The First 1000 Decisions of the Supreme Court of New Zealand: A study in how the Court grants leave.

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago.

October 2015

Acknowledgements

My most sincere and heartfelt appreciation goes to:

Marcelo Rodriguez Ferrere – stalwart supervisor, detail-oriented editor, terror of the passive voice and all around voice of reason and calm. Thank you for helping me produce a piece of writing I can be proud of.

Nikki Southall – my mini-Marcelo. Thank you for going above and beyond the call of duty and friendship. I don't know what I did to deserve you but I'm glad I did it. Thank you for all of your efforts in October, especially the soufflé.

My family – Tim, Sarah, Chloe and Imogen. Thank you for Australia in July and your unswerving steadiness and love. You are my rock.

My long-suffering flatmates – Kenzie, Jack and Sarah. Thank you for letting me vent at you, and putting up with TMI 24/7.

The 9th floor tutors office – especially Amy, Jack and Stacey. Thanks for being a safe haven, full of non-judgement, support and food.

Any errors remain my own.

Contents

Introduction

How does the Supreme Court of New Zealand determine whether it will hear an appeal, and how does it justify that decision? Under s 12 of the Supreme Court Act 2003 the Supreme Court functions as its own gatekeeper in granting leave to hear appeals. The goal of my dissertation is to analyse the statutory criteria that govern applications for leave in s 13 of the Supreme Court Act and what role they have played in justifying the Court's decisions to grant or refuse applications. To do this I analysed the first 1000 published decisions of the Supreme Court to see how each s 13 criterion has been interpreted and utilised. I have attempted to discern the Court's interpretation of each criterion, and whether the Court has consistently applied them in a way readily apparent to prospective litigants seeking guidance on how to gain the Court's leave. My findings are that the Court has left a conspicuous gap in its reasoning process, leaving s 13 without a clearly articulated interpretation.

Part I of my dissertation sets out the history of the Supreme Court Act 2003. In the contentious debate around creating New Zealand's final appellate Court, I wanted to see how the leave provisions were formulated, and what – if any – intentions Parliament had for how they would apply. I have set this discussion in the context of leave provisions of comparable Commonwealth jurisdictions. Final appellate Courts in common law countries traditionally have broad discretionary powers around the appeals they hear. I wanted to determine whether Parliament intended to grant the Supreme Court of New Zealand similar free reign, or if it instead attempted to fetter the Court's discretion. Section 13 appears to be the intermediary of these two points: within broadly framed statutory criteria, the Supreme Court possesses complete discretion to select the cases it will hear. The primary fetter on the Court's exercise of its leave discretion is the requirement that reasons be given to refused applications. This fetter was imposed in recognition of the need for some sort of accountability from the Court in the form of reasons.

Part II of my dissertation sets out the data I collated and the key themes around how the Court has applied and utilised s 13. In my analysis of the 574 applications that were refused leave I found the Court did provide reasons to refused applications. This created a negatively-construed body of precedent around the meaning of key language in s 13 which describes what fails to meet the criteria, rather than what satisfies it. The Court also used a variety of

non-statutory reasons to justify why leave was refused. These reasons ran parallel to, but were not meaningfully connected with, the statutory criteria for leave: a curious disconnection. In contrast, when granting leave the Court very rarely gave reasons explaining how it was "satisfied it was in the interests of justice" for an appeal to be heard. In the 190 substantive decisions of the Court, the statutory criteria were rarely mentioned, and given only cursory attention.

Part III of my dissertation analyses my findings by drawing together the legislative framework and the collated data. I place these findings into the context of the Court's duties as the highest judicial authority in New Zealand. I successfully challenge each of the arguments raised in defence of the Court's current practice of omitting to give reasons when granting leave.

My conclusion is that the Supreme Court can and should be doing more in interpreting and communicating its understanding of s 13 with the New Zealand public. In acting as gatekeeper the Court needs to be explicit in establishing the requisite standard for a successful application of leave. This method of judicial accountability will help avoid the appearance of arbitrariness in leave decisions and cement the Court's legitimacy as the apex of our judicial system.

Part I: The Statutory Origins of the Supreme Court

In the controversy surrounding the proposed creation of the Supreme Court of New Zealand in 2003, little attention was paid to the perceived "technical or procedural" aspects of the proposal.[1] This was unfortunate, as the criteria upon which the Supreme Court determines leave can have a profound influence on how the Court perceives its role and chooses cases to develop New Zealand's legal system.[2] The leave criteria and requirements in the Supreme Court Act 2003 are crucial as they represent one of the major checks on the Court's institutional power. In the vast majority of circumstances, the Court is accountable only to itself.[3] How these criteria were anticipated to work in the debate surrounding the creation of the Supreme Court is important to understanding how the Court utilised the criteria in its first 1000 decisions.

New Zealand's long process of removing the Judicial Committee of the Privy Council ("the Privy Council") as its final court of appeal, the "bruising"[4] debate around the topic and the controversial creation of the "backward South Pacific"[5] Supreme Court is a story I cannot give the full attention it deserves. My focus in this Part is in how the statutory criteria for leave to the Supreme Court were formulated by Parliament. What did Parliament intend the Supreme Court to do? What sorts of constraints were envisioned upon its exercise of power? This chapter will explore the inception of s 13, its development and Parliament's intent regarding its anticipated application. I will then continue by comparing s 13 with equivalent leave restrictions in other final-level appellate courts in the Commonwealth: Australia, Canada, and the United Kingdom. The formation of the Supreme Court and distinctive features of its leave procedures must be viewed as deliberate. The process forming the Supreme Court

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[1] Joshua Pringle "Leave to Appeal and the Proposed Supreme Court of New Zealand" [2003] NZ Law Review 71 at 72.
[2] Pringle at 72.
[3] Pringle at 89.
[4] Sian Elias, "Superior Courts in Transition" (Address given to the Anglo-Australasian Society, London, 13 May 2004) at 3.
[5] See comments of Dail Jones during the second reading of the Supreme Court Bill 2002 at (8 October 2003) 612 NZPD 9014.

purposefully drew on the experience of comparable and older courts' operations.[6] The events of 2003 were a unique attempt to create an independent final court while simultaneously ending appeals to the Privy Council.[7] In contrast, Canada and Australia's final courts both existed in some form under the Privy Council, and had developed their jurisdictional processes long before severing ties.[8] In fusing the two events in New Zealand, time was taken in reviewing the prospective models available. Variations by Parliament ought to be regarded as intentional.[9]

1. Consultation and Initial Stages

The concept of a New Zealand-based final appellate Court was not novel to Helen Clark's government in 2003. The idea of replacing the authority of the Privy Council with a national court arose under various New Zealand governments. Consultations on the feasibility of the change were held in 1978, 1986 and 1995.[10] In 2000, a Government Discussion Paper under Attorney-General Margaret Wilson explored ideas on how to restructure New Zealand's appeal system. The principled goals informing the change included "simplicity", "efficient administration" and "improving access to justice for New Zealanders".[11] At this preliminary stage, the Discussion Paper recommended maintaining a two-tier appeal system with a New Zealand-based final level court, as this would "allow legal arguments to develop and refine, promote better decision-making and more reflective development of the law".[12] In addition it was thought a two-tier appeal system would reduce the risk of human error and promote public confidence in the justice system.[13] The Discussion Paper questioned "how widely to frame the grounds for giving leave" and welcomed public submissions on the possible criteria.[14] It was proposed at this stage that leave could be restricted to "cases of special significance," and "where difficult questions of law are raised, which would make a second

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[6] Ministry Advisory Group *Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, Advisory Group Report, April 2002) at 62-66.
[7] Pringle above n 1 at 98.
[8] Mary-Rose Russel "Introduction" in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of new Zealand 2004*-2013 (Thomson Reuters, Wellington, 2015) xliii at xlv.
[9] Margaret Wilson "Opening of the Supreme Court of New Zealand, held at Wellington on 1 July 2004" [2004] NZLJ 290 at 290.
[10] *Reshaping New Zealand's Appeal Structure* (Office of the Attorney-General, Discussion Paper, December 2000) at ii.
[11] *Reshaping New Zealand's Appeal Structure* at 13.
[12] At 6.
[13] At 6.
[14] At 7.

appeal desirable in the interests of justice". The Paper also recognised that the procedures around granting leave would need to be developed, as they would determine the proposed Court's nature and role. However, mechanics of the appeal process were not considered contentious.[15] The detailed criteria by which leave would be decided and communicated were not yet developed.

In April 2002, a Ministry Advisory Group established by Margaret Wilson and chaired by Solicitor-General Terence Arnold produced a Report entitled "Replacing the Privy Council: A New Supreme Court".[16] The Report focused on how to establish a two-tier structure of appeal in New Zealand, in the form of a Supreme Court.[17] The Report estimated that the Supreme Court would hear between 40 and 50 appeals a year.[18] In the last ten years the average output is 24 substantive decisions annually.[19] As Justice Blanchard has noted, this is lighter than might have been expected.[20]

The Ministry Advisory Group recommended that appeals to the Supreme Court be by leave of that Court only.[21] The reasons for this included that the appellate court could control both the "volume and content" of appeals it heard, and prevent "unmeritorious" applications.[22] It was also how leave applications were determined in the majority of overseas jurisdictions reviewed[23] (although in fact some rights of appeal to final appellate courts existed in Canada and the United Kingdom).[24]

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[15] *Reshaping New Zealand's Appeal Structure* at 7. The key issues were conceived of as being how many judges would determine the question of leave, and whether they would be the judges who heard the original appeal or would hear the proposed second appeal
[16] Ministry Advisory Group above n 6 at i.
[17] In anticipation of a final level New Zealand court, what was then known as the Supreme Court was renamed the High Court in 1980 in anticipation of a New Zealand-based final appellate court: Courts of New Zealand "The History of the High Court" <www.courtsofnz.govt.nz>. The Group recommended naming the proposed court the Supreme Court in order to aid international recognition of its status (above n 6 at 17).
[18] Ministry Advisory Group at 27.
[19] See Appendix D.
[20] Peter Blanchard "The Early Experience of the New Zealand Supreme Court" (2008) 6 NZJPIL 175 at 185.
[21] Ministry Advisory Group above n 6 at 11.
[22] Ministry Advisory Group at 44.
[23] At 44.
[24] Pringle above n 1 at 89.

All but one member of the Group considered that the main criteria for leave should be set out in legislation.[25] Six main criteria for leave were listed at this stage:

- Whether the proceedings raise a significant issue involving the Treaty of Waitangi or tikanga Māori;
- Whether the proceedings involve a matter of general or public importance;
- Whether the proceedings involve a matter of commercial significance;
- The need to resolve differences of opinion between different courts, or within one court, as to the state of the law;
- Whether the proceedings raise the risk of a substantial miscarriage of justice;
- Where the circumstances are such that in the interests of justice, the Court should consider the matter. [26]

In establishing these criteria the majority recommended they be set out "on a non-exclusive basis".[27] It was assumed over time that the Supreme Court would develop principles which set out the Court's approach to these criteria.[28] The Report also indicated that it was important the criteria not be framed so as to unduly limit the scope of the Court's work.[29] Only one member of the Group opposed the inclusion of any leave criteria in legislation, preferring to minimise Parliament's interference and allowing the proposed Court to develop its own criteria.[30] At this stage, the majority considered that some form of Parliamentary control over the Supreme Court's discretionary power was necessary.[31]

These criteria supposedly reflected the Australian and Canadian jurisdictions' focus on "miscarriages of justice" and issues of "public importance", while also providing a guarantee that commercial cases of significance would be heard by the new Court. Business interests in New Zealand were vocally unwilling to lose their right of appeal to the Privy Council.[32] Similarly, many Māori feared losing a direct line of connection to the British Crown in severing the Privy Council, and so the Group recommended the Treaty of Waitangi be given

[25] Ministry Advisory Group above n 6 at 11.
[26] Ministry Advisory Group at 46.
[27] At 45.
[28] At 45.
[29] At 45.
[30] At 46.
[31] At 45.
[32] Pringle above n 1 at 91: which was available in any case where the disputed amount was more than $5,000.

explicit recognition in the leave criteria.[33] Margaret Wilson has since affirmed that the amendments to the criteria "were designed to accommodate the concerns of Māori and the commercial community".[34]

The proposals in this Report formed the structure and content of the Supreme Court Bill 2002, which was introduced to Parliament on 9 December 2002.[35] Margaret Wilson gave the first reading of the Bill on 17 December, highlighting that appeals could only be heard with the Court's leave.[36] She listed only five criteria in the first reading; "the need to resolve differences of opinion between different courts, or within one court, as to the state of the law", which is a key criterion in the Canadian and Australian jurisprudence was removed without comment.[37]

The Bill was then referred to the Justice and Electoral Committee. The Committee received only 68 submissions which commented on specific clauses.[38] The contentious aspect of the Bill remained whether or not the right to appeal to the Privy Council should be abolished. There was very little discussion on the form of the new Court, its powers or its technical procedures.

