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Trial by Motive

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Abstract

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Keywords

accused, murder, appeal

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Abstract

This article examines the implications of the High Court ruling in The Queen v Baden-Clay ('Baden-Clay')¹ for future murder accused with strong motives for killing their spouses who deny all knowledge of their deaths. The article argues that apart from underlining the risk run by any criminal accused who opts to remain silent at their trial, the reasoning of the Court has left open the possibility that a conviction of murder could become a 'default' verdict under Queensland law in the absence of clear evidence of manslaughter, once the act of homicide has been proved. It has also provided a 'pro-Crown' precedent for future cases in which a conviction may be obtained by means of items of purely circumstantial evidence, not all of which are established beyond reasonable doubt.

I Overview

The recent ruling of the High Court in the long-drawn-out saga involving Gerard Baden-Clay marks the final chapter in one of the most talked about homicides in Queensland's criminal history. Baden-Clay was tried by media long before he entered a plea of Not Guilty, his private life became public gossip, his face was known to every newspaper reader and television viewer, and his subsequent conviction for his wife's death came as no surprise to anyone who had formed an opinion on the case without the benefit of actual facts. But in this article it is argued that the choice of grounds upon which Baden-Clay based his appeal to both the Queensland Court of Appeal and the High Court obscured a fundamental issue concerning the process by which the jury was invited to find him guilty. It is an issue that has occupied our courts on more than one occasion in the past, and will almost certainly do so again in the future. For that reason, if for no other, it is important to draw attention to it, and it may be simply stated: Once it is proved that A had a powerful motive for wishing B dead, how much more evidence is required to convict A of bringing about that death?

* Associate Professor of Law, Bond University. I am grateful to the anonymous referees for their thoughtful comments and to Craig Smith for reviewing a later draft of this article. Any errors that remain are, as always, mine alone.

¹ (2016) 258 CLR 308.

II The evidence available to the trial jury

The body of Allison Baden-Clay ('Allison') was discovered on 30 April 2012 on the bank of Kholo Creek under the road bridge that crossed it at Mount Crosby, thirteen kilometres from the home in Brookfield, in Brisbane's affluent western suburbs, which she had shared with her husband Gerard Baden-Clay ('Gerard') and their three young daughters. The body had fallen, or been thrown, some fourteen metres down from the bridge, and she was casually dressed, with no damage to her clothing. Any immediately obvious cause of death was obliterated by the decomposition that had occurred during the eleven days in which she had been the subject of intense searching since her reported disappearance. However, the forensic evidence suggested that the body had been in that position since shortly after death.

Allison had been reported missing by Gerard on the morning of 20 April, after he had allegedly woken up and found that she had not returned from what he had assumed to have been her customary early morning walk. He claimed to have last seen her at around ten o'clock the previous evening, when he had gone to bed leaving her to watch television. Because Gerard was a heavy sleeper, he was unable to advise investigating police whether she had later joined him in their double bed or had slept on the couch downstairs.

It was immediately obvious to everyone who saw him at that time — relatives, friends, police and the viewing public to whom he made several emotional televised appeals for information regarding Allison's whereabouts — that he had what appeared to be scratch marks on his face, which he explained away as razor cuts caused by hurried shaving with a blunt blade.

Police questioning elicited from Gerard the admission that his relationship with Allison had recently become a tense one, due to an affair that he had been conducting with a former work colleague, Ms McHugh, who had been employed in Gerard's estate agency business. He had assured Allison that the affair was over, although it had recently been revived; he and Allison had been undergoing relationship counselling, and Allison was taking medication for depression at the time of her disappearance. It also emerged that the estate agency was in financial difficulty, that Gerard owed a considerable amount to friends who had helped to finance the business, and that he had recently unsuccessfully sought a loan of some \$300,000 from another friend.

Initially there seemed to be no evidence of any act of violence having occurred at the home itself. The three young children of the marriage had not been awoken during the night of 19 or 20 April, and there was no sign of a struggle in the house or garden. Allison's 4WD was still parked in the carport, and Gerard's own 4WD was also on the property. Then things become a little more suspicious.

First of all, forensic examination of Allison's 4WD, which was only two months old, revealed traces of a blood flow on the rear internal wheel

arch cowling. The blood was proved to be Allison's; it was a 'transfer' stain from a body or clothing having come into contact with the surface, and there was no evidence of any incident in which her blood could have got there innocently by way of accident or injury. Foliage associated with the body *in situ* could be traced back to the garden of the family home, but did not occur naturally where Allison's body was found. Additionally, there was no pathology evidence identifying any obvious cause of death; Allison had not suffered any fractures, nor did she appear to have drowned or been strangled. In addition, her toxicology was consistent with a moderate amount of alcohol having been consumed shortly before her death, and with her known prescribed ingestion of anti-depressants.

Further suspicion was aroused by what Ms McHugh was able to advise police regarding her affair with Gerard. When Allison had become aware of the three-year-old affair the previous year, Gerard had promised her that it was over, and had made reasonable efforts to avoid Ms McHugh, who left her employment in his office. But two months later — five months prior to Allison's death — Gerard had renewed the illicit relationship, assuring Ms McHugh that he still loved her and that his marriage to Allison would be over by July 2012. At the same time, he expressed concerns about the effect that any divorce might have on his children's future, Allison's mental state, and his financial position. Earlier on the day of Allison's disappearance Ms McHugh had revealed to Gerard that she and Allison would be attending the same conference the following day, and that it was time for their ongoing relationship to be revealed to Allison.

