and the High Court together constituted the Supreme Court of Judicature. That measure garnered little opposition — a point contrasting interestingly with the debate in this country over the proposed abolition of the Privy Council (and the almost-prevailing suggestion that there be no replacement therefor). Selborne's Bill received Royal Assent in August 1873 and was to come into force a year later in November 1874. But Disraeli and the Conservatives won the election in February 1874. The new Lord Chancellor, Cairns, had come around to Lord Selborne's approach, but found other Cabinet members disagreed. In July 1874 Disraeli advised the Commons that the reform would not be proceeded with. A Bill postponing the coming into force of the 1873 Act was passed and when Lord Cairns introduced *his* Appellate Jurisdiction Bill 1876, now to contrary effect, there was this time little opposition to that. So the House of Lords was reinstated as the final appellate court, a position it maintained for another 150 years until it passed from appellate life in 2009.

[15] Thus the Supreme Court of Judicature — the Court of Appeal and High Court together — ultimately was not supreme at all.

Criminal appeals

[16] Until 1907, and the introduction in England of the Court of Criminal Appeal, there was no true right of appeal from criminal conviction. The unhappy defendant might seek a writ of error, seek reservation of difficult questions of law (ultimately to the Court for Crown Cases Reserved), move for a new trial, or seek reprieve or pardon (which still left the stigma of conviction).

[17] Writ of error lay from inferior criminal jurisdictions to the Kings Bench, but was granted only upon the fiat of the Attorney-General and was based upon evident error in the judgment or other record. It was more readily obtained in misdemeanour than felony, the latter being allowed only *ex gratia*. But the form of the record often meant that a prisoner had few appellate options. Evidential rulings or jury misdirection would not appear upon the record. The writ of error thus was little used.

[18] Motions for new trial developed in the 17th century in Kings Bench, and were broader in scope than the writ of error capable of including evidence rulings or

misdirections. It was not a true appeal, however, because the conviction could not be quashed. It appears to have been used only in the case of misdemeanours, apart from a single exception identified by the antiquarians.¹⁴

[19] The injustice of the criminal appeal system in the 19th century was a scandal. It is measured in countless lives foreshortened as a consequence of indifference and indecision. The reform movement began in earnest in the 1830s: the *Legal Observer* advocated a Court of Criminal Appeal in 1836. The Criminal Law Commissioners stated that the law was “very defective in 1845”.¹⁵ A Bill giving appeal rights on questions both of law and fact was introduced in 1848. But there was profound disagreement as to whether appeals of fact should be permitted — the judges all being opposed — so there were effectively no appeals at all.

[20] One judge who did strongly support liberalisation of criminal appeals was Sir Fitzroy Kelly, who was Lord Chief Baron of the Exchequer from 1866–1880.¹⁶ Kelly pressed his views for two decades, in the face of trenchant opposition by judges such as Barons Parke and Bramwell, based on the need for certainty and “speedy termination” in criminal cases.¹⁷ Concern was also expressed for the integrity of the jury trial and the desirability of maintaining capital punishment (which appeal rights might imperil).¹⁸ But, as Kelly put it, “[i]f it were right that a man should have this power of appealing before a Court of Justice could adjudge him to pay a sum of money, what pretence was there for saying he ought not to have it before he was condemned to death?”¹⁹

¹⁴ A K R Kiralfy *Potter’s Historical Introduction to English Law* (4th ed, Sweet & Maxwell, London, 1958) at 126.

¹⁵ Manchester, above n 6, at 183–184.

¹⁶ Kelly was known as “Apple Pip Kelly”, a nickname earned in a failed defence in a poisoning case where he contended the victim had died from consuming too many apple pips (they contain prussic acid). The case remains famous because Kelly’s client was the first person to be arrested as a result of the use of a telegraph. He was spotted boarding a train and the police at Paddington were contacted by that means: see Carol Baxter *The Peculiar Case of the Electric Constable* (Oneworld, London, 2013).

¹⁷ Manchester, above n 6, at 185.

¹⁸ Sir Leon Radzinowicz and Roger Hood *A History of English Criminal Law* (Sweet & Maxwell, London, 1986) vol 5 at 760.

¹⁹ (30 May 1844) 75 GBPD HC 12 quoted in Radzinowicz and Hood above n 18, at 761.

[21] The debate raged for half a century. In 1892 the judges themselves proposed for a limited right of criminal appeal — in respect of sentencing only.²⁰ But a series of miscarriages of justice broke the drought. Two are very well known. The first was the case of George Edalji, the Parsee solicitor convicted of injuring animals. His case was taken up by Sir Arthur Conan Doyle, whose prestige and persistence resulted in exoneration by a Home Office Committee of Inquiry (no appeal right being available). The case was the subject of Julian Barnes' fine 2005 novel *Arthur & George*.²¹

[22] The second was the case of Mrs Florence Maybrick, convicted of the murder of her husband and sentenced to death in 1889, although the likelihood is that he had self-administered the paltry traces of arsenic — insufficient in itself to be fatal — found in his body. Unknown to each other, the Maybricks were *each* buying arsenic: she for her complexion and he as an aphrodisiac (he had a complicated personal life). Despite an enormous campaign of support, Mrs Maybrick was never exonerated, although her death sentence was commuted.

[23] The breakthrough case, however was the now largely forgotten case of Adolph Beck. He was convicted of swindling a number of women. Essential to his conviction was similar-fact evidence that he was in fact a Mr John Smith who committed similar offences by the same modus operandi some 18 years earlier. That is, that Beck and Smith were one and the same person. Beck was convicted and sentenced to seven years' imprisonment. In fact Beck was not Smith at all. That fact became apparent when a petition for a pardon was advanced. In the course of dealing with it, the Home Office obtained the medical records of Smith (who was Jewish). These showed Smith was circumcised. Beck was not. But the Home Office did not see fit to release this to Beck's solicitor. Instead it asked the trial Judge for his opinion. As it happened the trial Judge had been Smith's prosecutor some 20 years before. The Judge acknowledged that Smith and Beck could not be the same man, but considered there was still enough evidence without the similar fact material for Beck to be properly convicted. There matters rested. In 1904, after Beck had been released, further offences were committed, again using the same modus operandi. The victims again identified poor Beck. He was convicted, but Grantham J was concerned a

²⁰ Radzinowicz and Hood, above n 18, at 764.

