THE CONSEQUENCES OF FAILURE TO OBJECT TO INADMISSIBLE EVIDENCE IN CRIMINAL CASES

BY MARK WEINBERG*

[*The view has often been expressed that the trial judge in a criminal case has an overriding duty to exclude inadmissible evidence tendered by the prosecution even if no objection is taken by the defence. In this article the author examines the extent to which the Supreme Court of Victoria and courts of other jurisdictions have endorsed this view. He points to several recent decisions of the Victorian Full Court which have held that such failure to object in a criminal case may amount to a waiver which debars the defendant from taking an appeal point based on the wrongful reception of evidence. Mr Weinberg argues that this trend in Victoria towards a total waiver approach to criminal evidence is not a proper application of the responsibilities of a trial judge and, in effect, may penalize the defendant for mistakes made by his legal representative. He suggests that a better solution to this evidentiary problem would be to blend traditional non-waiver theory with the exercise of the 'no substantial miscarriage of justice' proviso contained in s. 568(1) of the Crimes Act 1958 (Vic.).*]

It has traditionally been said, in the Anglo-Australian context, that the rules of evidence may always be waived by either party in civil cases. It has also been said that in criminal cases there is a duty on the part of the trial judge to exclude inadmissible evidence tendered by the prosecution even if no objection is taken by the defence.[1] The purpose of this paper is to examine the extent to which, in particular, the second of these two propositions accurately reflects the state of the law on this point in Victoria, and incidentally in other jurisdictions.

In recent years the Victorian Full Court has on several occasions considered the consequences of failure on the part of defence counsel to object to inadmissible evidence during the course of a criminal trial. These recent decisions will be analysed and their background explored. It will be suggested that the Full Court has departed from long established doctrine, and moved this branch of the law onto a path which may not be wholly satisfactory.

A. THREE RECENT DECISIONS OF THE VICTORIAN FULL COURT

On at least three separate occasions in the last five years, the Victorian Full Court has addressed itself to the problem of determining what

* B.A., LL.B. (Hons.) (Monash), B.C.L. (Oxon); Barrister, (N.S.W.), Barrister-at-Law (Vic.), Senior Lecturer in Law, University of Melbourne.
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[1] See *e.g.* Criminal Law Revision Committee, *Eleventh Report* Evidence (General) Cmnd. 4991, 14. See also Gobbo J.A., *Cross on Evidence* (Australian edition) (1970) 3, and *R. v. Campbell* [1970] V.R. 120.

consequences flow from failure on the part of defence counsel to object to inadmissible evidence during a criminal trial.

(i) *R. v. Matthews and Ford*[2]

The accused were senior police officers who had been convicted of having conspired to obstruct the course of justice. One of their grounds of appeal was that the trial judge had admitted in evidence tape recordings which were copies of the original tapes. No objection to their admissibility had been taken at the trial. The Full Court was asked, in effect, to determine whether the secondary evidence rule (which normally necessitates the production of original documents and not copies save in exceptional circumstances) applied also to tape recordings. On this point, it held that tape recordings were not documents for the purposes of this rule.[3] The Court went on to say, however, that even if the secondary evidence rule had been applicable, the failure on the part of the defence to take the objection at the trial would have prevented the point from being raised on appeal.

The Court distinguished between those rules of evidence which went to 'mode or form of proof' only, and full exclusionary rules. It said in relation to the former category:

> As a general rule, where such an objection which relates only to the *mode or form of proof* has not been taken at the trial, the admission of the evidence will not justify the granting of a new trial, even if the objection would have been a sound one. The failure to object amounts to a waiver of irregularity in the mode of proof and renders the secondary evidence admissible.[4]

The proposition that rules of evidence which relate to the 'mode or form of proof' are waived by failure to object, was first asserted in *R. v. Umpleby*[5] where Stephen J. distinguished between evidence 'in its nature inadmissible' (not subject to any doctrine of waiver) and cases where it was only the mode of proof which was objectionable (which were subject to waiver). In *Umpleby*, secondary evidence was given about the contents of a document which would itself have been admissible had it been produced to the court. In essence the secondary evidence rule was characterized as merely conferring on the opposing party a right to object, and not as being a full exclusionary rule. The decision of the Full Court to apply similar reasoning in *Matthews and Ford* was perfectly consistent, on this point at least, with long established doctrine.

(ii) *R. v. Alexander and Taylor*[6]

The accused were convicted of robbery. One of the points taken on appeal was that the rules governing refreshing memory of witnesses had

[2] [1972] V.R. 3.
[3] *Cf. R. v. Stevenson* [1971] 1 W.L.R. 1.
[4] [1972] V.R. 3, 11 (emphasis added).
[5] (1897) 18 N.S.W.L.R. 154. See also *The King v. Sanders* [1919] 1 K.B. 550.
[6] [1975] V.R. 741. *Cf. Alward v. R.* (1976) 73 D.L.R. (3d) 290.

not been complied with. A key witness for the prosecution no longer had any independent recollection of the events in question. It is trite law that a witness with no independent recollection may 'refresh his memory' (in a notional sense) as to such events from a record or statement in writing made or adopted by him contemporaneously with those events. It is also clear that the document used to refresh the witness's memory must be produced for inspection by opposing counsel if he calls for its production. What was not clear was whether the document had to be produced in court in order for the witness to be competent to testify, even where opposing counsel did not call for its production.

It was held by the Full Court that the witness was not obliged to produce the document, (which he had virtually memorized as the basis of his testimony) unless called upon to do so by opposing counsel. In *Alexander and Taylor* counsel for the defence had failed to call for the production of this document, and this constituted waiver which barred the lack of production of the document from being taken as an appeal point.

In support of this proposition, the Full Court cited *R. v. Matthews and Ford*. It took the view that the production requirement in relation to refreshing memory went to 'mode of proof' in exactly the same way as did the secondary evidence rule. As the Full Court put it:

> what is really put in evidence is the contents of a document, and in both cases the principal reason why the original document should be produced is to guard against fraud or mistake.[7]

The Court went on to say, however, that had the accused been unrepresented at the trial the position might have been different.[8] In the instant case the accused were represented by experienced counsel, and it was no part of the trial judge's duty to warn them of their right to have the document produced, failing which the prosecution witness would be incompetent.

