



Case Note: Allison Baden-Clay

Content Warning

The following case note may include distressing material related to violence and death. We advise teachers and students to be prepared before proceeding. This case note considers the **right to appeal and the appeals process** in the upper end of the court hierarchy. It does not contain specific details regarding violent acts.

Introduction

The trial of Gerard Baden-Clay ('**Baden-Clay**') for the murder of his wife Allison Baden-Clay was one of the most high-profile murder investigations and trials in the history of Queensland.

This case note demonstrates the right to appeal and considers a number of questions about the criminal justice process:

1. What protections exist to ensure a person accused of a crime receives a fair trial?
2. How does the law address the expectations of the victims and the community in achieving a just outcome?

This case note will also show that even in high-profile cases, rule of law principles, such as the right to a fair trial and presumption of innocence, must be upheld.

*Pictured below: Allison Baden-Clay (left) and with her husband, Gerard Baden-Clay (right)
Photo credit: The Allison Baden-Clay Foundation and 9 News Australia.*



Facts of the Case

At 7:15am on Friday 20 April 2012, Baden-Clay called 000 and reported his wife, Allison, missing. He claimed that he had last seen her when he went to bed, and that at times, she went for an early morning walk before he and the children rose. He assumed she had done so that morning as some of her exercise clothes were not in

the closet. Baden-Clay had texted and called Allison's phone several times to ask her whereabouts before calling 000. He stated that he had become concerned when Allison hadn't made contact or returned as she was always home in time for their daughters' breakfast, and she had a conference to attend that day.

When the responding officers arrived, Constables Ash and Hammond noticed scratches on the side of Baden-Clay's face. He told the officers that the scratches were from a shaving injury.



*Pictured to the left:
The scratches on
Baden-Clay's face*

While officers and SES volunteers began searching the local area for Allison, it emerged that Baden-Clay had been conducting an affair with a woman that he had worked with. Questions regarding his financial status also began to arise.

On April 30, 2012, 10 days following her disappearance, Allison's body was found on a bank of the Kholo Creek in Brisbane's west. **"A post-mortem examination**

revealed no injuries to explain the cause of death." (Aitken, 2016, p. 301)

Procedural History

Interview and Charges

Baden-Clay was formally interviewed by police on 13 June 2012 and continued to maintain his innocence. He was charged with Allison's murder and for interfering with her corpse that same day.

Bail

He was refused bail on June 22, 2012, as he was considered a significant flight risk and was held on remand. A second application for bail was made on December 14, 2012, after traces of antidepressants were found in Allison's bloodstream in toxicology testing. The defence claimed the Crown's case had been weakened as a result of this. This application was dismissed by Justice Applegarth who found the Crown case was unaffected by the results.

Trial

At first instance, the trial of Gerard Baden-Clay began on 10 June 2014 in the Supreme Court of Queensland (QSC) where he pleaded 'not guilty' to the charges of murder and interfering with a corpse. A jury of 7 men and 5 women was appointed. On 15 July 2014, Baden-Clay was found guilty of the murder of Allison and given a life sentence with a non-

parole period of 15 years. The charge of interfering with a corpse had been dropped. (*R v Baden-Clay* [2014] QSC 154 and 155.)

Defence Appeal to QCA

On 7 August 2015, Baden-Clay appealed the murder conviction to the Queensland Court of Appeal (QCA). His conviction was downgraded to manslaughter, on the ground that the trial evidence could not exclude the possibility that **“there was a physical confrontation between [Baden-Clay] and his wife in which he delivered a blow which killed her (for example, by the effects of a fall hitting her head against a hard surface) without intending to cause serious harm.”** *R v Baden-Clay* [2015] QCA 265

Prosecution Appeal to HCA

In January 2016, the Queensland Director of Public Prosecutions (DPP) appealed the decision of the QCA to the High Court of Australia (HCA) to have Baden-Clay's murder conviction reinstated on the basis that his affair and financial position were motive enough for murder. On 31 August 2016, the HCA unanimously found that Baden-Clay's murder conviction should be reinstated. Baden-Clay was sentenced to life imprisonment for murder, with a 15 year non-parole period. (*R v Baden-Clay* [2016] HCA 35)

Legal Issues

Circumstantial Evidence

'It is sometimes said that there is no need to look further for a motive when the parties are married'.