2. Select Committee Recommendations

The Judicial and Electoral Committee recommended that the Supreme Court alone should have the ability to grant leave to appeal. The reasons given supporting this proposition of included that the Supreme Court would be able to develop a consistent approach in deciding leave, and parties would be guaranteed an independent consideration of their application.[39] The Law Commission later indicated that it too favoured leave to appeal being granted by the Supreme Court alone, as it was best placed to develop a consistent approach to the criteria

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[33] Ministry Advisory Group at 46.
[34] Margaret Wilson "Establishing a Final Court of Appeal for New Zealand" (paper delivered at The New Zealand Supreme Court: The First Ten Years Conference, Pullman Hotel, Auckland, 13 November 2014) at 12.
[35] Supreme Court Bill 2002 (16-2) (report of the Justice and Electoral Committee) at 63.
[36] Margaret Wilson, Attorney-General "Supreme Court Bill – First Reading Speech" (press release, 17 December 2002).
[37] Pringle above n 1 at 76 and 93.
[38] Justice and Electoral Committee above n 35 at 5. A total of 312 submissions were received, most of which challenged the move to sever ties with the Privy Council.
[39] Justice and Electoral Committee at 44.

and decide matters deserving further attention.[40] At no stage did it appear the Supreme Court would not be "gatekeeper" of its own docket.[41]

Regarding the proposed criteria for leave, the majority of the 28 submissions were critical of the prescriptive approach drafted in the Bill, and recommended "wider" criteria.[42] The theme of the submissions was that the criteria should be general and broad to enhance the Court's discretion. On the other hand, the Judicial and Electoral Committee removed the reference to "tikanga Māori" for being too broad a criterion.[43] Commentators like Bruce Harris questioned why it appeared to take precedence over "general and public importance" and proposed that it be subsumed under this (as it later was).[44]

The Select Committee also recommended amending clause 16 to make the reasons for refusing leave a mandatory – rather than permissive – requirement.[45] This was endorsed by a majority of submissions and the Committee held it did not dramatically increase the workload of the Court, as the reasons could be stated briefly.[46] The Committee regarded the provision of reasons for refusal a "significant matter of natural justice".[47] The change was a departure from the approach of comparable jurisdictions where neither statute nor practice prescribed giving reasons for refusing leave, holding that (if given) they would "likely be so formulaic as to be unsatisfactory for litigants".[48] The Select Committee's reasons for the amendment are illuminating; reasons for refusing leave are necessary for "transparency and accountability", "consistency with the fundamental principle of natural justice" and, perhaps most significantly because "it [is] a democratic requirement for judges to provide reasons for leave".[49] A minority of the Select Committee members argued that the Supreme Court should be trusted to rule appropriately and allowed to only give reasons at its discretion. The minority's

[40] Law Commission *Delivering Justice for All* (NZLC R85, 2004) at 113.
[41] Bruce Harris "The new Supreme Court" [2003] NZLJ 15 at 15.
[42] Justice and Electoral Committee above n 35 at 44.
[43] At 44.
[44] Harris above n 41 at 16.
[45] Justice and Electoral Committee, above n 35 at 46.
[46] At 46.
[47] At 46.
[48] At 46.
[49] At 47.

approach runs contrary to the general movement in administrative law towards ever-higher standards of procedural fairness.[50]

The Judicial and Electoral Committee's formulation of the leave criteria was adopted into the Supreme Court Act 2003. The criteria look as follows:

13 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) …

(5) Subsection (2) does not limit the generality of subsection (1); and subsection (3) does not limit the generality of subsection (2)(a).

16 Court to state reasons for refusal to give leave

(1) The Supreme Court must state its reasons for refusing to give leave to appeal to it.

(2) The reasons may be stated briefly, and may be stated in general terms only.

Leave must not be given unless the Court is satisfied it is "in the interests of justice" for the case to be heard. "Interests of justice" is deemed to include: matters of general or public importance, preventing a substantial miscarriage of justice, resolving an issue of general commercial significance or a significant issue involving the Treaty of Waitangi. This list is non-exhaustive which means "interests of justice" can be interpreted more generally.[51] Margaret

[50] Tim Cochrane "A general public law duty to provide reasons: why New Zealand should follow the Irish Supreme Court" (2013) 11 NZJPIL 517 at 531.
[51] Supreme Court Act 2003, s 13(5).

Wilson approved of the new formulation of the criteria, stating that the framework gave flexibility to the Court while not requiring it to give leave at every possible opportunity.[52] The Court has since affirmed it has retained some residual discretion in justifying why it was "necessary in the interests of justice" for an application to be granted leave.[53]

Adopting the Select Committee recommendations, Parliament read the Bill a second time 63 votes to 53.[54] At this stage, debate around the Bill was dominated by discussion as to whether it was premature and unconstitutional.[55] Despite the ongoing controversy, the House read the Bill for a third time on 14 October 2003 and it received Royal Assent on 17 October 2003. The Supreme Court Act 2003 came into force on 1 January 2004 and created the new Supreme Court of New Zealand.[56]

3. Subsequent discussion on the s 13 leave criteria

The speeches made at the opening of the Supreme Court on 1 July 2004 reflect some of the controversy surrounding its creation. The President of the New Zealand Bar made a comment about how the Court's ability to control the number of cases it heard also meant it could "raise and lower the bar to accommodate varying flows of potential appeals".[57] Mentioned in (what I assume was) a light-hearted way, this comment does reflect the fear of arbitrariness that arises from allowing the Supreme Court a broad and unchecked discretion in determining leave. Whether this fear has been assuaged will be analysed in Part III.

Since its creation, the most prolific judicial commentator on the Supreme Court's internal processes has been the Rt Hon Sir Peter Blanchard, who published three articles in 2007 and 2008 providing valuable insight into the Supreme Court's early processes and approaches.[58]

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[52] (8 October 2003) 612 NZPD 9005.
[53] Peter Blanchard "New Zealand Supreme Court Jurisdiction and Practice" (2007) 33(1) Commonwealth Law Bulletin 3 at 4.
[54] (7 October 2003) 612 NZPD 8923.
[55] (8 October 2003) 612 NZPD 9006. Opponents of the Bill wanted there to be a referendum held before changing New Zealand's final appeal structure, so public support of the proposal could be assessed.
[56] Supreme Court Act 2003, ss 2 and 6.
[57] Robert Dobson "Opening of the Supreme Court of New Zealand, held at Wellington on 1 July 2004" [2004] NZLJ 290 at 292.
[58] These articles are Peter Blanchard "A Commentary on the New Zealand Supreme Court Rules" (2007) 33(1) Commonwealth Law Bulletin 31; Peter Blanchard "New Zealand Supreme Court Jurisdiction and Practice" (2007) above n 53; and Peter Blanchard "The Early Experience of the New

Justice Blanchard was one of the five original appointments to the Supreme Court, a position he held until his retirement in 2012.

Justice Blanchard in these articles has given varied accounts of his interpretation and understanding of s 13, throughout which four main themes are recurrent:

1. "General importance" means the issue has precedential value for similar cases.[59] The criteria "general commercial significance" and "Treaty of Waitangi" are subsumed under – and instances of – what may be "general importance".[60]
2. A "significant miscarriage of justice" must involve an "arguable question of law of general application".[61] Justice Blanchard noted the language used is the same as in s 385(1) of the Crimes Act 1961, but did not comment on whether this would impact the Court's interpretation.[62]
3. The "interests of justice" may be satisfied in some unforeseen and general way, as the "stated criteria are not all-embracing".[63]
4. It is implicit in the criteria that an appeal must be "truly arguable". [64]

Writing a year later on the early experiences of the Court, Blanchard J asserted that "public and general importance is a well-understood test" which "rules out disputes which are largely factual or involve construction of a unique document".[65] I will test the veracity of the first half of this statement in Part II. Justice Blanchard asserted a great degree of 'obviousness' in how the Court has proceeded to date. He stated that the Court is dismissing "obviously hopeless" applications and granting the "obviously meritorious applications".[66] That the "interests of

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Zealand Supreme Court" above n 20. The themes raised in these three articles were repeated again in 2014 in Peter Blanchard KNZM, Former Justice of the Supreme Court "The Supreme Court - A Judge's View" (The New Zealand Supreme Court: The First Ten Years Conference, Pullman Hotel, Auckland, 14 November 2014) which will be analysed in detail in Part III.

[59] Blanchard above n 53 at 4.

[60] Blanchard at 4.

[61] At 6.

[62] At 5.

[63] At 4.

[64] Blanchard "Supreme Court Rules" above n 58 at 31. See also Blanchard above n 20 at 189.

[65] Blanchard above n 20 at 188.

[66] Blanchard above n 58 at 34.

justice do not require leave for a doomed appeal"[67] is clearly stated by Blanchard J, but this extrajudicial article makes overt a connection the Court normally only implies in its decisions.

Regarding the granting of leave, Blanchard J stated it would be "generally undesirable for the Court to give [reasons for granting leave]".[68] He further stated that "normally those reasons will be apparent from the approved grounds, and certainly once we have delivered a judgment in the substantive appeal".[69] The Registrar of the Supreme Court joined him in this view, arguing that reasons for granting leave "will be apparent".[70] My analysis in Part III will challenge whether or not these "apparent reasons" fit within the criteria and amount to the Court being "satisfied" as required by the Act.

5. Comparable jurisdictions' approach to granting leave

The Supreme Court of New Zealand was formed with the luxury of reflection and the ability to closely reference the approaches of comparable jurisdictions. At each stage of Margaret Wilson's consultation, and during the Select Committee process, the final courts of Australia, Canada and the United Kingdom were presented as reference models.[71] I will highlight the leave provisions and processes of these Courts, what considerations are mandatory and whether the court is obliged to give reasons for granting or refusing leave.

In the High Court of Australia the majority of cases require special leave given by the High Court itself. The High Court has a broad discretion in the cases it hears, regulated by the Judiciary Act 1903 (Cth).[72] Section 35A of that Act provides that in considering whether or not to grant leave, the High Court "may have regard to any matters it considers relevant but shall have regard to":

- questions of law of public importance;
- whether the interests of justice require leave; or

[67] Blanchard above n 53 at 6.
[68] Blanchard above n 58 at 35.
[69] Blanchard above n 20 at 192.
[70] Gordon Thatcher "The Supreme Court of New Zealand" (2010) 36(3) Commonwealth Law Bulletin 461 at 463.
[71] See for example, Justice and Electoral Committee above n 35 at 79; *Reshaping New Zealand's Appeal Structure* above n 10 at 15. See also Ministry Advisory Group above n 6 at 62.
[72] Pringle above n 1 at 75.

- whether the Court needs to resolve the differences between lower courts.[73]

Thus the High Court must consider two of the key elements required in New Zealand's Supreme Court Act ("public importance" and "interests of justice") but has a broad discretion to consider any other relevant matters. One Australian commentator has said: "Section 35A does not set out to establish the grounds which need to be met for special leave to be granted".[74] The statute sets out permissive criteria, rather than mandatory criteria. New Zealand did not follow this approach in drafting the Supreme Court Act and there is much less discretion in s 13.

In Australia, leave panels of three High Court Justices consider the applications and a short oral hearing is available as of right.[75] Short reasons are given when cases are rejected, a practice arising from convention, rather than mandated by statute.[76] In granting leave, the reasons should be "obvious from the dialogue in oral argument", according to academic commentary.[77]

In Canada, the primary jurisdiction and procedural requirements of the Supreme Court of Canada are conferred by the Supreme Court Act (R.S.C., 1985, c. S-26). Appeals can be made to the Court by right in criminal cases where there has been a split judgement in a lower court, by referral from the federal government or by leave of the Supreme Court.[78] Lower courts also have a limited ability to grant leave to a case "if the question is one that ought to be submitted to the Supreme Court".[79] The Supreme Court may grant leave under s 40(1) of the Supreme Court Act if it considers the question is of public importance, is an important legal question or is for any other reason so significant that it warrants Supreme Court consideration.[80] Appeals

[73] Judiciary Act 1903 (Cth), s 35A.
[74] Solomon "Controlling the High Court's Agenda" (1993) 23 UWAL Rev 33 at 48 as cited in Pringle above n 1 at 77.
[75] Pringle at 76.
[76] At 76.
[77] Anthony Blackshield, Michael Coper and George Williams *The Oxford Companion to the High Court of Australia* (Oxford University Press, Melbourne, 2001) at 426.
[78] *Reshaping New Zealand's Appeal Structure,* above n 10 at 15.
[79] Pringle above n 1 at 78.
[80] At 78.

by leave make up the majority of the Court's workload and there are ongoing complaints about how the criminal appeals as of right burden the Court's time.[81]

At the time of New Zealand's Supreme Court debate, the House of Lords was the final court of appeal in the United Kingdom.[82] Appeals were granted leave either by a three-judge panel of the House of Lords if the case involved an issue of "general public importance", or by recommendation of a lower court, particularly in criminal cases.[83] The criteria were not explicit in statute but rather developed through the Practice Directions of the Court. In refusing applications for leave, the House of Lords would not usually provide reasons.[84]

The Supreme Court of the United Kingdom was formed in 2009, and appears to have drawn on New Zealand's example. The rules for leave by right or leave by permission vary between jurisdictions. For the purposes of this analysis, it is enough that the Supreme Court sits in panels of three judges to determine leave applications under broad criteria formulated in the Court's Practice Directions.[85] The Court will permit the application if it raises "an arguable point of law of general public importance which ought to be considered".[86] No further criteria are given. If leave is permitted, no reasons are given. If leave is refused, the Court is obliged to provide brief reasons why.[87] These reasons are explicitly stated to not have any precedential value.[88] The applications that are refused leave are published on the Supreme Court's website each month, and the reasons appear formulaic. A typical reason is:

> "*Permission to appeal [is] refused because the application does not raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at this time bearing in mind that the case has already been the subject of judicial decision and reviewed on appeal.*"[89]

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[81] Ian Greene *Final Appeal: decision-making in Canadian Courts of Appeal* (J Lorimer, Toronto, 1998) at 100.
[82] Pringle above n 1 at 80.
[83] At 80.
[84] At 82.
[85] Supreme Court of the United Kingdom Practice Direction 3, r 3.1.1. <www.supremecourt.uk>.
[86] At r 3.3.3.
[87] At r 3.3.3.
[88] At r 3.3.3.
[89] The United Kingdom Supreme Court "Permission to appeal" (May 2015) <www.supremecourt.uk>.

