ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS/PERSONS UNDER THE AGE OF 18 YEARS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA624/2022
[2023] NZCA 397

BETWEEN	W (CA624/2022) Applicant
AND	THE KING Respondent

Hearing:	9 February 2023
Court:	Miller, Brown and Katz JJ
Counsel:	E Huda for Applicant R K Thomson for Respondent
Judgment:	1 August 2023 at 2.00 pm
Reasons:	25 August 2023

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial.

REASONS OF THE COURT

(Given by Miller J)

[1] This judgment responds to an application for leave to bring a pretrial appeal under s 217 of the Criminal Procedure Act 2011 (CPA). The proposed appeal would challenge a decision that propensity evidence is admissible at the applicant's pending trial for injuring a child with intent to injure.[1]

[2] The application for leave is being determined separately from the appeal. This Court takes the opportunity to revisit, in light of experience, the approach that it adopted to leave in 2015, in *Hohipa v R*.[2]

Context

The jurisdiction to hear pretrial appeals

[3] The jurisdiction to hear pretrial appeals under the CPA was described in *Hohipa*.[3] For convenience, we repeat what we said there.

[4] No general right of appeal lies from interlocutory decisions made before trial; rather, the CPA provides, like its predecessor,[4] that specified decisions may be appealed by leave of the court appealed to. Those decisions are listed in: s 215, which deals with pretrial evidential decisions in judge-alone cases; s 217, which deals with category 4 and category 3 jury cases; and s 218, which deals with particulars and venue in jury cases.

[5] Section 215 allows the defendant or the prosecutor a pretrial appeal by leave of the court appealed to (the first appeal court) where the proceeding is to be tried by a judge alone. Such appeals are restricted to a small class of decisions:

> (2) The defendant or the prosecutor may, with the leave of the first appeal court, appeal to that court against a decision that is one of the following:

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1 *R v [W]* [2022] NZDC 20319 [Pretrial decision].
2 *Hohipa v R* [2015] NZCA 73, [2018] 2 NZLR 1.
3 At [7]–[23].
4 Crimes Act 1961, s 379A. See *R v Livingston* [2001] 1 NZLR 167 (CA) at [23]; and *McGrath v R* [2005] NZSC 50 at [4].

(a) making or refusing to make an order under section 79 (as to admissibility of evidence):

(b) granting or refusing to grant permission under section 44 of the Evidence Act 2006 (which relates to the cross-examination of a complainant):

(ba) granting or refusing to grant an application for a direction under section 106F of the Evidence Act 2006 in respect of a notification under section 106D of that Act that cross-examination evidence is to be given by video record made before trial:

(bb) granting or refusing to grant an application under section 106H of the Evidence Act 2006 for further cross-examination of a sexual case complainant or propensity witness all of whose evidence has been or is to be given by video record made before trial:

(c) giving or refusing to give leave on an application under section 109(1)(d) of the Evidence Act 2006 (which relates to the identity of a witness):

(ca) making or refusing to make a pre-trial witness anonymity order under section 110 of the Evidence Act 2006:

(d) making or refusing to make a witness anonymity order under section 112 of the Evidence Act 2006.

[6] The list of appealable decisions in ss 217 and 218 corresponds generally to that formerly found in s 379A of the Crimes Act 1961. Section 217 allows the defendant or the prosecutor a much more extensive range of pretrial appeals in jury cases. Again, appeal is by leave of the first appeal court:

(2) The defendant or the prosecutor may, with the leave of the first appeal court, appeal to that court against a decision that is one of the following:

(a) making or refusing to make an order under section 21 (to amend, divide, or amalgamate charges):

(b) making or refusing to make an order under section 101 (pre-trial order about admissibility of evidence):

(c) making or refusing to make an order under section 102 (that Judge-alone trial be held in case likely to be long and complex):

(d) making or refusing to make an order under section 103 (that Judge-alone trial be held in case involving intimidation of jurors):

(e) amending or refusing to amend a charge under section 133:

(f) making or refusing to make an order under section 138(4) (that defendant be tried separately on 1 or more charges):

(g) making or refusing to make an order under section 151 (for a person to be retried on ground that acquittal tainted):

(h) refusing to make an order under section 157 (to transfer proceeding to a court at another place):

(i) granting or refusing to grant permission under section 44 of the Evidence Act 2006 (relating to the cross-examination of a complainant):

(ia) granting or refusing to grant an application for a direction under section 106F of the Evidence Act 2006 in respect of a notification under section 106D of that Act that cross-examination evidence is to be given by video record made before trial:

(ib) granting or refusing to grant an application under section 106H of the Evidence Act 2006 for further cross-examination of a sexual case complainant or propensity witness all of whose evidence has been or is to be given by video record made before trial:

(j) giving or refusing to give leave on an application under section 109(1)(d) of the Evidence Act 2006 (relating to the identity of a witness):

(ja) making or refusing to make a pre-trial witness anonymity order under section 110 of the Evidence Act 2006:

(k) making or refusing to make a witness anonymity order under section 112 of the Evidence Act 2006.

