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NO SUBSTANTIAL MISCARRIAGE OF JUSTICE: 
THE HISTORY AND APPLICATION OF THE PROVISO TO 
SECTION 385(1) OF THE CRIMES ACT 1961

Mathew David Downs

A thesis submitted for the degree of 
Doctor of Philosophy 
at the University of Otago, Dunedin, 
New Zealand.

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ABSTRACT

The proviso to s 385(1) of the Crimes Act 1961, which takes its name from its introductory phrase, "provided that", confers a significant appellate power on a court of criminal appeal, for by it, the court may dismiss an otherwise meritorious indictable conviction appeal if the court considers that "no substantial miscarriage of justice has actually occurred". The proviso has, however, received little academic attention. This paper examines the proviso's history and application, and in particular, why the proviso was enacted, the device's treatment by the courts and the issues to which it gives rise.

The proviso's origins lie in the Exchequer rule, a creature of the nineteenth century common law, which held that any error at trial entitled the losing party to a retrial. The proviso was enacted throughout the common law world to reform this rule and in New Zealand in 1893 to prevent it from taking effect. Whereas the Exchequer rule adopted a formal and absolutist approach to trial error by declining to assess its significance, the proviso invited courts of appeal to evaluate both the effect of error and the evidence for the purpose of determining whether justice had, in fact, miscarried. Both here and elsewhere, however, the courts treated the proviso with hostility, for the device, it was said, could usurp the role of the (lay) jury. This aspect shaped the proviso’s role in the criminal jurisdiction when various means of appeal to which it was coupled later emerged. It also shaped the courts' view of their role under the proviso, and in particular, limited the scope of an appellate jurisdiction to make findings of fact.

By reference to analogous harmless error devices in the United States of America, we find that the proviso has been applied in New Zealand in two ways since the advent of modern rights of appeal. First, when error has not affected the outcome of the proceeding, and second – and irrespective of jury usurpation – when the defendant's guilt is sufficiently clear from the record. Neither approach has, however, been closely considered here. Instead, our courts have oscillated between both. Our courts have also been inconsistent in their application of the proviso and ideas reminiscent of the Exchequer rule have endured. Consequently, we find that the proviso has had a narrow curative role in the disposition of indictable criminal appeals in New Zealand.

The relationship between the proviso and its attendant grounds of appeal has been problematic because of the linguistic and conceptual tension between the former and the latter. So too has the identification of incurable error, that is, trial error which is beyond the proviso's curative power. The latter problem has given rise to a variety of common law approaches ranging from the fundamental error jurisprudence of the Australian High Court to constitutional structural error, a concept of the United States' Supreme Court. None of the approaches to incurable error has, however, proved satisfactory so that it remains unclear which errors are potentially subject to the proviso's power.

The paper then outlines a principled approach to the proviso that would deal with the problems discussed: the stunted fact-finding function on the part of courts of criminal appeal, the shifting conceptual basis for the proviso's application, the friction between the proviso and its grounds of appeal and the vagaries of incurable error.

---

1 Crimes Act 1961, s 385(1).
When my professional responsibilities brought me into contact with the proviso some years ago, I was obliged to know how it ought to be applied by courts of criminal appeal. That inquiry led naturally to the proviso's history and from there, to how the proviso had been subsequently applied and so on. In short, this paper is the product of both curiosity and professional need. It would not have been possible without much help. In particular, I thank Mum and Dad for their sacrifices long ago; my wife for her extraordinary patience, love and support; the library staff of the Parliamentary Library and of the Remote Services Section at the University of Otago for their provision of materials; Saul Holt for his valuable critique of the Australian dimension; Judge Peter Butler and Marc Corlett for their comments on some early drafts; the staff of the criminal team at the Crown Law Office, and particularly Tiana Epati, for the many hours of proofreading; and that Office for its financial support.

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Errors remain mine alone.
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INTRODUCTION

On 16 February 1994 John Barlow entered the Wellington offices of two businessmen, a father and son, and fatally shot each with a pistol bearing a homemade silencer. He disposed of the weapon the next morning, having altered it in an attempt to prevent its connection – and hence his own – to the killings. He was later arrested and charged with murdering both men. Two juries were unable to determine the defendant’s guilt. A third jury, however, convicted him. Ten years later, the defendant’s legal advisors discovered that an apparently incriminating piece of circumstantial evidence was “unscientific and untenable”. The defendant petitioned the Privy Council for relief. It held that justice had miscarried. The admissible evidence against the defendant remained, however, very strong. Moreover, the Privy Council considered that “the guilty verdict was indeed the only reasonable possible verdict” and that the “Board itself feels sure of Mr Barlow’s guilt.” Accordingly, it dismissed the appeal concluding that “while the introduction of the misleading evidence ... was indeed a miscarriage, no substantial miscarriage of justice actually occurred.”

By use of such nomenclature the Privy Council exercised a power available to New Zealand appeal courts on an appeal against an indictable conviction; the power to dismiss an otherwise meritorious appeal upon satisfaction that the defendant had not suffered a substantial miscarriage of justice. This power, which is contained within section 385(1) of the Crimes Act 1961, is known as the proviso because of its introductory phrase, “provided that”. In context, the proviso reads:

On any appeal to which [this] subsection ... applies, the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion—

(a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
(b) that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
(c) that on any ground there was a miscarriage of justice; or
(d) that the trial was a nullity—and in any other case shall dismiss the appeal:

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

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2 *Barlow v R* [2009] UKPC 30 at [55].
3 Ibid at [74].
4 Ibid at [75].
5 Crimes Act 1961, s 385(1).
6 Ibid.
New Zealand is not unique in having the proviso for a number of cognate jurisdictions share it in similar terms. These include the Australian Commonwealth, all of the Australian states and territories, Canada and parts of the Caribbean. England and Wales had the proviso until 1995 when it was there repealed. Devices similar to the proviso appear in all fifty states of the United States of America and a like provision there exists to regulate federal appeals.

As the case of Barlow suggests, the proviso confers a formidable appellate power. The significance of the proviso, however, goes beyond this and the breadth of its common law adoption to the number and nature of issues that it poses for courts of appeal. The statutory text is illustrative. First, it will be noted that the statute is descriptive rather than prescriptive, in that while it provides that the appeal court may dismiss an appeal "if it considers that no substantial miscarriage of justice has actually occurred", the statute does not mandate the means by which the court is to determine whether such a miscarriage has occurred. How is an appeal court to make this inquiry? Does the statute envisage the court dismissing an appeal when the error did not affect the trial's outcome or when the defendant is plainly guilty even though an appeal ground is made out? Or may perhaps the court do both? Second, it will be observed that while the proviso invests the court with a discretion to dismiss the appeal once an appeal ground has been established, so that the court "may" but not must do so, again, the statute is silent as to how this task is to be undertaken. What errors then are to be treated as beyond the proviso's curative power? Moreover, when is error sufficiently serious for the defendant to be regarded as having suffered an actual substantial miscarriage of justice? Third, although the proviso is apparently curative of

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7 Federal Court of Australia Act 1976 (Cth), s 30AJ(2).
8 See the Supreme Court Act 1933 (ACT), s 370(3); Criminal Appeal Act 1912 (NSW), s 6; Criminal Code (NT), s 411(2); Criminal Code 1899 (Qld), s 688E(1A); Criminal Law Consolidation Act 1935 (SA), s 353(1); Criminal Code Act 1924 (Tas), s 402(2); Criminal Appeals Act 2004 (WA), s 30(4); Crimes Act 1958 (Vic), s 568(1) and Criminal Procedure Act 2009 (Vic), s 276.
9 Criminal Code (Can), s 686(1)(b)(iii).
10 See the Judicature (Appellate Jurisdiction) Act, (Jamaica) s 14(1) and the Supreme Court of Judicature Act, (Trinidad and Tobago) s 44(1).
11 For the repealed provision, see as passed the Criminal Appeal Act 1968 (UK), s 2(1). For the replacement provision, see the Criminal Appeal Act 1995 (UK), s 2(1).
12 See Chapman v California 368 US 18 (1967) at 22. For example, Article VI § 13 of the Californian Constitution (2009) provides: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."
13 28 USCS § 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."
14 Crimes Act 1961, s 385(1).
15 Ibid.
all of the grounds of appeal, at least one such ground— an unreasonable verdict— appears to be inherently incurable. What then is the relationship between the proviso and the various grounds of appeal?

Other matters also invite attention. The statute directs that the court must allow the appeal if “there was miscarriage of justice” and yet it provides that the court may dismiss the appeal if there has been “no substantial miscarriage of justice”. How are these two concepts to be reconciled? Further, the statute appears to place emphasis upon the evaluative judgement of the appeal court, hence the phrase “it is of opinion” and the term “considers” in relation to the court’s assessment of the appeal grounds and the proviso respectively. Given the various grounds of appeal, including one directed at matters at fact, are these terms to be understood as implying a fact-finding function on the part of the court? And if so, how is this function to be reconciled with the right of a defendant on a criminal charge to trial by jury, a right affirmed by New Zealand law as fundamental?

Questions such as these have troubled the courts both here and elsewhere. For example, our Supreme Court recently observed that the proviso’s meaning and application are “of some uncertainty”. Similarly, in 1997 the Victorian Court of Criminal Appeal remarked that the proviso’s relationship with the grounds of appeal was a “riddle” worthy of Homer. Appellate concern about the proviso is hardly new. In 1890 Windeyer J insisted that the New South Wales proviso did not confer an appellate fact-finding function and that the contrary view risked “the destruction of … a fundamental principle in the administration of the criminal law”. Lord Herschell LC expressed the same point only three years later, for the proviso would otherwise “gravely affect the much cherished right of trial by jury in criminal cases”.

But despite this rich vein of common law, the proviso has attracted little academic attention. It is, however, central to the operation of an appellate regime for

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16 Ibid.
17 Ibid.
18 See the New Zealand Bill of Rights Act 1990, s 24(e) and the Crimes Act 1961, ss 361A-361C.
19 Matenga v R [2009] 3 NZLR 145 at [1].
21 R v McLeod (1890) 11 NSWLR 218 at 238.
22 Makin v Attorney-General for New South Wales [1894] AC 57 at 70.
the determination of serious criminal charges and therefore concerns the frequently competing interests of defendants, victims, public and state.²⁴ Moreover, these questions often reflect fundamental forces at work in the criminal justice system, or to borrow Packer’s nomenclature, the clash between due process and crime control.²⁵ They also concern the correct operation of courts of criminal appeal, and in particular, the role of such courts in the administration of criminal justice as well as the nature and extent of their powers. For example, the proposition that the proviso confers a concurrent appellate jurisdiction on matters of fact was regarded as heresy in the late nineteenth century; hence the remarks of Windeyer J and Lord Herschell LC above. And yet, as we shall see, this idea has now gained currency in two senior courts of appeal including the New Zealand Supreme Court.²⁶ Consequently, this paper examines the history and application of the proviso to section 385(1) of our Crimes Act in the context of related developments elsewhere.

Chapter one considers the proviso’s history. In particular, we explore why the proviso was enacted throughout much of the common law world, including New Zealand, as well as the courts’ early response to the device. Central to both aspects is the Exchequer rule, a rule that any error at trial entitled the losing party to a retrial. As we shall see, while the proviso was intended to abolish the Exchequer rule, it did not do so, at least entirely. Instead, reasoning consistent with the rule endured so that the proviso was treated with caution, if not hostility, by the courts both in New Zealand and beyond. The result was that the proviso’s curative power was either constrained, diminished or both. Relevant allied developments are also considered including the emergence of a right of appeal in criminal cases in England and Wales, the proviso’s place in that regime and its domestic iteration through our Criminal Code Act 1893, the Crimes Act 1908 and the Criminal Appeal Act 1945.

The New Zealand courts’ treatment of the proviso since the 1945 Criminal Appeal Act is the subject of chapter two. Here, we consider how the proviso has been applied using an analytical framework from North America in light of developments there concerning the related doctrine of harmless error. It emerges that two approaches have occupied our jurisprudence, the error-impact approach and the guilt-based approach. As these labels imply, the former is concerned with measuring the effect of


²⁵ A Privy Council decision of Anderson v R [1972] 2 AC 100 is a reminder of what can be at stake. The defendant was convicted of murder and sentenced to death by a Jamaican trial court. The case against the defendant consisted chiefly of circumstantial evidence whereas the defendant relied upon an alibi. The Jamaican Court of Appeal and Privy Council held that the judge had made two “serious misdirections” about the evidence through overstatement of the prosecution’s case; ibid at 106. However, the Privy Council affirmed the application of the proviso by the Court of Appeal on the basis that “their Lordships’ view is that the ... facts would have inevitably led a jury properly directed to a conclusion of guilt”; ibid at 107. The appeal was dismissed and the appellant, presumably, hanged.


error whereas the latter focuses upon the strength of evidence of guilt. As we shall see, New Zealand courts have employed each in equal measure without closely considering either. Each has, however, a different conception of an appeal court’s role under the proviso. The result has been confusion. We then examine the relationship between the proviso and the various grounds of appeal including the Supreme Court’s recent reconciliation of the miscarriage of justice appeal ground with the terms of the proviso.\(^{27}\) Other difficulties in this area remain. From there we assess trends in the New Zealand proviso’s application over the last six and a half decades. Inconsistency, it is suggested, is the primary one. Moreover, ideas reminiscent of the Exchequer rule have retained their potency here so that the proviso’s curative role has been a modest one.

Chapter three addresses a question central to the application of the proviso and foreshadowed by chapters one and two; to what extent does the proviso confer a fact-finding role upon a criminal appeal court? In an ironic hangover from the Exchequer rule, common law courts said that the proviso did not permit appellate fact-finding. This practice, it was said, would usurp the constitutional role of the jury. Incongruously, however, the courts also embraced the proviso’s application using the guilt-based approach mentioned above, thereby engaging in a practice they had supposedly renounced. In addition to explaining these apparently contradictory developments, we consider the extent to which the idea of jury usurpation has affected the proviso’s application. As we shall see, this idea has heavily influenced the Supreme Court of Canada with the result that the proviso may there be obsolete.\(^{28}\) Conversely, the Australian High Court has repudiated jury usurpation as a barrier to appellate fact-finding under the proviso while imposing its own artificial restraints in this area.\(^{29}\) New Zealand has since adopted the Australian position,\(^{30}\) thereby implicitly rejecting the Privy Council’s extraordinary criticism of the New Zealand Court of Appeal’s apparent excess in Bain v R.\(^{31}\) But while theory has changed in this area, practice under the proviso has not. Instead, concerns about the inability of appeal courts to assess witness demeanour have supplanted jury usurpation as the basis for appellate deference. It is contended that these concerns are misplaced and that the proviso confers a fact-finding role broader than that hitherto recognised given its history, text and purpose.

Under the banner of incurable error, chapter four considers error that either constitutes a substantial miscarriage of justice or which is too serious to permit the exercise of the proviso’s discretionary relief. The origins of such error are English, for the Court of Criminal Appeal recognised that certain errors either could not or should not be remedied by the proviso. But while the notion of incurable error was articulated clearly, regrettably, the principles for its identification were not. The subsequent emergence of three overlapping types of incurable error – fundamental errors vitiating criminal proceedings, unfair trials and constitutional violations going to the structure of a trial – share the same defect. Consequently, fundamental error jurisprudence, which is

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\(^{27}\) Matenga v R [2009] 3 NZLR 145.

\(^{28}\) For example, see R v Trochym [2007] 1 SCR 239.

\(^{29}\) Weiss v R (2005) 224 CLR 300.


primarily the preserve of the Australian High Court, is bereft of an obvious pattern. The same is true in relation to the broader common law phenomenon of unfair trials; for while it is now settled that an unfair trial is necessarily a substantial miscarriage of justice, few workable principles exist for the identification of trials within this category. In North America, while the United States’ Supreme Court has attempted to settle how constitutional structural error is to be distinguished from regular error amenable to the proviso’s equivalents, the distinction between the two remains vague. And as we shall see, another difficulty emerges there too.

In the final chapter we outline a principled approach to the proviso that would resolve the difficulties discussed: the shifting conceptual basis for the proviso’s application, the incomplete fact-finding function on the part of courts of criminal appeal, the vagaries of incurable error and the friction between the proviso and its grounds of appeal. In relation to the first of these problems, it is contended that the two different approaches adopted by the courts in relation to the proviso should be seen as discrete stages of a unitary inquiry as to whether the defendant has suffered a substantial miscarriage of justice. The first stage of this inquiry would therefore consider whether error had affected the verdict, that is, the error-impact approach. If error had not done so, then the court need not go further; instead, it could conclude that there had been no substantial miscarriage of justice. However, if error might have affected the verdict, then the next stage of the inquiry would be whether the court was satisfied of the defendant’s guilt: the guilt-based approach. If so, and subject to considerations of incurable error, the court could also conclude that the defendant had not suffered a substantial miscarriage. By approaching matters in this way, the conceptual basis for the proviso’s application would always be clear. More importantly, and unlike the position currently, so too would the methodology itself.

The incomplete fact-finding position existing in both Australia and New Zealand requires, it will be contended, re-conception of the role of a criminal appeal court under the proviso. By this device, such courts have the jurisdiction to determine whether a verdict accords with the court’s view of the evidence. It follows that notions of appellate deference regarding first-instance factual findings, including witness demeanour, require revision in the criminal arena. Consequently, whenever error might have affected a verdict on the error-impact inquiry above, appeal courts should exercise their broad supplementary powers to hear evidence for the purpose of determining if a defendant is guilty beyond reasonable doubt. And in making such a determination under the guilt-based limb, it is contended that the court’s view of evidence rather than that of a putative jury should be dispositive.

The confusion in relation to incurable error requires an analytical framework for its resolution. A multi-factorial approach is posited as the best solution in light of the many concerns that exist in this area and the absence of any single self-executing test. Accordingly, it will be contended that courts should have regard to the nature of the error in issue, its significance in the context of the proceedings, the degree of prejudice, if any, to the defendant and the extent to which the error compromises the appearance of justice in assessing whether error is curable by the proviso.

The proposed model would also meet the final challenge; reconciliation of the proviso with the various grounds of appeal. The envisaged fact-finding role would permit courts of criminal appeal to receive evidence in order to cure an otherwise unreasonable verdict, the first of the grounds of appeal, thereby giving effect to the
statutory text that this ground is subject to the proviso. Further, the multi-factorial approach to incurable error could also be applied to trials that were a nullity, the last of the grounds of appeal, given the commonality of factors relevant to the proviso's applicability. The balance and most important of the appeal grounds, wrong decisions on a question of law and miscarriages of justice, would fit comfortably with the proposed two-stage inquiry involving the error-impact and guilt-based approaches if, as is contended, each is understood to concern error that was capable of having affected the verdict. The result would be a model that finally gives effect to the proviso's text and purpose.
CHAPTER ONE

THE HISTORY OF THE PROVISO: FROM R v BALL IN 1807 TO THE CRIMINAL APPEAL ACT 1945

I. INTRODUCTION

The proviso has long been part of New Zealand law. The mechanism predated the Criminal Appeal Act 1945 by which modern rights of appeal were enacted and the English template of 1907 upon which our Criminal Appeal Act was based. It first appeared in New Zealand by virtue of the Criminal Code Act 1893, at a time when no general right of appeal existed in criminal cases and when the prevailing scheme employed the cumbersome Crown Cases Reserved procedure. Like devices can be found earlier elsewhere. India enacted a form of the proviso in 1872. England did likewise a year later in relation to its civil law reforms. New South Wales implemented a variant in 1883. Canada did so in 1892. Queensland, Western Australia and the Australian Commonwealth enacted the proviso or similar provisions around the century’s turn.

The impetus for the legislative reform encapsulated in the proviso was the Exchequer rule, which held that any error at trial entitled the losing party to a retrial, irrespective of the significance of the mistake and the complexion of the evidence. However, the Exchequer rule was never a feature of New Zealand’s common law. Despite this, New Zealand inherited the proviso. This chapter explores how and why that occurred in the context of related developments elsewhere. The courts’ early response to the proviso is also considered; a response that may still be with us, at least to an extent, over a century later.

32 Criminal Appeal Act 1907 (UK).
33 Criminal Code Act 1893, s 415.
34 Evidence Act 1872 (India), s 167. See also the later Code of Criminal Procedure Act 1898 (India), ss 423 and 537.
35 Supreme Court of Judicature Act 1873 (UK), r 48.
36 Criminal Law (Amendment) Act 1883 (NSW), s 423.
37 Criminal Code 1892 (Can), s 746(f). Ontario enacted the proviso as part of its civil law in 1874; see the Administration of Justice Act 1874 (Ontario), s 34. See also the Judicature Act 1879 (British Columbia), Order XXXIX, r 3 and the Judicature Act 1884 (Nova Scotia), Order XXXVII, r 6.
38 Criminal Code Act 1899 (Qld), s 670.
39 Criminal Code Act 1902 (WA), s 670. Western Australia copied Queensland’s criminal code (drafted by Samuel Griffith) resulting in the respective provisions sharing the same section number.
40 Judiciary Act 1903 (Cth), s 75.
To understand the context in which the proviso came to be part of New Zealand's criminal law and the courts' response to it, an explanation of the Exchequer rule and the change effected by it are necessary. Consequently, this chapter has a broad sweep. It commences not with the Criminal Code Act 1893 by which the proviso was introduced to New Zealand, but with the period before the Exchequer rule, in which the common law courts engaged in an evaluative approach to trial error. The rise of the Exchequer rule, the legislative response in the form of the proviso and the courts' early interpretation of the section are then considered. Important developments are examined along the way; the enactment of the proviso in conjunction with the general right of appeal in criminal cases in England (later copied in New Zealand and beyond), the early search for principle in relation to the proviso's operation and the attendant judicial discord on the section's application. The chapter concludes with an examination of the preeminent House of Lords decision on the proviso and the approximately contemporaneous enactment of the New Zealand Criminal Appeal Act 1945.41

In traversing this 150-year period of history it is argued that the courts both here and abroad treated the proviso with particular circumspection. The proviso, it was said, had the potential to usurp the role of the jury in the administration of the criminal law. To prevent this perceived encroachment the courts gave the proviso a narrow curative role, employing it only when the evidence of a defendant's guilt was overwhelming. Similarly, trial error capable of having influenced a jury's verdict generally remained dispositive, so that if error might have affected the result, the proviso was held to be inapplicable.42 In so doing, the New Zealand courts like courts elsewhere, treated the risk of consequential error as synonymous with a substantial miscarriage of justice. By so doing, however, the reformatory nature of the proviso was ignored in that reasoning consistent with the Exchequer rule was allowed to endure. The result was that although the proviso had been intended to require courts to grapple with error, in the sense of determining as best they could whether in fact the defendant had suffered a substantial miscarriage of justice, error continued to be approached in a more formal and absolutist fashion.

II. THE EARLY NINETEENTH CENTURY: THE COURTS' EVALUATIVE APPROACH

Wigmore's survey of the English common law of the early nineteenth century reveals that trial error, such as the introduction of inadmissible evidence, did not necessarily result in the verdict under challenge being overturned.43 In relation to the criminal law, the courts were prepared to evaluate the error in light of the evidence to determine whether a conviction should be quashed. Regard was had to the nature of the error, the strength of the properly admitted evidence and all of the circumstances of the case in assessing whether the verdict should be reversed. In this way, evaluative judgement

41 Stirland v Director of Public Prosecutions [1944] AC 315.

42 As discussed later in this chapter, the judgments of Stout CJ in R v Lawrence (1905) 25 NZLR 129; R v Neary ([1916] NZLR 518 and R v Johnson (1923) NZLR 1315, albeit brief, provide the exception.

was brought to bear on the significance of trial mistakes. Importantly, on appeal, criminal courts were prepared to assess the complexion of the evidence.\footnote{44}

In \emph{R v Ball},\footnote{45} the defendant was tried at the Lewes summer assizes with forging a Bank of England promissory note by means of a camel hair pencil. At trial, the prosecution called propensity evidence that the defendant had uttered another forged note in the same way months earlier.\footnote{46} The conviction was affirmed, it being held:\footnote{47}

Whether the judges on a case reserved would hold a conviction wrong, on the ground that some evidence had been improperly received, when other evidence had been properly admitted that was sufficient of itself to support the conviction, the judges seemed to think, must depend on the nature of the case and the weight of the evidence. If the case were clearly made out by proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any reasonable man, they thought, that as there could not be a new trial in felony, such conviction ought not to be set aside ... because some other evidence had been given which ought not to have been received; but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect on the minds of the jury, it would be otherwise.

To like effect are \emph{R v Treble} and \emph{R v Tea}.\footnote{49} In the former it was argued that the prosecution had tendered inadmissible evidence, a point on which the judges were divided. The conviction was affirmed on the basis “there was sufficient evidence” without the offending material.\footnote{50} In the latter the complaint was the reverse, namely

\footnote{44}{The phrase ‘on appeal’ should be read as referring to proceedings analogous to an appeal as a right of general appeal in criminal cases in England did not exist until 1907, when the Criminal Appeal Act was passed. From 1848, points of law reserved at trial could be pursued in the newly created Court of Crown Cases Reserved; see the Court of Crown Cases Reserved Act 1848 (UK). Before then, no means of appeal existed under English criminal law. A trial judge could reserve questions of law and postpone the sentence or judgment, until the point(s) had been decided by the judge in consultation with other judges in a manner similar to the later Court of Crown Cases Reserved. But unlike the Court of Crown Cases Reserved, the judges sat in private and did not need to give reasons for their decision. Counsel could appear but hearings were informal. See W J V Windeyer, \textit{Lectures on Legal History} (2nd revised ed, 1957) 130. Without a right of an appeal, means of redress for a defendant convicted of a felony were limited. Convictions could be quashed pursuant to a writ of error in relation to errors apparent on the face of the record. The record, however, was “basically minuitiae touching upon the authority for holding the assize and the particular trial and the jurisdiction of the presiding judge”; \emph{R v Robinson} (1989) 51 CCC (3d) 452 at 464. Therefore, the scope for relief was narrow. Otherwise, a defendant could petition the Home Secretary to recommend the exercise of the Royal Prerogative of Mercy; see J M Beattie, \textit{Crime and the Courts in England 1660-1800} (1986) 409.}

\footnote{45}{(1807) Russ & Ry 133.}

\footnote{46}{The trial judge is reported as having warned the prosecutor that he would admit the evidence, “but if the judges should be of opinion that the evidence was inadmissible, it would probably operate as an acquittal”; ibid at 133.}

\footnote{47}{Ibid.}

\footnote{48}{(1810) Russ & Ry 165. Like Ball, the defendant was convicted of uttering a forged promissory note.}

\footnote{49}{(1809) 11 East 307.}

\footnote{50}{(1810) Russ & Ry 165 at 166.}
that admissible material of assistance to the defendant had been wrongly excluded.  

The appeal was dismissed, Lord Ellenborough observing, "that if the evidence had been admitted, it could have made no difference, at least it ought not to have made any difference in the verdict."  

The civil courts also adopted an evaluative approach to trial error. In the Court of Common Pleas in 1807 Mansfield CJ exhorted, "Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there was sufficient without it to authorize the finding of the jury." In Chancery, Eldon LC remarked, "... if upon the whole [record] he [the judge] is satisfied, that justice has been done, though he may think, some evidence was improperly rejected at law, he is at liberty to refuse a new trial." Tywhitt v Wynne demonstrates a similar approach by the Court of Queen's Bench. The critical question for the jury in the case was who had title to realty. The plaintiff adduced evidence of various acts of occupation consistent with that. The defendant tendered evidence that land in the area had been the subject of a Crown grant in 1614 that could be traced to him. The judge directed the jury that this evidence should be given little weight, as it was not clear that the grant included the land in question. The judge also excluded evidence of what were said to be rights and leases in relation to the defendant. Of the excluded evidence, Abbott CJ held:

Now, even supposing that in strictness these [the leases] were receivable in evidence, still that alone will not be sufficient; for it must be further shewn and substantiated, that if they had been received, they would have led to a probable conclusion in favour of the defendant; but I am clearly of opinion they would not, and that the rejection was not of any importance as to the result of the verdict.

Identifying a unifying principle in relation to how the courts evaluated trial error is difficult, primarily because the reported decisions are so short. However, the general proposition that the courts - both civil and criminal - would not grant a new trial unless the error was significant in the context of the admissible evidence remains valid. So too does the observation that the courts were prepared to weigh evidence, either in terms of

Thomas Teal and others were convicted of conspiring to falsely accuse the prosecutor of being the father of an illegitimate child. The child's mother had been a defendant but the charge against her was stayed and thereafter she was a prosecution witness. The defendants argued that evidence that she had been "connected with" others and was therefore "common" ought to have been before the jury given the centrality of her testimony to the prosecution's case; (1809) 11 East 307 at 311-312.

Ibid at 312. These cases are consistent with older authority, namely Margaret Tinkler's Case (1807) Russ & Ry 133, in which it was held that inadmissible evidence constituted harmless error given the totality of the admissible material against the defendant.


Horford v Wilson (1807) 1 Taunt 12 at 14. See also Doe v Tyler (1830) 6 Bing 561.

Pemberton v Pemberton (1805) 11 Ves 50 at 53.

(1819) 2 Barn & Ald 554.

Ibid at 558-559.
how a jury might be expected to react to it, or more directly, as to what the judges themselves thought of it.

III. THE RISE AND SPREAD OF THE EXCHEQUER RULE

In 1835 a decision of the Court of Exchequer in *Crease v Barrett* heralded a new approach. The emergent rule, later known as the Exchequer rule, stated that any error at trial entitled the losing party to a new trial. In this period the complexion of the evidence and the significance of the trial mistake were said to be irrelevant because first, the losing party had the right to an error-free (jury) trial and second, engaging in an evaluative assessment of trial error in light of the evidence was said to usurp the province of the jury. Appeal courts said either that they would not assume that role or that jurisdictionally, it was beyond them.

*Crease v Barrett* concerned a dispute about toll rights attaching to a tin mine in Cornwall. The defendant lost at first instance before a jury. He applied for a new trial, arguing that the judge had wrongly excluded relevant evidence in the defendant's favour. The plaintiff argued that the evidence was unlikely to have influenced the result. Baron Parke disagreed, holding that proposition was "laid down much too generally; and it is obvious that if it were acted upon to that extent, the Court would in a degree assume the province of the jury". The Judge offered a second justification against the evaluation of trial error: "its frequent application would cause the rules of evidence to be less carefully considered; and the litigant parties would in all probability have on most occasions recourse to bills of exceptions for the rejection or reception of improper evidence: a course productive of great delay and inconvenience." The ruling was not without apparent exceptions, for the Judge observed:

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58 For example, see *Tyrwhitt v Wynne*; ibid at 554.

59 For example, see *Pemberton v Pemberton* (1805) 11 Ves 50.


61 Traynor argues that *Crease v Barrett* gave rise to the rule only because the case was misunderstood and misapplied. He contends the court therein demonstrated a "profound understanding of its responsibility as an appellate court." See Roger J Traynor, *The Riddle of Harmless Error* (1970) 4. Wigmore thought the case "heresy"; see J H Wigmore, "New Trials for Erroneous Rulings upon Evidence; a Practical Problem for American Justice" (1903) 3 Columbia Law Review 433 at 435. But whatever was intended by Baron Parke, *Crease v Barrett* came to be seen as the source of an inflexible and unjust rule. For example, see G E Osbourne, "Some Problems of Procedural Reform" (1921) 7 American Bar Association Journal 245 at 248.

62 (1835) 1 Cr M & R 919.

63 Ibid at 933. As we shall see, that concern continues to be echoed by the courts today.

64 Ibid.

65 Ibid, citation omitted.
In some cases, no doubt, the Court may refuse a new trial when the witness has been improperly rejected, as where the fact which such evidence was to establish was proved by another witness, and not disputed ... or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered would have been clearly and manifestly against the weight of the evidence, and certainly set aside upon application to the Court as an improper verdict.

As it was not clear "beyond all doubt" that if the defendant had won at trial the verdict would have been set aside, a new trial was ordered. 66

Thereafter, two different interpretations of Crease v Barrett uneasily co­existed. 67 The first embodied the exceptions outlined by Baron Parke and permitted trial error to be excused if the admissible evidence against the appellant was overwhelming or something akin to that standard. Thus in Hughes v Hughes, 68 a decision of the Court of Exchequer in 1846, Alderson B said that the rule was that: 69

... the Court will not grant a new trial, if with the evidence rejected a verdict given for the party offering it would be clearly against the weight of evidence, or if without the evidence received there be enough to warrant the verdict.

To similar effect is Baron De Rutzen v Farr, 70 in which Lord Denman CJ held that a residual discretion to decline a retrial existed, at least where it was clear that the inadmissible evidence could not have affected the jury’s verdict. The second approach was absolutist and formal: evidence wrongly admitted or excluded at trial was said to create a right to a retrial, irrespective of the materiality of the error or the weight of the evidence. Thus in Wright v Tatham 71 in 1837, Lord Denman CJ abandoned his earlier view of Crease v Barrett and proclaimed that the courts had renounced their discretion to decline to order a new trial on the basis of immateriality and that, “where evidence formally objected to Nisi Prius is received by the Judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial.” 72

The view encapsulated in Wright v Tatham prevailed. Error at trial was seen to give rise to a right to a retrial. Wigmore records that the Exchequer rule, as he called it, “gained the ascendancy in virtually all the courts” by the second half of the nineteenth century.

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66 Ibid.
68 (1846) 15 Mees & Wels 701.
69 Ibid at 704.
70 (1835) 4 Ad & El 53. See also Morse-Le-Blanch & Another v Wilson & Another (1873) LR 8 CP 227 and Carmethen & Cardigan Railway Co v Manchester & Milford Railway Co (1873) LR 8 CP 685 in which Grove J cited Crease v Barrett as authority for the existence of a like discretion.
71 (1837) 7 Ad & El 313.
72 Ibid at 330, emphasis added.
century, even though some judges refused "to bow the knee in the Baal-worship of the rules of evidence."\textsuperscript{73}

In 1887 a decision of the Court of Crown Cases Reserved extended the Exchequer rule to criminal proceedings. The defendant in \textit{R v Gibson}\textsuperscript{75} was convicted of wounding the victim by throwing a stone at him. The latter testified he overheard a passerby identify the former as the assailant. The judge directed the jury's attention to this evidence, although there was apparently "ample evidence of identification against the prisoner" beyond this material.\textsuperscript{76} The prosecution subsequently accepted the passerby's remark was inadmissible (hearsay), but citing \textit{R v Ball},\textsuperscript{77} it contended that the balance of the admissible evidence justified the conviction being sustained.\textsuperscript{78} In particular, the prosecution invited an evaluative approach to trial error, observing that the evidence in issue had been tendered without objection and that other reliable evidence was before the jury.\textsuperscript{79} In an apparent reference to the Exchequer rule, Lord Coleridge CJ said that had this been a civil action the verdict would not have been allowed to stand, as the "rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the [losing] party was ...

\textsuperscript{73} See John H Wigmore, \textit{Evidence in Trials at Common Law} (Tillers revised ed, 1983) vol 1 at 888. The North American courts were especially vigilant in enforcing the Exchequer rule's application. Citing \textit{People v Vice} 21 Cal 345 (1853), Traynor notes that the Supreme Court of California quashed a conviction for robbery as the indictment failed to specify that the property in question did not belong to the defendant. See Roger J Traynor, \textit{The Riddle of Harmless Error} (1970) 3-4. Davis says that the "American practice before the early 20th century was to reverse and remand for almost any error, which tended to protract cases to Bleak House proportions"; M S Davis, "Harmless Error in Federal Criminal and Habeas Jurisprudence: the Beast that Swallowed the Constitution" (1999) 25 Thurgood Marshall Law Review 45 at 46. This approach was ridiculed even at the time. Writing in 1928, Proskauer observed: "In our own country the Exchequer rule spasmodically persists. courts disavow it from time to time and then return to it. The result is that in point of time-consumption and mental effort the law of evidence is a kind of pivotal point of every trial.... The meaningless rumble of the objection as incompetent, irrelevant and immaterial sounds through our courtrooms like the drone of destroying locusts." See J M Proskauer, "A New Professional Psychology Essential for Law Reform" (1928) 14 American Bar Association Journal 121 at 124. And see Kavanagh, "Improvement of Administration of Criminal Justice by Exercise of Judicial Power" (1925) 11 American Bar Association Journal 217 at 219: "An element crowded into a hypothetical question put to a doctor, so obscure and unnoticed in its influence as to be utterly forgotten by everyone until months after conviction and then discovered by the lawyer preparing his brief for the Supreme Court, has over and over again resulted in nullification of a just judgment and the escape of a guilty man." Pound says that as a consequence of the Exchequer rule the law of evidence "acquired a hypertrophy of detail" in which "the merits of the case played little part"; R Pound, "A Generation of Improvement of the Administration of Justice" (1947) 22 New York University Law Review 369 at 379-380.

\textsuperscript{75} \textit{R v Gibson} (1887) 18 QBD 537.

\textsuperscript{76} Ibid.

\textsuperscript{77} Ibid at 539.

\textsuperscript{78} (1807) Russ & Ry 133.

\textsuperscript{79} Ibid.
entitled to a new trial". The Chief Justice said the rationale for this rule was that "the Courts ... would not weigh evidence." The result was that the verdict had been "vitiated by reason of the illegal evidence being left to the jury" so that it "cannot stand". Baron Pollock agreed, because otherwise "in every case where inadmissible evidence had been received it would become the office of the Court to decide in what way the jury ought to have acted upon the evidence before them which was legally admissible". That, said the Baron, was beyond the "power" of a court of appeal. In similarly short judgments, Stephen, Mathew and Wills JJ concurred. But as with Lord Coleridge CJ and Pollock B, it is unclear whether the balance of the Court thought trial error, and in particular, the reception of inadmissible evidence, meant that an appeal court had no jurisdiction to consider the effect of error (for example, by reference to admissible evidence), or rather, whether the Exchequer rule was ultimately grounded in matters of policy and convenience. In any event, the Exchequer rule, or at least variations of it, was adopted in varying degrees throughout the Commonwealth resulting in a confusing patchwork of approaches.

Some Canadian courts held that the wrongful admission of evidence did not give rise to the right for a retrial if it could be shown that the evidence could not have influenced the verdict. But as in England the courts were inconsistent and on occasions adopted the full rigour of the Exchequer Rule. Consequently, in 1889 Allen CJ lamented that a new trial would be necessary because of the wrongful admission of evidence, "though I come to this conclusion with ... much reluctance; because, if the evidence had been considered as at all likely to influence the jury, they might have been directed to exclude it from their consideration". Although the rule in R v Gibson

80 Ibid at 540-541.
81 Ibid at 541.
82 Ibid.
83 Ibid at 542.
84 Ibid.
85 Ibid at 542-543. The judgment of Stephens J is ironic in light of the Judge's view of the Exchequer rule, his legislative action to prevent it from gaining hold in India and his inclusion of the proviso in the Draft Code of the Criminal Code Bill Commission. These developments are discussed shortly.
86 Baron Pollock's reference at 542 to the Court having "no power" to consider the balance of the evidence implies a jurisdictional concern, but his reference to the undesirability of appellate courts assessing evidence suggests a more practical reservation. And while Mathew J said that the conviction "ought not" to stand, Wills J said it "must be quashed"; ibid at 543, emphasis added. Whether this phraseology constitutes a reference to the existence (or absence) of a jurisdiction to assess admissible evidence probably cannot be known.
87 For examples of the Baron De Rutzen v Farr (1835) 4 Ad & El 53 formulation, see Doe d Barlow v Hatfield (1843) 4 NBR 122 and Bonner v Moderwill (1860) 9 UCCP 504.
88 For example, see McBride v Bailey (1856) 6 UCCP 9 and Quebec & Halifax Steam Navigation Co v Cunard (1835) 2 NBR 90.
89 Cameron v Moncton (1889) 29 NBR 372 at [26].
was not expressly adopted as part of Canada’s criminal law, in 1897 Henry J observed that prior to the enactment of the Canadian Criminal Code he knew of “no decision upon the question, whether the court may ... confirm a conviction, because, in the opinion of the court there is sufficient legal evidence to support a verdict of guilty, where material evidence has been improperly received.”

The position in Australia was similarly messy. In Tasmania, Dodds CJ acknowledged the rule “will render the administration of the criminal law difficult” but as R v Gibson92 was the law, and “appears to admit of no qualification”, it must be applied.93 Consequently, it was the “duty of the Judge to see that the prisoner is not convicted on any but legal evidence” and although it was “extremely improbable” that the inadmissible evidence had influenced the jury in that case, the appeal was allowed.94 R v Gibson was not expressly considered in Queensland or Western Australia, although the latter State adopted a similar approach in any event. In R v Martinelli,95 the Supreme Court of Western Australia held that as credibility was in issue then, “no one can say what effect such [inadmissible] evidence had upon the minds of the jury”.96 More confused was the position in Victoria. Before R v Gibson was decided, Fellow J proclaimed in 1875, “The mere circumstance of proving a fact which was entirely immaterial and beside the case, is not a ground for a new trial.”97 After Gibson it was said that the receipt of inadmissible evidence could “invalidate the whole proceeding” depending upon whether the offending material was bad in substance or merely lacking admissible form.98 However, even then Gibson’s rigour was said not to require a conviction to be quashed if it was clear that trial error could not have affected the outcome.99 The New South Wales courts were inconsistent. Speaking in 1890 Windeyer J said in R v McLeod100 that “no evidence shall be admitted upon which so momentous a determination depends, except such as is strictly legal” and that a breach of the rule “invalidates a conviction.”101 But a decade and a half later, Gibson was distinguished on the basis that the Dubbo Circuit Court judge directed the jury to disregard the wrongly admitted material, namely a single cheque, tendered to prove the

90 (1887) 18 QBD 537.
91 R v Dixon (1897) 29 NSR 462 at [118].
92 (1887) 18 QBD 537.
93 R v Hall (1905) 1 Tas LR 21 at 22.
94 Ibid.
95 (1908) 10 WALR 33.
96 Ibid at 35.
97 R v Ainsworth (1875) 1 VLR 26 at 27.
98 Madden v Shorten (1889) 25 VLR 325 at 329.
99 Know v Bible [1907] VLR 485 at 495-496. See also Duncan v Pilcher (1895) 21 VLR 412.
100 (1890) 11 NSWLR 218.
101 Ibid at 232, emphasis added.
murdered victim’s movements around Dunlop Station, Louth. 102 Notably, in 1910 in the Australian High Court, Griffith CJ suggested that Gibson “has been much misunderstood owing to the erroneous, or at least ambiguous, wording of the headnote”. 103 The Chief Justice said that what was “really decided was that if the jury are expressly invited to take inadmissible evidence into consideration, the conviction is bad.” 104 However, “there is no case which decides that a conviction is necessarily bad on the ground that the jury had not been expressly directed to disregard the evidence.” 105

A. The Common Law Position in New Zealand

Unlike England, Canada and Australia, the Exchequer rule did not become part of New Zealand’s common law. At a time when courts from these jurisdictions were embracing the Exchequer rule, the New Zealand Court of Appeal approached the issue of trial error by assessing the strength of the evidence to support the jury’s verdict.

In R v Taylor 106 in 1885 Prendergast CJ reserved a case for the opinion of the Court of Appeal in relation to the defendant’s conviction for the fraudulent misappropriation of Bank of New Zealand shares. In issue was the admissibility of a share register. At the time, registers of companies incorporated pursuant to the prevailing companies legislation could be admitted without additional evidence. As the defendant pointed out, however, the Bank of New Zealand had not been incorporated pursuant to that legislation so the register was hearsay. The Court of Appeal did not decide the point, on the basis that the admissible evidence was sufficient to have proved the defendant’s guilt: 107

Apart, however, from the share register, there was abundant and conclusive evidence from admissions of the prisoner and from other circumstances, that the shares were held by May [the victim]. To contradict this evidence no evidence on the part of the prisoner was adduced. If the share register had not been in evidence, and if the jury had been specifically asked to find as to the ownership of the shares, a finding that the shares were not May’s would have been contrary to evidence. Had the proceedings been of a civil nature, and the Crown stood in the position of a plaintiff, such a finding on such evidence would have been ground for a new trial. Under these circumstances, whether the share register were admissible or not, we see no reason for doubting the propriety of the conviction.

At first sight, one of Baron Parke’s exceptions to the rule in Crease v Barrett 108 appears to have been in the Court’s mind, namely that a contrary verdict would have been against the weight of the evidence and impeachable as such. However, that case

102 R v Midwinter (1905) 5 SR (NSW) 558.
103 R v Grills (1910) 11 CLR 400 at 410.
104 Ibid.
105 Ibid.
106 (1885) 3 NZLR 125.
107 Ibid at 129.
108 (1835) 1 Cr M & R 919.
was not cited. Indeed, Crease v Barrett appears never to have been cited in a reported case in New Zealand. Instead, the Court of Appeal turned to the English text on criminal law, Russell on Crime, as authority for the proposition that so long as the admissible evidence left "no doubt of the guilt in the mind of any reasonable man, such a conviction ought not, it seems, to be set aside because some other evidence was given which ought not to have been received". Further, the Court of Appeal applied R v Ball, in which a broad evaluative discretion in relation to trial error had been asserted. Of that decision William J said, "We concur with the opinion expressed by the Judges ... that the question as to whether a conviction is invalidated must depend on the nature of the particular case and the effect of the evidence"; or in other words, that the correct approach to trial error involved a context specific approach in which the totality of circumstances had to be assessed.

IV. THE PROVISO AS A LEGISLATIVE RESPONSE

In 1883 the Supreme Court of Judicature Act was enacted in England and Wales thereby creating a court of that name. Fresh rules of procedure were created to govern the new regime. The changes were exclusive to civil proceedings and matters relating to any "criminal cause or matter" were expressly excluded, that phrase receiving robust interpretation so as to keep criminal matters confined. The new regime refined civil appeals given the "various and discordant systems of appeal" then in existence, with powers and procedures to ensure that there was "complete justice between the parties". Significantly, rule 48 of the Supreme Court of Judicature Act Rules created the proviso in the civil law. The proviso read:

A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appears to such Court that such wrong or miscarriage affects only part of the matter on controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

Rule 48 was specifically intended to combat the Exchequer rule. A number of features support this conclusion. First, the rule created a presumption in favour of the verdict: a retrial was not to be granted unless the appeal court was satisfied that there had been a substantial miscarriage of justice. Second, the responsibility of determining

110 (1885) 3 NZLR 125 at 129.
111 (1807) Russ & Ry 132.
112 (1885) 3 NZLR 125 at 129.
whether that had occurred was placed directly upon the appellate court given the phrase “in the opinion of the Court”. Third, the wrong or miscarriage must have been “substantial”; nothing less would suffice. Fourth, the requirement that the trial error had “thereby occasioned” a substantial wrong imported a need for causative error thereby displacing the theory that any error constituted a miscarriage of justice. Fifth, and perhaps most importantly, this was the view of those at the time. Writing only four years after the Judicature Act’s reforms, Lord Coleridge CJ acknowledged that their advent permitted civil courts to “weigh” evidence to determine if the admission of inadmissible evidence had caused a miscarriage of justice.116 And in 1882, Sir MacKenzie Chalmers in a text on the area described the proviso as having introduced a “material” change, observing that formerly “a misdirection by the judge ... or the improper admission or rejection of evidence in any material matter was ground for a new trial as of right.”117

Other jurisdictions also responded with the proviso. In Canada, the first state legislatures to do so were Ontario,118 British Columbia119 and Nova Scotia.120 As noted earlier, although R v Gibson121 was not expressly adopted by the Canadian criminal courts, the Criminal Code of 1892 contained the proviso.122 It was enacted, according to Davies J in 1911, “for the purpose of putting an end to the judicial scandals occasioned by Courts feeling themselves obliged by authorities and precedents to give effect to trivial errors or mistakes at criminal trials ... irrespective of whether these errors or mistakes occasioned substantial wrong or injustice to the prisoner or not”.123

Western Australia and Queensland enacted forms of the proviso as an aspect of their first common criminal codes. The Chief Justice for Queensland, Samuel Griffith, drafted what became Queensland’s Criminal Code Act 1899. Western Australia copied it, resulting in its Criminal Code Act 1902 and Queensland’s Criminal Code Act sharing a like provision, section 670, which provided that wrongly admitted evidence of a formal character or immaterial nature did not vitiate a conviction. Griffith’s own note in relation to the provision reveals the apparent confusion of the time concerning Gibson’s ripples; his proviso was “perhaps new”, but “obviously right, whether it is the present law or not”.124 A like form of the proviso was enacted as section 75 of the

116 See R v Gibson (1887) 18 QBD 537 at 540-541.
118 Administration of Justice Act 1874 (Ontario), s 34.
119 Judicature Act 1879 (British Columbia), Order XXXIX, r 3.
120 Judicature Act 1884 (Nova Scotia), Order XXXVII, r 6.
121 (1887) 18 QBD 537.
122 Criminal Code 1892 (Can), s 746(f).
123 Alien v R (1911) 44 SCR 331 at 345.
124 Sir Samuel Walter Griffith, Draft of a Code of Criminal Law Prepared for the Government of Queensland (1897) 306. The Judge acknowledged having “freely drawn upon the labours” of the English codifiers, including Stephen; ibid at IV.
Commonwealth’s Judiciary Act 1903. The only other Australian state or territory to deal with the issue legislatively during this period was New South Wales. There, a version of the proviso was created in 1883 by section 423 of the Criminal Law (Amendment) Act of that year. It read, “upon any case being reserved, no conviction or judgment thereon shall be reversed, arrested, or voided in any case so stated, unless for some substantial wrong or other miscarriage of justice.” The provision was described shortly after its enactment as being intended “to prevent justice being defeated by technicalities, and to secure the punishment of crime, where crime has been committed, without injustice to the prisoner”.

New Zealand’s earliest proviso was enacted a decade after rule 48 of the English Supreme Court of Judicature Act Rules. The proviso to section 415 of the Criminal Code Act 1893 differed from its English counterpart in two respects. First, it formed part of the machinery of the criminal law. Second, the provision was created not to abolish the Exchequer rule but to prevent it from becoming part of our common law. Section 415 of the Criminal Code employed similar language to the English proviso, stipulating:

.... that no conviction or acquittal shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial....

The prophylactic quality of the proviso in New Zealand is most easily explained by reference to the history of the Criminal Code Act 1893 and its indirect but primary architect, Sir James Fitzjames Stephen. The Criminal Code Act was based upon Stephen’s English Criminal Code (Indictable Offences) Bill that was introduced to the English Parliament in 1880 but which was never passed.

At that time, while the civil courts applied the Exchequer rule, it had not reached the criminal law (R v Gibson was not decided until 1887). Stephen was undoubtedly mindful of the rule, because in British India he created a specific provision to prevent it from taking root. This early form proviso, which was enacted as section 167 of (Stephen’s Indian) Evidence Act 1872, read:

The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence

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125 R v Isaacs (1884) 5 NSWLR 369 at 375 per Windeyer J.

126 In relation to appeals to the Court of Appeal by way of reserved case.


128 (1887) 18 QBD 537.

129 See the discussion of the High Court of Australia in Weiss v R (2005) 224 CLR 300 at 310.
to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Addressing the Indian Legislative Council on 12 March 1872, Stephen stated:130

The fact that the opposite [of section 167] is the rule in England is the great cause of the enormous intricacy and technicality of the English law upon the point. If in the Tichborne case, one single question had been permitted after being objected to, and if the Court had afterwards been of opinion that it had been wrongly permitted then however trifling the matter might have been, the party whose objection had been wrongly over-ruled would have been by law entitled to a new trial and the whole enormous expense of the first trial would have been thrown away. This never was the law in India nor will it be so now.

It follows that New Zealand's proviso has an almost accidental history: it was part of a template intended for England's criminal law but never there embraced; adopted without any alteration from Stephen's original draft code131 and enacted (after a decade-long gestation) at a time when the Exchequer rule had reached the criminal law in England and Australia and the civil law in Canada.132

V. THE COURTS' REACTION: FIRST ENCOUNTERS AROUND THE CENTURY'S TURN

The New Zealand Court of Appeal greeted the proviso with circumspection. The Court was reluctant to evaluate evidence despite the proviso's birth and neither did it examine the provision's history. Had it done so, attitudes strongly associated with the Exchequer rule might have been relaxed, if not abandoned. Instead, in 1905 Williams J observed that "the proviso is confined to cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury. That in my opinion, is not the case here."133 The Judge's view was expressly influenced by the 1893 decision of the Privy Council in Makin v Attorney-General for New South Wales,134 a case now better remembered for its treatment of propensity evidence in relation to Australian 'baby farming' than the Law Lords' first consideration of the proviso. Further, by the time the proviso first reached the New Zealand Court of Appeal, the House of Lords had already announced its reservations about the device in

130 G C Rankin, Background to Indian Law (1946) 134. Similar provisions (ss 423 and 537) were later enacted in India's Code of Criminal Procedure 1898, as to which see Abdul Rahim v King-Emperor (1946) LR 73 lA. The Tichborne related litigation continued until 1881 and reached the House of Lords; see R v Castro (1881) 6 AC 229.


132 Few changes were made to the bill. The significant difference between the 454-clause bill and the resulting 424-section enactment concerned the omission of provisions concerning criminal libel. See S White, "The Making of the New Zealand Criminal Code Act of 1893: a Sketch" (1986) 16 VUWLR 353 at 367.

133 R v Lawrence (1905) 25 NZLR 129 at 138, emphasis added.

the context of an appeal involving the English civil proviso (the successor to rule 48). Consequently, the reaction of the New Zealand courts to the proviso should be seen in the context of broader judicial anxiety about the device throughout the common law world.

In Australia, the New South Wales proviso reached that state’s Supreme Court in 1884. Isaacs was convicted of receiving “twelve trunks and 576 pairs of [stolen] boots.” An agent of the manufacturer, who testified he recognised the boots’ trademark, gave evidence that the property was stolen from the manufacturer. On appeal by way of reserved case, the Supreme Court held that the evidence was inadmissible hearsay; only the manufacturer and not a mere agent could identify the property. The Court ruled that the proviso could not save the conviction. Chief Justice Martin said that while: “A mere defective proof may not be a substantial wrong or injustice in a civil action ... I am not disposed in a case like this, where the liberty of the subject is concerned, to say that this was not a substantial wrong, and that proof of the property of stolen goods is immaterial.” The Judge was also dismissive of the section, remarking that he was “unable clearly to interpret the meaning of the words in the proviso.” Justice Faucett’s remarks approached a judicial sneer: “Besides, I can hardly construe the word ‘substantially,’ used in sec 423(3). We may find cases to which it does apply, but I do not think that they are cases in which a material averment in the information has not been proved.”

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135 Bray v Ford [1896] AC 44.
136 Section 423 of the Criminal Law (Amendment) Act 1883 (NSW) provided, “upon any case being reserved, no conviction or judgment thereon shall be reversed, arrested, or voided in any case so stated, unless for some substantial wrong or other miscarriage of justice.”
137 R v Isaacs (1884) 5 NSWLR 369.
138 Ibid at 369.
139 Ibid at 372.
140 Ibid.
141 Ibid at 373. The Judge concurred in the result but wrote separately. Justice Windeyer dissented on the basis that as the charge could have been amended to allege that the defendant received stolen property of unknown origin, no substantial miscarriage of justice had occurred; ibid at 376. But in the later case of R v McLeod (1890) 11 NSWLR 218, which concerned the admissibility of a marriage certificate in relation to the defendant’s conviction for bigamy, Windeyer J thought at 235 that while the proviso may “often [be] of service in supporting convictions where points have been raised as to matters of less importance”, in no case “has it been extended to support a conviction where inadmissible evidence has been allowed to go the jury”. The Judge insisted at 234 that an appeal court “has no power, and no right to usurp to itself any power, of saying what the verdict of a jury ought to be” and at 235 that the Legislature had not “unmistakably meant to transfer the ultimate power of deciding as to the sufficiency of the facts from the jury to the Court, and to give it the power of sustaining a conviction”. Somewhat sententiously, the Judge proclaimed that he would not be a “party to the destruction of so a fundamental principle in the administration of the criminal law”, warning in a manner reminiscent of Parke B in Crease v Barrett (1835) 1 Cr M & R 919 that if the introduction of inadmissible evidence did not give rise to a substantial miscarriage of justice, then “the most dangerous laxity in the conduct of criminal cases in the inferior Courts will be the natural result”; ibid at 238. Consider also R v O’Keefe (1893) 14 NSWLR 345 and R v Snow [1918] SALR 173. In the former, the New South Wales Supreme Court held that a wrongly admitted confession constituted a substantial miscarriage of justice, notwithstanding the defendant’s
A decade later, the same provision reached the Privy Council. The facts of *Makin v Attorney-General for New South Wales* are well known. John Makin and his wife were charged with murdering an infant. The pair had agreed to adopt the baby for money. Two days later the child was dead. When the body was recovered, decomposition prevented determination as to cause of death. The defendants had by then pawned the deceased’s clothes and Mrs Makin had been caught out in a lie. Both made admissions, John Makin to a cell-mate. The Crown adduced evidence that bodies of twelve infants had been found buried at residences occupied at one time or another by the defendants. The trial judge, New South Wales Supreme Court and Privy Council agreed that such evidence was admissible, with the Supreme Court inclining to the view that the proviso would apply anyway, given the strength of the prosecution’s case beyond the propensity material. Justice Innes imposed a high threshold, observing that the proviso would apply only where the admissible evidence was “so conclusive, so clearly all one way, and not only undisputed but indisputable” as to guilt.

In the Privy Council, the Crown argued that the New South Wales section was based upon the English civil proviso and that the section was intended to give the courts the power of reviewing a criminal verdict as in England with civil cases. Speaking for the Board, Lord Herschell LC commenced by observing that:

> It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence—that is to say, what the law regards as evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

The Lord Chancellor continued.

> It is impossible to deny that such a change of the law would be a very serious one, and the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence

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142 [1894] AC 57.
143 (1893) 24 NSWR 1 at 41. The formulation bears a resemblance to that of Baron Parke in *Crease v Barrett* (1835) 1 Cr M & R 919 at 933; trial error could be excused if “a verdict in favour of the party for whom it was offered would have been clearly and manifestly against the weight of the evidence, and certainly set aside upon application to the Court as an improper verdict.”
144 [1894] AC 57 at 69-70.
145 Ibid at 70.
which might appear to the Court sufficient to support the conviction might have been reasonably
disbelieved by the jury in view of the demeanour of the witnesses. Yet the Court might under
such circumstances be justified or even consider themselves bound to let the judgment and
sentence stand.

Such “startling consequences” said Lord Herschell LC, “strongly tend in their
Lordships’ opinion to shew that the language used in the proviso was not intended to
apply to circumstances such as those under consideration.” Instead, “substantial
wrong would be done to the accused if he were deprived of the verdict of a jury on the
facts proved by legal evidence, and there were substituted for it the verdict of the Court
founded merely upon a perusal of the evidence.” The Board concluded that it “need
scarcely be said that there is ample scope for the operation of the proviso without
applying it in the manner contended for.” It did not elaborate, however, as to what
that scope was or how the proviso should operate.

The House of Lords’ first encounter with the English civil proviso resulted in
similar obiter dicta. Bray v Ford involved a libel action by the solicitor of a college
against the college’s governor. The latter had published a letter about the solicitor
alleging that he had abused a position of trust by charging the college fees at a time
when the solicitor was the college’s vice-chairman. At trial, the judge wrongly
instructed the jury that the solicitor was entitled to render an account for his
professional fees. The Court of Appeal, however, dismissed the governor’s appeal on
the basis of the civil proviso, holding that the error did not constitute a substantial
miscarriage of justice in light of the evidence. Importantly, the solicitor’s case against
the school’s governor had other particulars of libel; the letter had described the solicitor
as a swindler and was generally defamatory of him. The Court of Appeal saw the
judge’s misdirection as inconsequential given that context. Reversing the Court of
Appeal, the House of Lords held there had been a substantial miscarriage of justice.

By misdirection, said Lord Halsbury LC, the governor had been deprived of the
opportunity “to present his case to the jury”. That was ipso facto a substantial
miscarriage of justice. The Lord Chancellor “absolutely decline[d] to speculate what
might have been the result if the judge had rightly directed the jury.”

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146 Ibid.
147 Ibid.
148 Ibid.
149 Compare Ibrahim v R [1914] AC 599 in which the Privy Council rejected the submission that
Makin v Attorney-General for New South Wales precluded the Board from assuming the
province of the jury in determining the effect of error; the Board’s jurisdiction, it was held, was
not akin to that of an appellate court in relation to the proviso. See the speech of Lord Sumner at
615-616.
150 [1896] AC 44.
151 Ibid at 47.
152 Ibid at 48.
Lord Watson observed, “Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal.”\textsuperscript{153} As this right had been infringed, the miscarriage of justice was substantial. Despite such a broad dictum, as with Lord Halsbury, Lord Watson declined to say more about how the proviso could operate: “Each case must depend upon its own circumstances.”\textsuperscript{154}

Of the proviso, Lord Herschell noted:\textsuperscript{155}

The provision is, in my opinion, a very beneficial one, and I should be sorry to say anything to narrow its scope further than the language employed seems to me to render necessary. In cases in which the question is what are the facts, or the proper inferences from the facts, if the Court think that the verdict of the jury is in accordance with the true view of the facts and of the inferences to be drawn from them, it may be that they would have done right in refusing to grant a new trial on the ground of misdirection, even where the parties had a right to claim that the action should be tried by a jury. But in the case of an action for libel, not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal.

The tantalising question of how an appellate court determines what are the ‘true facts’ was not explored. The governor’s right to a jury trial, seemingly defined as one free from all trial error, meant there had been a substantial miscarriage of justice in Lord Herschell’s opinion also.

Lord Shand came to the same conclusion. Echoing the Lord Chancellor, the governor was “entitled to have the real case submitted to the jury”.\textsuperscript{156}

In Canada, \textit{Makin} was initially distinguished on the basis that the Criminal Code’s proviso\textsuperscript{157} specifically provided for the wrongful admission of evidence, “thus imposing on the [appellate] Court the duty of considering the probable effect of the evidence improperly admitted, and to say whether, in its opinion, any substantial wrong or miscarriage of justice was occasioned by its admission”.\textsuperscript{158} In 1911, however, a majority of the Canadian Supreme Court affirmed \textit{Makin}, with the result that the proviso was said to create “a discretion which they [appellate judges] may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may

\textsuperscript{153} Ibid at 49.

\textsuperscript{154} Ibid at 50.

\textsuperscript{155} Ibid at 52.

\textsuperscript{156} Ibid at 56.

\textsuperscript{157} Section 746(f) of the Criminal Code 1892 (Can) read: “Provided that no conviction shall be set aside, nor any new trial ordered, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned at the trial.”

\textsuperscript{158} \textit{R v Sunfield} (1907) 13 CCC 1 at 7-8 (Ontario Court of Appeal). See also \textit{R v Woods} (1897) 2 CCC 159 (Supreme Court of British Columbia).
be safely assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt." 159

Such was the context for the New Zealand Court of Appeal’s first encounter with the proviso in 1905. 160 The defendant in R v Lawrence 161 was convicted of conspiring to perform an abortion. At trial the Crown adduced evidence the defendant was carrying a telegram containing a code that appeared to link him directly to the young woman seeking the abortion. The Court of Appeal held that the telegram was inadmissible. In those circumstances, could the proviso apply?

Justice Williams thought not. Citing Makin v Attorney-General for New South Wales, 162 the Judge considered that the proviso was limited to cases where it was impossible to suppose that the inadmissible evidence had influenced the jury’s verdict. 163 Justices Edwards and Cooper were equally brief; a substantial miscarriage of justice had occurred by the admission of such material, it being impossible to say the jury was not improperly influenced. 164 Justice Denniston agreed, albeit observing that by the terms of the section, the onus of proving a substantial miscarriage lay on the prisoner. 165 However, “the wrongful admission of evidence is in every case a substantial wrong to the prisoner unless at least it can be shown that such evidence could not, by any reasonable intendment, have influenced the verdict.” 166 Whether evidential errors were a special category so as to reverse this onus was not explored. According to the Judge: 167

The result of a contrary view would be that evidence wrongly admitted might have been the cause of a conviction, and so substituted this Court for a jury in deciding on what should be the reasonable verdict—that is to say, that a Judge, by erroneously rejecting evidence or by

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159 Allen v R (1911) 44 SCR 331 at 339 per Fitzpatrick CJ. By this time, the proviso formed part of s 1019 of the Code. Dissenting, Justice Davies observed that there was a “radical difference” in the language of the respective provisions, so that under the Canadian proviso, the “duty of determining whether the facts which happened did or did not occasion such substantial wrong rests... upon the Court”; ibid at 344-346. Justice Idington was equally vigorous in his dissent, observing at 354 that to allow the appeal “is not only tantamount to an evasion or abandonment of all responsibility such as has been cast by the plain wording of the section, upon the appellate courts of Canada, but also a direction to every trial judge at a criminal trial, then or after the trial, to reserve a case in every instance of the occurrence of something of the like unimportant nature happening on a criminal trial, in order that the accused be acquitted or tried again.” For an early example of the proviso’s application by the Supreme Court of Canada, see Kelly v R (1916) 54 SCR 220.

160 Criminal Code Act 1893, s 415.

161 (1905) 25 NZLR 129.

162 [1894] AC 57.

163 (1905) 25 NZLR 129 at 138.

164 Ibid at 142-143.

165 Ibid at 138.

166 Ibid.

167 Ibid.
misdirecting the jury, may substitute the Court of Appeal for the tribunal given by the law to every person.

Chief Justice Stout approached matters quite differently. The Judge thought there was “ample evidence of corroboration” of the critical witness’s account and that the wrongful admission of the telegram had not caused a substantial miscarriage of justice in the sense of influencing the verdict.\(^\text{168}\) The Chief Justice continued:\(^\text{169}\)

Even before the Criminal Code Act was passed this Court held, in \(R\ v\) Taylor, that if there was abundant evidence and conclusive evidence the admission of statements not evidence would not warrant the Court in setting aside the conviction. A different ruling was given in \(R\ v\) Gibson, where it was held that if any evidence not legally admissible against the prisoner is left to the jury the conviction is bad, though there was other evidence sufficient to warrant the conviction. See also \(Makin\). But this Court must be guided by the \(\text{[Criminal]}\) Code.

The Judge then considered \(Bray v Ford\)\(^\text{170}\) and in particular the speech of Lord Herschell.\(^\text{171}\)

In my opinion these remarks show that this case should come within the proviso that no substantial wrong or miscarriage of justice would ensue by the conviction being affirmed. Lord Herschell, in the second sentence of the passage I have quoted, shows that if the Court believes the verdict is in accordance with the facts, then the admission of immaterial evidence should not lead the Court to set aside the verdict. Here the case is much stronger, as all that is required is some corroboration of an accomplice’s testimony [being the young woman seeking the abortion]; and there was such corroboration independent of the telegram.

Chief Justice Stout then turned to \(Makin\):\(^\text{172}\)

Their Lordships thought that the proviso did not mean to place the Court in the position of the jury, and that the function of the Court was not to weigh the evidence or consider its effect. But for such a decision I should have come to a contrary conclusion.

The Chief Justice concluded his judgment by observing that \(Makin\):\(^\text{173}\)

... much limits the effect of the section, and if given full effect to I fail to see how, if any evidence if material were wrongly admitted, the conviction can ever be upheld, and consequently the section seems about useless.

The Judge considered himself bound by the Board’s decision, however, with the result that he concurred in the appeal being allowed.\(^\text{174}\)
The judgment of Stout CJ stands alone in this period as signalling the possibility of a radically different approach to the proviso. First, the Judge does not appear to have held, as the Law Lords and other judges of the period did, that appeal courts should not weigh evidence in the sense of finding facts as to the guilt of the defendant. The short decision appears to contemplate that appeal courts could employ the proviso by assessing the evidence in terms of whether the jury’s verdict accorded with the judges’ view of the case on appeal. Second, unlike the prevailing orthodoxy, the Chief Justice does not appear to have assumed that such an exercise improperly encroached upon the function of a jury at first instance. That assumption plainly underpinned Makin, Bray v Ford and other judgments of the period, including R v Lawrence. Third, and unlike other members of the Court, Stout CJ did not treat the mere admission of inadmissible material as a substantial miscarriage of justice. Rather, the Judge took the view that this depended upon the complexion of the evidence, and in particular, whether there was admissible material on point. In summary, Stout CJ adopted an evaluative approach to error whereas the balance of the Court treated error in a manner reminiscent of the Exchequer rule. Ironically then, reasoning analogous to that rule entered our law through a device that was enacted to prevent just that.

By the beginning of the twentieth century the courts had registered the clearest reluctance to evaluate the effect of trial error notwithstanding the statutory constraint against an appeal being allowed unless a substantial miscarriage of justice had occurred. Indeed, writing in 1919 and so well after the proviso had been a feature of the law for many years; the authors of A Treatise on the Law of Evidence describe inadmissible evidence as making a conviction bad even when there is other evidence to support it.

VI. A CRIMINAL PROVISO FOR ENGLAND

The English movement to establish a right of appeal in criminal cases has been described as of “long gestation,” “protracted and tortuous” and “one of the longest and hardest fought campaigns in the history of law reform.” Ironically, the proviso did not form part of the seven-decade controversy to establish the right despite the Law Lords’ judicial hostility to the device, and it featured only once in the extensive
debates surrounding the bill that became the Criminal Appeal Act 1907. Pattenden concludes that the absence of any contention concerning the proviso was because the appeal judges were not disturbed that "they had to some extent ... take upon themselves the function of the jury" in applying the proviso that formed part of section 4 of the Criminal Appeal Act. Given the approach of the Law Lords in *Makin* and *Bray v Ford*, however, it is more likely that the judiciary's response on this issue was muted because the judges' attention was focused upon the broader debate. The criminal appeal template established by the Act of 1907, replete with the proviso, was subsequently adopted throughout the Commonwealth and by New Zealand in 1945. In light of the spread of the Act's progeny, two matters of importance emerge in relation to the enactment of the English criminal proviso: its form and its intended effect.

In relation to form, the Criminal Appeal Act provided for an appeal on matters of fact when the verdict was unreasonable, on matters of law when there had been a

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183 Knight, citing the Interdepartmental Committee on the Court of Criminal Appeal, *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (1965) 35, says that the debates in the House of Commons and House of Lords did not refer to the proviso; Michael Knight, *Criminal Appeals: A Study of the Powers of the Court of Appeal Criminal Division on Appeals Against Conviction* (1970) 9. In fact, the device was mentioned once. In the House of Commons it was said: "the Bill certainly discouraged the resort to technicalities. It expressly provided that on appeal, although on a particular issue raised the Court might be of the opinion that there was some irregularity, the conviction could not be quashed if the Court were of the opinion that no substantial miscarriage of justice had occurred"; (1907) 17 5 UKPD 222.


185 [1894] AC 57.

186 [1896] AC 44.