6. Conclusion

While the Supreme Court Act 2003 was carefully designed to emulate specific aspects of comparable Commonwealth courts, Parliament emphasised the value of reasons at the leave stage, and the need for statutory criteria to be fleshed out by the Court. In this way the Supreme Court can be distinguished from comparable final courts. The leave provisions reflect an unresolved tension between the desire to give the Supreme Court a broad discretionary power to choose its caseload and develop its own constitutional significance and the desire to constrain the Court by imposing statutory limitations upon its exercise of power.

The first constraint has been requiring reasons to be given when applications are refused leave. The language explaining this amendment by the Select Committee demonstrated "transparency [and] accountability" were expected of the Supreme Court[90] and that reasons were seen as an assurance that the Court would act in a procedurally fair and "democratic" way.[91]

The second mechanism of accountability was the requirement that the Court be "satisfied" that it was "in the interests of justice" for a case to be heard. There is some flexibility here, as s 13(5) does not render s 13(2) an exhaustive statement of what "the interests of justice" might mean. However, the Court is required to do more than its comparable commonwealth apex courts. Unlike in Australia, the New Zealand court "must be satisfied" not merely "have regard to" prescribed considerations. While Blanchard J might consider it "obvious"[92] why cases are granted leave, this may not be the same thing as demonstrating that the Court is "satisfied".

Having set out the statutory framework for granting leave to appeal, I now turn to analyse how the Supreme Court has used and interpreted these criteria in its first 1000 decisions.

[90] Justice and Electoral Committee above n 35 at 46.
[91] At 46.
[92] Blanchard above n 58 at 34.

Part II: Methods and Data

In this Part, I shall set out my methods of data collection and then explore some of the patterns I found within the Supreme Court's first 1000 decisions. Section 16 of the Supreme Court Act 2003 requires the Court to provide reasons for declining an application for leave to appeal. Accordingly, I shall first look at the 574 refusal decisions to see how – or even if – it applied the criteria for leave as detailed by s 13 of the Act. I will then look at the 217 cases where the Court granted leave and the dearth of statutory criteria or reasons given at this stage. Finally, I will discuss how the s 13 criteria appear to a very limited extent in the 190 substantive decisions of the Court. Overall, the Court is communicating the sort of cases it wishes to hear, but not through a consistent interpretation of s 13.

1. Methods

My data spans the first nine years of the Supreme Court of New Zealand, from the Court's inception up until Tipping J's retirement from the Court in August 2012. It is a happy coincidence that the Court had published 1000 decisions at the time of Tipping J's retirement. In these 1000 cases, I wanted to explore the approach of the original five appointments of the Court to s 13, and Tipping J was the fourth original puisne judge to retire. Chief Justice Elias remains the only original member of the Court still sitting at the time of publication. My research will attempt to discern the original Bench's approach to granting leave and its interpretation of s 13, with the idea that later studies could build upon this and compare the approach of later benches.

In entering these decisions into my database, I recorded the following information:

- case name;
- date of publication;
- court label and neutral citation;
- whether the applicant was self-represented;
- the decision made, further categorised as:
  - whether leave was granted or refused; and
  - whether the appeal was successful after hearing;
- reasons for the refusal or acceptance of leave;

- type of case (criminal or civil) and the area of law at issue;
- number of separate judgments;
- number of paragraphs in the decision; and
- the Courts of New Zealand official website's case summary.

In finding cases, I utilised a very similar method to that done in the recent empirical study of Mary-Rose Russell and Matthew Barber.[93] I started with the New Zealand Legal Information Institute website (NZLII) which published the Court's annual decisions in chronological order. I cross-referenced these with the Courts of New Zealand official website which provided useful case summaries of the key issues in the decision made.[94] I revised my data by checking and cross-referencing the official court citations I had against those in LexisNexis New Zealand.

I analysed each of the 789 leave decisions. Rejection of leave decisions averaged five paragraphs in length.[95] Decisions granting leave averaged three paragraphs.[96] I did not read the entirety of the Court's 190 substantive decisions (the longest of which involved five individual judgments totalling 388 paragraphs).[97] Instead, I searched through these decisions using a combination of the following keywords: "supreme", "s 13", "s 14", "leave", "public", "public importance", "public interests", "general importance", "commercial significance", "miscarriage", "interests of justice", "substantial", "justice". I was seeking any reference to the statutory language of s 13 or the Supreme Court Act, to see if it informed the Court's substantive reasoning.

What I was looking for in each type of decision was the Court utilising the statutory criteria, and any analysis of the meaning of the criterion. To do this, I created the following shorthand for the statutory criteria:

- IOJ = in the interests of justice;
- PI = public importance;

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[93] Mary-Rose Russell and Matthew Barber "Empirical Analysis of Supreme Court Decisions" in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of New Zealand 2004-2013* (Thomson Reuters, Wellington, 2015) 1 at 29.
[94] See for example: https://www.courtsofnz.govt.nz/about/supreme/case-summaries/.
[95] See Appendix D.
[96] See Appendix D.
[97] *Taunoa and ors v Attorney-General and anor* [2007] NZSC 70; [2008] 1 NZLR 429.

- GI = general importance;
- SMJ = substantial miscarriage of justice;
- MJ = miscarriage of justice;
- CS = general commercial significance; or
- No jurisdiction (barred by s 14 or ss 7-10 of the Supreme Court Act 2003).

As I will shortly explore in the section on applications refused leave, the Court also developed a series of non-statutory criteria to explain why leave was refused.

There are two further points to note about the data set. There are 21 decisions published by the Court during my period of study which I have counted towards my total but not analysed; these are the Court decisions on costs, filing fees, or the appointment of *amici curiae*. Secondly I have included applications for recall of Court decisions and applications for the recusal of judges within the data set since the Court can – and has – employed the language of s 13 when accepting and refusing these applications.

2. Applications for Leave

On average, decisions granting or refusing leave applications make up 79 per cent of the Supreme Court's total output (see Table 1 below). As the Court is required to give reasons for refusing leave applications, it has primarily developed its approach to and interpretation of s 13 in these decisions. Leave decisions have precedential value.[98] They are published in an identical method and format as substantive decisions of the Court, and are occasionally published in official reports.[99] The Court has indicated the precedential value of leave decisions by referring back to its prior reasoning in key refusal of leave decisions as authoritative in refusing further applications.[100] Moreover, unlike the United Kingdom, the Court has not explicitly indicated the decisions are "of no precedential value".[101] Assuming

[98] For further discussion, see below Part III at 3(a).
[99] Blanchard above n 20 at 192.
[100] For example, *Junior Farms Limited v Hampton Securities* [2006] NZSC 60; (2006) 18 PRNZ 369 has been referred to in the following refusal of leave applications: *Hayden Matthew Johnston and anor v Schist Mountain Orchards Ltd* [2006] NZSC 96; *Transpower v Todd Energy* [2007] NZSC 106; *Mamfredos v Herbert Equities Ltd* [2007] NZSC 79; and *N V Sumatra Tobacco Trading Company v New Zealand Milk Brands Limited* [2011] NZSC 113.
[101] Supreme Court of the United Kingdom Practice Direction 3, r 3.3.3. <www.supremecourt.uk>.

they hold value, I shall now explore the precedents that the Court has established in its refusal of leave decisions.

Table 1: Leave applications as percentage of annual output

	Total leave applications	Refused leave applications	Applications granted leave
2004	88	65	23
2005	84	51	33
2006	79	58	21
2007	79	54	25
2008	79	57	22
2009	71	49	22
2010	78	55	23
2011	83	68	15
2012	75	60	15
Average	79%	57%	22%

3. Refusal of leave applications

Refusals of leave make up over 50 per cent of the Court's annual output.[102] As indicated above, under s 16 of the Supreme Court Act, the Court is obliged to state its reasons for refusing a leave application.[103] Decisions refusing leave applications are, on average, 5.09 paragraphs long, and typically contain a brief summary of the facts and then a statement of how the criteria are not satisfied.[104] This section explores when the Court has used the statutory criteria in its refusals of leave, when it has used non-statutory criteria, and what analysis of the criteria exists in these decisions.

a) Statutory criteria utilised

The Supreme Court utilised some form of the statutory criteria in giving its reasons for refusal of leave in the majority of cases.[105] The Court relied more heavily upon statutory criteria in

[102] See Table 1 above.
[103] Supreme Court Act 2003, s 16.
[104] See Appendix D. A good example of this practice is the refused civil application in *Transpower v Todd Energy* above n 100. A typical example of criminal application refused leave is *Sturm v R* [2007] NZSC 63.
[105] This includes mentioning s 13, interests of justice, (substantial) miscarriage of justice, public importance, general importance, commercial significance or no jurisdiction.

refusals of leave in its earlier years. In 2004, 92 per cent of refusals for leave contained the statutory criteria. In 2005, 100 per cent of refusals referenced the statutory criteria. In 2006, 86 per cent of refusals referred to the statutory criteria in some way. The average percentage of cases which utilise the s 13 criteria in refusing leave is 79 per cent.[106] There is a clear indication from the Court that statutory criteria are important to help determine why applications ought to be refused leave. 2010 is an outlier, as in that year only 56 per cent of refusal decisions referred to the statutory criteria, while 87 per cent of decisions referred to alternate, non-statutory criteria developed by the Court.

Table 2: Use of statutory and non-statutory criteria in refused applications

	Cases using statutory criteria	Cases using non-statutory criteria	Number of cases using non-statutory criteria only
2004	92%	54%	0
2005	100%	75%	0
2006	86%	74%	7
2007	75%	72%	10
2008	83%	74%	10
2009	73%	68%	16
2010	56%	87%	39
2011	70%	78%	24
2012	78%	87%	11
Average	79%	74%	Total = 117

b) Non-statutory criteria utilised

The Court has not solely relied on statutory criteria in refusing leave applications. It has developed a wide range of non-statutory reasons to justify refusal. The following were repeatedly used:

- The application has "no merits";
- There were "no prospects of success" if leave was granted;
- The application was an "attempted relitigation of the facts";

[106] See Table 2 above.

- The application was an "attempted relitigation of a discretion correctly exercised";
- "No question of law" was raised;
- "No question of principle" arose on the facts;
- The appeal was on an issue of "settled law"; or
- The issue had been rendered "moot" by subsequent events or legislative change.

Cases frequently referred to some combination of these non-statutory criteria alongside statutory criteria. On average, 74 per cent of refused applications rely on non-statutory criteria of some sort, usually in concert with statutory criteria.[107] 2006 was the first year where applications were decided solely with reference to non-statutory criteria.[108] There decisions instead used reasons like "no viable basis for [a] challenge"[109] and "no merits"[110]. In 2007, ten decisions were rejected solely using non-statutory criteria: "no merits"[111], "ground not raised on first appeal"[112], and "no prospects of success"[113]. In 2009 sixteen cases used only non-statutory criteria, including "no tenable grounds"[114]. 2010 represents an outlier, where 39 out of 90 applications for leave were rejected with no reference to the statutory criteria. Instead, reasons given included "issue moot"[115], "no obvious error by the Court of Appeal"[116], and "no substantive merits" as the Court of Appeal's judgment "was convincing"[117]. These statements provide a clear indication of what the Court does not want to hear.

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[107] See Table 2 above.
[108] See Table 2 above.
[109] *B v M* [2006] NZSC 86; (2006) 18 PRNZ 398.
[110] *McNamara v R* [2006] NZSC 49; *James Parlane v Waipa District Council* [2006] NZSC 73; *Fiona Prasad v Chief Executive MSD* [2006] NZSC 26; (2006) 18 PRNZ 74; *Christopher Taunoa v AG - Recusal* [2006] NZSC 94.
[111] *Jason Glen Vincent v R* [2007] NZSC 67; *Patricia Owens v Social Development* [2007] NZSC 8; (2007) 18 PRNZ 422; *Burns and Burns v ANZ National Bank* [2007] NZSC 20.
[112] *Mankelow v R* [2007] NZSC 57 at [2].
[113] *Ch'elle Properties (NZ) Limited v Commissioner of Inland Revenue* [2007] NZSC 73; (2007) 23 NZTC 21,653.
[114] *Arshad Mahmood Chatha v R* [2009] NZSC 21; *Audrey Bredmeyer v Chief Executive Ministry Social Development* [2009] NZSC 28.
[115] *Crequer v Chief Executive, Department of Corrections* [2008] NZSC 48 at [2]; *Taniwha v R* [2010] NZSC 50 at [3].
[116] *Phillip Michael McMaster v R* [2010] NZSC 7; *Neville Fong and anor v Christopher Wong and anor* [2010] NZSC 152; (2010) 20 PRNZ 250; and *Rajendra Prasad v Indiana Publications (NZ) Ltd and others* [2010] NZSC 60 at [3]: "The Court of Appeal held this proceeding was an abuse of process … [this] was a fully justified and inevitable conclusion".
[117] *Churchill Group Holdings Ltd v Aral Property Ltd* [2010] NZSC 131.

c) Indications of what the Court wants

In refusing leave applications, the Court has provided some clear indications as to how it interprets its role as a final appellate Court.[118] This guidance exists as parallel commentary explaining its perceived role and is not normally meaningfully connected with the language of s 13.