[7] Section 218 allows the defendant (but not the prosecutor) to seek leave to appeal orders under ss 18 (further particulars of a charge) or 157 (change of venue) in jury cases.

[8] In an appeal under s 215 (judge-alone cases), s 216(2) specifies that the first appeal court may refuse leave to appeal if, without limitation,[5] it thinks it expedient that the issue under appeal should be determined on a post-trial appeal. The legislation is otherwise silent about the criteria for deciding pretrial appeals.

[9] The trial court may begin or continue the trial although an application for leave, or a pretrial appeal, has not been determined, if satisfied that it is in the interests of justice to do so.[6] A similar provision was found in s 379A(6) of the Crimes Act, but it was confined to pretrial appeals under s 344A of that Act (admissibility of evidence). The power now found in s 222 of the CPA is not confined to any subset of pretrial decisions.

Process

[10] The Court of Appeal (Criminal) Rules 2001 provide that an application for leave to appeal must be made in Form 1.[7] That form instructs the applicant to explain why the court should give leave to appeal. Where the appeal relates to the admissibility of evidence to be called at trial, the evidence must be outlined and its relevance to the trial explained. Where the appeal relates to a question of law, the question to be answered should be identified.

[11] Under r 5C of the Rules the respondent to the proposed appeal, usually the Crown, must file a reply memorandum. That memorandum should state whether the respondent considers the leave application should be heard separately from the proposed appeal, and why.[8] The mode of hearing decision is made by a single judge, who need not give reasons.[9]

[12] If heard separately from the proposed appeal, an application for leave to appeal may be decided by two judges,[10] and the court may state its reasons briefly and in general terms.[11] Applications for leave to appeal may be decided on the papers. The

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5 Criminal Procedure Act 2011 [CPA], s 216(3).
6 Section 222.
7 Court of Appeal (Criminal) Rules 2001 [the Rules], r 5B(1)(b).
8 Rule 5C(2)(b).
9 Rule 5D.
10 CPA, s 333(1).
11 The Rules, r 5I.

hearing time for those leave applications given an oral hearing is limited to 15 minutes per side with a brief reply.[12] Written submissions are limited to five pages.[13]

[13] Where the leave application is heard with the appeal, the hearing may also be on the papers, provided a judge is satisfied the appeal can fairly be determined on that basis.[14]

[14] The duty of an appeal court to consider an appeal is subject to any leave requirements being met.[15]

[15] In *Hohipa* this Court explained that these provisions differ significantly from the predecessor provisions in the Crimes Act.[16] Under both statutes a leave application might be heard on the papers, but the Crimes Act presumed that it would be given an oral hearing (before a panel of three judges).[17] Under the CPA there is no such presumption,[18] and leave applications may be decided by two judges.[19] As the Court noted, these provisions reflect a legislative desire to advance the interests of justice by assisting the courts to address causes of delay in their processes.[20] The Court also noted, as it had done in *R v Leonard*,[21] that pretrial appeals affect waiting times for substantive criminal and civil business, and this may be taken into account when deciding how to deal with leave applications.[22]

Legislative policy toward pretrial appeals

[16] Provision for interlocutory criminal appeals was first made in New Zealand in 1967, in response to a High Court Judge's decision, as trial judge, to decline a strong application for change of venue for a high-profile trial in a provincial centre.[23] A Full Court of the High Court reasoned that successive applications might be made and

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12 Rule 5G(3).
13 Rule 5G(3).
14 CPA, s 329.
15 Section 213(4).
16 *Hohipa,* above n 2, at [19] and [35].
17 Crimes Act 1961, s 392A.
18 *Hohipa,* above n 2, at [19].
19 CPA, s 333(1).
20 *Hohipa*, above n 2, at [35].
21 *R v Leonard* [2007] NZCA 452, [2008] 2 NZLR 218 at [7].
22 *Hohipa*, above n 2, at [34].
23 *R v Davis* [1964] NZLR 417 (SC) at 418.

such an application might be decided by two or more judges, so ingeniously permitting what amounted to an appeal to the Full Court.[24] Recognising a need for express jurisdiction, Parliament enacted s 379A of the Crimes Act to permit appeals to this Court.[25] The object of the legislation was that of avoiding retrials by permitting appeals in cases where such appeals were clearly justified.[26] F B Adams J argued, in opposition to the amendment, that while it might save retrials in some cases, such cases would be infrequent in comparison with the likely volume of pretrial appeals, some of which would prove unnecessary.[27] The legislature appears to have assumed that this risk could be managed via the requirement for leave of the Court of Appeal .