The effect of this decision was to render competent a witness who might not have been permitted to testify had counsel called for the production of the document which the witness had memorized out of court. Had the document not been produced, and had no adequate explanation for its absence been forthcoming, the witness would have lacked testimonial competence.

The decision of the Full Court to treat the evidential issue as going merely to 'mode of proof' is open to question. It is difficult to describe as being merely a rule about mode of proof a rule which has the effect of rendering a witness incompetent to testify. It is suggested that such a rule is just as much a full exclusionary rule of evidence as the more general rules governing competence of witnesses, the hearsay rule, the

[7] [1975] V.R. 741, 752.
[8] *Ibid.*

rules excluding evidence of bad character and disposition, and the opinion evidence rule. If the position regarding these latter rules is that they are not the subject of waiver, then it is submitted the same position ought to apply in respect of rules governing refreshing memory. Where it is clear that a witness will not be permitted to testify if objection is taken, why should not the trial judge himself intervene to prevent such evidence being given?

So far as earlier authorities were concerned, the Full Court was certainly not compelled to reach the decision that it did. Certainly in *King v. Bryant* (No 2)[9] the Supreme Court of Queensland by a two to one majority (*per* Stanley and Mack JJ.) had ruled that failure to call for the production of a document in similar circumstances amounted to waiver. It should be noted however that there was a strong dissent in that case by Hanger J., who argued that unless the document memorized by the witness out of court was produced in court, whether or not opposing counsel called for it, the witness would not be permitted to testify. In fact, *King v. Bryant* (No 2) was a civil case (a fact not alluded to by the Victorian Full Court in *Alexander and Taylor*). In civil cases the doctrine of waiver has always played a far more dominant role than in criminal cases, so much so that even full exclusionary rules may be waived in civil cases.

Furthermore, in another civil case, *Holm v. Smith*,[10] Townley J. of the Supreme Court of Queensland took the same view as was taken by Hanger J. in *King v. Bryant* (No 2). *Holm v. Smith* was a personal injuries action, in which a witness gave evidence at the trial, having 'refreshed his memory' from notes outside the court room. These notes were not produced by the witness in court. Even though no objection was taken by opposing counsel, Townley J. ruled that the witness was not competent to testify. Such a ruling, in a civil case, emphasizes the force of the exclusionary rule in question and its link with the very competence of witnesses. While it is conceded that it was probably erroneous to apply a non-waiver doctrine to a civil case, the decision is strong support for the view that such a doctrine is applicable to criminal cases involving refreshing memory.

The peculiar irony of *Alexander and Taylor* lies in the observation of the Full Court that its decision to apply a waiver doctrine might have been different had the accused been unrepresented at trial. If so, the judge might have been under a duty to prevent the key prosecution witness from testifying without producing his notes. Without that testimony there would have been no case against the accused. In essence the convictions were upheld because the accused had been represented by experienced counsel.

[9] [1956] St. R. Qd. 570.
[10] [1956] Q.W.N. 8.

(iii) *R. v. Gay*[11]

The accused was convicted of armed robbery. At his trial some pages from a police officer's notebook were received in evidence. It was said that they had been tendered to rebut a suggestion by the defence of recent fabrication. Counsel for the accused expressly stated that he did not object to these notes being received in evidence. He took the view, at the time, that more benefit than harm was likely to accrue to the accused from these notes being received.

On appeal one of the points raised was that the notes were inadmissible. It was held by the Full Court that in fact the notes were admissible for the purpose for which they were tendered. However, even if they had been inadmissible, a conscious decision not to object to their admissibility by defence counsel amounted to waiver and barred the point being taken on appeal.

In *Gay* the Full Court moved a step further in the direction of a total waiver approach to criminal evidence. There was no suggestion in *Gay* that the evidence in question went merely to 'mode of proof'. A full exclusionary rule was operative and it was said to be waived by a conscious decision not to object at the trial.[12] The fact that counsel might have made an error of judgment in underestimating the harmful effects of inadmissible evidence not objected to (for tactical reasons), apparently, was not considered a sufficient reason for declining to apply waiver principles.

B. FAILURE TO OBJECT TO INADMISSIBLE EVIDENCE IN CIVIL CASES — A BRIEF BACKGROUND NOTE

In civil cases failure to object to inadmissible evidence is said to constitute waiver and to prevent the matter of inadmissible evidence being raised on appeal.[13] The duties of the trial judge are rather more limited than in criminal cases. He is forbidden to call witnesses or to examine those that are called by the parties otherwise than for the purpose of clarifying their evidence where it is unclear.[14]

However there is still an unresolved debate about the effect of hearsay evidence admitted without objection.[15] In *Re Lilley, deceased*[16] Smith J.

[11] [1976] V.R. 577.

[12] See also *R. v. Cutter* [1944] 2 All E.R. 337 where a similar approach was adopted by the Court of Criminal Appeal, and *Re Ratten* [1974] V.R. 201, 214.

[13] *Robinson & Co. v. Davies & Co.* (1879) 5 Q.B.D. 26 (secondary evidence rule); *Gull v. Saunders & Stuart* (1913) 17 C.L.R. 82 (irrelevant evidence may be acted upon if no objection is taken to it). *Cf. Jacker v. International Cable Co. Ltd* (1888) 5 T.L.R. 13 (irrelevant evidence may not be acted upon even if no objection is taken to it). In *Miller v. Cameron* (1936) 54 C.L.R. 572 the *Jacker* rule was said to apply only to irrelevant evidence. Any other exclusionary rule could be waived, in civil cases.

[14] See Eggleston R., 'What is Wrong with the Adversary System' (1975) 49 *Australian Law Journal* 428.

[15] See Harrison W. N., 'Hearsay Admitted Without Objection' (1955) 7 *Res Judicatae* 58.