187 Most of the English judges opposed a right of appeal based on the facts; see Rosemary Pattenden, *English Criminal Appeals 1844-1994* (1996) 24. Sir James Fitzjames Stephen's view changed more than once, as to which see K Smith, *James Fitzjames Stephen* (1988) 96, cited in Pattenden at 24. Interestingly, Baron Parke, the Judge in *Crease v Barrett* (1835) 1 Cr M & R 919, was strongly opposed to a right of appeal in criminal cases on the basis that it would result in "the Protraction of Every Criminal Suit, and the Advantage of a Speedy Conviction and Punishment would be lost", and because "the cases in which the Innocent are improperly convicted are extremely rare"; Select Committee of the House of Lords, *Report from the Select Committee of the House of Lords on An Act for the Further Amendment of the Administration of the Criminal Law* (1848) 4.

188 However, unlike most cognate jurisdictions including New Zealand, the English Act did not permit the Court of Criminal Appeal to order a retrial. See Departmental Committee on New Trials in Criminal Cases, *Report of the Departmental Committee on New Trials in Criminal Cases* (1954) 10-11.

189 Section 4 of the Act read: "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."
wrong decision on such a question and a mixed ground when the appellant had suffered a miscarriage of justice. The proviso was enacted as potentially curative of all three. Further, the newly created Court of Criminal Appeal was vested with a discretion in relation to the exercise of the proviso; the Court could but need not employ it. In this regard, the criminal proviso differed in language to the English civil proviso and that in New Zealand's Criminal Code Act of 1893, both of which, as earlier discussed, seemingly precluded an appellate body from quashing the verdict unless first satisfied that there had been a substantial wrong or miscarriage. By way of change of emphasis, the criminal proviso invited the appellate court to determine first if an appeal ground had been made out and then to consider whether no substantial miscarriage of justice had actually occurred.

In relation to the proviso's intended effect, features of the Criminal Appeal Act and that enactment's history suggest that the proviso was to be a part of a regime that would weigh evidence and find facts notwithstanding the role of the jury in the English criminal justice system.

First, the alleged undermining of the constitutional role of the jury was one of the reasons a fact-based right of appeal was so contentious. Might not an appeal mean trial by a panel of judges instead of trial by jury? Addressing the House of Lords during the bill's passage, the Earl of Halsbury observed to the Lord Chancellor:

You are giving an absolute power to set aside a conviction on a question of fact. I object to that.... I regard it as a most serious constitutional alteration of our whole system.

A man has the right to be tried by a jury; and to say that the question may be remitted to a Committee of Judges is to make a serious innovation in our whole legal system.... At all events, the Constitution has made the tribunal on fact the jury, and for myself I very much regret to see an attack on that institution.

Second, the ability to challenge a jury's verdict on the ground that it was unreasonable meant that the Court of Criminal Appeal was now the final arbiter in relation to the facts. It rather than a jury ultimately determined whether a verdict had been returned in accordance with them.

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190 At first blush, the approach of the Law Lords to the English civil proviso and New South Wales criminal proviso accounts for this change. However, the enacted form of the English criminal proviso was identical to one which appeared in a failed criminal appeal bill predating these common law developments; see the Court of Criminal Appeal Bill 1883, cl 8. It follows that later nineteenth century judicial hostility to the device does not provide a complete explanation for the creation of a discretionary regime, although it is reasonable to presuppose that this was a factor in cementing change. The genesis of a discretionary mechanism perhaps lies earlier. In 1844, Sir Fitzroy Kelly, a former Solicitor-General, introduced a bill to create a right of appeal in criminal cases. When later examined before a Select Committee to consider the measure, Kelly spoke of a mechanism to filter "frivolous or obviously groundless" appeals, in which the appellant would need to show just cause in relation to his or her case. The context of his evidence concerned the approach of appeal courts in North America, in which he described the appeal being "at the Discretion of the Court, and so Appeals are rare"; Select Committee of the House of Lords, Report from the Select Committee of the House of Lords on An Act for the Further Amendment of the Administration of the Criminal Law (1848) 31.

191 (1907) 179 UKPD 1474.
Third, the new Court was given expansive supplemental powers consistent with a fact-finding function. In addition to ordering the production of any thing connected with the proceedings, the Court of Criminal Appeal could compel the attendance of witnesses whether or not called at the trial, receive evidence, order an inquiry by a special commissioner appointed by the Court, and appoint any person with special knowledge to assist in the determination of the case.\textsuperscript{192} Of such powers, the Attorney-General assured the House of Commons that the bill contained "ample machinery to enable the Court to do all that the Home Secretary could do at the present time".\textsuperscript{193} The reference concerned the function of the Home Secretary in considering and advising upon petitions for the exercise of the Royal Prerogative of Mercy, a process that might involve the interviewing of witnesses and the conduct of more general inquiries.\textsuperscript{194} Consequently, "it may well have been thought by some, at the time the [Criminal Appeal] Act was passed, that the powers given to the Court of Criminal Appeal by section 9 ... coupled with the proviso to section 4(1) of the Act, would enable the Court, in suitable cases, virtually to re-try the case."\textsuperscript{195}

Fourth, the immediate history to the 1907 Act suggests that the impetus was for an appellate body to act, where appropriate, as a court of inquiry. Cornish and Clark explain that the Act came to pass only because of the government's embarrassment over the misconviction of Adolf Beck and the "highly dubious conviction" of a solicitor, one George Edjali.\textsuperscript{196} A committee of inquiry into the Beck case recommended that a right of appeal be limited to questions of law, as in that case a determination about the admissibility of evidence had been central to the proceedings.\textsuperscript{197} After Edjali was convicted of attacking a horse following a scandalous police inquiry, however, the public clamoured for a right of appeal on matters of fact.\textsuperscript{198} The political response was the Criminal Appeal Act.

\textsuperscript{192} Criminal Appeal Act 1907 (UK), s 9. Further, s 1(7) of the Act stipulated that the Court had "full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the court", emphasis added. See A L Goodhart, "Acquitting the Guilty" (1954) 70 Law Quarterly Review 514 at 516.


\textsuperscript{194} In 1890 Stephen said admiringly of the process that the Home Secretary would "see the judge [who tried the case], the principal witnesses, especially those on whose testimony special discussions have arisen, and in fact, all persons who really know anything about the matter, in a perfectly easy natural way, and with entire freedom from the disturbing causes which may always arise from trial"; Sir James Fitzjames Stephen, A General View of the Criminal Law of England (2nd ed, 1890) 177. Seven years earlier, Stephen had described the Home Secretary's inquiries in less flattering terms: "They cannot take evidence, they cannot hear arguments, they act in the dark, and cannot explain the reasons of the decision at which they arrive. The evil is notorious, but it is difficult to find a satisfactory remedy"; Sir James Fitzjames Stephen, A History of the Criminal Law of England (1883) vol 1 at 313.


\textsuperscript{197} Ibid.

\textsuperscript{198} Ibid. See also Sir Leon Radzinowicz and Roger Hood, A History of the English Criminal Law and its Administration from 1750 (1986) vol 5 at 758.
It follows that the Act’s machinery and its associated history suggest that the proviso was intended to encourage appeal courts to function by weighing the evidence and considering its effect. As we shall, the courts were to continue to see things differently.

VII. THE NEW ZEALAND CRIMES ACT 1908 AND BEYOND

In 1908 the proviso was lifted without change into the Crimes Act of that year, a measure that consolidated rather than reformed the criminal law. The then recent English experience was not emulated and so there remained no right of appeal in criminal cases in New Zealand. Instead, the procedure remained one in which a question of law had to be reserved at trial and later considered by the Court of Appeal. The result was that the proviso received reasonably little attention until after 1945 when a right of general appeal based on the English Act of 1907 was introduced. The handful of cases to that point are best understood in two distinct periods, the first under Stout CJ, which offered glimpses of a very different approach, and the second under Myers CJ, which was orthodox and restrained. Consideration of the New Zealand common law does not provide the whole picture, however, for within this period the proviso reached the House of Lords on a number of occasions, decisions that from a New Zealand perspective were at least highly persuasive. As we shall see, the Law Lords’ stance on the proviso eventually softened, at least to a degree, following the passage of the Criminal Appeal Act 1907.

A. The Proviso under Stout CJ: a Different Approach?

In this period, the two relevant decisions of the Court of Appeal under Stout CJ are indicative of a different approach to the proviso. It will be recalled that in R v Lawrence Stout CJ was alone in expressing concern that the Law Lords’ approach in Makin had the potential to frustrate the device’s operation. The Chief Justice’s judgment left open the prospect that had the outcome not been constrained, the proviso might operate to permit an appellate court to determine whether the appellant had been proved guilty to its satisfaction. That premise appears to underlie both R v Neary and R v Johnson, although neither decision provides explicit guidance as to how the Court of Appeal approached its task.

199 Crimes Act 1908, ss 442 and 443.


201 (1905) 25 NZLR 129.

202 [1894] AC 57.


204 [1923] NZLR 1315.
The defendant in Neary was convicted of theft. At trial the prosecutor wrongly remarked that the jurors could draw their own conclusions as to why the defendant had not given evidence. The trial judge reserved a case for the opinion of the Court of Appeal observing he was of the opinion that no wrong or miscarriage had occurred. Chief Justice Stout was unsure that the case raised a question of law, but even if it did, the Judge thought that the appeal should be dismissed.

Our s 445 provides in the first proviso that ‘no conviction or acquittal shall be set aside, nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial.’ Assuming, then, that there was something not according to law done at the trial, still, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was occasioned at the trial, the conviction should not be set aside. In my opinion it cannot be said in this case that any substantial wrong or miscarriage was occasioned by what the Crown Prosecutor did. The learned Judge who heard the case at the trial is of that opinion, and I am of opinion that the view he has taken is warranted by the evidence, which I have carefully read.

The other judges agreed in brief judgments. Justice Edwards saw the jury’s verdict as reflecting “an intelligent appreciation of the case.”

In R v Johnson the defendant was found guilty of indecent assault but acquitted of other (more serious) charges. At trial, the victim was accused of being of poor character. To meet that challenge, the Crown adduced evidence to the contrary. The trial judge refused to state a case on the ground he did not think there had been a substantial miscarriage of justice. The Court of Appeal dismissed the appeal. The Chief Justice held that “we are bound in this case to refuse leave because of the provision in our statute”, namely the proviso. Although the evidence might have been improper, it “could not possibly have caused any substantial wrong or miscarriage, and therefore we are bound not to set aside a conviction or acquittal, or order a new trial, by s 445 of our statute.” The Court engaged in no further analysis.

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205 The comment was in breach of the antecedent to s 366 of the Crimes Act 1961 that served to protect the new right of a defendant to give evidence in his or her own defence.


207 Ibid at 521-522, emphasis added.

208 Ibid at 522-524.

209 Ibid at 523.

210 [1923] NZLR 1315.

211 A practice prohibited by Parliament in 1985 in relation to sexual reputation and experience absent leave of the judge in the interests of justice; see the Evidence Act 1908, s 23A and now the Evidence Act 2006, s 44.

212 [1923] NZLR 1315 at 1321.

213 Ibid.
Extrapolating a clear statement of principle from the two cases is difficult as both decisions are very short. Subject to that caveat, it appears that the Stout Court treated the proviso as meaning that an appeal could not be allowed unless the Court was first satisfied that the defendant had suffered a substantial miscarriage. Although the language of the provision said as much, this was a departure from *Makin v Attorney-General for New South Wales* and *Bray v Ford* in that trial error was treated by the Law Lords as automatically constituting a substantial miscarriage of justice, which of course had the effect of subverting the proviso’s injunction. Further, it is clear from *R v Neary* that the Court of Appeal reached its own view of the defendant’s guilt by virtue of the written record, thereby engaging in a function deprecated by the Privy Council in *Makin*. Such a “startling” approach, as the Lord Chancellor in *Makin* had described it, would not be explicitly endorsed by a common law court until the 21st century.

**B. The Proviso under Myers CJ: Makin Conservatism**

The few decisions concerning the proviso under Chief Justice Myers betray an approach consistent with *Makin*. Error seen as capable of having affected the verdict was deemed to constitute a substantial miscarriage of justice. Further, the Court of Appeal was not seen as having a role to assess or weigh evidence and, absent an overwhelming prosecution case, trial error beyond the trivial precluded the proviso from being invoked. Four cases are illustrative.

In *R v Hakiwai* the defendant was found guilty of arson by setting fire to bales of hay on land owned by him but leased to another. His defence was colour of right. The trial judge excluded evidence in connection with that claim, holding it irrelevant. The Court of Appeal held that the evidence had been wrongly excluded. Chief Justice Myers, with whom Kennedy and Blair JJ concurred, held that the proviso could not be invoked because the exclusion of evidence might have affected the possibility of an acquittal and that risk was treated as constituting an actual substantial miscarriage of justice. Justices Herdman and Smith saw the excluded evidence as depriving the jury of relevant material thereby giving rise to the need for a new trial.

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214 [1894] AC 57.

215 Ibid.


217 [1894] AC 57 at 70. See the decision of the High Court of Australia in *Weiss v R* (2005) 224 CLR 300.

218 [1894] AC 57.

219 [1931] NZLR 405.

220 Ibid at 408.

221 Ibid, citing *R v Lawrence* (1905) 25 NZLR 129.

222 Ibid at 411-414.
A similar approach was adopted in *R v Storey*, a case concerning the standard of care in relation to negligence under the criminal law. Seven judges in the Court of Appeal were unanimous that the appeal should be allowed as evidence that might have suggested the presence of an intervening act (breaking the chain of causation for culpable homicide) was wrongly excluded. The jury, it was held, might have acquitted but for the exclusion of this evidence. A substantial miscarriage of justice had therefore occurred. Divorced from the facts, the decision is unremarkable. However, seen in their context, the case can be read as authority for the proposition that the exclusion of any evidence relevant to a defence, no matter how implausible, automatically gave rise to a substantial miscarriage of justice. The possible acquittal relied upon an extraordinary scenario, namely that the deceased’s vehicle had plunged down a bank not because of the collision with the defendant’s car, the defendant having overtaken on a blind bend, but because the ground underneath the deceased’s car was unstable, thereby breaking the causative chain initiated by the defendant’s dangerous driving.

In *R v Pickering* the judge did not specifically instruct the jury to consider the evidence discretely in relation to each count in a multiple count indictment. As the complaint was one of error by omission, the case raised the question of how likely the risk of a miscarriage needed to be before it could be treated as an actual substantial miscarriage. The defendant was convicted of performing two (unlawful) abortions on different women nine days apart. Much of the evidence was common to both crimes and at least some of the evidence of each woman was admissible vis-à-vis the other. Although the judge directed the jury that its verdict on each count could differ, the judge did not go further and tell the jury to isolate the evidence in relation to each. The Court of Appeal held that was wrong. That left open the application of the proviso given the close temporal connection between the crimes, the common pool of evidence and the cross-admissibility of some evidence as between the two women. In a single paragraph, Myers CJ held that the conviction could not stand given *R v Lawrence* and *R v Hakiwai*; it was “impossible to say with certainty what they [the jury] would have done” had the direction been given. Justice Ostler relied upon *Makin*’s case as authority for the proposition that trial error which “might reasonably have prejudiced an accused’s person’s chances of acquittal” automatically gave rise to a substantial miscarriage of justice thereby rendering the proviso inoperative. Accordingly, while

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223 [1931] NZLR 417.
224 Ibid at 443-445.
225 Ibid at 443-445 per Myers CJ; 452-453 per Herdman J; 464-466 per Reed J; 470 per Blair J and 475 per Kennedy J.
226 [1939] NZLR 316.
227 (1905) 25 NZLR 129.
228 [1931] NZLR 405.
229 [1939] NZLR 316 at 322.
230 [1894] AC 57.
231 [1939] NZLR 316 at 323. Fair J concurred with the Chief Justice and Ostler J at 324.
not every error would vitiate a conviction, any error that might reasonably have affected the result was deemed to be sufficient to warrant a retrial.

*R v Martin*\(^2\) confirmed this approach. On charges of theft, it was held that the judge had insufficiently directed the jury as to the mental ingredient of the crime, and in particular, that the defendant had acted fraudulently. That direction assumed importance, because the jury had returned guilty verdicts with a recommendation for leniency on the basis that “we believe the crime to be a technical breach”.\(^3\) The Chief Justice thought it “impossible to say that a miscarriage may not have been occasioned”.\(^4\) So too did Smith J: “As the misdirection may have influenced the jury in arriving at this verdict, and it is impossible to say what verdict the jury would have reached had a full direction been given, a new trial must be ordered.”\(^5\)

Consequently, unlike the Court of Appeal presided over by Stout CJ, the Myers Court was not prepared to assess whether the defendant had in fact suffered a substantial miscarriage of justice. Instead, the possibility that error had influenced the verdict was seen as precluding the Court from engaging in such an evaluation. The conflation of a risk of a miscarriage of justice and an actual, substantial miscarriage was complete.\(^6\)

**VIII. THE PROVISO IN THE HOUSE OF LORDS: 1907-1945**

In 1934 the House of Lords grappled with the English criminal proviso for the first time.\(^7\) William Maxwell was convicted of manslaughter and procuring an abortion in relation to a patient who died as a consequence of the procedure. When questioned by Police about the incident the defendant said, “I am unlucky again”, a reference to the fact that he had been charged and acquitted of murder of another young woman who had died in similar circumstances.\(^8\) The prosecutor cross-examined the defendant about that incident, although the judge directed the jury to ignore it. The Court of Criminal Appeal dismissed the defendant’s appeal, holding that as the defendant had been acquitted of the charge, no inadmissible evidence had been introduced at the trial.\(^9\) The House of Lords disagreed, ruling that the evidence was irrelevant to the defendant’s credibility and therefore inadmissible.\(^10\) That raised the applicability of the

\(^2\) [1941] NZLR 361.

\(^3\) Ibid at 362.

\(^4\) Ibid at 368.

\(^5\) Ibid at 369.

\(^6\) While the Myers Court applied the proviso in *R v Crossan* [1943] NZLR 454 in which the indictment was bad for duplicity, the form of the indictment did not affect the evidence adduced at trial or the conduct of the defendant’s case. The proviso’s application was therefore not contentious as trial error was inconsequential.

\(^7\) Maxwell v Director of Public Prosecutions [1935] AC 309.

\(^8\) Ibid at 313.

\(^9\) Ibid at 315-316.

\(^10\) Ibid at 321.
proviso and the test for its operation. Viscount Sankey LC described the latter in the following way:\textsuperscript{241}

The rule which has been established is that, if the conviction is to be quashed on the ground of misreception of evidence, the proviso cannot operate unless the evidence objected to is of such a nature and the circumstances of the case are such that the Court must be satisfied that the jury must have returned the same verdict even if the evidence had not been given.

The House of Lords held that test had not been met. Viscount Sankey observed:\textsuperscript{242}

The effect of such ... [inadmissible material] on the minds of a jury might be overwhelming, and it is impossible to say in this case that the reception of this evidence was the deciding factor which made the jury give their verdict.... It might well be that the fact that he had been charged some years before with a similar offence, although the charge led to acquittal, might have been the last ounce which turned the scale against him.

The Lord Chancellor concluded his speech with a now celebrated passage:\textsuperscript{243}

If in any case the evidence against a prisoner (other than that which is inadmissible) is very strong and is abundant to justify a jury in convicting, it may well seem unfortunate that a guilty man should go free because some rule of evidence has been infringed by the prosecutor. But it must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed.... It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded and discredited.

In \textit{Maxwell} then, the Law Lords set an exacting standard for the proviso's application; an appeal court needed to be satisfied that the jury "must" have returned a guilty verdict had the error not occurred.\textsuperscript{244} Although that test was treated as having been earlier settled, it had not. The English Court of Criminal Appeal had articulated and employed a number of different formulations to that point.\textsuperscript{245} Moreover, although the posited test was directed at the certainty of conviction \textit{absent} error, given Viscount Sankey's consideration of the facts, including the events at trial, it appears that the Law

\begin{itemize}
  \item \textsuperscript{241} Ibid at 322-323.
  \item \textsuperscript{242} Ibid at 323.
  \item \textsuperscript{243} Ibid.
  \item \textsuperscript{244} Ibid at 322-323.
  \item \textsuperscript{245} \textit{R v Meyer} (1908) 1 Cr App R 10, the first reported case on the proviso, referred to "a consistent with innocence test" at 12. In \textit{R v Dyson} [1908] 2 KB 454, which was decided three days later, the Court of Criminal Appeal allowed the appeal as it could not be said "that the jury must have" convicted the defendant but for error; ibid at 15. Later, in \textit{R v Stoddard} (1909) 2 Cr App R 217 that formulation was questioned: "We think it is open to consideration whether the word 'must' is not too strong, and whether the proper question is not whether if properly directed the jury would have returned the same verdict"; ibid at 245. \textit{R v Cohen & Bateeman} (1909) 2 Cr App 197 created different tests according to the type of error: at trial, an error of law required the Crown to show that the jury must have come to the same conclusion but for the error, whereas a mistake of fact or omission in a summing up entitled the Court to assess for itself whether the only reasonable and proper verdict was one of guilty; see ibid at 207-208.
\end{itemize}
Lords saw the proviso’s applicability as turning upon whether the error had affected the outcome.\textsuperscript{246} This appears to explain the Lords’ recognition that the “very strong” evidence against the defendant was not determinative.\textsuperscript{247} Rather, inadmissible material had influenced the “chance of the jury fairly trying the true issues.”\textsuperscript{248}

A year later in \textit{Woolmington v Director of Public Prosecutions},\textsuperscript{249} the House of Lords adopted the same approach. Reginald Woolmington married on 25 August 1934. The marriage was short lived: within three months Violet Woolmington had left her husband and gone to live with her mother, Mrs Smith. The report records that the defendant “wanted her to go back to him and make efforts to induce her to go back, but she would not.”\textsuperscript{250} On the morning of 10 December the same year, Violet’s aunt (who lived next door to Mrs Smith) heard the defendant say, “Are you coming back or not?” and “Where’s your mother?”\textsuperscript{251} The aunt then heard a gun shot. Minutes later, she saw the defendant biking from the scene. She called to him but he rode away. The aunt then went next door, where she found Violet dead. Mrs Woolmington had been shot through the heart. Unsurprisingly, the defendant was the only suspect. When confronted, he said: “I want to say nothing, except I done it, and they can do what they like. It was jealousy I suppose. Her mother enticed her away from me. I done all I could to get her back, that’s all.”\textsuperscript{252} The defendant was found in possession of a note consistent with murder and suicide, which stated that he would have his revenge and that he had two cartridges, one for his wife and one for him. The note ended, “I love Violet with all my heart, Reginald”.\textsuperscript{253} He was charged with murder.

The defendant gave evidence at trial. He claimed that he had written the note after the shooting and that he had gone to frighten his wife in the hope she would go back to him. The defendant testified that the gun went off accidentally. The judge directed the jury that even if that account was possibly true, the defendant was still guilty of murder. Accident said the judge, had to be established by the defendant.\textsuperscript{254} Of that direction the Court of Criminal Appeal rather meekly observed that “it might have been better” if the trial judge had explained that unless the Crown could exclude an accident, the defendant should be acquitted.\textsuperscript{255} Despite such an error on the judge’s

\begin{footnotes}
\footnote{246}{For the distinction between the guilt-based and error-impact approaches to the proviso, see chapter two.}
\footnote{247}{[1935] AC 309 at 323.}
\footnote{248}{Ibid.}
\footnote{249}{[1935] AC 462.}
\footnote{250}{Ibid.}
\footnote{251}{Ibid at 463.}
\footnote{252}{Ibid at 464.}
\footnote{253}{Ibid.}
\footnote{254}{The prosecution had argued that accidental death, if accompanied by ‘malice aforethought’, was murder. That argument, however surprising today, had support in the authorities; ibid at 468.}
\footnote{255}{Ibid at 470.}
\end{footnotes}
part, the Court held that the proviso should be invoked given the strength of the evidence, it being satisfied that the jury would have convicted anyway.

The House of Lords disagreed. Viscount Sankey LC said that the proviso should not be applied as: "We cannot say that if the jury had been properly directed they would have inevitably come to the same conclusion."256 In light of the evidence, this conclusion seems strained, particularly when the Court of Criminal Appeal had reached a contrary view. As in Maxwell's case, it appears that the critical factor in Woolmington was not the apparent correctness of the verdict, but rather the serious nature of the error.

In Stirland v Director of Public Prosecutions257 the House of Lords adopted a different formulation for the application of the proviso that came to be regarded as the preeminent statement of the law.258 The defendant was convicted of forgery while in the employment of the BBC. In the course of the trial, he was cross-examined that he had committed forgery prior to being so employed. The Law Lords held that these questions should not have been asked and were "unfair".259 The appeal was dismissed, however, because, "Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the jury entirely to disregard), there was an overwhelming case proved against the appellant."260 Of the proviso, Viscount Simon LC observed:261

> When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to ... the Criminal Appeal Act 1907, should be applied.

Curiously, the House of Lords did not acknowledge that this was a modification of the actual jury test to one employing a notional reasonable body, for the Lord Chancellor continued:262

> The passage in Woolmington v Director of Public Prosecutions ... where Viscount Sankey LC observed that in that case, if the jury had been properly directed it could not be affirmed that they would have 'inevitably' come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the

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256 Ibid at 482-483.
258 The test in Stirland had "prevailed for many years"; Interdepartmental Committee on the Court of Criminal Appeal, Report of the Interdepartmental Committee on the Court of Criminal Appeal (1965) 37.
259 [1944] AC 315 at 324.
260 Ibid at 321.
261 Ibid.
262 Ibid, emphasis added.
evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case.

More significantly, *Stirlan*d represented an apparent acknowledgment by the House of Lords that appeal courts were themselves to assess the evidence as to guilt, at least to a degree, by virtue of the notional reasonable jury test. Further, in light of the prejudicial nature of the wrongly adduced evidence, the decision can be read as signalling that the proviso’s remedial function was directed to establishing whether the verdict was correct. Both aspects imply a more receptive judicial attitude towards the proviso than had hitherto existed. A number of qualifications are important, however. The evidence against the defendant was “overwhelming” and the jury had taken only seven minutes to find him guilty. Accordingly, the high threshold for the proviso’s application identified in *Maxwell* and endorsed in *Woolmington* was not diminished. *Stirlan*d did not open the proviso’s floodgates either; somewhat ironically, the English Court of Criminal Appeal most frequently applied the proviso in the Court’s earliest years long before *Stirlan*d was decided. Moreover, appellate concern that error might have influenced the verdict continued to render the proviso inapplicable in many English cases, with the consequence that *Stirlan*d’s approach to error was only haphazardly entertained. It follows that despite its contrary signals, *Stirlan*d continued to admit only a narrow curative role for the proviso. Coincidentally, at about this time New Zealand was copying the Criminal Appeal Act 1907 and its proviso in order to here create a new appellate regime.

263 Ibid.
264 Ibid at 317.
266 [1935] AC 462.
268 Ibid at 275-276. Goodhart observes that the proviso was “applied in only those very few cases in which the irregularity or misdirection has been held to be of a trivial nature.” See A L Goodhart, “Acquitting the Guilty” (1954) 70 Law Quarterly Review 514 at 514. Care must be taken with this proposition, however, because there were occasions in which the proviso was applied despite seemingly significant errors. For example, in *R v Atherton* (1910) 5 Cr App R 233 at 236-237 the Court of Criminal Appeal lamented of the summing up that: “here and there things were stated to have been proved which were not proved at all.” Nonetheless, the proviso was applied as the jury “would have come to the same verdict”; ibid at 237. In *R v May* [1912] 3 KB 572 convictions for indecent assault were upheld despite a misdirection on consent, with the Court noting in applying the proviso that the defendant’s explanations had been inconsistent and that there had been evidence analogous to recent complaint. See too *R v Metcalfe* (1913) 8 Cr App R 7 at 8 in which the Court of Criminal Appeal acknowledged that the evidence to support a conviction for larceny was “very slight”. However, the Court considered that as the depositions evidence bolstered the Crown’s case it was proper to apply the proviso.
269 The decision in *Stirlan*d was delivered on 21 June 1944. New Zealand’s Criminal Appeal Act came into force eighteen months later on 7 December 1945.
IX. THE NEW ZEALAND CRIMINAL APPEAL ACT 1945

The Criminal Appeal Act 1945 made more generous provision for appeals in criminal cases. The Act created a right of appeal on questions of law. Questions of fact and mixed questions could also be pursued with either leave of the Court of Appeal or upon the certificate of the trial judge. As noted, while the Act was based upon the English template, New Zealand retained the power to order a retrial should an appeal be allowed. Introducing the bill a second time, the Attorney-General announced:

Already in New Zealand we have certain rights to appeal in criminal matters, but they are of a very limited nature. This Bill follows quite closely what has been done in England and has obtained there for a very long time. That has been followed in many jurisdictions under the British Crown.... The Bill, I think, has its ultimate origin in the demand of the people for a means of rectifying mistakes that sometimes occur....

The proviso was re-enacted but redrafted. As in England, the device was framed as potentially curative of all grounds of appeal, including when a verdict was unreasonable or unsupported by the evidence. Similarly, the Court of Appeal was invested with a discretion in relation to the application of the proviso on an appeal against conviction. The relevant section read:

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

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

270 Criminal Appeal Act 1945, s 3(a).
271 Ibid, s 3(b).
272 Ibid, s 4(2).
273 (1945) 268 NZPD 780.
274 See the Criminal Appeal Act 1907 (UK), s 4 and the Criminal Appeal Act 1945, s 4(1). For discussion on whether the proviso can be reconciled with an unreasonable verdict, see chapters two and five. The power to quash a conviction on the basis of such a verdict predated the 1945 reforms; see the Criminal Code Act 1893, s 416 and the Crimes Act 1908, s 446.
275 However, the case stated procedure pursuant to ss 442 and 445 of the Crimes Act 1908 remained unchanged, with the curious result that the corresponding proviso in s 445 continued to prevent a case stated appeal being allowed unless the Court of Appeal first found that a substantial miscarriage of justice had occurred. This wording remains; see Crimes Act 1961, s 382. But as discussed earlier in this chapter, the courts had eroded that injunction in any event.
276 Criminal Appeal Act 1945, s 4(1).
The Attorney-General's speech to the House of Representatives offers limited insight as to what was envisaged in relation to the proviso's construction and the exercise of the Court of Appeal's corresponding discretion.  

No one, of course, will desire frivolous interference, but there has not arisen occasion for adverse criticism on that ground in the Old Country. There, the Court [of Criminal Appeal] has justified this enactment, as all accounts concur. Or the one hand, it has not been afraid to correct injustice where injustice has appeared before it. On the other hand, it has not interfered in a petty or frivolous way, where there has been no real ground for interfering. It has, as a matter of fact, administered the law in a way that has proved it satisfactory and a success. If honourable members will look at this Bill, they will see that there is a good provision there – that the Court does not have to uphold an appeal on technical grounds, if it is satisfied that there has been no real miscarriage of justice. In that respect, the Bill seems to me to be admirably drawn. The Court's attention is directed to the question whether there has been a miscarriage of justice or not. The striking feature is the subordination of technicalities to that great problem of securing that justice is done. I am sure that in that respect it will make an appeal to honourable members.

As with the English Act of 1907, the New Zealand reforms provided the Court of Appeal with broad supplemental powers that implied that the Court had the power to find facts, when necessary, in a manner akin to rerying a case. Thus, the Court could if it thought it “necessary or expedient in the interests of justice”, order the production of any document or other thing connected with the proceedings, compel the examination of any witness (irrespective of whether the person was called at trial), appoint a special commissioner to conduct “any scientific or local investigation” and “appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case.” Parliament’s provision for appeals on matters of fact, the admonition to allow an appeal if the Court of Appeal was “of the opinion” that the verdict was unreasonable, the use of similar language in relation to the proviso and the breadth and elasticity of the phrase “substantial miscarriage of justice” support this conclusion. As we shall later see in chapter three, the courts did not agree.

X. CONCLUSION

The history of the New Zealand proviso is unusual and yet orthodox. It is unusual in that the proviso was enacted to counter a common law rule that never here formally took root, in circumstances in which reasoning embraced by that rule then entered our law as a consequence of the courts’ response to the proviso elsewhere. The history is also orthodox, however, in that apart from contrary indications under Stout CJ, the Court of Appeal interpreted the proviso in a manner akin to the House of Lords and Privy Council. In this regard, the quintessential role of the jury was said to preclude an approach in which the appeal courts might find facts and a risk that error had influenced the outcome was treated as if it had actually done so. Consequently, the possibility of a miscarriage of justice was seen as an actual substantial miscarriage of justice so that ironically, reasoning consistent with the Exchequer rule continued to persist despite the proviso’s reformatory nature. The decision of the House of Lords in Stirland v Director

277 (1945) 268 NZPD 782-783.
278 Criminal Appeal Act 1945, s 9.
279 Ibid, s 4(1).
of Public Prosecutions, while suggestive of the possibility of a different approach, did not effect the courts' narrow and cautious interpretation of the device. It follows that by the advent of our 1945 Criminal Appeal Act and its modern rights of appeal, the courts' approach to the proviso had already been adumbrated. However, New Zealand courts had yet to answer how the proviso should be applied, and in particular, what methodology should underlie the inquiry of whether the defendant had suffered a substantial miscarriage of justice. To this we turn in chapter two.

\[\text{[1944] AC 315.}\]
CHAPTER TWO
APPLICATION OF THE PROVISO: FROM THE CRIMINAL APPEAL ACT
1945 TO THE PRESENT

I. INTRODUCTION

The enactment of the Criminal Appeal Act 1945, and with it, the re-enactment of the proviso, presented the New Zealand Court of Appeal with the task of determining how the proviso should be applied to the new grounds of appeal based upon the English template of 1907. Whereas the proviso in the Criminal Code Act 1893 and that as enacted in the Crimes Act 1908 precluded an appeal from being allowed unless the defendant had suffered a substantial miscarriage of justice, the 1945 Act made the proviso conditional upon the absence of such a miscarriage.1 The Act also invested the Court of Appeal with a discretion to apply the proviso when no such miscarriage had occurred.2 This formulation was retained in the Crimes Act 1961 and remains today.3 The result is that the establishment of a ground of appeal requires the court to allow the appeal, unless it considers that no "substantial miscarriage of justice has actually occurred".4 As with the proviso’s predecessors, however, the current formulation contains no explicit guidance as to how the appeal court should make such a determination. This chapter considers how our courts have done so since the enactment of modern rights of appeal.

In order to do so, it is first necessary to consider how appeal courts could determine that a defendant has not actually suffered a substantial miscarriage of justice. It might be assumed that the English common law would be the obvious avenue of inquiry in this respect, for as we have seen the House of Lords considered the proviso to the Criminal Appeal Act 1907 on three occasions before 1945, and cases under that enactment were “ legion” in the Court of Criminal Appeal.5 However, while the English courts did consider the tests for the proviso’s application, they gave little attention to the conceptual approaches underlying these tests. Instead, their focus was largely mechanical detail, for example, Stirland’s6 notional reasonable jury formulation as against the actual jury formulation of Maxwell.7 In contrast, North American jurisprudence is far more illuminating because the United States’ courts – more so than those of any other jurisdiction – explicitly considered what conceptual approach should be brought to the proviso’s application. There, in an attempt to abolish the Exchequer

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1 Criminal Appeal Act 1945, s 4(1).
2 Ibid.
3 Crimes Act 1961, s 385(1).
4 Ibid.
5 Maxwell v Director of Public Prosecutions [1935] AC 309 at 322 per Viscount Sankey LC. A number of these are considered in chapter three.
6 Stirland v Director of Public Prosecutions [1944] AC 315.
7 Maxwell v Director of Public Prosecutions [1935] AC 309.
rule, state governments and the federal government enacted devices akin to the proviso, some of which bear obvious similarity to the New Zealand provision. These led the courts to consider how error should be treated as harmless. As we shall see, two approaches emerged, the guilt-based approach and the error-impact approach, as did a contest between the two that reached the United States’ Supreme Court in 1946. It transpires that the American experience is not dissimilar to our own in some respects, for both sets of courts have oscillated between conceptually distinct approaches to the proviso with an attendant degree of inconsistency. More importantly, North American jurisprudence clearly reveals the distinction between these two approaches thereby providing a template for our own case law since the enactment of the Criminal Appeal Act 1945.

In addition to considering our approaches to the proviso since then, this chapter explores the remaining key aspects of the proviso’s operation, namely its relationship with the various grounds of appeal and the consistency, overall, of the New Zealand courts’ treatment of the device. It will be suggested that the relationship between the proviso and the appeal grounds is problematic, in part because of the way in which the enactment is drafted, and in part because of the apparent incompatibility of some of its statutory concepts with the proviso. While the Supreme Court’s decision in Matenga v R has clarified the proviso’s relationship with the miscarriage of justice appeal ground, its relationship with two other appeal grounds remains both difficult and unresolved. In relation to the courts’ treatment of the proviso, six decades of common law reveal evidence of inconsistency in the proviso’s application in that like cases have been treated differently. As we shall see, this appears to be explicable by a renewed reluctance on the part of the courts to engage in appellate fact-finding and an occasional focus upon the fact or error rather than its effect. Vestiges of the Exchequer rule, it will be suggested, remain with us.

II. CONCEPTUAL BASES FOR THE PROVISO’S APPLICATION: THE NORTH AMERICAN EXPERIENCE

In 1919 the United States’ Congress enacted the Judicial Code, of which rule 269 stated:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties.

For example, Article VI § 13 of the Californian Constitution (2009) provides: “No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” The primary difference between the Californian provision and our own is that the former precludes an appeal from being allowed unless the defendant has suffered a miscarriage of justice whereas the latter requires an appeal to be allowed upon such a finding unless the defendant has not actually suffered a substantial miscarriage of justice.

See Kottekos v United States 328 US 750 (1946).

Namely the unreasonable verdict and nullity appeal grounds; see the Crimes Act 1961, ss 385(1)(a) and 385(1)(d).
Rule 269 was enacted to combat the application of the Exchequer rule by federal appeal courts, which one commentator said "tower above the trials of criminal cases as impregnable citadels of technicality."\(^{12}\) In light of the same problem then beleaguering state courts, a number of state governments followed suit.\(^{13}\) In less than a decade, eighteen states had like provisions.\(^{14}\) By 1967 and the time of the seminal case of *Chapman v California*,\(^{15}\) the Supreme Court was able to observe that all 50 states had like "harmless-error statutes or rules."\(^{16}\) As was later stated by that Court, their general object was to:

... substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.

Importantly, as with the proviso to section 385 of the Crimes Act 1961, the American provisions did not (and do not) specify how appeal courts should carry out the task of distinguishing harmful errors from those that are harmless. On this point, the provisions – both New Zealand and American – are descriptive rather than prescriptive. Accordingly, there as here, the courts were left to fashion an appropriate response in the absence of explicit statutory guidance, with the result that "few areas of doctrinal development have been marked by greater twisting and turning than the development of standards for applying the harmless error rule".\(^{17}\)

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\(^{12}\) Kavanagh, "Improvement of Administration of Criminal Justice by Exercise of Judicial Power" (1925) 11 American Bar Association Journal 217 at 222. The examples cited in Roger J Traynor, *The Riddle of Harmless Error* (1970) at 3 and 85 illustrate the austerity with which North American courts enforced the Exchequer rule. Thus see *Williams v State* 27 Wis 402 (1871), in which the appeal was allowed because the indictment wrongly framed the offence as "against the peace of the State" instead of "against the peace and dignity of the State"; *Gragg v State* 148 Tex Crim 267 (1945), in which a murder conviction was quashed as the indictment did not allege the means by which the victim was killed and *Northern v State* 150 Tex Crim 511 (1947), in which the indictment, which alleged murder by kicking and stomping, was held to be insufficiently specific as to the cause of death.

\(^{13}\) Some states enacted harmless error statutes before the federal government. For example, rule 1258 of the California Penal Code (1872) directed Californian courts to "give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties"; although Wigmore says the provision "was virtually ignored by the Californian Supreme Court for more than a generation." See John H Wigmore, *Evidence in Trials at Common Law* (Tillers revised ed, 1983) vol 1 at 905.


\(^{15}\) 386 US 18 (1967).

\(^{16}\) Ibid at 22.

\(^{17}\) *Kotteakos v United States* 328 US 750 (1946) at 760.

The 1920 decision of *Smith v United States*\(^{19}\) sets the scene. The defendant and others were convicted of mail fraud in relation to a bogus livestock scheme. On appeal, they argued that the judge had wrongly admitted evidence in favour of the prosecution.\(^{20}\) The Circuit Court of Appeals thought it unnecessary to make a determination on the point, because the:\(^{21}\)

... evidence of the guilt of the these defendants was so conclusively established that, even if there had been some error in the admission of the evidence and we do not hold that there was, the modern law so clearly stated by Judge Hook in *Williams* [sic] *v United States* ... applies.

The Court had earlier observed that "we are convinced that there was substantial – in fact, we may say conclusive – evidence of the guilt of the defendants."\(^{22}\) At first blush then, the judgment appears to endorse the proposition that trial error may be ignored if an appeal court is satisfied about the defendant's guilt, and hence that harmless error is assessed by exclusive reference to the apparent strength of the evidence. The passage cited with approval from *Williams v United States*,\(^{23}\) however, reads differently:\(^{24}\)

> Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded.... It is manifest that he [the defendant] was not prejudiced by the admission of the testimony to which reference has been made.

This passage is suggestive of a different approach, namely one that focuses upon the impact of trial error in light of the evidence: and not what the court, on appeal, concludes as to the defendant's guilt. This distinction is better illustrated by other cases from the same period.

In *Hobart v United States*\(^{25}\) the defendant, a physician, was convicted of unlawfully supplying morphine. The defence, which was rejected by the jury, was that the doctor was legitimately prescribing the drug to his patients. The appeal was brought upon the ground that the trial was unfair in that the presiding judge was biased. The complaint was upheld, with the Sixth Circuit Court of Appeals noting:\(^{26}\)

> The record contains suggestions that the respondent had been before the judge upon a former occasion, wherefrom the judge had acquired good reason to believe that the respondent's alleged patient was a peddler, to whom respondent knowingly thus furnished a stock in trade. Hence it

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19 267 F 665 (8th Cir 1920).
20 The report is silent on what that testimony was.
21 Ibid at 670. The cited judgment should read *Williams v United States* 265 F 625 (8th Cir 1920).
22 Ibid at 669.
23 265 F 625 (8th Cir 1920).
24 Ibid at 670, emphasis added.
25 229 F 784 (6th Cir 1924).
26 Ibid.
is not surprising that the judge should have felt impatient that respondent was reluctant to be convicted, and should have regarded respondent's appeal to technical rules as a rather contumacious obstruction of the course of justice; but no amount of such provocation can justify the assumption by the judge of an attitude other than impartial. Throughout the testimony and the charge the judge's belief that respondent was acting in bad faith, and that his prescription was a subterfuge, was made so evident that the jury could not fail to be constantly affected thereby.

This finding squarely raised the issue of how the Court should treat especially serious trial error, for, if the focus were upon the error's effect, then plainly the appeal would have to be allowed. The Court acknowledged as much:

We do not disparage the power — and sometimes the duty — of the federal judge to assist the jury in reaching the right conclusion on the facts. This right, and its properly restrained exercise, strongly tend to make the federal trial courts efficient and dependable judicial machines; but the due restraint of its exercise is as important as the existence of the power. We recently pointed out instances within and others without the permissible scope of this exercise... The details of the present record in this respect need not be recounted. We cannot escape the conviction that a new trial would be necessary, except for the matter to be mentioned.

What was that matter? According to the Court, it was that there was powerful evidence of guilt such that the appeal should be dismissed. In short, serious error likely to have influenced the jury was ignored because the jury had reached the correct result, and it seems, the only one properly available:

... there is no possibility that conduct, such as Hobart admitted, could be lawful. The patient was not under restraint. Hobart furnished to him, at frequent intervals and for self-administration, large quantities of morphine, though in quantities diminishing from one time to another; but the patient was at liberty to apply to other doctors and get as many other similar prescriptions as he could.... where the guilt of the respondent so fully appears that the jury could not rightfully have rendered a verdict of acquittal, the conviction should not be reversed on account of a charge which practically directed the jury what to do.

Hobart v United States is not alone in this period as endorsing a proof of guilt or strength of evidence approach. However, other courts analysed harmless error

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27 Ibid.

28 Ibid.

29 See Carpenter v United States 280 F 598 (4th Cir 1922) at 601: "the verdict of the jury was plainly right, and that no error occurred in the trial of which the defendant can justly complain"; Lucadamo v United States 280 F 653 (2nd Cir 1922) at 658: "Abstractly, the defendants below were entitled to have charged their request.... But the case is not close, for the guilt of the defendants below is clear. The error is one which does not require reversal"; Snierson v United States 264 F 268 (4th cir 1920) at 275-276: "We cannot well conceive of a case in which the guilt of the accused is more clearly and conclusively established than here, entirely independent of anything that the stenographer may have testified to, or that may have been contained in his notes, and we are therefore of the opinion that the action of the lower court should be affirmed"; United States v Reed 96 F 2d 785 (2nd Cir 1938) at 786: "No impartial jury could have found otherwise [than guilt] on the evidence had the erroneously admitted evidence not been introduced at all. And so no reversible error on this account was made to appear"; Motes v United States 178 US 458 (1900), a decision of the United States Supreme Court at 476: "It would be trifling with the administration of the criminal law to award him [the defendant] a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him" and People v O'Bryan 165 Cal 55 (1913) at 66: "The final test is the opinion of the appellate court upon the result of the error. No doubt this view requires the court, to some extent, to weigh the evidence, and form
differently, preferring instead to focus upon the likely effect of trial error upon the jury in the context of the evidence. Examples may be found in *Illinois v Lane* and *Dobbs v State.*

In *Illinois v Lane* in 1921 the defendant and another were convicted of murder. The defendant was sentenced to death. He appealed on the basis that the judge had wrongly admitted propensity evidence that the defendant had committed another murder and robbery. The Supreme Court of Illinois held that this evidence was “irrelevant to the issue and incompetent to be shown on a trial of this charge.” However, the admissible evidence against the defendant was strong and included a signed confession to the murder that was the subject of the conviction. Unsurprisingly in such circumstances, the prosecution argued that the “evidence amply sustained the verdict and that there is no question of the defendant’s guilt” not having been proved. This argument was rejected, with the Court observing that it was “of no weight in this case.” The correct approach, the Court held, was to focus upon the likely impact of the inadmissible evidence on the jury’s deliberations. When applied to the facts, the Court said that it was:

... impossible for us to know what the jury would have done, and much less our province to say what they should have done, in the absence of this incompetent evidence. Its necessary effect was to close the minds of the jury to any consideration of mercy or leniency....

conclusions upon its weight – a function which, heretofore, has been reserved for the jury. But it cannot be doubted that the legislators, in proposing the amendment, and the electors, in adopting it, intended to put upon the courts the performance of just that function. We are not substituted for the jury. We are not to determine, as an original inquiry, the question of the defendant’s guilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which was reached. If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered."

300 Ill. 422 (1921).

148 Md. 34 (1925). See also *Bean v United States*: 192 F. 859 (1st Cir 1912) at 864; "in view of the weight of the evidence against the defendant, it is clear that if it had been admitted it would not have influenced a verdict for the defendant"; *Charles v United States*: 213 F. 717 (4th Cir 1914) at 721: "the jury could not have been influenced by that portion of the charge to which objection is made in determining the guilt or innocence of the defendant for the reasons stated"; *Oates v United States*: 233 F. 201 (4th Cir 1916) at 205-206: "It is manifest that the same result was effected by striking from the record as it stood all of the incompetent evidence and leaving the competent evidence for consideration. Any impression made by the incompetent evidence could not have been better effaced by a new trial than by excluding it from consideration" and *Katz v United States*: 273 F. 157 (1st Cir 1921) at 160: "their testimony was an admission that they were guilty of the offense charged in the indictment. If this were so, the statement in the indictment that they had been convicted became harmless error."

300 Ill. 422 (1921).

Ibid at 423.

Ibid at 424.

Ibid.

Ibid.
The appeal was allowed.

*Dobbs v State*\(^{37}\) in 1925 also involved the death penalty. The defendant and others were convicted of murder following a trial before three judges. The Maryland Court of Appeals ruled that the evidence of the defendant’s bad character had been wrongly adduced, as had the confession of a co-defendant. Although the case had been tried before professional fact-finders and not a lay jury, the Court held:\(^{38}\)

... when the errors are of such a character, and so interwoven with the case, as to lead a fair and impartial mind, trained and experienced in judicial investigation, upon an examination of the whole case and all the rulings involved therein, to the conclusion that there is a reasonable probability that such errors may have affected the determination of the case, they are prejudicial and reversible.

The appeal was allowed because the Court said it could not assume that the judges’ conclusion was not affected by the errors, for “in a criminal case no court is at liberty to indulge in speculation on such a subject.”\(^{39}\)

In 1946 the contest between these different approaches to harmless error reached the United States’ Supreme Court in *Kotteakos v United States*.\(^{40}\) There, the defendant and others were convicted of conspiring to fraudulently obtain loans. The issue, as framed by the Court, was whether the “petitioners ... [had] suffered substantial prejudice from being convicted of a single general conspiracy which the Government admits proved not one conspiracy but eight or more different ones of the same sort executed by a common figure”.\(^{41}\) That in turn squarely raised the question of how trial error should be approached. The ruling had been in favour of the prosecution in the court below. The United States Circuit Court of Appeals had dismissed the appeal on the basis that clear evidence of guilt meant that the global nature of the conspiracy charge and its associated inadmissible evidence constituted harmless error.\(^{42}\) Allowing the appeal, the Supreme Court explicitly rejected such an approach. It declared:\(^{43}\)

\(^{37}\) 148 Md 34 (1925).

\(^{38}\) Ibid at 48.

\(^{39}\) Ibid at 52.

\(^{40}\) 328 US 750 (1946). Despite what Traynor describes as a “provocative dialogue” on this issue between Judges Learned Hand and Jerome Frank in the United States Court of Appeals for the Second Circuit, the Supreme Court did not deal with the point until *Kotteakos*. See Roger J Traynor, *The Riddle of Harmless Error* (1970) 35. Examples of the Supreme Court’s judgments arising from the Second Circuit’s dialogue are to be found in *Berger v United States* 295 US 78 (1935) and *Bruno v United States* 308 US 297 (1939).

\(^{41}\) Ibid at 752.

\(^{42}\) Reported as *United States v Lekacos* 151 F 2d 170 (1945). The following lengthy passage, beginning at 172, illustrates the Court’s guilt-based approach and the extent to which it implies an appellate fact-finding function: “The guilt of the three appellants turned upon whether they had deliberately misstated their intent when they borrowed the money. The applications were in evidence and were undisputed; the evidence as to how they had spent the money depended upon the testimony of the investigators and of workmen; certainly the testimony that other applicants had used the money otherwise than they had stated that they intended, could not have persuaded the jury that the appellants had done the same thing with their money. The real crux was as to
... it is not the appellate court's function to determine guilt or innocence.... Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them the sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by error.

Instead, an appeal court: 44

... must take account of what the error meant to them [the jury], not singled and standing alone, but in relation to all else that happened. And one must judge others' reactions not by ... [the court's] own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

So how should appeal courts assess whether trial error was harmless? The Supreme Court framed the correct approach as one based upon the likely effect of error upon the proceedings: 45

If, when all is said and done, the ... [court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that [the defendant's] substantial rights were not affected. The inquiry cannot merely be whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Consequently, Kotteakos v United States 46 appeared to represent the defeat of guilt-based assessment of harmless error in favour of the error-impact approach. But

their transactions with Brown, and the only possible indirect prejudice that they could have suffered from the joinder was in case the jury would be more ready to accept what he said as to his dealings with them because of any testimony as to his dealings with other applicants. The mere fact that Brown himself swore to transactions with other applicants did not tend to confirm what he said about the appellants; indeed, that may have made his testimony, if anything, less likely. It is true that, so far as other witnesses confirmed his story as to his transactions with other applicants, the jury might have been disposed to find more credible the story of his dealings with the appellants. There was such testimony; it was as follows. One Dvorkin, swore to what took place between Brown and another of the accused, Posner. That may have tended to confirm Brown's credibility generally, although the jury disagreed as to Posner. Gerakeris and Issac Roth swore to transactions between Brown and Lekacos: again this may have added to Brown's credibility with the jury, though obviously it was an objection good only in the mouths of Kotteakos and Regenbogen. Finally, Shapiro, Brown's secretary, confirmed Brown's testimony as to transactions between himself and Kotteakos and Regenbogen: only Lekacos could have objected to this. These are the only instances we have found in which these three appellants could possibly have been prejudiced by testimony not admissible, if the conspiracies had not been joined: and, to repeat, any conceivable damage must be confined to the possibility that confirmation of what Brown said on other occasions might help to establish his general credibility."

328 US 750 (1946) at 763-764.

Ibid at 764.

Ibid at 764-765.
later developments suggest this may not be so. In 1967 the Supreme Court in *Chapman v California* held that a breach of the United States' Constitution could be harmless. In so doing, while the Court observed that Californian courts had approached harmless error by “emphasis, and perhaps overemphasis, upon the court’s view of ‘overwhelming’ evidence”, the Supreme Court did not depreciate a guilt-based approach. Further, in *Milton v Wainwright* in 1972, the Supreme Court declined to rule upon a constitutional-based challenge to the admissibility of a confession to murder because, “in addition to hearing the challenged testimony, [the jury] was presented with overwhelming evidence of petitioner’s guilt, including no less than three full confessions”. The Court went on to observe:

Our view of the record, however, leaves us with no reasonable doubt that the jury at petitioner’s 1958 trial would have reached the same verdict without hearing ... [the challenged] testimony.... In [this] ... process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.

Moreover, in *Rose v Clark* in 1986 the Supreme Court allowed a prosecution appeal concerning harmless error, holding that “Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.” This language implies a strength of evidence or guilt-based approach to the question of harmless error notwithstanding the Court’s earlier rejection of such an approach in *Kotteakos*.

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46 328 US 750 (1946).
47 386 US 18 (1967).
48 Before *Chapman v California* 386 US 18 (1967), it was generally assumed that constitutional violations were both harmful and incurable. See *Bram v United States* 168 US 532 (1897) and Yale Kamisar, Wayne R Lafave, Jerold H Israel and Nancy J King, *Modern Criminal Procedure, Cases Comments and Questions* (11th ed, 2005) 1615.
49 386 US 18 (1967) at 23.
51 Ibid at 373.
52 Ibid at 377-378.
54 478 US 570 (1986) at 579.
55 Chapel contends that guilt-based assessment of harmless error is now the preeminent approach of the United States' Supreme Court. See C S Chapel, “The Irony of Harmless Error” (1998) 51 Oklahoma Law Review 501 at 526. Similarly, Allen says that notwithstanding the different formulations of harmless error, “the one factor common to the great number of opinions affirming criminal convictions in harmless error grounds is the staunch belief of the reviewing courts in the guilt of the appellants”. See F A Allen, “A Serendipitous Trek through the Advance Sheet Jungle: Criminal Justice in the Courts of Review” 70 Iowa Law Review (1985) 332.
This précis of North American case law shows that there are two conceptually distinct approaches to the determination of harmless error. The first approach assesses the impact or likely impact of error on the jury’s deliberations. It therefore asks whether the error influenced or was likely to have influenced the verdict. On this approach, the strength of evidence against the defendant is not of primary importance, although such a consideration may have relevance in assessing whether the error influenced the result. Conversely, the second approach asks whether the evidence of guilt was so strong that trial error or errors may be justifiably ignored on appeal. The justification for this approach is not quite the bald one that the trial court has reached the correct result; rather, it is that as a retrial would undoubtedly lead to the same result – the defendant’s (re)conviction – the public interest justifies the conclusion that there has been no substantial miscarriage of justice. This inquiry is often framed in terms of whether the actual trial jury or a notional reasonable jury would have convicted the defendant had the error not occurred, or less frequently, as whether a verdict of guilty was the only proper or reasonable one on the evidence.

While the distinction between the two approaches has practical importance in that each can lead to different results, more importantly, and as the American jurisprudence suggests, underlying the two approaches are different visions of the proper role of a criminal appeal court. Proponents of the error-impact approach contend that such an approach respects the fact-finding role of the jury by leaving the determination of guilt exclusively to that body, whereas the guilt-based approach usurps this function by transferring it to an appellate court. Conversely, defenders of the

56 See John H Wigmore, Evidence in Trials at Common Law (Tillers revised ed, 1983) vol 1 at 929-933 and D Mathias, "Proof, Fairness and the Proviso" [2006] NZLJ 156. This paper adopts Wigmore’s classification of the two approaches to harmless error albeit with a subtle modification; whereas Wigmore says at 930 that the guilt-based approach represents an appeal court determining whether the verdict is correct, and hence that the “approach focuses on the question of whether the jury reached the right result despite the trial court’s error”, it is suggested this is a by-product of the guilt-based approach rather than its aim. Consequently, this paper uses the phrasing of a guilt-based or strength of evidence approach rather than Wigmore’s correct-result nomenclature. Traynor posits the existence of a third approach to harmless error, which he calls the “not clearly wrong” test, by which a court may dismiss an appeal, when, irrespective of trial error, the result is not clearly wrong upon the admissible evidence; see Roger J Traynor, The Riddle of Harmless Error (1970) 17. As Traynor observes, by that test, few errors would be reversible, ibid. However, it is difficult to see how such a test is an independent conceptual approach rather than a mere variant of what Wigmore describes as the correct-result approach, or what this paper describes as the guilt-based approach.

57 As the strength of the evidence against a defendant increases, the likelihood that any particular error influenced the verdict must decrease.

58 For example, see R v S [PL] [1991] 1 SCR 909 at 916 per Sopinka J.

59 The difference between an actual jury formulation and a notional reasonable jury is considered in chapter three. As we shall see, when faithfully applied, the former seeks to assess the strength of the evidence through the trial jury’s eyes. It follows that any jury questions that imply findings of fact or which allude to its collective process of reasoning are highly relevant to the appeal court’s task; for example, see R v Barlow [1986] 2 NZLR 88. The latter sometimes serves as a convenient catch phrase for or the extrapolation of the courts’ own assessment of the evidence; see the decision of the High Court of Australia in Weiss v R (2005) 224 CLR 500 at [37]-[39].

60 For example, see R v McI [1998] 1 NZLR 696 at 711 and Kotzekos v United States 328 US 750 (1946) at 763-764. Carter says that American appeal courts have “diminished the significance of constitutional violations and shifted the emphasis from the fairness of the process to the
guilt-based approach respond that as it is performed for the purpose of preserving the jury’s factual findings enshrined by a conviction, it therefore respects both the jury’s findings and function.61 Unsurprisingly then, while Kotteakos v United States62 appeared to represent the rejection of the correct-result approach in favour of the error-impact approach, it is clear that the existence of powerful evidence of guilt continues to influence the North American courts in dismissing appeals.63 This tension between the two approaches and the courts’ oscillation between them is not unique to North America. As we shall see, the same tension underlies the approach of New Zealand courts to the proviso since the advent of our modern rights of appeal.

III. GUILT-BASED ASSESSMENT VERSUS ERROR-IMPACT: THE NEW ZEALAND EXPERIENCE

In 1945 Maxwell Stuart Walker, a solicitor, was convicted of fraud in relation to the operation of his practice’s trust account. On appeal, he argued that the judge had misdirected the jury about the charge in the indictment.64 The Court of Appeal accepted this argument, holding that “there was confusion” in the summing up.65 In so doing, the Court implicitly acknowledged that there had been a miscarriage of justice. However, the Court then considered the possible operation of the proviso in the context of the then new Criminal Appeal Act, noting that by its terms, “in the case of an appeal against conviction ... the Court ... may ... dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.”66 The Court of Appeal then engaged in a close review of the evidence and concluded that no such miscarriage had occurred as:67

Though a fraudulent omission to account and a fraudulent conversion are not necessarily the same thing, yet in this case the evidence would have been precisely the same whether the prisoner had been charged with either fraudulent omission to account or fraudulent conversion, and that evidence was clearly sufficient to justify a guilty finding on either charge.... the jury

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must inevitably on a proper direction have found the prisoner guilty of fraudulent omission to account.

Walker therefore appeared to hold, without further discussion, that the proviso permitted an appeal court to assess the strength of the evidence and make its own conclusion about the defendant’s guilt; in short, that a guilt-based or strength of evidence approach was available under the terms of the statute, and that by it, an otherwise seemingly material error may be ignored. 68

Other cases from around this period suggest a similar approach. In R v Allingham & Brady 69 in 1954, the issue was whether the judge was correct in directing the jury that a torch, gloves and gelignite were instruments of house breaking. The Court of Appeal declined to rule on the point, on the basis that the appellants were in possession of one such instrument “beyond all question” and that as such, the verdict was correct. 70 In Campbell v R 71 the same year, the Court of Appeal dismissed an appeal against a conviction for burglary even though the judge did not summarise the defence case to the jury. Recognising that the error constituted a miscarriage of justice within section 385(1)(c) of the Crimes Act, the Court held that the inquiry in terms of the proviso’s invocation was “whether ‘on the whole of the facts, and with the correct direction, the only reasonable and proper verdict would be one of guilty’”. 72 The Court

68 The Court of Appeal did not cite the House of Lord’s then recent decision in Stirland v Director of Public Prosecutions [1944] AC 315, which applied a strength of evidence approach to the proviso albeit without any examination of the competing conceptual approaches. That case involved the introduction of inadmissible material [allegations of acts of prior forgery in relation to an indictment for forgery] and hence a miscarriage of justice, but the House of Lords dismissed the appeal on the basis that “a reasonable jury” as against a “perverse jury” would have undoubtedly convicted; see ibid at 321. See also the discussion of the case in chapter one.


70 Ibid at 1228.


72 Ibid at 25, citing R v McAllister [1952] NZLR 46. McAllister cites R v Haddy [1944] KB 442 as laying down the applicable test and R v Cohen & Bateman (1909) 2 Cr App R 197 as being its genesis. As McAllister notes at 47, the Haddy formulation had been approved by the House of Lords in Stirland v Director of Public Prosecutions [1944] AC 315. However, closer consideration of these three English cases illustrates that variation in language accompanying the guilt-based approach is not merely a New Zealand phenomenon. In Cohen & Bateman, Denniston J for the Court of Criminal Appeal initially framed the test this way at 207: “Taking sect. 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction the jury must have come to the same conclusion”; emphasis added. The Judge continued at 208: “If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso”; emphasis added. In Haddy, Humphreys J for the Court of Criminal Appeal cited Cohen & Bateman with approval, observing at 445 “it seems to us to matter very little what precise words are used so long as the language of the proviso is satisfied and the court is sure that there has been no ‘substantial miscarriage of justice’”; emphasis added. The House of Lords’ approval of Haddy in Stirland v Director of Public Prosecutions was preceded by the observation that the correct test was whether “a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict”; emphasis added. See the speech of Viscount Simon LC at 321.
applied the proviso, having satisfied itself that “no reasonable jury could have brought in a verdict other than that of guilty.”73

A year after R v Walker74 was decided, however, the Court of Appeal also appeared to endorse the error-impact approach as the correct one for the proviso’s application.75 In R v Wilkinson76 the defendant was convicted of incest. Consistent with the nature of the charge, the case against him depended heavily upon the credibility of the complainant.77 Oddly, the trial judge omitted to instruct the jury upon the standard of proof. Despite finding that this was a “serious omission”, the Court of Appeal dismissed the appeal upon the basis that the mistake “did not here occasion any substantial miscarriage of justice for the reason that the Judge appears to have adopted as his own, and to have passed to the jury ... a correct statement of the standard, which ... had been just made by counsel”.78 As in R v Walker,79 the judgment of R v Wilkinson80 is succinct and bereft of any discussion of the different conceptual approaches to the application of the proviso.

Since R v Wilkinson was decided in 1947, our courts’ methodology has fluctuated over six decades. Across a broad spectrum of trial error, the Court of Appeal has applied the proviso using both the guilt-based approach81 and the error-impact

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73 [1954] NZLR 22 at 25. The Court’s assessment of the evidence suggests it was satisfied about the defendant’s guilt. Justice Fair observed, ibid, that there was “very strong evidence of intent” to commit a crime and that the defendant’s “behaviour after he was approached made it clear that he had full use of his faculties and judgment.”

74 [1946] NZLR 512.

75 Relevant history is to be found in R v Hakiwai [1931] NZLR 405; R v Storey [1931] NZLR 417; R v Pickering [1939] NZLR 316 and R v Crossan [1943] NZLR 454. In R v Hakiwai and R v Storey the respective trial judges wrongly excluded potentially exculpatory evidence. In R v Pickering, the trial judge omitted to direct the jury of the need to consider the evidence discretely in relation to each count, thereby potentially affecting the outcome. The Court of Appeal under Myers CJ allowed all three appeals on the basis that trial error had deprived the defendants of the chance of an acquittal. Thus, in R v Pickering at 323, Ostler J held that trial error which “might reasonably have prejudiced an accused’s person’s chances of acquittal” automatically gave rise to a substantial miscarriage of justice thereby rendering the proviso inoperative. However, the three cases left open the possibility of the proviso being applied on the basis that trial error was unlikely to have affected the outcome. This occurred later in R v Crossan [1943] NZLR 454, a case better known for its discussion of duplicitous charges.

76 [1947] NZLR 412.

77 Although there was evidence from an occupant of the matrimonial home that the complainant frequently slept in her father’s room; see ibid at 413.

78 Ibid at 419.

79 [1946] 1 NZLR 512.


81 See R v Walker [1946] NZLR 512 (confusion as to the nature of the charge, but the jury “must inevitably” have convicted); Campbell v R [1954] NZLR 22 (no summary of the defendant’s case but this was the “only reasonable and proper verdict”); R v Weir [1955] NZLR 710 (wrongful admission of defendant’s criminal past, but a “reasonable jury” would have convicted); R v Dillon [1956] NZLR 110 (no identification by the judge of the evidence relevant
approach in roughly equal measure. Upon a handful of occasions, it has applied both approaches in the same case. More recently, both the Court of Appeal and Supreme
Court have endorsed the guilt-based approach, albeit without this nomenclature, in leading judgments upon the proviso.56 Neither Court, however, expressly excluded the error-impact approach. The cases below serve as examples of this period of history, the practical difference between the two approaches and the New Zealand courts' oscillation between both. From there we examine the leading decisions of the Court of Appeal in *R v Mc1*85 and more briefly, that of the Supreme Court in *Matenga v R*.86

In *R v Wall*87 in 1983 a Full Court of the Court of Appeal held that evidence obtained pursuant to an electronic interception warrant was admissible only in relation to drug-dealing offences and hence that other non-drug-dealing charges should not have been in the same indictment.88 Unsurprisingly, the error was held to constitute a miscarriage of justice.89 The resulting question, as framed by the Court, was whether the defendant had suffered "any practical harm".90 The Court then considered the evidence in the context of the issues at trial. It observed that the difficulty confronting the defendant was to show how he was "prejudiced in his defence by the joinder."91


Ibid at 239-241.

Ibid at 241.

Ibid.

Ibid.
the Court, Cooke J noted that while "attempts were made to find some plausible example of prejudice, such as a bearing on whether or not the accused elected to give evidence ... nothing capable of withstand scrutiny emerged." The Court satisfied itself that the wrongful inclusion of the additional charges had not influenced the trial’s outcome so that “the appeal fails under the proviso to s 385(1) of the Crimes Act 1961.”

Error-impact analysis also underlies R v Boyd in 1986 and R v H in 1999. In the former, the defendant was convicted of placing a bomb outside a house with the intent that it would explode and cause serious bodily harm. At trial, the prosecutor wrongly invited the jury to treat the defendant’s lies as corroborative evidence of an accomplice’s testimony. The Court of Appeal held that the error had given rise to a miscarriage of justice. However, it applied the proviso on the basis that the judge’s directions had removed the risk that the jury might have wrongly treated the defendant’s lies in this way:

In those remarks, not entirely logical though they may be if subjected to close analysis, the Judge went further than he had to in favour of the accused. We are satisfied from the general emphasis in the summing up that the jury could not have seen corroboration as a major factor in the case. There has been no substantial miscarriage of justice. We apply the proviso and dismiss the appeal against conviction.

In the latter case the defendant was convicted of sexual offending against an eleven-year-old girl but acquitted of like offending concerning a younger girl. The jury heard admissible evidence of statements by the defendant that he wanted to have sexual relations with both girls. The appeal concerned the judge’s directions about how the evidence should be treated, and in particular, a direction to the effect that this material “was a window” on the defendant’s character. The Court of Appeal held that these directions were wrong in law. A majority of the Court, however, concluded that the proviso should be applied. In reaching this conclusion, the majority considered that the directions had to be considered in context, “because that is the way they would be perceived by the jury.” The Court then analysed the summing up. While the offending directions assumed “some prominence”, the majority reasoned the jury would have treated the directions differently:

92 Ibid.
93 Ibid.
94 CA175/85, 9 June 1986.
95 CA359/98, 22 March 1999.
96 CA175/85, 9 June 1986 at 7, emphasis added.
97 R v H CA359/98, 22 March 1999 at [25].
98 Ibid at [27].
99 Ibid at [29].
100 Ibid.
... to a jury hearing the totality of the section of the summing up in which those words occur, they would not assume such prominence, rather, the jury would be likely to concentrate on the relevance of the words to the denial of guilt, which concept formed the substance of the direction.

Several other matters were seen as being indicative of the jury’s assessment of the case. First, the jury had acquitted the defendant on the charge in respect of the younger complainant. The majority said that this “would indicate that the jury did not reason from character or propensity to guilt, but rather, considered the evidence in relation to each complainant, and in particular the reliability of that evidence.”101 Second, the jury asked two sets of questions in relation to the evidence of the complainants. The majority thought that neither set “gives any indication of faulty reasoning caused by the error in the summing up.”102 Third, the verdict was returned several hours after both the summing up and the complainants’ evidential interviews had been replayed to the jury. This was seen as cementing the view that it was “unlikely that the inappropriate comments had any influence on that verdict.”103 As these passages illustrate, the Court’s analysis was directed at the error’s absence of effect rather than the apparent correctness of the verdict in terms of the defendant’s guilt.

Striking examples of the guilt-based or strength of evidence approach can be found in two cases a decade apart, namely R v Pope104 in 1988 and R v Fulton105 in 1998. In R v Pope106 the defendant and his associate murdered two men. The Crown case was that the defendants did so because at least one of the victims had provided information to the Police about Pope’s criminal activities. The murders were committed at a reserve, there being evidence that the eo-defendant shot both deceased with a shotgun while the defendant Pope was present. Shortly thereafter, both defendants made admissions. At trial, Pope argued that he was liable only for (double) manslaughter, saying that he thought his co-defendant intended to frighten the deceased by discharging the shotgun near them. The Court of Appeal held that the trial judge’s directions on this issue were wrong, in that the “jury were left with too stringent a test of Pope’s culpability”, thereby giving rise to a real risk the jury had wrongly rejected his case.107 In such circumstances, it could not be said that the error had not potentially influenced the verdict. Error-impact analysis was therefore unavailable. Citing Stirland v Director of Public Prosecutions,108 however, the Court of Appeal applied the proviso on the basis that the strength of the prosecution’s case was such there “was really an

101 Ibid.
102 Ibid.
103 Ibid.
104 CA305/87, 26 April 1988.
105 CA280/96, 7 April 1998.
106 CA305/87, 26 April 1988.
107 Ibid at 10.
overwhelming inference of ... mutual involvement in a planned and cold-blooded execution." The Court effectively held that it was satisfied of the defendant’s guilt, remarking that the “suggestion that Pope might only be guilty of manslaughter is quite unreal in light of all this evidence.”