[17] Over time the ambit of s 379A was expanded. Notably, s 344A was added to the Crimes Act in 1980 to permit trial judges to deliver pretrial rulings on admissibility of evidence, the rationale being that jurors were inconvenienced by being kept waiting while rulings were made during trial.[28] Provision was made for appeals by leave from such pretrial rulings, the legislature adding that, notwithstanding an application for leave to appeal, the trial court might continue with the trial before leave was decided if satisfied it was in the interests of justice to do so.[29] The list of pretrial rulings which may be the subject of a pretrial appeal under the CPA is set out at [3] to [7] above.

[18] The CPA was designed to achieve efficiency in criminal proceedings, reducing delays to trial and the number of court events.[30] Its processes contemplate case review hearings which follow initial disclosure and at which issues will be identified before the proceeding is adjourned for a judge-alone or jury trial.[31] These issues may include matters which may be the subject of pretrial applications.

[19] The CPA provides for pretrial evidence admissibility hearings.[32] For a jury trial, the prosecutor or the defendant may make such an application if they want to

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24 At 419–420.
25 Crimes Amendment Act 1966, s 8(1).
26 (15 June 1966) 346 NZPD 491; and Greg Taylor *Interlocutory Criminal Appeals in Australia* (Thomson Reuters, Sydney, 2016) at [1.80].
27 F B Adams "Submission to the Department of Justice on the Crimes Amendment Bill 1966".
28 Crimes Amendment Act 1980, s 3; and (1 August 1980) 432 NZPD 2294.
29 Crimes Act, s 344A.
30 Ministry of Justice *Criminal Procedure (Reform and Modernisation) Bill Initial Briefing* (7 February 2011) at [7].
31 CPA, s 54.
32 Sections 78 and 101.

adduce any particular evidence and believe its admissibility may be challenged.[33] This may be done before a proceeding is set down for a judge-alone trial or after it is transferred to the trial court for a trial callover.

[20] These administrative provisions of the CPA ought to result in issues being identified and resolved during or shortly after the end of the case administration phase and before the case is set down for trial. The expectation, as set out in a Departmental briefing paper to the Justice and Electoral Select Committee, was that they would reduce time to trial, and increase the proportion of cases which are resolved early through change of plea or withdrawal of charges.[34]

[21] Pretrial admissibility applications may be made as of right in proceedings to be tried by jury.[35] Permission is required where the admissibility issue arises in a judge-alone trial.[36] We mention the criteria for permission because they are a guide to legislative policy toward pretrial applications and hence relevant to the grant of leave to appeal. They are that:[37]

> (a) it is more convenient to deal with the issues pretrial: and
>
> (i) the admissibility issue is complex and the decision is likely to make a substantial difference to the overall conduct of the proceeding; or
>
> (ii) the decision may avoid the need for a trial; or
>
> (b) the complainant or witness is particularly vulnerable and resolving the admissibility issue is in the interests of justice.

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33 Section 101.
34 Ministry of Justice, above n 30.
35 CPA, s 101.
36 Section 78.
37 Section 78(4).

[22] As noted earlier, all first pretrial appeals are by leave and, in contrast to other appeals by leave, the legislation leaves the determination of the criteria for appeal to the courts.[38]

[23] As Ms Thomson noted for the Crown, legislation and judicial policy in comparable jurisdictions limit pretrial appeals:

(a) in Canada pretrial appeals are generally prohibited, with certain exceptions for the Crown where the pretrial ruling effectively brings the proceeding to an end;[39]

(b) in New South Wales and South Australia the Crown may appeal a decision about admissibility if the evidence concerned eliminates or substantially weakens the prosecution's case;[40]

(c) in Victoria either party may appeal a decision on the admissibility of evidence but only if the trial judge certifies its absence would "eliminate or substantially weaken the prosecution case".[41] Other interlocutory decisions may only be appealed if the trial judge certifies that the issue is "of sufficient importance to the trial to justify it being determined on an interlocutory appeal";[42] and

(d) in England and Wales pretrial rulings are uncommon and pretrial appeals lie by leave. The Crown may seek leave to appeal against interlocutory rulings but must accept that the defendant should be

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38 Second pretrial appeals are also by leave and the second court must be satisfied that the appeal involves an issue of general or public importance or that there may be a miscarriage of justice unless the appeal is heard: CPA, s 223. Where the Supreme Court is the second appeal court, s 74(4) of the Senior Courts Act 2016 imposes an additional requirement that it be in the interests of justice to hear the appeal before the proceeding in which it is brought has been concluded.

39 See Criminal Code RSC 1985 c C-46 (Can), ss 674 and 676. If a pretrial ruling gives the Crown "no reasonable alternative" but to withdraw the charges, the Crown may end the prosecution and appeal the interlocutory ruling, but that high threshold is strictly enforced: *R v Tingley* 2015 NBCA 51, 444 NBR (2d) 1 at 114. There is a right of appeal against certain disclosure decisions found in s 37.1(1) of the Canada Evidence Act RSC 1985 c C-5 (Can).