[16] [1953] V.L.R. 98.

of the Supreme Court of Victoria held that certain evidence tendered in support of the valid execution of a will was hearsay. If objection had been taken to this evidence, his Honour would have been bound to exclude it. No objection was taken because the applicant was the only person represented at the hearing. Smith J. held that he could take full account of the hearsay evidence, which had been rendered admissible because of the absence of any objection.[17]

This decision seems to suggest that in civil cases, the hearsay rule, and perhaps other exclusionary rules as well, operate merely to confer a privilege upon an opponent to have such evidence excluded if a timely objection is made. Professor W. N. Harrison challenged this mode of analysis strongly.[18] He argued that:

> hearsay, even though admitted without objection, cannot be treated as evidence on which to base a finding, unless of course it comes within the recognised exceptions to the hearsay rule and is admissible despite objection.[19]

Professor Harrison's contention that it is not open to parties to waive the rules of evidence in civil cases and that a tribunal ought not to act upon hearsay whether objected to or not, seems to be erroneous. It is interesting to note that most of the authorities which he cited in support of his view were criminal cases.[20] Those civil cases which he cited in support of his analysis date back well into the last century, and often involve the weakest of *dicta*.[21]

Ironically, Harrison sought to reinforce his analysis with the following statement of principle:

> If legal proceedings were viewed as being primarily a contest between parties, and the rules of evidence were rules for conducting the contest, it would naturally be open to either party to waive a rule. But if on the other hand the main object were the administration of justice, and the rules of evidence were laid down as those most likely to secure a correct decision by the tribunal, a doctrine of waiver would be less easily recognised.[22]

It is submitted that, perhaps regrettably, civil litigation bears a much closer resemblance to Harrison's first hand rather than his 'other hand'. In

[17] In *Diaz v. U.S.* (1912) 223 U.S. 442, the United States Supreme Court stated in relation to hearsay that 'when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible'.

[18] Harrison W. N., 'Hearsay Admitted Without Objection' (1955) 7 *Res Judicatae* 58.

[19] *Ibid.* 59.

[20] *R. v. Bertrand* (1807) L.R. 1 P.C. 520; *Stirland v. D.P.P.* [1944] A.C. 315; *R. v. Pearson* [1953] Q.W.N. 18; *Teper v. The Queen* [1952] A.C. 480; *R. v. Gibson* (1887) 18 Q.B.D. 537; *R. v. Coleman* (1901) 27 V.L.R. 153.

[21] *Jacker v. International Cable Co. Ltd* (1888) 5 T.L.R. 13; *Duncan v. Pilcher* (1895) 21 V.L.R. 412; *Black v. Turner* (1895) 6 Q.L.J. 153; *Ex parte Ward* (1855) Legge 872. Professor Harrison cites *Wright v. Doe d. Tatham* (1837) 7 Ad. & E. 313; 112 E.R. 488, in support of his view that the hearsay rule may not be waived in civil or criminal cases. With respect, this decision supports precisely the opposite conclusion. Evidence led to prove testamentary incapacity was not objected to, and was therefore received notwithstanding the fact that it was just as clearly hearsay as evidence adduced to prove testamentary capacity. The latter was objected to, and was held inadmissible.

[22] Harrison, *op. cit.* 61.

General Motors-Holden's Pty Ltd v. Moularas,[23] the High Court seemingly lent its imprimatur to the waiver theory of civil litigation, when Barwick C.J. stated:

> it is established that, generally speaking, a criticism of the summing-up which is capable of being cured at the trial must be taken at the trial and the judge asked to correct it.[24]

However his Honour did go on to say that the matter was not the subject of any hard and fast rule and that the Appeal Court might retain a general discretion in the interests of justice to quash a decision erroneously arrived at.[25]

Professor Harrison sought to draw a distinction between rules of evidence which were entirely exclusionary and rules of evidence which merely operated to confer a right to object upon the other party.[26] As an example of the latter type of rule, he postulated the secondary evidence rule.[27] He argued however that the hearsay rule could not be waived, even in civil cases, and that it was impermissible for a trial judge to take account of hearsay evidence not objected to, unless it came within the ambit of an existing exception to the hearsay rule.

Professor Harrison's views seem to be contradicted by the authorities, most of which support a total waiver doctrine in civil cases. An example of a statement to this effect may be found in the judgment of Asprey J.A. in *McLennan v. Taylor*[28] where his Honour stated:

> When counsel for a party at a trial tenders evidence for that party, whether the evidence be oral or documentary, it is the duty of counsel for the other party, if he desires to object to its admission into evidence, to object promptly to the tender and to state clearly to the judge all the grounds of his objection.[29]

In *Miller v. Cameron*[30] the High Court also indicated its support for a total waiver doctrine in civil cases. However, Latham C.J. indicated that the position might be different if the evidence which had been received without objection were irrelevant, rather than being the subject of a specific exclusionary rule.

While Professor Harrison's argument seems erroneous in so far as it attempts to assert that there are exclusionary rules (other than irrele-

[23] (1964) 111 C.L.R. 234.
[24] (1964) 111 C.L.R. 234, 242-3.
[25] *Ibid.* 243.
[26] Harrison, *op. cit.* 67. He argued that the main canons of exclusion, hearsay, similar facts, and opinion evidence were not the subject of any waiver doctrine, whether in civil or criminal cases. At page 69 he stated: 'The cases show that there are rules that may be waived, but they do not establish that the hearsay rule is one of them.' Again, with respect, so far as *civil cases* are concerned, this is precisely what the cases do establish.
[27] *E.g. Robinson & Co. v. Davies & Co.* (1879) 5 Q.B.D. 26. The secondary evidence rule has been held to be the subject of waiver in criminal cases as well. See *R. v. Umpleby* (1897) 18 N.S.W.L.R. 154; *R. v. Matthews and Ford* [1972] V.R. 3; and *The King v. Sanders* [1919] 1 K.B. 550.
[28] (1966) 85 W.N. (Pt. 1) (N.S.W.) 525.
[29] *Ibid.* 537. *Cf. Harper v. Burton's Haulage Co. Pty Ltd* (1955) 55 S.R. (N.S.W.) 236.
[30] (1936) 54 C.L.R. 572.

vance) which may not be waived in civil cases, his views deserve much more respect when translated into the sphere of evidence in criminal cases. In that context at least, there are conflicting lines of authority as to the extent to which the doctrine of waiver is applicable. In fact, three distinct approaches can be discerned, and these are discussed in turn below.