The Court is primarily concerned with providing "guidance [for] a future case".[119] The Court stated in *Shell (Petroleum Mining) v Todd* that the criterion of "general importance" in s 13(2)(a) means it will hear applications which have "precedent value".[120] This statement aligns with the extrajudicial analysis published by Blanchard J in 2007.[121] However explicit reference to the need for "precedential value" is rare: more often it is only implicit in leave decisions. *Shell (Petroleum Mining) v Todd* has been cited in two subsequent leave decisions.[122] The need for precedential value is not consistently used to justify why leave is refused or granted, nor is it widely published by the Court.

The Court has also given guidance around the type of cases it does not want to hear and does not see as falling within its role. It will not give advisory judgments.[123] It is generally unwilling to intervene when the legal issue has been rendered moot by subsequent events or legislative change.[124] It is unwilling to intervene in procedural matters, particularly when they involve the exercise of discretion by a lower Court.[125] Attempts to review the exercise of a discretion

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[118] For statements about the role of the Court see: *Burgess v R* [2008] NZSC 79 at [4] "It is not the role of a final Court to embark upon a review of the strength of the evidence when the Court of Appeal has already given the issues careful consideration"; or *Junior Farms Limited v Hampton Securities* above n 100 at [4]: "That is simply not the role of an ultimate appellate court, as can be seen from the practice and jurisprudence of comparable courts in the common law world."

[119] *Te Runanga O Muriwhenua Inc v Treaty of Waitangi Fisheries Commission and others* [2004] NZSC 12 at [7].

[120] In *Shell (Petroleum Mining) v Todd Petroleum Mining Co Ltd and ors* [2008] NZSC 26.

[121] Blanchard above n 53 at 4.

[122] *New Zealand Exchange Limited v Bank of New Zealand and* others [2008] NZSC 54; [2009] 1 NZLR 145; (2008) 18 PRNZ 992 at [2]; *Technix Group Ltd v Fitzroy Engineering* [2011] NZSC 57 at [4]. Both these cases affirm the need for "precedential value" in commercial applications only, not more broadly.

[123] *Gordon-Smith and King v R* [2008] NZSC 56; [2009] 1 NZLR 721 at [18].

[124] *Orlov v ANZA Distributing (NZ) Ltd (in liq)* [2011] NZSC 28; [2011] 2 NZLR 721 at [3]; *E v Chief Executive Ministry of Social Development* [2007] NZSC 94 at [3].

[125] *Fay v Wynston Chirnside and Rattray Properties Ltd* [2004] NZSC 32: "It will be a rare case in which this Court will grant leave on a procedural matter. In this case the refusal to refer the case back to the High Court after determination of the appeal on liability is an entirely discretionary matter in which intervention on appeal would be extraordinary. There is no issue of general or public importance."

by a lower court have been termed "futile".[126] It will not engage in general error correction[127]; fact-specific appeals are often unsuccessful because they stand or fall on the facts of the case.[128] The Court has repeatedly stated that an appeal must be sufficiently arguable.[129]

The meaning of the statutory criteria "substantial miscarriage of justice" remains unclear in the decisions. The Court has made varying statements over the years, which do little to clarify the matter. The Court generally states what a "miscarriage of justice" is not, rather than creating a positive test for it. For example, a general appeal on an issue of sentencing will not give rise to a "substantial miscarriage of justice".[130] Something more is required, as it is the Court of Appeal's primary role to establish clear sentencing principles.[131] Appeals against sentence will only "infrequently raise questions of general principle [that it is necessary for the Court to hear]."[132]

In 2005, the Court stated that "a further appeal is only appropriate where the … process has been seriously miscarried".[133] It asserted its interpretation of "substantial miscarriage of justice" was "substantially the same as that in respect of second appeals in other Commonwealth jurisdictions" and listed several Commonwealth authorities.[134] While generalised links to other jurisdictions were made, no test was set out, nor analysis given. Stating that a "substantial miscarriage of justice" giving rise to second appeal occurs when "the process has seriously miscarried" is tautological and does not give clear guidance. In 2008 the Court asserted that the principles of a miscarriage of justice are "clear and well

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[126] *Clifton v R* [2005] NZSC 3 at [7]: "The present case is a good example of the futility of applications for leave to appeal to this Court in a criminal matter which, in substance, seek further review of discretionary rulings and the application of established legal principles to the facts of particular cases".
[127] *Junior Farms Limited v Hampton Securities* above n 100 at [4].
[128] *Burgess v R* above n 118 at [4]. *Brown v Attorney-General* [2005] NZSC 59; (2005) 8 HRNZ 1 at [3].
[129] *Manuel v Superintendent, Hawkes Bay Regional Prison* [2004] NZSC 6; [2005]2 NZLR 721 at [6]. *Exley and McMillan v R* [2007] NZSC 104 at [2].
[130] *Trotter v R* [2005] NZSC 7 at [6].
[131] *Burdett v R* [2009] NZSC 114 at [4]. See also *Stephen Tandy v R* [2008] NZSC 8: "This court will be reluctant to interfere with [the Court of Appeal's] assessment, except where it is clear that some error of principle has been made in the setting of appropriate sentencing levels."
[132] *Bennett v R* [2004] NZSC 36. An example of a general question of principle was given as where "the jurisdiction for the imposition of a sentence" was in contention in *Burdett v R* above n 131 at [4].
[133] *Trotter* above n 130 at [6].
[134] *Trotter* at [7]. Two Australian authorities were cited to demonstrate this proposition: "Although there are some differences in the statutory provisions conferring jurisdiction, the general approach to the grant of leave is the same: see *Taylor on Appeals* at 14.028 (House of Lords) and 18.096 et seq (Privy Council), *Lowe v The Queen* [1984] HCA 46; (1984) 154 CLR 606 (High Court of Australia) and *R v M* [1996] 1 SCR 500 at [33] (Supreme Court of Canada)."

established; the Court will intervene only where there is no rational or logical explanation for different verdicts".[135] The Court did not cite any of its own authorities for this proposition. The requirements for a criminal "substantial miscarriage of justice" are thus difficult to construct with any certainty from the leave provisions. I will explore whether any clarity is given in the substantive decisions of the Court in section 5(c) below.

In contrast, the requirements for a civil "miscarriage of justice" were set out clearly in *Junior Farms Limited v Hampton Securities*.[136] The Court held that a civil "miscarriage of justice" would not be interpreted so as to allow a second exercise of "error correction".[137] Rather, a civil "miscarriage of justice" was held to exist where there was "a sufficient error ... of such a substantial character that it would be repugnant to justice to allow it to go uncorrected in the particular case."[138] This has been affirmed in multiple subsequent judgments.[139]

On the issue of "general commercial significance" the Court has expressly rejected that a case will be of significance because of the monetary value in dispute.[140] The Court has repeatedly affirmed that what is key is the precedential value of the decision to be made; that "a judgment of this Court [ought to] give guidance to other litigants in future cases"[141].

d) Conclusion

It is clear that the Court is engaging with the s 16 requirement which requires the Court to provide reasons in refused applications. The fact that non-statutory criteria were used nearly as frequently as the statutory criteria is worthy of comment. The Court has a clear perception of its role within the judicial system, and is using refused applications for leave to discuss that role. However the role asserted by the Court lacks connection to the language of s 13. The Court does not provide a simple test for "substantial miscarriage of justice" nor, despite the Court having indicated what such a test might involve for "public importance" has this interpretation been widely disseminated. I will analyse the implications of this disconnect

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[135] *Timothy Justin Nevin v R* [2008] NZSC 40.
[136] *Junior Farms Limited* above n 100.
[137] *Junior Farms* at [3]. here the plaintiff alleged the Court of Appeal had calculated the price of land relying on incorrect assumptions
[138] *Junior Farms* at [5].
[139] For decisions affirming *Junior Farms* see above n 100.
[140] In *Shell (Petroleum Mining) v Todd Petroleum* above n 120. Affirmed in *Technix Group Ltd v Fitzroy Engineering* above n 122 at [4].
[141] In *Shell (Petroleum Mining)* at [3].

between the Court's statements about the type of applications it will grant leave to and the statutory criteria in Part III.

4. How the Court grants leave to appeal

The Court granted leave to an average of 24 applications per year during my period of study.[142] Most decisions were extremely brief. The Court's normal practice when granting leave is to state that leave is granted, and then list the grounds. A typical example of such a decision is:

> *A* *Leave to appeal is granted.*
> *B* *The approved ground is whether the appellant should have been permitted at his trial to adduce evidence that he had no convictions for any criminal offence involving violence.*[143]

Leave decisions very rarely explain why leave was granted. In 2005, seven out of 28 applications granted granting leave included a reference to s 13 criteria, and this was the highest number I found in my study.[144] The Court is thus relying on the "obviousness"[145] of the merits of the application to communicate that it is "satisfied [the application] is necessary in the interests of justice to be heard".[146]

Table 3: Applications granted leave where criteria mentioned

	Cases granted leave with criteria	Cases granted leave with criteria as a percentage
2004	5/9	56%
2005	7/28	25%
2006	0/23	0%
2007	1/27	3%
2008	3/26	12%
2009	3/30	10%
2010	2/37	5%
2011	2/25	8%
2012	1/12	8%
TOTAL	24/217	11%

[142] See Appendix D.
[143] *Aaron Mark Wi v The Queen* [2009] NZSC 39.
[144] See Table 3 above.
[145] Blanchard above n 58 at 34.
[146] Supreme Court Act 2003, s 13(1).

The issue being of "public importance" is referred to in fourteen of the 217 applications granted leave, making it the most commonly cited reason for granting leave.[147] Five applications granted refer to "the interests of justice", three refer to a "miscarriage of justice" and two refer to a "substantial miscarriage of justice".[148] Perhaps the most extreme example of the opacity often found in leave granting decisions is that of *Allenby v H* which held:

> *A The case is clearly one in respect of which leave should be granted and we therefore grant leave.*
> *B The approved ground of appeal is whether the Court of Appeal was correct in answering the question before it in the negative.*[149]

This exemplifies the lack of clarity in the leave granting process. It also illustrates a gap in reasoning by the Supreme Court in its approach to granting leave. Anyone reading this particular decision would require background knowledge of New Zealand's Accident Compensation scheme, and the legal history of the fraught question of whether a pregnancy is a "personal injury" under the Injury Prevention, Rehabilitation, and Compensation Act 2001. That background and its significance for the New Zealand public is not clear when the application is granted leave, and no hint of s 13 appears in the 95 paragraphs and three separate judgments of the substantive decision published the following year by the full Court.[150]

Two types of cases indicate that this gap in reasoning is intentional. The first occurs when the Court accepts only some grounds of appeal, and rejects others. An example of this is *Simpson and Downes (receivers) v Commissioner of Inland Revenue* which held after granting leave that:

> *Although the applicants [also] wish to challenge this aspect of the Court of Appeal's judgment, we consider that this point does not warrant leave to appeal. In the first place, and despite the assertions of counsel for the applicants to the contrary, it does not raise a point of general or public importance. Instead it turns on a very particular set of facts and the interpretation of a one-off agreement which will plainly not be used as a template for future agreements. Secondly, there is no appearance of a miscarriage of justice. The conclusion and reasons of the Court of Appeal are unassailable.*[151] [emphasis added]

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[147] See Appendix H.
[148] See Appendix H.
[149] *Allenby v H* [2011] NZSC 71.
[150] *Allenby v H and others* [2012] NZSC 33.
[151] *Simpson and Downes (receivers) v Commissioner of Inland Revenue* [2012] NZSC 62 at [4].

The Court provided no reasons why it granted leave on the first ground of appeal. If the second ground pleaded was not of public importance as it lacked precedential value, and involved no potential miscarriage of justice, we can infer that the successful ground of appeal ("Were the applicants required to pay the GST on the sales to the Commissioner of Inland Revenue?") was either of public importance, or perhaps involved a potential miscarriage of justice. It is equally possible that leave was granted to the first ground for unrelated and unstated reasons. This lack of clarity is typical for the Court in granting leave applications, and undermines claims that the reason is "obvious" or "apparent".

The second example where the Court is aware of the need to give reasons are two unique decisions which explained why the leave granted was necessary. The first is the nineteen-paragraph decision by Elias CJ in the leave application of *Hamed v R* where the reason leave was granted was thoroughly unpacked:

> "*Both the validity of the surveillance and searches under s 198 of the Summary Proceedings Act and the assessment of disproportionality in the exclusion of the evidence … raise matters of general or public importance which make it necessary in the interests of justice for this Court to consider the correctness of the approach taken in the Court of Appeal.*"[152] [emphasis added]

The contentious aspect of the application was whether the Court should grant leave at an interlocutory stage of the proceedings. The Court cited the unusual circumstances, length of the proposed trial, and the number of accused as helpful factors in justifying that it was "in the interests of justice" for leave to be granted on the interlocutory application in this case.[153] Implicit in the Court's reasoning is that this decision sets a precedent that other applications will attempt to follow. Thus a "significant threshold" was set by the Court's reasoning to preclude premature interlocutory applications being brought.[154]

This lengthy discussion in *Hamed* around the role of the Supreme Court, and at what stage it will interfere gives some of the clearest insight into how the Court perceives its role. The decision ought to be contrasted with the leave granted in *Greymouth Gas Kaimiro Limited v GXL Royalties Limited*.[155] *Greymouth* follows the typical pattern of granting leave – stating that

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[152] *Hamed and others v The Queen* [2011] NZSC 27 at [2].
[153] At [17].
[154] At [13].
[155] *Greymouth Gas Kaimiro Limited v GXL Royalties Limited* [2010] NZSC 30.

leave will be given, and then the specific ground the Court will hear – but it then went on to provide six paragraphs "explaining" why leave was granted. The Court stated:

> *"It is not the Court's usual practice to give reasons when granting leave to appeal unless, which is not the case here, the leave precludes the advancing of one or more proposed grounds. However, it is necessary that we should say why we are of the view that the so-called concession by GXL … does not determine the pleading issue between the parties in GXL's favour."*[156]

The Court then explained the complicated factual scenario which was the basis for appeal, and stated it was "necessary to grant leave" because the parties "were at loggerheads".[157] This decision represents an aberration in normal Court procedure, and is worthy of comment. The Court first explains that it does not usually provide reasons when leave is granted, but then goes on to explain why, in this particular and unique fact scenario, reasons for leave were required. No statutory criteria were mentioned, and no context is given to readers as to why this is an issue of general or public importance, or even whether it had precedential value. The Court's analysis provides little guidance as to why the Court deemed this aspect of the very complicated, drawn-out and expensive litigation worthy of leave. This inaccessibility is a problem. I will now explore whether or not the opacity of the leave-granting process is remedied by the substantive decisions of the Court.