Sir James Fitzjames Stephen, History of the Criminal Law, Volume II (in Aitken, 2016, p. 301)

“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?”

(Field, 2017, p. 113)

Types of evidence

There are many types of evidence that can be admissible (allowed) in court in the course of a trial. Two broad categories significant to the Baden-Clay case are:

- **Direct evidence** proves a fact directly, such as testimony given by immediate witnesses to an act, or CCTV footage showing an act.
- **Circumstantial evidence** **“is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence.”** (Queensland Courts, 2017, no.48.1)

According to the Judicial Commission of NSW (2022), convictions based on circumstantial evidence can occur where

“all of the evidence leads to an unavoidable conclusion that the Crown has established the guilt of the accused”.

Evidence in the Baden-Clay case

There was a lack of direct evidence in this case. There was no obvious cause of death found by post-mortem examination, no physical evidence of struggle, no murder weapon or witnesses to the events that led to Allison's death and dumping of the body.

The case presented by the Crown against Baden-Clay was therefore based on a number of key pieces of **circumstantial evidence**, which collectively gave weight to the case against him to establish guilt Beyond Reasonable Doubt. These included:

- The conduct by Baden-Clay of a long running affair with a colleague
- The state of his financial affairs at the time of her death and his enquiries to her life insurance agency following the discovery of her body
- The couple were receiving relationship counselling as a result of Baden-Clay's affairs, and the counsellor had asked the couple to set aside time each day for Allison to air her grievances and feelings regarding Baden-Clay's infidelities
- Evidence given by police and experts at trial that a razor did not

cause the scratches on Baden-Clay's face, and Baden-Clay's consistent lies insisting the opposite

- Several types of leaves found attached to the body were all found to be present in the garden of the Baden-Clay house, but not all were present at the scene where the body was discovered
- Mobile phone records did not reflect statements he had made about his activities that night
- A lack of witnesses to Allison being on an early morning walk
- Neighbours of the Baden-Clay house and the place where the body was dumped reported hearing a woman's screams, thudding noises and car activity
- Allison's blood was found in the rear of the family vehicle that had been recently purchased
- The consistency of Baden-Clay's story throughout and the consistency of his lies, even when under oath.

Although none of these points of evidence conclusively establish guilt by themselves, the weight of all pieces combined created a reasonable belief that Baden-Clay was likely to have caused the death of Allison.

Mens Rea and Actus Reus

One of the issues that arises in the Baden-Clay case is the difficulty in proving the existence of **Mens Rea** (*Malice aforethought*) and **Actus Reus** (*the physical act*), either or both together which is required to successfully prove a murder charge.

Baden-Clay consistently maintained his innocence throughout the search, investigation, trial and appeals, making it difficult to determine whether there was **express malice** (pre-mediated and intentional) or **implied malice** (sudden and not premediated). The use of circumstantial evidence helped to define malice where physical evidence was unavailable.

“In Baden-Clay, express malice in the old sense was expressly disavowed by the Crown; rather, the accused's implied malice could be inferred ('discovered' or 'revealed') from the surrounding circumstances, which included the sudden act, the presence of motive, injuries on him which indicated a physical struggle, his deliberate concealment of her body, and the lies told by the accused, both to the police, and general public, and on oath.”
(Aitken, 2016, pg. 302)

There was also a lack of any direct evidence to suggest that Baden-Clay had

committed any act that led to the death of Allison, leaving Actus Reus undeterminable.

As a result of direct evidence being unable to prove Mens Rea or Actus Reus, the Crown case for the charge of murder was based on implied malice, supported by the circumstantial evidence gathered.