C. TRADITIONAL ANALYSIS — NON-WAIVER THEORY IN CRIMINAL CASES

There are many cases which support the proposition that failure to object to inadmissible evidence in criminal cases will not constitute waiver. In *R. v. Bertrand*[31] the accused was retried for a criminal offence. Certain prosecution witnesses were sworn but, instead of their evidence being given in the usual way, the evidence they gave at the first trial was read over to them. They were asked if they had any corrections to make. Counsel for the accused did not object. The Privy Council condemned this procedure, stating:

> The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be — not the interests of either party.[32]

In *R. v. Gibson*[33] the accused was convicted of unlawfully wounding the prosecutor with a stone. The stone was thrown from the direction of the accused's house, and he was seen to enter his house immediately after it was thrown. The prosecutor did not see who had thrown the stone but testified that he had overheard an unnamed woman exclaim, 'The person who threw the stone went in there', pointing to the accused's house. Defence counsel took no objection to this manifestly inadmissible hearsay evidence.[34]

On appeal the conviction was quashed, notwithstanding the failure to object. Lord Coleridge C.J. stated:

> I am of opinion that the true principle which governs the present case is that it is the duty of the judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows.[35]

Matthews J. declared:

> We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not. In either case it is the duty of the judge to warn the jury not to act upon evidence which is not legal evidence against the prisoner.[36]

[31] (1867) L.R. 1 P.C. 520.
[32] *Ibid.* 534.
[33] (1887) 18 Q.B.D. 537.
[34] *R. v. Gibson* may be seen as an authority for the proposition that the hearsay rule extends to implied assertions and more particularly to non-assertive conduct. For a discussion of this aspect of the case, see Weinberg, M., 'Implied Assertions and the Scope of the Hearsay Rule' (1973) 9 *M.U.L.R.* 268.
[35] (1887) 18 Q.B.D. 537, 542.
[36] *Ibid.* 543.

Wills J. explained:

> If a mistake had been made by counsel, that would not relieve the judge from the duty to see that proper evidence only was before the jury. It is sometimes said — erroneously as I think — that the judge should be counsel for the prisoner; but at least he must take care that the prisoner is not convicted on any but legal evidence.[37]

Perhaps the clearest indication that the waiver rule has no significant role to play in criminal trials is the decision of the House of Lords in *Stirland v. D.P.P.*[38] Viscount Simon L.C. stated:

> It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself . . . If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt . . . the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal, but . . . it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice . . . The object of British law, whether civil or criminal, is to secure, as far as possible, that justice is done according to law, and if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive.[39]

In *Teper v. The Queen*[40] the Privy Council set aside a conviction based upon hearsay evidence which had not been subject to an objection by counsel for the accused at the trial. In *R. v. O'Brien*[41] counsel for the accused took no objection to the admissibility of evidence of other acts of misconduct by the accused in circumstances which were clearly not within the ambit of the similar facts doctrine. On appeal it was held that this evidence was admissible as *res gesta*, but on the point of waiver, Cullen C.J. said:

> the Court will not lay down any rule that would exclude itself from remedying an obvious miscarriage of justice whereby an innocent person may have been convicted through some failure on the part of the counsel who defended him at the trial . . .[42]

Wade J. took a somewhat different emphasis:

> [W]hen we have a case of an accused person who has been defended by counsel . . . and no objection is taken to the evidence, but after the verdict the point is taken for the first time in this Court, we ought to have some very strong reason advanced why that course had been adopted . . .[43]

In *R. v. Kalinowski*[44] it was stated by Davidson J.:

> The accused were represented at the trial by counsel but no objection seems to have been taken at the time, to the summing up, as it should have been. Ordinarily speaking such an omission would debar the accused, after conviction, from taking advantage of the point on appeal. But it is possible and most probable in this case,

[37] *Ibid.*
[38] [1944] A.C. 315. See also *Curtis v. The Queen* [1972] Tas. S.R. 21.
[39] *Ibid.* 327-8. See also *R. v. Ellis* [1910] 2 K.B. 746.
[40] [1952] A.C. 480.
[41] (1920) 20 S.R. (N.S.W.) 486.
[42] *Ibid.* 490.
[43] *Ibid.* 493.
[44] (1930) 48 W.N. (N.S.W.) 97.

> that the jury . . . did not apply their minds to the facts upon the right principle, that there may have been mistrial and miscarriage of justice.[45]

Of course *Kalinowski* concerned an erroneous summing up by the trial judge rather than inadmissible evidence, and it may be that the arguments against applying waiver theory are stronger in such a case.

In *R. v. Samuels*[46] the accused was convicted of breaking and entering. At his trial hearsay evidence had been received against him because his counsel had inadvertently failed to object to its admission. On appeal the conviction was quashed. The New Zealand Court of Appeal declined to treat the failure to object either as amounting to waiver so as to bar the point being taken on appeal[47] or as a basis for the exercise of the proviso (*no substantial miscarriage of justice*[48]). It should be noted that the inadmissible hearsay was virtually the only evidence against the accused, and the proviso might well have been exercised had there been independent admissible evidence to support the conviction.[49]

It may also be noted that in at least two areas of criminal evidence the view is put strongly and often that the trial judge may act of his own volition to protect the accused. The first is the area of confessions where it has been assumed that the trial judge must exclude from the jury a confession which is involuntary even if counsel for the accused does not challenge the confession or ask for a *voir dire*.[50] The second is in relation to the exercise of the judicial discretion to exclude unfairly obtained or grossly prejudicial evidence.[51] In *R. v. Christie*,[52] for example, Lord Moulton stated:

> [T]hat, as a strict matter of law, there is no difference . . . between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice.[53]

[45] *Ibid.* 99.

[46] [1962] N.Z.L.R. 1036.

[47] For other examples of cases where convictions have been quashed notwithstanding a failure to make timely objection at the trial, see *R. v. El Mir* (1957) 75 W.N. (N.S.W.) 191; *R. v. Glover* (1928) 45 W.N. (N.S.W.) 148; *R. v. Cox* [1972] Qd. R. 366; and *R. v. Garner* (1963) 81 W.N. (Pt. 1) (N.S.W.) 120.

[48] The operation of the proviso is discussed at length below.

[49] Where a trial judge has failed to warn a jury about the dangers of convicting in the absence of corroboration, such a warning being peremptory, the fact that ample corroborative evidence was supplied, has on occasion been held to justify upholding the conviction on the basis of the proviso. See *e.g. Kelleher v. R.* (1974) 4 A.L.R. 450. See also Ligertwood, A., 'Failure to Warn in Criminal Cases Where Corroboration May be Required' (1976) 50 *Australian Law Journal* 158. By analogy, the existence of independent admissible evidence would be relevant to the exercise of the proviso where a conviction is appealed from on the basis that inadmissible evidence was received (without objection being taken); *R. v. Campbell* [1970] V.R. 120.