5. How the Court uses s 13 in substantive decisions

Justice Blanchard and the Supreme Court Registrar asserted that the reasons why leave were granted would become "apparent" in the substantive decisions of the Court, having been purposefully omitted from leave granting decisions.[158] I will now explore whether this assertion has any factual basis, by analysing the substantive cases which have mentioned and given analysis of the statutory language of s 13. During my period of study, the Court published 190 decisions, comprising 19 per cent of its total output.[159] Only one of the substantive decisions published has explicitly referred to the Supreme Court Act.[160] The Court rarely referred to s 13 or the statutory criteria in its substantive judgments, or explained why

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[156] *Greymouth Gas* above n 155 at [1]
[157] At [6].
[158] Blanchard above n 20 at 192 and Thatcher, above n 70, at 463.
[159] See Appendix D.
[160] *The New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated v Air New Zealand Limited* [2007] NZSC 89 at [89].

it was "satisfied" that it was in the "interests of justice" to hear an appeal. Only 44 of those 190 decisions utilised the statutory language in some way, but not always in the context of why leave was granted.[161]

a) Interests of justice

None of the substantive decisions analysed the meaning of "interests of justice" in any depth. The phrase was mentioned in six different decisions, but only in passing, and normally in combination with another ground, such as "general importance"[162] or "miscarriage of justice".[163]

b) General or public importance

My attempts to find a coherent interpretation and application of the statutory term "general and public importance" were not successful. "General and public importance", and its formulations, "general importance", "general significance" and "public importance" were mentioned in a total of ten substantive decisions.[164] The Court's approach in these cases appears to be one of explaining the specific ground upon which leave was granted, and then stating that that ground is a question of "general or public importance". A typical example of this is *Arbuthnot v Chief Executive of the Department of Work and Income* which asserted, rather than explained the general importance of the issue as follows:

> "*As this issue has some general importance to the Department and to beneficiaries we granted leave to appeal to this Court on the following ground:*
> *Did the Authority err in its interpretation of s 12J in holding that it had jurisdiction to consider evidence relating to the issue of whether or not the appellant was living*

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[161] See Appendix D.
[162] *Marfart and Prieur v TVNZ* [2006] NZSC 33; [2006] 3 NZLR 18; *Z v Dental Complaints Assessment Committee* [2008] NZSC 55; [2009] 1 NZLR 1.
[163] *Peter David Buddle v R* [2009] NZSC 117; [2010] 1 NZLR 717.
[164] *Taylor v Jones* [2006] NZSC 114; *Skelton v Jones* [2006] NZSC 113; [2007] 2 NZLR 178 at [15]; *Marfart and Prieur v TVNZ* above n 162 at [7]; *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55; [2008] 1 NZLR 13 at [3]; *Steele & Roberts v Serepisos* [2006] NZSC 67; [2007] 1 NZLR 1 at [74]; *Greenpeace v Genesis Power* [2008] NZSC 112; [2009] 1 NZLR 730 at [64]; *Leroy John Barr v New Zealand Police* [2009] NZSC 109; [2010] 2 NZLR 1 at [12]; *Davies v New Zealand Police* [2009] NZSC 47; [2009] 3 NZLR 189 at [5]; *NZ Recreational Fishing Council v Sanford Limited* [2009] NZSC 54; [2009] 3 NZLR 438 at [1]; *David McAlister v Air New Zealand Limited* [2009] NZSC 78; [2010] 1 NZLR 153 at [4]; and *Govind Prasad Saha v Commissioner of Inland Revenue* [2010] NZSC 89; [2010] 3 NZLR 796 at [1].

> *in a relationship in the nature of marriage if that evidence was relevant to the appellant's eligibility to the accommodation supplement?*"[165]

There is no meaningful connection drawn between this highly specific ground of appeal and "general importance". This follows the Court's pattern in refusing applications for leave; the relevant factual issue is specified and then the Court asserts it does not satisfy the claimed criteria.[166] Meaningful analysis as to the meaning of the criteria beyond the facts of the case is lacking.

c) Substantial miscarriage of justice

There is no substantive case analysis on the meaning of "substantial miscarriage of justice" in the Supreme Court Act. However, the phrase occurs frequently in the Court's decisions, as the same term is used in s 385(1) of the Crimes Act 1961. In its early years, the Supreme Court developed an important line of jurisprudence clarifying the distinction in s 385(1) between a "miscarriage of justice" and a "substantial miscarriage of justice".[167] This is not the same as analysing the meaning of "substantial miscarriage of justice" as it is used in s 13(2)(b) of the Supreme Court Act, as the phrase is used in vastly different contexts .[168] However it is the only potential guidance available on why the two terms are used interchangeably by the Court and therefore what is required to satisfy "a substantial miscarriage of justice" in relation to the leave requirements.

It appears that the Court does not recognise any distinction between the phrase "substantial miscarriage of justice" (which appears in 12 substantive decisions) and "miscarriage of

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[165] *Arbuthnot v Chief Executive of the Department of Work and Income* above n 164 at [3].
[166] See above n 104.
[167] The distinction was important, as the Supreme Court and Court of Appeal were obliged allow an appeal against conviction in set circumstances (including if a miscarriage of justice had occurred on any ground), but could dismiss that appeal if it considered that "no substantial miscarriage of justice [had] actually occurred": Crimes Act 1961, s 385(1). The key cases are: *Sungsuwan v R* [2005] NZSC 57; [2006] 1 NZLR 730; *Kurt Owen v R* [2007] NZSC 102; [2008] 2 NZLR 37 and *Matenga v R* [2009] NZSC 18; [2009] 3 NZLR 145.
[168] "Strictly speaking the binding rule of the earlier authority will be specific to the words of the legislative text with which that authority dealt": Michael Kirby "Precedent – Report on Australia" (speech given to International Academy of Comparative Law Conference, Utrecht, The Netherlands 17 July 2006) at 19. In the Crimes Act a mere "miscarriage of justice" can preclude an appeal, while in the Supreme Court Act "substantial miscarriage of justice" is the threshold for an appeal, but appears interchangeable with "miscarriage of justice."

justice" (which appears in 13 substantive decisions).[169] In *Rongonui v R* the wrongful admission of leading evidence amounted to "such a major and prejudicial departure from proper practice" the conviction was overturned and a retrial ordered because of the "miscarriage of justice" which had occurred.[170] In the substantive judgment of *Mason v R* in the same year it was held that combining two assault incidents into a single charge had resulted in a "substantial miscarriage of justice" requiring the conviction be overturned.[171] There is no Court explanation as to why different language was used and no indication whether the word "substantial" indicates a different standard was applied.

The lack of distinction between the two terms could be explained by the approach of Elias CJ and Tipping J to s 385(1) in *Sungsuwan v R*. Both made *obiter* statements which eliminated the distinction in s 385(1) of the Crimes Act between "miscarriage of justice" and "substantial miscarriage of justice" and set a single high standard.[172] This proposed singular meaning of "miscarriage" in s 385(1) required "something must have gone wrong in the trial" and that "what went wrong would lead to a real risk of an unsafe verdict".[173] The language of "real risk of an unsafe verdict" has been adopted in later Court decisions relating to "miscarriages of justice" in the leave context.[174] It may seem a stretch to conflate the Court's interpretation of s 385(1) with its interpretation of s 13(2)(b). This is rendered necessary by the Court's lack of clear analysis as to the meaning of "substantial miscarriage of justice" in s 13(2)(b), and its failure to confirm whether its interpretation of s 385(1) applies to leave requirements.

The analysis of "substantial miscarriage of justice" in the Crimes Act is the only potential guidance for litigants as to what the Court may require in a leave application. The fact that s 385(1) has since been repealed renders the current state of the Court's interpretation deeply problematic and in need of address.

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[169] See Appendix F and G. Compare to appendix E where 150 total applications refused using "miscarriage of justice", while 118 refused using "substantial miscarriage of justice".
[170] *Rongonui v R* [2010] NZSC 92; [2011] 1 NZLR 23 at [58].
[171] *Mason v R* [2010] NZSC 129; [2011] 1 NZLR 296 at [14].
[172] *Sungsuwan v R* above n 167: Elias at [6], Tipping at [113].
[173] *Sungsuwan* at [110].
[174] For example in *Timoti v R* [2005] NZSC 37; [2006] 1 NZLR 323 at [57]; *L v R* [2006] NZSC 18; [2006] 3 NZLR 291 at [39]; and *Rajamani v R* [2007] NZSC 68; [2008] 1 NZLR 723 at [21].

d) General commercial significance

The New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated v Air New Zealand Limited is the only substantive decision by the Supreme Court which mentions the criterion of "general commercial significance". Justice Anderson separate judgment is unique because it explicitly states:

> *"It was plain that different aspects of the Court of Appeal's reasons raised issues of general importance and of general commercial significance, sufficient to meet the requirements of s 13 of the Supreme Court Act 2003. Accordingly leave to appeal and cross-appeal was granted on specified grounds which put in issue the matters of concern to each party."*[175] [emphasis added]

This paragraph is the full extent of the analysis provided: the interpretation of the Holiday Act 2003 and minimum holiday pay entitlements are of "general commercial significance". "Commercial significance" as a term of art has not been developed or mentioned in any other substantive Supreme Court decision. The case is also noteworthy as the only time the Court has ever referred specifically to the words "s 13" and "the Supreme Court Act 2003" in a substantive decision.

e) Non-statutory reasons for leave

The Supreme Court does sometimes indicate why it granted leave with reasons outside the s 13 criteria. I took note of these decisions, but did not count them as interpretation of or giving guidance to the leave criteria. Many cases mention that the "public interest" and/or "public policy" was affected by and informed the outcome of the appeal.[176] Some cases make it clear that the issues being decided were crucial to maintaining "public confidence" in "the legal system",[177] "jury verdicts",[178] "justice being seen as well as done"[179] and in "the [general] administration of justice".[180] Other decisions explicitly stated they concerned "points of constitutional principle", without taking the further step of explaining why they were *ipso*

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[175] *The New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated* above n 160 at [89].
[176] For example: *Zaoui v The Attorney-General* [2004] NZSC 31 at [101]; *Taunoa v Attorney-General* above n 97 at [369]; *Brooker v The Police* [2007] NZSC 30; [2007] 3 NZLR 91 at [276].
[177] *Saxmere Company Limited and others v Wool Board* [2009] NZSC 72; [2010] 1 NZLR 35 at [38].
[178] *Gordon-Smith v R* above n 123 at [39].
[179] *Saxmere Company* above n 177 at [3].
[180] *Hamed* above n 152 at [58].

facto matters of general or public importance.[181] Without a connection between these reasons and the leave criteria, this cannot amount to the sort of "obviousness" claimed by Justice Blanchard.

6. Conclusions

The Supreme Court has not properly articulated its interpretation of key terms in the Supreme Court Act. The majority of analysis comes from a select few cases, which are only infrequently referenced again by the Court. Instead, a parallel line of common law authority exists on the type of appeals the Court wishes to hear which is ideologically disconnected from the criteria. The Court wants to make decisions which establish precedents for lower Courts.[182] Decisions which are fact-specific will thus not be accepted.[183] The next Part shall explore whether the approach of the Supreme Court is adequately fulfilling its empowering legislation and constitutional role.

[181] *Hamed* at [1]; *Tannadyce Investments Limited v Commissioner of Inland Revenue* [2011] NZSC 158 at [3].
[182] See above Part II 3(c) at n 119.
[183] See above Part II 3(c) at n 128.

Part III: Analysis

In this Part, I will draw together the legislative framework with the empirical data I have gathered to assess whether or not the Court is fulfilling its expected role. In assessing the interpretation and use of s 13 of the Supreme Court Act by the Supreme Court, we need to look both at how s 13 has been engaged in decisions refusing leave, and then how it has been utilised to justify cases where leave has been granted. In refusal of leave applications, the Court has provided some guidance through a bulwark of negatively-framed precedent: there are many cases stating what is *not* in the interests of justice and what is *not* a substantial miscarriage of justice. What is more significant is the seeming divide between the statutory criteria the Court must be "satisfied" of and the guidance actually given by the Court regarding the type of cases it wishes to hear. In the cases granted leave and the substantive decisions that follow, there is a notable absence as to how or why they satisfied the Court that it was "necessary in the interests of justice" they be heard. This final section will draw together what the obligations of the Supreme Court are, whether it is satisfying those obligations and what best practice by the Court would look like.