All of which clearly gave Gerard a powerful motive for doing away with Allison. In the laconic observation of the unanimous High Court,

[i]t was not unreasonable for the jury to conclude, on the whole of the evidence, that it tested credulity too far to suggest that his evident desire to be rid of his wife was fortuitously fulfilled by her unintended death.²

Gerard's defence at his trial was the bold and simple one that he had not been involved in Allison's death in any way; he had not been present when she died; he had not assaulted her in any way, either on 19 or 20 April or at any other time in the past; and he was unable to assist the jury in explaining how she had met her death. He gave oral testimony to that effect, but the persuasive circumstantial case that the Crown had prepared against him was clearly preferred by the jury when it came time to make the final decision on his guilt.

It was the Crown's 'theory of the case' that Gerard had killed Allison — intentionally or otherwise — during some sort of physical altercation in the family home, and had then driven her body to the road bridge at Kholo Creek in her 4WD. It was, however, submitted by the Crown in the High Court that 'the trial was conducted by both prosecution and defence as a

² Ibid [69]. These words were adopted, in an amended form, from the Court's previous ruling in *Plomp v The Queen* (1963) 110 CLR 234, 243, although whether the analogy between these two cases is validly drawn is a question raised later in this article.

case of murder or nothing’,³ and the Court of Appeal noted that the grounds of appeal before it did not include any defence submission that ‘it was not open to the jury to find that the appellant had killed his wife’.⁴

It is instructive to pause at this point and note the distinction maintained by our criminal law between the two ‘elements’ of crime identified by the Latin phrases ‘*mens rea*’ and ‘*actus reus*’. The former refers to what may be generically defined as ‘the state of mind’ of a person when they commit an act, and it is essential to both a conviction of any given crime and the definition of that crime. In order to obtain a conviction for ‘murder’, the Crown must show not only that the accused committed the act (the ‘*actus reus*’), but also that they did so with the necessary *mens rea*, which in respect of murder is an intention to kill or to inflict grievous bodily harm. If, on the other hand, the death of which they stand accused was the result of some lesser act of violence that was intended, but in consequence of which death was not reasonably foreseeable, then the perpetrator may only be convicted of ‘manslaughter’. To employ a simple example, if I hit my victim over the head with an axe with intent to at least cause them brain damage, I commit murder; if I merely slap them in the face, but as a result they fall over and hit their head fatally on some object, I have committed only manslaughter.

But before I may be convicted of either of these offences, it must be proved that the death was the outcome of my actions, and this is what we mean by the aptly-named *actus reus*. It requires no great leap of logic to appreciate that if I did not perform any act leading to death, then I cannot be held legally responsible for that death. Both ‘elements’ (i.e. *actus reus* and *mens rea*) must be proved beyond reasonable doubt.⁵

Gerard’s entire testimony at trial was to the effect that he had not committed the *actus reus* of any homicide of his wife, and yet both of his appeals, first to the Queensland Court of Appeal, and then to the High Court, focused on the *mens rea* question of whether or not murder, as opposed to manslaughter, could be assumed from the circumstantial facts that had led to his conviction. The absence of any direct appeal on the ground that those circumstances should not have been allowed to lead to a conviction has obscured the fact that Gerard is now serving a life sentence primarily because he had a motive for wanting Allison dead. Expressed in the legal terms explained above, his appeals were in relation to *mens rea* rather than *actus reus*, and it was assumed by everyone involved in the case, including Gerard himself for the purpose of his appeals, that it had been proved beyond reasonable doubt that Gerard had physically caused Allison’s death.

³ *Baden-Clay* (2016) 258 CLR 308, 321–2 [39].

⁴ *R v Baden-Clay* [2015] QCA 265 (8 December 2015) [2].

⁵ This is the ‘presumption of innocence’ first confirmed at the highest level for English common law by the House of Lords in *Woolmington v DPP* [1935] AC 462, and absorbed into Queensland law as part of its colonial legal inheritance: see *R v Mullen* (1938) 59 CLR 124.

III Murder or manslaughter?

The ground of appeal that seemed to occupy most of the attention of the Court of Appeal was whether Gerard should have been convicted of murder or manslaughter. Both of course require, as a prerequisite, that it be proved beyond reasonable doubt that he committed the act, but the way in which the appeal was framed seemed to take that fact for granted. As the Court noted, the ‘appellant accepted that it was open to the jury to be satisfied beyond reasonable doubt that he had unlawfully killed his wife, but contended that they could not properly be satisfied of the necessary intent for murder’.⁶ Perhaps he would have been better advised *not* to accept that, but in the event the remainder of the Court’s time was taken up in a consideration of whether his alleged actions had been intentional, or simply the unintended result of an assault gone wrong.