*R v Fulton* concerned the rape of an elderly victim in her home. The assailant left a fingerprint at the scene on the inside of the back door. The fingerprint was later identified as belonging to the defendant. The defendant testified that he had never been to the victim’s house so that the fingerprint must have been misidentified. He was cross-examined, effectively it appears, that he had not raised these matters when questioned by Police. The defendant challenged this tactic on appeal as being in breach of his right to silence. Significantly, the trial judge did nothing to ameliorate the prosecutor’s potential damage to the defendant’s credibility by way of direction to the jury. On appeal, the Crown accepted that the trial had miscarried in terms of section 385(1)(c) of the Crimes Act. Consequently, the primary issue for the Court of Appeal was whether the proviso should be applied. As in *R v Pope*, because the error might have affected the verdict, the only basis for the proviso’s application was that the defendant had not actually suffered a substantial miscarriage of justice in light of his evident guilt. The Court of Appeal implicitly sanctioned this approach.

In enacting the proviso, Parliament’s intention must have been that it should be applied unless for good reason the Court thought fit not to do so. The overall inquiry must relate to what is in the interests of justice in the widest sense, from the point of view of the appellant, the victim and society as a whole. If the jury would without doubt have convicted had the error or errors not occurred, there can be no actual prejudice to the appellant from them. That being the case, Parliament has indicated that the error should not in general terms vitiate the conviction, albeit as a matter of residual discretion the Court does not have to take that view of a particular case.

The Court also found its stated test satisfied on the evidence:

There was absolutely no capacity for a mix up of prints in this process, and no basis for such a mix up was suggested or capable of being suggested. We are therefore sure that even if there had been no breach of the appellant’s right to silence, the jury would without doubt have found the appellant guilty.

*A. McI, Conceptual Confusion and Matenga*

In 1998 the Court of Appeal endorsed the guilt-based approach to the proviso in *R v McI*, a case regarded for just over a decade as the leading New Zealand authority
on the proviso. The Court did not, however, expressly exclude the error-impact approach and indeed, its analysis confused the two.

Mcl was convicted of a number of crimes alleging, in effect, the sexual abuse of his stepdaughter and a number of nieces. Other like charges had been severed from the trial, but these charges were inadvertently left in the indictment distributed to the jury. Further, the prosecutor wrongly put to the defendant in cross-examination that he had faced similar allegations in respect of a son and niece. The judge instructed the jury in orthodox terms that the counts in the indictment were to be considered separately, but a majority of the Court of Appeal, Tipping and Keith JJ, held that the direction was capable of being misconstrued in that it was “open to the construction ... that the evidence of one complainant was generally capable of supporting that of another.” Moreover, Tipping and Keith JJ expressed particular concern at the “paedophilic overlay in the Crown’s case without any specific [overriding] direction from the Judge”. These errors, in combination, were held to have led to a miscarriage of justice. This left open the question of the proviso’s application and the corresponding approach to the device.

The majority examined the language and structure of section 385(1) of the Crimes Act to conclude that the proviso invested an appellate court with a discretion to dismiss an appeal, notwithstanding that an appeal ground had been made out, “if it considers that in substance the conviction was justified.” In relation to the most common ground of appeal, namely a miscarriage of justice within section 385(1)(c) of the Act, Tipping and Keith JJ noted that what “saves the proviso in a para (c) case from the logical difficulty of contradicting the para (c) ground is the word ‘substantial’.” In such circumstances, “there has been a miscarriage of justice, but no substantial miscarriage of justice has actually occurred.” The majority therefore considered that Parliament’s use of the term “actually” was “strictly redundant and must ... have been included for emphasis.”

Justices Tipping and Keith then endorsed the guilt-based approach by citing with approval the House of Lords’ decision of *Stirland v Director of Public Prosecutions* and New Zealand authorities that had adopted the decision. It followed that:

116 Ibid at 707. Justice Thomas disagreed, observing at 698 that the trial judge had gone to “considerable lengths” to correctly explain that each count must be considered separately.

117 Ibid at 709.

118 Ibid at 710. Justice Thomas’s judgment is expressed as “proceed[ing] on the basis that one or more of the grounds of appeal have been made out and that, for the purpose of argument, they may have [had] a combined effect which could be said to represent a miscarriage of justice”; ibid at 700.

119 Ibid at 711.

120 Ibid.

121 Ibid.

122 Ibid.

The Court is entitled to consider that no substantial miscarriage of justice has actually occurred if, but only if, the jury would without doubt have convicted had the error or deficiency not taken place.

The majority also referred to the rationale for the guilt-based approach, acknowledging that if, “in spite of the errors or deficiencies, the jury would have convicted anyway, there can be no prejudice to the appellant from those errors or deficiencies.” 126 The question was therefore, “whether we can be sure that the jury would without doubt have found the appellant guilty in the absence of the irregularities and deficiencies identified earlier.” 127 However, having seemingly affirmed the guilt-based approach to the proviso, Tipping and Keith JJ then analysed the case by using the alternative error-impact approach. As the following passages reveal, rather than asking whether the jury would have convicted had the errors not occurred, the majority instead asked whether the errors might have affected the verdict: 128

We regard the cumulative weight of the various points as too great to allow such a conclusion. It is a reasonable possibility that the jury’s knowledge of the other accusations, the uncertainty in the summing up overall about whether the complainants could reinforce each other, and the general paedophilic overlay without a clear and positive direction from the Judge about the proper compass of that evidence, could in combination have had a material, perhaps even a decisive bearing on the jury’s appraisal of the credibility of each complainant. In short, we find ourselves unable to say that, these factors aside, the jury would without doubt have convicted. The factors in question could have made a difference.

Since preparing this judgment, we have had the benefit of considering in draft the judgment which Thomas J has delivered. While he is satisfied that the evidence demonstrates the appellant is guilty, we are not sure the jury would without doubt have convicted, had the various matters creating the miscarriage of justice not occurred. It is the potential effect of the problems in this case on the reasoning process of the jury that is crucial, not whether we consider the appellant is guilty.

This analysis is confused. As the expressed test was what the jury would have done had the errors not occurred, consideration of what impact the errors had, or might have had, was irrelevant. Further, unlike Thomas J, the majority made no apparent attempt to assess the strength of the admissible evidence in the case. 129 That, however, is the primary consideration under the guilt-based approach. It follows that while the majority in R v McI endorsed the guilt-based approach to the proviso, the resulting analysis is heavily characteristic of error-impact.

Justice Thomas dissented. Unlike the majority judgment, Thomas J’s judgment is generally symmetrical in terms of the posited test and its application. 130 Aspects of

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126 Ibid.
127 Ibid.
128 Ibid, emphasis added.
129 Ibid at 702-703.
130 Ibid.
the dissent are not free from doubt, however, as vestiges of an error-impact approach also appear. The Judge stated the applicable test in similar terms to the majority so that the question was whether the defendant would have been convicted had the errors not occurred. This, Thomas J said, reflected the legislative intent.\textsuperscript{131}

If justice is to be done, the proviso must be applied in accordance with Parliament's intent. That intent is indicated by the language used. Parliament used the word "considers" rather than a more demanding word such as "satisfied"; it used the word "substantial" to describe the miscarriage of justice, notwithstanding that a miscarriage of justice had immediately beforehand been stipulated as a ground of appeal; and it imported the word "actually" for no apparent purpose than to emphasise that a substantial miscarriage of justice must have in fact occurred. In my view, it is clear Parliament did not want convicted persons to go free or obtain the benefit of a new trial on the basis of an error of law or irregularity unless the error or irregularity would have made a difference to the outcome.... The question therefore becomes; on the whole of the admissible evidence, could a reasonable jury have failed to convict?

Unlike the majority however, the Judge reached the conclusion that the jury "could not have failed to convict".\textsuperscript{132} Consequently, Thomas J did not consider that the defendant had actually suffered a substantial miscarriage of justice.\textsuperscript{133}

Consistent with the guilt-based approach to the proviso, the Judge focussed upon the admissible evidence at trial. The Judge said that the Crown's case was "extremely strong"\textsuperscript{134} and "highly prejudicial" in a legitimate way.\textsuperscript{135} Similarly, Thomas J saw the errors as being "overwhelmed by the strength of the prosecution evidence".\textsuperscript{136} Moreover, the Judge recognised that in "many cases where the proviso is in issue it is necessary for the Court to consider the evidence in considerable detail" in order "to decide whether, on the admissible evidence, a reasonable jury could have failed to convict."\textsuperscript{137} But despite this apparent endorsement of the guilt-based approach, the Judge also considered the effect of trial error. Justice Thomas likened "the impact of the matters complained of" having "had no more weight than a feather resting on a turgid pond."\textsuperscript{138} Similarly, the Judge also spoke of the defendant having suffered little "prejudice".\textsuperscript{139} Finally, Thomas J referred to the case not being one "where the additional illegitimate prejudice [from error] could have tipped the scales in favour of the accused in the course of the jury's deliberation when deciding whether there was a
reasonable doubt.”\textsuperscript{140} It follows that as with the majority judgment, the dissent is also characterised by conceptual confusion between the guilt-based and error-impact approaches to the proviso.

In \textit{Matenga v R}\textsuperscript{141} in 2009, the Supreme Court adopted the decision of the Australian High Court in \textit{Weiss v R}.\textsuperscript{142} In doing so, the Supreme Court sanctioned the guilt-based approach in light of Weiss’s test for the application of the proviso, namely appellate satisfaction, beyond reasonable doubt, that the defendant was guilty of the crime in issue according to the admissible evidence.\textsuperscript{143} But as in \textit{McI} eleven years earlier, the applicability of the error-impact approach was implicitly left open, with the Supreme Court observing that the task of an appellate court under the proviso was to assess whether the “potentially adverse effect [of error] on the result may, \textit{actually}, that is in reality, have occurred.”\textsuperscript{144} A substantial miscarriage of justice was therefore “one which in substance ... affected the result of the trial.”\textsuperscript{145}

\section*{IV. THE RELATIONSHIP BETWEEN THE PROVISO AND THE GROUNDS OF APPEAL}

The relationship between the proviso and the various grounds of appeal has troubled the courts here and abroad.\textsuperscript{146} For example, in the Australian case of \textit{R v Gallagher}\textsuperscript{147} Brooking JA described the issue as a riddle worthy of Homer.\textsuperscript{148} In part, the difficulties arise because of the language employed by the English template of 1907 and reproduced by section 385(1) of the Crimes Act 1961. The section provides that the appeal court “must” allow the appeal “if it is of the opinion” that an appeal ground is made out, and yet that the appeal court “may” dismiss the appeal “notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant ... if it considers that no substantial miscarriage of justice has actually occurred.”\textsuperscript{149} Consequently, the section appears to pull the appeal court in opposite directions by

\textsuperscript{140} Ibid at 703. The Judge also noted that “the impact or influence on the jury of certain directions in the Judge’s summing up can be too easily overstated” thereby causing the mistaken “perception ... that a single phrase or sentence can distort the jury’s deliberations”; ibid at 698.

\textsuperscript{141} [2009] 3 NZLR 145.

\textsuperscript{142} (2005) 224 CLR 300.

\textsuperscript{143} See [2009] 3 NZLR 145 at [25]-[27].

\textsuperscript{144} Ibid at [31], emphasis in original.

\textsuperscript{145} Ibid, footnote 39.

\textsuperscript{146} Many of the cases are collected in \textit{R v Gallagher} [1998] 2 VR 671. However, with the move to a single ground of appeal in England and the proviso’s repeal there in 1995 (see the Criminal Appeal Act 1995 (UK)), the refinements of the Australian High Court in Weiss v R (2005) 224 CLR 300 and Canada’s restriction of the proviso in 1955 to wrong decisions on a question of law, the significance of this issue has diminished for courts elsewhere.

\textsuperscript{147} [1998] 2 VR 671.

\textsuperscript{148} Ibid at 672.

\textsuperscript{149} Crimes Act 1961, s 385(1), emphasis added.
directing the court, once an appeal ground is satisfied, to allow the appeal while also considering the application of the proviso in order to dismiss the appeal. Other statutory language adds to the problem. For example, the application of the proviso is predicated upon the absence of a “substantial miscarriage of justice” and yet the primary ground of appeal is that the defendant has suffered a “miscarriage of justice”. How are these statutory concepts to be distinguished? In part, the troubled relationship also reflects the nature of at least two of the grounds of appeal subject to the proviso. Paragraphs (a) and (d) of section 385(1) provide that an appeal court must allow the appeal if the verdict is unreasonable or the trial was a nullity. Intuitively, both situations appear to involve a substantial miscarriage of justice and yet the potential applicability of the proviso suggests that this is not necessarily so. In considering how the New Zealand courts have responded to these difficulties, the miscarriage of justice and nullity appeal grounds provide the focus as these are the source of most of the relevant common law and the more important issues posed by it. The appeal grounds within paragraphs (a) and (b) are, however, briefly considered first.

A. The Proviso and Unreasonable Verdicts

The Court of Appeal has ventured that it is “hard to contemplate a case under para (a) where the proviso could be applied”. The Supreme Court has been less circumspect, observing that the proviso “cannot possibly apply to that paragraph since the rendering of an unreasonable verdict must always constitute a substantial miscarriage.” Neither Court has, however, had occasion to directly confront the issue so these remarks remain obiter dicta. While the Supreme Court’s view commands respect, it depends upon the assumption that a criminal appeal court may never receive evidence that was not given at trial for the purpose of augmenting a jury’s verdict. History and practice suggest this assumption is not beyond doubt, however.

In relation to history, a major purpose of the Criminal Appeal Act 1907 was to relieve the Home Secretary of the task of examining the question of actual guilt and to put that issue before a new court, the Court of Criminal Appeal. Accordingly:

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151 R v McI [1998] 1 NZLR 696 at 711 per Tipping J.

152 Matenga v R [2009] 3 NZLR 145 [9] per Blanchard J citing Owen v R [2008] 2 NZLR 37. The proviso, however, was not discussed in Owen. See also the observation in Sungsuwan v R [2006] 1 NZLR 730 at [114] per Tipping J: “para (a) of s 385(1) cannot logically be susceptible to the application of the proviso”.


... it may well have been thought by some, at the time the Act was passed, that the powers given to the Court of Criminal Appeal by section 9 ... coupled with the proviso to section 4(1) of the Act, would enable the Court, in suitable cases, virtually to re-try the case.

In this respect, it is noted that s 389(b) of the Crimes Act 1961, as with s 9 of the original English Act, permits the calling of witnesses irrespective of whether they were called at trial.

As to practice, on occasions courts of criminal appeal do receive evidence from the prosecution, beyond that in rebuttal to fresh evidence from a defendant, in order to conclude that a defendant has not suffered a miscarriage of justice and thereby dismiss an appeal. For example, in *R v Vaituliao and others* the Court of Appeal relied upon post-trial evidence of guilt, a letter by the defendant to the victim's family admitting responsibility for the offence, in concluding that "on any view, there can be no miscarriage of justice resulting from any defect in the trial." And in reaching this conclusion, the Court implicitly acknowledged that it would continue to receive such additional material for the purpose of determining criminal appeals.

In any event, the dissonance between paragraph (a) and the proviso is less acute if one considers the broad powers available to appeal courts to amend or substitute a conviction pursuant to s 386 of the Crimes Act 1961. It is not difficult to imagine a case in which, for example, an aggravating feature of a charge is not supported by the evidence but the basic charge is. Amending the conviction to conform to the proof in such a situation is compatible with the view that the defendant has not, in substance, suffered a substantial miscarriage of justice even though the verdict is technically unreasonable.

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155 Ibid.
157 Ibid at [26]: "Although, in this case, we have no doubt that the post-trial admission of guilt was unequivocal and means that no miscarriage of justice could have occurred, we acknowledge that, in some cases, the same result may not follow. The relationship to an appeal outcome of admissions in pre-sentence reports, medical reports and similar materials will vary, according to the circumstances and the grounds of appeal. Each case will depend on its own facts."
158 As to which, see *Walsh v R* [2007] 2 NZLR 109; *R v Thompson* [2005] 3 NZLR 577 and *Spies v R* (2000) 74 ALJR 1263.
159 English cases somewhat analogous to this example are discussed, albeit unfavourably, by J C Smith, "The Criminal Appeal Act 1995: (1) Appeals Against Conviction" [1995] Crim LR 920 at 926-927.
B. The Proviso and Errors of Law

This ground of appeal has been the least problematical in relation to the application proviso for two reasons. First, in 1944 the House of Lords held that an error of law was subject to the application of the proviso if a reasonable jury would undoubtedly have convicted but for error. The high authority of Stirland v Director of Public Prosecutions was adopted shortly thereafter by the New Zealand Court of Appeal and Stirland's guilt-based approach to the proviso has since been regularly applied to errors of law. Second, and as noted by Tipping J in Sungsuwan v R, a wrong decision on a question of law need not necessarily affect a verdict. Unsurprisingly then, the Court of Appeal has also used the error-impact approach to the proviso when it is clear that an error of law has not affected the trial's outcome.

But while this ground has been the least problematical, it has not been free from all difficulty. The language of the ground is awkward, in that the appeal court is directed to allow the appeal when it is of the opinion that the verdict "should be set aside". Logically, this appears to preclude the error-impact approach to the proviso as a verdict should only be set aside when the error has affected the verdict, but "it has long been accepted that para (b) is not to be read as having that literal effect". Further, in order for the ground of appeal to be engaged, there must have been an error of law rather than one of fact, a distinction of critical importance in relation to the similarly worded case-stated appeals regime and the corresponding proviso pursuant to section 382 of the Crimes Act 1961.

161 Although it troubled the English courts because of the Court of Criminal Appeal's view in R v Cohen & Bateman (1909) 2 Cr App 197 that errors of law should be treated differently from other errors. See chapter three.

162 [1944] AC 315. Ironically, Stirland did not involve a wrong decision on a question of law as there was no actual ruling in that case that the evidence in issue, the defendant's propensity to commit fraud, was admissible.


164 [2006] 1 NZLR 730 at [114].

165 For example, see R v Crossan [1943] NZLR 454 and R v Templer (2003) 20 CRNZ 181.

166 Crimes Act 1961, s 385(1)(b).


168 As to which, see R v Gwaze [2010] 1 NZLR 646 (CA) and [2010] NZSC 52. In Canada, the proviso within s 686(1)(b)(iii) of the Criminal Code now applies only to a "wrong decision on a question of law" within s 686(1)(a)(ii) of that Code. Classification of the error is therefore similarly critical; see R v Khan [2001] 3 SCR 823.
C. The Proviso and Miscarriages of Justice

The most common ground of appeal against conviction is that the defendant has suffered a miscarriage of justice. This follows from the elasticity of the phrase and the breadth of error encompassed by it. Although the provision refers to the appeal court being satisfied that the defendant has suffered a miscarriage of justice, the courts have held that the real risk of such a miscarriage is sufficient to satisfy the statutory ground. It follows that a defendant need only show that there is a real risk that trial error influenced the verdict, thereby precluding the reasonable prospect of an acquittal. This approach has led to "a degree of awkwardness" in the relationship between the appeal ground and the proviso because the inquiry as to whether trial error might have precluded an acquittal effectively transposes the two approaches in relation to the proviso to the appeal ground: did error affect the outcome? And if so, would the jury or a reasonable jury have convicted but for error? At heart, the problem is definitional: how is a miscarriage of justice distinguished from a substantial miscarriage of justice? The answer to this question and the corresponding tension between the proviso and this ground of appeal may be found in three decisions of the Supreme Court: *Martin v R* in 2005, *Sungsuwan v R* in 2006 and *Matenga v R* in 2009.

Lesley Jane Martin was a registered nurse. Her mother, Joy Martin, was terminally ill and in considerable pain. According to the defendant, Mrs Martin asked for the defendant’s help to commit suicide. The defendant said she was initially

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169 Crimes Act 1961, s 385(1)(c).

170 Ranging from inadequate pre-arrest investigation by the Police, as to which see *R v Harmer CA 324/02 & CA 352/02*, 26 June 2003, to the post-conviction discovery of fresh evidence, for example, see *R v Kingi CA122/05*, 10 August 2005.


172 See *Tuia v R* [1994] 3 NZLR 553 at 555: “in order to succeed on the miscarriage of justice ground, the appellant does not have to establish that there actually was a miscarriage of justice. All the appellant has to do is to satisfy the requirements of the authorities already cited. If the appellant can get that far the only way the Crown can succeed in holding the conviction is to satisfy the Court that no substantial miscarriage of justice has actually occurred. It will, in ordinary circumstances, be unlikely that after the appellant has shown a perceived risk of injustice the Crown will be able to demonstrate that nevertheless no substantial miscarriage of justice has actually occurred.”

173 *R v Sungsuwan* [2006] 1 NZLR 730 at [113] per Tipping J.

174 Cases on point from cognate jurisdictions are discussed by the Victorian Court of Criminal Appeal in *R v Gallagher* [1998] 2 VR 671.


176 *R v Sungsuwan* [2006] 1 NZLR 730.

177 [2009] 3 NZLR 145.

178 The facts are taken from the decision of the Court of Appeal; see *R v Martin CA199/04*, 14 February 2005.
shocked at the suggestion, but on a May evening in 1999 she injected her mother with a potentially fatal dose of morphine. Joy Martin died the next day. Although a Police inquiry was immediately launched, the defendant agreed to make only an 'off the record' statement. Consequently, her acknowledged involvement could not be tendered in evidence. Further, as the medical evidence could not establish that the defendant had caused her mother’s death, the Police closed their investigation without laying charges. Three years later, the defendant published a book in which she admitted the preceding sequence. Unsurprisingly, the Police reopened their inquiry and charged the defendant with attempted murder.179 At trial, and without the risks associated with giving evidence, the defendant sought to portray her admissions as unreliable. She called an expert who testified about a state called cognitive dissonance, in which through stress; a person might believe events that are untrue. By implication, said the defence, Lesley Martin suffered from that state. This proposition was problematic, for not only had the expert not examined the defendant, but the defendant had made “many deliberate, repetitive, detailed, private and public admissions of [her criminal] conduct”.180 Having been convicted, the issue for the Court of Appeal was whether the trial judge had erred in his jury directions in relation to the defendant’s criminal intent, the cognitive dissonance issue and the relevance of stress to both. On these topics the Court of Appeal held that the directions “were open to criticism”.181 It dismissed the appeal, however, by applying an error-impact approach to the proviso, holding that the verdict could not have been “tainted” by the misdirections so that there was no substantial miscarriage of justice.182

The defendant sought leave to appeal to the Supreme Court upon the ground that the Court of Appeal’s application of the proviso was wrong in law.183 The Supreme Court rejected leave on the basis that as the misdirections could not have affected the verdict, the application of the proviso was not in issue:184

Although the Court of Appeal determined the case by application of the proviso, on the reasoning in the judgment that does not seem necessary. If, as the Court found, the misdirections could not have affected the verdict – were not material – there could be no unfair trial, no miscarriage of justice and no need to invoke the proviso.

In Martin then, the Supreme Court appeared to accept that the proviso was applicable to the miscarriage of justice appeal ground and that such a miscarriage was

179 The scientific evidence could not sustain a charge of murder, thus the attempted murder count; see ibid at [23].
180 Ibid at [24].
181 Ibid at [111].
182 Ibid at [118].
184 Ibid at [6]. By virtue of s 13(1) of the Supreme Court Act 2003, the 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.” Section 13(2) of the Act deems it necessary for the Court to hear a criminal appeal if the case “involves a matter of general or public importance” or “a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard.”
one in which the error was capable of having affected the verdict. This view was ultimately adopted in Matenga v R, but only after contrary observations in Sungsuwan v R.

The defendant in Sungsuwan was convicted of rape. On appeal, he argued that further evidence ought to have been adduced at trial by his counsel. The Court of Appeal rejected this argument, holding that defence counsel’s tactical decision against calling the evidence was not ‘radical error’ as understood in the context of such complaints. The Supreme Court dismissed a subsequent appeal, but it emphasised that the overriding inquiry was whether the defendant had suffered a miscarriage of justice. Within this context, Elias CJ and Tipping J made a number of observations about the proviso’s relationship with section 385(1)(c) of the Crimes Act.

Chief Justice Elias opined that the proviso would be unlikely to save a conviction if the defendant had suffered a miscarriage of justice. In such circumstances, “resort to the proviso is not likely to be appropriate” because either the conviction would have been “unsafe” or the fairness of the trial irreparably compromised. This reasoning appeared to be predicated upon the assumption that the establishment of a miscarriage of justice necessarily entailed some substantial wrong going either to the fairness of the trial or rendering the resulting conviction unsafe. These propositions were not explored further, however, and neither did the Judge explain the relevance of the safety of conviction test, in circumstances where that nomenclature was arguably to import the now single statutory ground of conviction appeal in England and Wales, a jurisdiction that, in 1995, abolished the proviso.


[2006] 1 NZLR 730.

Namely that, based on the experience of two witnesses, the complainant’s screams were in fact consistent with consensual sexual relations.

R v Horsfall [1981] 1 NZLR 116 held that trial error on the part of defence counsel could constitute a miscarriage of justice. In R v Poinon [1985] 1 NZLR 109 at 114 the Court of Appeal described Horsfall error as “radical”, a phrase later arguably adopted by the Court as stipulating a pre-condition to a miscarriage of justice. For example, see R v Paparahi (1993) 10 CRNZ 293.

[2006] 1 NZLR 730 at [6].

Although our courts have often referred to a conviction being unsafe, with that term being used as a convenient shorthand for the s 385(1)(c) Crimes Act appeal ground. For examples, see R v Khan CA312/05, 7 March 2006; C v R CA126/04, 18 April 2005; A v R CA136/03, 24 July 2003; R v Kerr CA504/99, 11 April 2000; R v Sharplin CA78/97, 27 May 1997; J v R CA426/92, 28 June 1993; R v Gallagher CA417/92, 23 February 1993; R v Taylor CA155/90, 2 November 1990; R v Sampson CA85/88, 18 May 1989; R v Terry CA200/86, 19 May 1987 and R v Simmons CA190/83, 2 April 1984.

[2006] 1 NZLR 730 at [6].

The Criminal Appeal Act 1995 (UK) amended s 2 of the Criminal Appeal Act 1968 (UK), by directing the Court of Appeal to allow an appeal if “the conviction is unsafe”. The genesis of the reform lay in a report chaired by Viscount Runciman, which regarded the pre-existing statutory grounds as “confusing”, overlapping and insufficiently flexible. The report also saw the proviso as “redundant”; see Royal Commission on Criminal Justice, Royal Commission on Criminal Justice Report (1993) 167-170. Consequently, at 168 the Commission proposed that an appeal should be allowed if the conviction was unsafe or may be so. The latter limb was dropped in the
Justice Tipping went further, for His Honour suggested that the proviso could not apply to cases within section 385(1)(c) of the Crimes Act. The Judge observed that as a miscarriage of justice ordinarily involved trial error giving rise to "a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong", then "there is no room to apply the proviso once a s 385(1)(c) miscarriage of justice has occurred." Approaching matters in this way, "effectively fuses para (c) and the proviso. The purposes of the proviso are already subsumed in the criteria for establishing the [appeal] ground."

There is no disadvantage to appellants, or indeed the Crown, in this. If there is a real risk of an unsafe verdict it cannot be said that no substantial miscarriage of justice has actually occurred. The same applies if the trial has not been fair. Just as para (a) of s 385(1) cannot logically be susceptible to the application of the proviso, so too para (c), construed in this way, is not susceptible to its application either. The result is that the operation of the proviso is likely to be focused primarily on s 385(1)(b) which deals with erroneous legal decisions. In that context it is relatively easy to contemplate an erroneous legal decision which cannot sensibly have given rise to any real risk of an unsafe verdict and hence cannot have led to a substantial miscarriage of justice.

This analysis, however, sits uncomfortably with the language of section 385 of the Crimes Act, which draws a distinction between a miscarriage of justice and a substantial miscarriage of justice, and the structure of that section, which appears to contemplate discrete stages of inquiry by directing an appeal court's attention first to the...
grounds of appeal and then, if a ground is made out, to the proviso. Both points were implicitly recognised by the Supreme Court in *Matenga v R.*

In *Matenga* the Court of Appeal applied the proviso after finding that the defendant had suffered a miscarriage of justice within section 385(1)(c) of the Crimes Act 1961. It considered that "no substantial miscarriage of justice actually occurred ... in this instance." On appeal to the Supreme Court, and citing *Sungsuwan v R,* the defendant argued that these conclusions were incompatible and that the proviso could not remedy a miscarriage within section 385(1)(c) of the Act. This put the relationship between the two directly in issue.

In a judgment delivered by Blanchard J, the Court considered the intervening decision of the Australian High Court in *Weiss v R* and that Court's examination of the history to the proviso including the Exchequer Rule. Noting that historically, *any* error at trial constituted a miscarriage of justice irrespective of its significance, the Court "hesitated about whether in its statutory context that is the meaning which should be given to the word" as it said that the High Court had done in *Weiss.* The Supreme Court, however, rejected this approach as, "Few trials are perfect in all respects. Frequent use of the proviso may create the false impression that the appeal court is too ready to resort to it despite the existence of a miscarriage of justice." Instead, the Court held that a miscarriage of justice did not encompass "those irregularities which plainly could not, either singly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages." It followed that a "miscarriage is more than an inconsequential or immaterial mistake or irregularity" and was rather one "which was capable of affecting the result of the trial". Accordingly, having found a miscarriage of justice within s 385(1)(c) of the Crimes Act 1961, namely an error that was capable of having affected the verdict, "the task of ... [a] Court of Appeal under the proviso is then to consider whether that potentially adverse effect on the result may

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197 [2008] NZCA 260. Its decision and that of the Supreme Court are discussed more fully in chapter three.
198 Ibid at [45].
199 [2006] 1 NZLR 730.
201 (2005) 224 CLR 300.
203 Ibid at [30]. A close reading of *Weiss* reveals that the High Court did not hold that any error, irrespective of its materiality, constituted a miscarriage of justice. Rather, the High Court observed that this was the historical position under the Exchequer rule, and that the proviso had to be construed in light of this history.
204 Ibid.
205 Ibid.
206 Ibid at [30] and [31] respectively, emphasis in original.
actually, that is, in reality, have occurred."\textsuperscript{207} On this approach, a substantial miscarriage of justice was therefore one that "in substance, that is, in reality, affected the result of the trial."\textsuperscript{208}

By defining the respective terms in this way, the Supreme Court acknowledged, in accordance with the language and structure of the statute, the potential applicability of the proviso to the miscarriage of justice limb, the different inquiries in relation to each and the viable relationship between both.\textsuperscript{209} But while clarifying this area, the Court highlighted difficulties with a related one, namely the proviso's interaction with the final ground of appeal contained within section 385(1)(d), that when the trial was a nullity. In an obit dictum, the Court suggested that the proviso could not apply to a nullity which was "unlawful and cannot be upheld."\textsuperscript{210} Such a view, said the Court, had "rightly been ... taken by the Court of Appeal."\textsuperscript{211} But as we shall see, the position cannot be so simply stated.

\textbf{D. The Proviso and Nullities}

The New Zealand proviso is unique in expressly permitting an appeal court to dismiss an appeal even though the trial was a nullity.\textsuperscript{212} The provision, which formed part of the changes effected by the 1961 Crimes Act, has been described as both "a perceptive piece of realism by Parliament" and as "a legislative encouragement to approach technical defects in a practical way."\textsuperscript{213} The impetus for this aspect of the proviso is to be found in the 1958 decision of \textit{R v Bell}\textsuperscript{214} that Parliament sought to correct in 1961.

\textsuperscript{207} Ibid at [31], emphasis in original.

\textsuperscript{208} Ibid, footnote 39.

\textsuperscript{209} Consider, however, the subsequent decision of the Court of Appeal in \textit{R v Guo} [2009] NZCA 61.

\textsuperscript{210} [2009] 3 NZLR 145 at [9].

\textsuperscript{211} Ibid, citing \textit{R v Blows} CA103/95, 31 August 1995 and \textit{R v O (No 2)} [1999] 1 NZLR 326.

\textsuperscript{212} Crimes Act 1961, s 385(1)(d). In England, the determination that a trial was a nullity precluded the application of the proviso while permitting an order venire de novo. Such an error, the English courts said, was jurisdictional; see \textit{R v Mullan and others} [1984] 3 All ER 908; \textit{R v Morais} (1988) 87 Cr App R 9 and the decision of the House of Lords in \textit{Crane v Director of Public Prosecutions} [1921] 2 AC 299. While more recent authority such as \textit{R v Ashton} [2007] 1 WLR 181 had suggested a less severe approach, the decision of the House of Lords in \textit{R v Clarke} [2008] 1 WLR 338 has been seen as an unwelcome return to "'legalism'"; see PJT Fields, "Clarke and McDaid: A Technical Triumph" [2008] Crim LR 612 at 612. The position in Australia is unresolved. The New South Wales Court of Criminal Appeal recently divided upon the question of whether the proviso was applicable to a nullity, as to which see \textit{Swannson v R} (2007) 69 NSWLR 406, but the High Court has yet to determine the point. Its case law on nullities (for example, see \textit{Maher v R} (1987) 163 CLR 221) in conjunction with its fundamental error jurisprudence (see chapter four) tends to suggest that the proviso is incompatible with the finding that a trial was a nullity. In any event, the text of the New Zealand Crimes Act is clear that the proviso may 'cure' a nullity providing the defendant did not suffer a substantial miscarriage of justice. It is suggested this sets the New Zealand proviso apart.

\textsuperscript{213} \textit{R v Kestle (No 2)} [1980] 2 NZLR 353 at 359 and 360 respectively per Richmond P.

\textsuperscript{214} \textit{R v Bell} [1958] NZLR 449.
Bell was convicted of causing death under the influence of alcohol following a trial in which the jury was improperly constituted. The judge discharged two jurors after the jury had been empanelled as they knew those involved in the case. The judge then substituted them with two fresh jurors. The difficulty was that the Juries Act did not permit this course. In a brief judgment, the Court of Appeal held that this process "was not permissible and vitiated the trial, so that the conviction is bad and must be quashed." Although the Court did not use the term nullity, it appears that the error was treated as going to the jurisdiction of the trial court thereby causing a defect of this nature.

The first case to test the effect of the recast proviso involved the same error. Following the empanelment of the jury to try the defendant Kestle for murder, the judge discharged a juror who had a connection to the defendant and substituted another. While the Court of Appeal was not wholly satisfied with its earlier reasoning in Bell, as the Court noted, that "case was a deliberate decision by our predecessors, after argument, that the course taken by the trial Judge there was not permissible." It followed that "the Judge made ... a wrong decision on a question of law." The Court, however, immediately added that "it does not automatically follow that there was a miscarriage of justice, still less that the trial was a nullity, still less that this Court cannot consider under the proviso that no substantial miscarriage of justice has actually occurred." This was because the effect of the finding of a nullity was not argued in Bell, and more importantly, the enactment of the "significantly" amended proviso in the intervening period. Having considered the history above, the Court observed that the "New Zealand section is of special significance for a case such as the present, as the section clearly leaves it open to the Court to apply the proviso even when the trial was a 'nullity'." Whether a trial was within such a category was a question "of some difficulty" and "there may be no single test", but even "Serious procedural defects do not necessarily have that result." The Court, however, emphasised that in light of the proviso's potential applicability:

215 See the Juries Act 1908, s 108.
216 [1958] NZLR 449 at 453 per Gresson P.
217 As noted by a Full Court of the High Court in Re Kestle [1980] 2 NZLR 337 at 348 and by Lord Atkinson in Crane v Director of Public Prosecutions [1921] 2 AC 299 at 323, the term is not used in the sense that the trial has no legal effect or that it never, in law, took place. In Condon v R [2007] 1 NZLR 300 at [77], the Supreme Court appeared to accept that an unfair trial was not a nullity citing Jago v District Court of New South Wales (1989) 168 CLR 23 at 56-57 per Deane J.
218 R v Kestle (No 2) [1980] 2 NZLR 353 at 357 per Richmond P.
219 Ibid.
220 Ibid.
221 Ibid.
222 Ibid at 358.
223 Ibid at 359, citing the decision of the Privy Council in Hemapala v R [1963] AC 859.
224 Ibid.
... the Courts in this country may rarely be faced with the task of drawing the line and in our view need not do so in the present case. No matter whether a mistake should be classified as a wrong decision on a question of law or as a miscarriage of justice or as resulting in a trial that was a 'nullity', or as overlapping two or all three of those categories, it is prima facie a ground for allowing an appeal; but it is subject always to the proviso....

It followed that the "important question" was "whether this Court considers that no substantial miscarriage of justice has actually occurred."\(^{225}\) In determining this issue, the Court of Appeal said that a "radical or fundamental" error would exclude the operation of the proviso — presumably by itself constituting a substantial miscarriage of justice — but that this depended upon the seriousness of the error in "light of its consequences for the accused and the object of the [infringed] statutory provisions".\(^{226}\) Applied to the facts, the error was not of this nature as the relevant section of the Juries Act was intended to ensure that a jury was selected at random for the purpose of facilitating a fair trial and the judge had acted to achieve that objective.\(^{227}\) Further, the defendant had not suffered prejudice.\(^{228}\)

The Court also considered other matters. It noted that the defendant had not raised the point either at trial or upon his first appeal to the Court several years earlier.\(^{229}\) This underscored the Court's "belief that the reaction of the ordinary citizen would be to regard the course adopted by the trial Judge as a fair and commonsense one in all the circumstances, whatever the technicalities of the law."\(^{230}\) Canadian case law supported "the view that there was nothing inherently unfair in the course taken by the Judge here" and English common law was seen "as discouraging an unduly technical approach."\(^{231}\) The Court also noted that the proviso envisaged a practical response to procedural flaws.\(^{232}\) It concluded:\(^{233}\)

\(^{225}\) Ibid, emphasis added.

\(^{226}\) Ibid.

\(^{227}\) Ibid at 359-360.

\(^{228}\) Ibid.

\(^{229}\) Ibid at 360. The appeal was the second to the Court of Appeal following a reference by the Governor-General pursuant to s 406(a) of the Crimes Act 1961. The first appeal is reported as \(R v Kestle\) [1973] 2 NZLR 606 and involved a not dissimilar contention in relation to a defect in the committal process. An intervening application for habeas corpus was dismissed by a Full Court of the High Court in \(Re Kestle\) [1980] 2 NZLR 337, in part because of the power of an appellate court to apply the proviso to a nullity; see ibid at 347-348.

\(^{230}\) Ibid.

\(^{231}\) Ibid. Of the English cases, Cooke J said extra-judicially in 1955 that there was "no touchstone for determining when an irregularity is so serious as to cause mistrial"; see R B Cooke, "Venire De Novo" (1955) 71 LQR 100 at 128.

\(^{232}\) Ibid.

\(^{233}\) Ibid at 361.
We have given the argument for the applicant extensive consideration, bearing in mind especially that the conviction was for murder and that the complaint relates to the composition of the jury. But in the end, and in the words of the proviso to s 385(1) of the Crimes Act, notwithstanding that we are of opinion that the point raised in the appeal might be decided in favour of the appellant, we consider that no substantial miscarriage of justice has actually occurred.

Three points emerge from Kestle. First, that the proviso is applicable to a trial that was a nullity. Although this is clear from the statute itself, it bears repeating in light of the contrary observation of the Supreme Court in Matenga v R. Second, in determining whether a defendant had suffered a substantial miscarriage of justice as a consequence of procedural error giving rise to a nullity, a broad practical approach was called for. Accordingly, while the significance of the infringed provision in its statutory context was important, so too were prejudice, the practical effect of error, whether the point had been taken at trial and the overall justice of the case. Third, even serious procedural errors would not necessarily preclude the application of the proviso. In this respect, it is noted that the Court of Appeal effectively overruled its recent decision in Bell upon the proviso’s strength. Conversely, “radical or fundamental” procedural errors were beyond the application of the proviso although, regrettably, this category went unexplored.

A similar picture emerges from the subsequent cases of R v Fulcher and R v Loumoli. In Fulcher the defendant sought but was denied severance of charges. He lodged an appeal with the Court of Appeal. The trial judge, however, commenced the trial before the appeal could be heard. The defendant contended that this infringed the pre-trial appeal provision of the Crimes Act, which on its face, appeared to envisage the determination of such appeals before the trial other than those in relation to the admissibility of evidence, which might be later determined if the trial judge thought it appropriate. The defendant argued that his trial had been a nullity because the trial court had been “without jurisdiction” to proceed until the (severance) appeal had been

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234 [2009] 3 NZLR 145 at [9].

235 Ibid at 359. As noted earlier, the Court said that “the seriousness of the irregularity, which must be assessed in the light of its consequences for the accused and the object of the statutory provisions, has to be weighed in deciding whether or not to characterise it” as being within this category; ibid.

236 [1987] 2 NZLR 233. See also Cooke P in R v Cornelius [1994] 2 NZLR 74 at 79-80: “The effect of the mistake that occurred here in the preparation of the jury list before trial has to be considered in the light both of the nature of the mistake and of the modern tendency not to allow procedural defects to vitiate trials unless there has been a substantial miscarriage of justice. Thus even when a defect has resulted in a trial which can be called a ‘nullity’ (although the expression is inaccurate) s 385 of the Crimes Act allows the Court of Appeal to apply the proviso and save the conviction if no substantial miscarriage of justice has actually occurred”.


238 See the Crimes Act 1961, s 379A.
The Court of Appeal rejected the point on the basis that even if the trial had been a nullity, the defendant had not suffered a substantial miscarriage of justice:

... we are satisfied that even if there is any technical validity in the point raised by counsel it is still within the scope of the proviso in s 385(1) of the Crimes Act. As held in Re Kestle (No 2) ... even when the Court of Appeal accepts that the trial was a nullity — an expression itself of some technicality — the proviso applies. That is to say, the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. In the instant case no substantial miscarriage of justice actually occurred.

The question of severance is open and was argued on the present application. No prejudice or ground of miscarriage was put forward, except the point that there had been a late change of counsel representing the accused. But that change of counsel was met by some relatively short adjournment of the commencement of the trial, ordered by the Judge; and that matter could not possibly be held to constitute a substantial miscarriage of justice for the purpose of the argument concerned with the appeal about severance. Accordingly the ... point fails.

In R v Loumoli the defendant and another were tried for murder. Their liability on the included crime of manslaughter was also in issue. When verdicts were taken, the foreman announced a not guilty verdict on the murder charge in respect of both men. The Judge then discharged the jury. Within minutes, it became clear that the jury was concerned that they had not returned a verdict on the manslaughter charge. By this stage, some jurors were leaving the court. The judge reassembled the court and the jury delivered guilty verdicts on the manslaughter charge. The defendant contended that as the jury had been discharged before delivering their verdict, the jury was functus officio. The verdict, he said, was therefore a nullity.

The Court of Appeal surveyed the common law which revealed that the discharge of a jury did not necessarily preclude the course adopted by the judge, providing that the jury had not subjected to external influence before being reconvened. Significantly, the Court saw the proviso as fortifying its adoption of this principle. It noted that even if "one regards the life of the jury as ended with its discharge, with the consequence that any purported further procedure of the jury was a nullity, by application of the proviso the question of [a substantial] miscarriage of justice still arises."

Further, the Court was satisfied that no such miscarriage had actually occurred as the defendants had not suffered any prejudice.

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241 Ibid, citation omitted.
243 Other grounds of appeal were advanced and resulted in the appeal being allowed.
244 Ibid at 660-664.
245 Ibid at 665.
246 Ibid.
The foreman clearly made a mistake in returning the verdict, a mistake that was realised and corrected within minutes. There is no suggestion of reconsideration or change of mind. The jurors were unanimous that they had intended to return a verdict of manslaughter, and conveyed that to the Court officials.... The members of the jury had not had the opportunity to speak to anyone else in the intervening minutes, and there is no evidence that any outside source influenced their decision or had the opportunity to do so.

But as in *Kestle*, the Court of Appeal signalled that the proviso’s applicability in this area was not unbounded, or as it was put in *Loumoli*, “where a conviction follows a trial held to be a ‘nullity’, there are limits beyond which the concept of validation by use of the proviso cannot be pressed”247 Those limits were encountered shortly thereafter in *R v Blows*248 and *R v O (No 2).*249

In *R v Blows*250 the Police charged the defendant with incest. He was committed for trial to the District Court. The prosecutor then filed an indictment containing charges of both incest and sexual violation by rape. The defendant was convicted of the latter following a trial in which no objection was taken either to the form of indictment or the jurisdiction of the District Court. On appeal to the Court of Appeal, the defendant contended that his trial was a nullity as the District Court had been without jurisdiction to try the rape charges; jurisdiction that would have existed had the defendant been committed to the High Court rather than the District Court and the case then banded to the District Court in accordance with the statutory regime.251 The Crown accepted the jurisdictional point and, it would seem, that the trial should be characterised as a nullity.252 However, relying upon *Kestle* and *Loumoli*, it maintained that the overriding inquiry was whether the defendant had suffered a substantial miscarriage of justice in terms of the proviso.253

Echoing both those cases while citing the decision of the Australian High Court in *Wilde v R*,254 the Court observed that the proviso was unlikely to be applicable “where the defect has appeared ‘fundamental’ ... or the proceedings have ‘so far miscarried as hardly to be a trial at all’”.255 The Court then examined the relevant statutory provisions.256 It noted that as the rape charges had not been laid at the outset of proceedings, they could not come within the District Court’s jurisdiction by any

247 Ibid.

248 CA103/95, 31 August 1995. *Blows* was decided only three and a half months after *Loumoli*.


250 CA103/95, 31 August 1995.

251 Summary Proceedings Act 1957, s 168AA.

252 See CA103/95, 31 August 1995 at 5.

253 Ibid.


255 CA103/95, 31 August 1995 at 6.

256 Summary Proceedings Act 1957, s 168AA and District Courts Act 1947, s 28A.
order either it or the High Court could make. Moreover, the charges could only have been tried in the High Court if proceedings had been transferred to that Court. The result, said the Court of Appeal, was:

... so fundamental a deficiency in the proceedings as to make it inappropriate to apply the proviso ... even recognising the breadth of the discretion vested in the Court. To do so would be to effectively confer jurisdiction on a tribunal which in the particular circumstances could not have determined the case.

Although this conclusion was undoubtedly open to the Court of Appeal, it did not consider, as it had done in Kestle, Fulcher and Loumoli, the absence of prejudice to the defendant in assessing whether there had been an actual substantial miscarriage of justice. The defendant did not, for example, assert that the complexity of the case warranted a High Court trial rather than a District Court trial. Neither did the Court place weight upon, as it had done in Kestle, the absence of trial objection to the procedure followed. Further, rape charges can and are frequently heard in the District Court (when a case is banded there by the High Court), so the District Court wasn't without jurisdiction to try charges of that type. And obviously, the laws of evidence and procedure are identical in both courts. Accordingly, there was room for the Court to have taken a different view of the proviso’s applicability notwithstanding the serious nature of the error. This would not have been to confer de facto jurisdiction upon the District Court, but rather to recognise, as in Kestle, Fulcher and Loumoli, that the proceedings were substantially fair and that the defendant had not suffered prejudice.

In R v O (No 2) the Court of Appeal inclined to the view that its decision in Blows encapsulated the correct approach. The defendant in R v O was convicted of historical sexual offending, including sodomy, following a trial in the District Court. The difficulty was that while the District Court had jurisdiction to try charges of anal intercourse, the successor to the offence of sodomy from 8 August 1986, it did not have jurisdiction to try the earlier offence of sodomy itself. In light of this, the Court found that the conviction on the charge was a nullity. In relation to the application of the proviso, the Court did not express a concluded view because the appeal was allowed on an unrelated ground. It did, however, observe that it "would probably have felt unable to resort to it" given that Blows "points strongly against ... [that] when a fundamental defect has occurred." As in that case, the defendant neither took the point at trial nor complained of prejudice on appeal.

The final decision of relevance is R v Samuels. Samuels involved offending contrary to the Misuse of Drugs Act 1975 and dependent for proof on the evidence of an undercover Police officer. At the first trial, objection was taken to the production of a certificate justifying the officer’s anonymity and the judge aborted the trial rather than

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257 See CA103/95, 31 August 1995 at 7.
260 [1999] 1 NZLR 326 at 329 per Tipping J.
261 (2001) 18 CRNZ 566.
allowing the prosecution case to collapse. The judge's power to do so depended upon whether the trial had suffered a casualty in terms of the applicable law. The defendant was convicted following a retrial. In the Court of Appeal, he argued that the second trial was a nullity in that the first trial was wrongly aborted. The Court did not accept that the judge's decision was wrong as what had occurred could "fairly be regarded as a casualty". More importantly, the Court also observed that had it been of the contrary view, it "would nevertheless have been strongly inclined to apply the proviso to s 385(1) of the Crimes Act 1961." The Court confirmed that the proviso was applicable to a trial that was a nullity as that was "inherent in the way s 385(1) is expressed." Further, despite "the caution" expressed in Blows about the proviso's application in such circumstances, the Court "would probably have taken the view that the circumstances leading to the (assumed) nullity were not so fundamental or otherwise such as to preclude the use of the proviso." In reaching this tentative view, the Court of Appeal concluded by noting that the defendant had not suffered prejudice: "no substantial miscarriage of justice had actually occurred."

The cases above reveal that the relationship between serious procedural error and the proviso is complex in that the proviso can apply — but may not necessarily do so — to a trial that was a nullity. Much depends upon the circumstances of each case and in particular, the significance and purpose of the infringed procedure, the practical effect of error, prejudice and whether objection was taken at trial. The proviso is not applicable in proceedings exhibiting fundamental error, however, which do not appear to require either prejudice to, or timely objection by, the defendant. Instead, such error itself constitutes a substantial miscarriage of justice. Thus far, fundamental error has coincided with jurisdictional error in it purest sense, namely the conduct of proceedings beyond the jurisdiction of the court. It remains to be seen just how broad this category is.

V. INCONSISTENCY

As we saw in chapter one, while the Stout Court offered glimpses of an expansive interpretation of the proviso in the early period of the twentieth century, the subsequent Myers Court was more restrained. Since the 1945 Criminal Appeal Act, however, our courts' attitude to the proviso has been more complex. Overall, the courts have been wary of the device with the result that it has had only a modest role in the disposition of

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262 The applicable legislation at the time was the Evidence Act 1908, s 13. See now the Evidence Act 2006, ss 108 and 109.
263 Crimes Act 1961, s 374.
265 Ibid at [12].
266 Ibid.
267 Ibid.
268 Ibid at [13].
criminal appeals.\textsuperscript{269} Despite this trend, New Zealand courts have applied the proviso in cases involving both serious offending and serious error, but in doing so, similar cases have been treated differently. The following case couplets are illustrative.\textsuperscript{270}

In \textit{R v Savage}\textsuperscript{271} the defendant murdered a rival gang member. At trial, he argued that he had either been acting in self-defence or that he had been provoked by the deceased so as to be liable for manslaughter. The Court of Appeal held that the trial judge had made “two serious misdirections” in relation to the latter defence.\textsuperscript{272} This meant the “almost inevitable result would have to be a new trial”.\textsuperscript{273} The Court, however, applied the proviso on the basis that the misdirections had not, in all probability, influenced the verdict.\textsuperscript{274} This conclusion presupposed that the jury had made certain factual findings in rejecting the defence of provocation, but in light of the Court’s acknowledgment that there had been “confusion among the eye-witnesses about the events”, it is unclear that such a conclusion was warranted.\textsuperscript{275} Rather, the judgment suggests that the Court of Appeal agreed with the verdict and hence that the jury’s putative factual findings were in fact the Court’s.\textsuperscript{276}

Compare \textit{R v Hart}.\textsuperscript{277} In 1985 the defendant was convicted of murdering a young woman a year earlier. The deceased’s body had been found on an Auckland beach. She had been badly beaten and left to die in the surf. Death occurred by drowning. The defendant and the deceased had only recently met. Witnesses placed both in an intoxicated state at the scene. The defendant lied when first spoken to by the Police, claiming he had left the deceased alive at the beach. He then confessed to assaulting her, saying, “I went half crazy”.\textsuperscript{278} The deceased’s clothes were found at

\textsuperscript{269} Because statistics on the proviso’s application have not been maintained, this observation is necessarily impressionistic.


\textsuperscript{272} Ibid at 162.

\textsuperscript{273} Ibid.

\textsuperscript{274} Ibid at 160.

\textsuperscript{275} Ibid at 156.

\textsuperscript{276} It was once assumed that the proviso was inapplicable in murder cases because of the death penalty; see \textit{R v Dunbar [1958] 1 QB 1}. However, following the abolition of capital punishment and the Privy Council’s decision in \textit{Anderson v R [1972] AC 100}, the New Zealand Court of Appeal was persuaded that “no fundamental difference is involved in … [the proviso’s] application to murder charges from its use in other: offences, though, of course, the grave nature of the charge and the inevitably long period of imprisonment call for great care in its invocation”; see \textit{R v McKewen (No 2) [1974] 1 NZLR 626} at 630.

\textsuperscript{277} [1986] 2 NZLR 408.

\textsuperscript{278} Ibid at 411.
the defendant's home bearing traces of her blood. At trial, there was a dispute over whether the defendant or an unidentified third party had dragged the victim into the water. The Court of Appeal held that the directions were in error on this issue and that there were two other material "defects" in the summing up.\textsuperscript{279} Although the Court acknowledged that the prosecution's case was "strong" and that "a jury, properly directed, could reasonably have found the accused guilty of murder",\textsuperscript{280} it declined to apply the proviso because:\textsuperscript{281}

... the accused was entitled to directions materially different from those which were given. The combined effect of the three matters to which we have referred is such that we cannot safely leave the present conviction standing.

\textit{R v Rees}\textsuperscript{282} and \textit{R v Morgan}\textsuperscript{283} both involved drugs offending. In \textit{R v Rees} the defendant was convicted of possessing cannabis plant material for the purpose of sale after nine kilograms of the drug was found in drums adjacent to his property. The defendant ultimately admitted possession of the cannabis, but he testified that he was storing the material for others, albeit for his own financial gain. The Court of Appeal held that the directions were "defective" as to who had to intend to sell the drug and that the defendant had to have such a purpose.\textsuperscript{284} The Court applied the proviso, however, holding that "no reasonable jury could have accepted" the defendant's testimony.\textsuperscript{285} As the following passage illustrates, the Court was prepared to make factual findings to reach this conclusion:\textsuperscript{286}

From the accused's own evidence it is plain that he expected initially at least, a reward in terms of thousands of dollars from his part in the venture. The bagging which he carried out is strongly suggestive of retail sale, even if the quantities in the plastic bags did not necessarily represent the quantities intended to be sold ultimately. When it was put to him at the trial that he must have expected the money to come from the sale of cannabis, he said he really did not think where the money was coming from. He even said that he did not really know that marijuana was a fairly valuable commodity. These suggestions coming from a man who, according to his own account, had been closely involved over a considerable period in receiving and packaging the drug are totally incredible.

The facts of \textit{R v Morgan}\textsuperscript{287} were similar. The defendant occupied premises containing a commercial cannabis operation. He later admitted having grown and

\textsuperscript{279} Ibid at 417. One in relation to the defendant's lies and another concerning intoxication; see ibid at 414 and 416 respectively.

\textsuperscript{280} Ibid at 412.

\textsuperscript{281} Ibid at 417.

\textsuperscript{282} [1990] 1 NZLR 555.

\textsuperscript{283} CA68/03, 28 November 2003. See also \textit{W v R CA5/98}, 15 June 1998.

\textsuperscript{284} [1990] 1 NZLR 555 at 558.

\textsuperscript{285} Ibid.

\textsuperscript{286} Ibid.

\textsuperscript{287} CA68/03, 28 November 2003.
harvested the cannabis found there, but as in Rees, testified that he had done so at the behest of another but for his own financial gain. The Court of Appeal held that the jury “was not given adequate guidance as to how the presumption of possession for supply could be rebutted" and that other passages “exceeded the bounds of justified comment on facts in issue". But unlike Rees, the Court was not prepared to apply the proviso. With little discussion of the facts, the Court of Appeal held that “we cannot reasonably exclude the possibility that... [the jury] would have come to a verdict of not guilty.” Accordingly, the Court found that the “proviso to s 385(1) cannot apply.”

Injudicious summings up 30 years apart were in issue in R v Timo and others and K v R. In the former in 1971, the defendants pack raped a visibly pregnant woman. At trial, they sought to maintain that intercourse was consensual. The judge was extremely critical of the defence cases. He described one of their arguments as “plainly ridiculous” and acknowledged to the jury that he had “come to some very strong views” about the evidence. The Court of Appeal observed that it “did not wish anything which we now say to be taken as a commendation of this particular summing up”, noting that a “detached summing-up on fact[s], uncomplicated by an emphatic expression of personal views, is always the ideal at which to aim.” But despite the caustic nature of the judge’s remarks, the Court applied the proviso on the basis that “we do not think that any reasonable jury, on the case as presented for the Crown and for the defence, could possibly reasonably have come to a verdict different from that to which this jury came.” The Court confidently added that this was “the kind of case for which the proviso was inserted into the Appeal provisions of the Act; [and] we unhesitatingly use it”.

Ibid at [22].

Ibid.

Ibid at [35]. The Court sought to distinguish R v Rees [1990] 1 NZLR 555 on the ground the indictment in that case charged possession for the purpose of sale as against possession for the purpose of supply. However, it seems clear that the Morgan indictment was in error and that the Crown’s case was presented on a possession for sale basis.

Ibid at [36].

CA117/71, CA118/71 and CA119/71, 19 April 1972.

CA264/05, 27 February 2006.

CA117/71, CA118/71 and CA119/71, 19 April 1972 at 6 and 9 respectively. For example, the judge sarcastically described one of the defendants as “Don Juan”, “the man who sweeps into the dance hall, picks out his woman, kisses her goodbye, runs across the road, sees another woman, [and] immediately slays her with his charm”. The judge also asked rhetorically of the jury, “What sort of a chance did she [the complainant] stand if she got into the hurly-burly by resisting them?” Ibid at 6-8.

Ibid at 9.

Ibid at 14.

Ibid.
In *K v R* the judge implied (once) to the jury that if an aspect of the defence case were true, it might have been expected that defence evidence on the point would have been adduced. The Court of Appeal variously described the remark as "problematic", "wrong" and as "speculative and potentially damaging." As in *R v Timo and others*, the credibility of the complainant and defendant were live issues, but unlike that case, the Court of Appeal rejected any reliance upon the proviso for that reason. Instead, the Court held this was "not a case in which the proviso could be used because the credibility of the complainant and the appellant was pivotal".

In *R v Tait* in 1992 and *R v Aymes* in 2004 the Court of Appeal was confronted with sexual offending against children. Both cases involved the operation of section 23G of the Evidence Act 1908, which permitted expert testimony upon the behaviour of a child complainant and whether it was consistent with the behaviour of sexually abused children of the same age group. In *Tait*, the prosecution’s expert introduced an important subject without warning to the defence and also commented impermissibly upon the complainant’s credibility. The Court of Appeal, however, applied the proviso on the basis that the defendant’s conviction was "inevitable". Conversely, in *R v Aymes* the Court of Appeal rejected the application of the proviso in a single sentence in light of the "real risk that there has been a miscarriage of justice" following the absence of any direction upon the expert testimony. Witness credibility was paramount in both cases.

In *Campbell v R* in 1954 the Court of Appeal dismissed an appeal against a burglary conviction even though the judge did not summarise the defence case. The Court held that the omission gave rise to a miscarriage of justice, but it applied the proviso as "no reasonable jury could have brought in a verdict other than that of
guilty.309 In R v Shipton310 just over a half a century later, a judge made the identical error in the context of a multiple defendant rape case. Citing English authority but not Campbell,311 the Court of Appeal observed that where “a cardinal line of defence is placed before the jury and that finds no reflection at any stage in the summing up, it is generally impossible … to say that the proviso … can properly be applied”.312 Without further discussion, the Court held that as “the defence of D was not put at all”, the “conviction must be set aside”.313

The final cases of R v Meek314 and R v Batt315 involved misdirection upon the mental ingredient of the respective offences. In Meek in 1981 the judge instructed the jury that the defendant did not need to have intended that his threats to kill be taken seriously, and that the only issue was whether the threats had been uttered voluntarily. The misdirection went to the heart of the case because while the defendant accepted making such threats, he denied intending to influence others by them. The Court of Appeal, however, applied the proviso as there was “an abundance of evidence … from which we would conclude that a reasonable jury, properly directed, would without doubt have found the applicant guilty.”316 In Batt in 2000 the judge failed to instruct the jury that the defendant’s liability for fraud required proof of a wilful omission. The judge also misstated the evidence on the point. Unlike Meek, however, no complaint was raised at trial. Without further elaboration, a majority of the Court of Appeal held that “the proviso cannot apply.”317

Two factors appear to underlie the inconsistency of the proviso’s application. First, it seems that the Court of Appeal has become increasingly cautious of applying the proviso when witness credibility was in issue at trial out of a heightened concern for the role of the jury. This explanation fits all but the first of the case couplets, and K v R318 is its clearest illustration. Second, on occasions the Court appears to have been sensitive to the contention that the defendant was entitled to a trial without error, even

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309 Ibid at 25.
310 [2007] 2 NZLR 218.
311 R v Badjan (1966) 50 Cr App R 141. However, in Badjan at 144 the Court of Criminal Appeal immediately qualified the apparent breadth of its ruling by observing that it was not necessarily laying down a “general proposition”. Curiously, the Court of Appeal cited with approval its earlier decision in R v Maney CA116/99, 21 October 1999, even though Maney affirmed the potential applicability of the proviso to instances of misdirection and non-direction on the part of a trial judge.
312 R v Shipton [2007] 2 NZLR 218 at [57].
313 Ibid at [58].
315 CA47/00, 3 August 2000.
317 CA47/00, 3 August 2000 at [33].
318 CA264/05, 27 February 2006.
though guilt, objectively, was beyond dispute. The decision in *R v Hart*\(^{319}\) is an obvious example. Another, perhaps, is *R v Shipton*.\(^{320}\)

**VI. CONCLUSION**

The discretion vested in an appeal court to dismiss an appeal if it “considers that no substantial miscarriage of justice has actually occurred” is descriptive rather than prescriptive, for the proviso is silent as to how this determination should be made.\(^{321}\) Consequently, our courts have had to approach the task of what is *not* a substantial miscarriage of justice without the benefit of guidance from the statutory text. As we have seen, they have done so in two different ways since the enactment of the Criminal Appeal Act 1945. First, by determining that trial error has not influenced the jury’s verdict, and second; when error might have done so, by concluding that another jury or a notional jury would undoubtedly convict. The fault line between the error-impact and guilt-based approaches to trial error has, as in North America, given rise to oscillation and inconsistency. Unlike North America, however, there has been no actual contest here between the two.

The relationship between the proviso and the grounds of appeal has troubled the New Zealand courts due to the language of the enactment and the apparent incompatibility of some of its concepts. As we have seen, the proviso’s reach in relation to an unreasonable verdict remains unclear although the Supreme Court’s decision in *Matenga v R*\(^{322}\) has clarified the relationship with the most important ground, the miscarriage of justice head, while confirming the applicability of the proviso to errors of law. Unfortunately, however, the case has left the position in relation to nullities confused following a hitherto pragmatic approach to serious procedural error. The relationship between the proviso and modern rights of appeal has also been problematic in that the proviso has been applied inconsistently. While it is clear that the courts have been prepared to both evaluate error and weigh evidence pursuant to the proviso, they have not done so uniformly. Further, the courts have again become increasingly wary of the device, a trend that appears to have begun towards the end of the twentieth century. Underlying these developments is the deeply rooted idea that the role of the jury must not be usurped through appellate fact-finding, with the result that, ironically, a diluted form of the Exchequer rule lives on. While the proviso has not been as Stout CJ portended last century, “about useless”, its curative role in the disposition of criminal appeals here has been modest.\(^{323}\) The position would be different if a fact-finding role were accepted as being central to the application of the proviso, but as we have seen in these chapters; this view has been fiercely resisted.

\(^{319}\) [1986] 2 NZLR 408.

\(^{320}\) [2007] 2 NZLR 218.

\(^{321}\) Crimes Act 1961, s 385(1).

\(^{322}\) [2009] 3 NZLR 145.

\(^{323}\) *R v Lawrence* (1905) 25 NZLR 129 at 136.
CHAPTER THREE
THE FACT-FINDING ROLE OF AN APPELLATE COURT UNDER THE PROVISO

I. INTRODUCTION

On 25 November 1994 the body of Ms Helen Grey was found at her home in Eumemmering in the state of Victoria. She had suffered a number of blows to her head from a cricket bat found near her body. The case remained unsolved for almost six years. Then, in May 2000 Jean Horstead contacted the Police and told them that her former partner, Bodhan Weiss, had confessed to killing Ms Grey on the evening of the murder and that she had provided a false alibi for him in the weeks following it. Weiss, who had been a suspect at the time of the incident, ultimately admitted to the Police he had killed the deceased. He later told the trial court his confession was false. A jury rejected Weiss’s explanation and found him guilty of Ms Grey’s murder. He appealed to the Victorian Court of Appeal. The Court of Appeal held that the trial had erred in one material respect, namely the prosecutor’s improper cross-examination of the defendant about his conviction for sexual intercourse with an underage girl. The Court of Appeal, however, dismissed the appeal on the basis of the proviso to section 568(1) of the Victorian Crimes Act 1958, holding that the defendant had not actually suffered a substantial miscarriage of justice. Justice Callaway held that the defendant’s “conviction was inevitable”, in the sense that “this jury would still have convicted the appellant in the absence of the irregularity, not that he or she would have been convicted by any reasonable jury.” Elaborating, Callaway JA was not sure that “Another jury might not have taken a different view of Ms Horstead’s evidence or the reliability of the applicant’s confession, for this was a case that largely turned on the credibility of the

1 The facts are taken from the extensive judgment of the Victorian Court of Appeal following the remission of the case to that Court by the High Court of Australia; R v Weiss (No 2) [2006] VSCA 73. For the High Court’s decision, see Weiss v R (2005) 224 CLR 300.


3 Ibid at [60], [76] and [79].

4 Which reads: “The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal: Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.”

5 R v Weiss (2004) 8 VR 388 at [68].

6 Ibid at [70].
two principal witnesses."\(^7\) Or as the Judge also put it, "If the test were inevitability, in the sense that any reasonable jury properly instructed would inevitably have reached the same conclusion as this jury, I could not apply the proviso to this case."\(^8\)

The applicant was granted special leave to appeal to the Australian High Court in relation to the proviso, and in particular, the correct test for its application. Was inevitability of conviction to be framed in terms of a reasonable jury, the trial jury or some other formulation?\(^9\) Consequently, the stage was set for the resolution of an issue that had gone undecided in Australia for the better part of a century. In a unanimous and ground breaking judgment, the High Court held that "reference to a jury (whether the trial jury or a hypothetical reasonable jury) is liable to distract attention from the statutory task as expressed" in the proviso and the surrounding common form appeal provisions.\(^10\) Instead, appellate courts must make their own:\(^11\)

... independent assessment of the evidence and determine whether, making due allowance for the 'natural limitations' that exist ... [by] proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.

The High Court recognised that its decision may "prolong appellate hearings and increase the burden on already overburdened intermediate appellate courts."\(^12\) However, the Court said that the "immediate answer to that proposition must be that it is what the common form criminal appeal provision requires" and that if applied properly, the proviso "will avoid the needless retrial of criminal proceedings."\(^13\) The appeal was remitted to the Victorian Court of Appeal so that the "whole of the record of the trial" could be considered in determining whether the defendant's guilt had been (properly) proved beyond reasonable doubt.\(^14\) After exhaustive consideration of the evidence, that Court was satisfied that the High Court's test was met.\(^15\)

The decision in Weiss acknowledges that the proviso invests a criminal appeal court with an "independent" fact-finding function, albeit one heavily constrained by practical limitations.\(^16\) Weiss therefore stands in marked contrast to earlier decisions of the Australian High Court and other common law courts that had tended to emphasise

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\(^7\) Ibid.

\(^8\) Ibid.


\(^10\) Weiss v R (2005) 224 CLR 300 at [40].

\(^11\) Ibid at [41].

\(^12\) Ibid at [47].

\(^13\) Ibid.

\(^14\) Ibid at [58].

\(^15\) R v Weiss (No 2) [2006] VSCA 73 at [137].

\(^16\) Weiss v R (2005) 224 CLR 300 at [41].
the role of the jury as the exclusive finder of fact in the criminal justice system and the
danger said to be inherent in any other approach, usurpation of the jury’s constitutional
role. As we saw in chapters one and two, this view heavily influenced the courts’
view of the proviso with the result that it significantly impaired the device’s utility. But
while the courts have repeatedly renounced appellate fact-finding under the proviso,
paradoxically, tests premised upon the inevitability of conviction have also been widely
endorsed even though their underlying guilt-based approach rests upon an appeal
court’s satisfaction of the defendant’s guilt. Accordingly, this chapter considers a
question central to the proviso’s construction: to what extent does it confer a fact-
finding role upon a criminal appeal court?

We begin by re-examining the common law’s reaction to the proviso around the
end of the nineteenth century as authorities from this period, and in particular, the Privy
Council’s decision in *Makin v Attorney-General for New South Wales*,18 trenchantly
resisted the idea that appeal courts had, or should have by virtue of the proviso, any
fact-finding role. As we shall see, these views continue to affect the jurisprudence
although their influence appears to be waning.

We then turn to the early common law of the English Court of Criminal Appeal.
Here we trace the development of a number of tests for the proviso’s application that
involved some factual assessment of the appellant’s guilt, including the tests ultimately
rejected by *Weiss* but otherwise embraced by much of the common law world; inevitability of conviction by reference to the trial jury and a hypothetical reasonable
jury. Both tests are then reviewed in the context of more recent English authority. It is
argued that while the two have often been treated as interchangeable, this treatment has
ignored conceptual and practical differences between them, the most important of which
is the breadth of discretion conferred by each in terms of an appellate fact-finding role.

Canadian authority is then considered. Here, *Makin’s* shadow is at its longest
for the Canadian Supreme Court has been especially vigorous in denouncing appellate
fact-finding under the proviso upon the assumption it would be inconsistent with the
right of a defendant to be tried by a jury.

We then examine the long common law road to *Weiss*, the *Weiss* decision itself
and subsequent developments in the Australian High Court. Related Australian issues
are explored. What was the position before *Weiss*? What is meant by its requirement
that an appeal court conduct an “independent examination” of the record?19 And what
do subsequent decisions reveal about the fact-finding role of a criminal appeal court in
light of *Weiss*? It will be contended that while the High Court correctly departed from
tests grounded in the inevitability of the defendant’s conviction, *Weiss’s* coherence and
sustainability are at risk from its own self-imposed limitations in relation to demeanour-
based evidential assessment.

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17. For example, see *R v Glennon* (1994) 179 CLR 1; *R v Khan* [2001] 3 SCR 823 and *Bain v R*

18. [1894] AC 57.