Application of Rule of Law Principles

The Baden-Clay case raises interesting questions regarding the application of two key rule of law principles:

- Presumption of innocence
- The right to appeal decisions based on having an open, independent and impartial judiciary

These principles are also supported by Article 14 of the ICCPR, to which Australia is a signatory.

Refer to the Rule of Law Wheel explainers for further information about each of these principles at:

<https://www.ruleoflaw.org.au/principles/>

Presumption of Innocence

The Presumption of Innocence upholds the principles of **fairness and equality**. It requires that all accused before the court are innocent until proven guilty. This is to

ensure that all accused persons, regardless of the crime, receive a fair trial based on evidence and facts presented in court by the prosecution, that are then 'tested' by the defence to ensure accuracy and relevance to the matter at hand.

To uphold this principle, the **onus of proof** is on the prosecution to prove to the court that the accused has committed the crime. As outlined in the Criminal Code Act 1995 (Cwlth), the **standard of proof** required in all criminal cases in Australia is **Beyond Reasonable Doubt**.

Read more about the **meaning of beyond a reasonable doubt** here:

<https://www.ruleoflaw.org.au/beyond-reasonable-doubt/>

The **right to silence** for an accused also supports the presumption of innocence as any statements made by the accused can be used in a court and may have implications for the outcome of their case based on the statements that they make, their demeanour or how they appear. Baden-Clay chose to testify, which may have impacted upon the jury's interpretation of the circumstantial evidence and created a condition where reasonable doubt was removed.

The Right to Appeal

In Australia, a key component of the legal system is the **right to appeal**. A person can appeal a judge's decision to a higher court but can only do so on either the grounds of:

- an error of law,
- an error of fact, or
- an error of mixed fact and law.

Checks on the Decisions of Courts

Checks on the power of the courts are important in ensuring that justice is done. The **rule of law** requires that the decision by a court can be appealed to ensure that it is correct according to the law. In Australia, the concept of the **separation of powers** ensures that there are checks on the powers of all the arms of the legal system. The main check on the decisions of the courts is the right to appeal a decision to a higher court.

When a case goes to a higher court, especially the High Court, it can also draw the attention of the Parliament. If the case raises an issue of public importance that the Parliament believes requires law reform, they can pass a law which overrides precedents set by the courts.

To ensure **fairness and equality** before the law, both parties in a criminal proceeding may appeal a decision of the court.

In the case of Baden-Clay:

- The **defence** (Baden-Clay) appealed the decision of the **QSC** in the **QCA**.
- The **prosecution** (the Qld DPP) then appealed the decision of the **QCA** in the **HCA**.

The Defence Appeal Against the Murder Conviction

On December 8, 2015, Baden-Clay appealed the decision of QSC on the following grounds:

Ground 1: *that the judge misdirected the jury about the abrasions on his face*

Ground 2: *that the jury were inappropriately directed on the need to be satisfied beyond a reasonable doubt about the link between the transportation of Allison Baden-Clay's body and the blood found in the car and whether that meant there had been a miscarriage of justice*

Ground 3: *that the verdict of murder was unreasonable or unsupportable having regard to the evidence and whether intent was sufficiently proven by Bayden-Clay's post offence conduct (ie. whether his behaviour after Allison's death showed that he intended to kill her and was therefore guilty of her murder).*

Baden-Clay was only successful on the third ground for appeal regarding the verdict of murder being unreasonable. The QCA came to the conclusion that Baden-Clay was not guilty of murder, but of manslaughter, stating at paragraph 48 of the judgment:

"...the jury could not properly have been satisfied beyond a reasonable doubt that the element of intent to kill or do grievous bodily harm has been proved."

Further, Aitken (2016) states that **"In the Queensland Court of Appeal, to great public outcry (not to say outrage) the conviction was reduced to manslaughter on the basis that the Crown had not excluded the possibility beyond reasonable doubt that although Mr Baden-Clay was involved in her death, he did not 'intend' it."** (p. 302)

The QCA was therefore not satisfied that the jury could have found Baden-Clay guilty of the murder of Allison because his actions after her death did not show beyond reasonable doubt that he had an intent to kill her. They found that a conviction of murder could not be supported as the jury had not been exposed to the possibility that the death could have been unintentional. The QCA downgraded the charge to manslaughter from murder as a result.