[50] See the judgments of Gibbs, Mason and Jacobs JJ. in *Driscoll v. R.* (1977) 15 A.L.R. 47. *Cf.* the (as yet) unreported judgment of the Full Court of Victoria in *R. v. Davis* (21st November 1977), where the Full Court (Young C.J., Crockett and Gray JJ.) stated in relation to the trial judge:

> He was not asked to and did not of his own motion elect to have an examination of all the relevant material on a voir dire. Nor do we consider that it was necessary for him to do so in the absence of a request that such be done by one or other of counsel for the accused or the Crown.

[51] See generally Weinberg, M., 'The Judicial Discretion to Exclude Relevant Evidence' (1975) 21 *McGill Law Journal*, 1.

[52] [1914] A.C. 545.

[53] *Ibid.* 559. See also the observations of Lord Reading, 564.

His Lordship went on to express the view that in criminal cases the trial judge must be on his guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value. Therefore there had grown up a practice whereby in such cases the trial judge would intimate to prosecution counsel that he should not press for the admission of such evidence.[54] Implicit in Lord Moulton's reasoning is the proposition that the trial judge might act of his own volition, not waiting upon any formal objection from the accused's counsel. If the trial judge failed to exclude such evidence, an appeal court might quash the conviction notwithstanding the absence of any objection.

D. A CONFLICTING LINE OF AUTHORITY — CASES WHICH SUPPORT WAIVER THEORY IN CRIMINAL APPEALS

The cases considered above represent one side of the coin. They are all examples of non-waiver theory in operation. They all resulted in convictions being set aside notwithstanding failure to object.

On the other hand there are a number of cases which have in effect applied a waiver doctrine to failure to object. In *The King v. Sanders*[55] the prosecution tendered evidence of copies rather than the originals of certain documents. This evidence was inadmissible, but counsel for the accused made no objection. It was stated by the Court of Criminal Appeal:

> In our opinion if it was intended to rely on this point the objection should have been repeated at the time when the evidence was tendered, and not having been taken then, it cannot now be taken in this court, at all events when the prisoner was represented by counsel.[56]

In *R. v. Cutter*[57] it was held that a deliberate decision to refrain from making objection would constitute waiver. The jury, on retiring to consider their verdict, were provided with a copy of the indictment which contained a reference to a previous conviction. The trial judge in effect offered counsel for the accused a choice. He could register an objection and have the jury discharged and a new trial or he could decline to object and seek to have the conviction quashed on appeal. He deliberately elected to take the latter course. It was held by Tucker J., delivering the judgment of the Court of Criminal Appeal, that this failure to object amounted to waiver, a decision which it may be said is open to question. Counsel for the accused was forced to make an invidious choice. The matter should have been taken out of his hands by the trial judge who should have discharged the jury and recommenced the trial.

[54] *Ibid.* 559.
[55] [1919] 1 K.B. 550.
[56] *Ibid.* 553.
[57] [1944] 2 All E.R. 337.

In *R. v. Caplin*[58] the court applied a waiver doctrine in stating in relation to a misdirection by the trial judge:

> Although an accused person should not be penalized for a mistake made by his counsel, and although it is obviously the duty of the court to prevent a miscarriage of justice, still when such a point as this is not taken at the trial, it should not lightly be made a ground for the granting of a new trial.[59]

In *R. v. Davis*[60] Darling J. stated:

> [I]f counsel on the other side do not object, it is not obligatory on the Judge to do so. When a prisoner is defended by counsel, and he chooses for reasons of his own to allow such evidence to be let in without objection, he cannot come here and ask to have the verdict revised on that ground.[61]

In *R. v. Branscombe*[62] counsel for the accused first objected and then consciously withdrew objection to an item of evidence which was clearly inadmissible. It was held that failure to object at trial constituted waiver save only in the most 'exceptional circumstances'.[63] Wade J. took a somewhat narrower position, limiting his remarks to the situation where counsel had deliberately chosen not to object in the expectation that the admission of the evidence would be helpful, on balance, to his client.[64]

It should be noted that in New South Wales (though not in the other States) the Criminal Appeal Rules stipulate that where there has been a failure to make timely objection at the trial, no appeal may be taken on that point without first obtaining leave of the Court of Criminal Appeal.[65]

E. A THIRD APPROACH — TREATING FAILURE TO OBJECT AS RELEVANT TO THE EXERCISE OF THE PROVISO

All Australian States have legislation modelled on section 4(1) of the Criminal Appeal Act 1907 (U.K.) (altered somewhat in England by section 2(1) of the Criminal Appeal Act 1968[66]). For example, section 568(1) of the Crimes Act 1958 (Vic.) provides:

> The Full Court 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

[58] (1933) 50 W.N. (N.S.W.) 189. See also *R. v. Croft* (1933) 50 W.N. (N.S.W.) 56; *R. v. McCann* [1948] Q.W.N. 131; *R. v. Chidley* (1956) 73 W.N. (N.S.W.) 376; *R. v. Thompson* (1947) 64 W.N. (N.S.W.) 151.

[59] (1933) 50 W.N. (N.S.W.) 189, 191.

[60] (1909) 2 C.A.R. 133.

[61] *Ibid.* 139.

[62] (1921) 38 W.N. (N.S.W.) 121. Note also *R. v. Jenkins* (1906) 23 W.N. (N.S.W.) 5.

[63] *Per* Gordon J. See also *R. v. Little* (Unreported, 1st July 1977, N.S.W.).

[64] (1921) 38 W.N. (N.S.W.) 121, 127. This conscious choice criterion accords with the decision of the Full Court of the Supreme Court of Victoria in *R. v. Gay* [1976] V.R. 577. It also accords with the dissenting judgments of Brennan and Marshall JJ. in *Wainwright v. Sykes* (June 23, 1977) 45(49) Law Week 4807, discussed below.

[65] *Criminal Appeal Rules* 1953 (N.S.W.), Rule 4. *Cf. Criminal Appeal Rules* 1965 (Vic.); *Criminal Practice Rules* 1900 (Qd.), Order IX.

[66] For a discussion of the effect of the changes brought about in 1968, see Knight, M., *Criminal Appeals* (1970).

> ground there was a miscarriage of justice and in any other case shall dismiss the appeal: Provided that the Full 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.

Putting aside the proviso for the moment, there are three situations in which an appeal shall be allowed.