19. Ibid at [41].
From Australia we turn home. Two New Zealand developments stand out: first, the litigation that reached the Privy Council in Bain v R; and second, the Supreme Court’s recent adoption of Weiss in the case of Matenga v R. It is suggested that the former illustrates how theory and practice in this area can spectacularly diverge, in that as with other jurisdictions employing tests based upon what ‘a jury’ would have done but for error, such nomenclature can be used to “clothe” an appeal court’s findings as if they were other than its own. The latter, it is contended, reveals a unique view of how the proviso should be applied in accordance with a defendant’s right to trial by jury as well as providing a timely counterpoint to the Privy Council’s approach in Bain. But as with the Australian development of Weiss, fetters upon appellate fact-finding remain in this area so that little might have actually changed in practice.

We conclude by arguing that the proviso permits criminal appeal courts to find facts - for the purpose of preserving jury verdicts - on a much broader basis than has been recognised by the common law. It is suggested that this position is supported by relevant statutory text, the proviso’s purpose as revealed by the Exchequer rule and the history surrounding the creation of the (English) Court of Criminal Appeal. It is also argued that the idea of jury usurpation is unsustainable despite the eminence and depth of contrary authority. Before commencing, it is first necessary to consider what is meant by a fact-finding function in the operation of the courts, and in particular, those courts sitting as courts of criminal appeal.

II. WHAT IS MEANT BY A FACT-FINDING FUNCTION?

Legal dictionaries typically define fact-finding as the preserve of first instance tribunals. For example, Black’s Law Dictionary defines a fact-finder as “One or more persons – such as jurors in a trial or administrative-law judges in a hearing – who hear testimony and review evidence to rule on a factual issue.” Its definition of fact-finding is correspondingly narrow: “The process of taking evidence to determine the truth about a disputed point of fact.” Similarly, while Jowitt’s Dictionary of English Law broadly defines a finding as a “conclusion upon an inquiry of fact”, its examples of that process are limited to the return of a jury’s verdict and the decision of a judge sitting in the place of a jury.

22 Weiss v R (2005) 224 CLR 300 at [38]. The phrase ‘a jury’ refers to tests based upon either the trial jury or a notional reasonable jury.
25 Ibid.
At first blush, the common law system appears to be consistent with this narrow view of fact-finding. Conventionally, lower courts and tribunals find facts, whereas higher courts only review, either by way of statutory appeal or judicially, the factual and legal conclusions reached below. Moreover, while there are different types of appeal, most appeals proceed upon the written record, in circumstances in which considerable respect is afforded to first instance factual findings with the result that factual reversal, especially in relation to credibility, is closely circumscribed and therefore uncommon. And even when appeal courts hear appeals based upon alleged factual error, their judgments are often couched in terms of whether the factual findings below were available on the evidence rather than the appeal courts directly and unequivocally making findings of their own. It follows that on this narrow view of fact-finding, appeal courts could rarely act as fact-finders as they rarely hear evidence.

On closer inspection, however, common law courts have adopted a broader view of fact-finding, so that findings of fact which are upheld on appeal are treated as being the findings of both the first instance court and those of the appellate court. Hence, in 1886 Lord Herschell LC said that “concurrent” findings of fact, meaning those upheld by the intermediate appeal court, would not be reversed unless it could be shown with clarity that all of the judges below were to wrong to find as they did. Similarly, speaking for the Privy Council in 1989, Lord Bridge of Harwich said, “This appeal turns upon issues of fact which have been concluded against the appellants by concurrent findings of both the Courts below. As is well known the Board’s practice in such circumstances is not to embark upon a third trial of the issues of fact.” The House of Lords applied the same rule in relation to its conduct of appeals as the once final court in the United Kingdom.

This rule does not depend upon the manner in which the appellate court expresses itself. The New Zealand case of Stenson v AMP General Insurance (NZ) Ltd is illustrative. On appeal to the Privy Council, the Board observed that the Court of Appeal’s judgment was “carefully worded”, in that the Court had “refrained from making findings of fact of its own, because it declined to enter into a detailed examination of the evidence.” However, the Privy Council held that “By endorsing the [trial] Judge’s decision on the grounds stated in its judgment” the Court of Appeal “was, in effect, making the same finding of fact on that issue as that arrived at by the

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27 But see Austin, Nichols & Co v Stichting Lodestar [2008] 2 NZLR 141 at [5].
28 For example, see the decision of the New Zealand Court of Appeal in Stenson v AMP General Insurance (NZ) Ltd CA93/02, 18 March 2003 and the Privy Council’s observations about the carefully worded judgment below: Stenson v AMP General Insurance (NZ) Ltd at [2007] 1 NZLR 289 at [15].
29 Allen v Quebec Warehouse Co (1886) 12 App Cas 101 at 104.
31 See Owners of the ‘P Caland’ and freight v Glamorgan Steamship Company Ltd [1893] AC 207.
33 Ibid at [15].
However, criminal cases are different as most crimes are tried by a jury and a verdict says nothing about how the jury reached its decision. It follows that a verdict is not a reasoned decision but a conclusion as to guilt. Further, while a verdict implies that the defendant committed the offence with the requisite intent, surrounding facts, including those that may aggravate or mitigate the offence, are not necessarily implicit in the jury's verdict. Consequently, unlike a judgment in a civil case, a verdict comes without reasons and may be factually opaque. In such circumstances, how could criminal appeal courts act as fact-finders when a defendant challenges his or her conviction? The answer, in part, is provided by Masten JA in a 1939 decision of the Ontario Court of Appeal:

To avoid any possible misapprehension, it should be stated that, but for the errors complained of, the appellant could not have successfully attacked his conviction. But it is impossible to gauge the effect on the minds of the jury of the errors complained of. Though it may seem probable that the jury would have reached the same conclusion if these errors had not occurred, that does not warrant an appellate Court in affirming the conviction. To do so would be to substitute the verdict of this Court for that of a jury after a trial free of the errors in question.

In reaching the present conclusion, I am not at liberty to ask myself the question, 'Ought the jury to have found the appellant guilty if the errors complained of had not occurred?' To do that is to substitute my verdict for that of the jury. The question which I really have to answer is this, 'If the trial had proceeded without error might the jury have recorded a verdict of 'Not Guilty?'

The Judge's point is that in assessing whether trial error affected the verdict, a criminal court could form a view about the evidence and thereby engage in an appellate fact-finding function by ruling that the error ought not to have influenced the jury given the court's evidential view. But whereas Masten JA thought this fact-finding process could be avoided by asking, absent error, might the defendant have been acquitted instead of should the defendant have been convicted, it is contended that whenever an appellate court concludes serious trial error would not have led to an acquittal, it has necessarily satisfied itself that the defendant's guilt was proved on the basis of the material in the record, and by this process, made a judgment about evidence that was disputed below. After all, trials involve an evidential contest. Therefore, in ruling a verdict would have been the same notwithstanding material trial error, an appellate court must have found facts by drawing conclusions about the disputed evidence in terms of its worth and weight — expressly or otherwise — and then attributed those findings to the jury as if they were other than the court's.

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34 Ibid.
35 Ibid.
36 Recognising this, s 24 of the Sentencing Act 2002 provides a procedure for the resolution of disputed facts at sentencing.
37 R v MacDonald (1939) 72 CCC 182 at 199-200, emphasis in original.
38 By serious or material trial error is meant error that might have impacted upon the jury's deliberations; trivial error may be able to be dismissed as such without an appellate court having to form its own view of the evidence.
Admittedly, criminal appeal courts do not frame their reasoning in this way. Instead, it is said that the jury would have found guilt irrespective of error,\(^{39}\) that error did not influence the jury’s thinking\(^ {40}\) or that the only reasonable verdict was one of guilty.\(^ {41}\) But these are conclusions rather than processes of reasoning, and these underlying processes necessarily attribute worth and weight to the evidence in order to conclude that error was harmless. This is not to say that criminal appeal courts are primarily concerned with fact-finding — obviously they are not — or that appellate findings are necessarily controversial. Rather, it is to recognise that appeal courts must find facts by virtue of their function in declaring seemingly serious error harmless. Penhallurick succinctly captures the point:\(^ {42}\)

Since the reasoning of the jury is not publicly available, it is impossible to calculate with certainty the effect that the error would have had on their ultimate finding of guilt. This is why [in applying the proviso] the appeal court will often have no choice but to form its own view of the facts....

III. BABY FARMING AND JURY USURPATION

The decisions of *Makin v Attorney-General for New South Wales*\(^ {43}\) and *Bray v Ford*\(^ {44}\) provide the logical starting point in an examination of an appellate fact-finding role pursuant to the proviso. This is not merely because of their high English authority but their timing; *Makin* and *Bray v Ford* were the first cases in relation to the proviso to reach the Privy Council and House of Lords respectively following the excesses of the Exchequer rule. It will be recalled from chapter one that *Makin* concerned the effect of a New South Wales provision which prevented a conviction from being reversed "unless for some substantial wrong or other miscarriage of justice",\(^ {45}\) and that *Bray v Ford* involved a similarly worded but slightly earlier civil law enactment, which operated to preclude a "new trial ... on the ground of misdirection or of the improper admission or rejection of evidence, unless ... some substantial wrong or miscarriage has been thereby occasioned".\(^ {46}\) Each case represented the first occasion in the criminal and civil jurisdictions respectively in which the proviso had reached a senior common law court.

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\(^{39}\) For example, see *R v Howse* [2006] 1 NZLR 433.

\(^{40}\) For example, see *R v Tihi* [1989] 2 NZLR 29.

\(^{41}\) For example, see *Campbell v R* [1954] NZLR 22.


\(^{43}\) [1894] AC 57.

\(^{44}\) [1896] AC 44.

\(^{45}\) New South Wales Criminal Law (Amendment) Act 1883 (NSW), s 423.

\(^{46}\) Supreme Court of Judicature Act 1873 (UK), r 48.
In Makin v Attorney-General for New South Wales\(^{47}\) the Crown argued that even if the propensity evidence of ‘baby farming’ was inadmissible, then the conviction should stand because there was evidence to support it irrespective of trial error. The argument was based upon the proposition that the proviso was intended to give the courts the power of “reviewing a criminal verdict” so that the Board was vested with a jurisdiction to dismiss an otherwise proper appeal if it was satisfied of the defendant’s guilt in light of the admissible evidence.\(^{48}\) Notably, this contention might have gone unconsidered as the Privy Council held that the propensity evidence was admissible. It elected to deal with the issue, however, because of the “important question of law involved.”\(^{49}\) That question was described as whether, if an appeal court concludes that inadmissible evidence had been received at trial:

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\ldots \text{the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged.}
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The Crown accepted that “it would not be competent for the Court to take this course at common law” but that the proviso empowered such an approach “even if it did not compel” it.\(^{51}\)

Delivering the decision of the Board, Lord Herschell LC said “that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence ... established the guilt of the accused.”\(^{52}\) The result was that:

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\ldots \text{in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the Court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.}
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The Law Lords thought “such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases.”\(^{54}\) This was because:\(^{55}\)

\(^{47}\) [1894] AC 57.
\(^{48}\) Ibid at 63.
\(^{49}\) Ibid at 68.
\(^{50}\) Ibid at 69.
\(^{51}\) Ibid.
\(^{52}\) Ibid at 69.
\(^{53}\) Ibid at 69-70.
\(^{54}\) Ibid at 70.
\(^{55}\) Ibid.
The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses.

Such “startling consequences” had not been intended by the proviso according to the Board: 56

In their Lordships’ opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence.

Similar reasoning is apparent in the House of Lords’ decision of Bray v Ford57 in 1896. There, the judge had wrongly directed the civil jury as to how it might consider the libel action before it. The judge had said that the plaintiff, a solicitor, was entitled to render an account to an institution of which he was a governor when he was not so entitled. The defendant had not been able to defend this part of the suit by pleading justification. However, the action was brought and defended on a broader basis, so that the respondent argued that the verdict would have been same had the misdirection not been made. As the respondent put it: 58

The question whether there has been a substantial wrong or miscarriage is for the opinion of the Court and if the Court consider (as the Court of Appeal did) that the jury would have given, and would have been justified in giving the same verdict, if there had been no misdirection, there ought not to be a new trial.

The House of Lords unanimously rejected the argument. Lord Halsbury LC held that there was “a substantial wrong and a miscarriage” because “the defendant was not permitted to present his case to the jury with the argument that his original complaint was true.” 59 Significantly, the Lord Chancellor was “not prepared to say what a jury might think if they were told that the original complaint was itself unfounded” since the defendant’s right to present his case in this way had been infringed. 60 Lord Halsbury peremptorily rejected the contention that the proviso permitted a court to dismiss an appeal on the basis that the verdict was correct as that was an invitation “to speculate what might have been the result if the judge had rightly directed the jury”. 61

Lord Watson saw the error in constitutional terms: 62

56 Ibid.
57 [1896] AC 44.
58 Ibid at 46.
59 Ibid at 47.
60 Ibid.
61 Ibid at 48.
62 Ibid at 49.
Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal. In the present instance the case made in evidence by the appellant was not submitted to the jury.

Lord Watson also held that the proviso did not allow an appeal court to determine that the damages were correct on the basis the evidence supported them as that was a quintessential jury issue.\[63\]

In such a case the assessment of damages does not depend upon any definite legal rule, and is the peculiar function of the jury, by whom the party liable is entitled to have the measure of his pecuniary liability determined.

Lord Shand’s speech contains similar reasoning. The respondent’s argument was seen as asking: \[64\]

... that another and different case than that presented to the jury shall be tried, and tried, not by the proper tribunal of a jury, but by a Court of Appeal. The Court is asked to consider the libel and the evidence for the purpose of seeing whether: liability exists on a view different from that formerly presented, and whether the damages given on the case formerly presented will not fit in suitably with this different case.

While Lord Shand saw the proviso as “useful”, it did not allow an appeal court to be “asked, in order to sustain a verdict which involves a substantial wrong to the defendant, not merely to assess damages, but to do so in trying a case materially different from that laid before the jury.”\[65\] Rather, the defendant was “entitled to have the real case submitted to the jury” so that it could be tried by that body. \[66\]

Unsurprisingly, Lord Herschell, who delivered the decision in *Makin v Attorney-General for New South Wales*, \[67\] also rejected the contention that the proviso conferred an appellate fact-finding function, for it did not allow for “dealing with the case in this way”. \[68\] This was because “in the case of an action for libel, not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal.”\[69\] Or put differently, the proviso did not permit appellate usurpation of an exclusive jury function. \[70\]

\[63\] Ibid at 50.

\[64\] Ibid at 54.

\[65\] Ibid at 55 and 56 respectively.

\[66\] Ibid.

\[67\] [1894] AC 57.

\[68\] [1896] AC 44 at 52.

\[69\] Ibid.

\[70\] Oddly, Lord Herschell claimed to see the proviso as a “very beneficial” device, which may allow an appeal court to dismiss an appeal in “cases in which the question is what are the facts, or the proper inferences to be drawn from the facts, if the Court think[s] that the verdict of the jury is in accordance with the true view of the facts and of the inferences to be drawn from them”; ibid. Regrettably, the availability of this discretion and its application were not explored.
Two points link these decisions. First, appellate fact-finding was treated as being incompatible with the right of trial by jury on the basis that the jury was the exclusive finder of fact in the criminal justice system. Second, practical considerations were also important in that witness demeanour was assumed to be central to the process of factual evaluation; unlike a jury, the written record was presumed to be inadequate to this task. It is suggested that both cases have a reflexive and instinctive quality about them in that neither considered the proviso’s history and purpose in light of the Exchequer rule and both peremptorily dismissed the possibility of appellate fact-finding by virtue of the device. Moreover, both rest upon the assumption that such fact-finding is necessarily inconsistent with the right of trial by jury in both theory and practice. These ideas were soon cemented in parts of the common law world. The response of the Canadian Supreme Court is instructive.

In 1910 Thomas Allen, a Canadian soldier, was tried with murdering his superior officer. He was found guilty and sentenced to death. The Court of Appeal for British Columbia held that certain evidence was inadmissible, but it dismissed the appeal on the basis of section 1019 of the Canadian Criminal Code, which provided that “no conviction shall be set aside or any new trial directed, although it appears that some evidence was improperly admitted ... unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial”, and in particular, because the “abundant legal evidence of guilt” meant that the defendant had not suffered such a miscarriage. However, a majority of the Canadian Supreme Court reversed this decision on the basis that the proviso had been wrongly applied.

Chief Justice Fitzpatrick thought that the trial error had affected the defendant’s right of trial by jury. As the Judge put it:...

... what greater wrong can be done a prisoner than to deprive him of the benefit of a trial by a jury of his peers on a question of fact so directly relevant to the issue as the one in question here – the existence of previous threats – and to substitute therefor the decision of judges who have not heard the evidence and who have never seen the prisoner?

71 This point is explicit in Makin but only implicit in Bray v Ford.

72 Makin’s narrow view of the proviso was adopted by the New Zealand Court of Appeal in R v Lawrence (1905) 25 NZLR 129 (discussed in chapter one) and by the Canadian Supreme Court in Allen v R (1911) 44 SCR 331 (discussed above). Until Allen, Makin had been distinguished by the Canadian courts; see R v Sunfield (1907) 13 CCC 1 and R v Woods (1897) 2 CCC 159. Although Makin was a New South Wales appeal, the case never gained the Australian High Court’s unequivocal approval. Instead, its citation in relation to the proviso has tended to feature in dissenting judgments lamenting the supposed transference of the jury’s fact-finding function to an appellate court: see the dissents of Isaacs J in R v Grills (1910) 11 CLR 400 and Eather v R (1914) 19 CLR 409 and those of Evatt J in Sodeman v R (1936) 55 CLR 192; Murphy J in Yager v R (1977) 139 CLR 28 and Gaudron J in Wilde v R (1988) 164 CLR 365. This may explain, in part, the ascendancy of Weiss v R (2005) 224 CLR 300.

73 Allen v R (1911) 44 SCR 331 at 333. Key aspects of the Court of Appeal’s decision (Allen v R (1911) 16 BCR 9) are conveniently discussed by the Supreme Court.

74 Ibid.

75 Ibid at 337.
The Judge specifically rejected an argument that the proviso empowered the Court with a fact-finding role.\textsuperscript{76}

It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt.\ldots To say that we are in this case charged with the duty of deciding the extent to which the improperly admitted evidence may have influenced some of the jurors would be to hold, as I have already said, that Parliament authorized us to deprive the accused in a capital case of the benefit of a trial by jury.

Justice Anglin agreed citing \textit{Makin}.\textsuperscript{77} Otherwise, said the Judge, the proviso "would in effect substitute the court for the jury in "the determination of the question whether the evidence ... establishes the guilt of the accused".\textsuperscript{78}

Justices Davies and Idington dissented. Presciently, Davies J observed that the proviso cast a direct "duty [upon the Court] of determining whether the facts which happened did or did not occasion such substantial wrong".\textsuperscript{79} It followed that "unless we are able to find that some substantial wrong or miscarriage was so occasioned we are without any jurisdiction to interfere with the verdict of the jury."\textsuperscript{80} In an apparent reference to the Exchequer rule, Davies J said the proviso had been enacted:\textsuperscript{81}

\ldots for the purpose of putting an end to the judicial scandals occasioned by courts feeling themselves obliged by authorities and precedents to give effect to trivial errors or mistakes at criminal trials either with respect to the reception or rejection of evidence, the conduct of the trial or the charge or rulings of the trial judge, quite irrespective of the fact whether these errors or mistakes occasioned substantial wrong or injustice to the prisoner or not.

Foreshadowing the decision of the Australian High Court in \textit{Weiss}\textsuperscript{82} and its requirement that an appeal conduct an independent examination of the evidence, Davies J noted:\textsuperscript{83}

\begin{quote}
In order to discharge my duty in that regard I have, as I have stated, read most carefully the entire evidence with the result that I am unable to reach the conclusion that the occurrence or incident objected to or the manner of putting the questions objected to could have occasioned the prisoner any substantial injustice.
\end{quote}

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\item \textsuperscript{76} Ibid at 339. \textit{Makin v Attorney-General for New South Wales} [1894] AC 57 was cited as supporting this conclusion.
\item \textsuperscript{77} Justice Duff concurred with the Chief Justice.
\item \textsuperscript{78} (1911) 44 SCR 331 at 361.
\item \textsuperscript{79} Ibid at 344-345.
\item \textsuperscript{80} Ibid.
\item \textsuperscript{81} Ibid at 345.
\item \textsuperscript{82} \textit{Weiss v R} (2005) 224 CLR 300.
\item \textsuperscript{83} (1911) 44 SCR 331 at 345.
\end{itemize}
The Judge considered that *Makin* was distinguishable on the basis of differences in the statutory text of the respective provisions, and, in particular, the fact that the Canadian proviso envisaged the wrongful admission of evidence. Similarly, Idington J thought that the proviso’s language had “a comprehensive and imperative character” to it that required an appellate court to dismiss an appeal if it was satisfied the jury would have convicted the defendant but for trial error. The Judge held that was the correct conclusion on the evidence, noting it was the “bounden duty of the jury to convict.” Finally, Idington J rejected the majority’s construction of the proviso as a judicial “abandonment of all responsibility such as has been cast by the plain wording of the section … upon the appellate courts of Canada”.

IV. THE GUILT-BASED APPROACH: THE COURT OF CRIMINAL APPEAL FROM 1907 TO 1944

Although *Makin v Attorney-General for New South Wales* and *Bray v Ford* firmly rejected the notion of jury usurpation, a measure of appellate fact-finding entered the common law in the early twentieth century through the jurisprudence of the English Court of Criminal Appeal. This occurred by virtue of that Court’s adoption of various tests consistent with the guilt-based approach to the proviso, although this important development was marked by surprisingly little discussion. Instead, the Court merely assumed that the proviso permitted such an approach and the discussion that did occur focussed upon the level of probability of conviction necessary for the proviso’s invocation. Various attempts were made to articulate an embracing test and an artificial distinction emerged according to error type. Accordingly, errors of fact came to be treated differently from errors of law so that the proviso could be applied in relation to the former if the verdict was the only reasonable and proper verdict, whereas its application in relation to the latter required appellate satisfaction that the jury would have convicted but for error. While this distinction ultimately collapsed, the compatibility of such tests with the absence of an appellate fact-finding function attracted little, if any, judicial scrutiny. The same period also illustrated the potential

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84 Ibid at 347. The Judge went as far as to say that the Canadian provision was “so explicit, so definite, so clear, as to leave no possible doubt in ... [his] mind of its meaning”; ibid.
85 Ibid at 354 and 356 citing the English case of *R v Dyson* [1908] 2 KB 454 which is discussed shortly.
86 Ibid.
87 Ibid at 354.
88 [1894] AC 57.
89 [1896] AC 44.
90 In its first year of operation the Court of Criminal Appeal applied the proviso in only two reported cases: *R v Meyer* (1908) 1 Cr App R 10 discussed above and *R v Westacott* (1908) 1 Cr App R 246. Thereafter, while the proviso was applied with increasing frequency, the Court did so with very little attendant discussion of the conceptual basis for its application. According to the Criminal Appeal Reports, the proviso was applied on nine occasions in 1909 and 15 occasions in 1910. Within two decades of being established, the Court of Criminal Appeal had applied the proviso on 64 reported occasions.
for disjuncture between theory and practice in this area in that while the Court of Criminal Appeal explicitly disavowed a fact-finding function, it is clear that the Court sometimes dismissed appeals because it was satisfied that 'a jury' should have convicted the defendant when it was far from clear that 'a jury' would necessarily have done so.

A. The Search for Principle

In *R v Meyer* in 1908 the defendant complained of the judge’s directions to the jury following his conviction for larceny of a ring. The Court of Criminal Appeal rejected this complaint, although it suggested that the proviso would have been applicable in any event, and in so doing, ventured its first reported test for the proviso’s application. The Lord Chief Justice said that the proviso could operate unless "the facts proved should be consistent with innocence and not consistent only with guilt." This test, which appears to have envisaged the Court’s assessment of the defendant’s guilt, was not further discussed in light of the facts for the defendant "had kept the ring ... and had not communicated to the prosecutor the fact that he alleged the ring had been stolen from him." Therefore, even if the Court had thought there had been a misdirection, they would not have interfered.

A different formulation emphasising the primacy of the jury was adopted by the Court of Criminal Appeal only three days later. *R v Dyson* concerned the operation of the year and a day rule in relation to culpable homicide; on the facts, the manslaughter of a child by various assaults. The judge misdirected the jury that they might find manslaughter proved, inter alia, on an assault more than a year and a day before the child’s death. There was evidence of more recent qualifying assaults on the defendant’s part, however, as well as evidence that the later episodes of assault could have accelerated death. As in *Makin*, the Crown contended that the proviso should be applied in light of the complexion of the evidence, a proposition that “caused the Court anxious consideration". However, the Court of Criminal Appeal rejected this contention because to do otherwise would countenance a trespass upon the function of the jury:

... the reason that they could not use the power was – and it was so very important that it must be stated clearly – that the Court ought not to substitute itself for the jury. It was much to be regretted that Parliament had not given the Court power to order a new trial: such a power might

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91 (1908) 1 Cr App R 10.
92 Ibid at 12.
93 Ibid.
94 Ibid.
95 [1908] 2 KB 454. The report in the Law Reports is different to that which appears in the Criminal Appeal Reports at (1908) 1 Cr App R 15. Although the former is the official version, the latter is slightly longer, more revealing in terms of methodology and suggestive of verbatim transcription. Therefore, unusually, all references are to (1908) 1 Cr App R 13.
96 Ibid at 14.
97 Ibid at 15, emphasis in original.
only be wanted in few instances, but this is one of them. Here, as they could not substitute themselves for the jury, they could not positively say that there would be no miscarriage of justice; they could not say that the jury must have come to the conclusion that the death was accelerated by the previous assault – probably they would have done so, but there was some evidence – not indeed the bulk of the evidence – that death may have been due to a fall: and there was no sign of external injury, and therefore it was not absolutely certain that the death had been accelerated as suggested. It was too serious in such a case to say that the jury must have come to a verdict of guilty.

In *R v Cohen & Bateman*<sup>98</sup> the following year the Court outlined yet other tests involving the guilt-based approach. The defendants were convicted of obtaining money by false pretences and fraud. On appeal, they complained that the summing up contained misdirections in law. The Court of Criminal Appeal acknowledged this point “would be fatal unless the case came within the proviso”.<sup>99</sup> Other complaints were also levelled and sustained; the Court agreed that there were other errors in the summing up and that, on matters of fact, the judge had expressed himself “very strongly.”<sup>100</sup> Delivering the judgment of the Court, Channell J said that the type of error affected the test for the proviso’s application:<sup>101</sup>

This section has been considered in almost all the cases which have come before this Court, but these precedents are of little use in subsequent cases because of the varying circumstances of each particular case. Although, therefore, the principle is quite clear, we desire to express it again. Taking sect. 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction the jury must have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favour of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words ‘any other ground,’ so that the appeal should be allowed according as there is or is not a ‘miscarriage of justice.’ There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong decision of a point of law.

By this passage, the Court of Criminal Appeal created a distinction between errors of law that created a presumption of a miscarriage of a justice unless it could be shown that the jury would have convicted had the error not occurred, and other lesser errors in relation to which the proviso would apply upon satisfaction that the verdict was the only reasonable and proper one. The basis for this distinction is unclear from the judgment and incorrect but inconsequential decisions of law can be readily

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<sup>98</sup> (1909) 2 Cr App 197.

<sup>99</sup> Ibid at 208.

<sup>100</sup> Ibid at 209.

<sup>101</sup> Ibid at 207-208, emphasis in original.
imagined, for example the wrongful admission of trivial evidence. So too other types of error where the effect on a trial may be profound, for example, an unfair summing up or biased judge. Consequently, the assumption that error on a point of law was inherently more serious was questionable and nothing in the Criminal Appeal Act 1907 suggested such an approach. Indeed, s 4 of that Act placed the grounds of appeal upon an equal footing in that all were subject to the proviso. The same reasoning also tells against the Court’s sliding scale of probability of conviction according to error type. Most significantly, however, in Cohen & Bateman the Court of Criminal Appeal failed to acknowledge the potentially broad fact-finding function conferred upon an appeal court by the proper and reasonable verdict test and the more constrained discretion inherent in the ‘must have convicted’ formulation.

The Court’s assessment of the evidence is also revealing. The prosecution case was that the defendants, who had recently entered in business together as wool exporters, deceived a solicitor into lending them money by falsely representing their financial position. Various associates of the defendants were also involved, whether innocently or otherwise. To achieve their purpose, the defendants created a number of false documents including a balance sheet. The defendant Cohen gave evidence. He denied any dishonesty and said that the evidence of the principal prosecution witness, a Mr Cook, should not be accepted. The case therefore involved a credibility contest ordinarily said to require the exercise of a lay jury’s judgement. The Court, however, concluded “that the facts were such that if the verdict had acquitted either of the prisoners it would not have been a reasonable verdict” because the “facts relating to the balance-sheets are extremely strong.” But as the following passage suggests, this assessment appears to have involved the Court embarking upon a fact-finding function that it had specifically eschewed:

The next use made of Cohen’s balance-sheet was for the partnership between Bateman and Cohen. Cohen may have thought Bateman had the money he professed to have, and the same may have been true of Bateman’s balance-sheet, the substance of which was stated before it was put into writing. This statement may have been devised for the purpose of deceiving Cohen. Each balance-sheet is inaccurate. The items in Cohen’s are exaggerated. The items in Bateman’s are also exaggerated, and the balance is inflated by supposed stock and securities. What has become of them and where did they come from? Bateman commenced business with £2,000 and ended with nothing. How could £2,000 have increased to that supposed balance by unsuccessful trading? Obviously the balance is wrong. Bateman had the opportunity of explaining the matter, and he was really not stopped on that point. Although a foreigner, his statement is quite intelligible. It was to the effect that his balance-sheet was made to justify a claim for a larger share of profits than he would have had on a true balance-sheet. The balance-sheets were clearly wrong, and were undoubtedly used fraudulently. Was the bill purporting to be accepted by Wilks a forgery? Wilks was called and said it was a forgery. David Cohen gave evidence as to the manner in which it came into existence. He is not so innocent as he professed to be. Probably his object was to relieve his uncle Cohen by putting the blame on Bateman. The learned judge did not tell the jury his evidence was necessarily true, but he did assume that the flogging took place. Thinking to prevent further notice being taken of the transaction, David Cohen perhaps invented the story of the thrashing, which is probably quite problematical. But here we have forged bills used by both prisoners for their own purposes. There may be some doubt whether Bateman was the forger, and Max Cohen may be rightly substituted for Bateman as the forger; but it does not signify who tempted the boy, if we are right in our view.

102 The Court applied this test as there were no errors of law, ibid at 210.

103 Ibid at 211.
The Court dismissed the appeals as the defendants had not suffered a substantial miscarriage of justice despite the errors at trial.104

Unlike Cohen & Bateman, R v Stoddart105 concerned an error of law in that the judge directed the jury that the defendant bore an evidential onus to demonstrate his innocence. This was a serious misdirection even though Viscount Sankey LC’s “golden thread” was still two decades away.106 Despite this, the Court considered applying the proviso, an issue that in light of the facts was said to raise a question of “great difficulty.”107 Citing R v Dyson108 while echoing R v Meyer,109 the Court could “not say that the facts established are inconsistent with ... innocence.”110 And of the test in Dyson, the Court questioned whether “it is open to consideration whether the word ‘must’ is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict.”111 Applying its own formulation, the Court felt “unable to come to the conclusion that in this case if the jury had been properly directed they would have thought that the facts proved were inconsistent with the defendant’s innocence, and might not then have had a doubt” as to whether the charges were proved.112 Stoddart’s ‘would have convicted’ test was applied thereafter in R v Monk113 in which the judge summarised a matter of evidence “much too definitively”114 and the test later found favour with the Court of Criminal Appeal in other cases.115

It follows that by as early as 1912 several different tests as to the probability of conviction had been articulated including the ‘must have convicted’ formulation, a ‘would have convicted’ test and reference as to whether the verdict was ‘reasonable and proper’. As we have seen, the last of these tests could not be applied to errors of law whereas the second and third tests could. Unsurprisingly, the terms came to be used interchangeably and the resulting analyses conflated. For example, in R v Hilliard116

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104 Ibid at 212.
105 (1909) 2 Cr App R 217.
106 See Woolmington v Director of Public Prosecutions [1935] AC 462 at 481.
107 (1909) 2 Cr App R 217 at 244.
108 [1908] 2 KB 454.
109 (1908) 1 Cr App R 10.
110 (1909) 2 Cr App R 217 at 245.
111 Ibid.
112 Ibid.
113 (1912) 7 Cr App R 119.
114 Ibid at 124.
115 See R v Norton [1910] 2 KB 496; R v Loates (1910) 5 Cr App R 193 and R v Wilson (1911) 6 Cr App R 207.
116 (1913) 9 Cr App R 171.
the Court of Criminal Appeal held that the judge's failure to direct the jury on a particular point was within Channel J's second category, a miscarriage not arising from an error of law, and hence the question was whether the "only reasonable and proper verdict would be one of guilty". Having posed that inquiry, however, the Court held, "we are not able to say with certainty that the jury, on a proper direction, would have found that the offence had been committed." 

In 1918, Darling J sought to affirm Cohen & Bateman by insisting that errors of fact imported a persuasive onus on the appellant to demonstrate a miscarriage of justice, whereas mistakes of law placed an onus upon the Crown to show otherwise. However, the authorities in this period treated loosely the professed distinctions concerning error type and consequential proof with the result that in 1944 the Court of Criminal Appeal implicitly abandoned Channell J's analysis by concluding that, "it seems to us to matter very little what precise words are used so long as the language of the proviso is satisfied and the Court is sure that there has been no substantial miscarriage of justice." A year later a case involving an error of law resulted in the proviso being applied as "the only reasonable and proper verdict would have been one of guilty", that test being treated by the Court as synonymous for that involving non-legal error and the 'would have convicted' formulation.

B. The Difference between Theory and Practice

Throughout the period above, the appellate fact-finding implicit in the various tests utilising a guilt-based approach to the proviso went unconsidered. A divergence between theory and practice, however, also became evident. Reference is made to R v Atherton, R v May and R v Metcalfe.

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117 Ibid at 174.
118 Ibid at 175, emphasis added.
119 R v Broadhurst (1918) 13 Cr App R 125 at 130.
120 R v Haddy [1944] 1 KB 442 at 445. See also R v William & Woodley (1920) 14 Cr App R 135; R v Jones & Wright (1922) 16 Cr App R 124 and R v Wright (1934) 25 Cr App R 35; compare R v Turner [1944] KB 463. The same is true post-1945; for example, see R v Abbott (1955) 39 Cr App R 141 and R v Wallwork (1958) 42 Cr App R 153; compare R v Allan (1963) 47 Cr App R 243.
121 R v Farid (1945) 30 Cr App R 168.
122 Ibid at 180.
123 (1910) 5 Cr App R 233.
124 [1912] 3 KB 572.
125 (1913) 8 Cr App R 7. See also R v Bebby (1911) 6 Cr App R 138; R v Wilson (1911) 6 Cr App R 207; R v Monk (1912) 7 Cr App R 119; R v Cook (1912) 8 Cr App R 63; R v Murray (1913) 9 Cr App 248; R v Smallman (1914) 10 Cr App R 1 and R v Burnell (1914) 10 Cr App R 222.
In *R v Atherton* the defendant was convicted of receiving stolen property. The judge made so many factual mistakes in his directions that the Court of Criminal Appeal acknowledged that it was “impossible to shut our eyes to the fact that here and there things were stated to have been proved which were not proved at all.” Notwithstanding this, the Court applied the proviso as the jury “would have come to the same verdict” even though the evidence to support that conclusion was limited to the doctrine of recent possession. In *R v May* convictions for indecent assault were upheld despite a misdirection on the central issue of consent, the Court noting in applying the proviso that the defendant’s explanations had been inconsistent and that there had been evidence analogous to recent complaint. And while the evidence to support a conviction for larceny was “very slight” in *R v Metcalfe*, the Court referred to the depositions evidence to augment the case against the defendant and then held that the jury would have convicted had it known about that additional material.

Such instances were not limited to the first decade of the Court of Criminal Appeal’s operation. In *R v Beecham* in 1921, the defendant was convicted of vehicular manslaughter. On appeal, it was held he had been wrongly cross-examined about previous instances of speeding and that the judge’s summing up was “defective and unsatisfactory.” Despite such errors, Darling J held that the jury would have found the defendant guilty if the trial had been error-free. Similarly, in *R v Coulthead* in 1934 the Court applied the proviso in relation to a misdirection about corroboration in a case of indecent assault. While the prosecution’s case was strong, including evidence of recent complaint and other material “which indicated that there had been interference” with the boy’s genitals, a leap of faith is apparent in the conclusion that a jury would necessarily have convicted in a trial heavily dependent upon the credibility of witnesses. Collectively, these examples illustrate what less

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126 (1910) 5 Cr App R 233.
127 Ibid at 236-237.
128 Ibid at 237. While the doctrine of recent possession provides that a fact-finder may infer guilt from a defendant’s recent and unexplained possession of stolen property, the doctrine does not compel that conclusion; see *R v Keenan* [1967] NZLR 608. It follows that it could not be said that a jury would have undoubtedly convicted.
129 [1912] 3 KB 572.
130 Ibid at 579.
131 (1913) 8 Cr App R 7.
132 Ibid at 9.
133 [1921] 3 KB 464.
134 Ibid at 470.
135 Ibid at 472.
136 (1933) 24 Cr App R 44.
137 Ibid.
138 Ibid at 45.
contentious instances of the proviso’s application do not, namely that tests grounded upon the proposition that ‘a jury’ would have convicted are legal fictions in which appellate findings are presented as those of a putative jury.

V. THE ACTUAL JURY AND A NOTIONAL JURY: ENGLISH COMMON LAW FROM 1944 TO 1995

As discussed in chapter one, the 1944 decision of the House of Lords in Stirland v Director of Public Prosecutions139 settled the test for the proviso’s application as whether a reasonable and properly directed jury would have undoubtedly convicted on the admissible evidence. Notwithstanding this, subsequent English common law fluctuated between that test and earlier formulations of the Court of Criminal Appeal predicated upon what the trial jury would have done. The half-century between Stirland and the repeal of the English proviso in 1995 therefore provides an obvious foundation for considering the two tests in relation to the fact-finding role of a criminal appeal court.140

Davies v Director of Public Prosecutions141 and R v Allan142 frame a helpful starting point by identifying the most important distinction between the two. In Davies, the defendant was convicted of murder following an earlier trial in which the jury had been unable to agree upon a verdict. A former defendant from the first trial gave evidence against him. On appeal to the House of Lords, it was argued that the judge ought to have given an accomplice warning in relation to this witness. This argument was rejected and the Law Lords affirmed that the proviso was applicable to such an error if a reasonable jury would inevitably have convicted had an accomplice warning had been given.143 Notably, Lord Simonds LC said that the reason for insisting upon the notional reasonable jury test instead of an actual trial jury test was that, “No appellate court can tell what a particular jury would have decided in circumstances which did not occur.”144

[1944] AC 315.

By the Criminal Appeal Act 1995 (UK), the proviso and its associated appeal grounds in the Criminal Appeal Act 1968 were abolished in favour of a single criterion for conviction appeals, namely whether the appeal court thought the conviction “unsafe”. In R v Pendleton [2002] 1 WLR 72, Lord Bingham of Comhill thought it “undesirable” that this ground should be interpreted by reference to “words not to be found in the statute”, namely the postulated view of a notional jury, while recognising that a jury and not an appellate court was the “primary” fact­finder, ibid at [19]. Lord Hobhouse of Woodborough was more direct; in his Lordship’s view, “it is not right to attempt to look into the minds of the members of the jury. Their deliberations are secret and their precise and detailed reasoning is not known. For an appellate court to speculate, whether hypothetically or actually, is not appropriate. It is for the Court of Appeal to answer the direct and simply stated question: Do we think that the conviction was unsafe?” Ibid at [38].


Ibid.
The Court of Criminal Appeal’s decision in *R v Allan*\(^{145}\) shows the operation of the principle in reverse. There the Court declined to engage in “conjecture” as to how the trial jury would have reacted but for the error because the: \(^{146}\)

... witnesses were numerous, there were not unimportant discrepancies even on the prosecution side as to the parts alleged to have been played by the various accused, and in their two hour deliberations the jury must often have turned to the typed legal directions as to a sheet-anchor.

As both cases suggest, the trial jury test is conceptually awkward because an appellate court can rarely know how that jury would have treated the evidence had the error not occurred. In an attempt to overcome this difficulty, criminal appeal courts have on occasions sought assistance from the record as to how the jury must have reasoned for the purpose of extrapolating that reasoning to the application of the proviso. *R v Masters*\(^{147}\) provides an example. The defendant was convicted of capital murder, which required proof that the murder was committed to facilitate the commission of another crime. The prosecution said that crime was theft. The defendant had asked the victim for a loan. When the victim refused, the defendant beat him to death. A scene examination revealed that the “deceased’s room was in complete disorder, but [that] money remained in the house”\(^{148}\). The defence case was that although the defendant had killed the deceased, he had not committed theft.\(^{149}\) The issue for the Court of Criminal Appeal was whether the judge’s directions on the topic were adequate. In the course of its deliberations, the jury sought clarification of the law of theft and, in particular, whether the Crown had to establish the defendant had removed articles from the house. On appeal, the Crown said that question demonstrated that the jury “must have been satisfied that the attack was made with the intention of stealing” so that the proviso could be applied irrespective of any deficiency in the directions.\(^{150}\) The Court agreed as the jury “by the question they asked must have been satisfied of the attempt” to steal.\(^{151}\) Conversely, the notional reasonable jury test is not problematical in this regard as the hypothetical nature of the court’s inquiry is explicit.\(^{152}\)

The second and related difference is the extent to which each confers a fact-finding discretion. Because the collective thought processes of the trial jury cannot be known, appeal courts faithfully applying the actual jury test are limited to ‘finding’ that

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146 Ibid at 139.
147 [1965] 1 QB 517.
148 Ibid at 519.
149 The defendant said the state of the house was due to his frantic attempt to find bandages to apply to the victim.
150 Ibid at 521.
151 Ibid at 524.
the jury would have convicted in only the clearest and strongest of cases. Notional reasonable fact-finders, however, do not return perverse verdicts. It follows that the actual jury test confers a more limited fact-finding role than its reasonable jury counterpart. These points underlie the 1973 decision of the Privy Council in *Edwards v R*\(^{153}\) and the 1981 House of Lords’ decision of *Director of Public Prosecutions v Stonehouse*\(^{154}\) in which the reasonable jury test was affirmed.

In *Edwards v R* the defendant followed the deceased from Australia to Hong Kong and there fatally stabbed him 27 times. The Crown said his motive in doing so was financial gain. The appellant said his intention was blackmail, not murder, and that when he attempted the former the deceased attacked him with a knife which he wrested away. The defendant said that his subsequent stabbing of the deceased was committed either in self-defence or under the influence of provocation. Unsurprisingly, the jury convicted of murder. The Hong Kong Supreme Court held that the judge had wrongly withdrawn the issue of provocation but it applied the proviso.\(^{155}\) Speaking for the Board, Lord Pearson said that this application was wrong even though the bifurcated defence was implausible, as there was “a difficulty in ‘delving into the minds of the jury’ and speculating as to what the exact mental processes of the jury in fact were and what they would have been if a different question had been presented to them for decision”.\(^{156}\)

*Director of Public Prosecutions v Stonehouse*\(^{157}\) involved a politician who faked his death in order to enable his (innocent) wife to collect the benefits of life insurance policies. He was subsequently convicted of attempting to obtain property by deception. In issue in the House of Lords was the judge’s direction that the jury should find the attempt proved if they found certain facts had been established. A majority of the Lords held that constituted a misdirection, but the House was unanimous that the proviso should be applied given the strength of the evidence against the defendant.\(^{158}\) In reaching this conclusion, Lords Diplock and Salmon affirmed the reasonable jury test because only “a cynical view of justice” would promote a system in which a defendant was “entitled to … [a] chance of a perverse verdict of acquittal.”\(^{159}\) The test was therefore what a reasonable jury would have done and not what the trial jury might have (wrongly) done.\(^{160}\)

\(^{154}\) [1978] AC 55.
\(^{155}\) Criminal Procedure Ordinance (Hong Kong), s 81(2).
\(^{156}\) [1973] AC 648 at 659 citing *Bullard v R* [1957] AC 635.
\(^{158}\) Lords Salmon, Keith and Edmund-Davies held that whether the attempt had been proved was a matter for the jury and not the judge; ibid at 79-80, 88 and 94. Lords Diplock and Viscount Dilhorne dissented on this point; ibid at 70-71 and 74. As to the proviso; see ibid at 70-71, 73, 79, 88-89 and 95.
\(^{159}\) Ibid at 70.
\(^{160}\) Ibid at 70-71.
The reasonable jury test is, however, not mere ornamentation for an appeal court’s view of the facts. By such language, appeal courts acknowledge the jury as the primary finder of fact in the common law system of criminal justice. Moreover, unless an appeal court is satisfied that ‘a jury’, either real or imagined, would have convicted the defendant irrespective of error, then it must remit the case for another jury to try it. It follows that tests framed upon the inevitability of conviction have acted to both mask and constrain appellate fact-finding pursuant to the proviso.

VI. CANADIAN CONSERVATISM

As with their English counterparts, Canadian criminal courts have asked whether the trial jury or a reasonable jury would have inevitably convicted the defendant for the purpose of determining, upon a finding of serious trial error, if there has been no substantial miscarriage of justice.161 More so than other courts, however, the Canadian Supreme Court has emphasised that the proviso is reserved for cases involving overwhelming evidence of guilt in order to “respect the primary role of trial judges and juries in making factual determinations”.162 Further, that Court has recently held that the standard for concluding that a jury would have convicted is “substantially higher” than the criminal standard of beyond reasonable doubt.163 The result is that the Canadian Supreme Court has explicitly and consistently eschewed an appellate fact-finding role pursuant to the proviso upon the assumption that it would be inconsistent with that of the jury at first instance.

The story begins with Gouin v R164 in 1926. The defendant was found guilty of manslaughter arising from an attempt to procure an abortion. The evidence against him

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161 Section 686(1)(b)(iii) of the Canadian Criminal Code enables an appeal court to dismiss the appeal if “it is of the opinion that no substantial wrong or miscarriage of justice has occurred”. The proviso has been a feature of the Criminal Code since the Code was enacted in 1892 although the device has undergone several transformations. As first enacted, s 746(f) of the Code precluded an appeal from being allowed unless the appeal court was of the “opinion” “some substantial wrong or miscarriage of justice was ... occasioned on the trial” by an error or errors. However, in 1923, the proviso was redrafted (as s 1014 of the Code) to invest an appeal court with a discretion to dismiss the appeal if it was of the opinion that “no substantial wrong or miscarriage of justice has actually occurred.” The proviso was amended again in 1955 by removing the word “actually” on the basis it added nothing to the meaning of the text and by abolishing the proviso’s potential application to unreasonable verdicts and cases involving a miscarriage of justice. The more substantive amendments reflected the assumption that an unreasonable verdict and a miscarriage of justice necessarily entailed a substantial miscarriage of justice. Consequently, unlike the proviso to s 385(1) of the New Zealand Crimes Act 1961, the Canadian provision is now limited to wrong decisions on a question of law. For the history of the Canadian proviso, see Alan W Mewett QC, “No Substantial Miscarriage of Justice” in Anthony N Doob and Edward L Greenspan QC (eds), Perspectives in Criminal Law: Essays in Honour of John LLJ Edwards (1985) and Ronald R Price and Paula W Mallea, “‘Not by Words Alone’: Criminal Appeals and the No Substantial Wrong or Miscarriage of Justice Rule” in Vincent M L Del Buono (ed), Criminal Procedure in Canada (1982).

162 R v Khan [2001] 3 SCR 823 at [105] per LeBel J.

163 R v Trochym [2007] 1 SCR 239 at [82] per Deschamps J.

164 [1926] SCR 539.
came from an accomplice, but the judge gave no warning to the jury against convicting in the absence of corroboration.\textsuperscript{165} The Supreme Court held that this was a misdirection, which raised the questions of whether the proviso could be applied, and if so, upon what test. For the majority, Rinfret J held that once "a case of misdirection is made out, the burden is upon the Crown to show that, as a result, there has been no miscarriage of justice".\textsuperscript{166} The test, said the majority, required the Crown to "convince" the Court that "but for the ... [error], the verdict would necessarily have been the same."\textsuperscript{167} That could not be satisfied on the facts as "we cannot come to any other conclusion but that the jury may have been influenced by the improper direction".\textsuperscript{168} While \textit{Gouin} identified the test for the application of the proviso, appellate satisfaction that the verdict would necessarily have been the same but for error, the case left open the means by which an appeal court was to determine whether the outcome would have been the same. The answer came a year later in the factually similar case of \textit{Brooks v R}.\textsuperscript{169}

Bartlett Brooks was convicted of using means to procure an abortion, he having taken the young woman concerned to a doctor other than her family physician, and to whom she gave her name as Mrs Brooks. The judge appears to have been sceptical of the defence case, which was that the defendant did not know of the pregnancy, and as a result his directions to the jury were held not to have been expressed as "fairly and clearly" as had the case for the Crown.\textsuperscript{170} Citing \textit{Gouin v R},\textsuperscript{171} the Supreme Court held that the onus was upon the Crown to establish that the verdict would have been the same had the error not occurred, and that the approach was to ask whether, "the jury ... could not, as reasonable men, have done otherwise than find the appellant guilty."\textsuperscript{172} But while framing an objective approach, the Court emphasised that it was imposing a high standard for the proviso's application so as to avoid "substitut[eing] the verdict of the court for that of a jury properly instructed".\textsuperscript{173} The Court noted that while there "was quite enough evidence to warrant the jury ... drawing an inference of guilty knowledge" on the defendant's part, it was insufficient for an appeal court "perusing the record" to conclude that conviction absent error was merely "probable".\textsuperscript{174} The appeal was allowed.

\textsuperscript{165} Contrary to the English case of \textit{R v Baskerville} [1916] 2 KB 658.

\textsuperscript{166} [1926] SCR 539 at 543.

\textsuperscript{167} Ibid at 544.

\textsuperscript{168} Ibid. Justice Idington dissented as having "read the entire appeal book", he thought the misdirection was a mere "slip" and one "not likely to have influenced the jury unduly"; ibid at 545.

\textsuperscript{169} [1927] SCR 633.

\textsuperscript{170} Ibid at 635.

\textsuperscript{171} [1926] SCR 539. \textit{Allen v R} (1911) 44 SCR 331 and \textit{Makin v Attorney-General for New South Wales} [1894] AC 57 were also cited in support of this proposition.

\textsuperscript{172} [1927] SCR 633 at 636.

\textsuperscript{173} Ibid.

\textsuperscript{174} Ibid.
Similar reasoning underpins the 1965 decision of *R v Colpitts*,175 which remains the leading judgment of the Canadian Supreme Court on the application of the proviso.176 Colpitts was convicted of capital murder after he killed a prison guard. The evidence against him included a series of prompt confessions to the Royal Canadian Mounted Police, including one recorded on audio tape. The defendant testified at trial that he had falsely confessed to protect an unnamed friend even though he risked being hanged by so doing. The trial judge said little about the defence case in the summing up beyond that it was for the jury to determine if the defendant’s confessions or his later evidence were true. The Supreme Court of New Brunswick unanimously held that the judge’s directions were inadequate but a majority of that Court held that there had been no substantial miscarriage of justice in light of the evidence. The Canadian Supreme Court reversed the decision as it held that the proviso had been wrongly applied.177

Justice Ritchie held that while it was “improbable” the jury had been wrongly influenced by the judge’s limited summing up, he was “nevertheless unable to say that the verdict would necessarily have been the same” if the error had not been made.178 Similarly, Cartwright J held that it was “impossible to affirm from a reading of the written record that the testimony of the accused might not have left a properly instructed jury in a state of doubt”.179 The Judge expressly rejected the Crown’s argument to the contrary, observing it would “transfer from the jury to the Court of Appeal the question of whether the evidence established the guilt of the accused beyond a reasonable doubt.”180 The defendant was “entitled to the verdict of a jury which has been accurately and adequately instructed as to the law.”181

175 [1965] SCR 739.

176 *Colpitts* has continued to be cited with approval by the Supreme Court. For example, see *R v Arradi* [2003] 1 SCR 280; *R v Hibbert* [2002] 2 SCR 445; *R v Khan* [2001] 3 SCR 823, *R v Charlebois* [2000] 2 SCR 674; *R v Jolivet* [2000] 1 SCR 751 and *R v Brooks* [2000] 1 SCR 237. In the intervening decision of *Markadonis v R* [1935] SCR 657, Duff CJ suggested at 661 that the proviso operated to prevent a conviction from being quashed unless a substantial miscarriage had first been demonstrated by the defendant. This appears to have been a slip as the observation was inconsistent with both *Gouin v R* [1926] SCR 539 and *R v Colpitts* [1927] SCR 633. Moreover, the statutory text was amended in 1923 to invest an appeal court with a discretion to dismiss an appeal if the court was of the opinion the defendant had not suffered a substantial miscarriage.

177 [1965] SCR 739. Chief Justice Taschereau and Abbott and Judson JJ dissented on the ground that the trial judge’s error “was of a minor character” as the “theory of the defence was a simple one”; ibid at 743.

178 Ibid at 745.

179 Ibid.

180 Ibid at 744.

181 Ibid, emphasis added.
Citing *Brooks v R*, Spence J said that the test for the application of the proviso required appellate satisfaction that the jury could not, acting reasonably, have done other than find the defendant guilty. The Judge then noted:

In an attempt to persuade this Court that upon such a test being applied ... counsel for the respondent cited many pieces of evidence which would tend to show that the appellant had told the truth when he made the statements to the police and had lied when he testified in court. As pointed out by the various learned justices in appeal in the Supreme Court of New Brunswick, this, even if true, would not be sufficient because if the evidence of the appellant at trial, although the jury is not convinced of its truth, raises a reasonable doubt in their minds, that reasonable doubt must be resolved in favour of the accused.

According to Spence J:

... this Court cannot place itself in the position of a jury and weigh these various pieces of evidence. If there is any possibility that twelve reasonable men, properly charged, would have a reasonable doubt as to the guilt of the accused, then this Court should not apply the ... [proviso] to affirm a conviction.

More recent case law confirms that the Canadian Supreme Court has sought to restrict the application of the proviso to cases involving the clearest evidence of guilt in order to preserve the constitutional role of the jury. Consider *R v B* in 1993, *R v Khan* in 2001 and *R v Hibbert* a year later.

The defendant in *R v B* was convicted of crimes involving the sexual abuse of his niece over an eight-year period. At trial, the victim’s brothers and sisters gave evidence of the violent control the defendant exerted within the household. The Supreme Court was unanimous this evidence was admissible, but a majority of the Court held that the judge had insufficiently directed the jury as to how it was relevant. The Court was similarly divided over the application of the proviso. Chief Justice Lamer, who was joined by Sopinka J, affirmed the Court’s earlier decision in *R v Colpitts* noting.
... if appellate courts resort too readily to the proviso, 'the judges would in truth be substituted for the jury, the verdict would become theirs and theirs alone, and would be arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords'.

It followed that, "Unless used with great circumspection, the ... [proviso] would effectively deprive accused persons of the right to have their guilt or innocence determined by a properly instructed jury of their peers." 193 To avoid this risk, Lamer CJ considered that the test for the application of the proviso should be akin to that by which an unreasonable verdict was quashed under the Criminal Code: 194

I therefore approach the question of whether this is a case in which the proviso ... should be applied by asking whether, if the jury had been properly instructed, the verdict of guilty would necessarily have been the same in the sense that any other verdict would have been unreasonable or not supported by the evidence. This exercise must be conducted with respect for the function of the jury, whose role it is to determine what evidence of which witnesses they accept, the weight it should be accorded and, in the final analysis, whether there exists a reasonable doubt about the guilt of the accused.

By asserting such a connection, the Chief Justice imported a very high standard for the proviso's application. This is because the Supreme Court had earlier held that it would not quash a verdict as unreasonable unless it was one "that a properly instructed jury acting judicially, could [not] reasonably have rendered". 195 Moreover, the Court had also stressed that under this appeal ground, "the jurors are the triers of the facts and their finding is not to be set aside [simply] because the judges in appeal do not think they would have made the same finding if sitting as jurors." 196 Applying this stringent test, Lamer CJ held: 197

In approaching the question in this case, it is essential to bear in mind that, in the final analysis, the case turned on questions of credibility. Depending on what evidence was accepted, there certainly could have been ample evidence upon which a jury properly instructed could convict on the charges upon which this jury convicted the accused. However, verdicts of acquittal on all counts on the trial record as it stands would, in my respectful view, not be susceputible to be set aside as being unreasonable.

It followed, according to Lamer CJ, that "it can scarcely be concluded that the verdict of the jury would have been the same had the trial been conducted in accordance

193 Ibid at 704-705.
194 Ibid at 706. Section 686(1)(a)(i) of the Canadian Criminal Code permits an appeal court to allow an appeal "where it is of the opinion that ... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence." The equivalent New Zealand provision is s 385(1)(a) of the Crimes Act 1961, as to which see R v Munro [2008] 2 NZLR 87 and Owen v R [2008] 2 NZLR 37.
196 Corbett v R [1975] 2 SCR 275 at 279.
197 [1993] 1 SCR 697 at 706.
with the law" and that as the (trial) error was serious, the application of the proviso "is completely inappropriate."

Justice Iacobucci agreed as the proviso was to be reserved for "exceptional cases only" and "the evidence was not so overwhelming that the jury would have inevitably convicted the appellants if the judge had properly instructed them as to the use they could make of that testimony." Further, as with Lamer CJ, the Judge thought "Credibility was a large issue at trial, and it is impossible to know what was in the minds of the jurors and how they were affected by the unrestricted admission of the evidence in question."

Justice L'Heureux-Dube dissented. Although the Judge did not specifically reject the Chief Justice's unreasonable verdict test, L’Heureux-Dube J did not accept that the case turned upon witness credibility and was therefore unsuitable for the application of the proviso:

In most if not all cases, a jury must make determinations on credibility, but there is nothing here to suggest that credibility was more or less of an issue than in any other case. The issue before us is not one of credibility, but is rather of weighing the evidence in its totality.

The Judge also observed that the majority’s interpretation of the proviso had the potential "to render the curative provision impotent" by making it unavailable to appeal courts merely because credibility had been in issue below. Further, L’Heureux-Dube J stressed the objective nature of the inquiry required by the proviso:

The [statutory] task is not to consider what the jury may or may not have thought, but to examine whether the entire body of evidence before the jury was such that the court can be satisfied that a properly instructed and reasonably acting jury would reach the same conclusion.

Approaching the matter in this way, the Judge held that she could "say unequivocally that no jury, properly instructed and acting reasonably, could possibly have acquitted the accused."

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198 Ibid at 709. In reaching the conclusion that the proviso could not be applied, the Chief Justice paid regard to the trial jury’s lengthy deliberations at 707 notwithstanding the objective nature of the inquiry that he had posed.

199 Ibid at 737.

200 Ibid. Justice Iacobucci also agreed the test for the proviso’s application should be the same as that for an unreasonable verdict; ibid at 739.

201 As did Gonthier J, who saw the evidence supporting the guilt of the accused as “overwhelming”; ibid at 739.

202 Ibid at 721.

203 Ibid at 737.

204 Ibid.

205 Ibid at 719.
In *R v Khan* the transcripts containing inadmissible material were left in the jury room during deliberation. The judge recalled the material and declined a mistrial. The Supreme Court unanimously upheld the decision of the Manitoba Court of Appeal to apply the proviso as the transcripts were not especially harmful, but in so doing, the Court confirmed the exacting nature of the test for the proviso’s application. Justice Arbour saw cases dealing with the proviso as falling into two categories: “the first category is that of so-called ‘harmless errors’, or errors of a minor nature having no impact on the verdict”, whereas the second category “encompasses serious errors which would justify a new trial, but for the fact that the evidence ... was ... so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice.”

While the proviso was applicable in both situations “where there is no ‘reasonable possibility that the verdict would have been different had the error ... not been made’”, the latter category of error said the majority, required “evidence pointing to the guilt of the accused [that] is so overwhelming that any other verdict but a conviction would be impossible”.

Justice LeBel reached a similar conclusion. The test for the proviso “should remain a very demanding one” so that the defendant’s conviction must have been “inevitable”. Elaborating, LeBel J said:

... it is not sufficient for the court of appeal to agree with the first verdict or to think that the same jury would have convicted. They must be convinced that any other reasonable judge or jury would necessarily have convicted. Courts of appeal must respect the primary role of trial judges and juries in making factual determinations after having heard and seen the evidence. Thus, a finding by a court of appeal that the conviction was ‘inevitable’ must be reserved only for the most obvious cases.

The Judge considered that “too flexible” an approach to the proviso “might jeopardize the right of the accused to the fairness and regularity of the trial process and would not respect the distinction between the respective roles of trial courts and appellate courts in that process.” It followed that appeal courts “must resist the temptation of applying [the proviso] routinely ... unless they are convinced that a new trial would result in the same verdict”.

The Supreme Court’s decision in *R v Hibbert* in 2002 mirrored its earlier decision in *R v B*, again the Court emphasised the strictness of the applicable test

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207 Ibid at [26].
208 Ibid at [31], emphasis added.
209 Ibid at [104].
210 Ibid at [105].
211 Ibid at [106].
212 Ibid.
while being divided over the proviso’s application on the facts. The evidence and lower court proceedings best introduce both aspects.\textsuperscript{215}

On 24 October 1993 a real estate agent in Duncan, British Columbia, held an open home. Without warning or apparent motive she was viciously attacked by a man who had come to the house. The victim was struck on the back of the head, repeatedly assaulted and then partially strangled. Neighbours came to her aid. The victim later tentatively identified the defendant as her attacker from a montage of photographs as did other witnesses who lived in the area.\textsuperscript{216} However, the real strength of the Crown’s case lay elsewhere; a cap worn by the offender was found in the neighbourhood on which were traces of the victim’s DNA and the defendant’s DNA. Further, shoeprints from the scene matched the tread of footwear belonging to the defendant.\textsuperscript{217} The defendant testified he was elsewhere at the time.\textsuperscript{218} Unsurprisingly, he was convicted of attempted murder. The defendant then successfully appealed his conviction.\textsuperscript{219} Another jury found him guilty. The defendant’s second appeal to the Court of Appeal for British Columbia was dismissed on the basis of the proviso. The Court accepted that the judge had seriously misdirected the jury about the defendant’s alibi but it held that the evidence was “so strong that the jury would inevitably have convicted in spite of the error”.\textsuperscript{220}

A majority of the Supreme Court held that the proviso had been wrongly applied notwithstanding the strength of the Crown case because a conviction was “not … a forgone conclusion in the sense that any other reasonable jury would inevitably convict.”\textsuperscript{221} In reaching this conclusion, the Court observed that the case was not “open and shut” and that the credibility of defence witnesses was not a matter an appeal court could determine; it had not had “the benefit of actually hearing the evidence”.\textsuperscript{222} Further, despite the availability of independent evidence linking the defendant to the crime, namely his genetic material on the assailant’s cap, the Supreme Court saw “troubling features” with the case, and in particular, an “absence of motive; the limited
opportunity, even if the evidence of alibi is in part disbelieved; and the absence of any evidence linking the appellant to the scene of the crime."

For the minority, Bastarache J noted that the Court had effectively applied an unattainable test for the application of the proviso. It is "not whether it is in theory possible that the verdict would have been different had the error not been made, but rather whether there is a reasonable possibility that the verdict would have been different." Hence, while the applicable test should be "strict", Bastarache J thought the standard should not be too high otherwise "trials would be held over and over again as long as the trial ... contained some error, no matter how minute." The Judge concluded the evidence of guilt was "overwhelming" and that the proviso should apply in those circumstances.

The perceived incompatibility between the right of trial by jury and a more liberal application of the proviso might well have reached its zenith in the recent case of *R v Trochym*. There, the Supreme Court directed appeal courts to satisfy themselves beyond any doubt that a defendant's conviction was inevitable before invoking the provision. For the majority, Deschamps J explained how stringent this standard was to be:

The instant case is one that falls squarely within the category of serious errors that will justify a new trial unless the properly adduced evidence is so overwhelming that a conviction is inevitable, or would invariably result. This standard should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case "beyond a reasonable doubt" at trial. This higher standard reflects the fact that it is difficult for an appellate court, in particular when considering a

| 223 | Ibid at [74]. It is difficult to see why these features should have been dispositive when the Crown's scientific evidence went unchallenged. How likely is it that the DNA of both the victim and the defendant would coincidentally be on a cap worn by the attacker? Or put differently, given that the test was expressed as being what a reasonable jury would have done, was the defendant entitled to the possibility of a perverse verdict? Further, the Court had regard to the length of the deliberations of the respective trial juries in concluding that a notional jury might not convict; ibid at [72]. Apart from being questionable in light of the objective nature of the test, this misses an obvious point: both juries convicted. |
| 224 | Ibid at [103]. |
| 225 | Ibid. |
| 226 | Ibid at [105]. As discussed in chapter one, this was the effect of the Exchequer rule and one that the proviso was intended to curtail. |
| 227 | Ibid at [106]. Implicitly, the minority was prepared to engage in a fact-finding function that the majority was not. In concluding the proviso should be applied, the minority must be taken as having found that the accounts of the alibi witnesses were untrue. |
| 228 | [2007] 1 SCR 239. |
| 229 | Ibid at [82]. Justices Bastarache, Abella and Rothstein dissented with their Honours correctly observing that this standard was unprecedented. |
jury trial, since no detailed findings of fact will have been made, to consider retroactively the
effect that, for example, excluding certain evidence could reasonably have had on the outcome.

Although this development is perhaps the logical consequence of a
jurisprudence that has sought to affirm the primacy of first instance fact-finding, there
are, it is suggested, several difficulties with *R v Trochym*. First, since 1945 the
Canadian Supreme Court has held that the proviso is to be considered by reference to
what a reasonable jury would have done upon the premise that appeal courts need not
entertain the possibility of a perverse verdict in determining whether a conviction was
inevitable. By setting such an exacting standard for the application of the proviso,
*Trochym*, however, implies such verdicts should be respected. Second, as proof
beyond reasonable doubt requires a state in which the fact-finder is sure of guilt, it is
unclear that a higher standard of proof is conceptually sound. Third, because appeal
courts cannot know what a verdict would have been had serious trial errors not
occurred, it is difficult to see how the *Trochym* standard can ever be satisfied. There is
a risk that the Canadian proviso will become redundant in cases of serious error.

VII. AUSTRALIA: INDEPENDENT ASSESSMENT OF THE EVIDENCE AND THE
LONG ROAD TO *WEISS*

The High Court of Australia’s abandonment of tests premised upon the inevitability of
conviction in *Weiss v R* was in one sense unheralded, as hitherto, the Court had not
expressed doubt over the legitimacy of such tests for the application of the proviso. In
another sense the decision was foreshadowed, however, albeit by decisions of that Court
only peripherally on point, in which the concept of independent appellate assessment of
the evidence had emerged. As we shall see, the course by which the High Court came
to adopt this concept for the application of the proviso is difficult to chart even with the
benefit of hindsight. But it is worth pursuing because *Weiss* and its associated appellate
requirement of independent assessment of the evidence are best understood in context.

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230 [2007] 1 SCR 239.

231 The House of Lords’ decision of *Stirland v Director of Public Prosecutions* [1944] AC 315 was
affirmed by the Canadian Supreme Court in *Schmidt v R* [1945] SCR 438.

232 A proposition which sits uncomfortably with *R v Colpitts* [1965] SCR 739 given that Lamer CJ
said at 706 that the proviso should be applied if a not guilty verdict would have been a
“perverse” one.

233 Compare *Weiss v R* (2005) 224 CLR 300. The Court’s justification for such a standard is
unconvincing. Why should the law’s highest standard of proof be insufficient on appeal when it
is sufficient at first instance, especially when by definition, lay jurors have no legal training or
expertise, and whose task must be at least as difficult, if not more so, than those of professional
judges who are versed in the application of the law to the evidence?

234 There are already indications this may be so, as to which see *R v Illes* [2008] 3 SCR 134;

An early starting point is necessary. In 1922, Ross was convicted of murdering a girl, whose naked body had been found in central Melbourne. She had been raped and strangled. The defendant testified that while he had seen the deceased near his saloon, this was the limit of his interaction with her. A prosecution witness gave contrary evidence that the defendant had confessed to raping the girl, but that the defendant had said her death was accidental. On appeal to the High Court, the defendant contended that the judge should have left manslaughter to the jury on the basis of this partial confession. No such application had been made at trial. A majority of the Court rejected the argument on the basis of its own assessment of the evidence, which led the Court to conclude that as “no reasonable jury could have found in his favour” on a charge of manslaughter, the proviso should be applied. No authority was cited in support of this test and neither was it further explained. Dissenting, Isaacs J criticised the majority for its “judicial conjecture” of the defendant’s guilt, which the Judge said had “invade[d] the jury’s constitutional function when the result is to deprive a prisoner of his life.”

A little over thirty years later, the High Court affirmed that the proviso could be applied if an appellate court was satisfied of the inevitability of conviction, and in particular, upon the finding either that, “had the jury been properly instructed, they would have found the appellant guilty … or that ‘a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict’”. As in

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236 *R v Ross* (1922) 30 CLR 246.
237 Ibid at 251.
238 Ibid.
239 Ibid.
240 Ibid at 254. Chief Justice Knox, Duffy, Starke and Higgins JJ comprised the majority, although Higgins J delivered a separate concurring judgment. Isaacs J dissented.
241 Although the Court applied an objective test in invoking the proviso thereby implying that the views of the trial jury were irrelevant, the Court also rejected an argument that the murder verdict was unreasonable; “the determination of the guilt or innocence of the prisoner is a matter for the jury and them alone”; ibid at 256. Concurring, Higgins J said that if courts were to interfere with jury verdicts, “they would be unwarrantably usurping the functions of the jury”; ibid at 274.
242 Ibid at 256.
243 Ibid at 269. Justice Isaacs described the majority’s decision as “entirely misconceived” and as suffering a “fundamental flaw” because of the “constitutional right” of the defendant to “the considered verdict of a jury determining the very facts constituting the crime”; ibid at 270 and citing the House of Lords decision in *Bray v Ford* [1896] AC 44. Consequentially, “there should be a new trial, because the proper finding of the guilt of the accused … should be ascertained, not by Judges, but on a sufficient direction, by a jury in the way the law requires”; ibid.
244 *Mraz v R* (1955) 93 CLR 493 at 508 per Williams, Webb and Taylor JJ citing *R v Haddy* [1944] 1 KB 442 and *Stirland v Director of Public Prosecutions* [1944] AC 315. Plainly, the Court saw the two tests as synonymous. *Stirland’s* application by the Supreme Court of Tasmania was upheld by the High Court in *R v Niven* (1968) 118 CLR 513 although the Court did not unequivocally commit itself to the objective test, observing at 516: “We find it impossible to doubt that, assuming reasonableness on the part of the jury, a conviction was inevitable on the Crown case in chief.”
R v Ross;245 Mraz v R246 involved the vexed question of when the crime of manslaughter should be left to the jury, but unlike Ross, the majority in Mraz v R thought "it impossible to say with any degree of certainty that if the case had been so presented the jury would have found either murder or manslaughter."247 Concurring, Fullagar J explained how he thought the proviso should not be approached in a passage that came to be regarded as seminal:248

It is very well established that the proviso ... does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried....