1. Refusals of leave by the Supreme Court and the value these have

The Supreme Court is fulfilling its duty to give reasons in refusal of leave decisions. Through refusal of leave decisions, the Court has built up a body of negative precedent. It is thus possible to construct what is *not* an issue of "general or public importance", and what will *not* amount to a "substantial miscarriage of justice".[184] Cases like *Junior Farms* are the exception to this general trend in presenting positive analysis of what the leave criteria require.[185] *Junior Farms* is also valuable in proving the precedential value of leave decisions, as the Court refers back to it and relies on it as an authoritative statement of principle when refusing other applications.[186]

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[184] *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [13.02] and [13.04].
[185] *Junior Farms* above n 100 at [5].
[186] See for example *Mamfredos v Herbert Equities Ltd* [2007] NZSC 79 at [7]; *Transpower v Todd Energy* above n 100 at [4]; *Tulsi Ram Naresh v Gordon Edward McCluskie* [2009] NZSC 118 at [3].

The Court has upheld the requirement of s 16 that brief and general reasons are given when refusing leave applications. In 79 per cent of cases some form of statutory criteria were referenced in relation to why leave was not granted.[187] In a distinct but overlapping 74 per cent of cases the Court used non-statutory criteria, normally in conjunction with statutory criteria to explain why leave was refused.[188] A small minority of cases relied solely upon non-statutory criteria[189] which poses the question: should the Court have the ability to use non-statutory criteria in justifying refusals of leave applications? Section 13(5) states that the criteria in s 13(2) do not limit the generality of the words "in the interests of justice".[190] Justice Blanchard interprets s 13 criteria as a non-exhaustive list with room for further judicial additions; criteria like "is arguable" and "has merits" are implicit.[191] This expansive view seems permissible in the context of the Act.

It is thus safe to assume that the Court is able to create and use a cohort of non-statutory criteria in refusals of leave applications. The types of criteria utilised by the Court include "no merits" in the application, "no prospect of success" if leave is granted; "no principled question of law" being at issue; if the grounds plead are an attempted "relitigation of facts" or "relitigation of discretion correctly exercised"; where the legal issue has become "moot" due to subsequent events, or a law change; or where the Court refuses on the basis the appeal is in an area of "settled law". The most persuasive refusal decisions occur when the court combines its reasoning, and integrates statutory and non-statutory criteria in refusing leave. One such case is *Tulsi Ram Naresh v Gordon Edward McCluskie* [2009] NZSC 118 which held:

> *"The Court of Appeal concluded that the absence of merit in any of the grounds advanced by the applicant made the dismissal of the appeal "inevitable". No question of general importance would have arisen on appeal to this Court; the principles governing the removal of trustees are well-settled. No substantial miscarriage of justice has resulted."*[192] [emphasis added]

This analysis explains the history of the appeal, the approach of the Court of Appeal, the merits and then connects this to the statutory language. My conclusion is that the Court should endeavour to give its reasons for refusing leave within the framework of statutory

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[187] See above Table 2.
[188] See above Table 2.
[189] See above Table 2. 117 applications out of 574 only referred to non-statutory criteria.
[190] Supreme Court Act 2003, s 13(5).
[191] Blanchard above n 53 at 6.
[192] *Tulsi Ram Naresh* above n 186 at [3].

criteria, and continue to illustrate and elucidate the connection between non-statutory and statutory criteria. For example: the Court should explain how an appeal with no merits is not necessary to hear in the interests of justice when the outcome will not change and the ruling will not be of any precedential value to future litigants. This is not the Court's consistent and current practice in refusing applications.

2. Substantive decisions of the Supreme Court of New Zealand

The Court "must not give leave to appeal… unless it is satisfied it is necessary in the interests of justice".[193] We are forced to assume the Court is "satisfied" that the issues it grants leave to are indeed "in the interests of justice" and need to be heard. This assumption is required, as the Court intentionally omits giving an explanation of how applications granted leave satisfy the s 13 criteria. The stated policy was reiterated in 2014 by Blanchard J in his speech at the Supreme Court Conference: The First 10 Years[194]:

> *"The court is not obliged by its statute to do this, and rightly so. It is implicit in the approved grounds for leave that the court considers that those grounds are arguable and meet the leave criteria. To say more [during the leave decision] would give the appearance of adopting a position prematurely. … Reasons for leave would perhaps also embarrass the Court!"*

With the utmost respect, this is an inappropriate position for the Court and the judicial officers of New Zealand's highest appellate authority to take. Justice Blanchard has explicitly maintained this position over the years, and he is the only extra-judicial comment on this issue. However, the view that "it is not the Court's usual practice to give reasons when granting leave to appeal" was jointly written by himself with McGrath and Wilson JJ.[195] The justifications for this position are two-fold. It is assumed that the reasons leave was granted will either be "apparent from the approved grounds" or "once [the Court has] delivered a judgment in the substantive appeal".[196] My analysis of the cases granted leave demonstrated the opacity of the grounds published in leave decisions, which frequently need a contextual

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[193] Supreme Court Act 2003, s 13(1).
[194] Peter Blanchard KNZM, Former Justice of the Supreme Court "The Supreme Court - A Judge's View" (The New Zealand Supreme Court: The First Ten Years Conference, Pullman Hotel, Auckland 14 November 2014) at 13.
[195] *Greymouth Gas* above n 155 at [1].
[196] Blanchard above n 20 at 192.

knowledge of the case and how it was plead in lower courts to make any sense. My exploration of the use of s 13 in the 190 substantive decisions of the Court demonstrated that, in contrast with this bold assertion of Blanchard J, the reasons why leave was "necessary in the interests of justice" are rarely given. A gap exists in the Court's reasoning process, reliant on "obviousness": an idea which has neither principled justification nor is made out in actual fact. I argue that the Court can and ought to do better, both in providing explicit and clear reasoned processes and creating a positive body of precedent in leave decisions and around s 13 of the Supreme Court Act 2003.

Justice Blanchard was technically correct to assert that there is no statutory obligation to provide reasons when leave is granted, certainly not in the same way that reasons are required for refusals of leave. Nor is there yet any general duty on judicial decision-makers to provide reasons in New Zealand.[197] However, there is broad academic support, as well as indications from case law that the common law and New Zealand judiciary are moving towards the imposition of a general duty.[198] The arguments in support of a general duty to give reasons equally justify why the Supreme Court ought to provide reasons in all leave decisions, regardless of statutory obligations. The six broad (and connected) justifications behind requiring explicit reasons from judges include:

- It imposes a form of self-discipline upon judges, ensuring party submissions are "confronted and not avoided".[199]
- It holds decision-makers accountable by opening up the administration and processes of justice to public scrutiny.[200]
- It constrains the judiciary's exercise of power; giving reasons can be the fundamental difference between a "judicial" and an "arbitrary" decision.[201]

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[197] Cochrane above n 50 at 527.
[198] Cochrane at 528 and 535. See also the influential Michael Taggart "Should Canadian Judges be legally required to give reasoned decisions in civil cases?" (1983) 33(1) University of Toronto Law Journal 1.
[199] H L Ho "The Judicial Duty to give reasons" 2000 20(1) Legal Studies 42 at 47. Cochrane above n 50 at 528.
[200] Jason Bosland and Jonathan Gill "The principle of open justice and the judicial duty to give public reasons" [2014] 38 Melbourne University Law Review 482 at 499. See also Andrew Beck "Great Power, Great responsibility" [2009] NZLJ 295 at 297 and Cochrane above n 50 at 528.
[201] Ho above n 199 at 49. Michael Taggart above n 198 at 6.

- Reasons are an element of natural justice and fairness requirements, including giving rise to the ability to appeal.[202] However, the duty is not contingent upon the right to appeal.[203]
- The duty will vary with context, but will not be unduly onerous.[204]
- Reasons help create a body of precedent, allowing legal practitioners and members of public to ascertain the basis upon which similar cases will probably be decided in future.[205] Explicit reasoning encourages coherency and consistency in law.[206]

The justification behind requiring the Supreme Court to provide reasons when granting leave applications is that it will direct the Court's mind, ensure greater discipline and accountability and provide some guidance as to how s 13 is interpreted and will be applied in the future. The need for the Supreme Court to be held accountable for its decisions through explicit reasoning processes is supported by the fact that reasons are the only real method of accountability for the Court.[207] The traditional methods of judicial accountability are the ability to appeal, the power to remove judges, public hearings and judicial self-regulation.[208] There is no ability to review a decision made by the Supreme Court, and failing to provide clear reasons when granting leave is not the sort of behaviour which warrants removal from office.[209] While public hearings are held in substantive appeals, oral hearings for leave applications are the exception, not the rule.[210] In deciding leave applications on the papers, the Court is primarily accountable through self-discipline, demonstrated in the provision of reasoned decisions. Members of the Court have expressly recognised this. Chief Justice Elias in her address at the opening of the Supreme Court stated that: "Judicial decisions must be legitimate. That means they must always be justified through reasons."[211] Chief Justice Elias (as she was in 2000) also

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[202] Cochrane above n 50 at 531.
[203] Bosland and Gill above n 200 at 501.
[204] Cochrane above n 50 at 541. The fears that a duty to provide reasons will unduly burden decision-makers has been described as "overblown" by Michael Taggart in "Administrative Law [2000] NZ L Rev 439 at 442.
[205] Bosland and Gill above n 200 at 499.
[206] At 488.
[207] Beck above n 200 at 297.
[208] Beck at 295.
[209] At 295.
[210] Blanchard above n 20 at 191.
[211] Sian Elias, Chief Justice of New Zealand "Opening of the Supreme Court of New Zealand, held at Wellington on 1 July 2004" [2004] NZLJ 290 at 294.

delivered the judgment of the Court of Appeal affirming the need for public accountability of the judiciary through reasons:

> *"Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision making in the Courts. Judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined [without reasons]."*[212]

Such strong affirmations of the requirements of the justice system should not be paid mere lip service, or be considered inapplicable to the highest court in the land. The judiciary's general understanding that provision of reasons is a good thing upholding a fundamental tenet of the justice system ought not to be disregarded simply because Parliament failed to mandate in statute that reasons be provided. The duty to give reasons in the highest courts exist independent of a right to appeal. Reasons in the highest courts have precedential value, and serve to develop the law.[213] The inability to alter a decision makes it more compelling that parties and the public understand how it was reached.[214]

The duty of the Court to give reasons has not been totally neglected. Only in the granting of leave has the Court decided not to follow "best practice" and give reasons. At the same time that the Court has not engaged with the meaning of s 13, it has provided a consistent line of common law statements about the type of cases it wishes to hear, and guidance as to how it perceives its role. The Court wishes to construct legal precedent.[215] It is therefore reluctant to hear cases involving questions of sentencing[216], the exercise of a discretionary power[217] or interlocutory matters[218], as these types of cases are fact specific and do not have the capacity for much precedential value. This disconnect between the common law guidance of the Court and the neglected statutory criteria is a problem the Court needs to address. The issue is that legal practitioners, prospective litigants and the wider New Zealand public are left in the dark about the sort of cases the Court wishes to hear. There remains no clear and readily available formulation of the type of things which render a case of "public importance" and whether the

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[212] *Lewis v Wilson & Horton* [2000] 3 NZLR 546 at [79].
[213] Ho above n 199 at 63.
[214] Ho at 63.
[215] *Shell (Petroleum Mining) v Todd* above n 120 at [3]. See also Blanchard above n 53 at 4.
[216] *Trotter* above n 130 at [6].
[217] *Fay v Wynston Chirnside* above n 125.
[218] *Econicorp Holdings Limited v Minister of Education* [2011] NZSC 148 at [5].

Court sees any meaningful distinction between a "substantial miscarriage of justice" and a "miscarriage of justice".[219] The academic authorities in summarising the leave criteria have been forced to take a piecemeal approach. *McGechan on Procedure* lists examples of what is not in the public interest, and gives examples of what has been considered a substantial miscarriage of justice, and what has not.[220] The closest *McGechan* comes to stating what the Court wants is that it is "critical" to identify "an important issue of law" in the leave application.[221] *Sim's Court Practice* provides small case summaries which explain why leave was or was not granted on the facts.[222] *Sim* also asserts that "the expression "substantial" must not be overlooked in applying this provision; the implication is that a miscarriage of justice can be tolerated if it is not substantial."[223] This distinction has not been made out in the Court's use of the phrase in case law.[224] Legal practitioners searching for guidance are left with the broad statutory criteria and a series of fact-specific case examples. The decision of *Shell (Petrol Mining) v Todd*[225] explicitly stated that "general public importance" meant the decision was of "precedential value" but this principle is buried in a wall of academic text and has not been strongly emphasised by the Court.[226]

The problem is two-fold. First, from a practical perspective, applications for leave must state by reference to the leave criteria in s 13 why the Court should give leave.[227] The lack of a coherent connection between the Court's *obiter* assertions about the sort of cases it wishes to hear and the statutory criteria upon which applicants must rely leaves both litigants and practitioners without coherent or consistent guidelines as to whether leave applications will be granted or refused. Secondly, it is problematic in principle as the Court is not fulfilling its role to the best of its ability and in accordance with basic judicial principles. Accountability is near impossible to achieve in the Supreme Court, as its exercise of statutory power is unable to be reviewed or appealed.[228] The Court should therefore be vigilantly self-accountable and

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[219] See discussion in 5(c) of Part II above.
[220] *McGechan on Procedure* above n 184 at [13.02], [13.03] and [13.04]
[221] At [13.05]
[222] *Sim's Court Practice* (online looseleaf ed, LexisNexis) at [SC13.4].
[223] At [SC13.6].
[224] See discussion in 5(c) of Part II.
[225] *Shell (Petroleum Mining) v Todd* above n 120 at [3].
[226] *Sim's Court Practice* at [SC13.5].
[227] Supreme Court Rules 2004, cl 15.
[228] Beck above n 200 at 295.

demonstrate the type of good judicial practice and reasoning it expects of lower courts and other decision-makers.[229]

3. What possible explanations exist for this non-engagement with s 13?

The Court is cognisant of the requirements of the Supreme Court Act, and has explicitly affirmed its policy is not to give reasons when granting leave.[230] This is permitted by a literal reading of the Act; when leave is refused, reasons must be given under s 16. On the other hand, while leave can only be granted if the Court is satisfied it is in the "interests of justice" to do so there is no standard to which the Court must prove its satisfaction. There are five possible explanations for why the Court has refused to give reasons when granting leave, and failed to create a positive body of jurisprudence on the interpretation of the s 13 criteria.