²¹ Julian Barnes *Arthur & George* (Jonathan Cape, London, 2005).

miscarriage of justice may have occurred. He postponed sentencing. While Beck was on remand in custody a fourth round of swindling occurred — and an arrest was made. The perpetrator proved to be Smith, now returned from South America. Of course Beck could not have committed these further offences because he was in custody. The witnesses in Beck’s second trial now identified Smith instead. Beck was pardoned and paid £5,000 compensation.²² A Committee of Inquiry was convened. It concluded that the errors by the Judge and Home Office required legislation for a right of appeal on questions of law. Public sentiment now did not accept such a half measure. The Home Secretary, Herbert Gladstone, was the subject of a particularly vituperative campaign and, Leon Radzinowicz and Roger Hood suggest, the resultant Court of Criminal Appeal established in 1907 was the consequence of “political necessity born of a traumatic experience”.²³

[24] The Court of Criminal Appeal was given separate existence outside the Supreme Court of Judicature, presided over by the Lord Chief Justice and manned by King’s Bench Division Judges. It became known as the “Lord Chief Justice’s Court”.²⁴ Appeals on points of fact were by leave only. Radzinowicz and Hood point out, interestingly, that it was a crusading new Home Secretary in 1910 who breathed life into the Court of Criminal Appeal, somewhat counterintuitively by himself searching out injustices. The name of this politician, as some of you may have worked out by now, was Churchill.²⁵

Institutions of appeal

[25] I focus here exclusively on New Zealand legal history.²⁶

²² Approximately £500,000 in today’s money.

²³ Radzinowicz and Hood, above n 18, at 766.

²⁴ Cornish and others, above n 12, at 806.

²⁵ At 770.

²⁶ See generally Peter Spiller *New Zealand Court of Appeal 1958–1996: A History* (Brookers, Wellington, 2002); Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001); and Sir Ivor Richardson “The Permanent Court of Appeal: Survey the 50 Years” in Rick Bigwood *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oxford, 2009) 297.

[26] The history of the establishment of the permanent Court of Appeal, 60 years ago, is reasonably well known.²⁷ I will not focus on that well traversed topic, save to outline a little-known controversy that caused the creation of the permanent Court to be delayed by a decade.

Early steps

[27] The need for peaceable determination (and peaceable appeals from peaceable determinations) occurred from the outset of the colony. New Zealand Company settlers in 1840 had to sign a covenant aboard ship agreeing to an umpire, a Mr George Evans, resolving disputes (with appeal to a committee of five citizens). This however did not meet the approval of New Zealand Colonial Secretary, Lt Shortland (progenitor of our leading legal byway in Auckland, Shortland Street). He soon objected to this arrangement as a usurpation of a Royal prerogative to establish courts. And that was that: New Zealand's first "court of appeal" strangled at birth.²⁸

[28] This produced an interregnum. The New Zealand Company's expedient was reflected in the Supreme Court Amendment Ordinance 1846. There were only two Supreme Court judges, and appeal from one to the other (or the both of them) being invidious, a "Court of Appeals" was established "until there shall be within the Colony a sufficient number of Judges to constitute a Court of Appeals". It comprised the Governor and the Executive Council (excepting the Attorney-General). Its jurisdiction was relatively unconstrained: so long as the amount in issue was £100 or more it was entitled to "affirm, alter or reverse such judgments in whole or in part or to dismiss the said appeal with costs as may be just". But reflecting common law's influence, when the appeal was from a jury verdict, appeal would lie only for error of law apparent on the record.²⁹ Appeal to the Privy Council then lay if the amount was more than £500 or where a Court of Appeals had overruled the Supreme Court.³⁰

²⁷ The Permanent Court first sat on 17 February 1958.

²⁸ Robin Cooke (ed) *Portrait of a Profession* (AH & AW Reed, Wellington, 1969) at 26.

²⁹ Supreme Court Amendment Ordinance 1846, s 3.

³⁰ Section 8.

[29] It appears the Court of Appeals convened only once before its abolition in 1862. There is no written record of its deliberations. During this period, however, there is a single Privy Council decision from New Zealand, an appeal that bypassed the Court of Appeal — a direct appeal from a Full Court of Martin CJ and Chapman J. This was *R v Clarke*, and it concerned an ultra vires grant of 4,000 acres of land by Governor Fitzroy in excess of the statutory maximum of 2,500 acres.³¹ This land lay between Waimate and Hokianga (unpromisingly rendered “Hobianger” by the Privy Council reporter). The recipient was George Clarke, a lay missionary, gunsmith and builder of the Waimate mission house. He had been appointed Chief Protector of Aborigines by Governor Fitzroy in 1840, in which role he found himself mediating uncomfortably between Māori and settler interests. Grey replaced Fitzroy as Governor, and Clarke lost his position as Chief Protector. Grey set about currying favour with settlers by challenging Clarke’s land purchases. This case was one such challenge. The Supreme Court held that the Governor possessed prerogative enabling the grant notwithstanding the terms of the Ordinance. The Attorney-General applied for leave to appeal to London direct, which was granted in July 1849. Clarke did not appear or have representation (and it would be interesting to know why). The advice of the Privy Council, delivered in May 1851, was a laconic three paragraphs beginning:³²

Their Lordships have looked carefully through the papers in this case, and they are of the opinion that the judgment cannot be supported.