As the High Court later observed, Fullagar J's obiter dictum did not expressly advert to the distinction between a miscarriage of justice simpliciter and a substantial miscarriage of justice. Neither, it is noted, did the Judge explain how the proviso was to be applied, and in particular, whether an appeal court might find facts in exercising that statutory discretion.249

The High's Court decision in Ratten v R250 in 1974 did not directly answer these questions but the case requires attention as it was the genesis of the concept of independent (appellate) assessment of the evidence which was later grafted by the Weiss Court onto the application of the proviso. Leith Ratten was convicted of murdering his wife by shooting her with a shotgun.251 The Victorian Court of Appeal dismissed the

245 (1922) 30 CLR 246.
246 (1955) 93 CLR 493.
247 Ibid at 508. Justice McTieman dissented on the basis that the "only reasonable hypothesis upon the whole case is that in the absence of the direction, the jury would have found the accused guilty of murder"; ibid at 502. The Judge reached that conclusion "Having read all the evidence" and in light of the "most convincing proofs of the crime of rape and the injuries done by the accused to the victim in perpetrating it"; ibid. The defendant was later convicted by a different jury of raping the deceased, that crime arising out of the same incident. However, the case again reached the High Court and it quashed the conviction on the basis of double jeopardy principles; see Mraz v R (No 2) (1956) 96 CLR 62.
248 Ibid at 514.
249 See R v Festa (2001) 208 CLR 593 at [113]-[114] per McHugh J. Justice Fullagar's reference to English authority, including R v Cohen & Bateman (1909) 2 Cr App R 197 and Stirland v Director of Public Prosecutions [1944] AC 315, can be read as implying an endorsement of the tests therein. But as noted earlier in this chapter, and as McHugh J observed in R v Festa, Cohen & Bateman created different tests for the application of the proviso according to error type whereas Fullagar J appears to have envisaged a single test.
251 The prosecution alleged that the defendant then staged the scene to give it the appearance of an accident; the defendant's case was that death was an accident as a consequence of the gun firing
defendant's appeal based on fresh evidence after hearing the evidence itself.\textsuperscript{252} The High Court then granted special leave to appeal to determine whether the lower Court had erred "in acting upon its own view" of the evidence "rather than submitting the whole of it to a jury for its reconsideration upon a new trial".\textsuperscript{253} The High Court unanimously held that the Court of Appeal had correctly approached it task. Against this background, Barwick CJ, with whom McTiernan, Stephen and Jacobs JJ agreed, made a number of observations about the fact-finding role of a criminal appeal court confronted by common form appeal provisions.\textsuperscript{254}

Chief Justice Barwick said that the statutory concept of a miscarriage of justice\textsuperscript{255} vested an appellate court with the responsibility of forming an independent judgment upon the evidence:\textsuperscript{256}

It is convenient first to observe the powers given to the [Victorian] Court of Criminal Appeal by s 568 of the [Victorian] Crimes Act. This provision is in the same terms as s 4 of the Criminal Appeal Act 1907 of the United Kingdom. Apart from lack or deficiency of evidence or misdirection in point of law, the court is to allow an appeal if, on any ground there is a miscarriage of justice, just as it may yet reject an appeal, though there was error in the proceedings of the trial, if in the court's view there was no miscarriage of justice. The use of the expression 'miscarriage of justice' in this context has given to the Court of Criminal Appeal a function of independent judgment on the facts of the case which a Court of Appeal hearing an appeal has not.\textsuperscript{257}

while he had it under one arm and was cleaning some rust from the outside of the barrels. The defendant's original conviction appeal was dismissed by the Victorian Court of Appeal in 1971, as to which see \textit{R v Ratten} [1971] VR 87. The Privy Council then granted leave to appeal but dismissed the substantive appeal in relation to the admissibility of the deceased's telephone call to the Police, see \textit{Ratten v R} [1972] 1 AC 378. The case was then referred back to the Court of Appeal by the Governor-General so that fresh evidence could be considered.\textsuperscript{258}


\textsuperscript{252} \textit{Re Ratten} [1974] VR 201.

\textsuperscript{253} (1974) 131 CLR 510 at 514 per Barwick CJ. This issue had reached the High Court before, but the applicable principles had not been examined. Thus in \textit{R v Craig} (1933) 49 CLR 429 the Court gave only limited guidance per Rich and Dixon JJ at 439: "A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected".

\textsuperscript{254} By common form appeal provisions it is meant those based upon the English template of the Criminal Appeal Act 1907 (UK).

\textsuperscript{255} It is unclear from the judgment whether the Chief Justice was referring to the proviso, the ground of appeal or both, because s 568 of the Victorian Crimes Act 1958 framed the proviso as the absence of a "substantial miscarriage" whereas by the time \textit{Ratten} was decided, the English proviso had been amended by deleting the term "substantial". However, the subsequent decision of \textit{Driscoll v R} (1977) 137 CLR 517 at [18]-[25] suggests Barwick CJ was referring to both.

\textsuperscript{256} (1974) 131 CLR 510 at 515. The Judge cited two authorities for this proposition, neither of which was on point. The "legislative advance" referred to by Isaacs J in \textit{Hargan v R} (1919) 27 CLR 13 at 23 was not the concept of independent judgment of the evidence — it is not mentioned in the case — but that a miscarriage of justice did not require an error of law. And \textit{R v Baskerville} [1916] 2 KB 658, the second of the two authorities relied upon by Barwick CJ, was primarily concerned with corroboration, albeit that Lord Reading CJ noted, in an obiter dictum at 664, that the Criminal Appeal Act 1907 (UK) "gives larger powers to interfere with verdicts than had heretofore existed in criminal cases."
appeal from the verdict of a jury ordinarily does not have. 'That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance'....

Elaborating, the Chief Justice explained what constituted a miscarriage of justice and how appeal courts might detect one directly rather than through the use of a notional reasonable jury.257

Miscarriage is not defined in the legislation, but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal which no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court’s mind upon its review and assessment of the evidence which is the operative consideration.

The Judge then explained the ramifications of appellate assessment of evidence in cases involving fresh evidence. If the defendant was claiming innocence or the existence of a reasonable doubt, an appellate court had to decide for itself whether to believe the new evidence in the context of the court’s own view of the trial evidence. If the defendant was seeking a retrial, however, the role of the court was more limited and akin to a screening role, with the ultimate decision about the credibility of the fresh evidence to be made by a second jury upon a retrial.258 In the former situation, the Court’s view of all of the evidence was said to be dispositive, but in the latter, “it is what a reasonable jury might reasonably make of this evidence which is the dominant consideration.”259

Several things occurred after Ratten so that the potency of the concept of independent appellate assessment of the evidence - which was essentially left unexplained by the judgment - was not realised either in relation to the proviso or the disposition of criminal appeals more generally. First, in 1983, the Chief Justice’s analysis in Ratten was called into question in R v Whitehorn260 because of the “important differences between the functions of a jury and those of a court of appeal”.261 And then in the infamous case of R v Chamberlain (No 2)262 a year later, the

257 (1974) 131 CLR 510 at 516. The Judge also said ibid that an unfair trial constituted a miscarriage of justice, as to which see chapter four.

258 Ibid at 518-520. It is unclear that this distinction is valid as in each situation the defendant is seeking to disturb a jury’s verdict.

259 Ibid at 520.


261 Ibid at 688 per Dawson J. Those differences were said to be, ibid: “A jury is able, and is required, to evaluate the evidence in a manner in which a court of appeal cannot. A court of appeal is concerned to maintain the standards required by the law in the conduct of trials, including a standard of proof. It is concerned to discern whether the evidence is capable upon that standard of proof of supporting a verdict of guilty reached by a jury. No doubt when an appeal court is required to embark upon questions of fact there is a coincidence of function between it and a jury because a jury, properly directed, is concerned to apply the same standard.
High Court took a narrow view of the circumstances in which a jury’s verdict might be disturbed as unreasonable, with the result that independent appellate assessment of the evidence was circumscribed by being directed at what a reasonable jury would have made of the evidence. The Court saw “no justification … for an appellate tribunal to usurp the function of the jury”.263 Second, in 1986, Ratten’s approach to fresh evidence was reconfigured in Gallagher v R264 to focus upon how the jury might have treated the evidence on the basis it was “more consistent with the proper role of the jury that the Court … should inquire what effect the fresh evidence might have had if it had been before the jury.”265 Third, the High Court continued to exercise its discretion in relation to the proviso by inquiring whether the trial jury or a notional jury would have convicted, so that the focus remained upon how a jury would have assessed the evidence rather than the court itself.266 Curiously, in the case of Driscoll v R267 in 1977, Barwick CJ contributed to this trend even before Ratten was beginning to be doubted. There, of the applicable test, the Chief Justice said:268

It has, in my opinion, correctly been said that the test of miscarriage in relation to the proviso … is whether the court is satisfied that no reasonable jury, properly directed, could have failed to return a verdict of guilty on the evidence before it had it applied itself to its task in a proper manner, making in favour of the accused the presumption of innocence and bearing in mind the necessity that the charge be proved beyond all reasonable doubt … or, put another way, that no reasonable jury properly directed could fail in the performance of their duty on the evidence before them to have convicted the accused of the charge laid against him.

In the same decision, Barwick CJ said that assessment, when credibility had been in issue at trial, should be made according to the “view which the court thinks the jury must have formed, having regard to the verdict they have returned or, where no inference can be relevantly drawn from the verdict, the view which the court thinks they could reasonably have formed.”269

263 Ibid at 534 per Gibbs CJ and Mason J.
265 Ibid at 398 per Gibbs CJ.
266 For example, see Glennon v R (1994) 179 CLR 1.
267 (1977) 137 CLR 517.
268 Ibid at 524 citing the decision of the Victorian Court of Appeal in R v McGibbony [1956] VLR 424 at 426-7.
269 Ibid at 525. Driscoll was also the source of the often cited passage of Barwick CJ in which the Judge warned against “every irregularity of summing up, admission of evidence or error in procedure” warranting “a new trial, [otherwise] the basic intent of the Court of Criminal Appeal provisions would be frustrated and the administration of the criminal law plunged into outworn technicality”; ibid at 527.
Despite these setbacks, the idea of independent appellate assessment of the evidence survived, albeit that it remained largely unexplained.\textsuperscript{270} However, it is clear at least some saw it as a euphemism for an exercise in jury usurpation, which brings us to \textit{Wilde v R}\textsuperscript{271} in 1988.

The defendant was charged with sexual offending and theft in relation to two women. The two incidents were three days apart. The trial judge directed the jury that each incident could be used as similar fact evidence in relation to the other. The New South Wales Court of Appeal held that the incidents lacked sufficient similarity to be tried together but it applied the proviso on the basis of the strength of the admissible evidence which it thought overwhelming. A majority of the High Court agreed that the proviso had been correctly employed upon the test of whether “an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted”\textsuperscript{272} In reaching this conclusion, the High Court said somewhat incongruously that the test was to be made by an appellate court “according to its assessment of the facts of the case.”\textsuperscript{273}

Justice Gaudron dissented, and vigorously.\textsuperscript{274} The Judge said as the trial judge had made an error of law, appellate “assessment of the strength of the prosecution case”\textsuperscript{275} was impermissible. Such a process was “tantamount to the accused being tried with the Court of Criminal Appeal as the tribunal of fact.”\textsuperscript{276} Justice Gaudron thought this violated “the constitutional function of the jury to determine questions of fact” and that “If the proviso allows such a course of action it allows for the decision of an appellate court to trespass upon and undermine the role of the jury in a criminal trial. I cannot accept that such a consequence was intended by or is implicit in the proviso.”\textsuperscript{277}

Thereafter, the High Court continued to approach the proviso by reference to whether the trial jury or a notional reasonable jury would have convicted.\textsuperscript{278} However,\textsuperscript{279}

\textsuperscript{270} Although in the context of the unreasonable verdict appeal ground, the High Court has consistently explained an appeal court must consider not merely the sufficiency of evidence, but whether there was evidence upon which a jury could reasonably find guilt proved beyond reasonable doubt. The latter is said to require an appeal court to assess the quality of the evidence, bearing in mind a jury’s advantage in seeing and hearing it presented. See \textit{Morris v R} (1987) 163 CLR 454; \textit{Chidiac v R} (1991) 171 CLR 432 and \textit{M v R} (1994) 181 CLR 487.

\textsuperscript{271} (1988) 164 CLR 365.

\textsuperscript{272} Ibid at 372. Justices Brennan, Dawson and Toohey comprised the majority.

\textsuperscript{273} Ibid.

\textsuperscript{274} So too Deane J, who thought the trial was gravely unfair. The relationship between trial fairness and the proviso is discussed in chapter four.

\textsuperscript{275} Ibid at 384.

\textsuperscript{276} Ibid at 384, citing \textit{Makin v Attorney-General for New South Wales} [1894] AC 57.

\textsuperscript{277} Ibid at 385.

\textsuperscript{278} For example, see \textit{Glennon v R} (1994) 179 CLR 1.
two final developments in the road to *Weiss* collectively paved the way for the abandonment of such tests. First, in 1994, the High Court breathed fresh life into *Ratten* by acknowledging the breadth of Barwick CJ's observations as correct. The statutory concept of a miscarriage of justice was affirmed as requiring an appellate court to examine the whole of the evidence and form its own opinion as to whether it held a reasonable doubt about guilt. The High Court said that an appeal court's assessment of the evidence was deemed to be the view that would be held by a reasonable jury, as opposed to an appeal court artificially attempting to discern what a reasonable jury would have found and then adopting that assessment as its own. Accordingly, in *M v R* Mason CJ, Deane, Dawson and Toohey JJ said:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.

Second, in *Festa v R* in 2001, McHugh J suggested that this approach was also applicable to the proviso, so that an appellate court's assessment of the facts in determining whether the defendant would have been convicted was deemed to constitute the assessment a notional reasonable jury would have made:

> Although the term 'miscarriage of justice' appears both as ground of appeal and as part of the criterion for determining whether a conviction should stand, the issue under each provision is different. In one, the issue is whether the jury must have had a reasonable doubt; in the other, it is whether the jury must have convicted. But that said, there is no reason why the role of a court of criminal appeal should differ in deciding these issues. In examining the evidence for the purpose of applying the proviso, the court should assume that ordinarily if it thinks that the accused must be convicted, so would a reasonable jury. Speaking generally, the court's view of the evidence should prevail except where the error has so affected issues of credibility that the court cannot determine what are the primary facts of the case. In cases of circumstantial evidence, for example, the court's view of the evidence should be regarded as the view of the reasonable jury unless proof of one or more circumstances has been affected by an error relating to credibility. Even when a particular circumstance involves a credibility issue, other

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280 Ibid.
281 Ibid at [9].
282 (2001) 208 CLR 593.
283 Ibid at [123]. As this passage suggests, the mere fact credibility was in issue at trial was not seen by McHugh J as precluding the application of the proviso through an appellate fact-finding process. While the Court in *Festa* unanimously applied the proviso, none of the other Judges, namely Gleson CJ, Kirby, Hayne or Callinan J, endorsed McHugh J's observation. And strangely, having suggested the Court's view of the evidence should be expressed directly as its own, McHugh J then framed his conclusions in terms of what a reasonable jury would have done; see ibid at [127].
circumstances may be admitted or proved which are sufficient to permit the court to sustain the conviction.

VIII. A FRESH START: WEISS AND A FACT-FINDING ROLE FOR CRIMINAL APPEAL COURTS

In Weiss v R\textsuperscript{284} in 2005 the High Court implicitly overruled its earlier decisions in relation to the application of the proviso. The Court held that the device should not be applied according to the inevitability of conviction by either the trial jury or a notional reasonable jury, but instead, upon the appellate finding — and following an independent assessment of the evidence — that the defendant's guilt had been legitimately proved beyond reasonable doubt at trial. In this way, the concept of independent appellate assessment of the evidence, which had its genesis in Ratten,\textsuperscript{285} came to be associated with the application of the proviso thereby supplanting the traditional jury tests. The question of how the proviso should be applied crystallised in the proceedings in the Victorian Court of Appeal, as that Court was satisfied the trial jury would have convicted irrespective of error, but it was not sure a hypothetical jury would have done so.

Bodhan Weiss was convicted of the murder of Helen Grey following a jury trial in the Supreme Court at Melbourne. Two pieces of evidence were of particular importance.\textsuperscript{286} His former partner, Ms Horstead, testified that the defendant had confessed his guilt to her. Similarly, the jury heard evidence that Weiss had ultimately confessed to the Police, although in that interview, the defendant claimed he had not intended to kill.\textsuperscript{287} Weiss testified at trial. He said that his accounts to the Police were untrue and that while he had been to Ms Grey's home on the night of the killing, he found her dead.\textsuperscript{288} Weiss claimed his former partner was out to "frame" him.\textsuperscript{289} In response, the prosecutor cross-examined Weiss about his relationship with her, and put it to him that relationship had ended only when Weiss began seeing an underage girl.\textsuperscript{290}

The Victorian Court of Appeal held that evidence should not have been adduced, but it applied the proviso having found that the jury had not been influenced by the error.\textsuperscript{291} For the Court, Callaway JA said the defendant's conviction was inevitable in the sense the jury "would still have convicted the appellant in the absence of the

\textsuperscript{284} Weiss v R (2005) 224 CLR 300.
\textsuperscript{285} Ratten v R (1974) 131 CLR 510.
\textsuperscript{286} The facts are taken from R v Weiss (No 2) [2006] VSCA 161.
\textsuperscript{287} Ibid at [50]-[54].
\textsuperscript{288} Ibid at [55]-[66].
\textsuperscript{289} Ibid at [63] and [65].
\textsuperscript{290} Ibid at [70].
\textsuperscript{291} Holding the evidence was irrelevant but prejudicial. See R v Weiss (2004) 8 VR 388 at [60] and [69].
irregularity, not that he or she would have been convicted by any reasonable jury.”

The Judge explained this was because the “jury were not going to believe Ms Horstead or disbelieve the applicant or convict him because of a sexual liaison, even with a child” rather than the case containing overwhelming evidence of guilt. However, in reaching this conclusion Callaway JA acknowledged being “troubled by some statements of high authority” as to the applicable test, and that if it were inevitability “in the sense that any reasonable jury properly instructed would inevitably have reached the same conclusion as this jury, I could not apply the proviso to this case.”

The High Court began its task by observing that the correct approach to the proviso was ultimately a question of the proper interpretation of the appeal provisions of the Victorian Crimes Act. As the Court put it, “First and foremost, the root question is one of statutory construction”. However, because the proviso and the surrounding provisions were modelled as in other Australian States upon the English Criminal Appeal Act of 1907, the Court saw the history of that Act, and in particular, the operation of the Exchequer rule, as being of particular significance to its task. Having briefly traversed the history discussed in chapter one including Crease v Barrett, the Judicature Act reforms by which the proviso became part of English civil law and the House of Lords’ response in Bray v Ford, the Court observed “that the proviso to ... the 1907 English Act was intended to do away with the Exchequer rule” and that “history reveals ... that a ‘miscarriage of justice’, under the old Exchequer rule, was any departure from trial according to law, regardless of the nature or importance of that departure.” It followed, said the Court, that by “using the words ‘substantial’ and ‘actually occurred’ in the proviso, the legislature evidently intended to require [appellate] consideration of matters beyond the bare question of whether there had been any departure from applicable rules of evidence or procedure.” This gave rise to the obvious question of how should a court conclude that no substantial miscarriage of justice has actually occurred which the Court noted was “the determinative question” in the Court of Appeal below.

Again, the High Court said that this question was best answered by reference to the statutory language rather than the common law, as the “fundamental task committed to the appellate court by the common form of criminal appeal statute is to decide the
appeal”, and by virtue of the text of the proviso when there had been trial error, for an
appeal court to decide for itself “whether a 'substantial miscarriage of justice has
actually occurred’”.301 Elaborating, the Court said the proviso should not be
approached by reference to what the trial jury would have done as that could rarely, if
ever, be known, and further, it would frequently be possible to say that the trial jury
might have been influenced by error, thereby effecting a de facto return to the
Exchequer rule which the proviso had been enacted to reform.302

By hypothesis, when the proviso falls for consideration, the appellate court has decided that
there was some irregularity at trial. If there was not, there is no occasion to consider the proviso.
In cases, like the present, where evidence that should not have been adduced has been placed
before the jury, it will seldom be possible, and rarely if ever profitable, to attempt to work out
what the members of the trial jury actually did with that evidence. In cases, like the present,
where the evidence that has been wrongly admitted is evidence that is discreditable to the
accused, it will almost always be possible to say that that evidence might have affected the jury’s
view of the accused, or the accused’s evidence. And unless we are to return to the Exchequer
rule (where any and every departure from trial according to law required a new trial) recognition
of the possibility that the trial jury might have used wrongfully received evidence against the
accused cannot be treated as conclusive of the question presented by the proviso.

The Court then postulated an alternative approach, namely the notional
reasonable jury test, as this “would at least make the inquiry objective and take away
what might be said to be the element of speculation implicit in the 'this jury' test.”303
However – and importantly – it too was rejected on the basis that, “in cases where
conflicting evidence has been given at trial”, “another jury might take a different view
of the credibility of witnesses from that apparently taken at trial” with the result that
taken to its “logical conclusion”, such an approach would also risk “readopting the
Exchequer rule, for it would preclude applying the proviso in any case in which there
was a substantial factual controversy at trial.”304 But as the High Court noted, “the
history of the criminal appeal provisions reveals ... the legislative objective in enacting
the proviso was to do away with the Exchequer rule”, thus implicitly leaving room for
appeal courts to make their own factual findings despite the existence of credibility
contests in trial courts below.

So how were courts of appeal to determine whether a defendant had actually
suffered a substantial miscarriage of justice? The Court said that this task should be
approached as if the appellate court were deciding whether the verdict of the jury should
be set aside on the ground that it was unreasonable. The court must make its own
assessment of the evidence and then, making allowance for the natural limitations that
exist in the case of an appellate court proceeding on the record, ask itself whether “the
accused was proved beyond reasonable doubt to be guilty of the offence on which the
jury returned its verdict of guilty.”305 The Court stressed that this independent
assessment was to be made on the entirety of the written record, including the fact the

301 Ibid at [35].
302 Ibid at [36], emphasis in original.
303 Ibid at [37].
304 Ibid at [38], emphasis in original.
305 Ibid at [41].
defendant had been found guilty by the jury, or as it put it: “The fact that the jury did return a guilty verdict cannot be discarded from the appellate court’s assessment.” 306

Put together, the High Court said that appeal courts must determine for themselves on the basis of the entire written record, and without reference to what a jury would have done, whether the defendant’s guilt had been proved at trial, by admissible evidence, to the criminal standard of proof.

In reaching this conclusion, notions of jury usurpation were explicitly rejected. Citing Wigmore, the High Court reasoned that the possibility of an appeal court disturbing a verdict on the basis it was unreasonable demonstrated a jury’s factual findings were subject to appellate supervision, so “that the so-called ‘right’ to the verdict of a jury rather than an appellate court is [necessarily] qualified by the possibility of appellate intervention.” 307

Having outlined its approach, the Court declined “to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself” as that would “distract attention from the statutory test” and “would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration”. 308 The Court, however, reiterated that the proviso required an appellate court to make its own assessment of the evidence, a task it saw as “not materially different from other appellate tasks”, and that the standard of proof was a high one before the proviso could be applied, namely satisfaction to “the criminal standard” that guilt had been properly established. 309 Importantly, the High Court stressed that an appellate court’s responsibility to conduct its own assessment of the evidence did not confer an unqualified fact-finding function. Instead, it recognised that there “will be cases, perhaps many cases”, where the “natural limitations [of the written record] require the appellate court to conclude that it cannot reach the necessary degree of satisfaction.” 310 Consequently, “In such ... case[s] the proviso would not apply, and apart from some exceptional cases, where a verdict of acquittal might be entered, it would be necessary to order a new trial.” 311 In assessing whether guilt had been properly proved at trial, the High Court counselled against appeal courts engaging in speculation and deciding “‘according to how the speculation comes out’.” 312

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306 Ibid at [43].
307 Ibid at [30].
308 Ibid at [42].
309 Ibid.
310 Ibid at [43].
311 Ibid.
312 Citing Kotteakos v United States 328 US 750 (1946) at 763. The High Court’s reference to Kotteakos sits uncomfortably with Weiss as Kotteakos rejected a guilt-based approach to harmless error in preference for the error-impact approach (see chapter two for a discussion of both). However, the High Court in Weiss implicitly endorsed both approaches; its acknowledgement that the proviso could be applied notwithstanding error if “the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict”, represents the guilt-based approach to trial error, and its observation that there could be “cases in which it would be possible to conclude that the error made at trial would, or at least
Turning to the facts, the Court inclined to the view that the application of the proviso depended upon whether the "powerful testimony of the confessions to the police" established guilt beyond reasonable doubt or put differently, was there "a reasonable possibility that he had made a false confession?" The High Court did not answer these questions, observing that it did not have the entire record and that it would be preferable for the Victorian Court of Appeal to decide the case by, if it thought fit, making "its own judgment about what, if anything, the [defendant's] second interview, judged against the transcript of all else that was said at trial, revealed about the appellant's guilt." Consequently, the Court remitted the appeal to the Court of Appeal, directing it to make its own assessment of the evidence while allowing for the record's inherent natural limitations, as to whether guilt had been proved beyond reasonable doubt at trial.

The Victorian Court of Appeal subsequently dismissed the appeal holding that Weiss's guilt had been proved to this standard with the result that he had not suffered an actual substantial miscarriage of justice. In reaching this conclusion, the Court of Appeal extensively reviewed the evidence and found, as a matter of fact, that there was "independent support" of a critical aspect of Ms Horstead's evidence, namely that the defendant had confessed to her on the night of the murder and in so doing, relayed a level of detail consistent with the crime scene thereby betraying information only the murderer could have known. The Court observed that the defendant's explanation for his confession to the Police, which was that he had acknowledged manslaughter under Police pressure to avoid conviction for murder, "defies commonsense" and "would undoubtedly have been so regarded by the jury." However, the basis for the Court of Appeal's decision was not that its assessment of the record revealed compelling evidence of guilt, but rather, that the inadmissible evidence about the defendant's sexual relationship with a minor had not contributed to the verdict. The possibility that the jury's assessment of Weiss's confession had been influenced by the inadmissible evidence was held to be one that could "safely be discounted" with the result that "Weiss's guilt was proved beyond reasonable doubt".

should, have had no significance in determining the verdict that was returned by the trial jury" encapsulates the error-impact approach; see Weiss v R (2005) 224 CLR 300 at [41] and [43].

313 Weiss v R (2005) 224 CLR 300 at [57].
314 Ibid at [55]. The High Court noted the Court of Appeal had the videotape, implying that Court should watch it for the purpose of making its own conclusions about the defendant's guilt.
315 Ibid at [58].
316 R v Weiss (No 2) [2006] VSCA 73 at [137]. The Court of Appeal concluded the inadmissible evidence had not influenced the jury thereby applying an error-impact approach to trial error.
317 Ibid at [129] and [130]-[132]. The blood spatter at the scene matched Ms Horstead's account of Weiss's confession to her that he struck the victim from behind.
318 Ibid at [135].
319 Ibid at [136] and [137] respectively.
The significance of the High Court’s judgment in Weiss cannot be overstated; for the first time in the proviso’s history, a senior appellate court abandoned the traditional jury tests for the proviso’s application while recognising, albeit implicitly, that the proviso conferred a fact-finding role upon criminal appeal courts. Unsurprisingly, the decision has been controversial.\(^{320}\)

Care must, however, be taken in assessing Weiss for what it did not decide provides the important counterbalance. In this respect, it is noted that the High Court did not direct criminal appeal courts to retry cases on appeal; indeed, nothing in Weiss suggests that appellate courts are to hear evidence from witnesses and thereby directly settle facts. Instead, the Court made it clear that the written record was to be examined by appeal courts exercising a form of review and this term was specifically used in the judgment.\(^{321}\) Further, the High Court warned against speculation, directing intermediate courts of appeal to apply the proviso only when guilt had been proved beyond reasonable doubt.\(^{322}\) Most importantly, by recognising "the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record", the High Court underscored the advantages of first instance factual determination in relation to witness demeanour.\(^{323}\) Indeed, by virtue of this natural limitations doctrine, the Court arguably introduced a Trojan horse to the concept of independent appellate assessment of the evidence, thereby potentially neutralising Weiss’s fact-finding potency and its own sustainability as a coherent approach to the proviso.

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\(^{320}\) Justice Callaway, who sat on the Court of Appeal when Weiss first reached it, prematurely retired, in part because of the High Court’s decision. The Judge thought that Weiss mandated appeal courts dismissing otherwise meritorious appeals because “three, or perhaps only two, judges of appeal are satisfied that he [the defendant] is guilty”, a “proposition... that I could never bring myself to accept”; see F Callaway, “Farewell Speech” (2007) 140 Victorian Bar News 28 at 29. Priest bluntly says that Weiss is “wrong” and “should be reconsidered” as the decision requires appeal courts to approach the proviso in the same way as they do the unreasonable verdict appeal ground thereby conflating the two; see P Priest, “The Problematic Proviso: The Vice of Weiss”, (2007) 140 Victorian Bar News 32 at 39. (This view is misplaced; while Weiss requires appeal courts to make their own assessment of the evidence as they already do in relation to the unreasonable verdict appeal ground, this does not make the proviso and the appeal ground synonymous. Rather, it merely confirms the applicability of this form of analysis to the proviso.) The Victorian Court of Appeal immediately criticised Weiss for what it described as the decision’s “internal tensions ... given that, for the purpose of assessing the application of the proviso, the appellate court must put aside the jury’s verdict, while at the same time bearing in mind that the jury returned a guilty verdict ... must endeavour to decide the case itself, as would occur in an appeal in a civil matter, but with the difference that, if in the end the appellate court is not satisfied beyond reasonable doubt that the evidence below established that the accused was guilty of the offence charged, the court must ordinarily order that a new trial be had”; see R v Gill [2005] VSCA 321 at [28], which was decided a week after the Weiss judgment was released. Other commentators have been more balanced. For example, Pincus observes of Weiss that “Few more important decisions relating to the function of a court of criminal appeal have been published by the High Court”; see B Pincus, “Appellate Court Cannot Dismiss Convicted Person’s Appeal Unless Satisfied of Guilt Beyond Reasonable Doubt” (2006) 80 ALJ 169 at 169.

\(^{321}\) Weiss v R (2005) 224 CLR 300 at [47].

\(^{322}\) Ibid.

\(^{323}\) Ibid at [41].
IX. BEYOND WEISS: NATURAL LIMITATIONS OF THE WRITTEN RECORD

Subsequent developments suggest just that. First, while the High Court has affirmed Weiss on a number of occasions since the case was decided in 2005, its subsequent decision in Gassy v R\textsuperscript{324} shows that the appellate fact-finding role recognised in Weiss is heavily circumscribed.\textsuperscript{325} Second, state appeal courts have placed significant weight upon the natural limitations of the record in declining to apply the proviso. We turn first to Gassy v R.\textsuperscript{326}

A. Jean Gassy and the Murder of Dr Tobin

On 14 October 2002 Dr Margaret Tobin was fatally shot in an Adelaide city building as she left her workplace. Jean Gassy was convicted of her murder after a long trial in the Supreme Court of South Australia. A majority of the Full Court of that Court dismissed the defendant’s conviction appeal, holding that the judge’s additional jury directions did not cause a miscarriage of justice.\textsuperscript{327} Reversing that decision, a majority of the High Court concluded that the additional directions failed to summarise adequately the defence case and that the proviso could not be applied because of the natural limitations attaching to the record of the proceedings.\textsuperscript{328} Some appreciation of the facts is necessary.\textsuperscript{329}

Dr Tobin did not identify her assailant before she died and neither did anyone else in her office block. The prosecution case was circumstantial in nature and according to at least Kirby J, “very strong”.\textsuperscript{330} The trial court heard evidence that the defendant was “‘out to get’” the deceased as she had played a role in the defendant’s deregistration as a practising psychiatrist.\textsuperscript{331} Six months before the murder, Dr Tobin attended a conference in Brisbane. The jury heard evidence that the defendant, who

\textsuperscript{324} (2008) 236 CLR 293.

\textsuperscript{325} For example, see Burrell v R (2008) 238 CLR 218; Libke v R (2007) 235 ALR 517 and Bounds v R (2006) 228 ALR 190. In Darkan v R (2006) 228 ALR 334 at [83], a majority of the High Court applied the proviso in relation to convictions for murder concerning a summing up that was “wrong in law”.

\textsuperscript{326} (2008) 236 CLR 293.

\textsuperscript{327} R v Gassy (No 3) (2005) 93 SASR 454. After a day and a half of deliberation, the jury said they could not reach a verdict so the trial judge gave them supplementary directions “in the hope of assisting” them to break their deadlock; ibid at [4]. The jury then promptly returned a guilty verdict. Justices Bleby and White JJ, who constituted the majority, did not consider the proviso given their finding that the trial judge’s remarks were fair. Justice Debelle dissented, holding that the directions “did not preserve a balance between the prosecution and defence case”; ibid at [17] and that the proviso was unavailable as that error was “fundamental” and there had “not been a fair trial according to law”; ibid at [21].

\textsuperscript{328} Gassy v R (2008) 236 CLR 293 per Gummow, Hayne and Kirby JJ. Justices Crennan and Kiefel dissented on the basis that the majority of the Court of Appeal was correct.

\textsuperscript{329} These are taken from the judgment of Kirby J; see Gassy v R (2008) 236 CLR 293 at [69]-[89].

\textsuperscript{330} Ibid at [69].

\textsuperscript{331} Ibid at [89].
lived in New South Wales, hired a vehicle in Sydney, drove to Brisbane, stayed at a motel close to the conference venue, and later entered it in circumstances suggesting he was carrying a weapon under his clothing. A manager of a Brisbane gun store testified that the defendant ordered a piece of equipment for a firearm that same day.

On 11 October 2002, three days before the killing, the defendant rented a second car from Sydney and later drove over 3,000 kilometres; a distance consistent with a return-trip to Adelaide. Two moteliers between Sydney and Adelaide gave evidence that the defendant rented rooms on 12 and 13 October respectively, and in each case, that he provided a false name and associated contact details. On 15 October, a day after the murder, surveillance footage from a service station three-hours drive from Adelaide revealed a person disposing of a white plastic bag. A search of a nearby rubbish dump revealed the original registration forms from each of the two motels in handwriting consistent with the defendant's. Both were in a white plastic bag, as was an invoice for the Brisbane accommodation that was close to the venue of the April conference.

The defendant's rental car later tested positive for firearms residue that had the same profile as the cartridges used to shoot Dr Tebin, and at the time of the murder, the defendant was proved to own two pistols of the same make and calibre as that used in the crime. Both had been altered to preclude the possibility of telltale ammunition impressions being matched against the ammunition found at the crime scene. Finally, various pieces of evidence suggested the defendant had been away from home for a period of time consistent with him being the killer.332

The defendant gave evidence. He denied travelling to Brisbane and Adelaide and said that he had hired the October rental car to practise surveillance for his new vocation as a private investigator. Practise use of firearms was said to account for the residue in that car.

In rejecting the application of the proviso as a curative response to the judge's (unbalanced) supplementary directions, a majority of the High Court held that the inherent shortcomings of the written record precluded guilt from being established to its satisfaction, even though, and unlike Weiss, the case turned more upon inferences than witness credibility and hence circumstances seemingly more amenable to appellate evidential review than those prevailing in Weiss. Justices Gummow and Hayne said that it was the "[circumstantial] nature of the case ... which shows that the proviso was not engaged here"333 and that as proof of guilt turned upon the "accuracy and reliability" of evidence in relation to the Brisbane and Adelaide trips, this could not be determined "by an appellate court when it can refer only to the written record of the evidence."334 Why this was so was not explained.335

332 The defendant's computer had not been used in this timeframe and calls to his home had gone unanswered.

333 Ibid at [35].

334 Ibid at [37].

335 Although the judgment of Gummow and Hayne JJ is ambiguous as to why the proviso was not applicable, other remarks at [37] suggest that their Honours thought that there was insufficient evidence of guilt.
Justice Kirby was more fulsome. Having extensively reviewed the evidence, the Judge acknowledged that the “prosecution had built a very strong case” so that in light of Weiss’s test for the application of the proviso, namely whether guilt had been proved beyond reasonable doubt, the matter was “borderline” or as the Judge also put it, “at the cusp.”336 However, Kirby J concluded that the proviso could not be applied because the written record precluded the Court from assessing the case in its entirety, and in particular, from absorbing the manner in which the evidence unfolded at trial:337

Apart from their role in resolving resulting contested issues of credibility raised during the trial, the jury in this trial had one significant advantage over an appellate court. The jury sat for weeks listening to and watching the prosecution construct its case. Absorbing the entirety of the evidence is a very important function of the decision-maker, especially in a very long trial. Whilst this Court can certainly comprehend the gist and substance of the case, there are distinct risks in pretending that the appellate court can accurately and fairly comprehend the entirety of the evidence.

It is suggested that the reasoning of Gummow and Hayne JJ is awkward as it is difficult to see how an appellate court is disadvantaged in assessing a circumstantial case on the basis of only the record. Unlike cases involving direct evidence of guilt, which frequently turn upon the credibility of witnesses and thus demeanour-based factual assessment, circumstantial cases by definition turn upon a constellation of independent circumstances so that guilt is ultimately a matter of inference. Consequently, it is unclear why an appeal court is at any disadvantage from the first instance finder of fact. Moreover, can it really be suggested as Kirby J did, that an appeal court risks misapprehending the evidence simply because it hasn’t seen and heard it delivered?

B. Weiss in Intermediate Courts of Appeal

Since Weiss, state appeal courts have also relied heavily upon the natural limitations of the record in declining to apply the proviso. The cases of R v Rajakaruna (No 2),338 R v Michael,339 R v Smith340 and Buiks v State of Western Australia341 provide typical examples.342

336 Ibid at [69] and [91].
337 Ibid at [100], emphasis in original. Kirby J added, ibid: “Something obviously caused serious hesitation for the jury. This was only dispelled either by the content of the supplementary direction or by the jury concluding that the trial judge had made up her own mind and that they should follow her on the ‘way forward’ that she provided. Effectively, that way forward led only to a guilty verdict. The applicant was entitled to have that ‘way forward’ modified with a contemporaneous reminder of the essence of the applicant’s case whose ‘way forward’ urged acquittal. With respect, this was not provided.” As with the joint judgment of Gummow and Hayne JJ, these remarks suggest some equivocality in Kirby J’s judgment, as it is unclear whether the proviso was inapplicable due to failings in the record which precluded an appellate finding of guilt or because the jury was wrongly influenced by the judge’s remarks. However, even if the supplementary directions were unbalanced, it does not follow that guilt had not been proved beyond reasonable doubt; as explained in chapter two, the guilt-based approach and error-impact approach are conceptually distinct. Further, both approaches to the proviso were endorsed by the High Court in Weiss; see (2005) 224 CLR 300 at [41] and [43].
In *Rajakaruna* the defendant was convicted of sexually assaulting two prostitutes. The Victorian Court of Appeal held that the judge had wrongly admonished the defendant for failing to put his case with the result that there had been a "serious misdirection" in the summing up. Even though the defendant did not give evidence the proviso was held to be inapplicable, as the "prosecution case ... depend[ed] on the credibility of the complainants" and "To be satisfied beyond reasonable doubt that the applicant was guilty, one would need to see them give their evidence and be cross-examined."  

Michael was convicted of rape but the Queensland Supreme Court held that the judge's failure to direct the jury about the presence of the complainant's support person could not be cured by the proviso, as the credibility "choice can only be made on the basis of having seen and heard the witnesses at trial". Such an issue, said the Court, was "quintessentially a jury question".

In *Smith* the South Australian Court of Criminal Appeal quashed a murder conviction on the basis of the judge's misdirections in relation to party liability. Under cross-examination, the defendant acknowledged that his co-defendants were carrying knives at the relevant time, that there was a real risk that the deceased may be stabbed and that the defendants' planned robbery was a "'powder keg ready to go'." Chief

344 Ibid at [55] per Redlich JA.
345 Ibid at [5] per Callaway JA.
347 Ibid at [40] per Keane JA.
348 Ibid.
350 Ibid at [18].
Justice Doyle held, however, that the proviso could not be applied as the “true meaning” of the defendant’s admissions “can only be resolved only by the jury who saw and heard Mr Smith give that evidence. It cannot be resolved by this Court.”351 Concurring, Gray J said it was “not possible for this Court to review and assess the credibility of the appellant’s sworn evidence.”352

Similarly, the “natural limitations of appellate review on the record” precluded a majority of the Western Australian Court of Appeal from applying the proviso notwithstanding the existence of “a strong (primarily circumstantial) case” against the defendant of cannabis cultivation and drug trafficking.353 Weiss’s observation that the limitations of the record may prove insurmountable to the proviso’s application in “many cases” indeed appears prophetic.354

X. NEW ZEALAND: DAVID BAIN AND SHANE MATENGA

Since our first reported case on the proviso in 1905,355 the New Zealand Court of Appeal has consistently applied the device in cases of serious error upon a determination that either the trial jury or a notional jury would inevitably have found the defendant guilty.356 In so doing, however, the Court of Appeal has not acknowledged engaging in a fact-finding function. Instead, it appears to have assumed that as ‘a jury’ would have convicted, it was merely doing what that lay body would have done in giving effect to the indisputable strength of the evidence. Moreover, here as elsewhere, an appellate fact-finding function has been explicitly and repeatedly renounced. For example, in R v Lawrence357 Denniston J said that a contrary view:

... would be that evidence wrongly admitted might have been the cause of a conviction, and so substituted this Court for a jury in deciding on what should be the reasonable verdict—that is to say, that a Judge, by erroneously rejecting evidence or by misdirecting the jury, may substitute the Court of Appeal for the tribunal given by the law to every person.

It follows that through use of the ‘would have convicted’ standard, the Court of Appeal has frequently declined to apply the proviso on the basis that credibility was in issue.

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351 Ibid at [58].
352 Ibid at [82]. Justice Duggan concurred.
353 Buiks v State of Western Australia (2008) 188 A Crim R 362 at [82].
354 Weiss v R (2005) 224 CLR 300 at [41].
355 R v Lawrence (1905) 25 NZLR 129.
357 (1905) 25 NZLR 129.
358 Ibid at 138.
But as we saw in chapter two, the Court has been inconsistent in this respect. It follows that while the orthodox position was that identified in *R v McI*, namely that "it is what the jury would have done without the errors or deficiencies which is the issue, not what the Court thinks of the ultimate merits of the conviction", our Court of Appeal has undoubtedly engaged in a fact-finding function under the proviso. Consequently, tests based upon the inevitability of conviction by 'a jury' have acted to both mask and constrain appellate fact-finding here too.

These points are now overshadowed by two recent developments in our jurisprudence. In the first, the Privy Council trenchantly criticised the Court of Appeal for engaging in a fact-finding function and adopting "a decision-making role well outside its function as a reviewing body". While the now notorious prosecution of David Bain did not involve the application of the proviso, the Court of Appeal specifically observed that it was exercising a function akin to that in light of its inquiry as to whether the verdict of the jury, but for error, would necessarily have been the same. Further, although the Privy Council quashed the convictions on the basis that it was for a jury to determine the defendant's guilt rather than an appellate court, it is difficult not to conclude that the Board engaged in the very function it criticised the Court of Appeal for and that the difference between the two judicial bodies lies not in their methodology but in their competing conclusions about the defendant's guilt. Accordingly, *Bain v R* is perhaps the best example of how theory and practice in this area can diverge. Moreover, *Bain* is illustrative of the traditional view — on high authority — that appellate fact-finding is fundamentally incompatible with the system of trial by jury. The second development constitutes the counterpoint to *Bain*, for in subsequently adopting *Weiss* in *Matenga v R*, the New Zealand Supreme Court has acknowledged that the fact-finding function repudiated in *Bain* is one that the proviso confers. But while *Matenga* undoubtedly represents an important change in our law, it is far from clear, however, that the decision effects practical change to the courts' approach in this area.

**A. The Prosecution of David Bain**

The facts are especially important. On the morning of 20 June 1994 the defendant's immediate family was murdered. All five members were shot with a rifle normally...
stored in the defendant’s bedroom. One of the deceased, Stephen Bain, struggled with his assailant. In his bedroom, Police found a lens from a pair of glasses occasionally used by the defendant. Footprints in blood invisible to the naked eye were found in various rooms of the house, and importantly, in places where the defendant’s father, Robin Bain, had no reason to be. He was estranged from the defendant’s mother and lived in a caravan at the back of the home. A computer in the house was on when Police attended. It bore a message implying that Robin Bain was the killer and that he had spared the defendant before committing suicide. The defendant’s case was just that. He gave evidence at trial that he returned from his morning paper round, put on some laundry and then found, one by one, his family members dead. In describing this scene, the defendant said his sister, Laniet Bain, was still gurgling.

The Crown’s case was that the defendant was the killer and that he had left the computer message to make it appear as if his father had been responsible for the tragedy. Various pieces of circumstantial evidence supported this contention, but three were thought to be particularly probative by the Court of Appeal. First, the murder weapon (the defendant’s rifle) was normally locked with a trigger lock and on the relevant morning it had been unlocked with the use of a spare key. According to the defendant, only he knew of the key’s whereabouts. Second, the rifle was covered in blood except for an area which bore the defendant’s fingerprints. Plainly, this evidence suggested he was the last person to wield it. Third, a spare ammunition magazine was found next to Robin Bain’s hand. The position of the magazine was most unusual in that it was upright on its very narrow edge. At trial, the Crown contended that this implied the scene had been staged because had it fallen from Robin Bain’s hand as the killer, the magazine would almost certainly have landed flat.

Following conviction, the defendant said that fresh evidence cast doubt upon his guilt. In order to understand the decisions of the Court of Appeal and Privy Council,

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366 Ibid at [77].
367 Ibid at [53] and [54].
368 Ibid at [6]. The message read, “SORRY, YOU ARE THE ONLY ONE WHO DESERVED TO STAY”.
369 Ibid at [7].
370 Ibid at [98].
371 R v Bain [2004] 1 NZLR 638 at [165].
372 Ibid.
373 Ibid.
374 Ibid.
376 The defendant’s first conviction appeal was dismissed by the Court of Appeal in 1995, as to which see R v Bain [1996] 1 NZLR 129. Five years later, the Governor-General referred the case to the Court of Appeal asking whether fresh evidence disclosed a possible miscarriage of justice. The Court found that test met. Consequently, in 2003 the Governor-General referred the case back to the Court of Appeal pursuant to s 406(a) of the Crimes Act 1961 with the result that
more must be said about that evidence and the original trial. Unsurprisingly given the crimes in issue, the Crown's case was that David Bain was a disturbed individual whose behaviour had been deteriorating in the days before the killings. It adduced trial evidence that the defendant had described déjà vu experiences and how he had spoken ominously of an impending calamity involving "'black hands'". On appeal, the defendant adduced material to the effect that Robin Bain’s mental health was also deteriorating and that Robin might have had a motive to kill on the basis of an alleged incestuous relationship with his daughter, Laniet. Other appellate evidence called into question the prosecution's circumstantial case and in particular whether David Bain could have made the bloodied footprints throughout the house, if the blood on the rifle was even human, the position of the defendant’s lens in his brother’s bedroom, various timings in connection with the murders and the cause of Laniet’s gurgling.

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377 The referral was treated as a conventional appeal against conviction pursuant to s 385 of the Crimes Act 1961 and subject to the application of the proviso. The Court of Appeal’s dismissal of the appeal on 15 December 2003, see R v Bain [2004] 1 NZLR 638, gave rise to the appeal to the Privy Council; Bain v R (2007) 23 CRNZ 71.

378 Bain v R (2007) 23 CRNZ 71 at [40].

379 Ibid at [41]-[50]. Robin was the principal of a primary school. A colleague deposed that Robin was "deeply depressed" and other teachers at his school said that Robin’s pupils had published stories involving the serial murder of family members; ibid at [41]. The defendant argued that the "stimuli" to write these stories had come from Robin; ibid at [42]. Collectively, this evidence was proffered to suggest that Robin was dangerously unbalanced. The trial Judge excluded evidence in relation to Laniet on the basis it was unreliable hearsay, as to which see R v Bain (No 8) T1/95, 26 May 1995, High Court, Dunedin Registry per Williamson J. The ruling was upheld by the Court of Appeal; R v Bain [1996] 1 NZLR 129. However, the defendant subsequently identified additional witnesses who claimed that Laniet had told them that she was having a sexual relationship with her father.

The footprint issue depended upon the respective sizes of the defendant’s and Robin Bain’s feet. However, at trial it was accepted that the defendant had made the prints. Of this admission, the Board simply noted that it was "not clear why this should have been" made; (2007) 23 CRNZ 71 at [55]. No evidence was adduced at trial as to whether the blood on the rifle was human. Subsequent examinations revealed conflicting evidence on the point, although the Crown said that the defendant’s tests had wrongly used a contaminated sample and were therefore worthless; ibid at [96]. The defendant testified at trial that he had last used the rifle several months earlier to hunt possums. He was unable to account for the presence of his fingerprints at trial and did not offer an explanation to either the Court of Appeal or Privy Council. The parties agreed in both the Court of Appeal and Privy Council that the jury had been misinformed about the correct position of the spectacles’ lens; ibid at [111]. The Board thought that the issue had "obvious significance" given that Stephen had resisted his attacker, and it was therefore relevant as to whether the lens had come to be there unconnected to the murders or during their course; ibid at [85]. Two times were in issue: the time that the message was left on the computer, as determined by when the computer was turned on; ibid at [63]-[66] and the time that the defendant returned home from his paper run; ibid at [69]-[74]. The Crown argued that David Bain had returned earlier than usual to commit the killings, in part because of Robin Bain’s practice to enter the house at about 7am; ibid at [6]. Laniet Bain had a large amount of blood in her lungs which, according to the evidence at trial, would have caused her to make audible noises as she died. David Bain testified that he heard Laniet groaning while he was in her bedroom. The Crown argued that this constituted an unintentional admission because only the killer could have heard this, particularly when the defendant’s case was that he returned to find everyone already dead. On appeal, the defendant adduced evidence that bodies can make post-mortem noise; ibid at [97]-[100].
In light of this material, the Court of Appeal described its inquiry as whether “the new evidence, when considered alongside the evidence given at the trial, might reasonably have led the jury to return a verdict of not guilty”. The Court said that this inquiry was consistent with the application of the proviso given its emphasis upon the inevitability of conviction. Accordingly, the Court said that cases involving fresh evidence effectively subsumed the application of the proviso for two reasons. First, “as with the jurisprudence relating to the proviso”, the focus was upon the “effect the new evidence might reasonably have had on the jury” and “whether the jury ... not the Court ... would nevertheless have convicted had the posited miscarriage of justice not occurred.” Second:

The need for the appellate Court in a new evidence case to consider its effect on the jury is also consistent with the fundamental point that the ultimate issue whether an accused person is guilty or not guilty is for a jury, not for Judges. The appellate Court acts as a screen through which the further evidence must pass. It is not the ultimate arbiter of guilt, save in the practical sense that this is the effect of applying the proviso, or ruling that the new evidence could not reasonably have affected the result.

Although the Court of Appeal affirmed the primacy of the jury’s fact-finding role while disclaiming such a role for itself, the Court specifically noted that the issue before it was “not whether the new evidence might possibly have led the jury to return not guilty verdicts; it is whether it might reasonably have done so.” The Court said that the “objective criterion is the key to [deciding] the present case” for, in its opinion, the evidence “could only be seen by a reasonable jury as clearly and cogently establishing David’s guilt beyond reasonable doubt.” Three pieces of evidence were said to compel this conclusion, which, given their very different treatment by the Privy Council, warrant full citation:

(a) According to David only he knew of the existence, let alone the whereabouts, of the spare key for the trigger lock. The spare key was used by the killer to unlock the weapon. There is no evidence that Robin knew either of the existence of the key or its whereabouts. It is therefore a powerful inference that David was the killer.

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380  *R v Bain* [2004] 1 NZLR 638 at [24] per Tipping J. The coram was Tipping, Anderson and Glazebrook JJ.

381  Elaborating, the Court said: “If qualifying further evidence might reasonably have led the jury to an acquittal, it would be logically impossible to apply the proviso. It could not then be said that the jury would without doubt have convicted, even if the further evidence had been before it”; ibid at [27].

382  Ibid.

383  Ibid.

384  Ibid.

385  Ibid at [163], emphasis in original.

386  Ibid.

387  Ibid at [166].

388  Ibid at [165].
(b) The bloodstained condition of the rifle was such that the uncontaminated area associated with the fingerprints on the forearm leads to the almost inescapable conclusion that the hand that made the prints was in position contemporaneously with the murders. That hand was David’s.

c) The spare magazine was found standing upright on its narrow edge, almost touching Robin’s outstretched right hand. Its position is most unnatural in terms of the suicide theory. In view of its dimensions, the prospect of its having landed or ended up accidentally on its edge can only be described as extremely unlikely. Indeed as a matter of common sense and simple deduction, the prospect that it accidentally came to rest on its edge in the position it was found is so unlikely as to come close to defying belief. The conclusion that must be drawn in all the circumstances is that the magazine was deliberately placed as and where it was found in order to make the scene in the lounge look like a suicide. Only one person could have done that and that person is David.

Similarly, while the evidence was held “not to exclude the physical possibility of Robin having committed suicide”, the Court of Appeal concluded that “no reasonable jury could find there was a reasonable possibility that Robin committed suicide after killing the other family members.” Again, its reasoning is best cited in full:

Robin appears to have gone to bed the night before with a book and a hot-water bottle. His alarm was set for 6.30 am. In order to have committed the crimes Robin, wearing shoes, would have had to go into David’s room while he was away on his paper round; take David’s white opera gloves from his chest of drawers; know of the existence and whereabouts of the spare key for the trigger lock; remove the rifle from the cupboard without damaging David’s pre-existing prints on the forearm; find the magazines and probably load them; take off his shoes; use the rifle to effect the killings, again without damaging David’s pre-existing prints in spite of the fierce struggle with Stephen; dispose of the white cloth used in the shooting of Laniet in a manner or in a place which resulted in its not being discovered despite a thorough search; put his bloodstained clothes in the laundry for David to put into the machine; change his clothes to those in which he was dressed when he was found dead including putting the same shoes back on; go to the lounge, switch on the computer and type the message; and then, while for no apparent reason holding a magazine in his right hand, shoot himself in a manner which somehow allowed that magazine to end up on its narrow edge and in a most unlikely position; and all this without having emptied his bladder of its normal nightly collection of urine.

The Court was satisfied in a manner consistent with the application of the proviso that, “we have no doubt that any reasonable jury considering the new evidence along with the old would find David guilty.” The appeal was dismissed as the defendant had not suffered a miscarriage of justice.

The Privy Council reached a contrary conclusion when the case reached it three years later, holding that “in the very unusual circumstances of the case, a substantial miscarriage of justice has actually occurred” so that the “proviso ... cannot be applied”. The basis on which it was invited to reach that conclusion is important because the defendant’s central complaint was directed at the fact-finding role of a criminal appeal court. In particular, David Bain argued:

389 Ibid at [169].
390 Ibid at [170].
391 Ibid at [172].
392 Ibid at [174].
393 Bain v R (2007) 23 CRNZ 71 at [119].
394 Ibid at [38].
... the Court [of Appeal] had not given practical recognition to the primacy of the jury as the arbiter of guilt but had taken upon itself the task of deciding where the truth lay; had done so with inadequate regard to what was known of the jury’s thinking; had done so in relation to matters which the jury had had no opportunity to consider; had done so despite the admission of contradictory affidavits by witnesses, many of whom had not been cross-examined; and had failed to appreciate the extent to which the case had changed from that on which the jury had based their verdict....

Speaking for the Board, Lord Bingham of Cornhill emphasised that it was not being asked to find that the Court of Appeal had misapprehended the law, but rather that the Court of Appeal had misapplied it. Further, Lord Bingham’s postulated test, namely whether the trial jury acting reasonably “might” have reached a different verdict in light of the fresh evidence, was in similar terms to that applied by the Court of Appeal. But whereas the Court of Appeal concluded that the trial jury, acting reasonably, would have convicted the defendant irrespective of the fresh evidence, the Privy Council disagreed. It held that the fresh evidence “compels the conclusion” that the same reasonable jury might have had a reasonable doubt about the defendant’s guilt. The manner in which the Board reached this conclusion is significant, because it criticised the Court of Appeal for usurping the function of the jury by exceeding its appellate role in determining, in effect, that David Bain was guilty.

Speaking of the fresh evidence in relation to Robin’s mental state, Lord Bingham stressed that the importance of that evidence was for a jury to determine, and by implication, not an appellate court: “The Court of Appeal acknowledges that the fresh evidence redresses the balance in favour of David, and represents an evidentiary advance for him. But only the jury can assess the extent to which the balance is redressed and the evidence advanced.” Further, Lord Bingham said that the jury “might, not extravagantly, have felt that this evidence put a new complexion on the case” in circumstances where the evidence surrounding the killings was “highly contentious”.

The fresh evidence in relation to motive was treated similarly by the Board:

395 Ibid. Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood and Sir Paul Kennedy comprised the Board.
396 Ibid at [103]; compare R v Bain [2004] 1 NZLR 638 at [24].
397 Ibid at [104].
398 Ibid at [103].
399 It will be recalled the evidence under this heading was to the effect that Robin Bain might have been depressed and that he might have encouraged his school pupils to write stories about families being murdered. There was no direct evidence of the latter; ibid at [40]-[43].
400 Ibid at [105].
401 Ibid.
402 Ibid at [106]. The evidence of motive was the hearsay evidence that Laniet was having an incestuous relationship with Robin Bain; ibid at [45]-[50].
The ... Court of Appeal again acknowledged that this fresh evidence represented some advance for David, but discounted it as providing no basis for the conclusion that Robin committed the murders. This, again, is a matter for the assessment of a jury, not an appellate Court, and the jury’s assessment would depend on what evidence they accepted. If the jury found Robin to be already in a state of deep depression and now, a school principal and ex-missionary, facing the public revelation of very serious sex-offences against his teenage daughter, they might reasonably conclude that this could have driven him to commit these acts of horrific and uncharacteristic violence.

The Board was also critical of the Court of Appeal’s treatment of the new evidence in relation to the origin of the blood on the rifle and the timing of the message on the Bain’s household computer. The former evidence, said Lord Bingham, gave rise to issues that the trial jury did not have an opportunity to consider and which, “are not, with respect, issues which an appellate Court can fairly resolve without hearing cross-examination of witnesses giving credible but contradictory evidence.” And the latter material, said Lord Bingham, was wrongly dismissed by the Court of Appeal when it found that the evidence did not exculpate the defendant because, “there is no burden on David to prove physical impossibility” as the “onus is not on him”. Rather, the relevant focus ought to have been upon how the jury might have reacted in light of the material as to which it was thought, “the jury might reasonably have considered this peg of David’s argument on timing to be strengthened had they known the full facts.”

The Privy Council’s most forceful criticism of the Court of Appeal’s methodology was directed at the Court’s consideration of the evidence in relation to Lanie’s gurgling. The Board observed that the Court of Appeal had wrongly dismissed this category of evidence as the Court, on appeal, was “not empower[ed] ... to choose between the evidence of deponents, accepted as credible, but testifying to contradictory effect”. Moreover, the Board considered that the Court of Appeal had “assumed a decision-making role well outside its function as a reviewing body concerned to assess the impact which the fresh evidence might reasonably have made on the mind of the trial jury.”

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403 As well as the Court of Appeal’s treatment of the fresh evidence concerning the size of the bloodied footprints; see ibid at [107], the timing of the defendant’s paper run; ibid at [109] and the position of the lens from glasses worn by the defendant; ibid at [111]. In noting a similar reservation about who owned the glasses; ibid at [110], the Board, correctly it is suggested, referred to a question on this topic from the trial jury to the judge; the posited test was whether the trial jury, acting reasonably, would have convicted.

404 Ibid at [112].

405 Ibid at [108].

406 Ibid.

407 Ibid at [114].

408 Ibid at [113].
And what then of the three matters of evidence relied upon by the Court of Appeal in concluding that the trial jury would still have convicted? Lord Bingham said that they did not warrant detailed consideration for three reasons:

First, the issue of guilt is one for a properly informed and directed jury, not for an appellate Court. Secondly, the issue is not whether there is or was evidence on which a jury could reasonably convict but whether there is or was evidence on which it might reasonably decline to do so. And, thirdly, a fair trial ordinarily requires that the jury hears the evidence it ought to hear before returning its verdict, and should not act on evidence which is, or may be, false or misleading. Even a guilty defendant is entitled to such a trial.

The Board then dismissed each point in turn. The first concerned the defendant’s exclusive knowledge of the spare key to the rifle’s trigger lock. Whereas the Court of Appeal saw this point as giving rise to a “powerful inference that David was the killer”, Lord Bingham said it was “remarkable” for the defendant to make such an admission “if he was a murderer seeking to avert suspicion or baffle proof” and that “as Robin had much greater familiarity with firearms than David, and might reasonably be thought to know or suspect that rifles with trigger-locks are sold with two keys” he might have “rummaged about among David’s belongings to look for the key” and thereby found it.

The second was the bloodstained condition of the rifle and the presence of the defendant’s fingerprints in an area uncontaminated by blood, which the Court of Appeal said led to the “almost inescapable conclusion that the hand that made the prints was in position contemporaneously with the murders”. Dismissively, Lord Bingham said that as the point did not feature in the prosecutor’s closing address, there was “no reason to think that this point was in the jury’s mind at all.”

The third point related to the apparently staged position of the spare magazine. Of this, the Court of Appeal concluded, “Only one person could have done that and that person is David.” The Privy Council did not agree.

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409 Ibid at [115]. These observations ignore the strength of the evidence. First, and using the same sequence as Lord Bingham, while guilt is determined at first instance by a jury in the common law system of criminal justice, evidence of guilt may be considered by an appeal court in determining whether to allow an appeal (employing guilt-based methodology). Moreover, and as will be argued later in this chapter, it does not follow that an appellate fact-finding role is necessarily incompatible with the role of the jury. Second, the test identified by Lord Bingham was not that employed by the Court of Appeal, which as noted earlier, was satisfied that the trial jury would have convicted. Third, unless a trial is unfair, as to which see chapter four, an appeal court may dismiss an appeal pursuant to the proviso if it considers that the defendant has not suffered a substantial miscarriage of justice. It was not argued that David Bain’s trial was unfair.

410 (2004) 1 NZLR 638 at [165].

411 (2007) 23 CRNZ 71 at [116]. There was no evidence before the jury, the Court of Appeal or the Privy Council to suggest Robin Bain had done so.

412 (2004) 1 NZLR 638 at [165].

413 (2007) 23 CRNZ 71 at [117]. The Board also implied the Court’s reliance upon the point was unfair for the same reason, ibid.

414 (2004) 1 NZLR 638 at [165].
But even if it be accepted that the magazine was put in the position in which it was found and did not fall into that position, the question remains: who put it there? It could have been David. But there is no compelling reason why it could not have been Robin. This again is a jury question, not a question for decision by an appellate Court.

Consequently, the Board held that the fresh evidence precluded it from applying the proviso as it could not be said that the jury, acting reasonably, would have convicted in light of that evidence. And as a final reminder of the basis of its decision, the Privy Council concluded by observing that, “Where issues have not been fully and fairly considered by a trial jury, determination of guilt is not the task of appellate Courts.”

_Bain_ is therefore an obvious and powerful example of the view that appellate fact-finding is incompatible with the system of trial by jury. But the case also illustrates the potential for divergence between theory and practice in this area because of the fictional nature of determinations predicated upon what ‘a jury’ would have done. Ironically then, the critical difference between the Privy Council and the New Zealand Court of Appeal was not the latter’s appellate excess but the former’s view of the defendant’s possible innocence.

_B. Matenga and the Adoption of Weiss_

In _Bain_’s wake the Supreme Court adopted a different view of an appeal court’s role under the proviso thereby implicitly rejecting the Privy Council’s analysis. The Court accepted that while “the jury is in general terms the arbiter of guilt in our system of criminal justice”, the “very existence of the proviso demonstrates that Parliament intended the judges sitting on the appeal to be the ultimate arbiters of guilt in circumstances in which the proviso applies.” Other aspects of the decision in _Matenga v R_, however, qualify the breadth of this proposition so that the role of an appellate court is considerably more constrained than this observation may otherwise be thought to imply.

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415 (2007) 23 CRNZ 71 at [118].
416 Ibid at [119].
417 Ibid. The defendant was acquitted at a retrial. Aspects of the case reached the Supreme Court; as to which see _Bain v R_ [2010] 1 NZLR 1 and _Bain v R_ (2009) 19 PRNZ 524.
418 In fairness to the Board, it specifically disclaimed any view of the defendant’s guilt; ibid at [119]. Several things tell otherwise; the Board’s cursory and dismissive treatment of the key features of the Crown’s case, its implicit concern that the defendant lacked motive, the associated credence given to hearsay evidence to impute motive to Robin Bain, its extrapolation, that in the absence of direct evidence, Robin was mentally unstable, its focus upon relatively inconsequential trial error, a surprising degree of speculation in relation to the trigger lock to rebut evidence of guilt and the unusual strength of its criticisms of the Court of Appeal.
419 Matenga v R [2009] 3 NZLR 145 at [29] per Blanchard J.
420 Ibid.
Shane Matenga was convicted of sexually violating an intellectually impaired complainant following a trial in which the jury was wrongly told that an injury to the complainant’s genitalia was consistent with non-consensual intercourse. The Court of Appeal, however, dismissed the appeal by applying the proviso as “the Crown case in support of an absence of consent was overwhelming”, “the appellant’s description of the sexual encounter was inherently implausible” and the Court was “in no doubt that the jury would still have found an absence of consent, absent the inadmissible material.”

The Supreme Court granted leave to appeal in order to determine whether “the Court of Appeal was entitled to apply the proviso to s 385(1) of the Crimes Act 1961”, a device that the Supreme Court said had long given rise to “some uncertainty”. The Court examined a number of leading decisions on the proviso including that of the House of Lords in Stirland v Director of Public Prosecutions (discussed in chapter one), the decision of the New Zealand Court of Appeal in R v McI (discussed in chapter two) and the “important decision” of the Australian High Court in Weiss v R discussed earlier. Having done so, the Court held that the application of the proviso by reference to a notional reasonable jury – the formulation in Stirland and McI – should be abandoned as, “It is artificial to say that judges, while holding one view themselves, may ascribe a different view to the hypothetical jury.” Instead, the Court was “persuaded of the soundness of the general approach taken by the High Court in Weiss, which we consider should now be followed in New Zealand”. In reaching this conclusion, the Supreme Court recognised that:

... in reality, and this should be reflected in the test, the decision to confirm a jury verdict, despite something having gone wrong, depends upon whether the appellate court considers a guilty verdict was inevitable on the basis of the whole of the admissible evidence (including any new evidence).

But having recognised the existence of an appellate fact-finding role under the proviso, the Court then qualified the operation of this role; “The general rule that guilt is determined by a jury rather than by judges does, however, mean that the proviso should be applied only if there is no room for doubt about the guilt of the appellant”. Moreover, “considerable caution is necessary before resorting to the proviso when the

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421 R v Matenga [2008] NZCA 260 at [43].
423 Matenga v R [2009] 3 NZLR 145 at [1].
426 Matenga v R [2009] 3 NZLR 145 at [21]. As discussed in chapter two, the Supreme Court also considered but rejected its earlier observations in Sungsuwan v R [2006] 1 NZLR 730.
427 Ibid at [28].
428 Ibid at [27].
429 Ibid at [28], emphasis added.
430 Ibid at [29].
The Supreme Court also echoed the concerns of the Australian High Court in *Weiss v R* about the inherent limitations of the written record.

In coming to its conclusion concerning the inevitability of the verdict, the appeal court must of course take full account of the disadvantage it may well have in making an assessment of the honesty and reliability of witnesses on the sole basis of the transcript of the oral evidence. In a case turning on such an assessment the court will often be unable to feel sure of the appellant's guilt and will therefore be unable to apply the proviso.

The effect of these constraints, said the Court, was that the proviso would continue to operate in much the same way as "if the Court of Appeal continued to guide itself by reference to McF' and similarly, that the new approach was "not in practice different from the actual practice of appeal courts in England prior to ... [the] removal of the proviso".

The Supreme Court also modified *Weiss* by directing that the fact of a guilty verdict should be ignored in determining whether the appeal court considered the defendant to be guilty beyond reasonable doubt. This was because as "the jury's verdict may have been influenced by the existence of the miscarriage" the verdict should be set to one side for the purpose of the appeal court's independent assessment of the evidence.

The combined effect of these qualifications upon an appeal court's fact-finding role is best illustrated by reference to the facts. Something more must therefore be said about them. On the morning in question the defendant was intoxicated. He went to the home of a friend, who happened to be out. By chance, this led the defendant to the complainant's home. She and the defendant had never met. As noted earlier, the complainant is intellectually impaired. She invited the defendant into her home for a cup of tea while he waited for his friend. Once inside, the defendant allegedly attacked the complainant, forcing her to her bedroom. He there had sexual intercourse with the complainant vaginally and anally. The defendant then immediately left. A female neighbour heard the complainant calling for her and went to her aid. She found the complainant naked save for her underwear. The neighbour described the complainant as "crying, emotional and frightened." She also said that the complainant was

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431 Ibid.
432 (2005) 224 CLR 300.
433 [2009] 3 NZLR 145 at [32].
434 Ibid at [27].
435 Ibid at [33].
436 Unless otherwise stated, these are taken from the Supreme Court's decision at [3]-[5] and [34]-[35].
437 [2008] NZCA 260 at [25].
438 Ibid.
holding a teddy bear and sucking her thumb. The complainant promptly called the Police. The arrival of a male officer was seen to cause the complainant additional distress. Injury to her genitalia was discovered later that day. The defendant was questioned the same day. As the Supreme Court observed, his “account was weakened by his statement ... that the complainant had consented ‘maybe seventy percent, I assumed’”. Notwithstanding this remark and the circumstances more generally, the defendant maintained consent on the complainant’s part at trial.

Although the Court of Appeal thought that this narrative was “overwhelming” as to guilt, the Supreme Court was more circumspect; it saw the Crown case as (only) “a strong one.” Similarly, whereas the Court of Appeal thought that “All of the contextual circumstances were inconsistent with consensual sexual activity”, the Supreme Court considered that this “was a case very much turning on the credibility of the complainant and the accused”. Consequently, the Supreme Court held that:

... the Court of Appeal could not in the circumstances of this case properly conclude that if the inadmissible (and incorrect) medical opinion had been excluded, the only reasonably possible verdict was one of guilty. It is not enough that a jury could reasonably have convicted on the basis of the admissible evidence. When, because of the miscarriage, the Crown needed to rely upon the proviso it had to go further and satisfy the Court that the guilty verdict was not only reasonable but inevitable. We are not satisfied that has been established.