(a) If the verdict of the jury is unreasonable or cannot be supported having regard to the evidence. This gives the Appeal Court a discretion to interfere with a jury's verdict on the facts in a perfectly conducted trial. The test is whether a reasonable jury could have reached this verdict on the evidence, had it applied itself to its task properly.[67]

(b) If at the trial there was a wrong decision of any question of law. This would cover a misdirection to the jury, or the wrongful admission or exclusion of evidence.[68]

(c) If on any ground there was a miscarriage of justice. This would cover various forms of procedural fault, such as jury irregularities or improper conduct by the judge or prosecuting counsel.[69]

Of course, if the type of fault alleged by the appellant is within the ambit of (a) and this contention is proved, the proviso will not be used to save the conviction because the Court is saying that there is not a strong enough case on which to base a conviction. Miscarriages of justice under (c) will almost invariably lead to the conviction being quashed and perhaps a new trial being ordered.[70]

We are concerned essentially with the consequences of a failure on the part of defence counsel to object to matters within the ambit of (b), wrong decisions on questions of law. To what extent will such failure to object render it more likely that the proviso will be used to save a conviction obtained in this manner?

In *R. v. Smyth*[71] the accused was convicted of murder, after the trial judge had erroneously directed the jury in terms of there being a presumption (that a man intends the natural and probable consequences of his acts) which affected the incidence of the burden of proof. No objection was taken to this misdirection. The Court of Criminal Appeal *per* Street C.J. stated in applying the proviso:

> Although the failure to take the objection at the time is not fatal to its being dealt with later, as was pointed out by the Privy Council (*sic*)[72] in *Stirland v. D.P.P.* the failure of counsel to object may have a bearing on the question whether or not the accused was really prejudiced. I find it difficult to think that counsel in the present case would have failed to have drawn His Honour's attention to this suggested misdirection if it had played such a part in His Honour's summing-up as to have been capable of misleading the jury in the way in which it is now suggested to us it might have done.[73]

[67] *R. v. McGibbony* [1956] V.L.R. 424.
[68] Knight, *op. cit.* 5.
[69] *Ibid.*
[70] Knight, *op. cit.* 10.
[71] (1956) 73 W.N. (N.S.W.) 539.
[72] *Stirland* was in fact a decision of the House of Lords, not the Privy Council.
[73] (1956) 73 W.N. (N.S.W.) 539, 541. See also *R. v. Harm* (1975) 13 S.A.S.R. 84, 88.

To the same effect was the reasoning in *R. v. Hally*.[74] It was held by the Queensland Supreme Court that failure to object to inadmissible evidence did not of itself bar an appeal from being taken in respect of the admission of that evidence. However, the absence of timely objection was a relevant factor in determining whether there had been a miscarriage of justice and whether the proviso should be used to uphold the conviction. The Court also observed that it would be improper for counsel to refrain from taking an objection to inadmissible evidence merely in order to preserve an appeal point.

Other cases where the proviso has been applied as a result of a failure to object include *R. v. Thompson*,[75] *R. v. McCann*,[76] *R. v. Croft*[77] and *R. v. Chidley*.[78] In *R. v. Green*[79] the High Court ruled on the question whether the accused could introduce fresh evidence on appeal. Latham C.J. stated:

> In considering whether there has been a miscarriage of justice . . . if . . . an accused person has by himself or by his legal advisers deliberately decided to set up a particular defence, he cannot complain as of a miscarriage of justice for the sole reason that, that defence having failed, he comes to the conclusion, or a court comes to the conclusion, that he might succeed if he set up another defence.[80]

By way of contrast note the observations of Barwick C.J. in *R. v. Pemble*:[81]

> Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law.[82]

The third line of authority represents a midway position between traditional non-waiver theory and total waiver theory. It is close to waiver theory to the extent that it posits that it is the duty of counsel to take objections to the admissibility of evidence (or to the form of the judge's summing up) at the trial. Failure to take such objection will prejudice the accused's chances of mounting a successful appeal in that such failure will be taken into account in determining whether or not to exercise the proviso.

However, it is close to non-waiver theory in that it recognizes that there may be a duty on the part of the trial judge to intervene and exclude inadmissible evidence even where the accused is represented by competent counsel who fails to make any objection. There are cases where despite

[74] [1962] Qd. R. 214.
[75] (1947) 64 W.N. (N.S.W.) 151.
[76] [1948] Q.W.N. 31.
[77] (1933) 50 W.N. (N.S.W.) 56.
[78] (1956) 73 W.N. (N.S.W.) 376. But *cf. R. v. Gaffney* [1968] V.R. 417.
[79] (1938) 61 C.L.R. 167.
[80] *Ibid.* 174. See also *R. v. Jeffrey* [1967] V.R. 467; and *R. v. James* [1971] *Criminal Law Review* 476 regarding fresh evidence. Note especially *Ratten v. The Queen* (1974) 48 A.L.J.R. 380.
[81] (1971) 45 A.L.J.R. 333.
[82] *Ibid.* 337. Chief Justice Barwick has apparently moved towards a waiver theory since these remarks were made. See his observations about the consequences of failure to object to an improper direction in *La Fontaine v. The Queen* (1977) 51 A.L.J.R. 145, 149. Gibbs J. also endorsed a waiver theory, 152.

failure to object, the Appeal Court has declined to exercise the proviso to uphold a conviction. This is particularly the case where the accused was unrepresented at the trial[83] or where an improper summing up to the jury has been delivered without objection.[84] In cases involving inadmissible evidence received without objection, where the accused was represented by competent counsel, it is more difficult to argue that a miscarriage of justice has occurred, and the proviso has often been used. However where the *only* evidence against the accused was the inadmissible evidence received without objection, some courts have declined (and it is submitted very properly so) to use the proviso.[85]

F. A COMPARATIVE EXCURSUS — A NOTE ON THE UNITED STATES APPROACH

A reading of the transcript of any civil or criminal trial held in the United States will reveal that many formal objections to the admissibility of evidence (and to the form of particular questions) are raised by opposing attorneys.[86] Dean Wigmore explained this peculiarly American phenomenon as follows:

> The initiative in excluding improper evidence is left entirely to the opponent — so far at least as concerns his right to appeal on that ground to another tribunal. The judge *may* of his own motion deal with the offered evidence; but for all *subsequent* purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence not invoked is *waived*.[87]

To the same effect is Rule 4(a) of the Uniform Rules of Evidence (1953).