The Prosecution Appeal to the High Court of Australia

Immediately after the QCA downgraded Baden-Clay's conviction from murder to manslaughter, the Queensland DPP sought, and was granted, special leave to **appeal** the decision of the QCA to the High Court of Australia (HCA) and have the murder conviction reinstated.



Pictured above: The High Court of Australia

The HCA sat in July 2016 and delivered its judgement on August 31, 2016. It found unanimously that Baden-Clay's murder conviction should be reinstated due to the fact that he had given evidence that he could not have been the cause of her death, intentionally or unintentionally.

In its findings, the HCA stated:

"[T]his is not a case where the accused remained silent...the accused gave evidence...The respondent's evidence was that he had nothing to do with the circumstances in which his wife was killed...he simply was not present when her

death occurred; and he could not have been the unintentional cause of her death." – *The Queen v Baden-Clay* [2016] HCA 35 at 52

The HCA found that the theory about accidental killing had been proposed by the QCA during the appeal hearing, meaning that it was the first time this was presented as a possible cause of Allison's death in a court. It had not been presented by the Crown as a possibility during the original hearing with the jury; the only possibility presented was that Baden-Clay had intentionally killed Allison.

The HCA found that the QCA was not allowed to propose this theory because it was not supported by the evidence given by Baden-Clay at trial. The HCA found that the jury could not have found that he accidentally killed his wife (leading to a manslaughter conviction rather than a murder conviction) because that possible explanation was never put to them during the course of the original trial.

"The respondent was the only witness who could have supported the fall hypothesis (other than the deceased, he was the only person present at the time of her death) but by his evidence he had excluded that possibility." *The Queen v Baden-Clay* [2016] HCA 35 at 66 and 79.

The HCA found that the jury was open (able) to convict Baden-Clay of murder. The HCA made the following remarks

about trial by jury, appeal courts and the evidence in the Baden-Clay case:

“a court of criminal appeal is not to substitute trial by an appeal court for trial by jury... it was open to the jury rationally to conclude that the respondent killed his wife and did so with intent, at least, to cause her grievous bodily harm. Upon the whole of the evidence led at trial, it was open to the jury to be satisfied beyond reasonable doubt that the respondent was guilty of murder.” – *The Queen v Baden-Clay* [2016] HCA 35 at 66 and 79.

The right to appeal the decision of a court is important to the accused, the community and the victims of crimes to ensure a just outcome is achieved by the correct application of the law and legal processes during trials. In this case, the DPP and Baden-Clay appealed decisions they believed to be incorrect.

The ability to appeal the decision of a court is the main check on the power of courts and ensures that decisions made are done so according to the rule of law. The Baden-Clay case is also an example of the High Court exercising its role as the final court of appeal in all criminal matters in Australia.

See also: [ABC News' detailed interactive timeline](#), which finishes at the application to appeal to the HCA.

Reference Note:

Aitken, L., 2016. Interpreting R v Baden-Clay: 'discovering the inward intention', or 'what lies under the veil'? *University of Queensland Law Journal, The*, 35(2), pp.301-311.

Activities:

1. What caused the initial trial to be heard by a jury?
2. List the difficulties of a case being based on circumstantial evidence where a jury is involved.
3. Using the link below, review the Chronology submitted by the Crown to the HCA:

https://cdn.hcourt.gov.au/assets/cases/b33-2016/Baden-Clay_Chrono.pdf

Identify what you believe to be the 3 most important pieces of evidence, discuss their relevance to the Crown case and predict how the defence may question the validity of that evidence.

4. Outline the difference between the charges of murder and manslaughter. Account for the differences in sentencing of these offences.
5. Explain how the right to appeal supports the achievement of justice for individuals and upholds the rule of law.