in this case is the finding of a Master in Chancery, or, under more recent procedure, a Chief Clerk of the Court. It is referred to him to make inquiry and report. Then we find under Part XV., again, that in analogy to that procedure the Supreme Court forwards to the Clerk of the House of Representatives a copy of the decision of the Judge. Then, as my colleagues have stated, effect is given to the decision, not by the Court (except as regards costs awarded by the Court), but by Parliament. If an election be declared absolutely void, effect is to be given to that decision of the Court (according to sec. 171), by the holding of a new election. It is not the Court that holds the election—it is Parliament that causes it to be held. For these reasons I concur in the decision that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the applicant, *Moss & Barsden.*
Solicitors, for the respondent, *Le Mesurier.*

N. G. P.

Cons *Clark v NZI Life Ltd* [1991] 2 QdR 11

[HIGH COURT OF AUSTRALIA.]

MUTUAL LIFE INSURANCE CO. OF NEW YORK . . . . . APPELLANTS;
DEFENDANTS,

AND

MORRIE MELVILLE MOSS, OFFICIAL RECEIVER IN BANKRUPTCY AND TRUSTEE OF THE ESTATE OF H. I. BLAKE DECEASED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Life Assurance—Warranty not to die by own hand, sane or insane—Circumstantial Evidence — Suicide — Motive, evidence of, when admissible — New trial — Misdirection.

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In considering the conduct of a man, regard must be had to the ordinary course of human affairs; and when the question for consideration is whether an extraordinary and a wicked act is intentional or not, it is of importance to consider whether the person in question, in the circumstances in which he was placed, had any inducement to form such an intention.

In an action upon a policy of life assurance in which the question was whether the assured died by his own hand or by accident, the facts being otherwise consistent with either view, evidence was given to show that he had a strong motive to commit suicide.

Held, that the jury had been properly directed to regard such evidence.

In such a case the function of evidence of motive is twofold; first, to rebut the presumption that a man in a sane state of mind will not commit suicide; and secondly, there being evidence from which the jury might legitimately find either that the death occurred accidentally or by design, to assist them in arriving at a conclusion as to whether it was accidental or self inflicted.

A new trial will not be granted on the ground of misdirection because the Judge has laid stress on one point more than on another; nor unless the attention of the Judge has been called at the trial to the alleged misdirection, and opportunity has been given to correct it.

APPEAL from the Supreme Court of Western Australia.

B., the manager at Perth for a company, whose head-quarters were in New Zealand, began in 1903 a course of embezzlement which continued to the middle of 1905, when his defalcations exceeded £4,000. From May to the end of 1904, B. effected policies of £7,000 on his life, including one for £2,000 with the defendants, at a time when he was hopelessly insolvent. In July 1905 the company's Inspector, on auditing B.'s books at Perth, detected a large deficiency, and informed B. of the discovery, and later placed him under suspension. B. admitted the crime to some extent, and with the knowledge of the Inspector sent a cable to his father asking for £1,500 "to avoid legal proceedings." The Inspector also warned B. that if he absconded he would be brought back. B. for some time had kept some dynamite in his house, and when informed of the Inspector's discovery bought more explosives, fuse and detonators, the use of which was explained to him. He told several people different stories, that he was going out to get rid of some old dynamite, or to blow up a log, or a tree, or to dynamite fish. Soon after his suspension he rode out some distance alone, and his dead body was found in a