The Supreme Court’s analysis suggests that notwithstanding its adoption of Weiss, the determination of guilt pursuant to the proviso remains one to be exercised sparingly. Indeed, the Court appears to envisage that its approach will be little different from that by reference to what ‘a jury’ would have done. Its reference to a guilty verdict having to be not merely reasonable but “inevitable” underscores this conclusion. It follows that while Matenga is now clear authority for the proposition that the proviso confers a fact-finding role upon a criminal appeal court, this role is both narrow and constrained. Theory has changed but practice, it appears, has not.

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439 Ibid.
440 Ibid.
441 Ibid.
442 [2009] 3 NZLR 145 at [34].
443 [2008] NZCA 260 at [43].
444 [2009] 3 NZLR 145 at [34].
445 [2008] NZCA 260 at [43].
446 [2009] 3 NZLR 145 at [35].
447 Ibid.
448 Ibid. As discussed shortly, it is difficult to see how reference to what ‘a jury’ would have done is relevant to the appeal court’s task under either Weiss or Matenga as the test posed by each is whether the appeal court is satisfied of guilt beyond reasonable doubt.
449 It does not appear that the proviso has been applied more liberally since Matenga. The Privy Council invoked the device in Barlow v R [2009] UKPC 30 having found that the trial testimony of an FBI expert was wrong in a material respect, as “the circumstantial case against Mr Barlow...
XI. A FACT-FINDING ROLE? SOME THOUGHTS

In spite of the formidable breadth and depth of contrary authority, it is suggested that the Australian High Court and the New Zealand Supreme Court were correct to conclude that the proviso confers an appellate fact-finding role. However, it is contended that this role is broader than that recognised by either Court. Several matters support this conclusion. First, the text of the proviso in the context of its surrounding appeal provisions; second, the history surrounding the creation of the Court of Criminal Appeal and third; the proviso’s purpose in reforming the Exchequer rule. It is also suggested that the conventional objections to a fact-finding role, namely jury usurpation and demeanour-based evidential assessment, are misplaced notwithstanding their common law pedigree.

A. The Relevant Statutory Text

The language of the proviso and its associated appeal grounds in section 385 of New Zealand’s 1961 Crimes Act, like those of other jurisdictions framed upon the (English) Criminal Appeal Act of 1907, is important. The section contains several grounds of appeal, all of which are subject to the proviso. The first ground of appeal empowers an appeal court to quash a conviction if “it is of the opinion” that “the verdict is unreasonable or cannot be supported having regard to the evidence.” This ground creates a right of appeal on matters of fact in which the court’s opinion of the evidence is dispositive. As discussed in chapter two, while an unreasonable verdict will often constitute a substantial miscarriage of justice, it is notable that the proviso is applicable to, and curative of, fact-based appeals. Further, the proviso permits an appeal court to dismiss a conviction appeal if the court “is of opinion” that, even though the point raised in the appeal “might be decided in favour of the appellant”, the court “considers” that “no substantial miscarriage of justice has actually occurred.”

As the provision makes clear, the duty of determining whether the defendant has suffered such a miscarriage is cast directly upon the appeal court and the intended statutory focus is upon the position of the defendant beyond the mere establishment of a ground of appeal. When the section is read as a whole, plainly it is the appeal court’s assessment of the case that is determinative. The court may form its own view of the evidence and ultimately, whether the defendant has suffered an actual, substantial miscarriage of justice.

The breadth of New Zealand’s appellate courts’ supplemental powers (and those of other courts based upon the English template), which may be exercised in the

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450 Crimes Act 1961, s 385(1)(a). The provision was redrafted in 1945 by virtue of the Criminal Appeal Act of that year so as to provide for greater appellate intervention on matters of fact, thereby broadening the hitherto “very limited” power; (1945) 268 NZPD 780. For the courts’ view of the earlier law, see R v Styche (1901) 20 NZLR 744; R v Allandale (1905) 25 NZLR 507 and R v Ross (1948) NZLR 167.

451 Ibid.
“interests of justice” in determining any appeal, underscore this conclusion.\textsuperscript{452} These powers include the ability to order the production of any document, compel witnesses to give evidence (including witnesses not called at trial), direct local or scientific inquiries by a court-appointed commissioner and appoint any person with specialist knowledge to act as an assessor “for the proper determination of the case”.\textsuperscript{453} Moreover, the original corresponding English provision was seen by the Attorney-General as ensuring that the Court of Criminal Appeal had “ample machinery” to discharge the inquisitorial function exercised by the Home Secretary in relation to the Royal Prerogative of Mercy.\textsuperscript{454}

\textbf{B. History}

This point can be made succinctly. As discussed in chapter one, one of the reasons that a right of appeal in criminal cases was so controversial was that it was seen as encroaching upon the system of trial by jury.\textsuperscript{455} Further, the final impetus for a court of criminal appeal arose from a high-profile miscarriage of justice in which a demonstrably innocent defendant was convicted, with the result that there was public agitation for an appellate court with the power to reconsider, for itself, factual matters going to the heart of proceedings.\textsuperscript{456} The result was the Criminal Appeal Act of 1907, the Court of Criminal Appeal and the proviso in the criminal jurisdiction. It follows that the proviso was part of a regime by which that new Court was empowered, and expected, to reconsider matters of fact.

\textbf{C. The Proviso’s Purpose}

Before the rise of the Exchequer rule, common law courts said that they would weigh evidence on appeal for the purpose of determining the effect of trial error.\textsuperscript{457} For example, in \textit{R v Teaf}\textsuperscript{458} Lord Ellenborough said of defence evidence ruled inadmissible not only that it “could have made no difference”, but that “it ought not to have made any difference in the verdict.”\textsuperscript{459} Consequently, courts were prepared to make their own assessment of the evidence without reference to how it might have been treated by a jury. When the Exchequer rule put an end to this approach, legislatures responded with

\begin{itemize}
\item \textsuperscript{452} Crimes Act 1961, s 389.
\item \textsuperscript{453} Ibid.
\item \textsuperscript{454} See the discussion in chapter one and the Departmental Committee on New Trials in Criminal Cases, \textit{Report of the Departmental Committee on New Trials in Criminal Cases} (1954) 6.
\item \textsuperscript{456} Again, see chapter one and W R Cornish and G de N Clark, \textit{Law and Society in England 1750-1950} (1989) 619.
\item \textsuperscript{457} In relation to criminal cases, the seminal statement of the law is contained in \textit{R v Ball} (1807) Russ & Ry 133. Obviously, no right of appeal existed at this time so the phrase “on appeal” is a reference to the Crown Cases Reserved procedure.
\item \textsuperscript{458} (1809) 11 East 307.
\item \textsuperscript{459} Ibid at 312, emphasis added.
\end{itemize}
the statutory proviso. Strangely, however, the courts have largely overlooked this period of history with the result that they have also neglected the proviso's purpose. But as the Australian High Court correctly observed in Weiss v R, "history ... readily show[s] that the proviso to s 4(1) of the 1907 English Act was intended to do away with the Exchequer rule" with the result that the proviso may be applied if the appeal court was "persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt".

D. Jury Usurpation

As we have seen, the primary argument against fact-finding pursuant to the proviso is jury usurpation. This has some significance as New Zealand specifically affirms the right of trial by jury for serious criminal cases. Echoing sentiment elsewhere, our Law Commission has said that the jury system constitutes "a powerful symbol of democracy" because of the store it places upon lay participation in the criminal justice process. Similarly, the jury system has been described as the "conscience" of the community, a "safeguard against arbitrary or oppressive government", and more grandiloquently as "the lamp that shows that freedom lives." Linking these disparate ideas is the unifying one of community judgement; the concept that lay people, the defendant’s peers, should decide allegations of serious criminality instead of another arm of government, thereby protecting the individual and ultimately society from various forms of wrongful governmental interference; politically motivated allegations, corrupt state investigators and invasive or repressive laws. Unsurprisingly then, the role of the jury is now seen as having a constitutional dimension, interferences with which are subject to fierce judicial scrutiny.

It is against this backdrop that notions of jury usurpation must be considered. When Lord Herschell said that appellate fact-finding under the proviso would

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460 The text of Stephen's proviso in s 167 of the Indian Evidence Act 1872 provides unequivocal evidence that an appellate fact-finding function was intended as does Stephen's associated speech to the Indian Legislative Council; see G C Rankin, Background to Indian Law (1946) 134. See also chapter one.


462 Ibid at [18] and [44] respectively.

463 See the New Zealand Bill of Rights Act 1990, s 24(e) and the Crimes Act 1961, ss 361A-361C.


466 Ibid at 18.


468 Siemer v Solicitor-General [2010] NZSC 54 at [26].

469 For example, see Parris v Attorney-General [2004] 1 NZLR 519 at [14] per Tipping J and the observations of the New Zealand Supreme Court in Wong v R [2008] 3 NZLR 1 at [8].
undermine the “cherished right of trial by jury in criminal cases”, although the Lord Chancellor did not directly speak of the pantheon of benefits associated with this constitutional right, by this phraseology, he was probably evoking them. The issue posed by the proviso’s use is not, however, whether by it the jury trial system and its associated host of benefits are in jeopardy—plainly they are not—but a much more specific one, namely whether appellate fact-finding is inconsistent with the right of trial by jury. This highlights a problem particular to this area. The perceived advantages of the jury system run so deep that challenges to it, real or otherwise, risk a reflexive response. Here, conclusions have been presented as argument; while the courts have repeatedly said that appellate fact-finding undermines the quintessential function of a lay jury and in so doing, a defendant’s right to trial by this body, this is to beg the question rather than answer it. The result has been that Weiss v R and Matenga v R aside, the point has been treated as beyond debate.

Several matters suggest that the idea of usurpation is misplaced. First, the right of jury trial must be understood in its context, for it is a right that is qualified in both theory and practice. The laws of evidence, procedure and substantive criminal law dictate what a jury may receive as evidence, how that material may be used and ultimately, what it must prove. Judges and not juries decide whether there is sufficient evidence for a case to be tried. A trial is presided over by a judge, to whose control the jury is subject throughout. Further, a case may be removed from a jury, whether for want of evidence or some other legal impediment, and this remains true even after the delivery of a jury’s verdict. It follows that a jury’s fact-finding role and a defendant’s corresponding entitlement to have a charge determined by a jury are regulated by procedural as well as substantive rules so that the process is ultimately—and necessarily—under the direction of both trial and appeal courts. Wigmore observes this has always been so, in that a judge has “never been without this [evidential] revisory function.” It follows that while it is correct that a defendant has the right to a jury trial, the right is not unqualified. Instead, it exists in the context: of an overarching system of justice which places a strict emphasis on control, both at first instance and beyond. Further, and as the Supreme Court observed in Matenga v R, by virtue of the proviso

470 Makin v Attorney-General for New South Wales [1894] AC 57 at 70.

471 (2005) 224 CLR 300.


473 In Matenga the Supreme Court held that “nothing” in the jury trial guarantee in the New Zealand Bill of Rights Act 1990 “prevents the appellate court from considering whether, despite the miscarriage, the verdict already rendered by a jury should stand”; ibid at [28].

474 These points, albeit with a different emphasis, come from Wigmore whose work plainly influenced the Australian High Court in Weiss v R (2005) 224 CLR 300. See John H Wigmore, Evidence in Trials at Common Law (Tillers revised ed, 1983) vol 1 at 890-891.

475 For example, see Crimes Act 1961 (NZ), s 347 and Fong v Attorney-General [2009] 1 NZLR 600.


“Parliament has given the appeal courts an ability to uphold the conviction despite there being a miscarriage of justice in some respect.” 478

Second, rights of appeal in criminal cases underscore the overriding nature of appellate control over jury verdicts. This is especially true of grounds of appeal which permit the quashing of a conviction when the verdict is unreasonable or cannot be supported having regard to the evidence. If an appeal court may conclude that a verdict should be quashed because it is unreasonable, why may the same court not uphold a verdict when satisfied that the verdict is correct? It is illogical to say that appellate fact-finding is inconsistent with the system of trial by jury when the existence of fact-based grounds of appeal is predicated upon the proposition that a jury’s verdict is not immune from challenge.

Third, in applying the proviso to dismiss a criminal appeal an appellate court acts to preserve a jury’s verdict. Moreover, by engaging in this process, an appellate court makes a concurrent conclusion as to guilt rather than undermining that of the jury at first instance. Or as Wigmore puts it, the “precise question that the appellate court decides is ... whether, subtracting or adding the evidence admitted or excluded [or, it may be added, trial error], the truth seems to be identical with the jury’s verdict.” 479 Accordingly, it is suggested that there is no reason in either principle or practice as to why appellate factual findings should not be seen as complementing those of the jury at first instance.

E. Witness Demeanour

As we have seen, both the Australian High Court and New Zealand Supreme Court consider that appellate fact-finding under the proviso is necessarily constrained by a key disadvantage suffered by appeal courts, the absence of live testimony, so “that there may be many cases in which the appellate court “cannot ... reach the necessary degree of satisfaction” of the defendant’s guilt. 480 The same concern finds expression elsewhere. For example, the Canadian Supreme Court has said that its very high standard for the invocation of the proviso reflects “the difficult task for an appellate court of evaluating the strength of the Crown’s case retroactively, without the benefit of hearing the witnesses’ testimony and experiencing the trial as it unfolded.” 481

Such a concern is not new. Indeed, witness demeanour has long been regarded as important by appeal courts. For example, in 1867 the Privy Council quashed a conviction after the judge read to the jury the testimony of witnesses from an earlier trial. 482 Speaking for the Board, Sir John Coleridge condemned the practice as it could not provide “the manner or look of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, [or] his calmness or consideration” with the

478 Ibid at [29].
480 Weiss v R (2005) 224 CLR 300 at [43].
481 R v Van [2009] 1 SCR 716 at [36] per Lebel J.
482 R v Bertrand (1867) LR 1 PC 520.
result that the jury had only "the dead body of the evidence" before it.483 And similar, albeit more balanced, misgivings have been repeatedly expressed by cognate courts throughout the common law world in relation to the ability and desirability of appeal courts engaging in factual analysis with only the written record.484

It is suggested that the significance of demeanour-based evidential assessment can be overstated. Modern psychological research suggests that such assessment is at best fraught with difficulty and at worst, shibboleth.485 Unsurprisingly then, appeal courts are beginning to move away from demeanour as a justification for appellate deference in relation to first instance factual findings.486 Technological advances also considerably undermine the demeanour argument. Pre-recorded testimony from complainants and Police video interviews are now routinely admitted as evidence thereby enduring for appellate review, and there is no reason why trials could not be recorded on video so that the record is not merely the written word but the complete account of a trial. Similarly, and as noted earlier, appeal courts have broad supplemental powers in relation to the taking of evidence.487 If they wished, they could hear from witnesses themselves. The demeanour argument also overlooks the advantages professional judges have over lay juries in relation to evidential assessment; judges are more likely to understand the dangers of certain types of evidence such as identification evidence488 and propensity evidence489 as well as the intricacies of certain subjects common to criminal cases such as the science of DNA490 and the behaviour of sexually abused children.491 Consequently, one senses that the demeanour objection to appellate fact-finding is frequently a proxy for the concern about jury usurpation rather than an objection in its own right. But this concern, as we have seen, is misplaced. Further, overemphasis upon the importance of witness demeanour in credibility-based trials risks, as one very senior Judge has put it, the proviso being rendered "impotent."492 Plainly, the legislature cannot have intended this result.

483 Ibid at 535.
486 For example, see M v R (1994) 181 CLR 487; R v Munro [2008] 2 NZLR 87 and Owen v R [2008] 2 NZLR 37.
487 For example, see Crimes Act 1961, s 369.
488 For example, see Peato v R [2010] 1 NZLR 788.
489 For example, see R v Healy [2007] 3 NZLR 850.
490 For example, see Wallace v R [2010] NZCA 46.
491 For example, see R v Aryan [2010] NZCA 57.
492 R v B [1993] 1 SCR at 737 per L’Heureux-Dube J.
XII. CONCLUSION

Criminal appeal courts have widely embraced tests for the application of the proviso grounded in the inevitability of conviction by ‘a jury’ since their birth by the English Court of Criminal Appeal in the early twentieth century. Under this orthodoxy, the absence of substantial miscarriage of justice was determined by reference to what the trial jury or a hypothetical reasonable jury would have done in the absence of trial error — found guilt established beyond reasonable doubt. The associated theory was that because effect was being given to the strength of the evidence, such tests did not involve an appellate fact-finding function. The corollary, as the courts repeatedly said, was that any other approach would usurp the role of the jury and violate the right of a criminal defendant to that system of trial. As two senior common law courts have now recognised, however, these ingrained views are also misplaced. Courts cannot know what a trial jury would have found by reference to hypothetical circumstances and the invocation of a hypothetical jury is by definition not the jury that passed judgment upon the defendant. It follows that the conclusion premised upon such tests that a defendant has not suffered a substantial miscarriage of justice has necessarily involved an appellate fact-finding function. While the use of jury nomenclature has restrained this process, it has also masked it when theory and practice have diverged. Bain v R\textsuperscript{493} is the obvious example.

As has been argued, a fact-finding role pursuant to the proviso is consistent with its statutory text, the surrounding common form appeal provisions and the proviso’s purpose. In this context history is revealing, as it shows that legislatures intended criminal appeal courts to engage in a fact-finding function so as to identify miscarriages of justice rent by unreasonable verdicts while being free from the shackles of error embodied by the Exchequer rule. None of this compromises the system of trial by jury or a defendant’s corresponding rights. Rather, it recognises that appellate control is a quintessential feature of the adversarial system in circumstances in which that control extends to matters of fact.

While the decisions of Weiss v R\textsuperscript{494} and Matenga v R\textsuperscript{495} are welcome developments in this respect, the alleged inability of appeal courts to engage in demeanour-based factual assessment remains a pressing common law concern. As we have seen, this endangers the efficacy of both decisions and the proviso’s utility. A broader approach would not countenance “judicial lynch law” as one commentator has suggested, for the appeal court would still need to be satisfied that the trial was fair.\textsuperscript{496} This leads us then to a new and vexed area in chapter four, and in particular, resolution through the proviso of serious trial error with irrefutable evidence of guilt.

\textsuperscript{493} (2007) 23 CRNZ 71.
\textsuperscript{494} (2005) 224 CLR 300.
\textsuperscript{495} Ibid.
\textsuperscript{496} Lester Bernhardt Orfield, Criminal Appeals in America (1939) 197.
CHAPTER FOUR

THE PROVISO AND INCURABLE ERROR: FUNDAMENTAL ERROR, UNFAIR TRIALS AND CONSTITUTIONAL STRUCTURAL ERROR

I. INTRODUCTION

The proviso to section 385 of the Crimes Act 1961, as with the proviso in other common law jurisdictions, provides that a criminal appeal court “may ... dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred”.1 The provision, however, provides no guidance as to how appeal courts should exercise the statutory discretion conferred upon them by the proviso and neither does it define a substantial miscarriage of justice. This gives rise to the interrelated questions of how common law courts decline to apply the proviso even though the tests for its application are otherwise met and whether some errors are themselves treated as occasioning a substantial miscarriage of justice thereby precluding the proviso’s application. Framed as a single inquiry, are some errors incurable by the proviso?

The New Zealand case of R v Fulton2 gives some shape to these problems. The defendant was convicted of rape after he left a fingerprint at the scene, although he denied having ever been to the address. The trial was marred by a very serious error: in cross-examination and then closing the prosecutor commented adversely upon the defendant’s silence in the face of Police questioning. The Court of Appeal treated these comments as a “persistent and substantial breach” of the appellant’s right to silence.3 The defendant contended that the proviso should not be applied given the “flagrancy of the breach” and notwithstanding the strength of the evidence against him.4 Faced with such a serious transgression, should the Court decline to apply the proviso? Or worse still, was the error itself a substantial miscarriage of justice? The Court of Appeal observed that while the breach of the defendant’s rights was “substantial”, it was nonetheless made in good faith.5 Further, there could be no doubt about the defendant’s guilt in light of the fingerprint evidence.6 The Court implicitly found that the error had not occasioned a substantial miscarriage of justice in light of these two factors. The Court also explicitly held that it should exercise its discretion to apply the proviso as it was “in the interests of justice to uphold the appellant’s conviction.”7 It followed that affirmation of the defendant’s rights, “when weighed against the interests of society and those of the victim, does not require a further trial.”8 But in reaching this conclusion,

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1 Crimes Act 1961, s 385(1).
2 CA280/96, 7 April 1998.
3 Ibid at 4.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
8 Ibid.
the Court noted that it did so only because of "the cogency of the fingerprint evidence", or in other words, incontrovertible evidence of guilt. Accordingly, in Fulton the Court of Appeal appeared to recognise that some errors may be incurable by the proviso either because the interests of justice warranted a new trial or because some errors are themselves a substantial miscarriage of justice.

This chapter considers how incurable errors are identified and what distinguishes them from regular error amenable to the proviso's relief. We shall see that the courts have identified three categories of incurable error: fundamental errors that vitiate criminal proceedings, unfair trials and constitutional violations going to the structure of a trial. While the boundaries between these categories are indistinct and there is often overlap between them, this chapter examines each individually. There are good reasons for doing so. First, approaching matters this way creates a workable division between jurisdictions. The concept of fundamental error in the context of the proviso is primarily the preserve of Australian common law, whereas that of constitutional structural error is a feature of North American jurisprudence. Moreover, consideration of the unfair trial category is most easily undertaken by reference to New Zealand common law in light of the Privy Council's decision in Howse v R. Second, analysing each category individually provides structure to an area that is otherwise bereft of one.

The chapter begins with consideration of relevant English common law, most of which lies under the Criminal Appeal Act 1907 and the Court of Criminal Appeal. This is where the roots of incurable error may be found even though the case law is largely unshaped by any clear unifying theme. It remains, however, the logical starting place given the statutory template established by the Criminal Appeal Act 1907, the influence of the English common law and the adumbration of incurable error within it. From there we move to Australia and the seminal decision in Wilde v R, the genesis of the first category of error incurable by the proviso, fundamental errors going to the root of proceedings. Subsequent developments of the High Court are then considered, as are those of state appeal courts in this context. As with the English jurisprudence, it will be argued that the Australian approach to incurable error is without any clear guiding principle, so that the boundary between it and regular error amenable to the proviso is largely arbitrary.

The second category of incurable error, an unfair trial, is considered by reference to New Zealand common law and the Privy Council decision of R v Howse. It is now

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9 Ibid.
10 Technically, the finding that a trial has been an unfair trial is a conclusion about the way in which the trial has been conducted rather than a type of error itself (such as the admission of inadmissible evidence or a defect in the summing up). But in order for a trial to have been unfair, it must have first suffered serious error. The issue is therefore the same: what type of error causes a trial to be unfair so as to preclude the application of the proviso? It is in this sense that an unfair trial is here considered as a type of incurable error.
11 [2006] 1 NZLR 433.
clear that an unfair trial is itself a substantial miscarriage of justice so that the proviso is necessarily excluded whenever an appeal court concludes that a trial has been unfair. Further, and as we shall see, this remains true notwithstanding irrefutable evidence of guilt. Less clear, however, is the means by which the fairness of a trial is determined so that the ambit of the proviso’s application remains vague. Contributing to this situation, it is suggested, is Hawse’s adoption of the Australian concept of fundamental error as a touchstone for the determination of an unfair trial. Consequently, broad value judgements about trial fairness rather than clear legal principles inform this area, with the result that, in practice, the proviso’s boundaries remain ill-defined.

From New Zealand and the category of an unfair trial we turn to North America and constitutional structural error, the third and final category of error incurable by the proviso. Unlike other common law jurisdictions, the United States of America has attempted to create a unified theory of incurable error based upon violations of its federal constitution. The resulting concept of structural error holds that any breach of the federal constitution that affects the framework of a trial causes immeasurable harm to the reliability of the verdict, so that such an error cannot be cured by the harmless error enactments akin to our proviso. Conversely, routine constitutional error or regular trial error, as it is there known, remains subject to such enactments. As we will see, while this dichotomy was apparently intended to create a uniform means for the identification of error incurable by the proviso, and in so doing, establish an analytical framework for an area that was largely without any, subsequent jurisprudence reveals

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14 Canadian jurisprudence is not examined in this chapter because the unusual legislative structure of the Canadian proviso removes from its purview the category of error that would otherwise be the most propitious source of incurable error, namely that involving a miscarriage of justice. The key change occurred in 1954 when the proviso was confined by s 592(1)(b)(iii) of the Canadian Criminal Code to wrong decisions on a question of law. This change endured and is now encapsulated in s 686(1)(b)(iii) of the Criminal Code. Before the 1954 amendment, Canadian common law appeared to recognise the notion of error incurable by the proviso. For example, in R v Josephson [1949] 1 WWR 93, the defendant entered a plea of guilty in the magistrate’s private chambers but the Manitoban Court of Appeal held that the proviso was not able to save the conviction given that the principles of open justice had been violated. Similarly, in R v Allan (1949) 93 CCC 191 at 193, Robertson CJO said that “the irregularities in the trial were of so grave a character, and so interfered with the assurance of a fair trial of the appellant, that the conviction cannot ... stand.” And in R v Pavlikoff (1953) 10 WWR 26 at 51, Sloan CJB said that some errors “render a trial so manifestly unfair that, no matter how strong the evidence against an appellant, the court of appeal is impelled to order a new trial not alone because of the possibility of marked prejudice to the accused but also because the public confidence in the administration of criminal justice might be imperilled should the conviction be sustained.” Since then, it is clear even from the reduced pool of cases subject to the proviso that incurable error is a feature of Canadian common law. For example, in R v Krieger [2006] 2 SCR 501 at [25], the Supreme Court held the proviso could not cure the error of law inherent in a directed verdict of guilty as the device had no application when there “has in effect been no trial by jury at all.” And similarly, in R v Cardinal (2005) 200 CCC (3d) 323 at [13], the Alberta Court of Appeal held the judge’s wrongful intervention in the jury selection process caused an error of law not amenable to the proviso because it was “so severe” that the error “mandates a new trial ... even if no prejudice to the accused can be shown”. Overall, however, the small number of Canadian cases and their confined remit by virtue of the proviso’s structure do not sufficiently add to the analysis so as to warrant inclusion. For the legislative history of the proviso and reference to some of the cases above, see Ronald R Price and Paula W Mallea, “‘Not by Words Alone’: Criminal Appeals and the No Substantial Wrong or Miscarriage of Justice Rule” in Vincent M Del Buono (ed), Criminal Procedure in Canada (1982) 453. See also the decision of the Canadian Supreme Court in R v Khan [2001] 3 SCR 823.
that structural error is ill-equipped to these tasks. In particular, it will be suggested that contrary to the theory of structural error, most errors confronting criminal appeal courts are distinguishable by degree rather than kind and that harm to the structure of the trial does not necessarily affect its outcome. It will also be suggested that structural error’s focus is too narrow in that it does not accommodate values of importance to the criminal justice system beyond the search for truth, with the result that the concept struggles to provide an exclusive approach to the proviso’s application.

Common to these jurisdictions is the difficulty in reconciling conflicting values that underlie the criminal justice system. While few would wish to see convictions of the guilty quashed, similarly, few would accept that egregious error should be tolerated by a credible system of justice. The problem is compounded by the sheer variety of trial error and the competing need for a consistent response on the part of the courts. The magnitude of the challenge presented by the proviso in this area is therefore obvious. So too is the need for consideration of the courts’ response in meeting it.

II. ENGLAND: THE ROOTS OF INCURABLE ERROR AND ITS ARBITRARY NATURE

In 1952 Brian Edward Clewer was convicted of forgery in relation to cheques drawn upon his business. The evidence against him was strong. The cheques bore the forged signature of the defendant’s business partner, were written to the defendant’s personal debtors and the defendant was in “financial straits” at the time. Further, in each case, the cheques were accompanied by letters in the defendant’s own hand. The defence case was correspondingly weak. The defendant accused his wife of forging the signatures and said that while he had written the accompanying letters to his debtors, he had not intended to send them until he had sufficient funds. Unsurprisingly, this aspect of the defendant’s testimony was thought to be “inherently improbable” by the Court of Criminal Appeal.

The defendant, however, appealed upon the ground that his trial “was not conducted in a regular or fair manner, so that, in effect, his counsel was deprived of a fair opportunity of placing the defence properly before the jury.” During the trial, the judge frequently interrupted defence counsel’s cross-examination and examination in chief with imputations of specious defences, and in so doing, the judge conveyed an adverse view of the defence case. For example, the judge spoke of the “dust storm” raised by the defendant which the jury would need to see through in order “that they may do justice.” The Court of Criminal Appeal found the judge “was really saying in the presence of the jury ... that counsel for the defence was raising false issues, that

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15 For the distinction between principles and policies favouring due process as against crime control in the criminal justice system, see the seminal work of Herbert L Packer, The Limits of the Criminal Sanction (1968) 149-173.
16 R v Clewer (1953) 37 Cr App R 37 at 37.
17 Ibid at 39.
18 Ibid at 38.
19 Ibid at 41.
there was nothing in the defence being put forward, and that he intended to tell the jury so."²⁰ Equally seriously, the judge frequently interrupted defence counsel’s closing address in a manner designed to “have conveyed to the jury the idea that the learned judge was completely convinced of the appellant’s guilt”.²¹

The Court of Criminal Appeal observed that while “it is sometimes difficult, when the defence is one that appears ... to be fantastic or devoid of merit, to treat it with the same consideration” as that due “to a defence not marked by those characteristics”, the “first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial, and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury.”²² The Court noted that matters of facts “under our law” are “entirely the province of the jury” and that a defendant, as a matter of law, “is entitled to have his defence, even the most improbable, put to the jury by his counsel”.²³ It followed that the Court felt “obliged to yield to the appellant’s contention that the trial was irregular, and that the conviction ought not to stand.”²⁴ In reaching this conclusion, the Court said it was “impossible to apply the proviso.”²⁵

Implicitly, the Court found that judicial interference with the defendant’s right to present a defence had rendered the trial unfair and, as such, that there had been a substantial miscarriage of justice. In light of these conclusions, the decision in R v Clewer in 1952 represents an early and striking expression of incurable error when there could be little real doubt about the defendant’s guilt. And in just over a decade later, two other decisions of the Court of Criminal Appeal confirmed that the proviso had limitations in the face of grave procedural error despite its broad and all-embracing language.

In R v McKenna²⁶ in 1960, the judge told the jury to reach a verdict within 10 minutes, failing which the jury would be required to retire together overnight. The jury returned guilty verdicts within the allotted period having previously been deliberating for over two hours. The three defendants appealed on the ground they had suffered a “substantial miscarriage of justice in that, contrary to the principles of the common law, the judge set a time limit within which the jury should return their verdict”.²⁷ The Court of Criminal Appeal accepted the judge erred in setting such a limit, for it was “a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced

²⁰ Ibid.
²¹ Ibid.
²² Ibid at 39-40.
²³ Ibid at 42.
²⁴ Ibid.
²⁵ Ibid.
²⁶ R v McKenna [1960] 1 QB 411.
²⁷ Ibid at 413.
by any promise, [and] unintimidated by any threat.”\textsuperscript{28} As such, the judge’s instruction was seen as “a disservice to the cause of justice” and “insupportable”.\textsuperscript{29} Despite this, the prosecution argued that the proviso should be applied as the evidence of guilt was “overwhelming”\textsuperscript{30} The Court inclined to the view that while that might be so in relation to two of the defendants, it was not necessarily so in relation to the third. More importantly, the Court held it was “a reasonable inference” that the verdicts were not the product of the evidence, but rather “the inconvenience and discomfort” with which the jury had been threatened.\textsuperscript{31} Given that, the Court did “not think it right to resort to the proviso”, a conclusion it reached with “regret”.\textsuperscript{32} Notably, the Court concluded its judgment with the following remarks, the last sentence of which alludes to the concept of incurable error:\textsuperscript{33}

> Although any jury would have been amply justified in finding all these appellants guilty of what was, by whomsoever committed, an extremely serious, well-planned crime, it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement. Plain though many juries may have thought this case, the principle at stake is more important than the case itself.

In \textit{R v Badjan}\textsuperscript{34} six years later, the defendant was convicted of intentionally causing grievous bodily harm to a fellow card player using a hammer. The assault was observed by at least one witness beyond the victim and an independent witness said she saw the defendant fleeing the scene with the weapon.\textsuperscript{35} Although the defendant made some admissions to the Police, he later testified the victim had attacked him and fallen while the defendant acted in self-defence. This he said explained the victim’s serious head injuries. The judge made no reference to the defence in the summing up. The Court of Criminal Appeal agreed the defence case was “of tenuous worth”, but it held the defendant “was entitled to have [it] left to the jury for their assessment.”\textsuperscript{36} As in \textit{R v McKenna},\textsuperscript{37} the prosecution contended the proviso should be applied “having regard to all the evidence”.\textsuperscript{38} The Court said it was “unable to accede to that invitation” because when “a cardinal line of defence is placed before the jury and that finds no reflection at any stage in the summing-up, it is in general impossible … to say that the

\begin{itemize}
  \item \textsuperscript{28} Ibid at 422.
  \item \textsuperscript{29} Ibid.
  \item \textsuperscript{30} Ibid at 423.
  \item \textsuperscript{31} Ibid.
  \item \textsuperscript{32} Ibid.
  \item \textsuperscript{33} Ibid.
  \item \textsuperscript{34} (1966) 50 Cr App R 141.
  \item \textsuperscript{35} Ibid at 142.
  \item \textsuperscript{36} Ibid at 143.
  \item \textsuperscript{37} [1960] 1 QB 411.
  \item \textsuperscript{38} (1966) 50 Cr App R 141 at 144.
\end{itemize}
proviso can properly be applied so as to say that the conviction is secure in those circumstances.\textsuperscript{39} While the breadth of this observation has since been doubted, \textit{R v Badjan}, \textit{R v McKenna} and \textit{R v Clewer} demonstrate that by the middle of the twentieth century, English courts saw the proviso as potentially inapplicable in relation to instances of serious procedural error.\textsuperscript{40} By about the same time, however, it was becoming clear this was an area fraught with difficulty in that reasonable minds could readily disagree about which errors should not be cured by the proviso, a problem underscored by the absence of any methodology for determining how such errors might be identified. Accordingly, we now turn to the trilogy of cases made up of \textit{R v Oliva}\textsuperscript{41} in 1960, \textit{R v Slinger}\textsuperscript{42} in 1962 and \textit{R v Sparrow & Friend}\textsuperscript{43} of the same year.

Oliva was convicted of assault causing bodily harm after he attacked a man in a Soho club. The jury was confronted with a sharp conflict in the evidence. A Police officer testified he saw the assault while the defendant and other witnesses said the victim had attacked him.\textsuperscript{44} The judge instructed the jury about the burden of proof but said nothing about that burden being upon the Crown. Neither counsel mentioned that matter in their address. The Court said it found the case “troublesome” because while it was unlikely the decision turned upon the burden of proof, the issue really being who was to be believed, it was nonetheless “a cardinal principle of our law that the burden of proof is on the prosecution”.\textsuperscript{45} Further, the Court considered “it has become almost a rule of law that the jury in every case should be told that that is the law” and it expressed itself as being anxious “that nothing we say should be thought in any way to whittle down that principle.”\textsuperscript{46} It followed that “the court feels that the principle in issue is so important that it has no option but to quash the conviction.”\textsuperscript{47} As with the other cases discussed earlier, \textit{R v Oliva} rests upon the premise that a proper trial has certain core features, the omission or infringement of which should not cured by the proviso. However, as the two cases following \textit{Oliva} show, while this premise can be simply stated, it is also open-ended and therefore susceptible to judicial disagreement.

In \textit{R v Slinger}\textsuperscript{48} and \textit{R v Sparrow & Friend},\textsuperscript{49} the judge in each case made the same omission as in \textit{Oliva}: a failure to direct the jury that the burden of proof lay upon

\textsuperscript{39} Ibid.
\textsuperscript{41} (1960) 46 Cr App R 241.
\textsuperscript{42} (1962) 46 Cr App R 244.
\textsuperscript{43} (1962) 46 Cr App R 288.
\textsuperscript{44} (1960) 46 Cr App R 241 at 242.
\textsuperscript{45} Ibid at 243.
\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{48} (1962) 46 Cr App R 244.
the Crown. The Court of Criminal Appeal, however, applied the proviso in both cases while purporting to acknowledge as correct the principle in *Oliva*. In *Slinger*, the Court said of the decision in *Oliva* that:

... the court went out of its way to assert that whatever exact words were used, two matters must in every case be brought home to the jury, first, that the burden of proof is on the prosecution to prove guilt and not on the prisoner to prove innocence. Secondly, that the degree of proof is one which has been variously expressed as that the jury must be sure or that they must be sure beyond reasonable doubt.

The Court then reiterated that "in every case a statement should be made to the jury as to where the burden lies", while acknowledging that "in the present case that was not done."51 But having done so, the Court thought that as the judge had effectively expressed himself to the jury as saying, "'Have the prosecution satisfied you that this, that or the other happened, or may it be that it is otherwise?'", it was satisfied in "the circumstances of this case" that "that there was no substantial miscarriage of justice."52 The Court adopted a similar approach in *R v Sparrow & Friend*.53 Delivering its judgment, Ashford J confirmed that a direction on the burden of proof was mandatory: 54

... it is an essential requirement of law that it should be made clear to a jury that the case for the prosecution cannot succeed without establishing affirmatively the guilt of the accused in all essential elements of the offence. No particular form of words is requisite to convey that meaning, the law being plain that the accused does not need to establish, in the generality of cases, any defence or fact in order to secure an acquittal. It is equally plain that the summing-up must make this clear to the jury and must instruct them that they can only convict if the prosecution has established guilt.

As in *R v Slinger*, the Judge said it was clear that the proviso could be applied to correct the absence of an explicit direction "in an appropriate case".55 The Court held that this was such a case as it was "quite plain that the jury can have been under no misapprehension as to the proper approach to the problem before them."56 Whereas *Oliva* treated the absence of a direction about the burden of proof as an error that should not be cured by the proviso given the fundamental nature of the principle at stake, *Slinger* and *Sparrow & Friend* saw the issue in less absolute terms. Instead, the Court of Criminal Appeal inquired whether the substance of the relevant direction had nonetheless been conveyed to the jury for the purpose of determining whether the error had affected the outcome. In other words, by engaging in error-impact analysis in accordance with the proviso, the Court implicitly revisited its conclusion about the

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49 (1962) 46 Cr App R 288.
50 (1962) 46 Cr App R 244 at 245.
51 Ibid.
52 Ibid at 246.
53 (1962) 46 Cr App R 288.
54 Ibid at 289.
55 Ibid at 290.
56 Ibid.
nature of this error to find that it was not of the type that represented a core ingredient of a proper trial. In short, the notion of the burden of proof as incurable error was reversed.

The later decision in *R v Edwards* supports this interpretation. The defendant was convicted of a knife-point rape of a young victim following a trial in which the judge failed to direct the jury on the standard of proof. The Court of Appeal saw this as a "serious defect" that could not be cured by the fact that the standard of proof had been mentioned in counsel's addresses and the presence of jurors who had previously served as jurors. For the Court, Goff LJ said: "In our judgment, it is clearly the duty of the judge to direct the jury on the standard of proof so as to ensure that that direction is heard by the jury in each criminal trial, with the authority which only the judge can give to such a direction." The Court then considered whether the proviso should be applied, with Goff LJ observing "that there is no absolute rule excluding the operation of the proviso in a case of this kind." The Judge specifically noted that the Court had been "troubled" by the decision in *Oliva*, "which appeared to indicate that ... the requirement that the judge should direct the jury on the burden of proof was regarded as so fundamental that if he fails to do so the Court will, as a matter of principle, decline to exercise the proviso." However, having considered *Slinger* and *Sparrow & Friend*, the Judge said the Court had "abandoned that view." It followed that "the Court must consider the operation of the proviso in the light of the particular facts of the case" as it would do in any other case of serious trial error. Having concluded that the proviso could be applicable to an error of this nature, the Court inquired "whether on the evidence a reasonable jury, properly directed on the standard of proof, would without doubt have convicted the appellant." It found that test satisfied in light of the "overwhelming" evidence of guilt.

Broader consideration of English common law highlights the problem of the open-ended nature of incurable error. In 1915, Lee Kun was convicted of murder. He appealed upon the ground that he had not understood the trial evidence as it had not been translated from English. While it might have been thought that the ability of a

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58 Ibid at 7.

59 Ibid.

60 Ibid.

61 Ibid at 8.

62 Ibid.

63 Ibid.

64 Ibid at 8, citing *Stirland v Director of Public Prosecutions* [1944] AC 315.

65 Ibid.

66 *R v Lee Kun* [1916] 1 KB 337. The evidence had been translated at the preliminary hearing and the defendant had counsel at the trial.
defendant to comprehend the proceedings was a critical feature of a criminal trial to which the proviso should not be applicable, the Court of Criminal Appeal dismissed the appeal as.\textsuperscript{67}

There is no authority in English law for the proposition that the omission to translate the evidence in the circumstances under consideration is an irregularity or is an irregularity which vitiates the proceedings.... In any event, we could not, as a matter of law, even apart from the considerations under s. 4 of the Criminal Appeal Act, 1907, hold that an irregularity had been committed at the trial which would justify the quashing of the conviction.

Conversely, in \textit{R v Pipe}\textsuperscript{68} in 1966 the Court of Appeal quashed convictions for larceny and burglary notwithstanding clear evidence of guilt as it held the Crown should not have adduced the testimony of an accomplice until the criminal proceedings against the accomplice were complete. The Lord Chief Justice said this was a "well-recognised rule of practice" that "must be observed" with the result that "there is no alternative but to quash the conviction."\textsuperscript{69} Similarly, in \textit{R v Bates}\textsuperscript{70} in 1911, the absence of the Attorney-General's consent to the defendant's prosecution was held to preclude the application of the proviso as such consent was a necessary pre-condition to the trial, whereas in \textit{R v Kiley}\textsuperscript{71} in 1957, the irregular composition of the trial court for a period during the trial was held to be the type of error coming "exactly within the words of the proviso" so that the Court was "equally clear that no miscarriage of justice has occurred".\textsuperscript{72} None of these cases offers explicit guidance as to why the Court of the Criminal Appeal saw the proviso as being either applicable or inapplicable to the errors therein. Nor do these cases exhibit any means by which the Court sought to distinguish between curable and incurable error. Instead, the Court approached these questions by reference to broad but largely implicit value judgements about the nature of the error in issue.

Adding to the arbitrary nature of the English common law was an appellate preparedness to leave open the application of the proviso to instances of improper judicial interference at trial.\textsuperscript{73} For example, in \textit{R v Barnes}\textsuperscript{74} in 1970, the judge made it clear to the defendant that he thought the defendant's case was "hopeless".\textsuperscript{75} The judge also invited the defendant to reconsider his plea as well as placing pressure upon his counsel to withdraw from the case. When the defendant said he would need an

\begin{itemize}
\item \textsuperscript{67} Ibid at 344.
\item \textsuperscript{68} (1967) 51 Cr App R 17. See also \textit{R v Boucher} (1952) 36 Cr App R 152.
\item \textsuperscript{69} Ibid at 21.
\item \textsuperscript{70} [1911] 1 KB 964; compare \textit{R v Williams (Roy)} [1978] QB 373.
\item \textsuperscript{71} (1957) 41 Cr App R 241.
\item \textsuperscript{72} Ibid at 249.
\item \textsuperscript{73} See \textit{R v Cain} (1936) 25 Cr App R 204 and \textit{R v Bateman} (1946) 31 Cr App R 106. For the change in approach, see \textit{R v Barsoum} [1994] Crim LR 194.
\item \textsuperscript{74} (1971) 55 Cr App R 100.
\item \textsuperscript{75} Ibid at 103.
\end{itemize}
adjournment if counsel withdrew, the judge declined the request with the result that the defendant continued with representation in which he had no confidence. The Court of Appeal found the judge had placed "extreme pressure" on the defendant to plead guilty, that it was "wholly unreasonable" for the judge to have refused the request for an adjournment and that aspects of the judge's conduct were "bound to make the appellant think that the judge had taken so adverse a view of his case that he was unlikely to obtain a fair trial." But while the Court allowed the appeal, it did so after having first "anxiously considered whether to apply the proviso on the basis that it is difficult to think that the result of the trial would have been any different" but for the judge's interventions and only in the face of prosecutorial "doubts as to the propriety of applying the proviso in such a case as this."77

In contrast to the errors discussed so far, all of which turned upon the discretionary exercise of the proviso, certain types of error began to emerge as errors that were incapable of being cured by the proviso even in the absence of specific prejudice to the defendant.78 But as with the cases of discretionary error, no systematic approach was brought to this issue. Instead, these errors were treated as being incurable because that is how they were perceived to be. Put differently, as with the earlier instances of error, the courts' approach to these errors was largely intuitive rather than analytical. These errors fell into three broad types: interferences (and perceived interferences) with jury deliberations, failures to take majority verdicts correctly, and the absence, albeit temporary, of the judge from the trial. Each is briefly discussed before some concluding remarks about the English roots of incurable error.

A. Interferences with Jury Deliberations

In R v Green79 in 1949 the defendant was convicted of a "bad case" of receiving stolen property in relation to which the evidence disclosed "no reason for interfering with the verdict of the jury".80 The judge, however, had received and answered a "simple question" from the jury in the absence of counsel and the defendant during the jury's deliberation.81 The defendant argued his appeal should be allowed given the departure from the recognised rules of procedure in dealing with the question but the Crown contended that as the evidence of the appellant's guilt was indisputable, the proviso should be applied. The Court observed that "any communication between a jury and the presiding Judge must be read out in Court, so that both parties, the prosecution and the defence, may know what the jury are asking, and what is the answer."82 Further, this

76 Ibid at 106-107.
77 Ibid at 108.
78 Save perhaps R v Bates [1911] 1 KB 964 which appears to have been treated by the Court of Criminal Appeal on the basis that the absence of the Attorney-General's consent went to jurisdiction.
79 (1949) 34 Cr App R 33.
80 Ibid at 34.
81 Ibid.
82 Ibid at 34.
rule required that “these matters must be done openly in Court.” The Court noted that as these procedures had not been followed, the defendant did not know what the jury’s communication had been. An aspect of the trial in its critical stage had therefore been kept from the defendant. Accordingly, in a very brief judgment, the Court of Criminal Appeal held it was obliged to allow the appeal.

In these circumstances, however unfortunate it may be that a man who was, to the satisfaction of the jury, shown to have been guilty of a most serious crime should escape punishment, the Court feels that there is no option but to quash the conviction.

In *R v Owen* three years later, a jury question during their deliberation resulted in the judge allowing the prosecution to call further evidence to answer it. While the appeal could have been allowed on the narrow basis that the evidence had prejudiced the defendant, in that it related to a “vital point” and guilty verdicts were returned shortly thereafter, the Court of Criminal Appeal allowed the appeal on a broader basis, in that it was “right to lay down that once the summing-up is concluded, no further evidence ought to be given.” Implicitly, the proviso could not be applied as the...

... theory of our law is that he who affirms must prove, and therefore it is for the prosecutor to prove his case, and if there is some matter which the prosecution might have proved but have not, it is too late, after the summing-up, to allow further evidence to be given ....

This conclusion was affirmed in *R v Wilson* in 1957. There, the judge permitted the jury to receive additional evidence during their deliberation even though the evidence “was so clear” the Court of Criminal Appeal could not understand why the jury had the “smallest hesitation in convicting”. The Court held there had been “a departure from that rule which this court has laid down” and “that if we were to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, it would be in effect overruling Owen’s case”. The Court declined to do so even though the defendant was...
“obviously guilty” as “maintenance of the principle ... is more important than the result of this particular case”.91

Finally, in *R v Davis*92 in 1960 these two threads came together when the judge privately answered a jury question by allowing a shorthand writer in the jury room to give, in effect, additional testimony. On behalf of the Court of Criminal Appeal, Hilbery J said the private answering of a jury question was an “irregularity of itself ... enough to make it necessary for this court to quash this conviction” but that matters were compounded by the introduction of fresh evidence in breach of the rule “laid down time and again that, once the summing-up is concluded and the jury has been enclosed, no further evidence can be adduced”.93 The Court concluded that because of these errors, the “conviction must be quashed.”94

**B. Errors in Taking Majority Verdicts**

In *R v Barry*95 in 1960 the judge failed to inquire of the foreman the number of jurors who respectively agreed to and dissented from the verdict in contravention of the legislative provisions for the taking of a majority verdict. Notably, the appeal was “devoid of any merit regarding the justice of the conviction” in relation to a defendant who had an “appalling record” for driving offending of the type in issue, but as the judge had not complied with the mandatory statutory terms, the Court of Appeal held that the verdict was “not a proper or indeed a lawful majority verdict authorised by ... statute.”96 For this reason, but without elaboration, the Court held that the proviso could not be applied even though there had been “no injustice whatever in the verdict in this case”.97

The same conclusion was reached in *R v Reynolds*98 in 1981 in which the jury indicated that ten jurors had reached a verdict whilst being silent as to the position of the remaining two jurors. The judge made no inquiry as to whether those jurors dissented. Although English law permitted a majority verdict of ten jurors, the Court of Appeal considered that it was “a fallacious argument” that the number who had dissented could be discerned as a matter of arithmetic.99 Instead, the statutory provisions, which were in

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91 Ibid.
93 Ibid at 240-241.
94 Ibid at 242.
95 (1975) 61 Cr App R 172.
96 Ibid at 172-174. For the legislative provisions, see the Criminal Justice Act 1967, s 13 and the Juries Act 1974, s 17.
97 Ibid at 177. The decision also implies that if the verdict had complied with the statutes above but not the relevant practice direction then the proviso might have been applicable. This underscores the inapplicability of the proviso to statutory breaches in this area.
99 Ibid at 326.
"peremptory and mandatory terms", were held "to preclude a verdict being accepted where ten had agreed but one or both of the remaining jurors had not formed a final view at all." The Court found that the proviso could not be applied because the omission was "fatal"; "no verdict was properly taken" in accordance with the law. But as in Barry, the Court did not say more about either the fundamental nature of the error or the inapplicability of the proviso.

The House of Lords reversed the breadth of Reynolds the following year holding that so long as it was clear how many jurors were agreed upon the verdict, the majority verdict provisions had been substantially complied with. In reaching this conclusion, however, the Law Lords accepted the provisions were "mandatory" and that unless it was "clear to an ordinary person how the jury was divided", "the judge cannot lawfully accept the verdict." Moreover, in affirming the decision in Barry, the House of Lords implicitly accepted the limitations expressed therein in relation to the application of the proviso.

C. A Judge's Absence from the Trial

In R v Hunter the defendant was convicted of importing cannabis after a trial in which the jury took a view of a scene at the dock by which the drugs had entered the jurisdiction. The judge did not attend as the judge "had other work ... in court whilst that view was taking place." A witness who was giving evidence immediately prior to the view attended and answered questions from the jury, and the jury also used binoculars to assess what the witness had seen with their aid at the time of the incident. The defendant argued the view was an aspect of the trial over which the judge had not presided with the result there had been such a serious irregularity at trial that his conviction should be quashed. Notably, the defendant did not argue that he had suffered prejudice as a consequence of the judge's absence. The Crown contended that as the demonstration was ineffective, with relevant vantage points being no longer vantage points, and its case being "a strong one", the error had not affected the jury's verdict.

The Court of Appeal observed that a view of a relevant scene "is a stage of the trial" and unsurprisingly, that the trial "judge should be present at every stage of the trial." It followed that the judge must attend a view irrespective of whether evidence

100 Ibid at 326-327.
101 Ibid at 327.
103 Ibid at 13 per Lord Brandon of Oakbrook.
104 (1985) 81 Cr App R 40.
105 Ibid at 42.
106 Ibid at 45.
107 Ibid at 44.
was there taken. The Court concluded the nature of the error precluded the application of the proviso for:\textsuperscript{108}

\ldots the irregularity here is of such a fundamental nature, is such a fundamental departure from the basic principles on which trials are conducted in this country, namely that the whole of the trial shall be in the presence of the judge, that it is quite impossible for us to say that we can in the circumstances apply the proviso.

The principle in \textit{Hunter} was later affirmed as “cardinal” in \textit{R v Albarus \& James}.\textsuperscript{109} There, the judge invited the jury to inspect the scene of the alleged thefts in issue, a nearby bus stop. However, the Court of Appeal applied the proviso as no formal view had been taken in the judge’s absence and nor was there any evidence that any juror had inspected the scene so as to give rise to an irregular continuation of the trial.\textsuperscript{110}

\textbf{D. Conclusion in Relation to the English Position}

This review of the English cases reveals three things. First, English jurisprudence recognised the concept of incurable error, albeit without such nomenclature, both in terms of the proviso’s discretionary nature and as error incapable of remedy. This was an identifiable feature of the English common law by about the middle of the twentieth century. The English cases therefore provided the roots of incurable error by providing the earliest adumbration of the concept. Second, no attempt was made to identify any means for distinguishing incurable error from regular error. Instead, the relevant judgments are brief and intuitive and the patterns that do exist, for example, in relation to interferences with jury deliberations, appear as unconnected incidents of the concept, as opposed to formal categories according to a broader design. Third, and linked closely with the second point, is the arbitrary nature of the English case law in this area. As we have seen, on an important aspect of a criminal trial, namely jury directions upon the burden of proof, the Court of Criminal Appeal reversed its position with little attendant discussion. More generally, the reviewed cases admit of no guiding principle as to the circumstances in which error was to be treated as fundamental and thereby incurable by the proviso. Or, as one commentator has succinctly observed of the

\textsuperscript{108} Ibid at 45. In \textit{Tameshwor v R} [1957] AC 476 the Privy Council reached a similar conclusion on a petition from British Guiana. Therein, Lord Denning observed at 487 that the judge’s absence from a view “was such a departure from the essential principles of justice \ldots that the trial cannot be allowed to stand.” Moreover, the Board reached this conclusion in the absence of specific prejudice to the defendant for, ibid, it was “too disturbing a precedent to be allowed to pass.”

The decision in \textit{Hunter} may be contrasted with the earlier case of \textit{R v Lawrence} (1968) 52 Cr App R 163 in which the jury took a view during their deliberations and in which Diplock LJ appears to have left open the proviso’s application at 166: “this is not a case in which this Court could apply the proviso, for it is difficult to say that the jury must have convicted whether they saw the car or not, since they expressed a wish to see the car before they could make up their minds whether he was guilty or not. With some regret, therefore, we quash the conviction.”

\textsuperscript{109} [1989] Crim LR 905 at 905.

\textsuperscript{110} The Court also said that the scene was “useless and irrelevant” in terms of proof of the offences so that the verdicts could not have been influenced if one or more jurors had gone there; ibid at 906. In isolation, this remark is inconsistent with \textit{Hunter} but the rest of the judgment tells against that construction.
English position, the line between fundamental error and regular error is obscure so that: 111

... there does not seem from the judgments to be any clear explanation laid down of what faults are so fundamental or cardinal that, irrespective of how much other material there is to justify a conviction and how much the appellate Court feel the conviction should be upheld, the proviso cannot be applied.

As we shall see, this feature is not merely one of the English common law.

III. AUSTRALIA: WILDE AND BEYOND: FUNDAMENTAL ERROR

In Wilde v R 112 the defendant was tried in the New South Wales District Court for committing three sets of offences over four days. The first set concerned the sexual assault of a woman in her home and theft of a sum of cash from the same victim on 26 September 1983. The second set, which occurred the next day, related to the theft of a car after the offender broke and entered a home and removed the car’s keys. The third set, which was also the most serious, occurred the following day. The defendant was alleged to have entered another home and there committed a series of sexual offences upon a second female victim as well as stealing from her a sum of cash and two rings. The defendant was acquitted of the first theft and discharged in relation to the first sexual assault on the basis of an insufficiency of evidence. He was convicted of all of the offences in the second and third sets. The issue at trial was the identity of the offender. In this respect, and in relation to those sets, the Crown case was formidable. The pattern of verdicts acknowledged as much. In particular, the defendant left his fingerprints at the home of the second female victim as well as a piece of his own property. He could not explain either fact. A car like that stolen in the second set of offences was seen outside the home of the second female victim and the defendant was driving the stolen car when arrested. Sets two and three were thereby demonstrably linked. Further, the rings stolen from the second female victim were found in the defendant’s possession, and that victim’s description of her assailant matched the defendant’s appearance. Finally, the defendant made admissions upon arrest in relation to the third set of offences that he later sought to recant by means of an unsworn dock statement.

The defendant appealed to the New South Wales Court of Criminal Appeal on the ground that the judge should have severed the three sets of offences into a corresponding number of trials and that the judge erred in permitting the jury to use the first and third sets as similar fact evidence in relation to each other. The Court of Criminal Appeal accepted these complaints. 113 It followed, as the High Court later acknowledged, that the wrongful joint trial and the erroneous similar fact directions represented a “substantial blemish in the conduct of the trial.” 114 Nevertheless, the

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111 Michael Knight, Criminal Appeals: A Study of the Powers of the Court of Appeal Criminal Division on Appeals Against Conviction (1970) 35. A similar assessment by the same author is to be found in, “The Nelson Touch” (1965) 16 Northern Ireland Legal Quarterly 262 at 279.

112 (1988) 164 CLR 365. The facts are recorded at 367-368.

113 Ibid at 369.

114 Ibid.
Court of Criminal Appeal applied the proviso as it concluded that the defendant had not suffered a substantial miscarriage of justice by virtue of these defects. Rather, it held that "putting to one side the evidence wrongly admitted, the evidence supporting the conviction ... was overwhelming" so that the jury would have convicted in any event. 115

On appeal to the High Court, the defendant did not challenge this conclusion. Instead, he contended that the proviso was inapplicable and therefore wrongly applied by the Court of Criminal Appeal, as the errors in the trial court were so serious that there had been a fundamental departure from the essential requirements of a proper criminal trial. 116 In so doing, the defendant argued for the recognition of a species of error that was incurable by the proviso notwithstanding the proviso's broad and unfettered statutory language and the absence of any direct Australian authority on point. 117 The High Court unanimously accepted that certain errors precluded the application of the proviso but it divided both on the formulation of this principle and its application to the facts. Close textual analysis of the decision in Wilde v R is therefore necessary.

The majority, comprising Brennan, Dawson and Toohey JJ, accepted that the proviso was not intended to provide "in effect, a retrial before the Court of Criminal Appeal when the proceedings before the primary court have so far miscarried as hardly to be a trial at all." 118 This was because: 119

It is one thing to apply the proviso to prevent the administration of the criminal law from being 'plunged into outworn technicality'... it is another to uphold a conviction after a proceeding

115 Ibid.
116 Ibid at 370-371.
117 The possibility of a species of error incurable by the proviso was identified by the Western Australian Court of Criminal Appeal in Quartermaine, a judgment later endorsed on appeal to the High Court by Gibbs CJ; see Quartermaine v R (1980) 143 CLR 595 at 601: "However, Wickham J, who delivered the judgment of the Court of Criminal Appeal in the present case, recognized that even if this were established 'there might still be a substantial miscarriage of justice if the trial was so irregular that no proper trial had taken place, in that 'there had been a serious departure from the essential requirements of the law'. The Court of Criminal Appeal was right in taking that view of the law'. In accepting Wickham J's statement of the law, Gibbs CJ cited Andrews v R (1968) 12 CLR 198 in which the High Court had declined to apply the proviso as defects in the indictment meant that the "very fundamentals of a proper criminal trial have not been observed"; ibid at 207. It is noted, however, that the High Court in Andrews did not purport to identify a principle of general application in relation to the proviso. Similarly, while in Johns v R (1979) 141 CLR 409 the High Court held that the proviso could not cure a trial that was a nullity, in Yager v R (1977) 139 CLR 28 in which the judge arguably directed the jury to convict, only Murphy J adverted to the notion that the proviso could not cure such an error; ibid at 52-53. In any event, this seems to have been based upon the Judge's interpretation of Makin v Attorney-General for New South Wales [1894] AC 57 as opposed to a broader theory of incurable error. And while linguistic formulations similar to those of fundamental error are to be found in the old cases of Eather v R (1914) 19 CLR 409; Hicks v R (1920) 29 CLR 1; Ross v R (1922) 30 CLR 246 and O'Leary v R (1946) 73 CLR 566, none of these cases articulated a general principle of such error.
118 Ibid at 372-373.
119 Ibid. at 373.
which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted.

Accordingly, the majority said that the proviso had no application when “an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings.”120 Such an error, without more, meant the defendant had “not had a proper trial and that there has been a substantial miscarriage of justice.”121 In such circumstances, the “effect of the irregularity upon the jury’s verdict” was immaterial and need not be considered.122 Instead, errors of this kind “may be so radical or fundamental that by their very nature they exclude the application of the proviso”.123 By these remarks, the majority accepted that a defendant need not necessarily demonstrate prejudice in order for error to be treated as incurable. Materially, the majority offered no analytical framework for determining whether an error was ‘fundamental’ or ‘radical’ and therefore incurable by the proviso. Rather, Brennan, Dawson and Toohey JJ said that there was “no rigid formula to determine what constitutes such a radical or fundamental error” and that such an error “may go either to the form of the trial or the manner in which it was conducted.”124 A “mechanical approach” to this issue was therefore eschewed in favour of each case being “determined upon its own circumstances.”125

Transposed to the facts, the majority noted that the defendant’s specific complaint was “that the admission of evidence relating to the attack on 26 September for the identification of the applicant as the attacker on 29 September was an irregularity of such gravity that no proper trial took place.”126 It followed that the critical inquiry was “the significance of the evidence wrongly admitted, in the context of the trial which must determine whether the error was of a fundamental kind.”127 As the majority recognised, this necessitated considering “the strength of the prosecution case upon those counts and the weakness of the defence”, but only “for the purpose of determining the gravity and significance of the error and not for the purpose of determining whether the jury would inevitably have convicted notwithstanding the error.”128 Justices

120 Ibid.
121 Ibid.
122 Ibid.
123 Ibid. The proposition that such error “may” exclude the operation of the proviso sits awkwardly with the preceding sentence given that the error was there said to give rise to a “substantial miscarriage of justice”. Such a miscarriage would normally mean that the proviso’s precondition had not been met, unless the absence of the phrase actual substantial miscarriage of justice was intended to distinguish the situation. Such subtlety appears unlikely, however, so that the apparent inconsistency between these sentences remains unexplained by the joint judgment of Brennan, Dawson and Toohey JJ.
124 Ibid.
125 Ibid.
126 Ibid at 374.
127 Ibid.
128 Ibid.
Brennan, Dawson and Toohey held that the wrongly admitted evidence was unlikely to have influenced the jury in light of the admissible, and powerful, evidence of guilt. It followed that the error was not of a fundamental kind, with the result there could be "no doubt" that the Court of Criminal Appeal gave the "correct answer" to the application of the proviso in light of the evidence.\footnote{129} Justices Deane and Gaudron dissented, but each Judge adopted a different approach in relation to the proviso and incurable error. Although Deane J acknowledged being in agreement with the majority's "exposition of principle", the Judge saw trial fairness as the guiding principle to incurable error.\footnote{130} Hence the Judge observed that it was: \footnote{131}... not open to a court of criminal appeal to dismiss an appeal, in reliance on such a proviso, on the ground that there has been 'no substantial miscarriage of justice' in a case where error, impropriety or unfairness has pervaded and affected the trial to an extent where the overall trial ceased to be a fair trial according to law.\footnote{132} Justice Deane said that in such a case, the verdict of guilty is "intrinsically flawed and it is no part of the function of a court of criminal appeal to say that the accused is, in its view, so obviously guilty that the requirement of a fair trial according to law can be dispensed with."\footnote{133} A contrary view, the Judge said, would mean that the "fundamental prescript of the criminal law could be reduced to a mockery".\footnote{134} The test for fundamental error was therefore whether the "relevant misdirection, error or unfairness could ... be seen as depriving the trial of the overall character of a fair trial according to law."\footnote{135} Approach ed in this way, Deane J saw the defendant's trial as having been "gravely affected by unfairness and error", as the trials should have been severed, and the trial judge had wrongly directed the jury that they could use the evidence of the first set of offences in relation to the third.\footnote{136} This evidence was also "highly prejudicial material".\footnote{137} In light of these features, the Judge considered it beside the point that "at this distance from the impact of live evidence and the atmosphere of the trial" the case appeared to have been "an overwhelmingly strong one."\footnote{138} In summary, Deane J considered that so much had gone wrong at the defendant's trial that there was no proper trial in law for the proviso to cure.

\begin{footnotes}
  \item 129 Ibid.
  \item 130 Ibid at 375.
  \item 131 Ibid.
  \item 132 Ibid.
  \item 133 Ibid.
  \item 134 Ibid at 377.
  \item 135 Ibid at 376.
  \item 136 Ibid.
  \item 137 Ibid.
\end{footnotes}
Whereas Deane J’s enunciation of principle in relation to incurable error was similar to that of the majority, Gaudron J’s was very different. Justice Gaudron said the proviso was defined by the precept “fundamental to the integrity of the administration of criminal justice that no person should be convicted of a criminal offence on which he is indicted save by the verdict of a jury following a trial in which the relevant principles of law are correctly applied.” Accordingly:

Recourse to this fundamental precept in interpreting the proviso places limitations on what a Court of Criminal Appeal is entitled to do in exercising its discretion to utilize the proviso. Where there has been an error of law in the course of the trial a Court of Criminal Appeal is not entitled to undertake an independent assessment of the evidence with a view to determining whether a jury, properly instructed in the law in a trial where the rules of procedure and evidence are strictly followed, would on the available evidence have convicted the accused.

That process, said the Judge, would amount to the defendant being tried by a court of appeal rather than a jury. It followed that whenever there had been an “error of law” at a trial, the proviso could not save the conviction unless it was clear the “law was correctly applied by the jury notwithstanding the error.” While an error of law was therefore not necessarily incurable, “unless it can be said that notwithstanding the error the law was correctly applied, it is not possible to say that the accused person has received what the law guarantees”, namely “the verdict of a jury arrived at by correct application of the relevant legal principles. If that cannot be said then it cannot be said that there has been no substantial miscarriage of justice.” Put more simply, Gaudron J appears to have seen errors of law as being presumptively incurable as a substantial miscarriage of justice unless the Crown could demonstrate that the jury had correctly applied the law. The Judge held that this test was not met as the not guilty verdict in relation to the first set of offences did “not foreclose the possibility that the jury was of the view that the applicant was or was probably the assailant” in that set and the jury might have had regard to that evidence “in reaching its verdicts of guilty to the charges arising out of the attack” that formed the third set of offences.

In summary, the High Court in Wilde accepted that the proviso was not applicable to all types of error despite the breadth of the proviso’s statutory language and the absence of any express legislative command to this effect. Moreover, Wilde acknowledged the existence of a category of incurable error that, to borrow the language of the majority, arose when there had been a fundamental or radical departure from the essential requirements of a proper trial so that the error went to the root of the proceedings. In so doing, Wilde marked the advent of a jurisprudence in which litigants have routinely alleged, but the courts have rarely found, such fundamental or radical errors.

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138 Ibid at 383.
139 Ibid at 383-384.
140 Ibid at 384.
141 Ibid.
142 Ibid.
143 Ibid at 385.
Before considering this jurisprudence, two further observations about Wilde are made. The first is that the notion of fundamental error as articulated by the High Court presents something of a paradox, for while it may be thought that the notion of fundamental error implies a general class of error that is essentially self-evident by its overtly egregious nature, Wilde treats such error as fact-specific, wholly dependent upon context and as potentially arising in the absence of prejudice. However, if context is everything and prejudice is not a prerequisite to such a determination, in what sense is fundamental error truly fundamental? The second is that by declining to provide an analytical framework for the identification of fundamental error and instead insisting upon the need for a fact-specific inquiry, the High Court created the climate for the operation of a largely arbitrary jurisprudence akin to that in the English common law. This is borne out by the case law following Wilde, for while the High Court has identified only a handful of instances of fundamental error—S v R\textsuperscript{144} in 1989, Fleming v R\textsuperscript{145} in 1998, Subramaniam v R\textsuperscript{146} in 2004 and arguably AK v State of Western Australia\textsuperscript{147} in 2008—each case contains little associated analysis of why the error was held to be within this category. To these cases we now turn.

### A. Instances of Fundamental Error in the High Court

In S v R,\textsuperscript{148} the High Court unanimously accepted that when the prosecution proffers a specific charge, it was not open to the prosecution to adduce evidence of a number of acts that amount to that offence and then to invite the jury to convict on any one of the alleged acts. It was divided, however, on the application of the proviso, whether the error was fundamental and the bases for treating the error as one of that nature. Some context is necessary. The defendant was convicted of three charges of incest with his daughter after the victim testified that her father had engaged in sexual intercourse with her over a seven or eight-year period.\textsuperscript{149} Because of the frequency of the acts of intercourse, the victim was unable to recall when each act occurred. Indeed, she was largely unable to distinguish between them. Rather, the victim testified to a pattern of conduct on the defendant’s part. For these reasons, each of the charges spanned a significant time period. In directing the jury, the judge said that at least one act of incest within each period must be proved to found a conviction on each charge. A majority of the Western Australian Court of Criminal Appeal dismissed the defendant’s appeal on the basis that the trial was without material error. The proviso was not raised in that Court, so that the issue of fundamental error arose in the High Court.

\textsuperscript{144} (1989) 168 CLR 266.
\textsuperscript{145} (1998) 197 CLR 250.
\textsuperscript{146} (2004) 211 ALR 1.
\textsuperscript{147} [2008] HCA 8. As discussed shortly, the existence of fundamental error in this case is not beyond doubt.
\textsuperscript{148} (1989) 168 CLR 266. A different conclusion has been reached by the New Zealand courts on this issue: R v Accused [1993] 1 NZLR 385.
\textsuperscript{149} For the facts, see ibid at 267-269.
Justice Dawson held that as the charges were inherently ambiguous, in that each was a specific offence bounded by evidence of multiple acts, the defendant had:  

... not had a proper trial and there is, for that reason, a substantial miscarriage of justice which precludes the application of the proviso contained in s. 689 of the Code. It is, therefore, unnecessary to consider whether, had the applicant been properly tried, he would inevitably have been convicted. He was entitled to a fair trial and his conviction in proceedings which were fundamentally flawed cannot be sustained.

Justice Toohey reached the same conclusion, albeit for different reasons. Whereas Dawson J treated the way in which the charges had been framed as the source of fundamental error, Toohey J saw the trial judge’s directions as the basis for this conclusion:

This trial was fundamentally flawed in that the jury were invited to convict the applicant so long as they were satisfied that within any of the periods specified in the indictment the applicant ‘carnally knew’ the complainant. Put that way, the acts of intercourse described in the generalized evidence were available, not merely as going to prove any of the offences charged against the applicant but as the offences themselves. In respect of each count, the jury were not required to direct their attention to any particular occasion and to satisfy themselves, beyond reasonable doubt, that there was such an occasion and that it occurred within the period specified in the count. There was a real likelihood that they would convict the applicant on the basis that since acts of carnal knowledge were frequent, an act must have occurred during each of the periods mentioned in the indictment.