[30] The history of (and problems with) the attached Court of Appeal — Supreme Court judges sitting on appeal from one another — are well known and need not be rehearsed. This form of appellate court lasted nearly a century, from 1862–1958. When the Court of Appeal Act 1862 was enacted any two or more Supreme Court judges might sit as that Court. There were then four Supreme Court judges, including Arney CJ. Consistent with English practice the powers of the Court included order for new trial, the resolution of questions of law or discretion in cases stated and appeal for error appearing on the record. In crime, provision was made for Crown cases reserved and error upon the fiat of the Attorney-General, in cases of both felony and

³¹ *R v Clarke* (1851) NZPCC 516 (PC).

³² At 520.

misdemeanour. Following the English Judicature Act a much-simplified new Court of Appeal Act was constituted in 1882.

[31] As Peter Spiller, Jeremy Finn and Richard Boast observe, the two main complaints were a lack of appellate talent in the Supreme Court, and delay.³³ Turner P is quoted as saying, presumably of the Supreme Court judges in the first part of the 20th century, that they were a “very mixed bag ... including some of limited experience and capacity and who were not up to the mark of appellate work”.³⁴ As to delay, the problems were twofold. First, the judges needed to rush back to their circuit work without a gap for the completion of appellate judgments, and the fact that the panel was now distributed across New Zealand (with drafts to be exchanged by post).

Criminal appeal reforms

[32] New Zealand had its own George Edaljis, Florence Maybricks and Adolph Becks. One, whom Jeremy Finn has written about, was James Meikle — a Southland farmer convicted of sheep stealing in 1887, successful prosecutor of the principal prosecution witness for perjury (in 1895), subsequent subject of a Commission of Inquiry (by two Supreme Court Judges which found the prosecution evidence insufficient to sustain conviction) and finally the subject of legislation declaring him innocent: the Meikle Acquittal Act in 1908.³⁵

[33] Prior to 1893, the appellate legislation (the Court of Appeal Acts 1862 and 1882) permitted appeal on points of law only and only then if the point had been reserved by the trial judge. Otherwise recourse against a perverse verdict was confined to petition to the Executive for a reprieve or a pardon. But the Criminal Code Act 1893 broadened the position significantly, permitting three forms of criminal appeal: (1) appeal by way of case stated (effectively preserving the Crown case review procedure, but making bypass of the trial judge possible); (2) motion for a new trial on the basis that the verdict was against the weight of evidence — although considering only *that* evidence, not new

³³ Spiller, Finn and Boast, above n 26, at 227.

³⁴ At 227 citing an interview with Sir Alexander Turner on 16 May 1993.

³⁵ Jeremy Finn “John James Meikle and the Problem of the Wrongly Convicted: An Enquiry into the History of Criminal Appeals in New Zealand” (2010) 41 VUWLR 519.

evidence;³⁶ and (3) a power for the Governor to refer petitions for exercise for the prerogative of mercy to the Court of Appeal (which could consider new evidence).

The Court of Appeal in *R v Styche* placed a limiting gloss on the second ground — motion for a new trial on the basis the verdict was against the weight of evidence — by emphasising firmly the need to respect the jury function and jury advantage of seeing the witnesses.³⁷ The question was whether the verdict was one no reasonable man could reach at all. The appeal in *R v Boakes* exemplifies the limits of the Criminal Code 1893 and the Crimes Act 1908.³⁸ Mr Boakes had denied paternity of a Ms Keyte’s child in the Magistrates Court. He was then indicted for perjury in the Supreme Court in relation to that denial. On the third day of the trial, during the closing addresses, Ms Keyte arranged herself in full view of the jury holding a small child. As Chapman J said in the case he stated at the Court of Appeal, “it was fair haired, as was the accused, and both had curly hair. The child had its hair brushed as nearly as possible in the same way in which the accused had his hair brushed.” In closing the Crown Solicitor referred to the child on Ms Keyte’s knee as “the child in question”, which the Judge stopped. The jury convicted. As Chapman J also said in his case stated:

I am unable to say the jury were not influenced by the act of Pattie Keyte in exhibiting to them the child in this way. I think it probable that they were so influenced.

[34] The Judge deferred sentencing and stated a case to the Court of Appeal, as to whether the facts set out were such to vitiate the verdict. Mr Boakes also moved for a new trial on the basis the verdicts were against the weight of evidence. A Court of Appeal of six convened (including Chapman J who had stated the case to it). The motion for new trial was readily disposed of: there was ample evidence of guilt if the jury believed the Crown witnesses. As to the case stated, the collective view was that the circumstances did not give rise to jurisdiction to state a case because they did

³⁶ Criminal Code Act 1893, s 416.

³⁷ *Rex v Styche* (1901) 20 NZLR 744 (CA). Emeritus Professor of History at Canterbury University, Geoff Rice, has written a fascinating paper on the case, as yet unpublished, “A Notable New Zealand Appeals Precedent: The Sensational Styche Case of 1900”. Harry Styche, a well-to-do solicitor’s clerk, was convicted of attempting to procure the murder of his wife. It is difficult to read that account without a sense of unease that the primary evidence, letters said to be authored by Styche, might not instead have been crafted by his wife (who was mentally unstable) or one of her friends.

³⁸ *R v Boakes* (1911) 31 NZLR 449 (CA).

not raise a question of law. Several of the judges expressed grave reservation about what had occurred and the effect it would have had on the jury. But the only mechanism to rectify the injustice was for Mr Boakes to apply to the Governor for a new trial under s 447 of the Crimes Act 1908.

[35] The Crimes Act 1908 gave no general appeal ground based on misdirection (in particular for omission) or new evidence — or indeed miscarriage of justice generally.³⁹ Despite the fact that England had its Court of Criminal Appeal from 1907 with such a jurisdiction, despite the Meikle Acquittal Act 1908 and despite Justice Chapman’s concerns as to the narrowness of appeals in 1911, nothing was done about it until 1945. Then, the Attorney-General Rex Mason, with bipartisan and judicial support, promoted the Criminal Appeal Bill. As the Parliamentary Debates disclose, Myers CJ had made a public statement widely reported in the press which lent his support to the Bill.⁴⁰

[36] The Criminal Appeal Act 1945 provided for a right of appeal against conviction as of right on a question of law and, with the leave of the Court of Appeal or the trial judge, against conviction “on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal”.⁴¹ Section 4(1) then provided:

The Court of Appeal on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before which the appellant was convicted shall be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

³⁹ See for example contribution of Mr Harker MP in Parliament: (1 August 1945) 268 NZPD 785.