Inconsistently with its assertion that Gerard had the strongest possible motive for Allison’s death, the Crown apparently conceded before the Court of Appeal that the trial had not been conducted on the basis that the killing of Allison had been ‘motivated by some benefit he stood to gain from [Allison’s] death’.⁷ The Court then went on to make the somewhat startling assertion that it ‘was not, of course, incumbent on the Crown to establish a motive, but to do so might have assisted in proving an intent to kill or do grievous bodily harm’.⁸ With the greatest of respect, the entire trial and resulting conviction had been predicated on the assertion that it had suited Gerard to have Allison out of the way, so it was hardly appropriate to imply that the Crown had not established ‘motive’. What it had failed to do was convert that motive into evidence for murder, as opposed to manslaughter. As the Court observed, ‘the evidence of financial stress and the extra-marital affair suggested a context of strain between the couple which might well have culminated in a confrontation; but it did not provide a motive or point to murder rather than manslaughter’.⁹

The Court ultimately ruled that the conviction for murder should be set aside, and a verdict of manslaughter substituted, opining that:

the lies,¹⁰ or the lies taken in combination with the disposal of the body, would not enable the jury to draw an inference of intent to kill or do grievous bodily harm if there were, after consideration of all the evidence, equally open a possibility that all of that conduct was engaged in through a consciousness of a lesser offence; in this case, manslaughter ... [I]n the present case there was no evidence of motive in the sense of a reason to kill, and [Gerard] had never intimated any intention of harming his wife ... [T]he jury could not properly have been satisfied beyond reasonable doubt that the element of intent to kill or do grievous bodily harm had been proved.¹¹

⁶ *R v Baden-Clay* [2015] QCA 265 (8 December 2015) [38].

⁷ *Ibid* [42].

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ Strictly speaking, this was only one lie, told more than once.

¹¹ *R v Baden-Clay* [2015] QCA 265 (8 December 2015) [45], [46], [48].

With respect, we are being asked to accept that there was sufficient motive to justify a finding of guilt of the act of killing, but insufficient motive that Gerard had intended to kill Allison. Was it not the alleged convenience, to him, of her death, that had been argued as the justification for drawing an adverse inference against him? If, as was alleged, Gerard wanted Allison dead, would it not be logical to conclude that he deliberately brought that about?

Not content to quit while they were not entirely losing, the Crown appealed to the High Court against the substitution of the manslaughter conviction for the original one for murder.¹² Given this narrow ground of appeal, the Court did not have the opportunity to enquire into the evidence of *actus reus* that had led to the guilty verdict. Instead it concentrated on the *mens rea* implications of what it took to be proven fact.

In restoring the murder conviction, the unanimous Court took the Crown's theory of the case at trial to have been that:

on the night of 19 April 2012, [Gerard] was confronted by the consequences of his conduct, which included the long-term tension in his relationship with his wife, the tension in his relationship with Ms McHugh, his discussions with Ms McHugh on the late afternoon of 19 April, and the prospect of his ongoing relationship with Ms McHugh being exposed to his wife at the conference which was to be held on the following day, and of his wife being unwilling to forgive him a second time. In these circumstances, he became involved in an altercation in which he killed his wife with the intention of doing so or of causing her grievous bodily harm.¹³

The Court's main concern was that the hypothesis of manslaughter that the Court of Appeal had identified had not been open to the jury on the evidence led at trial. The evidence that had led to Gerard's conviction was 'intractably neutral'¹⁴ as between murder or manslaughter. Even if the jury *had* been satisfied that Gerard had a reason for wanting his wife dead, that he was in a heightened state of tension, that he had acquired scratch marks in a physical confrontation with her, and that he had disposed of her body in panic when he realised that she was dead, this was just as consistent with an absence of intent to kill as it was with an intent to kill or cause grievous bodily harm. Put another way, it did not conclusively suggest either murder or manslaughter, although it had been proved that Gerard had been the 'agent' of Allison's death — that he *had* committed the *actus reus*.

The High Court then proceeded, on the basis of 'the unchallenged conclusion that the respondent was the agent of his wife's death',¹⁵ to rule that the:

hypothesis identified by the Court of Appeal was not open. Once that hypothesis is rejected, no other hypothesis consistent with guilt of

¹² *Baden-Clay* (2016) 258 CLR 308, 315 [4].

¹³ *Ibid* 319 [30].

¹⁴ *Ibid* 321 [38], citing a phrase originally coined in *R v Ciantar* (2006) 16 VR 26, 39 [40].

¹⁵ *Ibid* 324–5 [50].

manslaughter, but innocence of murder, has ever been identified at trial, before the Court of Appeal, or in this Court.¹⁶

The Court ascribed part of the blame for this hiatus in evidence of manslaughter on Gerard himself, since his evidence at trial:

was that he had nothing to do with the circumstances in which his wife was killed. On his evidence he simply was not present when her death occurred; and he could not have been the unintentional cause of her death.¹⁷

Put another way, Gerard had not testified to circumstances that might have inclined the jury to opt for a manslaughter verdict, and, in the words of the High Court in *Weissensteiner v The Queen*:

in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.¹⁸

Weissensteiner was a case in which the accused failed to testify at all, but the principle would seem to apply equally when an accused does testify, but says nothing that would assist a finding of fact in their favour. If Gerard wished the jury to believe that he had caused Allison's death accidentally, or unintentionally, then there was at least a 'tactical burden' on him to say so on oath, and his failure to do so allowed the jury to think the worst of him. It was probably in this sense that it could be said that the trial had been conducted on a 'murder or nothing' basis.¹⁹

But is such an approach justified? When Queensland's *Criminal Code* was first drafted,²⁰ it adopted the common law philosophy that murder was more serious than manslaughter, and s 303, in its terms, effectively defines manslaughter as some act of homicide that is *not* murder, and what might be called the 'culpability pecking order' between the two is currently further underlined by the lesser maximum sentence for manslaughter. Section 576 of the *Criminal Code* underlines this point further by allowing for a manslaughter conviction to be entered as an 'alternative' verdict in a murder trial, but not the other way around.