In a joint judgment, Gaudron and McHugh JJ held that the global nature of the victim’s evidence in conjunction with the judge’s directions precluded the application of the proviso. This was because:

The trial ... was fundamentally flawed by the admission of evidence of multiple acts of carnal knowledge and by the way in which such evidence was left to the jury. The rule as to the admissibility of evidence of offences, not being the offences charged, is clear. Such evidence, whether identified as similar fact evidence or by some other description, is only admissible if it has probative value such that it raises the objective improbability of some event having occurred other than as alleged by the prosecution.... More significantly in the present case, evidence of other acts of carnal knowledge was not left to the jury on the basis that such acts might prove the offences charged, but on the basis that the jury might be satisfied that one act of carnal knowledge occurred within each of the periods specified in the indictment.

Justice Brennan dissented on the basis that the defendant had not suffered any prejudice from the nature of the charges or the manner in which the trial had been conducted:

The applicant was not prejudiced in countering the allegations. Had the applicant wished to impugn the imprecise evidence of the daughter relating to any of the intermittent acts of

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150 Ibid at 277-278; compare KBT v R (1997) 191 C.R 417, in which the High Court approached this issue by reference to whether the defendant had lost the chance of an acquittal rather than fundamental error analysis.

151 Ibid at 283.

152 Ibid at 287.

153 Ibid at 271.
intercourse of which she spoke, he could have done so with as much (or as little) effect whether or not each of the counts in the indictment had been confined to a single act.

Moreover, the Judge considered it “fanciful to suggest that the verdict could have been returned because some jurors were satisfied that one act of intercourse occurred, [and] others that another act occurred ... within a relevant period.”

It followed that the defendant had not suffered a substantial miscarriage of justice even though the defendant’s point was “good in law”. In reaching this conclusion, Brennan J implicitly rejected the majority’s ruling that the defendant’s trial was vitiated by a fundamental error going to the root of the proceedings.

In Fleming v R the defendant was convicted of having sexual intercourse with an underage girl who was a pupil at the school at which he taught. The case was tried by a judge without a jury. In finding the charges proved, the judge did not specifically advert to the potential unreliability of the victim’s evidence or to the fact her testimony was unsupported by other evidence. The High Court held that New South Wales law meant that the judge ought to have done so. This raised the potential application of the proviso. The High Court was unanimous that the proviso could not be applied as it held, in a single paragraph, that the judge’s error was fundamental.

With respect to the application of the proviso, it has been held in this Court that not every wrong decision on a question of law will lead to the quashing of the conviction or a new trial and that ‘[i]n there is no rigid formula to determine what constitutes such a radical or fundamental error’ as to preclude the application of the proviso. There may be cases where the failure to satisfy the requirements of ... [the relevant statute] involves errors that are so trivial that the Court of Criminal Appeal may conclude that there has been a trial according to law, notwithstanding that failure. However, given the importance of the subject-matter of the warning demanded by this case, the miscarriage of justice was a substantial one. This was not a case for the application of the proviso.

Subramaniam v R involved departures from New South Wales legislation that governed the special hearing of charges against defendants who had been found unfit to stand trial. Amongst other things, the statute required the trial judge to explain to the jury, at the beginning of the trial, what was meant by a defendant’s unfitness to stand trial, the purpose of the special hearing, the available verdicts and the legal principles and factual findings relating to the verdict(s). Because of the sexual nature of the case, the controlling common law principle directed the finder of fact to evaluate the victim’s evidence with care; see Longman v R (1989) 168 CLR 79, a decision of the High Court.

Ibid at [39], footnotes omitted. The Court also stressed that as a judge-alone trial was a departure from the normal rule of trial by jury then, “justice must not only be done but also be seen to be done”; ibid at [22], footnote omitted.
consequences of the verdict. The High Court observed that while the judge had told the jury that the appellant was unfit to be tried because of her mental condition and that the hearing was a special one for that reason, with other explanations being given “piecemeal over the course of the hearing” to the jury, it found the judge’s directions “fell short” of what was required by the legislation, particularly as the judge had not conveyed all of this information at the outset. The Crown contended that these omissions did not constitute a miscarriage of justice as the judge’s observations to the jury, the summing up, the judge’s answer to the jury’s question about the mental unfitness of the appellant and counsel’s addresses “informed the jury of all that the Act required them to know.” The High Court unanimously held that this argument “must be rejected”, as any departure from the statute’s mandatory requirements “deprives the hearing of its fundamental character” and such a departure “itself constitutes a miscarriage of justice.” Further, in equally brief remarks, the Court unanimously held that the omissions were a “substantial miscarriage of justice” and that:

A material departure from any of the elements described in ... the Act is a departure from an essential requirement going to the root of the special hearing. Where such a departure occurs, it is unnecessary to consider further whether the miscarriage of justice that has occurred has affected the verdict of the jury. There is no need to weigh up the evidence and consider whether the jury’s finding was inevitable. The failure to comply with ... [the relevant section] in this appellant’s special hearing is, of itself, a substantial miscarriage of justice with the result that the appeal should be allowed and the verdict quashed.

It is not clear that the final case, AK v Western Australia, is truly an instance of fundamental error for the determinative joint judgment of Gummow and Hayne JJ is equivocal on this issue. The facts can be briefly stated. The defendant, a teenager, was convicted of sexual offences against his younger female cousin following a judge-alone trial in the Western Australian Children’s Court. The charges arose from a night when the victim, the defendant, his brother and another slept in a caravan without supervision. The victim testified that after falling asleep next to the defendant, she was woken by him touching her sexually. Although the victim was adamant the defendant was her assailant, she did not explain why. The defence suggested that the defendant’s brother might have been the assailant. The judge, who delivered an oral judgment, said that he was satisfied beyond reasonable doubt of the defendant’s guilt without giving extensive reasons for his decision. On appeal, the Western Australian Supreme Court held that the judge’s reasons were inadequate to satisfy the requirements of the controlling legislation, which obliged the judge to identify the findings of fact upon which he relied. That Court, however, by majority, applied the proviso on the basis that it had

160 See the Mental Health (Criminal Procedure) Act 1990 (NSW).
161 (2004) 211 ALR 1 at [44] and [37] respectively.
162 Ibid at [43].
163 Ibid at [44].
164 Ibid at [48].
166 See the Criminal Procedure Act 2004 (WA), s 120(2).
no reasonable doubt about the defendant’s guilt. The dissenting judge considered that this course was unavailable in light of the limitations of the written record and the issue at trial. Accordingly, the Western Australian Supreme Court made no explicit determination about the nature of the judge’s error, and in particular, whether it was fundamental. By majority, the High Court reversed the decision on the basis that the defendant had suffered a substantial miscarriage of justice.

Justice Heydon explicitly found that the judge’s omission was a fundamental error. Echoing the language of Wilde, the Judge said that “the error was one which was a sufficiently ‘serious breach of the presuppositions of the trial’ to go to ‘the root of the proceedings’.” In reaching this conclusion, the Judge placed weight upon the importance of justice being seen to be done.

The joint judgment of Gummow and Hayne JJ is more equivocal. Their Honours observed that the omission “related to the central issue in the appellant’s trial” and that it was “constituted by the complete failure to articulate any of the reasoning by which the trial judge reached the ultimate conclusion that the appellant was guilty.” This led Gummow and Hayne JJ to conclude:

Complete failure to meet the mandatory requirements of [the] ... Act with respect to the central issue in the appellant’s trial was a substantial miscarriage of justice. It was a substantial miscarriage because the Criminal Procedure Act required that the trial of the appellant yield a reasoned decision that met the criteria stated in the statute. This trial did not, and it did not in respect of the central issue that was tried.

The absence of any specific reference by their Honours to the error being either ‘radical’ or ‘fundamental’, together with the admonition not to see such error “as a judicially determined exception grafted upon the otherwise general words of the relevant statute” count against the judgment being premised upon fundamental error. Against this, the conclusion of a substantial miscarriage of justice in relation to an error central to the case is reminiscent of Wilde and the joint judgment’s focus upon the departure from the mandatory requirements of the relevant legislation is consistent with the finding of fundamental error in Subramaniam. On balance, the latter aspects are probably more telling.

167 Justices Roberts-Smith and Pullin, applying Weiss v R (2005) 224 CLR 300, formed the majority.
168 Justice Buss dissented.
171 Ibid at [55].
172 Ibid at [56].
173 Ibid at [54].
Chief Justice Glesson and Kiefel J dissented on the basis that the majority in the Supreme Court had not erred on the proviso’s application. While their Honours did not doubt “that there will be cases in which a failure to give reasons will leave an appellate court in no position to apply the proviso”, equally, “it should be remembered that the most common case, in practice, for the application of the proviso is a case of trial by jury, where there are no reasons for decision and, obviously, no findings upon or descriptions of demeanour.”\(^{175}\) Implicitly then, Glesson CJ and Kiefel J rejected the proposition that the judge’s statutory omission gave rise to a radical or fundamental error.

Linking the cases above is the strangely incidental quality of fundamental error, for all of them could equally have turned upon the inapplicability of the proviso according to its conventional tests. This, it is suggested, underscores the arbitrary nature of the decisions in this area, while augmenting the earlier observation of Wilde that it is difficult to see how fundamental error is really fundamental.

**B. Regular Error in the High Court**

The counterpoint to the authorities above may be found in a selection of cases from the many in which the High Court has rejected the contention of fundamental error.\(^{176}\) We turn therefore to *Krakouer v R*\(^ {177}\) in 1998, *Hembury v Chief of General Staff*\(^ {178}\) of the same year, *Nudd v R*\(^ {179}\) in 2006 and *Glennon v R*\(^ {180}\) in 1994.

In *Krakouer v R*\(^ {181}\) the defendant was charged with inchoate offences in relation to controlled drugs with the intention of supplying those drugs. The judge directed the jury that intention was presumed by virtue of a reverse onus provision in the Western Australian controlled drugs legislation, but as that provision required a defendant to be in possession of the controlled drug for the presumption to operate, the direction was wrong; the defendant was never in possession of the drugs in issue.\(^ {182}\) It followed that

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\(^{175}\) (2008) 232 CLR 438 at 449.

\(^{176}\) Examples of cases in which the High Court has rejected fundamental error, either explicitly or implicitly, are to be found in *Webb & Hay v R* (1994) 181 CLR 41 (by majority); *Green v R* (1997) 191 CLR 334 (by majority); *Katsuno v R* (1999) 199 CLR 40 (by majority); *Heron v R* (2003) 197 ALR 81; *Stanton v R* (2003) 198 ALR 41; *King v R* (2003) 215 CLR 150; *Darkan v R* (2006) 228 ALR 334; *Bounds v R* (2006) 228 ALR 190 (by majority); *Ayles v R* (2008) 232 CLR 410 (by majority); *CTM v R* (2008) 236 CLR 440 (by majority) and *Cesan v R* (2008) 236 CLR 358 (by majority). The large number of instances in which the High Court has divided on this issue may be thought to underscore the amorphous nature of the concept of fundamental or radical error.


\(^{180}\) (1994) 179 CLR 1.


\(^{182}\) See the Misuse of Drugs Act 1966 (WA), ss 11 and 33.
the judge had not only erred in his directions, but that the judge had done so in relation to an ingredient of the offences. The defendant contended that this error was fundamental as “the misdirection concerned proof of an element of each of the offences with which the appellant was charged”, “the misdirection occurred at a point when the appellant had no opportunity to address the jury about it” and “the misdirection included a reversal of the onus of proof.”

Justices Gaudron, Gummow, Kirby and Hayne rejected this argument:

We do not accept that the proceedings against the appellant were fundamentally flawed or ‘have so far miscarried as hardly to be a trial at all’. Each of the matters which we have mentioned (the fact that the misdirection concerned an element of the offence, occurred at the end of the trial and reversed the onus of proof) may invite the most careful attention to whether the proviso can be applied; each of these matters may be said to suggest that the jury may have been led into a false or unsafe chain of reasoning. But we are not persuaded that the fact that there has been a misdirection about one element of the offence with which an accused is charged means that the trial was necessarily fundamentally flawed. After all, most cases of misdirection will concern directions about matters relevant to the jury’s deliberations and yet the proviso requires that not every ‘wrong decision of any question of law’ lead to the quashing of the conviction or a new trial. As was said in Wilde v R [1]here is no rigid formula to determine what constitutes such a radical or fundamental error’ as to preclude the application of the proviso. Simply demonstrating that there was a misdirection on a matter relevant to the jury's consideration is not sufficient.

The majority held that this conclusion was reinforced by the complexion of the evidence in light of the large quantity of drugs involved and the fact that “the appellant had made no point about intention to sell or supply” in his defence.

Dissenting on this issue, while McHugh J accepted that not every misdirection of this type would necessarily be fundamental, matters “such as the standard or onus of proof or the functions of the jury” were such that they normally went “to the root of a criminal trial according to law.” Further, in the context of the trial, the error was fundamental as the “misdirection prevented the constitutional tribunal from determining whether on the evidence the Crown had proved beyond a reasonable doubt one of the elements of the offence.” Accordingly, McHugh J thought the defendant “did not have a trial according to law.”

Hembury v Chief of General Staff involved the operation of the proviso in a court martial setting. The defendant, a sergeant of the Australian Regular Army, was convicted of charges of sexual harassment following a hearing in which the Judge

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183 (1998) 194 CLR 202 at [22].

184 Ibid at [23]. The appeal was allowed however as the error might have influenced the jury: “Strong as the case against the appellant may otherwise have been, it cannot be said that conviction was inevitable”; ibid at [37].

185 Ibid at [26].

186 Ibid at [74].

187 Ibid at [76].

188 Ibid.

Advocate directed the panel comprising the court martial to vote “in order of seniority”. This direction was wrong in that the Defence Force Discipline Rules required the vote to be in reverse order, so that “the minds of the younger members may not be influenced by the opinion of their seniors” in light of the hierarchal nature of the armed forces. The defendant’s appeal was rejected by the Defence Force Discipline Appeal Tribunal on the basis that the panel’s deliberation time in conjunction with the fact that each member of the panel knew of the other’s views before the formal vote excluded the risk of influence according to rank in that vote. The High Court unanimously allowed the defendant’s appeal, but it was sharply divided on the reasons for doing so. Significantly, only one Judge, McHugh J, saw the breach of the rule regarding voting order as giving rise to a fundamental error. The Judge reasoned that in “light of its long history and legislative recognition, the inevitable conclusion is that those experienced in the conduct of courts-martial believe, and have long believed, that the rule is fundamental to the fair trial of a member of the defence forces.”

Justice Kirby specifically rejected this analysis because the “kinds of ‘radical’ or ‘fundamental’ errors that have been described by the courts in the context of criminal appeals have typically concerned mistakes of law and procedure which are profound and which clearly distort the course of the proceedings”. However, “the misdirection by the Judge Advocate complained of in this appeal” was not within “the same category as the ‘radical’ or ‘fundamental’ errors just mentioned. Further, the rule in question in “comparison with other rules in the collection” could not be said to go “to the root of the proceedings”. And of incurable error more generally, Kirby J presciently observed that “classifications expressed in terms of ‘so extreme an irregularity’ or ‘fundamental error’ are such that exactitude is impossible to attain” and consequently that “[u]nanimity on the application of the classification may be elusive.”

Whereas the errors in Krakouer and Hembury were essentially procedural, the error in Nudd v R was more substantive. Kevin Philip Nudd was convicted of importing over 89 kilograms of cocaine to Australia following a trial in which he was represented by grossly incompetent counsel. The evidence against the defendant was described in the various judgments of the High Court as “overwhelming.”

190 Ibid at [3].
191 Ibid at [27].
192 Ibid at [8]. An intermediate appeal was also rejected by a majority of the Full Court of the Federal Court.
193 Ibid at [28].
194 Ibid at [63].
195 Ibid at [64].
196 Ibid.
197 Ibid at [62], footnotes omitted.
199 For example, see the judgment of Glesson CJ; ibid at [20].
this evidence were recordings of the defendant's conversations in which he and his co-conspirators chartered and then tracked the progress of the boat ultimately intercepted by the authorities and containing the drugs. But, as noted, the defendant's counsel was grossly incompetent. He misapprehended the law in relation to the ingredients of the offence and failed, in preparing for the trial, to take a full brief of the defendant's account and then advise his client in accordance with the applicable law. These functions were, as Kirby J observed, "rudimentary to the duties of a lawyer". This incompetence formed the basis of the defendant's appeal to the Queensland Court of Appeal, which was dismissed, and the appeal to the High Court. In the latter, he contended for the first time that "the incompetence ... went to the root of his representation at trial" so that he had suffered a miscarriage of justice incurable by the proviso. The stakes for the defendant were high: the trial judge had sentenced him to a term of 22 years imprisonment with a non-parole period of 11 years.

The High Court unanimously rejected the fundamental error argument. Chief Justice Glesson said that while trial counsel put forward some hopeless arguments at trial, he also:

... understood that the appellant's only real prospect of success lay in seeking to persuade the jury that there was a doubt about whether the extent of the appellant's demonstrated knowledge of, and connection with, the cocaine importation was sufficient to amount to being knowingly concerned in the importation. He had an erroneous view of the law on that point; but, again, that does not make the case unique. Nothing in the material before the Court of Appeal suggested there was any real doubt about the appellant's guilt. The Court of Appeal was in a good position to determine that the conviction was not unjust. There was no failure of process that departed from the essential requirements of a fair trial.

Justices Gummow and Hayne considered the case against the defendant as being so strong that, in practice, nothing more could have been done that would have affected the outcome. This meant that the argument of fundamental error "is either self-evident or circular." This was because:

If all that was meant was that counsel was incompetent, the addition of reference to the root of the appellant's representation is superfluous. If it was intended to convey that the incompetence of representation at trial led to a miscarriage of justice, it is a proposition that does not add to the considerations examined earlier in these reasons.

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200 Portions of the incriminating conversations may be found in the joint judgment of Callinan and Heydon JJ at [137]-[140].

201 For discussion of counsel's omissions, see the judgment of Kirby J; ibid at [107].

202 Ibid.

203 Ibid at [155] per Callinan and Heydon JJ.

204 Ibid at [20].

205 Ibid at [29]-[34].

206 Ibid at [37].

207 Ibid.
Similar reasoning underpins the joint judgment of Callinan and Heydon JJ, although their Honours also placed weight upon the trial judge’s corrective measures.\(^{208}\) It is most unfortunate that a person charged with such a serious crime as the appellant was, should come to be represented by a person whose competence fell short of the standard which a court should be entitled to expect. However, just as in medicine there may be terminal cases which not even the most brilliant surgeon can remedy, there will be prosecution cases which an accused could not successfully defend with the aid of the most resourceful and competent of counsel. We have come to the conclusion that this was such a case. That does not mean of course that a person against whom the case is a very strong one, is not entitled to a fair trial. However, just as in the operating theatre, there is in the criminal court a suitably qualified judge, detached from the protagonists and whose duty it is to intervene and make such corrections as need to be made to ensure a fair trial. Trial judges may only correct errors that become apparent to them, but in this case such errors as might otherwise have caused the trial to miscarry, were duly corrected by way of her Honour’s summing up and insistence that instructions be duly obtained.

Justice Kirby was more circumspect in relation to fundamental error, noting that “I have found the resolution of this issue much more difficult.”\(^{209}\) The error was, the Judge thought, “at the borderline” given the level of incompetence in light of the seriousness of the charge.\(^{210}\) However, Kirby J held that the “prosecution evidence against the appellant was so detailed, overwhelming and in large part uncontested, that it left no significant possibility of an acquittal ... had the appellant been differently and competently represented at the trial.”\(^{211}\) In other words, the Judge was satisfied that as nothing could have been done to answer the Crown’s case, there was no error going to the root of the proceedings. But by approaching the question of fundamental error in terms of whether the defendant had been deprived of the chance of an acquittal, it might be thought that Kirby J, as with the balance of the Court, conflated a conventional test for the application of the proviso with the issue of fundamental error when the latter, by its nature, was supposed to preclude the proviso’s application as an instance of incurable error.

The final decision illustrative of the High Court’s counterpoint to fundamental error is *Glennon v R.*\(^{212}\) The defendant was convicted of sexual offences against young persons. The evidence incorporated his responses to Police questioning which in relation to certain allegations involved the exercise of the right to silence. While the judge correctly directed the jury that such silence was not evidence of guilt, the judge wrongly said the jury could consider it to test the veracity of the defence case. The Victorian Court of Criminal Appeal applied the proviso to dismiss the defendant’s appeal on the basis that it was unlikely the jury had impermissibly used the evidence of silence in finding guilt proved.\(^{213}\) The defendant contended the Court of Criminal

\(^{208}\) Ibid at [162].

\(^{209}\) Ibid at [106].

\(^{210}\) Ibid at [109].

\(^{211}\) Ibid.

\(^{212}\) (1994) 179 CLR 1.

\(^{213}\) A summary of the Court of Criminal Appeal’s decision may be found, ibid at 7, in the joint judgment of Mason CJ, Brennan and Toohey JJ.
Appeal was wrong to do as “the nature of the trial judge’s error was so fundamental as to depart from the essential requirements of a fair trial.”\(^{214} \) Although the High Court allowed the appeal, it unanimously rejected this contention. In brief remarks on this issue, Mason CJ, Brennan and Toohey observed:\(^{215} \)

... it cannot be said that the trial judge’s misdirection on the applicant’s right to silence was ‘so fundamental’ that the trial was ‘hardly a trial at all’. Although the right to silence is a fundamental right of any accused person, it cannot be said that any misdirection on that subject is a fundamental irregularity of the kind discussed in \textit{Wilde}. In this case, the trial judge directed the jury that they were not to use the applicant’s exercise of his right to silence in a manner adverse to him. This direction was perfectly proper. However, the trial judge then qualified the direction by informing the jury that they might use the applicant’s silence to test the veracity of the applicant’s defence. This subsequent direction was clearly erroneous. However, in the context in which it appeared and at a trial in which there was other evidence on which the applicant could be convicted and in which there was no other misdirection by the trial judge, the trial judge’s misdirection was not a fundamental irregularity. We would reject the applicant’s submissions in so far as they are based on this approach to the proviso.

Justices Deane and Gaudron were even more concise:\(^{216} \)

There is nothing to give any significance to the misdirection involved in this case over and above that which ordinarily attaches to a misdirection as to the use or evaluation of properly admitted evidence. Accordingly, there is no basis for an argument that, overall, there was not a fair trial according to law and, thus, no scope for the operation of the proviso.

\subsection*{C. A Review of Fundamental Error and the Position in Intermediate Courts of Appeal}

It is suggested this review reveals the absence of any clear division between fundamental error and regular error to which the proviso remains potentially applicable, so that the resulting jurisprudence has an arbitrary quality.\(^{217} \) For example, whereas the majority in \textit{Hembury}\(^{218} \) thought that the departure from the mandatory voting order was not fundamental error, this conclusion sits at best awkwardly with the Court’s decisions in \textit{Subramaniam v R}\(^{219} \) and \textit{AK v Western Australia},\(^{220} \) both of which also involved departures from prescriptive statutes on adjudicative matters of criminal procedure. Similarly, whereas \textit{AK v Western Australia} and \textit{Fleming v R}\(^{221} \) were based at least in part on the manifest importance of justice being seen to be done (in relation to the

\begin{itemize}
\item \(^{214} \) Ibid.
\item \(^{215} \) Ibid at 8.
\item \(^{216} \) Ibid at 13.
\item \(^{217} \) Penhallurick correctly concludes that an “examination of the case law suggests that not only is there no ‘rigid formula’ [for determining fundamental error], but also that it is not possible to state any guiding principles as to what constitutes a fundamental error.” See C Penhallurick, “The Proviso in Criminal Appeals” (2003) 27 Melbourne University Law Review 800 at 809.
\item \(^{218} \) (1998) 193 CLR 641.
\item \(^{219} \) (2004) 211 ALR 1.
\item \(^{220} \) (2008) 232 CLR 438.
\item \(^{221} \) (1998) 197 CLR 250.
\end{itemize}
provision of judicial reasons), this concern was strangely absent in Nudd. While it is true that Nudd had no defence, reference to the importance of the appearance of justice suggests competent representation was relevant if not critical to the opportunity to present a defence. And viewed more broadly, can it really be said that the failure to provide sufficient reasons for findings of fact is worse than a defendant facing a very serious charge without competent representation? Is it an answer to this question to say, as the High Court did in Nudd, that he had no defence when the judge in AK v Western Australia plainly thought the same of that defendant? Or viewing Krakouer and Subramaniam together, why was the reversal of the burden of proof on an ingredient of an offence not fundamental whereas failing to tell the jury about the operation of a special disability hearing was? After all, the former involved an interference with the law’s golden thread whereas the latter only involved the jury not learning certain pieces of information about the type of hearing in question at its outset. Further, in Krakouer the quantity of controlled drugs and the absence of dispute about the use to which they would be put were seen as reinforcing the conclusion the misdirection was not a fundamental error. In other words, the immateriality of the error was treated as being relevant to the question of whether the error was fundamental. But if a materiality approach had been adopted in Subramaniam, the fact that the jury had been given the relevant information about the special hearing before the jury’s deliberations commenced would have seriously undermined the conclusion of fundamental error. And in relation to Glennon v R, what of the significance of the right to silence in the Anglo-American system of criminal justice? Why was error in this respect mechanical and therefore amenable to the proviso when the latent ambiguity of a charge was not in S v R? If the answer to this question is that the defendant in S v R was prejudiced by error whereas the defendant in Glennon was not – the approach adopted by the High Court in each case – is this not the application of a conventional test for the proviso rather than an assessment of fundamental error?

This absence of pattern is replicated in the case law of Australian intermediate courts of appeal. Hence, while these courts have treated jury misdirection upon matters of intoxication, self-defence and corroboration as regular error amenable to the proviso, and so too omissions from jury directions in relation to the right to silence and circumstantial evidence, several state courts have treated as fundamental error glosses upon the burden of proof. Similarly, whereas the temporary ejection of the defendant from the hearing, in camera applications excluding the defendant and the wrongful

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225 (1994) 179 CLR 1.
226 (1989) 168 CLR 266.
introduction of extraneous material into the jury room have been held to be curable by
the proviso, the addition of a charge to the indictment and a judicial inducement to plead
guilty have been seen as fundamental error. Other error, and in particular, adverse
comment upon the right to silence, has resulted in decisions going both ways. Moreover, the judgments in this area typically contain little more than an assertion as to
why error is either fundamental or otherwise. For example, in R v Shepherd the New
South Wales Court of Criminal Appeal rejected the contention of fundamental error in
the following single paragraph:

On the appellants behalf it was argued that the error made by the trial judge was an error in
explanation of the onus and standard of proof, and that accordingly it is 'so radical or
fundamental' (to borrow from the words of the majority judgment in Wilde v R (1988)), as to
exclude the operation of the proviso. I am unable so to regard it. Taking the view that I have,
that the proposition underlying the Chamberlain direction is not a separate proposition of law,
but rather (if valid at all) a corollary of matters covered in directions that were given, I find that
there was no 'radical or fundamental' error in the summing-up, but merely a failure to give what
has been found to be a direction which the law calls for in cases of this nature.

And in R v Muto & Eastey for example, the Victorian Court of Appeal was
equally brief in concluding that "the common law and statutory right to which we have
referred", a unanimous verdict, "is fundamental and a direction entailing a significant
risk that an accused might be deprived of it cannot be answered by reference to the
proviso."

The absence of an analytical framework by virtue of what Kirby J has described
as "the Polonian advice that courts should avoid mechanical approaches and determine
each case 'upon its own circumstances'", has undoubtedly contributed to the
unpredictability of decision making in this area. So too, at a deeper level, has the
unmined jurisprudential foundation of fundamental error: while Wilde and its progeny
presuppose that a trial has certain sacrosanct features, any departure from which means
that there has not been a proper trial 'accordingly to law', no attempt has been made to
identify what these features are. However, as the English roots of incurable error

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228 Compare Gazepis v Police (1997) 70 SASR 121 (exclusion of defendant); R v Collie [2005]
SASC 148 (in camera application) and R v Sharp [1999] QCA 393 (introduction of material into
jury room) with R v Alridge (1993) 67 A Crim R 371 (NSW, addition of a charge) and R v KCH

229 Compare R v Bozolla [2001] NSWCCA 8; R v Giri [2001] NSWCCA 197; R v Smith (1990) 50


231 Ibid at 406 per Roden J, citations omitted.


233 Ibid at [27].


235 For expressions of this principle as the foundation of fundamental error see the dissent of Deane
and the dissent of Kirby J in Darkan v R (2006) 228 ALR 334 at [139]. Other additional bases
show, because this premise is open-ended in theory it is also malleable in practice. The result is an unstructured jurisprudence in need of revision. Perhaps unsurprisingly then, the High Court has begun to express doubts about whether there is a category of error that is so fundamental as to preclude the application of the proviso. But the High Court need only look to its own jurisprudence to answer this question, and in any event, such introspection comes too late. As we shall see, Wilde's influence now lies beyond the category of fundamental error and indeed the jurisdiction of Australia. This brings us to the second category of incurable error, an unfair trial, and related developments in New Zealand.

IV. UNFAIR TRIALS AND THE PROVISO: THE NEW ZEALAND EXPERIENCE

Section 385 of the Crimes Act 1961, as with the appeal provisions of other jurisdictions modelled upon the 1907 English Criminal Appeal Act, does not provide for an unfair trial as a ground of appeal. Notwithstanding this, the New Zealand Court of Appeal has frequently considered appeals by reference to whether the respective defendants' trials were unfair. In most of these cases, however, the Court has done so upon the statutory criterion of a miscarriage of justice, in circumstances in which the reference to an unfair trial was merely shorthand for such a miscarriage. In other words, these cases have turned upon orthodox principle in terms of paragraph (c) of section 385(1) of the Crimes Act.

A small number of cases have been decided upon the more fundamental finding that a trial has been unfair, in that some feature of the trial has gone so badly wrong that the conviction must be quashed irrespective of the strength of the evidence, the defendant's apparent guilt and the potential curative power of the proviso. It is this narrower category of cases that we are concerned with, and in particular, the relationship between this category and the proviso. Intuitively, the conclusion that a trial has been unfair appears to preclude the application of the proviso, in that such a conclusion also tends to imply the defendant has suffered an actual substantial miscarriage of justice so that the pre-condition to the proviso's application cannot be met. This still leaves unresolved, however, the question of how an appellate court determines whether a trial has been unfair and the related question of whether there remains any room for the proviso's application in such a case. Or putting the second question a different way, is an unfair trial necessarily equiparated with an actual substantial miscarriage of justice? These questions have a constitutional dimension in light of section 25(a) of the New Zealand Bill of Rights Act 1990, which affirms the

have been mooted. For example, in *Weiss v R* (2005) 224 CLR 300 at [46], the High Court left open whether the Australian Constitution "imports minimum requirements into the elements of ... a trial", a breach of which would incurable by the proviso. A similar question was posed by Kirby J in *Nudd v R* (2006) 225 ALR 161 at [112]. Further, in *Weiss v R* the Court also said that it may be wrong to apply the proviso if there had been "a significant denial of procedural fairness at trial"; ibid at [45]. And in *Darkan v R* (2006) 228 ALR 334 at [139]-[142], Kirby J questioned whether human rights law might underlie fundamental error.


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right of a defendant “to a fair and public hearing by an independent and impartial court” and the panoply of constituent rights enshrined by section 24 of that Act. As we shall see, our courts have responded to these questions by seeking to balance the rights of a trial’s participants, namely the defendant, victim and community, in determining whether a trial has been unfair while recognising that a defendant’s fair trial right is ultimately absolute. Accordingly, it is now clear that a breach of such a right precludes the application of the proviso, as an unfair trial is treated as being an actual and substantial miscarriage of justice. It is equally clear, however, that the determination of whether a trial has been unfair, and hence the potentially decisive factor in relation to the application of the proviso, is an exercise laden with value judgement. Two cases in this area stand out, *R v Griffin*, a decision of the New Zealand Court of Appeal, and *Hawse v R*, a decision of the Privy Council on appeal from that Court. The context for both resides in earlier as well as subsequent New Zealand decisions, so that this is an area best approached more or less chronologically.

**A. Older Fair Trial Authorities and the Proviso**

The unreported 1978 decision of *R v Voice* is an early example of a case in which the Court of Appeal declined to apply the proviso upon the basis that the trial was unfair. The defendant was convicted of indecent assault and a non-sexual assault after he entered female toilets in an office block. The issue for the jury was identification, even though the defendant left his fingerprints on the toilet cubicle’s door. Two serious errors marred the trial. The judge failed to give the mandatory identification warning in relation to the defendant’s dock identification and the jury also heard that his fingerprints were in Police records thereby implying a criminal history. To compound matters, the judge did not direct the jury to ignore this reference. The Court of Appeal acknowledged the strength of evidence of guilt, and in particular, the presence of the defendant’s fingerprints at the scene. It held that the issue “is not one of guilt or innocence but the propriety of the conviction and taking everything into account we are not prepared to apply the proviso.” The decision in *Voice* therefore implied the proviso could be used to cure an unfair trial but that the discretion to do so should not be exercised in such circumstances.

In *R v Woods*, three years later, the Court of Appeal explicitly confirmed that an unfair trial permitted appellate relief on the basis that such a trial constituted a miscarriage of justice in terms of section 385(1)(c) of the Crimes Act, although the Court also observed it was a “matter of fact and degree” as to whether a trial was unfair. Inconsistently with *Voice*, which was not referred to in the judgment, the

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239 [2006] 1 NZLR 433.
240 CA22/78, 13 October 1978.
241 Ibid at 9.
242 Ibid.
243 CA48/81, 17 December 1981.
244 Ibid at 8.
Court appeared to imply that the proviso was incapable of curing such error because an unfair trial effectively meant there had been "no trial at all".  

A similar approach was adopted in *R v Gemmell*[^246] and *R v Hart*,[^247] which were decided in 1985 and 1986 respectively. In *Gemmell* the judge misdirected the jury on the operation of the law of conspiracy by wrongly incorporating the ingredients of the common unlawful purpose limb of section 66(2) of the Crimes Act, so that the defendant was said to be guilty of a conspiracy to commit aggravated robbery if he recognised his accomplices may go further than mere robbery. The Court implied this rendered the trial unfair. Further, it held that because the misdirection was of "such importance" it was "unable to apply the proviso to save the conviction."[^248] In *Hart* the judge's errors were more wide-ranging in that the judge wrongly said that intoxication went to the defendant's capacity to form an intent, that lies could be evidence of guilt and that equivocal evidence was of assistance to the prosecution.[^249] The Court of Appeal observed that had there been only one or two errors, "it might then be possible to say, in terms of the proviso to s 385(1) of the Crimes Act, that no substantial miscarriage of justice actually occurred."[^250] It concluded that although the Crown case was strong, "the accused was entitled to directions materially different from those which were given" and that the "combined effect of the three matters to which we have referred is such that we cannot safely leave the present conviction standing."[^251] In other words, the Court allowed the appeal on the assumption that an unfair trial was a substantial miscarriage of justice thereby excluding the operation of the proviso.

More recent authority confirms this approach. In *R v Baleitavuki*,[^252] two defendants were convicted of aggravated robbery. During the evidence of one, the judge asked a series of questions tending to suggest that the judge disbelieved him and that by association, his co-defendant was also a known criminal. The Court said that the judge's apparent message to the jury was "unmistakable, whatever the real intention" so that a "fair trial was thereby denied."[^253] It held that the proviso could not be applied as the unfairness of the trial meant that the defendant had suffered a substantial miscarriage of justice.[^254] Similarly, in *R v Eagles*[^255] the conclusion that the defendant

[^245]: Ibid.
[^246]: [1985] 2 NZLR 740.
[^247]: [1986] 2 NZLR 408.
[^248]: [1985] 2 NZLR 740 at 749, emphasis added.
[^249]: In light of s 124 of the Evidence Act 2006 and the decision of the Court of Appeal in *R v Tepu* [2009] 3 NZLR 216, lies may now be used as circumstantial evidence of guilt.
[^250]: [1986] 2 NZLR 408 at 417, emphasis added.
[^251]: Ibid, emphasis added.
[^252]: CA142/03, 24 October 2003.
[^253]: Ibid at [14].
[^254]: Ibid at [15].
had been “deprived of a fair trial” meant there was “no question of applying the proviso to s 385(1) of the Crimes Act 1961.”

B. Griffin (2001): the Absolute Nature of Trial Fairness

Unlike the decisions above, in *R v Griffin* a Full Court of the Court of Appeal gave close consideration to a defendant’s right to a fair trial and that right’s interaction with the proviso. Although the case appeared to settle that an unfair trial would ordinarily constitute a substantial miscarriage of justice, thereby precluding the proviso’s application, it also highlighted that entrenched appellate division could readily emerge in this area as a consequence of contestable views about what trial fairness required. In this sense, *Griffin* is an obvious precursor to *Howse v R* five years later.

*Griffin*, a taxi driver, was convicted of unlawful sexual intercourse with a severely subnormal woman whom he regularly transported. The offending occurred over a four-year period in the context of a secret relationship between the two. The primary issue at trial was whether the complainant’s level of subnormality was severe. Both sides adduced expert evidence on this point. On appeal, the defendant contended that as his expert had not had access to the complainant herself – unlike those for the Crown – his trial had been unfair. This was said to follow from an impeded ability to challenge the contention that the complainant was severely subnormal. In support of this argument, reliance was placed upon the New Zealand Bill of Rights Act 1990 and its corresponding rights to “a fair and public hearing by an independent and impartial court” as well as “adequate time and facilities to prepare a defence.” The Court divided on whether the latter right had been infringed and hence whether the former right, the right to a fair trial, had thereby been violated. It also divided on the application of the proviso.

The majority, comprising Richardson P, Blanchard and Tipping JJ, held that the inequality of the competing experts’ access to the complainant on a material trial issue meant the defendant was not afforded adequate facilities to prepare his defence, so that he “was required to go to trial on a basis which in the particular circumstances rendered a fair trial impossible.” The majority reached this conclusion as the question of the complainant’s abilities was thought to be “finely balanced” and the defendant’s lack of

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256 Ibid at [28].
258 [2006] 1 NZLR 433.
259 New Zealand Bill of Rights Act 1990, ss 25(a) and 24(d). The issue of whether a complainant could be required to submit to an examination by a defence-retained expert first arose in New Zealand in *R v B* [1995] 2 NZLR 172. As in *Griffin*, the defendant placed considerable weight upon the right to a fair trial and associated rights within the New Zealand Bill of Rights Act 1990. A Full Court of the Court of Appeal held that in exceptional circumstances, a complainant’s refusal to undergo such an examination might permit a trial court to either exclude evidence of the Crown’s examination or more rarely, stay the charge(s) in order to vindicate the defendant’s fair trial right. The case did not raise the application of the proviso, however.
260 [2001] 3 NZLR 577 at [39].
access to the complainant meant his expert could only challenge the methodology of the Crown’s experts rather than proffering her own substantive opinion based upon her actual observations of the complainant. This was treated as having been likely to have adversely affected the defence’s cross-examination of the Crown’s experts so that their challenge to the prosecution case might have “appeared rather artificial to the jury.”

The majority considered that this conclusion would “ordinarily” mean that the defendant had suffered a miscarriage of justice so that his appeal should therefore be allowed. It then went on to address whether “no ultimate miscarriage had occurred” in terms of the proviso. Significantly, their Honours thought it “difficult to contemplate a case” involving a breach of the right to adequate facilities to prepare a defence “but occasioning no [substantial] miscarriage of justice.” This was because such a right was an integral component of the right to a fair trial which in turn was “an absolute right.” Despite this, the majority noted it had “carefully read and reread all the evidence” in order to determine whether the defendant had suffered a substantial miscarriage of justice. It thought the issue was ultimately factual, and turned upon whether the defence expert’s “inability to interview the complainant was capable of making any difference to the verdicts.” President Richardson and Blanchard and Tipping JJ concluded that the defendant’s case might have been so compromised as the issue in relation to the complainant’s subnormality “was one upon which jurors’ minds could reasonably have differed.” The appeal was therefore allowed.

Justices Gault and Thomas dissented in separate judgments. Justice Gault considered that as the defendant was not entitled to have his expert examine the complainant, there could be no breach of the right to adequate facilities to prepare a defence. Moreover, the Judge thought that this right did not require symmetry of arms between the prosecution and defence as only the former bore the onus of proof in a criminal trial. It followed that the defendant’s right to a fair trial had not been violated by any underlying breach of the right to adequate facilities to prepare a

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261 Ibid at [37].
262 Ibid at [38].
263 Ibid at [40].
264 Ibid.
265 Ibid.
266 Ibid.
267 Ibid at [42].
268 Ibid.
269 Ibid.
270 Ibid at [48].
271 Ibid at [49].
defence. In reaching this conclusion, the Judge observed that the evaluation of the right to a fair trial right also required recognition of competing interests and values.272

Fairness involves fairness not only to the accused but to the prosecution, to the alleged victim and to the public. It is to be considered in the circumstances of each particular case not idiosyncratically or by reference to emotions, sympathy, or prejudice, but by reference to those values which have evolved as necessary to ensure the justice and reliability of criminal convictions.

The Judge held that as there was no direct evidence that the defendant had been materially disadvantaged by his lack of access to the complainant, he did “not consider it is appropriate on appeal to infer unfairness”.273

Justice Thomas concluded that the right to adequate facilities to prepare a defence had not been breached because there was no underlying right of a defendant to require an examination of a complainant.274 Further, the Judge held that a victim’s rights required recognition in determining whether there had been a breach of the defendant’s right to adequate facilities to prepare a defence, and if there had, to whether that had caused an actual and substantial miscarriage of justice in terms of the proviso.275 In the Judge’s own words, while:276

... the right to a fair trial is paramount and may even be considered absolute, the component elements required to constitute a fair trial are not. Thus, the rights and interests of the victim may be taken into account in two ways; first, by having regard to those rights and interests when determining the requirements of a fair trial and, secondly, by the Court insisting upon a close analysis and evaluation of the evidence so as to be satisfied that the accused’s trial was not in substance unfair before setting the verdict aside and ordering a new trial.

Justice Thomas thought that the critical distinction between his approach and that of the majority was that the latter was exclusively concerned with procedural fairness and hence how the trial might have been different had the defence expert had been able to examine the complainant:277

The unfairness perceived by the majority may be properly called ‘procedural unfairness’: if M had been made available for an examination by Ms Jerram her evidence might have been more creditable and at least some of the jurors might have been left with a reasonable doubt. But because M was not made available, and because Ms Jerram was therefore at a perceived disadvantage relative to the psychologist called for the Crown ... the procedure is regarded as unfair.

Conversely, Thomas J said his approach involved a close substantive consideration of the effect, if any, upon the trial by virtue of the absence of a defence

272 Ibid at [51].
273 Ibid at [53].
274 Ibid at [60], [102] and [180].
275 Ibid at [106] and [180].
276 Ibid at [180].
277 Ibid at [182], emphasis in original.
examination of the complainant. The Judge noted this approach mirrored that envisaged by Parliament under the proviso:278

... In the proviso to $ 385(1) of the Crimes Act 1961, Parliament provided that 'notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant', the Court may dismiss the appeal if it considers that no 'substantial' miscarriage of justice has 'actually' occurred. Rather than simply policing apparent adherence to procedural fairness, Parliament has empowered and enjoined the Court to be satisfied that a substantial miscarriage of justice has actually occurred. Consequently, the Court may look beyond any apparent procedural unfairness and determine whether there was in substance a fair trial. It is in taking this further step that regard is had to the rights and interests of the victim. Her rights and interests are not overwhelmed by the accused's right to a fair trial unless it can be said that, taking the trial as a whole, the accused did not in substance obtain a fair trial. A miscarriage of justice must have actually occurred.

Similarly, the Judge endorsed:279

... a more realistic and pragmatic attitude which recognises that the constituent elements of a fair trial are not absolute and that, notwithstanding some perceived irregularity or defect in the procedure followed, a close analysis and evaluation of the evidence may reveal that the trial was not unfair and that the conviction was not unsafe.

After an extensive review of the evidence, Thomas J held that a defence examination of the complainant "would have added little if anything to the overall veracity of Mr Griffin's defence" with the result the defendant's rights had not been breached.280 The Judge also expressed this conclusion in terms of the proviso that "no substantial miscarriage of justice" had actually occurred.281

C. Howse: Incontrovertible Evidence of Guilt versus Trial Fairness

Howse v R282 is undoubtedly the most important New Zealand judgment on the relationship between the proviso and the right to a fair trial, and as a decision of the Privy Council, it is also a leading Commonwealth authority.283 The case is also a striking example – and perhaps the best example – of the tension generated when a

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278 Ibid at [65].
279 Ibid at [66].
280 Ibid at [172]. For the Judge's review of the evidence, see [119]-[160] inclusive.
281 Ibid at [173].
282 [2006] 1 NZLR 433 (PC) and see R v Howse [2003] 3 NZLR 767 (CA).
283 Howse is a leading Commonwealth authority rather than the pre-eminent one as the Privy Council questioned its breadth in Bernard v The State [2007] UKPC 34. There, the Board cautioned against Howse being taken to mean that so long as the evidence of guilt was "overwhelmingly strong, the defects in procedure required for setting the verdict aside on the ground that the trial was unfair have to be such that there has scarcely been a trial at all"; ibid at [29]. Instead, the contextual significance of the error was said to be all important, so that if "the defects were relatively minor, the trial may still be regarded as fair. Conversely, if they were sufficiently serious it cannot be accepted as fair, no matter how strong the evidence of guilt." In such circumstances, the Board said the defendant would also have been "deprived of his constitutional right of due process"; ibid.
badly flawed trial nonetheless reveals irrefutable evidence of guilt. Accordingly, "Howse"
is a quintessential proviso case.

The facts are disturbing.284 The defendant was convicted of murdering his two young stepdaughters, Saliel and Olympia, following a jury trial. Their mother, Charlene Aplin, testified that the defendant woke her in the early hours of the morning to complain he had been attacked by intruders. The defendant was injured. She called Police. Their attendance led to the discovery of both girls’ bodies in a sleep-out at the rear of the home. The defendant was interviewed by Police, initially as a witness. An examining doctor thought that his injuries were self-inflicted. The defendant was then repeatedly questioned as a suspect. In the course of these interviews, he admitted killing both girls. Several days later, the defendant then retracted his confessions and blamed the girls’ mother for their murders.

The Crown alleged that the defendant had a motive for murder. Saliel and Olympia had complained the defendant had been sexually abusing them and Olympia had recorded this in her diary.285 Consequently, the Crown called a number of witnesses to recount both girls’ statements to this effect. Confusion appears to have arisen, however, as to whether the prosecution was alleging actual sexual abuse or merely the fact of such complaint. This had forensic significance because the former was hearsay evidence and only admissible if sufficiently reliable whereas the latter was merely original evidence such complaints were made.286 The defendant objected to this material but it was ruled admissible following a pre-trial application. The admitting judge's ruling was ambiguous as to which category the evidence came within and the different trial judge did not clarify the position. In summing up, the judge said that the evidence was admissible as proof of the truth of its contents. No warning was given to the jury about the dangers of hearsay evidence. The defendant did not testify.

On appeal to the Court of Appeal, the defendant said that the complaint evidence was insufficiently reliable to warrant admission as hearsay evidence, particularly when the defendant had not also been charged with any sexual offending. He pointed out, for example, that Olympia had been in the habit of making these allegations against the defendant and that on an occasion had "retracted" them.287 Further, the authorities had investigated the complaints and concluded they were "not well founded."288 Other evidence was also said to show Olympia might have had a motive for false complaints against the defendant.

284 The facts are taken from [1]-[8] of the Privy Council's decision at [2006] 1 NZLR 433.
285 The details of this evidence and the corresponding pre-trial chapter are at [20]-[30] of the judgment of the Court of Appeal at [2003] 3 NZLR 767.
286 At the time, the admission of hearsay evidence was governed by the Court of Appeal's decision in R v Manase [2001] 2 NZLR 197. There, it was held such evidence was admissible if the evidence was relevant, sufficiently reliable and that the maker of the statement was unavailable. Similar tests now operate pursuant to the Evidence Act 2006, ss 17 and 18.
287 [2003] 3 NZLR 767 at [27].
288 Ibid.
The Court of Appeal upheld these criticisms of the evidence. It was "driven to the view" that Olympia's allegations "did not satisfy the threshold requirement of sufficient apparent reliability" to justify admission as hearsay evidence. Although the problems with Saliel's complaints of sexual abuse were "not quite as substantial", the Court did not consider their admission required "any final determination." This was because the defendant's "due process rights" had been "already significantly compromised" by the wrongful hearsay admission of Olympia's complaints, a position compounded by evidence from a third party that she had been the victim of sexual abuse by the defendant. The Court held this latter material could have had no relevance if the Crown's case had been properly confined to motive based upon the fact of the girls' complaints, so that its wrongful admission also constituted "a prima facie miscarriage of justice." 

Other errors also troubled the Court. For example, the Crown called more witnesses of the girls' complaints of sexual abuse than were necessary, so that it was "not immediately easy" to see why such material should have been adduced. Further, in explaining to the jury that manslaughter verdicts were unavailable, the Judge's observations were "rather more emotive than was desirable" and even "somewhat gratuitous". And as noted already, the trial judge did not direct the jury upon the dangers of hearsay evidence. Given the Court's earlier conclusions about the hearsay evidence in relation to Olympia, it held that the jury "should have been warned in strong terms not to use this evidence as proof that the [sexual] allegations were true, and not to treat the evidence as having been led for that purpose." 

Despite this catalogue of serious trial error, the arguments in favour of the application of the proviso had considerable strength. First, the defendant's confession included a level of detail about the girls' deaths that only the killer could have known. Mr Hawse said he stabbed each girl once with a knife using a downward motion while they lay in their beds. This description matched the nature, number and location of the girls' injuries as revealed by the post-mortem examination. Moreover, the officer to whom the confession was made was ignorant of these details when speaking to the defendant as was the pathologist until the post-mortem examination. Consequently, the Court of Appeal found it would be: 

289 Ibid at [28].
290 Ibid at [30].
291 Ibid.
292 Ibid at [31].
293 Ibid at [32].
294 Ibid at [40] and [41] respectively.
295 Ibid at [43].
296 Ibid at [52].
... stretching credulity beyond breaking point to entertain the possibility that, by an amazing coincidence, Mr Howse happened to have fabricated or guessed the ... precise details of wounds inflicted in differing ways by someone else.

Second, there was “absolutely no evidence to support Mr Howse’s out of Court assertion that Ms Aplin was the killer.” In short, all of the evidence pointed exclusively to the defendant as the girls’ murderer. Third, the defendant drew a diagram for the Police concerning the pattern of blood left by Olympia’s wound that mirrored the scene. The Court of Appeal viewed this evidence as confirmatory of guilt as the appellant never adequately explained how he might have learned this innocently. Finally, the defendant had Olympia’s blood on his trousers, a fact also left unexplained by his retraction. Viewed together, these features demonstrated irrefutable evidence of guilt so that in a very real sense, the choice for the Court of Appeal was between due process in allowing the appeal, or affirmation of the accuracy of the result in applying the proviso.

The Court of Appeal held the proviso should be applied. It was:

... sure that even if the problems with the trial we have identified had not occurred, the jury would without doubt have convicted Mr Howse on the 2 counts of murder. The combination of the points noted above leads to an irresistible inference of guilt, which the jury must have recognised. We therefore consider that no substantial miscarriage of justice has actually occurred in this case.

But in reaching this conclusion, the Court appears to have accepted that the defendant had cause to feel aggrieved by the nature and gravity of trial error as it “appreciate[d] the point he made about fair trial considerations, natural justice and the presumption of innocence.” The Court treated these matters as being “recognised in the jurisprudence concerning the proviso and the high threshold which is necessary for its successful invocation”, all of which the Court had borne “very much in mind.” It nonetheless remained satisfied “by reason of the matters we have discussed that the Crown has established the criteria for the application of the proviso.”

The defendant’s challenge to the Privy Council put this reasoning directly in issue as he contended that the Court of Appeal was wrong to apply the proviso as his trial had been unfair. In so doing, the defendant placed weight upon the right to a fair trial as protected by section 25(a) of the New Zealand Bill of Rights Act 1990 and the

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297 Ibid at [53].
298 Ibid at [54].
299 Ibid at [55].
300 Ibid at [56].
301 Ibid.
302 Ibid.
303 Ibid.
304 [2006] 1 NZLR 433 at [32]. As the Board noted, this had been mentioned only briefly in the Court of Appeal.
decision in *R v Griffin* discussed earlier. As in that case, the fair trial point resulted in pronounced appellate division with a minority of the Privy Council disagreeing “fundamentally” with the majority’s conclusion that the defendant’s trial was flawed but still fair. Framing this division but also highlighting it was a level of agreement across the Board upon the applicable principles. These, said Lord Carswell for the majority, required the Board “to examine closely what is meant by a fair trial in this context and the relationship between the right to a fair trial and the operation of the proviso.”

By reference to the Australian case of *Driscoll v R*, the majority considered that “not every irregularity or error in the conduct of a trial, even if it might constitute a miscarriage of justice for the purposes of an appeal under s 385(1) of the Crimes Act 1961, will ... suffice to make the trial unfair.” Otherwise, and borrowing the language of Barwick CJ from that case, “the basic intent of the court of criminal appeal provisions would be frustrated and the administration of the criminal law plunged into outworn technicality.” It followed that:

There may be errors in the course of a trial, whether relating to the admission of evidence or in legal rulings or in the terms in which the Judge sums up to the jury or in the conduct of the Judge or counsel, which while they can be described as giving rise to unfairness, do not constitute such grave irregularities and so undermine the integrity of the trial that it can be said that the accused was denied a fair trial.

However, Lord Carswell said the proviso could not be applied despite overwhelming evidence of guilt if the proceedings had “been so defective that there has scarcely been a trial at all”.

The majority then considered the decision of the Australian High Court in *Wilde v R* and its progeny of (incurable) fundamental error going to the root of the proceedings. Lord Carswell said that the Board agreed with the High Court’s “statements of the law” in that decision including the proposition that each case turned upon its own circumstances, so that, as with errors of a fundamental kind, it was the significance of the error “in the context of the trial” that determined whether a trial had

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305 [2001] 3 NZLR 577.
306 [2006] 1 NZLR 433 at [42] per Lord Rodger of Earlsferry and Sir Andrew Leggat.
307 Ibid at [33].
308 (1977) 137 CLR 517.
309 [2006] 1 NZLR 433 at [33].
310 (1977) 137 CLR 517 at 527. *Driscoll* was not about trial fairness, or more specifically, the interaction between the proviso and the right to a fair trial. Further, there Barwick CJ held at 527 that the inadmissible evidence, which included similar fact or propensity evidence, might have affected the verdict. *Driscoll*’s citation by the majority therefore appears out of place.
311 [2006] 1 NZLR 433 at [33].
312 Ibid.
been unfair. Such an approach, said Lord Carswell, was “not confined to jurisdictions with a constitutional provision similar to s 25 of the New Zealand Bill of Rights Act 1990” but was one that was shared by the common law. In other words, whether a trial was unfair so as to preclude the operation of the proviso was to be determined in a manner similar to whether an error was fundamental: a court must have regard to the totality of the circumstances of the trial with each case turning upon its own facts. In short, a contextual approach was required rather than one involving any “rigid formula.” Having identified this approach to the proviso in connection with trial fairness, the majority said that “the threshold for application of this principle needs to be kept high, if the operation of the proviso is not to be stultified.”

Applied to the facts, Lord Carswell accepted that the trial had been plagued by “undeniably very serious errors.” The majority said that a contextual approach required an assessment of what the trial would have been like without such error, so that:

It would have been proper to lead evidence that both girls had made recent allegations and that the authorities were about to investigate them, which provided a powerful motive for the appellant to silence them, very much stronger than any motive which could be attributed to Charlene Aplin. He had ample opportunity to commit the murders. His behaviour, the self-inflicted wounds and the false story which he told are heavily adverse to his case, and the jury may well have found unconvincing the explanation put forward for the blood on his trousers. Most damning of all was the accuracy of the description which he gave of the path of the knife wounds inflicted upon the victims, something he could not possibly have known if he had not inflicted them himself. Similarly, he described the pattern of the blood in a degree of accurate detail which supports the conclusion that he was present and observed it.

314 Ibid at [36] and [35] respectively.
315 Ibid at [36], a proposition augmented by reference to the Privy Council decision of Randall v R [2002] 1 WLR 2237, an appeal from the Cayman Islands, in which convictions for theft and fraud were quashed as the defendant’s trial had been rendered unfair by virtue of prosecutorial misconduct. Therein, Lord Bingham of Cornhill said that “not every departure from good practice” would make a trial unfair or else this “would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice”; ibid at [28]. However, Lord Bingham also recognised, ibid, that there would “come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty.” Similar sentiments were expressed by Lord Steyn in Brown v Stott [2003] 1 AC 681 at 708, namely that it is “a grave conclusion that a defendant has not had the substance of a fair trial. It means that the administration of justice has entirely failed.”
316 [2006] 1 NZLR 433 at [34], borrowing the language of the Australian High Court in Wilde.
317 Ibid at [37], citing Barwick CJ in Driscoll v R (1977) 137 CLR 517.
318 Ibid.
319 Ibid at [38].
It followed, considered the majority, that because the evidence of guilt was overwhelming and the jury would have received admissible evidence in any event that both girls had complained of sexual abuse:

... there was no realistic possibility that the jury would have felt it necessary to have recourse to the inadmissible evidence to be satisfied that the accused had murdered the two girls and they think that the evidence wrongly admitted cannot have carried any significant additional weight having regard to the other evidence.

Consequently, the Privy Council held that:

... the errors were not radical or fundamental enough, nor were they such a departure from the essential requirements of the law as to deprive the appellant of a proper trial within the context of the present enquiry. They were undoubtedly serious and regrettable, but their Lordships do not consider that they changed the direction of the trial or that the conviction was fundamentally flawed.

The minority's view of the principles concerning the interrelationship between the proviso and the right to a fair trial was similar to that of the majority. Lord Rodger of Earlsferry and Sir Andrew Leggatt accepted that “not every failure to observe the rules makes a trial unfair” and that even when “a mistake is not corrected, the trial will still be fair if, in all essential respects, it is the kind of trial which the law expects that an accused should have.” Conversely, their Lordships recognised “that some flaws are so bad that one can say that the accused has not had that kind of trial.” Obvious examples were ventured of a biased judge or jury or when “the accused is prevented from putting forward his defence.” Such errors by “their very nature ... inevitably deprive the accused of any real trial of the allegations against him.” But aside from such “extreme cases, what makes a trial unfair depends on the particular circumstances and raises questions of degree.” According to the minority and with Wilde v R seemingly in mind, the touchstone for an unfair trial was therefore whether there had been a “departure from the essential requirements of a trial according to law.

320 Ibid at [39].
321 Ibid at [40].
322 The one appreciable difference was that the minority saw no risk of the proviso being stultified by the threshold for an unfair being trial set too low, as Wilde anticipated a “high threshold” for this determination in any event; ibid at [54].
323 Ibid at [47].
324 Ibid at [48].
325 Ibid. These examples are very similar to those proffered by the United States' Supreme Court as the types of error that are incurable by the proviso, as to which see Arizona v Fulminante 499 US 279 (1991) at 310. The concept of constitutional structural error in North America is discussed shortly.
326 Ibid.
327 Ibid at [49].
[that] may well have gone to the root of the proceedings”. The minority
made explicit what the majority did not, namely that an unfair trial necessarily meant
that there had been an actual and substantial miscarriage of justice. It followed that the
“prerequisite for the application of the proviso - that there should have been no
substantial miscarriage of justice - is simply not met.”

Unlike the majority, Lord Rodger and Sir Andrew Leggatt thought that the Court
of Appeal had, in applying the proviso, “concentrated on the evidence against the
appellant as tending to prove his guilt and did not deal with the effect of the defects on
the fairness of his trial.” This meant the Board needed to consider the application of
the proviso afresh, because if the trial had been unfair, the defendant had suffered a
“substantial miscarriage of justice and, for that reason, the proviso cannot be applied.”

The minority held the trial had been unfair on the basis that the wrongful
introduction of the hearsay evidence of possible sexual abuse amounted to a
“fundamental or radical departure from the requirements of the law”. This was
because the hearsay evidence was unreliable and that evidence “lay at the very heart of
the strategy devised by the Crown for pinning the blame on the appellant”. Accordingly, the minority thought it “impossible to imagine a clearer example of a trial
that has gone off the rails” by the wrongful admission of dangerous and unreliable
evidence. Similarly, the minority concluded the jury must have relied upon this
evidence in reaching its verdicts given the “Crown's position at trial was that, in
deciding who killed the girls, they should have regard to it.” It followed that as
highly prejudicial and inadmissible evidence had been allowed to feature upon the
“central live issue at the trial”, the trial had been unfair and there had been “a
substantial miscarriage of justice.”

It is contended that the differences between the Howse majority and minority in
relation to trial fairness are at least threefold. First, each took a different view of the

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329 [2006] 1 NZLR 433 at [48].
330 Ibid at [50].
331 Ibid at [58].
332 Ibid at [59].
333 Ibid at [61].
334 Ibid at [63].
335 Ibid at [69].
336 Ibid at [68].
337 Ibid at [68] and [70] respectively.
338 Mathias says the majority’s decision represents “a misuse of pragmatism at the expense of
justice” because the majority applied the wrong test by considering what the trial would have
been like without the hearsay evidence. The correct approach, Mathias contends, was to
counter that the trial was like with that evidence. See D Mathias, “Proof, Fairness and the
Proviso” [2006] NZLJ 156 at 158. This criticism, which is the same as that made by the Howse
significance of the wrongful admission of the hearsay evidence in the context of the trial. Whereas the minority thought there was a "world of difference" between adding the complaints of sexual abuse as original evidence and using the same material as hearsay evidence, the majority saw the position in less absolute terms. Similarly, whereas the minority saw this evidence as being at the heart of the prosecution case, the majority thought it less central. Second, each reached a different conclusion upon whether the jury would have been influenced by the hearsay evidence. The minority thought as it implied "a powerful motive" for murder and the Crown had said so at trial, it was disingenuous to now suggest the jury had not placed great weight upon this evidence. Conversely, the majority considered that the fact of the complaints, and hence a legitimate use of the material as original evidence, would have provided a similarly powerful motive in any event. Equally, whereas the minority placed less emphasis upon the other admissible evidence of guilt in determining the probable effect of error, the majority thought that irrefutable evidence of guilt meant it was unlikely such error had actually affected the verdicts. Third, and fundamentally, whereas the minority placed less emphasis upon the appearance of justice as an aspect of the right to a fair trial, the majority emphasised the accuracy of the verdicts as confirmation the trial had been fair. In this way, the division in Howse mirrored the division in Griffin in that the appellate fault line demarcated procedural fairness and the appearance of justice on one side from substantive fairness and accuracy of result on the other.

D. Reflections upon Trial Fairness

The entrenched appellate conflict in Griffin and Howse suggests that in the absence of a manifestly unfair trial, such as one involving a biased judge or jury, the question of what constitutes an unfair trial and therefore error incurable by the proviso is largely a matter of value judgement infused by potentially competing ideas about what trial fairness entails. Moreover, in the absence of an analytical framework beyond the nebulous Australian concepts endorsed by the Privy Council such as ‘fundamental error’, error going to the ‘root of proceedings’ and departures from the ‘essential requirements of the law’, this phraseology serves to clothe rather than inform the adjudicative process in the determination of what renders a trial unfair. In short, value judgement rather than legal principle dominates this area.

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339 Ibid at [2006] 1 NZLR 433 at [56], is misplaced; the unusual thing about the case was that much of the sexual complaint evidence was admissible as original evidence so that the majority’s point – that the additional inadmissible sexual complaint evidence did not render the trial unfair in light of the other evidence of guilt – has considerable force.

340 Ibid at [64]. The majority thought a non-hearsay use of the same evidence was relevant and admissible to motive; ibid at [37] and [38].

341 Ibid at [38] and [39].

342 Ibid at [64]. And see also [64].

343 Ibid.
The small number of New Zealand developments since Howse suggests just that. For example, in R v Southon, inadmissible material was inadvertently included in the defendant’s video interview with Police, including reference to an earlier unrelated serious assault and an associated prison sentence. The material was prejudicial in light of the charge – murder – and the judge did not direct the jury to ignore these references. Having reviewed the common law developments above, the Court of Appeal said that it was “driven to conclude that the gravity and significance of the wrongly admitted evidence is such that the error must be said to be of a fundamental kind” so that the proviso was not applicable. The same conclusion was reached by the Court of Appeal in R v K in relation to that defendant’s trial representation. The Court held that as trial counsel failed to properly advise the defendant upon his election to testify, and in particular, the implications of the defence strategy upon that election, the case fell “on the ‘unfair trial’ side of the line” defined by Howse in light of Wilde. Conversely, in the recent Privy Council decision of Barlow v R, it was held that appellate identification that particular trial evidence had been misleading had not given rise to an unfair trial. Speaking for the Board, Lords Scott and Rodger said that “in their Lordships’ view, the introduction of the inaccurate evidence was not ‘such a departure from the essential requirements of the law that it [went] to the root of the proceedings’”.

As in R v K and R v Southon, this conclusion was reached with little discussion beyond reference to the authorities above and a recital of some of their language as seemingly determinative of the issue of trial fairness. However, the concepts discussed in Howse and Wilde do not, by themselves, provide any self-authenticating means for the resolution of trial fairness so that the limits of the proviso remain unclear. In light of this difficulty, it may be thought that the solution lies in a prescriptive formula for the identification of incurable error and a correspondingly rigid dichotomy between it and regular error. But as we shall see, the North American experience of the third category of incurable error, constitutional structural error, suggests otherwise.

V. NORTH AMERICA AND CONSTITUTIONAL STRUCTURAL ERROR

North American courts originally assumed that any violation of the constitution was necessarily incurable by the various harmless error statutes akin to our proviso. This

345 Ibid at [37].
347 Ibid at [55].
349 Ibid at [58]. As noted earlier, Lord Rodger of Earlsferry dissented in Howse.
350 For convenience, the terms proviso and harmless error are used interchangeably in this part of the chapter. As discussed in chapter two, North American courts were also victims of the Exchequer rule with the result that, at different times, the federal government and state governments enacted harmless error statutes akin to the New Zealand proviso. For example, Article VI § 13 of the Californian Constitution (2009) provides: “No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error
assumption took root because the Supreme Court never expressly adverted to the possibility of the proviso’s application in cases involving a constitutional breach, although equally, the issue was never the subject of formal adjudication by that Court. This changed in 1967 with the Supreme Court’s landmark decision in Chapman v California that some such errors were amenable to the proviso and over two decades of subsequent allied rulings extending the proviso’s reach to most constitutional violations. Then, in 1991 the Supreme Court announced that the controlling distinction in this area was constitutional structural error, so that only constitutional errors going to the structure of a trial were incurable by the proviso. This approach continues today. Here, we consider the concept of constitutional structural error and in particular its make-up, its relationship with curable constitutional error and the coherence of its analytical approach to the application of the proviso. In order to do so, it is first necessary to place constitutional structural error in the context of the Supreme Court’s approach to the proviso in cases involving constitutional infractions. The logical starting point is Fahy v Connecticut in 1963.

A. Fahy and Chapman: from Incurable Constitutional Error to Curable Constitutional Error

Fahy was convicted of wilful damage for painting swastikas on a synagogue after the incriminating brush and paint were discovered by an unlawful search in violation of the Fourth Amendment. The Connecticut Supreme Court of Errors affirmed the conviction on the basis that the state’s harmless error statute was applicable, in that the error had not “materially injured the appellant”. The Supreme Court, by majority, disagreed, but the case left open the possibility that constitutional errors could be harmless under the proviso. In particular, Warren CJ for the majority acknowledged that this required

as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”

While in Motes v United States 178 US 458 (1900) the wrongful admission of evidence contrary to the Sixth Amendment appears to have been treated as harmless error in relation to one defendant who confessed during his testimony, with the Supreme Court remarking at 476 that it would be “trifling with the administration of the criminal law to award him a new trial ... when in effect he has stated under oath that he was guilty”, the Court did not specifically invoke the proviso. Further, and notwithstanding this decision, commentators took the view that the proviso could not cure constitutional violations. For example, see Robert W Gibbs, “Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts” (1957) 3 Villanova Law Review 48. Until the 1960s the issue assumed little practical importance as the federal constitution had a limited reach upon state criminal trials. However, with the due process revolution of that period and its corresponding expansion of federal constitutional regulation of state procedures, the relationship between the proviso and the federal constitution assumed greater significance because of the increased potential for constitutional error in state criminal cases. See Yale Kamisar, Wayne R LaFave, Jerold Israel and Nancy J King, Modern Criminal Procedure, Cases Comments and Questions (11th ed, 2005) 1615.
future adjudication, observing it was "not now necessary for us to decide whether the erroneous admission of evidence obtained by an illegal search and seizure can ever be subject to the normal rules of 'harmless error'". The minority was less circumspect, observing that they would have dismissed the appeal upon the ground that the unconstitutional search was harmless error under the state proviso. Justice Harlan, joined by Clark, Stewart and White JJ, said it was "obvious that there is no necessary connection between the fact that evidence was unconstitutionally seized and the degree of harm caused by its admission." Instead, "harmless error turns not on the reasons for inadmissibility but on the effect of the evidence in the context of a particular case." It followed that as constitutional error might be less serious than non-constitutional error, the issue was not the type or source of error, but rather, its effect upon the proceedings. This set the stage for Chapman v California four years later and its ruling that some constitutional error was curable by the proviso.

In Chapman the defendants were convicted of robbing, kidnapping and then murdering a bartender. The prosecutor commented adversely upon their trial silence suggesting that it implied guilt. The practice was then permissible under Californian state law, but by virtue of the Supreme Court's decision in Griffin v California it contravened the state's obligations to the due process clause of the federal constitution by violating the right to silence enshrined in the Fifth Amendment. Despite this, the California Supreme Court upheld the convictions by applying the state proviso. It found that the defendants had not suffered a "miscarriage of justice" in terms of the state constitution. A majority of the Supreme Court disagreed, holding that "absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts". More importantly however, the Court, again by majority, rejected the defendants' argument that a violation of the federal constitution

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356 375 US 85 (1963) at 86, emphasis added.
357 Ibid at 94.
358 Ibid.
359 The Fahy minority did not suggest that all constitutional violations could be cured by the proviso, only that some were potentially so and that on the particular facts, this one should be.
360 368 US 18 (1967).
361 380 US 609 (1965). For the applicable state provision, see what was then Article I, § 13 of the California Constitution.
362 California Constitution, Article VI, § 4 ½.
363 368 US 18 (1967) at 26-27. Justice Harlan dissented, primarily because the Judge considered that state law determined whether the state had adequately responded to a federal breach. More importantly, the Judge said the majority's ruling "revives the unfortunate idea that appellate courts must act on particular errors rather than decide on reversal by an evaluation of the entire proceeding to determine whether the cause as a whole has been determined according to properly applicable law"; ibid at 49. In approaching error in this way, Harlan J said the majority had ignored the history of the proviso in light of the Exchequer rule, which involved treating "any error of substance [as] requir[ing] a reversal of conviction"; ibid at 48. Instead, the Judge said that "harmless-error rules concern, instead, the fundamental integrity of the judicial proceedings as a whole"; ibid at 50.
necessarily precluded the operation of the Californian proviso or like devices in other states. Chief Justice Warren explained why the Court declined to adopt such a rule: 364

All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." .... None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

The Court set an exacting test for a constitutional error to be cured by the proviso. A "court must be able to declare a belief that it was harmless beyond a reasonable doubt." 365 This standard was considered necessary as harmless error rules were capable of "very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." 366 Most significantly, while the Court accepted that some constitutional errors could be harmless, it did not identify either the constitutional errors in this category or an analytical means for determining them. Instead, and by reference to a single footnote, the majority merely referred to a handful of examples of trial error in which harmless error analysis would not be applicable, namely a biased judge, unconstitutional interference with the right to counsel and the admission of a coerced (and therefore inadmissible) confession. 367 Consequently, and other than by allusion to these examples, the Supreme Court provided no guidance concerning how appeal courts were to distinguish constitutional error amenable to the proviso from incurable constitutional error that was not.