⁴⁰ Describing the absence of a Court of Criminal Appeal as a “blot on the administration of justice in New Zealand for many years”: see (1 August 1945) 268 NZPD 787; *The Press* (New Zealand, 24 July 1945); and *The Evening Post* (New Zealand, 24 July 1945).

⁴¹ Criminal Appeal Act 1945, s 3(b).

Permanent Court?

[37] A permanent Court had been mooted as long ago as 1907 by the then Attorney-General, Dr John Findlay. It was reduced to the form of a bill but it was met with the formidable opposition of the then Solicitor-General, John Salmond. His memorandum to the Attorney-General on the topic begins:

The objections to this proposal are so formidable that I take liberty of suggesting for your consideration an alternative scheme.

Salmond proposed a system of divisions — essentially taking the nine Supreme Court Judges and creating two teams of four, the Chief Justice being in both. It was that scheme that operated until the end of 1957.

[38] Sir Ivor Richardson observes that there was a momentum for a permanent Court of Appeal in 1946, supported by the retiring Chief Justice, Myers CJ, and the Law Society, “but not by the Judges and the Bill foundered”.⁴² That does not quite tell the full story, as I will now relate. A scrapbook of correspondence and minutes compiled by the then President of the Law Society, Philip Cooke KC is now in my possession.⁴³ It tells a fascinating story.

[39] Chief Justice Myers’ advocacy for a separate Court of Appeal appeared to align the planets. Myers spoke (or seemed to speak) for the judges. The Attorney-General (H G R Mason KC) approved and prepared a Bill. And the Law Society supported the proposal (albeit some districts were not wholly convinced). But the planets soon fell out of alignment when the Law Society became suspicious that Mason had in mind himself being appointed to the Court of Appeal.⁴⁴ The Law Society Council resolved that its approval of the Bill “is given only on the condition that [the Attorney] will not be appointed”.

⁴² Richardson, above n 26, at 299.

⁴³ It appears to be left in the Court of Appeal by his son, and my predecessor, Cooke P. Philip Cooke KC was appointed a High Court Judge in 1950. He died in 1956. His grandson (and Cooke P’s son) Francis Cooke QC was appointed a High Court Judge in 2018. I am hopeful that Philip Cooke’s scrapbook will in due course form part of a judicial history archive at the Supreme Court Library.

⁴⁴ In 1907 Attorney-General Findlay had also in mind a direct appointment, this time of Francis Henry Dillon Bell KC: Richardson, above n 26, at 299. Attorney-General Herdman orchestrated his own appointment to the Supreme Court in 1918 on the retirement of Denniston J. Herdman J served until 1935. He is not accounted much of a success.

[40] Mason was 62 at the time. He had been an MP since 1926, and before that had practised with his brother in a small firm in Pukekohe. He had taken silk in 1946. But that was more a reflection of his imminent duties at the Paris Peace Conference than his past standing as a practitioner. The Law Society Council members did not think Mason an appropriate appellate appointment. Not, they later stressed, because of his character or the performance of his duties as Attorney, or because they did not hold him in the highest respect. Rather it was simply that he lacked sufficient experience at the bar to deserve such appointment.

[41] Poor decent Cooke and three others were deputed that thankless task of seeking an assurance from Mason that he would not be put forward as an appointee to the new Court of Appeal. In the end just Cooke and Mason met on 18 June 1947, Mason (who seemed to have some forewarning of trouble) demanding to know what “the nigger in the woodpile” was. Cooke sought the assurance. Mason would not give it. Indeed Mason said “this would smash the Bill”. The following morning they met again. Mason again refused to give the assurance. Cooke said the Society’s approval of the Bill was withdrawn.

[42] Mason stewed upon the matter. In August 1947 he saw Cooke and said he found the intimation so offensive “as to poison the relationship between the Society and himself”. Accordingly he would receive no further communications from the Society. That state of affairs then continued until 1949, with Mason returning correspondence he received from the Society. For instance, on 26 September 1947 the Law Society wrote to Mason conveying its continued resolution on the matter. He responded the same day, tersely noting that as the Society’s letter “does not comply with my last communication with your President I can only return your letter herewith”. Similarly, on 12 November 1947 Mason returned a letter from the Society concerning Supreme Court appointments:

As your Society understands there is only one communication from it that would have my attention.

[43] Alexander Johnstone KC, a member of the Council from Auckland, described the Attorney’s attitude as “absurd”. He appears to have intervened to obtain the Prime Minister’s ear to overcome the difficulties with the Attorney. Cooke also sought assistance from the Chief Justice, but apparently to no avail in October 1948.

[44] In December 1948 the Statutes Amendment Bill increased the number of Judges from nine to 10. At that point chatter about Mason's judicial future spilled into the press. Mason intervened to scotch these rumours, saying his constituents were not going to lose him because of that clause. He issued an "emphatic denial" that he was to be appointed to the Supreme Court.

[45] If that offered promise for the realignment of the planets for a permanent Court, a dissident note was then entered by the Judges, no longer under the minatory rule of Myers CJ. In January 1949 Fair J wrote to the Crown Solicitor for New Plymouth, Ronald Quilliam, to complain that the Law Society had not asked the Judges what their view of a permanent Court was, and that nor had Mason. Fair J's view plainly was antipathetic to the idea.

[46] Two months later, in March 1949, Mason extended an olive branch to Wilfred Leicester, saying the issue over the undertaking was "all forgiven and forgotten", and that he would now be happy to meet the Law Society. Cooke then wrote again to the districts. A mandate for change was again gained.