It is somehow counter-intuitive to conclude, in the absence of any evidence as to the circumstances in which an act of homicide was committed, that in its absence one may assume the worst. True it is that the jury had no factual basis upon which to conclude that Gerard was guilty of manslaughter, but neither had they heard any evidence to justify a finding of murder. Given the absence of probative evidence of either form

¹⁶ Ibid 328–9 [63].

¹⁷ Ibid 325 [52].

¹⁸ (1993) 178 CLR 217, 227–8, cited in *Baden-Clay* (2016) 258 CLR 308, 324–5 [50]. This has led scholars to doubt whether or not the much-vaunted 'right to silence' of a criminal accused accompanies them into the trial court: see, eg, David Hamer, 'Does Silence Imply Guilt?' (2006) 72 *Precedent* 4; Barbara Hocking and Laura Manville, 'What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?' (2001) 1(1) *Macquarie Law Journal* 63.

¹⁹ *Baden-Clay* (2016) 258 CLR 308, 321–2 [39], referring to a submission by the Crown.

²⁰ *Criminal Code Act 1899* (Qld) sch 1.

of *mens rea*, why should murder be judged to be the ‘fallback’ conclusion? In every other aspect of the criminal trial process, the accused is entitled to the benefit of any ‘reasonable doubt’ — is there not a persuasive argument for extending that to the *mens rea* in those (admittedly rare) circumstances in which a choice is available?

But in proceeding on the basis of the allegedly ‘unchallenged’ conclusion that Gerard had caused Allison’s death, the Court — like the Court of Appeal below it — had also missed an opportunity to clarify an area of the law of evidence that has been in urgent need of clarification for some time. On the basis of the narrow grounds of appeal raised in both courts, this may perhaps be justified procedurally, but the academic community enjoys the luxury of freedom from such procedural constraints.

For a start, the allegation that Gerard had been ‘the agent of his wife’s death’ had not gone ‘unchallenged’. As the Court itself highlighted later in its judgment, Gerard had sworn on oath that he had not committed the *actus reus*. That the jury had clearly not believed him might perhaps justify the soubriquet ‘unchallenged’ from the perspective of the avenues of appeal left open, and it is certainly the case that those advising him had not sought to attack the jury’s findings on the basis that Gerard’s physical involvement in Allison’s death had not been proved beyond reasonable doubt. Whether or not those findings were still open to attack depends upon how much weight should have been attached, by the jury, to Gerard’s motive for Allison’s death. This requires a distinction to be drawn between ‘direct’ and ‘circumstantial’ evidence.

In a case involving ‘direct’ evidence (e.g. that the accused was seen committing the offence, that he later admitted it to police, that the weapon employed or the property stolen were found in the accused’s possession etc.), the Crown’s task is straightforward. However, the position is not quite so straightforward when some or all of the Crown’s case is ‘circumstantial’.

By ‘circumstantial’ is meant evidence that points for or against a particular ‘fact in issue’. A good example is evidence of an accused running from the scene of a crime, which suggests that he or she was recently involved in it; another example is alibi evidence led by the defence, the inference being that if the accused was at place A at the time of the crime, he or she could not have been in Place B at the same time. The strength of the ‘circumstantial inference’ to be drawn will increase with the distance between the two places.

An aspect of circumstantial evidence that has caused considerable difficulty in criminal cases over the years is whether (1) each such item must be proved beyond reasonable doubt, or (2) it is sufficient that, at the end of the day, the jury is satisfied of the guilt of the accused beyond reasonable doubt on what might be termed ‘the totality of the evidence’, even though each of the items of circumstantial evidence that make up that

totality have not been proved beyond reasonable doubt.²¹ In a trial in which the entire Crown case is circumstantial, as in the *Baden-Clay* case, the answer to this question is critical. And yet considerable doubt has plagued this issue throughout the case-law, and the ultimate findings of both the Court of Appeal and the High Court in the *Baden-Clay* case have done nothing to clarify it.²²

IV The Crown's circumstantial case

The Crown had led no direct evidence to prove that Gerard had killed Allison, intentionally or otherwise. Rather, it relied upon various processes of circumstantial inference to argue that her death had been the result of what the Court of Appeal described as 'certain stressors affecting [him] at the time of his wife's death ... [that] might provide some explanation for uncharacteristic violence'.²³ These were: (a) his financial difficulties; and (b) his involvement in an extra-marital affair. Both of these, of course, constitute only *motive*, and are not circumstances tending to prove that Gerard actually killed Allison.

There were other circumstances relied on by the Crown that tended to support the theory that Gerard had 'lost the plot' with Allison, killed her, and subsequently disposed of her body where it had been found. The bloodstain inside her 4WD could not be explained, not even by Gerard during his testimony.²⁴ The explanation that the marks on his face had been occasioned by careless shaving on his part was challenged by Crown forensic experts who were of the opinion that they were fingernail marks ('defence wounds' inflicted by a struggling Allison).²⁵ It was therefore open to the jury to believe that Gerard had lied about the source of those marks, and the trial judge was persuaded to give what is known as an 'Edwards Direction'²⁶ in respect of this alleged lie.²⁷ An *Edwards* Direction is an instruction to the jury that it is open to them to conclude that an accused person has lied about some significant fact in an attempt to cover up their guilt, provided that they keep in mind the possibility of other, more innocent, reasons for that lie. There was no objection to this at the trial,²⁸ although it was submitted on appeal that this Direction had been

²¹ This issue has been the focus of considerable scholarly debate: see, eg, David Hamer, 'The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof' (1997) 23 *Monash University Law Review* 43; John J Costanzo, 'The Indispensability of Shepherd to the Flock' (1997) 16 *Australian Bar Review* 138.