40 Criminal Appeal Act 1912 (NSW), s 5F(3A); and Criminal Procedure Act 1921 (SA), s 157(1)(e) and (3).

41 Criminal Procedure Act 2009 (Vic), s 295(3)(a).

42 Section 295(3)(b).

acquitted if the appeal fails.[43] Further sections (which have not been brought into force) would have allowed the Crown to appeal on evidentiary rulings where the ruling would significantly weaken the Crown case.[44] Either party may appeal, again with leave, against certain pretrial rulings in serious, lengthy, and complex cases.[45] Because pretrial appeals are "exceptional", leave will only be granted in "appropriate" cases.[46]

[24] Several rationales have been advanced for the conservative approach taken in these jurisdictions:

(a) interlocutory applications and appeals delay trials. In *R v Mills*, the Supreme Court of Canada stated that "experience has shown that the interlocutory motion or appeal has all too frequently been the instrument of delay";[47]

(b) the trial is the appropriate place to decide many issues, especially those involving the admission of evidence, the trial judge is often best placed to assess the impact of the issue on the trial and balance relevant considerations, and the trial gives an appellate court a more complete picture of the case;[48]

(c) interlocutory applications and appeals fragment trial issues which are frequently interdependent, so should be discouraged unless the issue concerned will have a major effect on the trial; and

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43 Criminal Justice Act 2003 (UK), ss 57, 58 and 61.

44 Sections 62 and 63.

45 Criminal Justice Act 1987 (UK), ss 7 and 9(11) (in respect of serious or complex fraud prosecutions); and Criminal Procedure and Investigations Act 1996 (UK), ss 29 and 35 (in respect of other complex, serious, and/or lengthy prosecutions).

46 *R v VJA* [2010] EWCA Crim 2742 at [43] in relation to the Criminal Justice Act; and *R v AJ* [2019] EWCA Crim 647 at [62]–[63].

47 *R v Mills* [1986] 1 SCR 863 at [276].

48 *Kourtessis v Minister of National Revenue* [1993] 2 SCR 53 at [16]; *R v Seaboyer* [1991] 2 SCR 577 at [117]; and Taylor, above n 26, at 16.

(d) interlocutory appeals may demand more resources of the appellate court than they justify.[49] This is another way of putting the point made by FB Adams J; for every pretrial appeal which averts a retrial, there will be a substantial number which are unnecessary or unsuccessful.[50]

The *Leonard* and *Hohipa* criteria

Leonard

[25] In *Leonard* the Court explained that its practice had been to hear leave applications with the merits so that trials were not unduly delayed by the appeal process.[51] However, that practice had resulted in leave being routinely granted in many cases and the distinction between appeals as of right and those by leave becoming inappropriately blurred.[52] The Court decided that leave applications would be heard separately unless the documents filed showed that leave likely would be granted.[53]

[26] The Court identified policy reasons for and against pretrial appeals:

> [5] The existence of the leave requirement in s 379A recognises that there are competing interests to be considered in pretrial appeals in criminal matters. Policy reasons in favour of pretrial appeals include:
>
> (a) If an accused is denied access to a pretrial appeal, he or she must wait until the conclusion of a trial and a post-trial appeal (if convicted) for review of any error. The entire trial must then be repeated and both the accused and the legal system have expended considerable time and cost for naught. This was the rationale for the insertion of s 379A given by the Hon J R Hanan (the then Minister of Justice) on its introduction – (15 June 1966) 346 NZPD at 491;
>
> (b) Delay occasioned by postponing relief until after the trial may impact negatively on the memories of witnesses at any retrial. Delay may also limit the ability of either side to put their case;
>
> (c) If any error leads to a successful post-trial appeal, the parties (and in particular the Crown) may have an unwarranted opportunity to improve their case at any retrial;

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49 *CGL v Director of Public Prosecutions (No 2)* [2010] VSCA 24, (2010) 24 VR 482 at [5]. See generally Taylor, above n 26.

50 Adams, above n 27.

51 *Leonard*, above n 21, at [4].

52 At [4].

53 At [8].

(d) The Crown has limited post trial appeal rights (see s 380 of the Crimes Act and s 107 Summary Proceedings Act 1957) and those that exist are used very sparingly. The Crown should have the opportunity to test on appeal any rulings which will significantly affect its case at trial;

(e) While an accused can appeal post trial if convicted, the test under s 385 is more onerous than that under s 379A.