[47] But the Judges remained implacable and Mason's draft Bill offered them ammunition. It provided for the Chief Justice to preside in the Court of Appeal, and a Vice President to preside in his absence. The number of Supreme Court Judges would be increased from 10 to 11, but as three were to be reserved to the Court of Appeal (and do no Supreme Court work) that was two less than the Supreme Court now had.⁴⁵ The Judges felt this was no good thing: the Supreme Court judges would be overworked, and the Court of Appeal judges underworked. O'Leary CJ wrote to the Attorney in June 1949 saying that a permanent Court was unnecessary, undesirable and contrary to the best interests of the public. It seems that the Judges had been working at this theme since 1947 when a memorandum to that effect was sent to Mason signed by all Judges bar Smith J. O'Leary CJ now suggested that reducing the number of available Supreme Court Judges would be worse than the problem it was supposed to solve.

⁴⁵ Mason's Bill provided specifically the Court of Appeal Judges would not sit in the Supreme Court without their consent.

[48] The Judges' opposition caused the Law Society districts to fracture. Some of the smaller regions had been dubious, but now Otago too jibbed. One representative said the Society "should not be made a chopping block between the Attorney-General and the Judges". The Council referred the issue back to the Districts. Wellington and Taranaki supported the bill. Auckland, Canterbury Hawkes Bay and Hamilton supported a separate permanent Court, but not on the terms of the new bill. Otago, Nelson, Wanganui, Southland, Gisborne and Westland now opposed creation of a permanent Court altogether. Marlborough placed itself upon the fence and refused to budge.

[49] With that, the new reforms stalled until in 1956, under a new Chief Justice (Barrowclough CJ), the Judges changed their minds and now supported the creation of a permanent Court. With that change in stance the last real impediment to the creation of a permanent Court of Appeal ended. It was enacted in 1957 and first sat on 18 February 1958.⁴⁶

Forms, and reforms, of appeal

[50] I will touch now on some current controversies New Zealand appellate courts are engaged with.

Appeals by way of rehearing

[51] Civil appeals in the Court of Appeal are by way of "rehearing".⁴⁷ Section 221 of the Criminal Procedure Act 2011 does not use the expression, but may be taken to have that effect.⁴⁸ Section 78 of the Senior Courts Act 2016 provides that appeals to the Supreme Court in both jurisdictions are by way of rehearing.

[52] The meaning of appeal by way of "rehearing" was explored in the Court of Appeal's 1977 decision *Pratt v Wanganui Education Board*.⁴⁹ There the Court said an

⁴⁶ Judicature Amendment Act 1957.

⁴⁷ Court of Appeal (Civil) Rules 2005, r 47.

⁴⁸ The Supreme Court decision in *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 places important limits on the scope of criminal appeals.

⁴⁹ *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 (SC) at 490.

appeal by way of rehearing involves the appellate tribunal giving judgment as ought to have been given if the case came before the court of first instance at the time the appeal is heard. That is, on the basis of the law at the time the appeal is heard,⁵⁰ and on the basis of the evidence that appears on the record of the proceedings.

[53] Presently, the leading authority on appeals by way of rehearing is *Austin, Nichols & Co Inc v Stichting Lodestar*.⁵¹ That decision sought to reverse a perceived overly deferential attitude toward lower tribunals. The Court of Appeal's *Austin, Nichols* decision marshalled a number of its previous decisions to conclude the High Court on appeal from the Commissioner of Trade Marks was "required" to give some weight to the Commissioner's decision because the decision was within her expertise.⁵²

[54] Elias CJ writing for the Supreme Court made several key observations. First, a general appeal is "usually" by way of rehearing, consistently with *Pratt*.⁵³ Secondly, the appellate tribunal must come to its own conclusion on the record. If the appellate-tribunal's decision differs from the lower, the lower tribunal is wrong even if that decision was one reasonably available.⁵⁴ Thirdly, there had been a trend in which the Court of Appeal had self-imposed a reluctance to scrutinise lower tribunals, particularly expert ones.⁵⁵ The question of whether the appellate tribunal was obliged or merely permitted to take account of the lower tribunal should be determined in favour of a less restrictive approach. Fourthly, the appellate tribunal begins with a presumption the decision under appeal is correct. The onus is on the appellant to identify and demonstrate error in the decision appealed.⁵⁶

[55] This was no revolution, as some have suggested. Lord Cooke said much the same thing in *Shotover Gorge Jet Boats Ltd v Jamieson*.⁵⁷ The position articulated in

⁵⁰ Citing *Attorney-General v Birmingham, Tame and Rea District Drainage Board* [1912] AC 788 (HL) at 801–802.

⁵¹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

⁵² *Stichting Lodestar v Austin, Nichols & Co Inc* [2007] NZCA 61 at [24].

⁵³ *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 51, at [4] and [13].

⁵⁴ At [16].

⁵⁵ At [14].

⁵⁶ At [4].

⁵⁷ *Shotover Gorge Jet Boats Ltd v Jamieson*, above n 1, at 440.

Austin, Nichols was further reinforced by the Supreme Court in *Kacem v Bashir*.⁵⁸ There Tipping J writing for himself, Blanchard and McGrath JJ stated the “important point” arising from *Austin, Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court “even where that opinion involves an assessment of fact and degree and entails a value judgment”.⁵⁹

[56] In *Green v Green* the Court of Appeal further clarified the scope of appellate review and reinforced two fundamental constants.⁶⁰ First, the appellant bears the onus of persuading the appellate court to reach a different conclusion. To that end, the appellant must identify the alleged errors in the decision below. Secondly, the appellate tribunal may still have regard to any advantages enjoyed by the lower tribunal.

[57] The position following *Austin, Nichols, Kacem v Bashir* and *Green v Green* is now a relatively clear one. An appeal by way of rehearing is to be undertaken on the basis of the evidential record from the tribunal below. The appellate tribunal must form its own view and if that view differs from the lower tribunal’s the appealed decision is a wrong one, although any special advantage enjoyed by the first instance decision maker may still warrant moderate deference.