²² For a scholarly but accessible assessment of the power of circumstantial evidence to convict an accused, see Ian Barker, 'Circumstantial Evidence in Criminal Cases' [2011] (Winter) *Journal of the NSW Bar Association* 32.

²³ *R v Baden-Clay* [2015] QCA 265 (8 December 2015) [12].

²⁴ *Ibid* [19].

²⁵ *Ibid* [24]–[27].

²⁶ *Edwards v The Queen* (1993) 178 CLR 193 ('*Edwards*').

²⁷ *R v Baden-Clay* [2015] QCA 265 (8 December 2015) [29].

²⁸ *Ibid*.

inappropriate,²⁹ because there was no evidence that Gerard had made any attempt to hide the two marks, and before the jury might use them against him it would need to be established by the evidence — which it was not — that the two separate marks had been made at different times.³⁰

The Court of Appeal disposed of this ground by concluding that ‘it was entirely open to the jury to conclude that a different mechanism was involved in the two different forms of injury’,³¹ and that if:

the jury were satisfied that the wounds were inflicted by different means, their precise timing was not critical; the only question was whether the red scratches were sustained later ... It was open to them ... to reach the conclusion that they had been inflicted separately, by different means, and with the red scratches occasioned later. That conclusion being open, the direction was properly given.³²

In short, that Gerard had deliberately cut himself in order to ‘lie’ regarding the cause of the original marks, which could have been fingernail scratch marks occasioned by Allison fighting for her life.

As if this were not damaging enough to the defence case, the trial judge had also declined to direct the jury that they should be satisfied beyond reasonable doubt that Gerard had disposed of Allison’s body at Kholo Creek before they could conclude from that circumstance that he had killed her. The trial judge was asked by defence counsel to give this direction because, or so it was argued, the disposal of her body was ‘an indispensable link’ to a finding of guilt.³³ The significance of that phrase is considered below, but suffice it to say at this stage that the jury were sent out with the belief that they could conclude guilt partly on the basis of Gerard’s alleged disposal of Allison’s body without being satisfied beyond reasonable doubt that this is what he had done. On appeal, not only was this alleged oversight on the part of the trial judge pleaded as a ground for overturning the resulting murder conviction, but so too was his failure to give a similar direction in respect of the bloodstain in Allison’s 4WD, even though this had not been requested at trial.

It is appropriate to pause at this point and consider the significance of what was being argued. The Crown’s case was entirely ‘circumstantial’, in the sense that it consisted of a series of alleged facts from which an inference of guilt *might* be drawn. The issue was whether the Crown was obliged to prove those ‘primary or ‘inferred’ facts beyond reasonable doubt before inviting the jury to ‘join up the dots’ that led to a conclusion of

²⁹ Ibid [30].

³⁰ Ibid.

³¹ Ibid [31].

³² Ibid [32].

³³ Ibid [33]. There was also the unspoken question of why, if a third party had murdered Allison, they had taken the trouble to return her 4WD to the carport.

guilt.³⁴ Did they have to be satisfied beyond reasonable doubt (a) that the blood in Allison's 4WD got there while her body was being transported to Kholo Creek, and (b) that Gerard had been the one who had driven it there?

The Court of Appeal ruled that they did not, and in restoring the original murder conviction the High Court impliedly endorsed that ruling. As the unanimous Court of Appeal put it, '[b]oth were capable of assisting to prove guilt, but neither was essential'.³⁵ It is instructive to lay out at length what it then went on to rule.

The jury could properly have found that Allison had been killed by Gerard on the basis of finding: that she had been with him on the night of 19 April; that she had died about the time of her overnight disappearance; that the leaves in her hair suggested that her death had occurred at their home; that there had been difficulties in the marriage; that there had been a physical altercation between them, as evidenced by the fingernail scratch marks; and that Gerard had lied about those marks in a way suggestive of a guilty mind.

Of those six cited bases for inferring guilt, one (the difficulties in the marriage) arises from what might be broadly labelled 'motive', while the final one required that the jury consider, in an unfavourable light, an alleged lie told by a man who they already strongly suspected because of that motive. There was no direct physical evidence whatsoever linking Gerard to the death of Allison, and he had steadfastly denied the existence of any in his testimony. The facts that she had been left alone by Gerard downstairs at home on the night of her probable death, and that vegetation in her hair suggested that her death had occurred at home, did not point to Gerard's guilt other than by inference, an inference heavily coloured by the obvious motive he had for killing her. The Court of Appeal then appeared to be condoning a process under which that colouring was deepened by the addition of a suggestion not proved beyond reasonable doubt that he had transported her body to Kholo Creek in her own 4WD.

Any further consideration that might have been given to the difficulties presented by this troubling state of affairs was deflected by the limited ground of appeal to both courts, which concerned the *mens rea* and not the *actus reus*. This obviated any need for either court to make an authoritative ruling on whether all, or any, of the circumstantial evidence against Gerard required to be proved beyond reasonable doubt, or whether it was sufficient for the jury to be persuaded to that standard 'on the totality of the evidence'.