[6] Policy reasons against appeals in pretrial matters include:

(a) Hearing an appeal after the trial is ended permits the Court to address all appeal issues simultaneously and in the context of the completed trial, thus preventing the wasted time and confusing fragmentation that may occur if several separate appeals arise out of a single trial. It also allows the Court to get a better gauge of the impact of any error, which is especially important in terms of the application of the proviso to s 385;

(b) Often the trial Judge is in the best position to determine the issue and primacy ought to be given to his or her decision;

(c) Declining to hear a pretrial appeal ensures that the appeal is truly required and it is not later rendered moot by an acquittal or by a subsequent ruling made at trial;

(d) Limiting pretrial appeals limits delay in the trial process. Not only does the accused have the right to be tried within a reasonable time, there is also a societal interest in dealing quickly with criminal charges, leading some commentators to argue that the effects of pretrial appeals are especially pernicious in criminal proceedings – see Layton "The Pre-trial Removal of Counsel for Conflict of Interest: Appealability and Remedies on Appeal" (1999) 4 Can Crim L Rev 25 at 30;

(e) An expeditious trial lessens the attendant strain on complainants and witnesses – see *Clark v R* [2005] 2 NZLR 747 at [11] (SC).

[27] The Court noted that pretrial appeals have resourcing implications for the Court, which was dealing with about 70 pretrial leave applications a year and found that some had been hopeless from inception, related to matters of little significance for the trial, or concerned issues that might be revisited at trial.[54]

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54 At [7].

[28] The Court established criteria which would be taken into account to the extent applicable in any given case. Factors pointing towards leave were:[55]

> (a) The argument is based on a novel point or is of significance for other cases;
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> (b) There is conflicting authority covering the issue to be determined on the proposed appeal;
>
> (c) The application relates to an identified error of law;
>
> (d) The application involves the admissibility of evidence that is important to one of the parties;
>
> (f) The matter cannot be dealt with adequately in any appeal after the trial or there are only limited post-trial appeal right (as will often be the case for Crown applications);
>
> (g) The proposed grounds of appeal are arguable.

[29] Factors pointing against leave were:[56]

> (a) The issue will need to be revisited at trial or is best dealt with in the context of the trial;
>
> (b) The application involves the admissibility of evidence that would not make a significant difference to the course of the trial and is unlikely to lead to post conviction appeal success;
>
> (c) The issue is best dealt with in the context of any post conviction appeal;
>
> (d) The application challenges a factual finding, especially where the finding rests on an assessment of credibility;
>
> (e) The application challenges the exercise of a discretion. In such cases leave should not be granted unless there are grounds articulated which point to the fact that the judge has, in exercising his or her discretion, acted on some wrong principle, has given weight to extraneous or irrelevant matters, has failed to give sufficient weight to relevant considerations, or is plainly wrong;
>
> (f) The appeal will cause unnecessary delay: for example where there is not time to hear the appeal before the trial commences or where it would unduly delay the trial;
>
> (g) The proposed appeal is without merit.

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55 At [13].
56 At [14].

[30] The Court noted that the onus was on the applicant to justify leave and stated that adequate information must be provided with the leave application.[57] The information required corresponded generally to that now required by Form 1.

Hohipa

[31] The Court took the opportunity in *Hohipa* to revisit its approach to pretrial appeals in light of its initial experience with the then-new CPA.[58] The Court observed that legislation continued to leave it to this Court to develop criteria for deciding pretrial appeals in the exercise of its supervisory jurisdiction.[59]

[32] The Court held that the *Leonard* criteria remained relevant and should continue to apply under the CPA, but it would evolve as appropriate.[60]

[33] The Court explained that in practice its expectation, following *Leonard*, that leave applications would be heard separately as a matter of course had not been met.[61] This reflected experience: time savings from hearing leave applications separately were minimal and separate leave hearings would delay trials in which leave was granted. The Court accordingly saw the CPA's provision for on the papers hearings as significant.[62] It proposed to respond by deciding more leave applications on the papers.[63]

Recent experience

[34] The number of leave applications doubled following *Hohipa*, reaching about 140 per year.[64] About 60 per cent of them relate to the admissibility of evidence. Contrary to the Court's expectation in both *Leonard* and *Hohipa*, in most cases leave and merits are still argued together. There are, we think, two reasons for this.

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57 At [12] and [33].

58 We confine discussion to cases in which this Court is a first appeal court dealing with pretrial appeals. This judgment does not address the Court's approach to other appeals by leave.

59 *Hohipa,* above n 2, at [23].

60 At [27].

61 At [31].

62 At [35].

63 At [36].

64 This Court in *Hohipa,* above n 2, at [34] noted the number of pretrial leave applications filed had remained static, at about 70 per year. The increase predated the COVID-19 pandemic. There has been a decline in numbers in recent months, with 60 having been filed so far this year.

[35] First, it is usually obvious from the leave application that the issue matters to the party seeking leave. For example, appeals against the admission of propensity evidence matter to the applicant because such evidence increases the likelihood of conviction. However, applications often fail to identify any issue of wider significance, address the impact of the appeal on the prosecution case, advise whether the outcome will avoid a trial or substantially affect its scope and duration, or explain why the issue cannot be dealt with in a conviction appeal. Seldom is the Court told that its decision will avert a trial. The Crown's reply memorandum under r 5C of the Rules often rehearses the leave criteria without adding much information, possibly because Crown counsel have learned from experience that leave seldom receives a separate hearing.