Appeals from discretionary decisions

[58] It is appeals from what may be called “discretionary” decisions where the common law’s old review-based approach reasserts itself in the 21st century. Broadly the analytical timeline for appeals from discretion can be severed into three parts: the position prior to the Court of Appeal’s decision in *May v May*;⁶¹ the period between that decision and the Supreme Court’s decision in *Kacem v Bashir*;⁶² and from *Kacem v Bashir* onward.

⁵⁸ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

⁵⁹ At [32].

⁶⁰ *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [29]–[31]. See also *Simon v Wright* [2013] NZHC 1809 at [22]–[23].

⁶¹ *May v May* (1982) 1 NZFLR 165 (CA).

⁶² *Kacem v Bashir*, above n 58.

[59] Beginning with the period prior to *May v May*, in the 1879 decision of *Ruston v Tobin* Jessel MR affirmed the Court there had jurisdiction to entertain an appeal from an exercise of a discretion but that there must be a “very strong case” before it would interfere.⁶³ *Ruston v Tobin* was cited for that very proposition in the 1882 decision *Ormerod v Todmorden Joint Stock Mill Co Ltd*, where the English Court of Appeal stated an appeal against a discretionary decision of a lower-court judge that issues of fact tried by an official referee was one to be exercised with “extreme delicacy”.⁶⁴ In that judgment, too, Holker LJ also stated that it must be demonstrated the lower tribunal made a mistake or error, or acted upon a wrong principle when exercising that discretion.⁶⁵ Holker JL’s formulation came to dominate English jurisprudence on the topic.

[60] Interestingly, however, in the 1922 New Zealand Court of Appeal decision in *Rose v Rose* Sim J appears to reject that formulation of the test in favour of giving due weight to the opinion of the lower tribunal without being fettered by it, something a little more akin to an appeal by way of rehearing.⁶⁶ However in *Davis v Davis* the Court of Appeal in 1950 adopted the English approach.⁶⁷ O’Leary CJ stated that in an appeal from discretion the question was whether any of these now-familiar grounds could be demonstrated: that the tribunal was guilty of a wrong exercise of law; took account of an irrelevancy; or “left out of account” relevant matters, or whether the decision was “calculated to work a manifest injustice”, or was plainly wrong.⁶⁸

[61] And so in 1982 the Court of Appeal in *May v May* essentially reiterated, although it had in a slightly more pared-down form, those then-familiar criteria that an appellant must, in an appeal from an exercise of discretion, demonstrate that the lower tribunal: (1) acted on a wrong principle; (2) failed to take into account a relevancy; (3) took account of an irrelevancy; or (4) was plainly wrong.⁶⁹ In other words, whereas

⁶³ *Ruston v Tobin* (1879) 10 ChD 558 (CA) at 565.

⁶⁴ *Ormerod v Todmorden Joint Stock Mill Co Ltd* (1882) 8 QBD 664 (QB) at 679 per Lord Coleridge CJ.

⁶⁵ At 682.

⁶⁶ *Rose v Rose* [1922] NZLR 809 (CA) at 815.

⁶⁷ *Davis v Davis* [1950] NZLR 115 (CA).

⁶⁸ At 117.

⁶⁹ *May v May*, above n 60, at 169–170.

general appeals are by way of rehearing, the standard of appeal from a discretionary decision is more one of review.

[62] In *Kacem v Bashir*, Tipping J writing for himself, Blanchard and McGrath JJ, affirmed the *May v May* criteria.⁷⁰ The majority there also favourably cited the Court of Appeal’s decision in *Blackstone v Blackstone* to the effect that *Austin, Nichols* had not disturbed the *May v May* criteria.⁷¹

[63] In *Financial Markets Authority v Vivier* the Court of Appeal was seized of the question of whether the FMA’s decision to deregister a financial service provider was discretionary such that a heightened barrier was placed before Vivier in challenging that decision.⁷² The Court concluded the decision was not a discretionary one and the appeal was therefore to proceed by way of rehearing.⁷³ The prerequisites for deregistration — involving misconduct by the provider — required an evaluation of evidence, an “assessment”, and not a choice between equally open options.

[64] Over the last 150 years the trend in principles applicable to the reviewability of discretionary decisions has shifted from the general to the taxonomical. But, in truth, has been little changed despite the great temporal step between *Ruston v Tobin* and now. While the standard was once to enquire whether the judge “wrongly exercised” his or her discretion such that an injustice was done, the now discrete criteria in *May v May* are arguably simply specific iterations of that more general test. In any event, the principles are well established.

[65] The real question is this: is the decision at first instance truly from a discretion, where there is a range of answers, each valid, or evaluative and judgmental, where the context permits only one true answer? Few decisions will be wholly discretionary, where the first- instance judge has a choice of options not based on a fully contestable evaluation of law or evidence. Procedural case management decisions are perhaps an example. But the realm of the appeal for discretion is now a dwindling one.

⁷⁰ *Kacem v Bashir*, above n 58, at [32].

⁷¹ *Blackstone v Blackstone* [2008] NZCA 312 at [8]; cited in *Kacem v Bashir*, above n 58, at [32] n 26. See also to the same effect *Rowley v Commissioner of Inland Revenue* [2011] NZCA 160, (2011) 25 NZTC 20-051 at [31].

⁷² *Financial Markets Authority v Vivier and Company Ltd* [2016] NZCA 197, [2016] 3 NZLR 70.

⁷³ At [40]–[46].

[66] In fact we said just that in *Taipeti v R*, a decision delivered by the Court of Appeal after this paper was originally delivered. There we said:⁷⁴

[T]he classes of case which appeal courts classify as an exercise of a discretion are dwindling. Three possible indicia of the presence of discretion emerge. First, the extent to which the decision-maker can apply his or her own “personal appreciation” has been identified as a “key indication”. Clearly, the greater the level of prescription in terms of what is required of the decision-making process the more likely the decision is an evaluative process, rather than the exercise of a discretion. Second, procedural decisions are more likely to be an exercise of discretion than wider issues of principle involving the application of law to the facts. Third, if only one view is legally possible, that points away from a discretion. In other words, where there is scope for choice between multiple legally “right” outcomes, that points towards a discretion.