lonely spot off the road, shattered by an explosion of dynamite which had occurred close to his body. The Official Receiver of B.'s estate having sued the defendant company for the amount of the policy, the plea was set up *inter alia* that B. deliberately caused his own death, so committing a breach of a warranty in the policy that he would not die by his own hand, sane or insane, during twelve months from the date of its inception. At the trial a great deal of evidence, besides the facts stated above, was adduced by both sides to establish, and to rebut, the inference that the death was deliberately caused. The learned Judge, in the course of an elaborate summing up to the jury, directed them that "if on the evidence there was anything which inclined them to believe that B. took his own life, they would be more entitled to give effect to that view if they found that there were at the same time strong motives existing which would account for his committing that act; they must therefore look at all the facts in the case, and one of them, and the most important one, was the presence or absence of motive." He then dwelt upon the evidence pointing to suicide and motive, but expressly left the whole of the evidence, whether he had dealt with it or not, to the jury's consideration. The jury found that B. died by his own hand. On a motion for new trial on several grounds, the Full Court granted a new trial, holding that the Judge misdirected the jury by attaching undue importance or prominence to the evidence relating to motive, which ought not to supersede the necessity for the same amount of proof of suicide as would be deemed necessary in the absence of all evidence of such a stimulus, and that it should not be regarded as a matter of the greatest importance, but merely as an auxiliary circumstance to throw light upon the nature of the principal facts, which might otherwise be in doubt. The defendant company appealed from the judgment of the Full Court to the High Court.

Villeneuve Smith, (with him *Russell*) for the appellants. The Full Court was wrong in selecting merely a passage from the summing up, which, taken as a whole, correctly directed the jury. Also the passage to which the Full Court took exception was a proper direction. Motive may be evidence of guilt: *Wills*

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on Circumstantial Evidence, 5th ed., p. 52. Where the evidence is evenly balanced, and there is nothing else, there should be a verdict of accident; but motive is evidence of design, where the other evidence would reasonably justify a verdict to that effect: *Harvey* v. *Ocean Accident and Guarantee Corporation* (1). On an equal balance of evidence for design or accident, motive clinches the inference in favour of design. The direction of the learned Judge in his summing up was less favourable to the defendants than the law there laid down by *Fitzgibbon* L.J., as he directed the jury only to consider motive "where the balance inclined in favour of the presumption of design." Suicide is not to be presumed, where the evidence of motive is evenly balanced; but where the evidence of motive is all on one side, the presumption against suicide is outweighed: *Ingersoll* v. *Knights of Golden Rule* (2), citing judgment of Supreme Court of the United States in *Travellers' Insurance Co.* v. *McConkey* (3).

Pilkington K.C. (with him *Marsland*), for respondent. Besides the point of misdirection on evidence of motive, the respondent relies on the point taken in the rule *nisi* that the Judge did not put the facts of the case fully and fairly to the jury. Civil differ from criminal cases in allowing the preponderance of evidence to prevail; but when some criminal offence, such as suicide, is imputed, there must, even in a civil case, be strict proof beyond all reasonable doubt: *Taylor on Evidence*, 10th ed., pp. 112-13. "Motive" was used in this case, and logically could only be used, in the sense of the proved existence of circumstances which may operate upon the mind of the person concerned as an incentive to the crime. There is no evidence to show that the proved circumstances in this case ever did operate on B.'s mind. "Motive" is not proved until it is shown, by expressions used or attempts made, that B.'s mind was operated on by these circumstances. Motive can only be used in conjunction with practically convincing proofs of guilty conduct: *Wills on Circumstantial Evidence*, 5th ed., pp. 49-50.

Motive is only to be taken into consideration when it is evidenced by declarations or clearly explains contemporaneous

(1) (1905) 2 I.R., 1, at p. 29, *per Fitzgibbon* L.J.

(2) 47 Fed. Rep., 272, at p. 275.

(3) 127 U.S., 661, at p. 667.

facts otherwise inexplicable. It may be used as evidence of guilt only where it is proved to have operated on the mind so as to produce an intention; or to explain and co-ordinate inculpatory facts; or to rebut the presumption of innocence which always exists in the absence of proof of motive; or to show the existence of intention, where a deliberate act is established *aliunde*, and intention becomes a necessary ingredient of the offence. But the Judge put motive before the jury as a guiding star, the most important fact, in the case, instead of a mere ancillary consideration.