[36] Second, a substantial and growing number of leave applications — about 43 per cent — are made in close proximity (90 days or fewer) to the scheduled trial date. This appears to be a consequence of late applications in the trial courts, rather than a delay in bringing appeals. This Court almost always delivers a judgment swiftly, in the expectation that the trial will proceed or resolve by plea on the scheduled date. The pressure of time usually makes it necessary to decide leave and merits together. Occasionally a judge indicates that the Court cannot hear a pretrial appeal before the scheduled trial date and the trial judge should consider whether to proceed with the trial under s 222 of the CPA.[65]

[37] So the Court's practice is underpinned by an expectation that trials will proceed on schedule or be avoided by a plea on that date. It has become increasingly clear that expectation is not being met. In the year ended 30 June 2022 there were 146 pretrial applications. In 10 cases a guilty plea was entered following the pretrial hearing. In 91 cases the pending trial was recorded as "not complete", meaning it was adjourned or rescheduled. Jury trials were affected by the pandemic in that year, but the pattern was also evident in 2017 and 2018. In the year ended 30 June 2019 there were 116 pretrials. In 16 of those cases a guilty plea followed the decision. In 61 cases the trial did not proceed on the scheduled date.

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[65] This happens in about 16 cases annually.

[38] After argument was heard in this application, the Ministry of Justice published a study on increased delays in guilty pleas and increases in jury trial elections since 2016 in the District Courts at Auckland, Christchurch and Manukau.[66] The significance of the study for our purposes is that it rests on data which confirms that guilty pleas are more often being entered close to the eventual trial date. The authors state that between 2016 and 2019 the likelihood of a late guilty plea rose by about 20 per cent.[67]

[39] We did not invite further submissions on the study because we need not express a view on its suggestions about the complex causes of these developments.[68] It was a focus group study and the authors acknowledge that it should be seen as qualitative and exploratory.[69] It points to a need for better information about issues including the size and timing of guilty plea discounts and the use of sentencing indications. For our purposes, what can be said is that a pattern of adjournments after pretrial appeals followed by much later guilty pleas suggests that other factors are making a substantial contribution to outcomes.

[40] From this Court's perspective, that is not surprising. It remains true, as it was when *Leonard* and *Hohipa* were decided, that a substantial majority of pretrial appeals fail and many obviously lack merit. It is a reasonable supposition that most of these proceedings would have ended in a guilty plea in any event. If so, both the pretrial ruling and the appeal were unnecessary. Pretrial applications are most likely to determine whether the proceeding ends in abandonment, plea or trial where: a) the pretrial ruling resulted in strongly probative evidence being ruled in or out; and b) the application had reasonable prospects of success. Challenges to police searches are a good example of pretrial applications in which the outcome is often decisive but the prospects of excluding the evidence are frequently slight, either because no real error of process affected the search or the balancing exercise under s 30 of the Evidence Act 2006 manifestly favours admission.

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66 Research First Ltd *A Qualitative Insight Into the Increase in Later Guilty Pleas and Election of Jury Trials* (Ministry of Justice, 30 June 2021).

67 At 3.

68 We heard from counsel on questions of policy and practice but (as in *Hohipa*, above n 2) did not invite submissions from professional bodies. The issues are substantially matters of judicial administration.

69 Research First Ltd, above n 66, at 5.

[41] This raises two questions: why are pretrial applications made, and why is leave to appeal sought, in so many cases? We do not have empirical information about that. But something can be said about incentives to isolate issues for decision before trial. In an appeal after conviction the court is interested not only in whether something went wrong at trial but also in the materiality of an error to the jury's verdict.[70] The appellate court is also better informed because it has the evidence actually led at trial, the full trial record and the views of the trial judge. These considerations usually favour declining leave. The pattern of late applications and adjournments also suggests that, far from saving time, pretrial applications and appeals may be contributing to delay in some cases.

Restatement of the leave criteria

[42] We have concluded that the exercise of the Court's leave jurisdiction requires some change to the leave criteria.

Review of policy considerations

[43] Pretrial appeals allow this Court to settle issues of law and practice in criminal proceedings, and to exercise its general supervisory jurisdiction over jury trials. The leave jurisdiction will continue to be exercised to that end.

[44] The original rationale for pretrial appeals — avoiding retrials which result from serious and obvious pretrial errors — retains its potency. It favours leave where the prospects of the pretrial ruling being shown to be in error are high and the error carries a real risk of affecting the outcome of the trial. These are cases in which a conviction appeal likely will result in an order for retrial.

[45] The other historic rationale for pretrial rulings — saving the time of juries who must otherwise wait while admissibility issues are argued during trial — does not justify a pretrial appeal.