[67] Concluding that reasoning we said, “the distinction between a discretionary decision, giving rise to limited review, and an evaluative judgment, giving rise to a general review of the merits, is incapable of precise definition. Indeed there are now voices that question whether the distinction continues to have any value.”⁷⁵

Bail appeals

[68] Section 7(5) of the Bail Act 2000 provides:

7 Rules as to granting bail

...

- (5) Subject to sections 9 to 17, a defendant who is charged with an offence and is not bailable as of right must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention.

[69] The statutory provisions for appeals from the District Court to the High Court and from the High Court to the Court of Appeal differ in a curious fashion. An appeal from a District Court bail decision to the High Court is simply stated to be “by way of rehearing”.⁷⁶ On the other hand, an appeal from a High Court bail decision to the Court of Appeal is governed by s 48(5). That does not refer to a rehearing but instead

⁷⁴ *Taipeti v R* [2018] NZCA 56, at [49]. (I should note that I was a member of the panel in *Taipeti v R*. The other members were Winkelmann and Asher JJ.)

⁷⁵ At [50]

⁷⁶ Bail Act 2000, s 44(6).

provides that this Court may “confirm the decision appealed against, or vary it, or set it aside”.

[70] In the recent appeal mentioned above, *Taipeti v R*, the Crown conceded that the provision dealing with appeals to the High Court involved an evaluative standard; that is, it was not an appeal from discretion.⁷⁷ But it argued a different appellate standard applied from the High Court to the Court of Appeal.

[71] Differing from earlier decisions of the Court of Appeal we rejected that submission, and concluded that the powers conferred by s 48(5) meant the Court of Appeal had to carry out an overall assessment of the merits of the type set out in *Austin, Nichols*.

[72] We concluded that a defendant who had been charged had a right to be released on bail on reasonable terms unless there was just cause for continued detention, and that the importance of that right indicated that a defendant who had been unsuccessful in obtaining bail should have the benefit of a general appeal.⁷⁸ A court determining a bail application had therefore to carry out a full evaluative review, applying detailed and prescriptive criteria - some mandatory, others not. That was not the exercise of a discretion in appellate terms, and instead gave rise to a full rehearing on appeal. The appellant would bear the onus of persuading the appellate court to reach a different conclusion, and was required to identify the respects in which the judgment under appeal was said to be in error.

[73] Disagreeing with the Crown’s submission, we found the approach taken in the Court of Appeal was not different to bail appeals in courts below. If an appellate court’s examination of the merits produced a conclusion that the correct decision should differ to that of the lower court, the appeal would be allowed. But where a defendant wished to challenge a bail decision on the basis of fresh evidence, that should ordinarily be pursued by way of a fresh application for bail, rather than an appeal.⁷⁹

⁷⁷ *Taipeti v R*, n 74 above.

⁷⁸ At [62].

⁷⁹ At [59]–[61].

Sentence appeals

[74] The sentencing exercise is a sui generis one. The sentencer’s role is oftentimes a difficult and intuitive one, requiring a careful consideration of all the particular factors relevant to the particular offence and the particular offender. It is a fundamentally discretionary exercise.⁸⁰ But, what does the significance of that word, “discretionary”, have in an appeal from a sentence?

[75] The role of the appellate tribunal is defined and constrained by the empowering statute. In *R v Shipton* the Court of Appeal articulated its frustration at the failure of counsel generally to appreciate the limits of an appellate court in relation to an appeal against sentence.⁸¹ In the course of doing so it set out the particular methodology the Court undertakes on appeal. After noting the threshold in the repealed s 385(3) of the Crimes Act 1961 (that “a different sentence should have been passed”) the Court discussed the so-called “error principle”. It is the Court’s guiding light in sentence appeals.

[76] The error principle, the Court stated, requires that an appellant demonstrate an error “whether intrinsically, or as a result of additional material submitted” before it will re-exercise the sentencer’s discretion.⁸² And then, only if the Court is satisfied a different sentence should be imposed will the appeal be allowed. The array of “errors” that might be demonstrated are numerous: the failure to consider a mandatory sentencing consideration under the Sentencing Act 2002 comes to mind as an obvious example.

[77] And that approach is consistent with both the wording and structure of s 250(2) of the Criminal Procedure Act which provides that a first appeal court must be satisfied an error was made and a different sentence should be imposed. In any other case the appeal must be dismissed.

⁸⁰ *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 237.

⁸¹ *R v Shipton* [2007] 2 NZLR 218 at (CA).

⁸² At [140]. See also *Ferris-Bromley v R* [2017] NZCA 115 on the approach to be taken to mathematical errors by sentencing judges.

[78] But the question of what it really means to appeal from a sentencing “discretion” remains. The potential confusion that that term might pose in the light of a carefully constructed statutory appeal pathway and appellate scope, on the one hand, and the well-worn criteria in *May v May* and *Kacem v Bashir*, on the other, was an issue explored by the Court of Appeal in *Kumar v R*.⁸³ There, the Court noted that the characterisation of the sentencing process as a “discretionary” does not signal the need to invoke the usual criteria articulated in *May v May*.⁸⁴ That view was affirmed in *Wilson v R*, but the Court of Appeal there also noted that there were aspects of a sentence that might well be evaluative in nature such that the *Austin, Nichols* approach would indeed apply: that is, that the appeal would be by way of rehearing in relation to that aspect of the sentence (there, preconditions of a sentence).⁸⁵ Similarly, the Court of Appeal in *R v Hughes* identified that a discharge without conviction was susceptible to *Austin, Nichols* analysis on appeal type review,⁸⁶ and in *Clifton v R* in relation to findings of facts.⁸⁷

[79] The interplay between the discretionary and evaluative components of a sentence is not always an easy one and was briefly addressed in the Court of Appeal’s decision in *Houston v R* where the Court noted *Austin, Nichols* had been applied to criminal appeals in the past, but that *Austin, Nichols* did not apply to discretionary decisions.⁸⁸ Ultimately, in that case, the appeal being in relation to whether remorse was properly factored into the sentencing exercise, *Austin, Nichols* had no application.⁸⁹

[80] The Court of Appeal was right to say in *Kumar v R* that the discretionary nature of sentencing does not invite an analysis on appeal of the *May v May* criteria. The error principle instead operates and does so more broadly than *May v May* would.⁹⁰ But components of a sentence or of the sentencing process may be subject to scrutiny on

⁸³ *Kumar v R* [2015] NZCA 460.