Motive was also dealt with in the forefront of the judgment, and exhaustively treated before any of the main facts; and the jury were also wrongly invited to speculate and imagine how B.'s mind might have been operated on by the proved circumstances.

The summing-up was unfair in laying too much stress on the theory for suicide and none on plaintiff's story.

[GRIFFITH C.J.—That is an unheard-of ground for new trial unless you can show that the summing up as a whole was such as to amount to a mistrial.]

Nine-tenths of plaintiff's case was omitted or changed about; the facts were never fairly put before the jury.

Russell, in reply. In *Harvey* v. *Ocean Accident and Guarantee Corporation* (1), apart from motive, there was no balance of evidence, and motive was therefore most important; the circumstances were held not to amount to sufficient evidence of motive.

The omissions in the summing up were immaterial; the chief omissions were as to matters of common ground, such as the footmarks and other surroundings of the locality where the death occurred. The only question at issue was whether the act that caused death was an intentional act, and motive was clearly the main question to be considered in view of the balance of evidence.

In *Belcher* v. *Prittie* (2), *Tindal* C.J. admitted that at the trial he summed up too strongly for one side; but the Court refused a new trial.

A Judge is not wrong in letting the jury know what impression the evidence made on his mind: *Davidson* v. *Stanley* (3).

(1) (1905) 2 I.R., 1.
(2) 4 Moo. & S., 295.
(3) 2 Man. & G., 721.

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So long as the Judge properly left the questions of fact to the jury, it has been held no misdirection, even though in one case he gave them a wrong impression of the law governing proof of misrepresentation: *Taylor* v. *Ashton* (1); *Darby* v. *Ousley* (2); *Beckham* v. *Osborne* (3); *Prudential Assurance Co.* v. *Edmonds* (4).

If the Judge was not requested, at once or as soon as possible, to alter his summing-up on points omitted or misstated, it is not ground for new trial: *Speight* v. *Syme* (5); *Nevill* v. *Fine Art and General Insurance Co.* (6).

[*Pilkington.*—It is not for counsel to suggest proper questions to be put to the jury otherwise than where a specific set of formal questions is submitted by the Judge to counsel for their approval: *Weiser* v. *Segar* (7).]

[GRIFFITH C.J.—Objection can not be taken to a Judge's directions to the jury by picking out particular passages from the summing-up: *Australasian Steam Navigation Co.* v. *Morse* (8).

HIGGINS J. referred to *Smith* v. *Dart & Son* (9).]

[*Pilkington.*—If the particular points of misdirection amounted to a mistrial of the case, there must be a new trial.]

GRIFFITH C.J. This was an action brought by the personal representative of one H. I. Blake upon a policy of assurance effected upon the life of the assured with the appellant company. Amongst other defences it was pleaded that by the policy the assured warranted and agreed that he would not die by his own hand, whether sane or insane, within one year of the issue of the policy, 15th September 1904, and that the assured died on the 6th August 1905 by his own hand. The only matters for consideration by the Court are in respect to that defence. The case was tried by *McMillan* J. with a jury, who found that that defence was proved. A motion was then made to the Full Court for a new trial on the ground of misdirection, and upon other grounds which do not concern us. The misdirection complained of was in respect of the way in which the learned Judge dealt

(1) 11 M. & W., 401.
(2) 1 H. & N., 1.
(3) 6 Man. & G., 771.
(4) 2 App. Cas., 487, at p. 507.
(5) 21 V.L.R., 672; 17 A.L.T., 173.
(6) (1897) A.C., 68.
(7) (1904) W.N., 93.
(8) L.R. 4 P.C., 222.
(9) 14 Q.B.D., 105.