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[70] Taylor, above n 26, at 15 citing Y Kamisar and others *Modern Criminal Procedure: Cases, Comments and Questions* (12th ed, Thomson/West Academic Publishing, St Paul, 2008) at 1542f.

[46] Protecting vulnerable witnesses is an important consideration for trial judges, who are almost always best placed to decide how to do this. Most pretrial appeals are brought by defendants, who usually can invoke this consideration only when the outcome might avoid trial altogether or the pretrial ruling will lead to a retrial. It is most likely to affect leave where the pretrial ruling requires witnesses to give evidence twice, in separate trials. In those cases the leave application is brought by the Crown.

[47] One of the objectives of pretrial rulings and appeals is to reduce overall trial delays and the number of court events. This is a question of system efficiency in which the interests being balanced include those of defendants and witnesses in a fair and prompt trial, as well as those of the state, in an effective justice system. Pretrial appeals may promote these interests, as s 217 of the CPA envisages. A substantial minority of pretrial applications are brought soon after the case administration phase in the District Court and a substantial minority of pretrial appeals result in proceedings being concluded by abandonment, plea, or trial on the scheduled trial date. Sometimes the pretrial appeal significantly affects the scope and duration of the trial.

[48] However, in practice, pretrial appeals often do not achieve these ends. There are too many in which leave is granted, and the merits heard urgently, in the expectation that the trial will proceed or the proceeding will be otherwise concluded, on an impending trial date. The need to ensure the trial can proceed on that date frequently outweighs considerations that otherwise weigh against leave. This might be acceptable if trials proceeded, or pleas were entered, on the scheduled date. In too many cases that is not happening.

[49] In addition, system efficiency considerations must be weighed against the risk of error when issues are fragmented by deciding some of them in isolation from the trial. In an appeal after trial the appellate court has the advantage of the evidence actually led there, the full trial record and the views of the trial judge, who is better placed than an appellate court to assess the evidence and issues. The issue can be placed accurately in context. All of this is lacking in a pretrial appeal. (The judge who decided the application at first instance did so before the trial commenced and may not have been the designated trial judge in any event.) For these reasons this

Court may decline leave where the trial judge will have an opportunity to review a pretrial ruling at or before trial.[71]

[50] As the Court noted in *Leonard*, resourcing is also a relevant consideration in pretrial appeals.[72] The CPA recognises that,[73] as the Court explained in *Hohipa*,[74] leave applications may be decided by two judges on the papers, and reasons for declining leave may be brief. Appeals require three judges and fuller reasons.[75] This favours separate consideration of leave applications unless the case for leave is obvious or the court is persuaded that a scheduled trial date will be vacated unless the appeal is heard without delay.

[51] The volume of pretrial appeals in this Court has continued to grow, and as we have explained, they are given priority over other business. Time savings in trial courts that are achieved by pretrial appeals must be balanced against delays in dealing with this Court's substantive criminal and civil business. From a system efficiency perspective the overall objective, after all, is to minimise delays in final dispositions. We noted in *Hohipa* that waiting times in criminal appeals were six months, and in civil cases before the Permanent Court, 12 months.[76] The position remains the same for conviction appeals today, but civil waiting times for Permanent Court hearings have grown to 15 months and they would be longer but for the increasing use of Divisional Courts to decide civil appeals.

Restatement of leave criteria.

[52] The overall criterion remains the interests of justice. The considerations listed below are designed to facilitate this Court's supervisory jurisdiction over trial practice. They are:

(a) the proposed appeal raises a novel issue or point of law;

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71 In *Hamed v R* [2011] NZSC 27, [2011] 3 NZLR 725 the Supreme Court granted leave to bring a second appeal partly because the issue could not be revisited by the trial Judge.
72 *Leonard*, above n 21, at [7].
73 CPA, ss 327, 331, 333(1) and 340; and the Rules, r 5I.
74 *Hohipa*, above n 2, at [18].
75 Senior Courts Act, s 47(1).
76 *Hohipa*, above n 2, at [34].

(b) the proposed appeal raises an issue of wider significance — for example, it is the subject of conflicting authority;

(c) where the proposed appeal concerns the admission of evidence, the outcome will eliminate or substantially weaken or strengthen the prosecution case;

(d) the proposed appeal has merit, and if not corrected, the pretrial ruling is likely to result in a retrial being ordered under s 232 of the CPA;

(e) the outcome may avert the need for a trial, or may significantly alter its scope and duration;

(f) the issue cannot be dealt with adequately in a conviction appeal after trial, or post-trial appeal rights are limited (the latter distinguishes leave applications brought by the Crown);

(g) the pretrial ruling can be revisited by the trial judge in light of the issues and evidence which emerge at trial;

(h) the issue is best dealt with in a conviction appeal after trial, perhaps because the evidence led there may vary from that disclosed before trial, the trial will better put the issue in context, or an appeal would benefit from the opinion of the trial judge;

(i) the outcome will affect a complainant or witness who is particularly vulnerable;

(j) the pretrial appeal will require this Court to undertake an extensive evaluation of evidence to be led at trial, replicating work which will need to be done in the event of an appeal against conviction;

(k) the application challenges a factual finding made by the judge who heard the pretrial application;

(l) the decision challenged is highly evaluative, such that it will not be easy to show that the first instance judge was wrong;

(m) the appeal will delay the defendant's trial.