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears on record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection . . .[88]

It is not difficult to understand the reasons for the existence of a waiver doctrine. It would be manifestly unjust to permit a party, with knowledge of a secret defect in the proceedings, to take his chance for a favourable verdict with the capacity and intention to appeal if the verdict be unfavourable. Furthermore, it would be wasteful if errors were not pointed out at the time they were made, but rather saved as appeal points for future rectification. Also, if counsel had informed his opponent of

[83] *R. v. Eversen* (1916) 33 W.N. (N.S.W.) 106; *R. v. Campbell* [1970] V.R. 120.

[84] *R. v. El Mir* (1957) 75 W.N. (N.S.W.) 191; *R. v. Kalinowski* (1930) 48 W.N. (N.S.W.) 97; *R. v. Garner* (1964) 81 W.N. (Pt 1) (N.S.W.) 120.

[85] *Supra* n. 49.

[86] See for example the edited transcript of the celebrated Chicago Eight conspiracy trial, published in 1971 (edited by Clavir and Spitzer). The presiding judge, Judge Julius Hoffmann ruled on literally thousands of objections during the trial. It is interesting to note that in the first one hundred and fifty pages of the transcript, Judge Hoffmann upheld every objection raised by counsel for the prosecution, and dismissed every objection and motion raised by counsel for the defence.

[87] *Wigmore on Evidence* (3rd ed.) Vol. I 321.

[88] Note also proposed Federal Rule of Evidence 103 (1973). In the United States some objections have to be raised before trial *e.g.* objections to evidence obtained by illegal search and seizure, or to in-court identification based on a tainted line up.

the objection immediately the opponent could at least have considered adjusting his presentation of the case to avoid later challenge.

Since Wigmore wrote his treatise, the law regarding waiver has developed considerably in the United States. On the one hand there has emerged a threefold classification of error on appeal. 'Harmless error' consists of error raised at trial but found not to affect substantial rights. 'Reversible error' is that raised at trial which is found to affect substantial rights. 'Plain error' is that *not raised at trial* but nevertheless considered by an appellate court because it is found to affect substantial rights.[89] As one leading text puts it:

> The distinction between harmless and plain error turns on whether the particular error in the case excuses the party's failure to bring it properly to the trial court's attention.[90]

This series of distinctions would seem to have weakened the crude notion that failure to make timely objection constitutes waiver of an appeal point. Most recently, however, the total waiver theory expressed by Wigmore has been forcibly reasserted by the United States Supreme Court. In *Wainwright v. Sykes*[91] the respondent had been tried for murder. A confession was received in evidence against him without any objection from his counsel. The trial judge did not question its admissibility. Even on appeal no challenge was made to the admissibility of the confession. It was only after all avenues of appeal had been exhausted through the State Courts that the respondent sought to challenge his conviction collaterally through the Federal District Court, Court of Appeals and the Supreme Court. In proceedings on a petition for *habeas corpus* he argued that the confession had been inadmissible as it had been obtained in breach of the *Miranda*[92] warning requirements.

The District Court ruled that there was no bar to the respondent challenging the admissibility of the confession in collateral proceedings even though his counsel had failed to make a contemporaneous objection at the trial. This was so notwithstanding the fact that there was State legislation requiring objections of this kind to be taken before the trial actually commenced.

The Federal Court of Appeals agreed, adding only that if it could be demonstrated that counsel for the defence had consciously decided not to object for tactical reasons, then and only then would failure to object constitute waiver of constitutional rights to the exclusion of the confession.

[89] See the discussion in Maguire, Weinstein, Chadbourn and Mansfield *Cases and Materials on Evidence* (1976), 1135. Note however that the 'plain error' doctrine was rejected by the Supreme Court of Pennsylvania in *Commonwealth v. Clair* (1974) 326 A.2d. 272.

[90] *Ibid.* See also Spritzer, R., 'Criminal Waiver, Procedural Default and the Burger Court' (1978) 126 *University of Pennsylvania Law Review* 473.

[91] (June 23, 1977) 45(49) Law Week 4807. For a discussion of the position in the State of Pennsylvania prior to *Wainwright,* see a recent Comment in 15 *Duquesne Law Review* 217 (1977).

[92] *Miranda v. Arizona* 384 U.S. 436.

The Supreme Court reversed the Court of Appeals. It held by a majority of seven to two that the normal rule that failure to object constitutes waiver should apply, unless the accused can demonstrate both that there had been good cause for not objecting, and also that the accused was prejudiced by the admission of the evidence. In the words of the majority:

> Respondent has advanced no explanation whatever for his failure to object at trial; and as the proceeding unfolded the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.[93]

All the indications were that defence counsel's failure to object was simply *inadvertence*[94] on his part, rather than a *conscious* decision. Yet this was sufficient to constitute waiver of the accused's constitutional rights. This decision represents a high point in adversary theory. It seems that, whether in civil or criminal cases, in the United States, a timely objection must be taken to inadmissible evidence if an appeal point is to be preserved.[95]

G. CONCLUSIONS

It has been generally assumed, at least in England and Australia, that failure to object to inadmissible evidence in criminal cases does not constitute waiver so as to debar an appeal point being taken. Indeed, a number of cases support this view. However, there is a line of authority which appears to be in clear conflict with this traditional view.

This conflicting line of authority may take any one of three distinct forms:

[93] (June 23, 1977) 45(49) Law Week 4807, 4812. It should be noted that Justices Brennan and Marshall dissented. They held that the waiver doctrine should apply only if defence counsel had deliberately by-passed his right to make contemporaneous objection to inadmissible evidence. Mere inadvertence on the part of an accused's lawyer should not lead to forfeiture of constitutional rights.

[94] Prior to *Wainwright*, the Supreme Court of Pennsylvania had moved away from a 'plain error' doctrine, and had adopted a total waiver theory. See *Commonwealth v. Clair* (1974) 458 Pa. 418; 326 A.2d. 272. An exception to this total waiver theory was a claim of ineffective assistance of counsel. This exception was discussed in *Commonwealth v. Carter* (1975) 463 Pa. 310; 344 A.2d. 846. *Wainwright* seems to have done away with even this limited exception.