with evidence which had been given as to motive. The Full Court were of opinion that the direction of the learned Judge was erroneous, and ordered a new trial. I will state very briefly the nature of the case, to show how the question arises. On the 6th August Blake was undoubtedly killed by an explosion of dynamite or gelignite, which must have been close to his person when it exploded—the explosion taking place in a somewhat lonely spot in the bush a few miles from Perth, although not very far from a main road. There were many circumstances indicating that the explosion was not accidental, but had been caused by Blake himself, and a great deal of evidence was given on the subject. The evidence was of course circumstantial, but it is admitted by the respondent that upon the evidence, apart from the evidence of motive, the jury might as reasonable men have come to the conclusion that Blake died by his own hand. In order to assist the jury in coming to that conclusion evidence was given of motive. Evidence of motive is of itself, of course, in the nature of circumstantial evidence as to the main question in issue. In considering the conduct of a man, regard is had by Judges and juries to the ordinary conduct of human affairs. When a man does an extraordinary or a wicked thing, there is probably some cause inducing or impelling him to do so, and the more heinous the act is the more important becomes the question of motive. When, therefore, the question for consideration is whether such an act is intentional or not, it is of the highest importance to consider whether the person in question, in the circumstances in which he was placed, had any inducement to form such an intention. On charges of murder sometimes the question is whether or not the accused caused the death, and sometimes whether, if he caused it, he did so intentionally or accidentally. The existence of a motive may tend to show either that the person in question did the act *simpliciter*, or that he did it intentionally. Such evidence is given on the subsidiary question of probability; and in cases depending on circumstantial evidence the question of probability may be most important. In the present case the motive suggested is this: Blake was a man of good connection, the son of a gentleman holding a high official position in the British Empire. He had been employed in Perth as manager of

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an insurance company, and had embezzled from that company a sum of £4,000. On the 4th August, two days before his death, it had been definitely discovered that he had been embezzling. On that day he was suspended from his office, and was told that if he went away he would be brought back; which was a plain intimation that his employers intended to prosecute him. On the following day, the 5th, he sent a message by cable to his father asking for the sum of £1,500 to prevent legal proceedings. That cablegram was written in the presence of the general manager of the company who was his employer. He knew then that, whether that appeal to his father succeeded or not, he was not in a position to make good the deficiency of £4,000. He must then have known that the discovery of the full amount of his defalcations was imminent, and that, whether his father responded to the appeal or not, he would be prosecuted for embezzlement, to which he would have no possible defence; and he further knew that if he attempted to abscond he would be arrested. When, under these circumstances, a man on the following day is found dead by an explosion of dynamite, the surrounding circumstances of themselves justifying the conclusion that the death was not accidental, the existence of a motive for self-destruction was clearly a matter for the jury to consider in making up their minds whether the act was intentional or not, that is to say, in considering that question they would naturally direct their minds to the question whether he had a reason to commit such an act, and, therefore, whether it was probable that the act was accidental or intentional. This being, in short, the nature of the evidence, *McMillan* J. thus directed the jury upon the point:—" Mr. Harney, in asking you to come to the conclusion that he committed suicide, laid great stress on the fact that there is here to be found a strong motive for an act which, as a rule, is not committed by a man unless under some influence which strongly urges him to do that from which we should all of us shrink. Here again the onus is on him. He has to satisfy you that this death is not an accidental death, but one brought about by Blake's own hand, and if the death is explicable in two ways the presumption is against suicide. It must be made out, to use the expression which was chosen by Mr. Pilkington on one of the cases,