1. The Court does not wish to fetter its discretion and box itself in with binding precedential leave decisions.[231]
2. The Court maintains ambiguity in the interpretation of s 13 to allow it to manage its varying workload between years.
3. The Court thinks the reasons why leave is granted are sufficiently apparent from the grounds or the later substantive decision.
4. The Court could be "embarrassed" if it explained why it granted leave and adopted a position "prematurely".[232]
5. Providing reasons when granting leave is too onerous for the Court.[233]

a) Will the Court be bound by its leave decisions?

The first concern of the Court could be that if a body of positive leave precedent is created, the Court may lose the ability to apply its discretion in future leave applications. As already established, the leave decisions of the Supreme Court are of precedential value.[234] A precedent

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[229] *Westfield (New Zealand) Ltd & ors v North Shore City Council & ors* [2005] NZSC 17; [2005] 2 NZLR 597; [2005] NZRMA 337 at [56] and [54].
[230] See Blanchard above n 58 at 35. See also discussion of *Greymouth Gas* in section 4 of Part II.
[231] Taggart above n 198 at 19.
[232] Blanchard above n 194 at 13.
[233] Taggart at 18.
[234] Refer to section 2 of Part II.

is a past decision which serves as a guide for present or future action.[235] They are inherently exemplary.[236] Current academic theory holds that precedential decisions are binding when judges consider themselves to be bound, or at least bound to take account of them.[237] Fears that the Supreme Court would be overly constrained by treating its leave decisions as having precedential value and providing more detailed reasons why leave is granted are overblown. The Court is not "absolutely bound" by any authority, even its own prior decisions.[238] The distinction is between the value of a persuasive precedent and the binding principle of *stare decisis*. The latter means "to stand by that which is decided" and is the system under which lower courts are bound to follow previous decisions on the same issue in our common law system.[239] However the Supreme Court, like other comparable final courts, is not bound by the principle of *stare decisis*, and thus previous decisions can at best be highly persuasive.[240] The Court would retain its ability to depart from or construct new precedents even as it created a positive body of persuasive precedent around the interpretation of s 13. The value of the precedent is providing clear guidance in how the Court is likely to treat future applications for leave. This is not the same as saying that because the Court found an issue relating to sentencing principles "in the interests of justice" that it will be obliged to grant leave to all future applications involving sentencing principles.

b) Does the Court need to be able to flexibly manage its annual workload?

It was recognised from the Court's inception that the Court's sole control over the decision to refuse or grant leave would "create latitude allowing [it] to raise and lower the bar to accommodate varying flows of potential appeals".[241] The most the President of the Bar Association could do in the face of this possibility was urge the Court to "resist such temptation".[242]

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[235] Neil Duxbury *The Nature and Authority of Precedent* (Cambridge University Press, New York, 2008) at 1.
[236] At 7.
[237] At 15.
[238] We only have obiter statements from the Court on this issue, as the Court has not yet been asked to overturn its own precedent. In *Couch v A-G* [2010] NZSC 27 at [32] Elias CJ stated that: "It is open to this Court to depart from a decision of its own … if it is right to do so". Justice Tipping affirmed at [104]: "It would not be appropriate for this Court to regard itself as absolutely bound by its own previous decisions. No other comparable court takes that approach to its own decisions."
[239] Duxbury above n 235 at 15.
[240] Kirby above n 168 at 8.
[241] Dobson above n 57 at 292.
[242] At 292.

There is only one possible response to this, which is to trust the Court "will not cut corners" and will "take great care with the explanation and development of legal principle," as asserted by Elias CJ at the opening of the Supreme Court in 2004.[243] In 2008 and 2014, Blanchard J stressed that the Court has been "conscious" of its requirement to maintain a consistent approach in making leave decisions, and that the Court has resisted the temptation to "make up the numbers" when business was slow.[244] While the desire is to trust the Court in its assertion, reasoned interpretation and application of s 13 creating a body of persuasive and consistent precedential analysis would help affirm this trust and be a source of "legitimacy" for the Court.[245] Even if we assume that justice is being done by the Court, something more must be done to show the public that fact.[246]

c) Are the reasons sufficiently "apparent", negating the need to be explicit?

There is some old common law authority which says that even if a judicial duty to give reasons exists, this duty does not extend to situations where the reasons are "obvious to any intelligent person".[247] The immediate counter to any assertion of "obviousness" is to ask 'against what standard do we judge obviousness'? Must a decision be "obvious" to any lay person, upholding the judicial principles of transparency and accountability to the public? Or will it suffice if the reasons are obvious to a legal practitioner who is familiar with the contentious legal background of the issue, as in *Allenby v H*?[248] If taken to its logical conclusion, the assertion that it is "obvious" a judge must have favoured the strength of the applicant's arguments because of the outcome would mean reasons need never be provided.[249] It would be implicit in every decision that a judge awarding a case in favour of one side demonstrated that she accepted its argument as the correct statement of the law. The mere provision of the outcome without justification is no longer considered an acceptable process by judges.[250] In the absence of an "obvious" standard of "obviousness" to be applied, it is more appropriate for the Court to err on the side of caution and explain the ways it was

[243] Elias above n 211 at 294.
[244] Blanchard above n 194 at 12. Emphasised in Blanchard above n 20 at 191.
[245] Elias above n 4 at 8.
[246] Bosland and Gill above n 200 at 483.
[247] At 505.
[248] See discussion in section 4 of Part II.
[249] Ho above n 199 at 55.
[250] At 42.

satisfied the leave criteria were met. Another way of looking at this is to ask if a decision is so obvious, why is that unable to be quickly and simply elucidated?[251]

d) Will the Court's provision of reasons "prematurely" adopt a (potentially embarrassing) position?

This claim by Blanchard J in 2014 is difficult to give credence to. Claims that reasons might prematurely indicate the Court's opinion cannot be sustained. In granting leave to appeal the Court is admitting it sees an issue of value. The Court should not avoid explaining why and how it has come to this conclusion on the off chance it later changes its view. Similarly the Court's reasons for accepting an application for leave should not be taken as indicating the prospects of a party's success, or taking a stance on the merits which have yet to be heard. See below for a discussion of the difference between leave submissions and substantive hearing submissions. If done correctly, the former should not need to get into the merits of the case at all, according to Blanchard J.[252] Justice Blanchard also claimed that giving reasons was undesirable as the Court might change its mind during the substantive hearing and realise leave ought to have been granted on different grounds, referencing a case he was involved in.[253] Potential "embarrassment" is no response to this admitted evasion of duty.

e) Would providing reasons for granting leave unduly burden the Court?

There are two possible responses to this. The first response is that for the Supreme Court, the broad discretionary nature of the statutory power to grant leave cannot justify the refusal to give reasons. Rather, where the Court has a discretion the need for accountability is stronger.[254] Reasons render decisions more palatable.[255] Thus even if providing reasons was seen as a burden on the Court, the need for an accountable and open system of justice would require it nonetheless. Secondly, it seems likely that the duty to provide reasoned interpretation of s 13 will not be onerous, due to the "obvious" nature of the explanation. The Court cannot claim that the reasons are not provided because they are simplistic and obvious and simultaneously claim it would damage their productivity and output to list them. Furthermore, the Court admitted to turning its mind to, and discussing the distinctions

[251] Bosland and Gill above n 200 at 505.
[252] Blanchard above n 53 at 12.
[253] Blanchard above n 194 at 14.
[254] Ho above n 199 at 54.
[255] At 50.

between criteria, but this helpful analysis is not communicated to the public.[256] The next section will demonstrate how the Court can give a concise interpretation of s 13 while still providing clarity and guidance.

Overall, the arguments for refusing to provide reasons in leave applications do not outweigh the principled justifications requiring reasons and the benefits they offer to the public. The fears about the effect this duty will have on the Court's functions are overstated.

4. What needs to be done?

In the words of Elias CJ, "observance of the discipline of the common law method is good practice for courts which must demonstrate the legitimacy of their decisions".[257] Having established that there is a principled basis for requiring reasons by the Supreme Court, the Court ought to change its policy on giving reasons when granting leave applications. The Court needs to be more explicit in stating why and how the cases it grants leave to satisfy the s 13(2) criteria. In setting out the type of cases the Court wants to hear, it needs to be explicit in integrating the common law themes I have mentioned into the statutory framework upon which litigants and practitioners rely when making applications for leave.

Reasons explaining how the application satisfied s 13 criteria need to be given and published at the leave granting stage. This is for several reasons. The first is that there will be an inevitable time gap between granting leave and the substantive decision. The average interval in New Zealand is 3.8 months.[258] The second is that there is a risk that the judge who gives the substantive decision will not have been sitting on the leave application. Over half of the substantive decisions delivered by the Supreme Court up until 2012 comprised only one judgment.[259] The judge delivering the substantive outcome of the Court cannot necessarily know the factors which persuaded his or her peers that the case was worthy of leave. While it might sometimes be self-evident, application for leave submissions and substantive hearing submissions are very different documents, which attempt to prove different things. Leave

[256] Blanchard above n 194 at 14.
[257] Elias above n 4 at 8.
[258] Mary-Rose Russell and Matthew Barber "Empirical Analysis of Supreme Court Decisions" in Mary-Rose Russell and Matthew Barber (eds) *The Supreme Court of New Zealand 2004-2013* (Thomson Reuters, Wellington, 2015) 1 at 7.
[259] Russell and Barber above n 258 at 23.

application submissions, in less than 10 pages[260] need to "give a concise demonstration of how the proposed grounds meet the requirements of s 13 … there [is] no need to go into the ultimate merits [of the case]."[261] In contrast, "once leave is granted, the Court will be looking for a well-researched and well-directed argument on the merits".[262] Perhaps the reason that substantive decisions so rarely contain references to why leave was granted is because counsel do not dedicate time at the hearing to proving a point already won months previously. It is thus optimistic for Blanchard J to assert that how s 13 is satisfied will naturally be elucidated in a vastly different context months after the requisite consideration and decision on the issue. It is worth noting that in the one substantive decision in which a Supreme Court judge mentions s 13 criteria requirements and "commercial significance"[263], the judge was not part of the leave panel.[264]

The following provides an example of how the Court could explain its reasoning that granting leave "is necessary in the interests of justice":

A. Leave to appeal is granted.
B. This present case involves a question of X.
C. Finding an answer to X is necessary as there is a risk of a substantial miscarriage of justice occurring (see test from Junior Farms).[265] Establishing the correct approach to X will give needed precedential guidance for the disposition of future cases.
D. Therefore we are satisfied under s 13(1) and (2) that leave should be granted.

This reasoning is not much longer than the usual leave decisions of the Court, but ties the issue pleaded into the wider statutory context, and gives specific reference to the need for the case to have some form of precedential value. This could also tie in to the Court's purpose to, in the Chief Justice's words, "maintain overall coherence" in the legal system.[266] A lay person or potential litigant reading this decision would see how the specific issue at question could logically relate back to the larger picture of justice in New Zealand, as well as having a starting point for the meaning of "substantial miscarriage of justice" in civil cases. Such extrapolation

[260] Supreme Court Rules 2004, cl 20(3).
[261] Blanchard above n 53 at 12.
[262] At 13.
[263] *The New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated* above n 160 at [89].
[264] *New Zealand Airline Pilots' Association v Air New Zealand* [2007] NZSC 12. Leave was granted by Elias CJ and Blanchard and Tipping JJ.
[265] *Junior Farms*, above n 100, at [5].
[266] Elias above n 4 at 9.

of the "obvious" value of a case being heard will not break the Court's reasoning capacity, and can only form a more positive and helpful line of precedent, as well as helping it fulfil its statutory and common law duties to be open, transparent and publically accountable.

5. Conclusion

As the final and highest judicial authority, the operations of the Supreme Court should be above reproach.[267] With few mechanisms holding the Court accountable, it must zealously maintain public confidence through self-accountability measures. The provision of reasoned judgments has long been recognised as one of the most effective methods of holding the judiciary accountable.[268] In studying the original Bench's approach to its empowering criteria, the acknowledged and intentional refusal of the Court to give reasons for granting leave stands out as a significant and discordant omission in the Court's reasoned processes. Parliament deliberately crafted the criteria of the Supreme Court Act to provide some constraint on an otherwise unfettered power to decide leave applications.[269] In the absence of an explicit statutory requirement for reasoned interpretation, the Court has left undeveloped any substantive or positive body of jurisprudence interpreting the statutory criteria.[270] This is contrary to the growing movement in public law requiring reasons from all decision-makers, and judges in particular.[271] The leave granting process remains substantially opaque, with judges apparently relying on the degree of "obviousness" as sufficient explanation. I have successfully challenged the assumptions that the reasons for leave being granted will become obvious in the substantive decision and that obviousness is a justification for not providing any reasoned analysis.

My recommendation is that the Court reconsider its approach to s 13 when granting leave, and provide a more detailed and explicit account of the connection between the cases it wants to hear and what "necessary in the interest of justice" means. Establishing this connection will go a long way to building a positive line of precedent and establishing guidelines for the New Zealand legal community. The rigour of its reasoning processes will in turn will foster public confidence in the legitimacy of this final Court.