⁸⁴ At [81].

⁸⁵ *Wilson v R* [2016] NZCA 377 at [45].

⁸⁶ *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [63]–[65].

⁸⁷ *Clifton v R* [2013] NZCA 85 at [18].

⁸⁸ *Houston v R* [2013] NZCA 581 at [8].

⁸⁹ At [9].

⁹⁰ A comprehensive list of “errors” satisfying the principle is set out in: Geoffrey G Hall (ed) *Hall’s Sentencing* (loose-leaf ed, LexisNexis) at [APPII.5.2.(a)]. It also includes an enormous range of errors enabling the appellate court to apply its own discretion.

an *Austin, Nichols* standard. Ultimately, what the standard of review is will be governed by the statute granting the appeal pathway.

Appellate pathways

[81] It is widely recognised that the Court of Appeal is overloaded. It delivers about 450 criminal judgments annually, a figure that is forecast to increase by some 15 per cent in 2018. And it delivers about 200 civil judgments. It does all this with a complement of ten permanent Judges plus High Court Judges sitting with it in divisions. In HR speak, effectively 12 FTEs.

[82] One practical effect of this is that every Judge is writing a judgment every week of the year. Not too demanding, you might say? But as the Court sits in panels of three, the same week also requires them to review closely two other draft judgments by other panel members (and, it may be, draft a dissent if they disagree). And at the same time the Judges also sit in Court actually hearing the appeals — a process which requires absorbing enormous volumes of written material including on appeals the Judge may not be slated to write the first draft of. And, finally, Judges also look at other draft judgments by panels they have not sat on at all — because uniquely in the antipodean appellate system, in New Zealand drafts are circulated to the entire permanent Court.

[83] The other practical effect of this is that the Court of Appeal operates without adequate time to fully reflect on work it does or to keep in touch as well as its members would wish with legal developments elsewhere (although keen interest is shown in the work of the Supreme Court.)

[84] The Court of Appeal operates at all through a magnificent compromise, depending on collegiality, willingness to work collectively, and through the beneficence of divisional judges drafted in from the High Court.

[85] The Criminal Procedure Act 2011 provides that conviction appeals from most District Court jury trials (and all trials in the High Court) come to the Court of Appeal. Sentence appeals also go to the Court of Appeal where it is a category 3 offence and the sentence is more than five years, or a category 4 offence, or (of course) if the sentence

was imposed in the High Court. This was in part a hangover from the 1980 Beattie Commission Reform which introduced jury trials to the District Court — whereas hitherto they had been held in the High Court only.

[86] The question all this begs is whether the High Court leapfrog is still appropriate, or whether more District Court conviction and sentence appeals should go to the High Court.

[87] That, certainly, was the recommendation of the Law Commission in 2013 — proposing all appeals from District Court jury trials be heard in the High Court, by a Criminal Appellate division comprising two High Court judges for conviction appeals (and one for sentence appeals only).⁹¹ If those judges disagreed the appeal would be reheard in the Court of Appeal. And if they agreed the seriousness or complexity of the appeal justified it, they could transfer it to the Court of Appeal. The Court of Appeal would sit, at least in criminal matters, only as a permanent Court on leapfrog appeals, High Court appeals and rare second appeals.

[88] That 2013 proposal did not proceed. The change was very substantial, and the High Court's workload would have increased substantially (and beyond the level of the resourcing currently diverted to Court of Appeal divisions). In a sense the proposal was simply exporting a problem. In doing so it echoed the problems of 1949.⁹² There was also concern that the Court of Appeal's role as guardian of jury trial standards would be weakened, with the prospect of conflicting direction.

[89] There is, I think, consensus that there is a problem. Indeed perhaps two problems: the workload of the Court of Appeal (which cannot be solved by just adding more judges) and the illogicality of the extent to which District Court appeals leapfrog the High Court. But there is not yet consensus as to the solution.

[90] That solution will take time to emerge, but *might* include some of the following possible reforms. First, that all District Court pre-trial appeals go to the High Court

⁹¹ Law Commission *Advice to the Justice Sector Ministers, Re: Criminal Jury Trial Appeals from the District Court* (2013) at [79]–[103].

⁹² See [47] above.

only (to a single Judge). Secondly, that all judge-alone conviction appeals in the District Court be heard by a panel of two judges in the High Court (with transfer to the Court of Appeal in the event of disagreement). Thirdly, that the Court of Appeal be given the power to refer District Court jury trial conviction appeals to the High Court where no point of general importance arises on the appeal. Fourthly, that the same principles apply to sentence appeals. Fifthly, that cautious consideration be given to whether a leave requirement be introduced for civil appeals — as is the case in Victoria. Applicants for leave in Victoria must show the proposed appeal has a real prospect of success.⁹³ Criminal appeals in Victoria are also subject to leave, although in New Zealand s 25(h) of the New Zealand Bill of Rights Act 1990 stands in the way of any such reform. In any event, I have some doubt the extra step is worth the effort in criminal appeals: the truly hopeless appeal seldom detains the Court unduly and it might as well get on and deal with it in one stage rather than two.

[91] But the lesson of history is not to simply export problems. The solution lies in a more logical allocation of appeals, reducing the degree to which appeals from the District Court leapfrog illogically the tier above that Court, the High Court, and resourcing that Court appropriately to handle the additional work it now would undertake.

⁹³ See Supreme Court Act 1986 (Vic) s 14C; and *Kennedy v Shire of Campaspe* [2015] VSCA 47.