[95] The position in Canada may be different to that which prevails in the United States. See Schiff, *Evidence in the Litigation Process: A Coursebook in Law* (1974), where the author says at p. 136

> 'Indeed, some judges have suggested that, even if defence counsel at a criminal trial recognized the error when made and withheld his objection for purely tactical reasons, after conviction the accused person may found his appeal upon that very error.'

In civil cases in Canada, the Supreme Court has ruled that failure to object at trial will not lead to an appeal being dismissed of itself. However, if a new trial is ordered, the party who failed to object will be deprived of legal costs for the first trial. See *Mann v. Balaban* [1970] S.C.R. 74; 8 D.L.R. (3d) 548. Note *Imrich v. R.* (1977) 75 D.L.R. (3d) 243, a case which supports waiver theory.

(a) Cases which hold that failure to make timely objection prevents the point of inadmissible evidence being raised on appeal, *i.e.*, full waiver theory.[96]

(b) Cases which hold that failure to make timely objection does not of itself constitute waiver, but is a relevant consideration in determining whether the proviso should be used to uphold the conviction.[97]

(c) Cases which draw a distinction between different exclusionary rules of evidence, some of which are subject to waiver, and some of which are not, *i.e.*, partial waiver theory.[98]

Traditional non-waiver theory can accommodate category (b), so long as the proviso is only used to uphold convictions where there is ample admissible evidence (independent of the item of inadmissible evidence to which objection has not been made) to support the conviction. When the only evidence against the accused is the inadmissible evidence not objected to,[99] traditional analysis conflicts with all three categories set out above.

The United States Supreme Court[1] has embraced category (a) as its solution to the problem. Even inadvertent failure to object will constitute waiver. The full waiver theory it has adopted will lead to the continuing disfiguration of American criminal trials by numerous formal objections. It will continue to prevent evidence being presented in a coherent fashion.

The Victorian Full Court has embarked down the path of waiver without fully considering the consequences of its actions. Its most recent pronouncements indicate a movement away from traditional non-waiver theory in the direction of category (c). It is said that 'mode or form' evidence is subject to waiver, while other rules of evidence are not.[2] It is said that where there has been a 'deliberate choice not to object' (for tactical reasons other than preserving an appeal point) this constitutes waiver.[3]

With respect, it is suggested that this approach has little to commend it. The proper solution would be a blend of traditional non-waiver theory, and category (b). The proviso ought to be used to uphold a conviction only where there is ample admissible evidence (apart from the inadmissible evidence received without objection) to sustain that conviction. In cases where the only evidence against the accused is the inadmissible evidence to which no objection was taken, the conviction should be quashed (subject to one slight modification discussed below).

[96] See *Wainwright v. Sykes* (discussed *supra*).
[97] *R. v. Smyth* (1956) 73 W.N. (N.S.W.) 539.
[98] *R. v. Matthews and Ford* [1972] V.R. 3; *R. v. Alexander and Taylor* [1975] V.R. 741; *R. v. Gay* [1976] V.R. 577. Note also that Barwick C.J. and Gibbs J., in *La Fontaine v. The Queen* (1977) 51 A.L.J.R. 145, 149, 152 respectively, indicated some sympathy for the waiver doctrine, at least where the decision not to object was consciously taken by experienced counsel.
[99] See *R. v. Alexander and Taylor* [1975] V.R. 741.
[1] *Wainwright v. Sykes* (discussed *supra*).
[2] *R. v. Matthews and Ford* [1972] V.R. 3.
[3] *R. v. Gay* [1976] V.R. 577. See also *Re Ratten* [1974] V.R. 201, 214.

Category (c) is unsatisfactory because it provides no workable criteria for determining which rules of evidence are subject to waiver, and which are not. The 'mode or form of proof' test is vague. Does it apply to hearsay received without objection?[4] What about opinion evidence? Clearly it does not (or at least should not) cover competence of witnesses and character evidence. Why distinguish some exclusionary rules from others in this way? Why are those which are said to go to 'mode or form' less fundamental, even assuming that this distinction can be drawn in some non-arbitrary way?

The conscious choice criterion does not seem entirely satisfactory either. Why should an accused person be convicted because his counsel has blundered at the trial — whether as a result of inadvertence or a deliberate decision made in ignorance of the total repercussions?

The real basis of waiver theory in criminal cases is the fear that without it, counsel will refrain from taking objections at the trial in order to preserve appeal points. How realistic is this danger? To the extent that it does exist, would it not be overcome by having a simple rule that where counsel has deliberately failed to object *in order to preserve an appeal point* this will constitute a basis for the exercise of the proviso. (Admittedly there would be difficulties of proof associated with such a rule.) A conscious decision not to object *for any other reason,* including tactical considerations, ought not to prejudice the accused on appeal. *A fortiori* neither should inadvertence on the part of the accused's legal representative.[5]

Adversary theory is central to any understanding of civil litigation, (though there are those who regret this). The criminal trial, however, should not be seen as being a contest between parties conducted according to sporting rules. It is the duty of the trial judge to secure a fair trial for the accused. The emergence of a doctrine of waiver, no matter how attenuated, is in conflict with this central duty. As such, it warrants the closest scrutiny from our Criminal Courts before it is adopted. It does not appear to have received such scrutiny at this stage.[6]

[4] Harrison, *op. cit.* argued that the rule against hearsay is as fundamental as any other exclusionary rule — and is not subject to any doctrine of waiver in civil or criminal cases. This argument does not withstand close scrutiny so far as civil cases are concerned. It is more tenable in relation to criminal cases, as has been illustrated.

[5] In contrast to the Victorian approach, note the recent decision of the Court of Appeal (Criminal Division) in *R. v. Young and Robinson* [1978] *Criminal Law Review* 163. There it was held that a trial judge had a duty to intervene on behalf of the accused where, through sheer incompetence, counsel for the defence was inadvertently damaging his client's case.

[6] Nor has the doctrine of waiver been closely analysed by other State Supreme Courts. In three recent South Australian cases the Court of Criminal Appeal has endorsed the non-waiver plus proviso approach advocated by the author of this article. See *R. v. Harm* (1975) 13 S.A.S.R. 84 *per* Bray C.J.; *R. v. Byczko* (Unreported, 26 July 1977, S.A.) *per* Bray C.J. and King J.; and *R. v. Stephenson* (Unreported, 20 March 1978, S.A.) *per* Walters J. However none of these judgments reveals any clear understanding of the competing principles in this area, nor of the specific merits of adopting the non-waiver plus proviso solution.