Over a century ago, in *Peacock v The King*, Griffiths CJ observed that in circumstantial cases such as this 'the circumstances must be such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused'.³⁶ But during the intervening years it has remained unclear whether that conclusion may be based upon a combination of evidential

³⁴ On the distinction in criminal law between four possible categories of 'fact' (including 'primary' and 'inferred' facts) see Glanville Williams, 'Law and Fact—1' [1976] *Criminal Law Review* 472; Glanville Williams 'Law and Fact—2' [1976] *Criminal Law Review* 532.

³⁵ *R v Baden-Clay* [2015] QCA 265 (8 December 2015) [35].

³⁶ (1911) 13 CLR 619, 634.

items, none of which is itself proved beyond reasonable doubt, or whether certain ‘indispensable links’ to such a finding of guilt must first be proved beyond reasonable doubt, and if so, what form they may take.

The confusion began in connection with an infamous Australian case, the trial of Lindy Chamberlain for the murder of her infant daughter Azaria.³⁷ Although eventually exonerated, she first unsuccessfully appealed to the High Court against her conviction, and one of the primary issues in that appeal was whether or not the jury could in law have convicted her if not convinced beyond reasonable doubt that blood found inside the family car was ‘foetal blood’.³⁸ The majority held that, before an accused may be convicted on a Crown case that is wholly circumstantial, the jury must be satisfied beyond reasonable doubt of any fact that leads to an inference of guilt.³⁹ In the instant case, it held, dismissing the appeal, that even though the jury might have entertained doubts as to whether or not the blood in the car was foetal, they were entitled to conclude beyond reasonable doubt that it was blood, and that given all the other incriminating circumstances⁴⁰ they had been entitled to find Lindy Chamberlain guilty on the basis of ‘the whole body of primary facts’.⁴¹

Rightly or wrongly, there grew out of this judgment a perception of the need, in every criminal case that involved circumstantial evidence, for a ‘*Chamberlain* Direction’ to be given by the trial judge to the jury, to the effect that if their reasoning as to guilt relied on one or more items of circumstantial evidence, then they could not convict unless and until every single such item was proved beyond reasonable doubt. This perception was corrected by a differently constituted High Court in *Shepherd v The Queen* (‘*Shepherd*’).⁴²

Shepherd had been convicted of conspiring to import heroin into Australia, on the basis of three distinct and separate categories of evidence. They consisted of statements made by him in the hearing of undercover police officers that suggested that he was taking over the drug syndicate; evidence that he had taken a share of the profits of that syndicate, and evidence by accomplices who had been given immunity from prosecution. The first two of these categories were clearly circumstantial in nature, and the submission on appeal was that the trial judge should have directed the

³⁷ *Chamberlain v The Queen* (1984) 153 CLR 521 (‘*Chamberlain*’). The other person convicted was her husband Michael, as her accessory after the fact.

³⁸ Ibid 552. Foetal blood is blood from an infant less than six months old, as Azaria was at the time of her disappearance. There was a conflict of expert evidence as to whether or not the blood was foetal in nature.

³⁹ Ibid 536 (Gibbs CJ and Mason J), 599 (Brennan J). Their precise words were that ‘the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt’.

⁴⁰ For example, a camera bag located in the car in which it was suggested that the infant corpse had been taken away, the presence of scissors in the car that could have been used to kill Azaria, and clothing later found, associated with Azaria, that appeared to have been cut with an implement rather than torn by dingo teeth.

⁴¹ *Chamberlain* (1984) 153 CLR 521, 599 (Brennan J).

⁴² (1990) 170 CLR 573.

jury that before they could rely upon either of these circumstantial categories in order to reason towards guilt, they had to be satisfied of their veracity beyond reasonable doubt.

This submission was rejected, and the opportunity was taken to clarify what the Court had intended to lay down in *Chamberlain*. Mason CJ explained that the reference in *Chamberlain* to ‘a fact as a basis for an inference of guilt’ that required to be proved beyond reasonable doubt was in fact more accurately described as ‘an intermediate fact as an indispensable basis for an inference of guilt’.⁴³ explained that the reference in *Chamberlain* to ‘a fact as a basis for an inference of guilt’ that required to be proved beyond reasonable doubt was in fact more accurately described as ‘an intermediate fact as an indispensable basis for an inference of guilt’.

This has the effect of dividing circumstantial evidence into two categories; one that involves facts that are ‘indispensable’ to any conviction, which must be proved beyond reasonable doubt, and another that contains all the other circumstantial inferences, which need not. This in turn requires an appreciation of the distinction that may be drawn between what Wigmore identified as ‘chain’ and ‘rope’ forms of circumstantial evidence.⁴⁴

The analogy is an apt one. The strength of a rope is determined primarily by the number of strands of which it is composed; the greater the number of individual strands, the stronger the rope. A chain, on the other hand, can be destroyed by the failure of just one of its links. When a circumstantial case against an accused is of the ‘rope’ variety, guilt may be proved by the sheer number of ‘strands’ of circumstances, even if a certain number of them lack individual strength. In such cases, it is appropriate, according to the ruling in *Shepherd*, to allow a jury to conclude guilt even though not convinced beyond reasonable doubt by one, or even several, of the individual ‘strands’ of circumstantial evidence, if their combined effect removes all reasonable doubt of the accused’s guilt.