B. Beyond Chapman: an Incremental Approach to the Proviso

For more than two decades after Chapman the Supreme Court approached the proviso's interaction with constitutional error in the absence of an over-arching methodology for demarcating the respective boundaries between curable and incurable error. Two features of this period and the Court's corresponding incremental approach stand out.

364 Ibid at 22, citation omitted. Justice Stewart joined the result while seeing no reason "to break with settled precedent" in which the Supreme Court had "steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless';" ibid at 45 and 42 respectively. The Judge also remarked that "constitutional rights are not fungible goods", so that "one source of my disagreement with the Court's opinion is its implicit assumption that the same harmless-error rule should apply indiscriminately to all constitutional violations"; ibid at 44-45. But as noted above, the majority did not conclude that all constitutional error was amenable to the proviso.

365 Ibid at 24.

366 Ibid at 22-23.

First, the Court held that most errors involving a constitutional violation were subject to the proviso. In this category were jury directions containing an erroneous conclusive presumption, the misstatement of an ingredient of the offence, an incorrect rebuttable presumption, the wrongful exclusion of evidence regarding a defendant’s account of a confession, interferences with a defendant’s right to be present at trial, improper comment upon the defendant’s silence at trial and the wrongful admission of evidence in violation of the Fourth Amendment. Moreover, in 1983 the Supreme Court declared that “most constitutional violations” were harmless. Three years later the Court went further. There was “a strong presumption” that the proviso could cure constitutional error other than cases involving a biased judge or jury or the wrongful denial of counsel. Conversely, the Court found as incurable error racial discrimination in the selection of a grand jury, the wrongful denial of the right to self-representation, interferences with the right to a public trial and the omission of an adequate jury direction upon the standard of proof.

Second, in the absence of an embracing methodology for the determination of incurable error, the Supreme Court struggled to remain consistent in its approach. On
occasions the Court said that the key consideration in this area was the ability of an appellate court to measure the harm of the error upon the accuracy of the result, so that if this could be objectively quantified, the error would be subject to the proviso. For example, in *Rose v Clark*, Powell J said for the majority:

The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'

The Judge distinguished this situation from a trial involving a biased judge or jury and hence incurable error because without "these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." It followed that the error, a jury direction in relation to malice containing an erroneous rebuttable presumption, did "not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction", particularly when the verdict was "correct beyond a reasonable doubt". Similarly, in *Vasquez v Hillery*, which involved racial discrimination in the selection of the grand jury, the Court held that when


Ibid at 577-578.

Ibid at 579 and 580 respectively. Justice Stevens concurred, although the Judge expressed reservations about the proposition that incurable error was founded upon "concerns about reliability and accuracy"; ibid at 587. Instead, the Judge thought that the violation of certain constitutional rights, such as the right to an impartial finder of fact, were incurable even though they were "unrelated to the truth-seeking function of the trial"; ibid. Similarly, the Judge said that the admission of a coerced confession would give rise to an incurable error "even though the basic trial process was otherwise completely fair and the evidence of guilt overwhelming"; ibid at 588. This was because the American "Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination"; ibid. An undue focus upon reliability as the touchstone for incurable error therefore risked "a corrosive impact on the administration of criminal justice"; ibid.

“constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm.” 387 In other cases, the Supreme Court repudiated this approach in recognition of the importance of more abstract constitutional values. For example, in Waller v Georgia 388 a week of pre-trial argument was held in camera in contravention of the various defendants’ right to a public trial under the Sixth Amendment. The Court held that this constitutional breach was incurable by the proviso for while “the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real.” 389 Similarly, in McKaskle v Wiggins, 390 a case about the right of self-representation, the Court considered that measurement of harm as the test for curable error was inapposite. This was because as the right of self-representation was “a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to ‘harmless error’ analysis.” 391 Instead, the right was “either respected or denied; its deprivation cannot be harmless.” 392 This brings us to constitutional structural error and the genesis of the doctrine in 1991 in Arizona v Fulminante. 393

C. Fulminante: the Emergence of Constitutional Structural Error

Oreste Fulminante was convicted of the brutal murder of his stepdaughter following a trial in which the jury received evidence he had confessed to a paid informant while the two men were in prison. The Arizona Supreme Court later held that the confession was involuntary: the informant had approached the defendant and offered his protection from fellow inmates in return for the defendant telling him about the killing. The latter then admitted choking and sexually assaulting the victim before shooting her twice in the head and dumping her body in the desert. The Arizona Supreme Court also held that the admission of this type of evidence could not be cured by the proviso, a view expressed by the United States’ Supreme Court in Chapman but not the subject of its ruling. That Court granted certiorari because of subsequent and “differing views in state and federal courts over whether the admission at trial of a coerced confession is subject to harmless-error analysis”. 394 A majority of the Supreme Court held that it was, and in so doing, promulgated the concept of constitutional structural error incurable by the proviso.

387 Ibid at 263.
389 Ibid at 50, footnote 9.
391 Ibid at 177, footnote 8.
392 Ibid.
394 Ibid at 284-285.
Chief Justice Rehnquist, joined by O'Connor, Kennedy, Souter and Scalia JJ, held that there was a distinction between regular constitutional error that was curable by the proviso and structural constitutional error that was not. This former class of error, which was described as "trial error", was "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." This class of error respected "the belief that the harmless-error doctrine is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence" thereby promoting "public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error."

Conversely, constitutional structural error concerned "structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards." Error of this nature, it was said, affected "the entire conduct of the trial from beginning to end." Drawing upon the Court's pre-Fulminante case law, the majority gave as examples of structural error the wrongful denial of representation, a biased presiding judge, the unlawful exclusion of members of the defendant's race from a grand jury, interference with a defendant's right to self-representation and violation of the right to a public trial. Common to these constitutional errors was a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Or as it was also put, errors of this nature meant that a criminal trial could not "reliably serve its function as a vehicle for determination of guilt or innocence" so that any resulting punishment would be "fundamentally unfair".

The division between structural error and regular trial error was also said to explain the Court's post-Chapman jurisprudence in relation to the applicability of the proviso. Accordingly, those cases in which the error had been amenable to the proviso were connected by the "common thread" that each had involved error during the

395 Ibid at 307-308.
396 Ibid at 308.
397 Ibid at 309.
398 Ibid at 310.
400 Tumey v Ohio 273 US 510 (1927).
401 Vasquez v Hillery 474 US 254 (1986).
404 Ibid.
405 Ibid.
presentation of the case to the jury and which could therefore be quantitatively assessed in the context of the other admissible evidence to determine whether the error was harmless beyond reasonable doubt. Similarly, structural error was said to explain the cases above in which the proviso had been found to be inapplicable to violations of a constitutional nature.

Turning to the facts, the majority held that the wrongful admission of an involuntary confession in violation of the Fifth and Fourteenth Amendments belonged in the category of regular constitutional trial error rather than constitutional structural error. This was because:

The evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment – of evidence seized in violation of the Fourth Amendment – or of a prosecutor’s improper comment on a defendant’s silence at trial in violation of the Fifth Amendment.

Moreover, the majority said the admission of an involuntary confession was not the “type of error which ‘transcends the criminal process’” and that the Court had applied the proviso “to the violation of other constitutional rights similar in magnitude and importance and involving the same level of police misconduct.” It followed that as “with the admission of other forms of improperly admitted evidence”, error of this type merely required the appellate court to assess the remainder of the evidence to determine whether the admission of the confession was harmless beyond reasonable doubt.

In reaching this conclusion, it was acknowledged that while the admission of such evidence could be “devastating to a defendant”, this did not warrant the conclusion the error was therefore of a structural nature. Instead, “this simply means that a

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406 Ibid at 307. For the list of cases within this category; see ibid at 306-307.
407 Ibid at 309-310.
408 Ibid.
409 Ibid.
410 Ibid at 411. The majority judgment is silent upon whether the notion of an error that “transcends the criminal process” is synonymous with constitutional structural error, a touchstone for identifying such error or some other category of incurable constitutional error. Further, the majority’s use of speech marks for the phrase is not associated with any case citation. Unsurprisingly, commentators are divided on how this aspect of the judgment should be interpreted. Lorenger and Olgetree say that this represents another category of incurable constitutional error whereas Faehnrich suggests the phrase is synonymous with constitutional structural error. See M J Lorenger, “Ake v Oklahoma and Harmless Error: The Case for a Per Se Rule of Reversal” (1995) 81 Virginia Law Review 521 at 540; C J Olgetree Jr, “Arizona v Fulminante: The Harm of Applying Harmless Error to Coerced Confessions” (1991) 105 Harvard Law Review 152 at 162 and D M Faehnrich, “The ‘Harm’ in the Application of the ‘Harmless Error’ Doctrine to the Constitutional Defect in Re CP” (1999) 44 South Dakota Law Review 340 at 379, footnote 240. It is suggested Faehnrich’s view is the better one because the notion of error transcending the criminal process has not appeared in subsequent judgments of the Supreme Court and it seems unlikely that the Court would create a new category of incurable error only to then discard it.
411 Ibid at 310.
412 Ibid at 312.
reviewing court will conclude in such a case that its admission was not harmless error; it is not a reason for eschewing the harmless-error test entirely."\(^{413}\)

Justice White, joined by Marshall, Blackmun and Stevens JJ, dissented on both the trial/structural error dichotomy and the applicability of the proviso to the reception of an involuntary confession. The minority said that the Court’s new scheme could not “neatly” explain its earlier jurisprudence in which a failure to direct the jury upon the presumption of innocence had been held to be amenable to the proviso, whereas a similar failure to direct the jury upon the standard of proof had not.\(^{414}\) As the dissent noted, these cases “cannot be reconciled by labeling the former ‘trial error’ and the latter not, for both concern the exact same stage in the trial proceedings.”\(^{415}\)

In rejecting the applicability of the proviso to the admission of an involuntary confession, the minority noted the signal importance of values beyond the “search for truth” in the criminal justice process.\(^{416}\) Accordingly, while such a notion was “indeed central to our system”, it remained the position that “certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial.”\(^{417}\) The use of an involuntary confession was seen as being among these rights because “using a coerced confession ‘aborts the basic trial process’ and ‘renders a trial fundamentally unfair.’”\(^{418}\) In reaching this conclusion, the minority noted that being forced to incriminate oneself was fundamentally inconsistent with the constitution’s protection of both the right against self-incrimination and the right to a jury trial. Or as White J succinctly put it: “ours is not an inquisitorial system of criminal justice.”\(^{419}\) This aspect and the overwhelmingly prejudicial effect of an involuntary confession were held to compel the conclusion that the proviso could not cure an error of this nature.\(^{420}\)

In summary, in *Fulminante* a majority of the Supreme Court recognised the concept of constitutional structural error or error involving a constitutional violation that affected the framework of the trial – and hence the entire conduct of the trial – so precluding a criminal appeal court from engaging in a quantitative assessment of the

\(^{413}\) Ibid.

\(^{414}\) Ibid at 291 referring to *Kentucky v Whorton* 441 US 786 (1979) and *Jackson v Virginia* 443 US 30 (1979) respectively.

\(^{415}\) Ibid. The minority did, however, acknowledge that the omission of a direction on the standard of proof “distorts the very structure of the trial because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof”, a point rather underscoring the majority’s analysis; see ibid.

\(^{416}\) Ibid.

\(^{417}\) Ibid at 295.

\(^{418}\) Ibid at 295.

\(^{419}\) Ibid at 293-294.

\(^{420}\) Ibid at 290.
error's impact upon the reliability of the verdict.\textsuperscript{421} Further, by establishing structural error as the single uniform criterion for the determination of error incurable by the proviso, the Supreme Court seemingly abandoned its patchwork of hitherto incremental approaches. Despite this, the \textit{Fulminante} minority's reservations about the neatness of the trial/structural error scheme and its foreclosure of considerations beyond the search for truth foreshadowed three problems with structural error's contribution to the jurisprudence of the proviso. First, the distinction between trial error and structural error is arguably one of degree rather than kind in light of the elusive boundary between error affecting an aspect of the trial and error going to a trial's framework. This dichotomy, which was supposed to be rigid and controlling in demarcating incurable error, is therefore of questionable utility in this area. Second, the central premise of structural error, namely that error affecting the framework of a trial causes immeasurable harm to the outcome of the proceedings, does not necessarily explain why certain constitutional violations are beyond the application of the proviso. Third, by focusing exclusively upon the reliability of the proceedings' outcome, structural error struggles to provide an all-embracing theory to the proviso's interaction with incurable error. These points, it is suggested, emerge from the Supreme Court's three principal harmless error decisions since \textit{Fulminante}; \textit{Sullivan v Louisiana}\textsuperscript{422} in 1993, \textit{Neder v United States}\textsuperscript{423} in 1999, and \textit{United States v Gonzalez-Lopez}\textsuperscript{424} in 2006.\textsuperscript{425}

\textbf{D. Post-Fulminante and the Problems of Structural Error}

In \textit{Sullivan v Louisiana}\textsuperscript{426} the judge gave a jury direction upon the standard of proof that the prosecution conceded was constitutionally inadequate. This led the Supreme Court to inquire "whether a constitutionally deficient reasonable-doubt instruction may be harmless error." In a unanimous decision delivered by Scalia J, the Court held it could not. The Court reasoned that as the Fifth and Sixth Amendments required a jury verdict in which guilt had been proved beyond reasonable doubt and the judge's direction breached the Fifth Amendment in terms of the standard of proof, there had been "no

\textsuperscript{421} While \textit{Fulminante} and its progeny do not explicitly state that the reliability of a verdict is affected whenever error attaches to the framework of the trial, the jurisprudence appears to take this view. In \textit{United States v Gonzalez-Lopez} 548 US 140 (2006) at 159, however, Alito J suggested that an error could affect the framework of the trial without causing such harm so that it would not be (incurable) structural error.

\textsuperscript{422} 508 US 275 (1993).

\textsuperscript{423} 527 US 1 (1999).

\textsuperscript{424} 548 US 140 (2006).

\textsuperscript{425} The Supreme Court's discussion of structural error in \textit{Johnson v United States} 520 US 641 (1997) was obiter dictum and in \textit{Washington v Recuenco} 548 US 212 (2006) the Court applied its decision in \textit{Neder v United States} 527 US 1 (1999) to conclude the sentencing error (in relation to proof of aggravating facts) was not structural. Other cases discussing structural error such as \textit{Rivera v Illinois} 129 S Ct 1446 (2009) turn upon the interaction between state and federal law. The three cases in the text are therefore the most relevant. For the impact of structural error on North American intermediate courts of appeal, see D McCord, "The "Trial'/"Structural' Error Dichotomy: Erroneous, and Not Harmless" (1997) 45 Kansas Law Review 1401 at 1429-1454.

\textsuperscript{426} 508 US 275 (1993).
jury verdict of guilty-beyond-a-reasonable-doubt” and “no jury verdict within the meaning of the Sixth Amendment”.427 This meant the proviso could not apply, because there was no constitutional verdict upon which the proviso could operate. Or as it was put: “There is no object, so to speak, upon which harmless-error scrutiny can operate.”428 In reaching this conclusion, the Court also held that the error amounted to structural error in terms of Fulminante. This was because the constitutional violation affected the right to a jury trial and that such a right was “a ‘basic protection’ whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function”.429 Further, as a breach of the jury trial guarantee gave rise to “consequences that are necessarily unquantifiable and indeterminate”, the violation “unquestionably qualifies as ‘structural error.”430

Chief Justice Rehnquist concurred while expressing “lingering doubts” about the Court’s reasoning.431 The Judge pointed out that the case was similar to Rose v Clark432 in which a direction wrongly placing the burden of proof upon the defendant in relation to criminal intent had been held to be amenable to the proviso. There, while the jury had been wrongly instructed to presume malice from certain facts, the jury had been correctly directed to find those facts beyond reasonable doubt. That situation was seen as permitting the proviso’s application because the jury had rendered a constitutional verdict. However, as the Chief Justice observed, the difference between the two cases was largely one of degree and structural error was supposed to represent something altogether more profound. For example, the error did not involve judicial bias or the denial of counsel thereby immeasurably effecting the framework of the trial.433 Moreover, the Judge noted that while it could be said that the infringement of the jury trial guarantee gave rise to error of a structural nature, most instances of the proviso’s application necessarily entailed “some speculation as to the jury’s decisionmaking process; for in the end no judge can know for certain what factors led to the jury’s verdict.”434 In other words, determining if a jury would have found guilt proved beyond reasonable doubt was little different from determining how a jury might have reasoned, absent serious trial error, a technique commonly employed in the proviso’s application. Accordingly, Rehnquist CJ considered that treating the error as structural did not sit easily with the orthodox application of the proviso in circumstances in which the difference between the presence and absence of a constitutional verdict, and hence the boundary between regular error and structural error, was largely one of degree.

427 Ibid at 280.
428 Ibid at 281.
429 Ibid.
430 Ibid.
431 Ibid at 284.
432 478 US 570 (1986).
433 Ibid at 283.
434 Ibid at 284.
These difficulties became more apparent in *Neder v United States*. The defendant was convicted of various frauds of which it was an ingredient that there had been misrepresentation of a material fact. The judge omitted to direct the jury that they had to find the materiality of the relevant facts proved beyond reasonable doubt so that this ingredient was never the subject of the jury’s verdicts. The available evidence on the issue was, however, overwhelming. In light of that, the United States Court of Appeals for the Eleventh Circuit applied the proviso. In the Supreme Court, the defendant contended that this error was structural so that the proviso’s application was precluded. The Court divided upon this issue and the applicability of the proviso more generally. Chief Justice Rehnquist, joined by O’Connor, Kennedy, Thomas, and Breyer JJ, held that the error was analogous to those cases in which there had been an error of either misdescription or misdirection in relation to a single ingredient of the offence so that, as in those cases, the absence of a complete verdict was not incompatible with the proviso. And distinguishing *Sullivan v Louisiana*, the majority noted that the instant error did not vitiate all of the jury’s findings. It was therefore amenable to the proviso. The majority also considered that a jury direction omitting an ingredient of the crime differed “markedly” from structural error because the entire process or framework of the trial was not affected by the error. Unlike error such as the “deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” This conclusion was seen as counting “against the argument that the omission of an element will always render a trial unfair.” As the defendant’s trial was substantively fair, the error was therefore not structural: “Neder was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel; [and] a fairly selected, impartial jury was instructed to consider all of the evidence” in respect of Neder’s defence.

In dissent, Scalia J, joined by Souter and Ginsburg JJ, saw the error as undoubtedly structural, for the Constitution’s requirement of a jury verdict on all ingredients of the offence represented the “spinal column of American democracy.” This was because the “Constitution does not trust judges to make determinations of

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437 Ibid at 10-11.
438 Ibid at 8-9.
439 Ibid at 9, emphasis in original. The majority’s reference to fundamental fairness as an apparent touchstone of structural error echoes the language of the Australian High Court in relation to that Court’s fundamental error jurisprudence, a point underscored by the minority’s recognition in *Neder* that structural error could be context-specific and thus discoverable only by fact-intensive inquiry. Unlike Australian fundamental error, however, structural error is a species or type of error rather than a conclusion about error largely shaped by circumstance and context.
440 Ibid at 9, emphasis in original.
441 Ibid.
442 Ibid at 31.
criminal guilt”, absent waiver of the right to jury trial. It followed, the minority said, that it was not within the power of any court to review the facts and effectively deliver a verdict on an ingredient of the offence that was never so-returned at first instance.

The overwhelming nature of the evidence on the issue did not affect the conclusion the error was structural. The “very premise of structural-error review is that even convictions reflecting the ‘right’ result are reversed for the sake of protecting a basic right.” Or as the dissent also put it: “[the] amount of evidence against a defendant ... while relevant to determining whether a given error was harmless, has nothing to do with determining whether the error is subject to harmless-error review in the first place.” And in relation to structural errors more generally, the minority observed that some such errors, “like the complete absence of counsel or the denial of a public trial, are visible at first glance”, whereas others, “like deciding whether the trial judge was biased or whether there was racial discrimination in the grand jury selection, require a more fact-intensive inquiry.” The error in issue was said to be in the former category given the profound importance associated with the right to jury trial and the impairment of that right by virtue of the absence of a verdict touching upon all ingredients of the offence.

Sullivan and Neder suggest that the dichotomy between error going to the structure of a trial and regular trial error is more malleable and ambiguous than the scheme anticipated by Fulminante. In Sullivan the absence of a constitutionally adequate direction upon the standard of proof was seen as going to the framework of the trial so that the error was structural, whereas in Neder, the absence of a verdict upon an ingredient of the offence was seen as affecting only an aspect of the trial so that the error was regular trial error. This distinction is rather fine. In both cases at least an ingredient of the respective offences had not been the subject of a properly-directed jury verdict so that any difference between the two was essentially one of degree. Or as Scalia J put it in Neder, if denying the right to conviction by a jury is structural error, then why should “taking away one of the elements ... be treated differently from taking away all of them”? Moreover, as Neder involved a failure to deliver a verdict upon

443 Ibid at 32.
444 Ibid.
445 Ibid at 34.
446 Ibid. The dissent also considered that as the trial judge had usurped the jury’s function by finding against the defendant on the materiality point, thereby precluding a verdict on that issue, the majority had engaged in a “repetition of the same constitutional violation by ... making the determination of criminal guilt reserved to the jury”; ibid at 32.
447 Ibid at 37.
an actual ingredient of the offence whereas Sullivan involved only a misdirection upon the standard or proof, it could be argued that the two results were wrongly transposed. It is therefore awkward to distinguish the two cases on the basis that Neder involved error only affecting an aspect of the trial whereas Sullivan involved error affecting the entire trial. And while it could be said that this implies only that one case was wrongly decided, few errors are so cleanly divisible in their effect as Fulminante appears to suggest. For example, most jury directions on general matters of law could be treated as affecting the framework or structure of the trial, for that is how they are intended to operate, and yet structural error was intended to provide only a narrow exception to the rule that most errors are subject to the proviso. So how then does one define the framework or structure of the trial in contrast to error going only to a discrete aspect of it?

The final decision of United States v Gonzalez-Lopez is similarly illustrative. In Gonzalez-Lopez the defendant's counsel of choice was wrongly precluded from acting at trial in circumstances in which the prosecution conceded amounted to an interference with the Sixth Amendment right to counsel. The United States Court of Appeals for the Eighth Circuit quashed the conviction for controlled drugs offending on the basis that such a constitutional violation was incurable by the proviso. A majority of the Supreme Court agreed. Justice Scalia, joined by Stevens, Souter, Ginsburg and Breyer JJ, considered that while the Sixth Amendment protected a fair trial, it did not follow that the right could be disregarded so long as the trial was, on the whole, fair. Instead, the right required that the trial be fair in a particular way, "to wit, that the accused be defended by the counsel he believes to be best." The majority said the error was "unquestionably" structural error because:

Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

Consequently, given the above "myriad aspects of representation, the erroneous denial of counsel bears directly on the 'framework within which the trial proceeds,' or indeed on whether it proceeds at all." As it was impossible to know what decisions counsel of choice would have made and how those choices would have affected the case, the application of the proviso would involve "a speculative inquiry into what might have occurred in an alternate universe."

In dissent, Alito J, joined by Roberts CJ, Kennedy and Thomas JJ, considered that the Sixth Amendment protected the assistance that counsel of choice was able to

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451 Ibid at 146.
452 Ibid at 150.
453 Ibid, citations omitted.
454 Ibid.
provide so that if "the erroneous disqualification of a defendant’s counsel of choice does not impair the assistance that a defendant receives at trial, there is no violation of the Sixth Amendment." The minority similarly rejected the finding of structural error and hence the inapplicability of the proviso because:

Fundamental unfairness does not inexorably follow from the denial of first-choice counsel. The decision to retain a particular lawyer is ‘often uninformed,’ a defendant's second-choice lawyer may thus turn out to be better than the defendant's first-choice lawyer. More often, a defendant’s first and second-choice lawyers may be simply indistinguishable.... Fairness may not limit the right, but it does inform the remedy.

The dissent also characterised the majority’s use of structural error analysis as “misleading” on the basis that Fulminante did not hold that every error affecting the framework of the trial was necessarily structural. Instead, the “touchstone of structural error is fundamental unfairness and unreliability.” This was why structural error was incurable by the proviso, or as Alito J put it: “Automatic reversal is strong medicine that should be reserved for constitutional errors that ‘always’ or ‘necessarily’ produce such unfairness.”

Although the Gonzalez-Lopez majority found that the error was structural as it had an unquantifiable effect on the outcome of the proceedings, it is suggested this conclusion is more compatible with a case in which a defendant did not have counsel rather than one involving state interference with the choice of counsel. The distinction between counsel of choice representing a defendant and a different lawyer doing so is surely one of fact and degree, whereas the complete absence of representation due to a constitutional violation may be thought to be error of a different order in light of the benefits that representation is presumed to confer upon a defendant facing a serious criminal charge.

Gonzalez-Lopez is also illustrative of the second problem confronting the concept of structural error in that while most errors besetting criminal appeal courts are distinguishable only in terms of degree, the balance of error, which is altogether more fundamental, is not necessarily explained by the key premise of structural error that such error involves immeasurable harm to the reliability of the proceedings' outcome. Taking the case as an example, what if it were known that the defendant's counsel of choice was both inexperienced and ineffective in contrast to the lawyer who represented him at trial? In such circumstances, could it still be said that there had been harm, let alone immeasurable harm, to the outcome of the trial? Or to take the example frequently offered by the Supreme Court as a paradigm one of structural error, that is, a biased judge, is it necessarily the case that such a feature causes unquantifiable harm to the reliability of the verdict?

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455 Ibid at 153.
456 Ibid at 158.
457 Ibid at 159. Fulminante, however, does imply that errors affecting the framework of the trial necessarily affect the result of the trial.
458 Ibid, citations omitted.
459 The example of a biased judge as structural error was first given in Arizona v Fulminante 499 US 279 (1991) at 309 citing Tumey v Ohio 273 US 510 (1927). Tumey, which concerned an Ohio mayor who could be paid for his services as a judge only if he convicted those before him, was
directions were in accordance with the law but bias was evidenced in another way, namely the judge’s out-of-court remarks? In such a situation it is the grave appearance of injustice that mandates that the proceedings’ outcome cannot be respected. However, and as we have seen, the concept of structural error under *Fulminante* is not concerned with the importance of the appearance of justice or indeed any matter beyond the parameter of the framework of the trial; instead, it is concerned only with those errors that immeasurably affect the reliability of a verdict.

This leads us to the third difficulty with the concept of structural error. By looking only to those errors that affect the reliability of the outcome of proceedings, other important values such as the appearance of justice remain unconsidered thereby compromising structural error’s viability as an all-embracing theory of the proviso’s interaction with incurable error. This was the minority’s point in *Fulminante*; other values deserve protection beyond (and perhaps in spite of) the search for truth. But it was also the minority’s point in *Neder* that irrespective of the evidence against the defendant on the materiality ingredient, only a jury could determine that ingredient in light of the constitutional allocation of responsibilities as between judge and jury. It followed that the issue was not the reliability of the verdict but the more fundamental one of whether the jury had actually returned a verdict in accordance with the constitution. Ironically, the concept of structural error cannot explain the majority’s conclusion in *Gonzalez-Lopez* that an interference with counsel of choice impaired the framework of the trial and in turn the reliability of its outcome. The better explanation for the decision is that as in *McKaskle v Wiggins*, a case discussed earlier about the right of self-representation, the measurement of harm was seen as the wrong test for incurable error in light of the nature of the right in issue: the unfettered choice of representation. Structural error’s narrow focus may therefore explain why the concept was offered only as an alternative means of analysis in the Supreme Court’s principal

earlier cited as an example of incurable error in *Chapman v California* 368 US 18 (1967) at 23, footnote 8.

As Wicht puts it: “even more problematic in the trial versus structural error framework is the incorrect assumption that a reviewing court’s only concern is whether the error can be ‘quantified’. Indeed, the common bond shared by all Constitutional rights is their significance in our system of justice.” See J E Wicht III, “There is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal” (1997-1998) 12 BYU Journal of Public Law 73 at 85. Ogletree makes the related point that if accuracy is the overriding value, most errors can be quantified so that everything is potentially amenable to the proviso. See C J Ogletree Jnr “Arizona v Fulminante: The Harm of Applying Harmless Error to Coerced Confessions” (1991-1992) 105 Harvard Law Review 152 at 165. These criticisms must be tempered by an acknowledgment that to date, the trial/structural error scheme is the only one proffered by a senior common law court as a unified theory of constitutional incurable error.

Carter says that American appeal courts have “diminished the significance of constitutional violations and shifted the emphasis from the fairness of the process to the correctness of the result” resulting in “usurpation” of the jury’s fact-finding role in violation of the constitution. See L E Carter, “The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court’s ‘No Harm, No Foul’ Debacle in *Neder v United States*” (2000-2001) 28 American Journal of Criminal Law 221 at 230. But this contention, which presupposes that the jury is the exclusive finder of fact in the trial process, ignores the role of both trial judges and criminal appeal courts in supervising jury verdicts. Moreover, as discussed in chapter three, appellate fact-finding pursuant to the proviso is not necessarily incompatible with the jury-trial system.

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post-Fulminante decisions above. Accordingly, despite the suggestion in Fulminante that structural error could provide a single uniform criterion for the determination of incurable error, structural error has been and continues to be but one approach in delimiting the application of the proviso in cases involving a violation of the federal constitution.

VI. CONCLUSION

It is clear that the common law courts have imposed limitations upon the type of error amenable to the proviso’s relief notwithstanding any such limitations in the proviso’s statutory language. These limitations, as we have seen, comprise three overlapping error types: fundamental errors that vitiate criminal proceedings, unfair trials and constitutional violations going to the structure of a trial. Less clear, however, are the principles that determine whether error comprises one of these types, with the result that the limits to the proviso’s application remain vague. This situation was first evident in England by about the middle of last century and so long before the proviso was there repealed in 1995.463 While the English courts recognised the notion of incurable error, they made no corresponding attempt to identify a conceptual approach for distinguishing such error from regular error amenable to the proviso. The result was both the absence of guiding principles in this area and a related body of unshaped jurisprudence. In this respect, the English position represents something of a common law template, for this situation has since been replicated in both Australia and New Zealand.

In Australia, the home of the first identifiable category of incurable error, fundamental error, the absence of an analytical framework for the determination of such error has given rise to an arbitrary jurisprudence without obvious pattern. Although fundamental error is based upon the proposition that a trial has certain sacrosanct features, no attempt has been made to identify what these features are. In New Zealand, while it is clear that the proviso cannot cure an unfair trial, the second category of incurable error, contestable value judgements rather than clear legal principles dominate this area. The result has been sharp appellate division. Further, while our recent adoption of fundamental error has introduced fresh nomenclature to this area, this has not resulted in the establishment of more lucid guiding principles for the determination of an unfair trial. The proviso’s limits therefore remain abstract.

Unlike other jurisdictions, the United States of America has attempted to create a unified theory of incurable error grounded in federal constitutional violations after a long period of incrementalism. Regrettably, however, the resulting third category of incurable error, structural error, has not brought better definition to the proviso’s limits. This, as we have seen, is because the distinction between structural error and regular trial error is problematic and because the concept is also insufficiently nuanced to reflect the competing values underlying the criminal justice system. Structural error there operates as but one approach to the identification of error that is incurable by the proviso despite its seemingly universal applicability.

In making these observations, the difficulty of the courts’ task is acknowledged. A coherent approach to this area must be sufficiently nuanced so as to balance the

463 See the Criminal Appeal Act 1995 (UK), s 2.
criminal justice system's competing values and yet sufficiently prescriptive so that the proviso's boundaries are consistently demarcated.\textsuperscript{464} Overall, the jurisprudence of England, Australia and New Zealand has achieved the former at the expense of the latter while that of North America has probably done the reverse. A principled approach to the proviso, however, requires both.

\textsuperscript{464} This probably best explains why this is an area "strewn with judicial disagreement"; see \textit{Hembury v Chief of General Staff} (1998) 193 CLR 641 at [62] per Kirby J.
CHAPTER FIVE

PUTTING IT ALL TOGETHER: A PRINCIPLED APPROACH TO THE PROVISO

I. INTRODUCTION

As we have seen, the proviso poses particular difficulties for courts of criminal appeal. The first concerns the conceptual basis for the proviso’s application: is it the error-impact approach, the guilt-based approach or some amalgam of both? Second, the extent of a criminal appeal court’s fact-finding function in light of Weiss v R¹ and Matenga v R.² Third, the vagaries of incurable error and the identification of an analytical framework for distinguishing it from its curable counterpart. And fourth, the tension between the proviso and the grounds of appeal – and the means of resolving it. A principled approach to the proviso must address these issues while aiding a construction that conforms with the statutory text and purpose. In this chapter we outline just such an approach.

The solution to the first issue resides in the error-impact and guilt-based approaches being treated as sequential inquiries under the proviso, with each being applied in accordance with the criminal standard of proof. The second difficulty can be resolved by reconfiguring the role of a criminal appeal court role with a broadened discretion to hear evidence in relation to the proviso’s guilt-based limb. The third issue, the seemingly intractable one of incurable error, requires a fresh multi-factorial approach that balances the legislative imperatives of the proviso with the concerns posed by serious error. As we shall see, these responses to the first three issues would also settle the fourth as well as giving effect to the statutory text.

II. RECONCILING THE GUILT-BASED AND ERROR-IMPACT APPROACHES

The omission of a legislative prescription for the application of the proviso has meant that courts have had to consider for themselves how they should determine whether a defendant has suffered a substantial miscarriage of justice. Here, as elsewhere, two different approaches have emerged: the guilt-based approach and the error-impact approach. As we have seen, our courts have oscillated between both, resulting in conceptual confusion, as illustrated by R v Mei,³ as well as an associated ambiguity about which approach, if either, assumed precedence. Plainly, however, the application of the proviso should not be a matter of judicial preference by which either test may be adopted according to inclination; the issue is therefore whether the proviso mandates one approach over another and if not, how the two may be synthesised in an overarching framework. In both respects, the North American experience and developments in New Zealand since Mei are instructive.

¹ [2005] 224 CLR 300.
² [2009] 3 NZLR 145.
It will be recalled that in *Kotteakos v United States*\(^4\) the Supreme Court finally rejected the guilt-based approach in favour of the error-impact approach to harmless error. The Court’s rationale was clear; it was “not the appellate court’s function to determine guilt or innocence” as such “judgments are exclusively for the jury”.\(^5\) Instead, an appellate court was to consider the record and dismiss an appeal only when it was “sure that the error did not influence the jury, or had but very slight effect”.\(^6\) This view could be adopted here in the sense that nothing in the text of s 385(1) of the Crimes Act 1961 specifically precludes it. Other matters, however, tell against it. First, and as discussed in chapter two, subsequent North American jurisprudence continues to disclose the operation of the guilt-based approach to harmless error.\(^7\) While this is not a principled reason for rejecting *Kotteakos*, it does suggest that the decision is not the foundation for a stable common law in relation to the proviso. Second, and more importantly, the decision of the New Zealand Supreme Court in *Matenga v R*\(^8\) rejects the premise upon which *Kotteakos* is based, namely that appellate fact-finding is inconsistent with the system of trial by jury. As we saw in chapter three, *Matenga* holds that while “the jury is in general terms the arbiter of guilt in our system of criminal justice”, the “very existence of the proviso demonstrates that Parliament intended the judges sitting on the appeal to be the ultimate arbiters of guilt in circumstances in which the proviso applies.”\(^9\) Moreover, and as has been argued earlier, our Supreme Court was correct to reach this conclusion. Third, it is contended that, providing a trial has been fair, indisputable evidence of guilt should permit the dismissal of an appeal upon the basis that the public interest justifies the conclusion that there has been no substantial miscarriage of justice. Or, as it has been put by the Canadian Supreme Court, “depriving the accused of a proper trial” when there is overwhelming evidence of guilt “is justified on the ground that the deprivation is minimal when the invariable result would be another conviction.”\(^10\) In short, the guilt-based approach is conceptually sound.

An alternative would be to insist that the error-impact approach be discarded in favour of the guilt-based approach, leaving the latter as the unitary means for the proviso’s application. But this, it is suggested, is to throw the baby out with the bath water. Cognate jurisdictions such as Canada,\(^11\) Australia\(^12\) and the United States of

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\(^4\) 328 US 750 (1946).

\(^5\) Ibid at 763-764.

\(^6\) Ibid at 764.


\(^8\) [2009] 3 NZLR 145.

\(^9\) Ibid at [29] per Blanchard J.

\(^10\) *R v S (PL)* [1991] 1 SCR 909 at 916 per Sopinka J.

\(^11\) For example, see *R v Khan* [2001] 3 SCR 823.

\(^12\) For example, see *Jones v R* [2009] HCA 17.
America\textsuperscript{13} all endorse the error-impact approach for good reason: error that has not affected a verdict is an obvious example of when justice has not actually miscarried. Further, Matenga itself tells against the abandonment of the error-impact approach for while the Supreme Court there affirmed the fact-finding role of a criminal appeal court, it did not limit the application of the proviso to cases in which guilt was established to appellate satisfaction. Instead, the Court said that the statutory task was to assess whether error's "potentially adverse effect on the result may, actually, that is in reality, have occurred."\textsuperscript{14} It followed that a substantial miscarriage of justice was "one which in substance ... affected the result of the trial."\textsuperscript{15} A close reading of Matenga therefore suggests that the Court envisioned the retention of both approaches. Can both be reconciled then?

The solution, it is suggested, is to consider the two approaches as discrete stages of a single inquiry as to whether the defendant has suffered a substantial miscarriage of justice. On this view, the first stage of the inquiry addresses whether error has affected the verdict, that is, the error-impact approach. This stage is subjective, in the sense that the focus is upon whether error affected the jury's treatment of the case. Appellate scrutiny of events at trial, including jury questions, may reveal if error had an effect upon the jury's deliberations. Should the court conclude that error had no such effect then the inquiry need go no further; the defendant has not suffered a substantial miscarriage. However, if error either had or might have had such an effect, then the inquiry continues to the second stage to consider whether the evidence is sufficiently determinative of guilt so as to justify applying the proviso in any event; in other words, the application of the guilt-based approach.\textsuperscript{16} Unlike the first stage of the inquiry, this stage is objective in that it is the court's view of the evidence rather than the jury's that is determinative. By applying the proviso in this way, legal fictions such as a notional reasonable jury are avoided. Further, by dividing the inquiry into two discrete stages, the precise conceptual basis for the application of the proviso is clear. The result, it is suggested, is a more nuanced and transparent approach.

The sequential treatment of the approaches is consistent with the Supreme Court's analysis in Matenga because, as noted above, the Court endorsed the guilt-based approach while appearing to accept the applicability of the error-impact approach through its definition of a substantial miscarriage of a justice as one that had actually affected the outcome.\textsuperscript{17} It is also consistent with the Supreme Court's definition of a miscarriage of justice as one in which error was capable of having had that effect.\textsuperscript{18} More importantly, the sequential application of the approaches gives effect to the proviso's purpose in abolishing the Exchequer rule, which, it will be recalled from

\textsuperscript{13} See Kotteakos v United States 328 US 750 (1946).
\textsuperscript{14} \[2009\] 3 NZLR 145 at [31], emphasis in original.
\textsuperscript{15} Ibid, footnote 39.
\textsuperscript{16} The standard to which an appeal court should be satisfied at each stage of the inquiry is considered next.
\textsuperscript{17} \[2009\] 3 NZLR 145 at [31].
\textsuperscript{18} Ibid.
chapter one, precluded appeal courts from both weighing evidence and assessing the impact of error. It is therefore suggested that the combined application of the error-impact and guilt-based approaches – in this order – is the logical discharge of the statutory task conferred by the proviso.

III. APPELLATE STANDARDS OF SATISFACTION

Having identified the sequential application of both approaches as the proper framework for the application of the proviso, some detail is now necessary. In particular, it will be recalled that an appeal court may dismiss an appeal if it “considers” that no substantial miscarriage has occurred, which raises the question of the level of appellate satisfaction attaching to each stage of the inquiry.19 For example, must the court be satisfied beyond reasonable doubt that error has not affected the verdict or is some lesser standard sufficient? And what standard attaches to the second stage of the inquiry if the first is not answered in favour of the proviso’s application? Must the appeal court be sure of guilt in order to utilise the guilt-based approach or is it enough that the court “considers” that the defendant is guilty? Does such statutory language imply that standards of proof were intended to be eschewed in favour of evaluative judgement? In this respect, it is noted that an appeal ground pursuant to section 385 of the Crimes Act 1961 is made out when the appellate court is “of opinion” that it has been established, whereas the proviso may be applied when the court “considers” that no substantial miscarriage has occurred. Is this therefore evidence of a legislative intention to avoid formal legal standards? A principled approach to the proviso must confront and resolve these difficulties, a task complicated by the variety of possible standards that exist at common law in relation to both the error-impact approach and the guilt-based approach.

A. The Correct Standard for the Error Impact Limb

North American harmless error jurisprudence is here important. As will be recalled from chapter two, the United States’ Supreme Court held in Kotteakos v United States20 that error must be harmless beyond reasonable doubt when federal law operates:21

> If, when all is said and done, the ... [court] is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand.... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that [the defendant’s] substantial rights were not affected. The inquiry cannot merely be whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

The criminal standard of beyond reasonable doubt also applies to constitutional error because harmless error rules are there considered to be capable of “very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of

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19 Ibid.
20 328 US 750 (1946).
21 Ibid at 764-765.
guilt or innocence is a close one." But because state courts are free to set their own standards for non-constitutional error, a number of different approaches have emerged.

For example, the Supreme Court of Michigan once adopted a highly probable test, by which appeal courts there had to be satisfied it was "highly probable that, in the light of the strength and weight of the untainted evidence, the ... [error] did not contribute to the verdicts." Traynor considered that this test struck the correct middle ground between a standard that was too low and one that was too high thereby avoiding "the extremes of all too easy affirmance of a judgment or all too ready reversal." However, the Court subsequently rejected this test in favour of one that requires the defendant to demonstrate that error affected the outcome on the balance of probabilities. The California Supreme Court has settled upon a reasonably probable standard, by which the defendant must demonstrate that "it is reasonably probable that a result more favorable ... would have been reached in the absence of the error." Other state courts require that there be no reasonable possibility that error played a substantial role in the determination of guilt or that it is more probable than not that error did not affect the verdict. Some, however, have settled upon the criminal standard of proof and hence the Kottekos formulation. The Pennsylvania Supreme Court has done so in light of the fact that the "standard is commensurate with the standard of proof in criminal trials", in order to "maintain the integrity" of such a standard and because all error should be treated alike "in determining whether it is prejudicial to the accused." In so doing, the Court noted "the danger that a lenient harmless error rule may denigrate the interests and policies which both constitutional and non-constitutional rules promote" and that the criminal standard "reaches the most reasonable balance between the consideration of judicial economy and the important policies which underlie constitutional and non-constitutional rules."

26 Michigan v Lukity 460 Mich 484 (1999). This standard appears to reflect the statutory language of the proviso there, which precludes an appeal from being allowed unless the court is affirmatively satisfied that there has been a miscarriage of justice. Dissenting, Cavangah J noted that "given our tendency to credit the jury for possibly selecting any pearl of evidence from a sea of shells, the majority's test will place the defendant in a position of not only having to demonstrate the harm wrought by the error, but: also of having to counter suppositions and inferences from other evidence that are limited only by the number of witnesses offered and the imagination of the reviewing court"; ibid at 509.
27 California v Watson 46 Cal 2d 818 (1956) at 836.
28 Yale Kamisar, Wayne R Lafave, Jerold H Israel and Nancy J King, Modern Criminal Procedure, Cases Comments and Questions (11th ed, 2005) 1614.
29 Ibid.
31 Ibid at 408.
In *R v McI*, Thomas J concluded that the statutory language of the proviso and its appeal grounds demonstrated that “Parliament did not want convicted persons to go free or obtain the benefit of a new trial on the basis of an error of law or irregularity unless the error or irregularity would have made a difference to the outcome". In reaching this conclusion, the Judge noted that "Parliament used the word ‘considers’ rather than a more demanding word such as ‘satisfied’; it used the word ‘substantial’ to describe the miscarriage of justice, notwithstanding that a miscarriage of justice had immediately beforehand been stipulated as a ground of appeal; and it imported the word ‘actually’ for no apparent purpose than to emphasise that a substantial miscarriage of justice must have in fact occurred." This language, and in particular the term "considers", raises the possibility that evaluative judgement was preferred by the legislature over a particular standard of satisfaction, a point augmented by the omission of any such standard from the statutory text. To borrow the language of Lord Pearson, if a particular standard had been intended by Parliament, such a “formula could and should have been used". What then, is the correct approach?

It is contended that any construction that would require a defendant to demonstrate that error actually affected the verdict should be rejected as being inconsistent with the statutory scheme. This is because under section 385(1)(c) of the Crimes Act an appeal must be allowed once it is established that error might have affected the verdict, whereas the application of the proviso under the error-impact limb of the proviso presupposes that error has not done so. The imposition of a burden upon a defendant at either the appeal ground stage or the proviso stage would therefore reverse the statutory formula.

The highly probable formulation, in which the proviso may be applied if it is highly probable that error did not affect the verdict, is consistent with the elasticity attaching to the term “considers”. Traynor points out that the test imposes a high but not unattainable standard of appellate satisfaction. Accordingly, the highly probable test could be seen as striking the correct balance for distinguishing harmless error from harmful error. However, such a formulation would permit the proviso's application in a case in which there is a real possibility error affected the outcome even though it is highly probable that such error did not. This conclusion sits awkwardly with the statutory criterion that the defendant has not “actually” suffered a substantial miscarriage of justice. In light of the interests at stake here, while the highly probable standard is high, its threshold remains too low.

33 Ibid at 701, emphasis added.
34 Crimes Act 1961, s 385(1).
35 *Blyth v Blyth* [1966] AC 643 at 676.
36 Ibid.
38 Crimes Act 1961, s 385(1).
Similar reasoning tells against the rejection of all formal standards in favour of an appeal court’s evaluative judgement. Standards of proof are just that — standards — and these have the benefit of directing judicial attention to matters of significance. In this respect it is to be remembered that the proviso is not engaged unless serious error might have affected the trial’s outcome.

This leaves the standard of beyond reasonable doubt, which, it is suggested, should not be seen as operating merely by default. Such a standard is consistent with that employed by the criminal law and therefore indicative of the interests concerned. The criminal standard would permit satisfaction of the error-impact limb only when an appellate court was sure that error did not affect the outcome. This conforms to the remedial nature of the proviso in the context of section 385(1) of the Crimes Act by which an appeal would otherwise have to be allowed. The standard of beyond reasonable doubt would also “uphold the high standards of legal accuracy expected in trials of offenders for criminal offences whilst at the same time recognising that mistakes of varying degrees of significance are difficult or impossible to eliminate completely in any system of criminal justice.”

And while appropriately high, the standard does not require “absolute certainty” on the part of an appellate court that error did not affect the outcome. There is little risk then that the proviso would be rendered impotent or that courts would return to the Exchequer rule. Finally, the criminal standard is not inconsistent with the legislative term “considers” because it is difficult to see how a court could ‘consider’ that error had not affected the verdict if there remained a reasonable possibility that error did.

B. The Standard for the Guilt-Based Limb

The guilt-based limb raises similar issues. As noted in chapter three, the Canadian Supreme Court has held that there must be no doubt, reasonable or otherwise, concerning the defendant’s guilt if the proviso is to be applied in the face of serious error. This standard, which is unique to Canada, is more exacting than:

... the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case “beyond a reasonable doubt” at trial. This higher standard reflects the fact that it is difficult for an appellate court, in particular when considering a jury trial, since no detailed findings of fact will have been made, to consider


R v Wanhalla [2007] 2 NZLR 573 at [49].

Crimes Act 1961, s 385(1).

R v Trochym [2007] 1 SCR 239.

Ibid at [82] per Deschamps J.
retroactively the effect that, for example, excluding certain evidence could reasonably have had on the outcome.

The Australian High Court insists upon the usual criminal standard of proof in the appellate determination of guilt, a level that must be “at the forefront of consideration” of the proviso’s application. The same standard has been adopted by the New Zealand Supreme Court. Here an appeal “Court must itself feel sure of the guilt of the accused.”

It is contended that the Canadian approach is wrong and that the criminal standard of beyond reasonable doubt is that to which an appellate court should find guilt established under the guilt-based limb of the proviso. It is difficult to understand how a standard could be higher than that of beyond reasonable doubt – let alone “substantially higher” as the Supreme Court of Canada insists in relation to the proviso – and yet remain achievable. After all, proof beyond reasonable doubt requires a state in which the fact-finder is “sure” of the requisite position. The Canadian requirement of appellate certainty may be thought “generally an impossible objective to achieve when discussing human affairs and human behaviour”. The introduction of such an unattainable standard would undermine the efficacy of the proviso while risking the reintroduction of the Exchequer rule. It follows that such a standard is incompatible with the proviso’s purpose.

There is no justification, however, for an approach involving anything other than the criminal standard. A lesser standard, for example, could give rise to a situation in which a trial marred by serious error resulted in the application of the proviso, even though an appellate court was unsure of guilt. Such a position would be indefensible. And while the term “considers” in section 385(1) could be interpreted as evidence of the renunciation of formal standards of proof, it makes little sense to say that a court could ‘consider’ that a defendant has not suffered a substantial miscarriage if the court was unsure of guilt in the face of serious error.

IV. APPELLATE FACT-FINDING UNDER THE GUILT-BASED LIMB

As we saw in chapter three, in Weiss v R and Matenga v R notions of jury usurpation were finally abandoned in recognition of an appellate fact-finding role under the proviso. Both decisions, however, emphasise the so-called limitations of the written record and the significance of demeanour-based credibility assessment. Consequently,

44 Weiss v R (2005) 224 CLR 300 at [43].
45 Matenga v R [2009] 3 NZLR 145 at [31] per Blanchard J.
46 R v Trochym [2007] 1 SCR 239 at [82].
48 R v Reardon CA325/98, 18 March 1999 at [17]. See also R v Batt CA47/00, 3 August 2000 and Miller v Minister of Pensions [1947] 2 All ER 372.
49 (2005) 224 CLR 300.
Australian intermediate courts of appeal have frequently declined to apply the proviso on the basis of these perceived limitations and this pattern is likely to emerge here too; in Matenga the New Zealand Supreme Court specifically said that the proviso would continue to operate as “if the Court of Appeal continued to guide itself by reference to McF” and that the new approach was “not in practice different from the actual practice of appeal courts in England prior to … [the] removal of the proviso”. But as we have seen, this approach exhibited undue concern about perceived shortcomings of the appellate process as well as a misplaced anxiety about how ‘a jury’ would have assessed the case. It has therefore been argued that appeal courts should exercise a broader fact-finding discretion than that hitherto envisaged under the guilt-based limb. How then should this discretion be exercised?

In order to answer this question we must be clear about the malady: a seemingly undiminished judicial reluctance to engage in an appellate fact-finding function notwithstanding the responsibility cast by the proviso in this regard. The solution, it is suggested, therefore begins with a fresh perspective of a criminal appeal court’s role. Wigmore alludes to the necessary change:

Inasmuch as the general purpose of the rules of evidence is merely to serve as a means to an end, viz, the correct ascertainment of the facts in litigation, the natural action for the appellate tribunal would be to scrutinize the entire record of the evidence in the case, to determine whether without the erroneously admitted evidence or with the erroneously excluded evidence the verdict should nevertheless have been the same as actually rendered; if yes, the judgment should be affirmed; if no, the verdict should be set aside. This solution would seem to be the only one consistent with a rational and efficient system of appellate review in the administration of justice.

On Wigmore’s approach, it is the appeal court’s view of the case that is important and that of the trial jury or a notional reasonable jury is ultimately subsidiary:

This form defines as a standard the objective facts in the case as disclosed by all the evidence when scrutinized by the appellate court. If in view of the whole case the [appeal] court concludes that the verdict is correct, then obviously the error ... affords no reason for setting that verdict aside.

This orientation harbours considerably less deference for first instance factual findings because the appeal court must also “ascertain the facts.” Wigmore therefore commends attention to an appellate assessment of the evidence.

It is suggested that this approach captures that required by the proviso for as discussed in chapter three, the proviso’s text, its purpose in reforming the Exchequer rule and its surrounding history reveal that appeal courts were intended to grapple with facts according to their view of the case. That being so, an appeal court has a much

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51 Ibid at [27].
54 Ibid.
broader discretion than has been hitherto recognised to hear testimony, reheat evidence or consider an electronic record of the trial in order to determine whether the proviso should be applied according to its guilt-based limb.

Whereas part of the solution is conceptual, the balance is necessarily practical: appeal courts should have much more frequent recourse to such measures in the determination of whether the defendant has suffered a substantial miscarriage of justice. The related powers within section 389 of the Crimes Act provide the mechanism for just such an approach in permitting, as is “necessary or expedient in the interests of justice", the production of any document or thing connected with the proceedings, the examination of any witness (whether called at trial or not) and the appointment of a special commissioner or person with special expert knowledge to act as an assessor to the court. 55

By judicious use of such powers, witness credibility would no longer be an impediment to the proviso’s operation, thereby avoiding the situation described earlier in Canada, Australia and New Zealand in which this concern has constrained the courts’ use of the device. It follows that vestiges of reasoning based upon how a putative jury would have assessed the evidence should be finally discarded in favour of the ungarnished opinion of the appeal court.

While this interpretation is without precedent, it is not wholly without judicial support. In 1905 Stout CJ said that but for Makin, 56 he would conclude that the proviso entitled an appellate court to both “weigh the evidence” and “consider its effect”. 57 The way forward, it is suggested then, is to acknowledge what the proviso says, namely that the opinion of the appeal court is the overriding consideration, so that an appeal may be dismissed if the court considers (beyond reasonable doubt) that the admissible evidence establishes guilt. Logically then, it is the appeal court’s view of the case – and only the appeal court’s view – that matters.

V. A MULTI-FACTORIAL APPROACH TO INCURABLE ERROR

As we saw in chapter four, a coherent approach to incurable error has eluded the courts thus far. This is a reflection of the competing difficulties in this area as the applicable principles must be sufficiently flexible to accommodate the various values of the criminal justice system without being so open-ended as to abet arbitrariness. Structural error, it was suggested, failed the former consideration while the jurisprudence concerning fundamental error and unfair trials failed the latter. Plainly, a fresh approach is called for.

The logical solution is a multi-factorial approach to incurable error in which the courts would assess a number of considerations in determining whether the proviso should be applied. McCord commends such an approach in relation to North American constitutional error, noting that labels such as structural error “‘tend to be surrogates for

55 Crimes Act 1961, s 389.


57 R v Lawrence (1905) 25 NZLR 129 at 136.
matters of degree and multiple concerns". In determining whether constitutional error is susceptible to harmless error analysis, McCord contends that the courts should have regard to the importance of the infringed right, the degree, manner and circumstances of its breach, the likelihood that a different result would have prevailed absent error and other considerations such as "basic fairness." This approach, McCord suggests, would avoid "doctrinal confusion" by "grappling with the real factors" underlying this area. Transposed here and shorn of its constitutional overlay, a similar approach would operate in relation to the proviso in much the same way as the prevailing multi-factorial approach to improperly obtained evidence under the Evidence Act 2006.

In determining whether error should be treated as incurable by this methodology, regard would be had to the nature of the error in issue, its significance in the context of the trial, the degree of prejudice, if any, to the defendant and the extent to which the error compromises the appearance of justice. These considerations would then be weighed with the legislative objectives of the proviso, bearing in mind the high threshold for incurable error, so that "the operation of the proviso is not to be stultified."

A. The Nature of the Error in Issue

A biased judge or jury is error of a different order than the wrongful reception of inadmissible evidence. A misdirection or omission in the summing up is ordinarily of lesser seriousness than a situation in which a defendant is wrongly denied legal representation. The first consideration is therefore the nature of the error in issue. From here, some refinement may be necessary. For example, an error in the summing up concerning an ingredient of the crime may be seen as more serious than one directed at an evidentiary principle. Similarly, prosecutorial misconduct is generally more serious than error arising through mere carelessness.

The nature of the error may also require consideration of the statutory setting. An example is Subramaniam v R, which involved mandatory and prescriptive statutory requirements in relation to defendants found unfit to stand trial. Failures to

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59 Ibid at 1457.
60 Ibid at 1460.
61 Evidence Act 2006, s 30.
62 Howse v R [2006] 1 NZLR 433 at [37], citing Barwick CJ in Driscoll v R (1977) 137 CLR 517. While the strength of the evidence is not a specific consideration under the proposed approach, it would often have relevance in the contextual assessment of the gravity of the error. However, it is important to remember that incurable error precludes the otherwise proper application of the proviso, and on the scheme envisaged by this paper, the court would first have to be satisfied that either the error had not affected the verdict or that the defendant's guilt was proved beyond reasonable doubt in order to reach this juncture.
observe such Parliamentary commands should, it is suggested, be considered more serious than regular error.

**B. The Significance of the Error**

Whereas the first factor is general in nature, the second is specific: the focus here is upon the contextual significance of the error. The case of *Howse v R*\(^{64}\) provides a useful example. It will be recalled from chapter four that prejudicial hearsay evidence was wrongly adduced at trial although similar evidence was admissible as original evidence that both deceased girls had made complaints about the defendant of sexual abuse. It followed that the error was not as serious as it might have otherwise appeared. Similar analysis would also be applicable in the *Subramaniam*\(^{65}\) situation, for, while the judge failed to comply with the requisite legislation there, the departures were not particularly serious in light of the issues at trial. This would ameliorate the gravity of the error in relation to breaches of the statutory regime.

**C. Prejudice**

Some errors cause prejudice to the defendant whereas others are inconsequential. Prejudice should therefore be a material consideration without necessarily being dispositive.

**D. The Appearance of Justice**

It is contended that this criterion should have heightened significance as the most egregious errors generally compromise the appearance of justice without necessarily effecting actual prejudice. A biased judge or jury provides the paradigm example. But other circumstances may impinge upon this interest too. For example, in *Nudd v R*,\(^{66}\) discussed in chapter four, the defendant was convicted of a very serious crime following a trial involving grossly incompetent representation. While the Australian High Court concluded that this failing did not constitute fundamental error in the absence of prejudice, an error of such a nature may be thought to leave proceedings stained because of the harm to the appearance of justice as against practical harm in the conduct of the case.

**E. The Legislative Objectives of the Proviso**

In determining whether error was incurable, courts should also have regard to the legislative objectives of the proviso. The observations of Tipping J in *R v Fulton*\(^{67}\) are apposite.\(^{68}\)

\(^{64}\) Ibid.


\(^{67}\) *R v Fulton* CA280/96, 7 April 1998.

\(^{68}\) Ibid at 6-7.
In enacting the proviso, Parliament’s intention must have been that it should be applied unless for good reason the Court thought fit not to do so. The overall inquiry must relate to what is in the interests of justice in the widest sense, from the point of view of the appellant, the victim and society as a whole. That being the case, Parliament has indicated that the error should not in general terms vitiate the conviction, albeit as a matter of residual discretion the Court does not have to take that view of a particular case.

A low threshold for incurable error would frustrate the legislative aim of reforming the Exchequer rule. Incurable error should remain the exception rather than the norm, with appeal courts finding such error when either the overall effect of the multi-factorial approach was one that required such a conclusion or a particular factor individually mandated it.

It is accepted that the dividing line in any case would remain one of fact and degree. However, by it courts would have sufficient flexibility to entertain the “multiple concerns” raised in this area as well as a framework within which to address such concerns. More principled and consistent outcomes should therefore follow.

VI. CLARIFYING THE RELATIONSHIP BETWEEN THE PROVISO AND THE GROUNDS OF APPEAL

As we saw in chapter two, the relationship between the proviso and the grounds of appeal is a troubled one. The proposed sequential application of the error-impact and guilt-based approaches in conjunction with the Matenga v R definition of a miscarriage of justice would resolve the tension between the proviso and the two most common grounds of appeal. Such an approach would respect the complementary notions of a miscarriage of justice as one in which error was capable of having affected the verdict and a substantial miscarriage of justice as one in which error might have done so absent appellate satisfaction of guilt beyond reasonable doubt. This would reconcile the proviso with section 385(1)(c) of the Crimes Act.

Like treatment of “a wrong decision on a question of law” would also cure the seemingly over broad category of error in relation to paragraph (b) of section 385(1), because only those legal decisions that were capable of having affected the outcome would warrant the proviso’s attention. Inconsequential legal errors could therefore be dismissed without recourse to the device, with the balance of error being subject to the error-impact and guilt-based limbs of the proviso in the manner discussed earlier.

Being directed at outcome rather than process, the unreasonable verdict appeal could not admit the proviso’s error-impact limb. A similar difficulty arises in relation to the guilt-based limb, for, if a verdict is unreasonable then the defendant could not be guilty beyond reasonable doubt. At first sight then, the proposed approach does not alleviate the conceptual tension in relation to the appeal ground pursuant to section


70 Matenga v R [2009] 3 NZLR 145.

71 Crimes Act 1961, s 385(1)(b).
385(1)(a). However, the language and structure of the statutory text obviously anticipate that the proviso is potentially curative of an unreasonable verdict.

The solution, it is suggested, lies in the broad appellate fact-finding responsibilities discussed earlier. Just as an appeal court must form its own view of the evidence, so might the court receive additional evidence of guilt in order to cure an otherwise unreasonable verdict through application of the proviso.

This is not as radical as it may seem. The New Zealand Court of Appeal and the English Court of Appeal will, on occasions, receive additional evidence of guilt in order to determine criminal appeals.72 The New Zealand practice emerged before Matenga's advent73 and thus before judicial recognition of the fact-finding responsibilities cast upon criminal appeal courts by the proviso. As discussed in chapter two, history provides some support for this interpretation. So too, in a sense, does the appeal ground itself, for by it, a court of criminal appeal may find a jury’s verdict unreasonable. This underscores the ultimate importance of an appellate court’s view of the evidence, a feature that dovetails with the expansive view of discretionary powers available to courts of criminal appeal advanced above. It follows that section 385(1)(a) of the Crimes Act and the proviso could be reconciled if it were accepted that post-trial evidence of guilt may be considered and received by a court of criminal appeal in order to augment what would otherwise be an unreasonable verdict.74

The case of R v Vaituliao and others,75 mentioned in chapter two, illustrates how this could operate in practice. There, the defendant denied being part of a group that seriously assaulted the victim. At sentencing, the defendant wrote a letter to the judge admitting responsibility for the offence and describing his role in it. The Court of Appeal relied upon this material to find that “on any view, there can be no miscarriage of justice resulting from any defect in the trial”.76 As in Vaituliao, an appellate court would need to conclude that the new evidence was both admissible and reliable, and that with the evidence adduced at trial, guilt was established beyond reasonable doubt to its satisfaction. Such instances are likely to be rare, but they would conform to the view advanced here that the proviso casts an independent fact-finding function upon courts of criminal appeal to determine, as best as they are able, the facts that comprise the subject matter of the litigation.

The remaining appeal ground pursuant to paragraph (d), which is directed at a trial that was a nullity, should be considered in much the same way as has been suggested for incurable error, namely a multi-factorial approach that seeks to balance

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74 As discussed in chapter two, the tension between s 385(1)(a) of the Crimes Act and the proviso should also be seen in light of the powers available to amend or substitute a conviction pursuant to s 386 of that Act.
75 [2007] NZCA 525.
76 Ibid at [24].
the legislative objectives of the proviso with various concerns attaching to serious error. Indeed, the four factors identified in relation to incurable error—the nature of the error, its significance in the context of the trial, prejudice and the appearance of justice—could be transposed directly to the nullity jurisprudence, as they overlap the principles identified in *R v Kestle (No 2)*77 and applied by its progeny.78 This would give rise to the uniform treatment of nullities and incurable error vis-à-vis the proviso as well as affirming the statutory text that the proviso is applicable to section 385(1)(d) of the Crimes Act. It would also provide a methodology by which courts of criminal appeal could decline to apply the proviso when the balancing test required as much.

VII. CONCLUSION

The scheme advanced above is evolutionary rather than revolutionary, for it builds upon existing common law rather than demanding radical change. But change is advocated, especially in the approach to incurable error and the appellate fact-finding arena. The former involves a shift from an epithet-based regime to a multi-factorial one, whereas the latter requires reorientation of a criminal appeal court’s role and heightened evidential concern. Collectively, these proposals would clarify the conceptual basis for the proviso’s application, the associated fact-finding responsibilities of a criminal appeal court and the means by which incurable error is determined, thereby satisfying our first three criteria of a principled approach to the proviso.

The articulation of the criminal standard as an adjunct to the proviso’s operation would strike the correct balance between the high standards of accuracy expected in trials of criminal defendants and the need for a practical system of criminal justice in which error invariably occurs. So too would the proposed balancing tests vis-à-vis nullities and incurable error. The result is a scheme that would also reconcile the proviso with the grounds of appeal in a manner that is consistent with the legislative text and purpose. A coherent, principled approach to the proviso is therefore possible.

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78 As to which, see chapter two.
CONCLUSION

While the connection between the legislative power to dismiss an otherwise meritorious conviction appeal and toll rights attaching to a nineteenth century Cornish tin mine would appear to be tangential at best, a decision concerning the latter heralded the advent of a jurisprudence that led legislatures to enact the proviso throughout the common law world. Because of Stephen, British India did so first. England, Australia and Canada responded shortly thereafter. No understanding of the proviso would be complete without an appreciation of this history, for the proviso was intended to reform the inflexibility and injustice of the Exchequer rule by permitting appeal courts to determine the effect of error as well as finding facts. Further, vestiges of the Exchequer rule then influenced the courts’ construction of the proviso thereby retarding its effect. Foremost amongst these was jury usurpation, which held that the system of trial by jury would be imperiled through appellate fact-finding under the proviso. Ironically, these vestiges – including jury usurpation – entered New Zealand law because of the proviso, and in particular, our adoption of *Makin v Attorney-General for New South Wales* to the proviso in the Criminal Code Act 1893. Consequently, the New Zealand proviso, which was an aspect of Stephens’ code designed to prevent the Exchequer rule’s incursion, began life dominated by its presence. This, as we have seen, led to the device having a narrow curative role in the disposition of criminal appeals by way of reserved questions of law. The subsequent emergence of a right of criminal appeal in England gave rise to a number of tests for the proviso’s application founded upon a putative jury’s reaction to the case; tests created by the Court of Criminal Appeal and later adopted by the House of Lords in varying forms. These tests, which were legal fictions, both permitted and restrained appellate fact-finding notwithstanding the courts’ apparent renunciation of such a practice. This case law was applied in New Zealand following our mid-century enactment of a similar regime, thereby settling one approach to the proviso based upon a defendant’s guilt. A second approach founded upon the effect of error also emerged, with both being employed in equal measure thereafter. As in England, this process occurred without reflection about the correct conceptual approach to the proviso, whereas in the United States of America, related harmless error developments led to the federal rejection of the guilt-based approach in favour of the error-impact approach. The former, however, continues to there survive.

The post-1945 New Zealand record is a mixed one, for, while the Court of Appeal applied the proviso liberally on occasions, it also frequently declined to do so. Moreover, the Court appears to have become increasingly anxious of applying the proviso when witness credibility was in issue at trial while occasionally displaying undue sensitivity to error. It follows that vestiges of the Exchequer rule have continued to survive. Overall then, the proviso’s application has been here inconsistent. Conceptual confusion has also accompanied the unreflective use of both the error-impact and guilt-based approaches.

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1 [1894] AC 57.
The concept of jury usurpation ignited again this century. In the notorious case of *Bain v R*, the Privy Council engaged in an extraordinary rebuke of the Court of Appeal for finding facts allegedly the preserve of the jury. But then in the landmark case of *Weiss v R*, the Australian High Court acknowledged what the proviso and its history implied; an appellate fact-finding function unadorned of jury nomenclature. The New Zealand Supreme Court has since adopted this position, along with Weiss's reservations about witness demeanour and credibility. Ironically, both now supplant jury usurpation as the proviso's barrier to more comprehensive appellate relief. Conversely, in Canada jury usurpation lingers such that the proviso may there be redundant.

Other aspects of the proviso have proved no less difficult. New Zealand's adoption of the English template of 1907 imported tension between the proviso and the grounds of appeal; tension in part textual and part conceptual. For a time our Supreme Court inclined to the view that the primary ground of appeal was incompatible with the proviso, although it has subsequently reconciled the two by defining a miscarriage of justice as one in which error was capable of having affected the verdict. The interaction of the proviso with nullities has similarly taxed the Court of Appeal, which to date has responded with a largely pragmatic approach to errors of this nature. Further, and as with courts elsewhere, New Zealand courts have assumed that the proviso cannot cure an unreasonable verdict despite statutory language to the contrary.

Consistent with developments originating in the English Court of Criminal Appeal, courts across the common law have concluded that the proviso both cannot and should not cure all error. None of the three approaches to incurable error has, however, proved satisfactory. The North American response, constitutional structural error, has struggled to provide a coherent distinction between curable and incurable error while failing to accommodate the various values underlying the criminal justice system. The Australian response, which is now that of New Zealand too, has been inconsistent in the identification of fundamental error giving rise to a largely arbitrary jurisprudence. Similar problems beset the cases concerning unfair trials due to the broad and open-ended value judgements that demarcate this area.

For all of these problems, however, a principled approach to the proviso is within reach. The sequential application of the error-impact and guilt-based approaches according to the criminal standard of proof would both settle and clarify the conceptual foundation for the proviso, while a broad appellate fact-finding function coupled with robust use of a criminal appeal court's supplementary powers would finally give effect to the proviso's purpose in reforming the Exchequer rule. Similarly, a multi-factorial approach to incurable error would provide structure and promote consistency in this area while also providing a platform for the application of the proviso to nullities. And as we have seen, the proviso's relationship with the balance of the appeal grounds would be redressed through *Matenga*’s definition of error with the other changes advanced above.

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3 (2005) 224 CLR 300.
The resulting model would not compromise a defendant’s right to a trial by jury or endanger the fairness of such proceedings. Neither would it mark a dramatic shift in the balance between due process and crime control, nor involve, as Baron Parke portended in Crease v Barrett, usurpation of “the province of the jury”. Instead, the proposed approach would give effect to the proviso’s language and purpose and equip— for the first time in the proviso’s history—courts of criminal appeal with a methodology to determine this very important inquiry.

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5 (1835) 1 Cr M & R 919.

6 Ibid at 933.
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