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[267] Andrew Beck "Litigation" NZLJ 17 at 17.
[268] Beck above n 200 at 295.
[269] See above section 1 of Part I at n 31.
[270] Beck above n 200 at 297.
[271] Cochrane above n 50 at 551.

Conclusion

This dissertation aimed to assess the use and interpretation of the statutory leave criteria by the Supreme Court of New Zealand. With the Court having recently celebrated its tenth anniversary, this was an appropriate time to engage in this study. A review of the practices and processes adopted by the Court in its formative years is an important function of academia, as it is the primary external method of accountability for the final Court of New Zealand, which cannot otherwise be reviewed by any judicial authority. My goal was to assess the Court's interpretation and use of its empowering leave provision and make any necessary recommendations to improve its practice.

Part I explored the creation of the Supreme Court Act 2003, and what informed the basis of the leave provisions. Section 13 of the Act represents a compromise between Parliament's desire to allow the Supreme Court to develop the common law, and its desire to fetter an otherwise unconstrained discretion exercised by a Court with no external accountability measures. In the context of comparable final Courts, the Supreme Court of New Zealand has slightly less discretion in relation to how it determines leave, primarily because of the statutory requirement that it must give reasons for refusing applications.

Part II set out the data I gathered from the first 1000 published decisions of the Court. In my analysis of the 574 refused applications I found reasons were given, but that what the Court did not want to hear and its interpretation of s 13 were often disconnected. In cases granted leave and the substantive decisions that followed I found that the Court was not providing meaningful guidance around s 13.

Part III set out my analysis of how the Supreme Court is acting, and what principled justifications there are for arguing it needs to do more. The data I found showed that the Supreme Court was providing reasons for refused applications for leave mostly within the framework of s 13. The parallel line of authoritative statements about the type of cases the Court wished to hear was permissible in the context of the Act but could be better integrated with the statutory framework. However, what was not justified was the Court's intentional omission of published reasons explaining how the Court was "satisfied" the application was worthy of leave and in the "interests of justice" to be heard.

My conclusion is that the Supreme Court of New Zealand needs to be more rigorous in its self-discipline through the provision of reasons. My dissertation set out to discover how the Supreme Court is utilising its empowering statute to justify and explain its gatekeeping role. What I found was that the Court has left key provisions in s 13 of the Supreme Court Act without consistent or meaningful interpretation. When granting leave, the Court relied on the "obviousness" of the merits of a case to explain how it was fulfilling its statutory obligation that it be "satisfied". This is an unprincipled evasion of its duty, and has left both litigants and practitioners without clear authority as to how to satisfy the Court as gatekeeper.

My recommendation is that the Supreme Court review the process by which it grants leave, and ideally modify this approach. The reasoning vacuum I have identified could be filled with the provision of some analysis connecting the cases the Court chooses to hear with the statutory criteria for leave. In doing this the Court will be demonstrating the sort of "best practice" it expects of lower Courts and giving clear guidance to legal practitioners and litigants as to whether or not the Court is likely to accept their application for leave appeal. As the Court celebrates its eleventh anniversary, it should be more rigorous in its processes, so as to ensure its legitimacy as New Zealand's highest judicial authority is unquestionable.

Appendices

A. Annual Data 2004 – 2006, comparing criminal and civil applications

	civil	crim	**2004**	civil	crim	**2005**	civil	crim	**2006**
# of cases total	22	17	**40**	41	42	**86**	63	48	**112**
# of costs/other decisions	-	-	**1**	-	-	**3**	-	-	**1**
LEAVE GRANTED	6	3	**9**	20	8	**28**	16	7	**23**
w criteria	4	1	**5**	4	3	**7**	0	0	**0**
# paragraphs average			**3.4**			**3.29**			**2.5**
Leave REFUSED	13	13	**26**	15	29	**44**	30	35	**65**
w criteria	12	12	**24**	15	29	**44**	23	33	**56**
w other	7	7	**14**	12	21	**33**	22	26	**48**
W ONLY non-stat criteria			**0**			**0**			**7**
# paragraphs average			**6.03**			**5.4**			**5.9**
Substantive decisions	3	1	**4**	8	4	**12**	17	6	**23**
w criteria	1	1	**2**	0	1	**1**	2	4	**6**
# paragraphs average			**91**			**70**			**74.86**
Longest decision length			**104**			**184**			**227**

B. Annual Data 2007 – 2009, comparing criminal and civil applications

	civil	crim	**2007**	civil	crim	**2008**	civil	crim	**2009**
# of cases total	64	44	**110**	55	58	**116**	70	58	**134**
# of costs/other decisions	-	-	**2**	-	-	**3**	**-**	-	**6**
LEAVE GRANTED	21	6	**27**	19	7	**26**	19	11	**30**
w criteria	1	0	**1**	2	1	**3**	2	1	**3**
# paragraphs average			**3.37**			**4**			**2.2**
Leave REFUSED	27	32	**60**	22	44	**66**	29	37	**66**
w criteria	17	28	**45**	22	33	**55**	19	29	**48**
w other	20	23	**43**	18	31	**49**	22	23	**45**
w ONLY non-stat criteria			**10**			**10**			**16**
# paragraphs average			**5.95**			**4.75**			**4.36**
Substantive decisions	15	6	**21**	14	7	**21**	22	11	**33**
w criteria	3	2	**5**	2	4	**6**	6	6	**12**
# paragraphs average			**101.52**			**68.23**			**54.58**
Longest decision length			**388**			**219**			**138**

C. Annual Data 2010 – 2012, comparing criminal and civil applications

	civil	crim	**2010**	civil	crim	**2011**	civil	crim	**2012**
# of cases total	88	72	**162**	78	80	**159**	44	35	**81**
# of costs/other decisions	-	-	**2**	-	-	**1**	-	-	**2**
LEAVE GRANTED	24	13	**37**	16	9	**25**	9	3	**12**
w criteria	1	1	**2**	1	1	**2**	0	1	**1**
# paragraphs average			**2.67**			**4.2**			**2.75**
Leave REFUSED	43	47	**90**	48	60	**108**	19	30	**49**
w criteria	25	25	**50**	26	50	**76**	15	23	**38**
w other	37	41	**78**	41	43	**84**	16	27	**43**
w ONLY non-stat criteria			**39**			**24**			**11**
# paragraphs average			**4.63**			**4.54**			**4.27**
Substantive decisions	21	12	**33**	14	11	**25**	16	2	**18**
w criteria	1	6	**7**	1	3	**4**	1	0	**1**
# paragraphs average			**59.51**			**72**			**114.67**
Longest decision length			**261**			**286**			**318**

D. Annual Data Totals and Averages

	2004	2005	2006	2007	2008	2009	2010	2011	2012	TOTALS
# of cases total	**40**	**86**	**112**	**110**	**116**	**134**	**162**	**159**	**81**	**1000**
# of costs/other decisions	1	3	1	2	3	6	2	1	2	**21**
LEAVE GRANTED	**9**	**28**	**23**	**27**	**26**	**30**	**37**	**25**	**12**	**217**
w. criteria	5	7	0	1	3	3	2	2	1	**24**
# paras	**3.4**	**3.29**	**2.5**	**3.37**	**4**	**2.2**	**2.67**	**4.2**	**2.75**	**Average = 3.15**
Leave REFUSED	26	44	65	60	66	66	90	108	49	**574**
w criteria	24	44	56	45	55	48	50	76	38	**436**
w other	14	33	48	43	49	45	78	84	43	**437**
w ONLY non-stat criteria	0	0	7	10	10	16	39	24	11	**117**
# paras	**6.03**	**5.4**	**5.9**	**5.95**	**4.75**	**4.36**	**4.63**	**4.54**	**4.27**	**Average = 5.09**
Substantive decisions	**4**	**12**	**23**	**21**	**21**	**33**	**33**	**25**	**18**	**190**
w criteria	2	1	6	5	6	12	7	4	1	**44**

E. Number of times each criterion used in refused leave applications

	2004	2005	2006	2007	2008	2009	2010	2011	2012	Totals
"Interests of justice"	2	16	17	11	10	10	16	25	5	112
"General or public important"	15	33	38	22	31	29	16	36	13	233
"General commercial significance"	1	6	8	2	6	3	5	2	1	34
"Miscarriage of justice"	2	3	20	17	31	22	24	19	12	150
"Substantial miscarriage of justice"	7	27	12	11	5	10	6	24	16	118

F. Substantive decisions which mention "miscarriage of justice"

- *Siloata v R* [2004] NZSC 28
- *Timoti v R* [2005] NZSC 37; [2006] 1 NZLR 323; (2005) 21 CRNZ 804
- *L v R* [2006] NZSC 18; [2006] 3 NZLR 291; (2006) 22 CRNZ 553
- *Thompson v R* [2006] NZSC 3
- *Jonathan Jarden v R* [2008] NZSC 69; [2008] 3 NZLR 612; (2008) 24 CRNZ 46
- *Aaron Mark Wi v R* [2009] NZSC 121; [2010] 2 NZLR 11; (2009) 24 CRNZ 731
- *Buddle v R* [2009] NZSC 117; [2010] 1 NZLR 717 (26 November 2009)
- *Matenga v R* [2009] NZSC 18; [2009] 3 NZLR 145; (2009) 24 CRNZ 849
- *Rongonui v R* [2010] NZSC 92; [2011] 1 NZLR 23; (2010) 24 CRNZ 946
- *Fairburn v R* [2010] NZSC 1579; [2011] 2 NZLR 63
- *Hart v R* [2010] NZSC 91; [2011] 1 NZLR 1; (2010) 24 CRNZ 924
- *Tabbsum and Azees Mahomed v R* [2011] NZSC 52; [2011] 3 NZLR 145; (2011) 25 CRNZ 223
- *B (SC 114/2010) v R* [2011] NZSC 64

G. Substantive decisions which mention "substantial miscarriage of justice"

- *Condon v R* [2006] NZSC 62; [2007] 1 NZLR 300; (2006) 22 CRNZ 755
- *Rajamani v R* [2007] NZSC 68; [2008] 1 NZLR 723; (2007) 23 CRNZ 696
- *Hayes v R* [2008] NZSC 3; [2008] 2 NZLR 321; (2008) 23 CRNZ 720
- *Alex Kwong Wong v R* [2008] NZSC 28; [2008] 3 NZLR 1; (2008) 23 CRNZ 843
- *Cumming v R* [2008] NZSC 39; [2010] 2 NZLR 433; (2008) 23 CRNZ 737
- *Lewtyn Scott v Rosemary Scott and others* [2009] NZSC 111
- *Stewart v R* [2009] NZSC 53; [2009] 3 NZLR 425; (2009) 24 CRNZ 774
- *Buddle v R* [2009] NZSC 117; [2010] 1 NZLR 717
- *Matenga v R* [2009] NZSC 18; [2009] 3 NZLR 145; (2009) 24 CRNZ 849
- *R v George Evans Gwaze* [2010] NZSC 52; [2010] 3 NZLR 734; (2010) 24 CRNZ 702

- *Mason v R* [2010] NZSC 129; [2011] 1 NZLR 296; (2010) 25 CRNZ 96
- *Stewart v R* [2011] NZSC 62; [2012] 1 NZLR 1

H. Applications granted leave which contain reference to statutory criteria

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- *Westfield New Zealand Ltd v North Shore City Council* [2004] NZSC 14
- *Otago Station Estates Ltd v John Robert Parker* [2004] NZSC 15
- *Prebble v Huata* [2004] NZSC 8
- *Otago Station Estates Ltd v John Robert Parker* [2004] NZSC 15
- *Bryson v Three Foot Six Ltd* [2005] NZSC 6; [2005] ERNZ 311
- *Chamberlains v Lai* [2005] NZSC 32
- *Brooker v R* [2005] NZSC 61
- *Mafart v Television New Zealand Limited* [2005] NZSC 65
- *Gordon-Smith and King v R* [2008] NZSC 56; [2009] 1 NZLR 721; (2008) 23 CRNZ 958
- *Wyeth (NZ) Ltd v Ancare New Zealand Ltd & Anor* [2009] NZSC 100
- *William Patrick Jeffries v The Attorney-General* [2009] NZSC 6
- *William Patrick Jeffries v The Privacy Commissioner* [2010] NZSC 34
- *Peter Morrison Petryszick v R* [2010] NZSC 41
- *Hamed v R* [2011] NZSC 27

"Interests of justice"

- *Otago Station Estates Ltd v John Robert Parker* [2004] NZSC 15
- *Zaoui v A-G and others* [2004] NZSC 20
- *Mafart v Television New Zealand Limited* [2005] NZSC 65
- *Thom v Days Burton* [2007] NZSC 107; (2007) 18 PRNZ 766
- *Hamed and others v R* [2011] NZSC 27

"Miscarriage of justice"

- *Timoti v R* [2005] NZSC 37; [2006] 1 NZLR 323; (2005) 21 CRNZ 804
- *Thompson v R* [2005] NZSC 66
- *Saxmere Company Limited & others v Wool Board Disestablishment Co Limited* [2008] NZSC 94; (2008) 19 PRNZ 132

"Substantial miscarriage of justice"

- *Stewart v R* [2009] NZSC 53; [2009] 3 NZLR 425; (2009) 24 CRNZ 774
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Brown v Attorney-General [2005] NZSC 59; (2005) 8 HRNZ 1

Burdett v R [2009] NZSC 114

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Burns and Burns v ANZ National Bank [2007] NZSC 20.

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Chatha v R [2009] NZSC 21; *Audrey Bredmeyer v Chief Executive Ministry Social Development* [2009] NZSC 28

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