Where the Crown’s case is of the ‘chain’ type, on the other hand, the failure to prove a single circumstantial link in that chain beyond reasonable doubt results in the entire case against the accused being lost. Arguably, this is what the Court in *Shepherd* was reminding us — that some items of evidence are so essential as a link in the chain of guilt as to be ‘indispensable’, although as Stephen Odgers pointed out in his case commentary on *Shepherd*, ‘the problem is in defining the limits of what is indispensable’.⁴⁵

Costanzo suggests a ‘but for’ test to overcome this difficulty. In his words:

⁴³ Ibid 576, with whom Dawson, Toohey and Gaudron JJ concurred on this point.

⁴⁴ John Henry Wigmore, *Evidence in Trials at Common Law* (Little, Brown and Company, Chadbourn revised ed, 1981) vol IX, 412–14 [2497].

⁴⁵ Stephen J Odgers, ‘Criminal Cases in the High Court of Australia: Shepherd’ (1991) 15 *Criminal Law Journal* 203, 204.

[b]ut for the existence of the inferential fact does proof of the guilt of the accused exist? That is, if the crown case must fail in the absence of that piece of evidence then, at the end of the day, it should be proved beyond reasonable doubt.⁴⁶

He added that ‘[i]n future, it would seem, whether a fact is taken by the court to be an indispensable link in a chain or a mere single strand in a rope or a cable, will be a matter of individual perception and persuasion’.⁴⁷

Dawson J in *Shepherd* drilled further into the practicalities of the distinction that was being drawn in the following terms that serve to explain precisely what happened in the *Baden-Clay* case:

Proof of an intermediate fact will depend upon the evidence, usually a body of individual items of evidence, and it may itself be a matter of inference ... For example, with most crimes it is a necessary fact that the accused was present when the crime was committed. But it may be possible for a jury to conclude that the accused was guilty as a matter of inference beyond reasonable doubt from evidence of opportunity, capacity and motive without expressly identifying the intermediate fact that the accused was present when the crime was committed.⁴⁸

This seems to have been what happened in the *Baden-Clay* case. Once it was shown (but not necessarily proved beyond reasonable doubt) that Gerard possessed the opportunity, the capacity and the motive, the jury were entitled, it seems, to conclude that he must have been the one who killed Allison. It then followed that he must have been the one who disposed of her body, and that he must have lied about the source of the facial scratches, and it was not necessary for the trial judge to identify either of these facts as ‘intermediate’ ones that required to be proved beyond reasonable doubt.

It is one’s intuitive belief that the involvement of the accused in the actual mechanics of the crime of which they are accused would come high on the list of those factors that have to be proved beyond reasonable doubt, but the significance of the *Baden-Clay* case is the realisation that even that may be dispensed with if the remaining circumstantial facts leave the jury in no doubt that the accused was the perpetrator of the criminal act. Gerard possessed the opportunity and the means — but above all he had the *motive*, the third of those ingredients most beloved of crime writers.

This was not a case like *Plomp v The Queen*, in which Dixon CJ, at 242, warned that

[t]here may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case.⁴⁹

⁴⁶ Costanzo, above n 21, 145.

⁴⁷ Ibid 148.

⁴⁸ (1990) 170 CLR 573, 579.

⁴⁹ (1963) 110 CLR 234, 242.

The facts of *Plomp*, although very similar to those in the *Baden-Clay* case, were different in one vital respect — Plomp himself admitted that he was there at the time that his wife died. Otherwise, there was considerable analogy between the facts of the two cases, and particularly the fact that the death of Mrs Plomp ('F') was extremely serendipitous for Mr Plomp ('H'). The couple had not been happily married for some time, and on at least one occasion H had been violent towards F. Then he had fallen for another woman ('W') with whom he was conducting an affair at the time of F's death; W believed H to be a widower, and had accepted his marriage proposal. He had gone so far as to introduce one of his children to W and describing her as that child's 'new mummy'.⁵⁰ After F's death, H began co-habiting with W, lied about his relationship with her to investigating police, and sought to prevail upon W to corroborate his lies. When refused a marriage ceremony with W by a local minister who wished to await the outcome of the inquest into F's death, H confidently asserted that 'I am the only witness to the drowning and if I claim privilege and refuse to give evidence, that is the end of the inquest'.⁵¹

H was indeed the only witness to the alleged drowning, and this is what, it is submitted, distinguishes his case from the *Baden-Clay* case. H's 'story' was that he and F, who was a strong swimmer, had gone for a swim in the surf, and that when F had been pulled down in a strong 'rip', H had made valiant attempts to rescue her, but had failed.⁵² The extrinsic evidence was that the surf that evening was no challenge to a proficient swimmer. Clearly, a strong inference arose from the combination of all these facts, including that of the convenience to H of F's death, but the trial judge had cautioned the jury that:

before you can use evidence of motive, there must be a sufficiency in the evidence to establish to you that this death was not an accidental death, to establish that he did something in order to get his wife into the water, and having got her there he wilfully murdered her.⁵³

The High Court dismissed H's subsequent appeal, inferentially finding nothing wrong with the trial judge's direction to the jury. Dixon CJ, referred to the fact that:

it would put an incredible strain on human experience if Plomp's evident desire to get rid of his wife at that particular juncture, presaged as it was by his talk and actions, were fulfilled by her completely fortuitous death although a good swimmer and in circumstances which ought not to have involved any danger to her.⁵⁴

It will have been noted, however, that in his directions to the jury the trial judge had emphasised the need for them to find 'sufficient' evidence that H had been physically present when his wife died, and that her death

⁵⁰ Ibid 236.