[53] Applications for leave, and r 5C reply memoranda from the Crown, should address these considerations to the extent applicable. It is unlikely that any given application will engage all the considerations listed. The Court also appreciates that counsel sometimes may not be in a position to say whether, for example, the outcome of the appeal may avert the need for a trial. But if a given consideration is said to be engaged the application should explain why that is so and provide sufficient information to allow the court to assess the application against it. Box-checking will not assist the Court in its exercise of judgement.

[54] The court will take an overall approach to the considerations. It may not suffice that one or more of them is met, if others favour declining leave.

[55] It sometimes will remain necessary to hear pretrial appeals brought after the end of the case administration phase and when a trial has been scheduled. In such cases a judge will continue to consider whether the court will hear leave and merits together, to ensure the trial can proceed on the scheduled date. Counsel must advise the court if the trial date is provisional or they anticipate that the trial may be adjourned for other reasons.

[56] Where a judge directs that leave be argued separately, the Registrar ordinarily will assign the application to a panel of two judges for hearing on the papers.

[57] Where leave is granted, no reasons will be given unless the panel thinks it appropriate. Where leave is declined, the reasons given ordinarily will be as brief as the circumstances allow.

The application for leave to appeal

[58] We turn to the application for leave to appeal, which we assess (in fairness to the applicant) by reference to the *Leonard* criteria to the extent they assist him.

[59] The applicant faces two charges of injuring his infant daughter with intent to injure between 27 May 2020 and 22 February 2021. One charge alleges bruising to her face (Charge 1), the other injuries to her left tibia and fibula (Charge 2). Charge 1 rests on evidence that the child was injured while in his care and his explanation — a fall in the bath — is unlikely to account for the extensive bruising seen on medical examination several days later. During examination healing fractures were observed to her leg, hence Charge 2. The child was not yet a toddler. Expert witnesses will say that the injuries are not consistent with an accident.

[60] The pretrial issue concerns the admissibility of propensity evidence, in the form of a conviction for ill-treating his older daughter in 2012, when she was between six to nine months of age. We will call this the 2012 propensity evidence.

[61] The applicant argues that the medical evidence is insufficient in itself to sustain convictions and, that being so, the Crown case rests on the 2012 propensity evidence. That evidence is said to be prejudicial, and also lacking in probative value because the applicant has matured since 2012. He was 19 then, and there was evidence from the child's mother that his parenting exhibited impulsive behaviour consistent with his youth. There is a good deal of evidence, in addition to the summary of facts, that he would punish the child physically for not staying still or for crying. He was 27 at the time of the index charges and the mother of this child says she has never seen him use or threaten violence against her.

[62] The proposed appeal raises no novel question or issue of wider application. It is a routine application of settled principles to the case at hand.

[63] The evidence is important to the applicant, in that it significantly increases the likelihood of conviction. But notwithstanding the absence of direct evidence of identity for Charge 2, we do not accept that the 2012 propensity evidence will substantially strengthen the Crown case. Identity is not in issue for Charge 1, which rests on evidence that the injuries are consistent with assault and not consistent with the applicant's explanation. The jury may rely on the evidence for Charge 1, using propensity reasoning, to help establish identity when it comes to Charge 2. Intent, for

both charges, will rest primarily on inferences to be drawn from the nature of the injuries.

[64] The proposed appeal is arguable, but its merits are not strong. The propensity evidence is robust, and the propensity is sufficiently distinctive. The evidence is not illegitimately prejudicial, and its evaluation is a jury question. There is no reason to think the jury will not follow the usual directions.

[65] In addition, the evidence is not settled. We were told that the proposed expert evidence about the bone injuries is to change. It is possible that the ruling will need to be revisited in light of the evidence actually led at trial. It is unclear to what extent evidence about the 2012 incidents will be led, in addition to the summary of facts to which he pleaded at that time. The impact of the propensity evidence can be gauged more accurately by the trial judge and, if necessary, in an appeal against conviction.

[66] There is some reason to think that a partial success on appeal might result in a resolution. However, the propensity evidence will not significantly alter the trial's scope or duration.

[67] It appears the proposed appeal will not delay the trial. A trial date has yet to be allocated.

[68] When the applicable considerations are viewed overall, the proposed appeal does not merit leave.

Disposition

[69] The application for leave to appeal is declined.

[70] In order to protect W's fair trial rights, we make an order prohibiting publication of this judgment and any part of the proceeding (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in a law report or law digest is permitted.

Solicitors:
Crown Law Office, Wellington for Respondent