⁵¹ Ibid.

⁵² Ibid 235.

⁵³ Ibid 236.

⁵⁴ Ibid 243.

had not been accidental. Put more bluntly, be sure that you are persuaded that the accused was present at the crime scene before you then employ motive to draw conclusions as to how his wife came to meet her death.

The reasoning in *Baden-Clay* would seem to have been reversed. Allison's death was undeniably convenient to Gerard (i.e. his motive for killing her), and on his own admission he was at the property during the time when Allison must have died there. Although (unlike Plomp) he denied being present when she died, one could add into the factual mix his lies regarding how he had come by the scratches, and the circumstantial inferences, from the bloodstain in her 4WD and the presence at the site of her body of vegetation from the family garden, that she had been killed at the property and her body taken away in her own 4WD. There being no other nominated candidate for her homicide, it then followed logically that Gerard must have been the one who disposed of the body, once the remaining circumstantial evidence eliminated any reasonable doubt that he had been responsible for her death.

If there had been any scintilla of credible evidence, from any source (including Gerard's testimony), that Allison had died elsewhere, or had been attacked by anyone else, then Gerard's motive for having Allison dead would not have assumed the significance it did in the case. But his very presence at the crime scene, and his very involvement in the mechanics of her death, were being proved by compelling additional items of circumstantial evidence, perhaps the most telling of which being his undoubted motive for killing her.

It will be recalled that one of the arguments raised on appeal before the Queensland Court of Appeal in the *Baden-Clay* case was that the trial judge had failed to direct the jury that, before they might convict Gerard, they had to be satisfied beyond reasonable doubt (a) that the bloodstain in Allison's 4WD occurred while her body was being transported to Kholo Creek, and (b) that Gerard had been the person doing the transporting. This was because both items of evidence were alleged to be 'indispensable intermediate steps'⁵⁵ towards a conclusion of guilt. Put another way, they were the only evidence that the Crown possessed of any possible involvement by Gerard in Allison's death, and insofar as they might be used to conclude that he had been so involved, they were required to be proved beyond reasonable doubt in accordance with what the High Court had laid down in *Shepherd*.

The Court disposed of both submissions with apparent ease by concluding that they were not 'indispensable' to a finding of guilt. It is instructive to reproduce their precise conclusions *ad longum* in order to appreciate how powerful the 'motive' factor was in securing Gerard's conviction.

The jury could properly have found that Mrs Baden-Clay had been killed by her husband on the basis of finding: that she had been with him on the night of

⁵⁵ The term 'indispensable facts' was used by the Court of Appeal: *R v Baden-Clay* [2015] QCA 265 (8 December 2015) [35].

19 April; that she had died about the time of her overnight disappearance; that the leaves in her hair suggested that her death had occurred at their home; that there had been difficulties in the marriage; that there had been a physical altercation between them, as evidence by the fingernail scratch marks; and that the appellant had lied about those marks in a way suggestive of a guilty mind. It was not then necessary for them to reach any particular view about how the body arrived at the creek, although, of course, to find that it had been taken there by the appellant in [Allison's 4WD] would certainly go to reinforce the conclusion of guilt.⁵⁶

But surely the jury could only have concluded that Gerard had taken Allison's body to Kholo Creek if they were satisfied that he killed her in the first place? To paraphrase the words of the Court of Appeal, they would be using any inference that Gerard had disposed of Allison's body in order to reinforce a belief they had already formed that he had been the one who killed her. And they had based that initial belief largely upon motive. The fact that Gerard was at home at the time when Allison was probably killed there would have meant very little without Gerard's motive for her death, so 'opportunity' was not a crucial determinant of guilt. As for 'means', the cause of death was never reasonably established, and even if it consisted only of punches, Gerard was not the only man with a pair of fists. It really came down to the powerful motive, in the face of which there could be no reasonable hypothesis consistent with Gerard's innocence, absent some other striking explanation of how Allison met her death.

Conclusion

The purpose of this article is not to suggest that the jury got it wrong, or that Gerard Baden-Clay is innocent. Only he can know if that is the case. Rather, it seeks to draw attention to the powerfully persuasive effect of 'motive' in a criminal trial in which other items of evidence are equivocal. Persons with strong motives for desiring the death of another are likely to remain the *only* suspect for their subsequent death once it is possible to point to other 'facts', from which adverse circumstantial inferences may be drawn which are heavily 'coloured' by that motive. Even if those facts are 'intractably neutral' in the inferences that may be drawn from them, it would seem that they do not require to be proved against the accused beyond reasonable doubt, once motive has played its part in eliminating any 'reasonable' hypothesis consistent with innocence.

The case also raises the unsettling possibility that in future homicide trials in which the evidence before the jury lacks any specifics regarding the accused's mental state at the time when they committed the act, then 'murder' will be the verdict of first choice. At the very least it raises the bar for any criminal trial accused who would otherwise prefer to stay out of the witness box — if they wish to the jury to conclude that there was no 'intention' to kill or cause grievous bodily harm, then the ball is in their

⁵⁶ *Baden-Clay* (2016) 258 CLR 308, 320–1 [37].

court — particularly if they had the strongest of motives for wanting their victim dead.