'by preponderence of evidence,' and it is really hardly so much a statement of law as of common sense, because no jury ever found that a man had committed an act of self destruction unless there was a preponderance of evidence. If the matter were left so evenly balanced that the jury thought he might have died by accident or by suicide, then of course they would take the former view, and they would assume that he had not committed that which is a crime—they would find that the death was an accidental death. It is in this respect that motive becomes of the greatest importance. Mr. Pilkington very properly told you that motive in itself is no evidence of a crime. If murder has been committed it is possible to put one's hand very often on a person who had every motive to commit the deed, but that in itself is no evidence against the suspected person; but if you found evidence against him, then the motive taken in connection with that evidence"—which I take to mean *primâ facie* in connection—"would make the case much stronger against him than it would be if the motive were absent. . . . If on the evidence there is anything which inclines you to believe that Blake did take his own life, then you will be more inclined, and you would be more entitled, to give effect to the views which you form if you found that there was at the same time strong motive existing which would account for his committing that act. You must therefore look at all the facts of the case, and one of them, and the most important one is the presence or absence of motive." That part of the summing up was quoted by the Chief Justice in the Full Court, and he was of opinion that the direction was wrong. He put it in this way: —"In thus charging the jury I venture to think the learned Judge attached undue importance to the evidence relating to motive. The existence of a motive for self destruction rebuts the presumption against suicide, but it ought not, in my opinion, to supersede the necessity for the same amount of proof as would be deemed necessary in the absence of all evidence of such a stimulus. . . . Consequently I have come to the conclusion that the learned Judge misdirected the jury. The effect of the misdirection upon the minds of the jury may have been such as to lead them to give undue weight to the evidence

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of motive when considering the two questions, the answers to which are objected to." *Burnside* J. thought that undue weight was given to the question of motive. He said:—"It appears to me that in a case of this nature the weight which ought to be attached to the presumption of innocence was left out of view, or rather displaced from its position, and the question of motive was given a preponderance which it was not entitled to under the present circumstances. On looking at the learned Judge's summing up to the jury with regard to the question of motive, I cannot help being struck by the importance which the learned Judge directed the jury to attach to the existence or otherwise of what is known as motive." He said further:—"From the passages to which the learned Chief Justice has referred—and they are characteristic of several passages which are to be found in the learned Judge's summing up to the jury—it appears to me that motive has been put forward as a fact of the greatest importance—not merely an auxiliary circumstance to throw light upon what might otherwise be in doubt, but put in the forefront as a matter of the greatest importance." It appears therefore that *Burnside* J. thought it probable that the jury had been induced to attach too great importance to the existence of a motive. *Rooth* J. expressed his opinion thus:—"I think that the authorities show that the function of motive is twofold; first, to rebut the natural presumption that a man in a sane state of mind will not commit suicide, and secondly, where there is evidence from which a jury might legitimately find that the death was caused by design, to assist them in arriving at a conclusion as to whether it was by design or accident. This I consider to be the province of motive." I entirely agree with that. *Rooth* J. continues, "It should be ancillary to the evidence, and not used, as the learned Judge has in my opinion used it in this case, as a sign-post to indicate to the jury whither their conclusion should tend." I have some difficulty in following that passage. However, the learned Judge was of opinion that there had been a misdirection, for he says further on, "I think it is impossible for this Court to say that the way in which the jury were directed on the question of motive could not have influenced their minds." I think it must be taken that the

direction did influence the minds of the jury, but on consideration I am of opinion that the direction was entirely correct. The learned Judge told the jury in effect that they could use the evidence of motive to assist them in arriving at a conclusion whether the event was by design or accident. I agree with *McMillan* J. that motive in this case was of the greatest importance. Even if it were not, I do not know that it is misdirection in point of law if a Judge attaches more importance to one part of the evidence than to another. That motive was a fact or consideration of the greatest importance in this case cannot be denied. The man was found in such circumstances as certainly pointed to his having put an end to his life —he was surrounded before his death by such circumstances that to many men death would appear the only escape from an intolerable burden to himself and his reputation, and the reputation of his family. Under these circumstances it would not be surprising if he put an end to his life. Further, the evidence being such that the jury might find either way, I fail to see that the learned Judge attached too much importance to motive. Whether the evidence in any case is equally balanced or not is a question which can only be answered by the individual to whom it is put. I do not quite know what is the exact meaning of evidence being equally balanced—it may be that one man may say, "I cannot make up my mind," while another man may say, "I think the evidence is a little in favour of the plaintiffs." A juryman, however, has to consider whether he has such a reasonable doubt that the existence of a motive is sufficient to remove that doubt. The stronger the motive the more influence it is likely to have. I think that, if the summing up of the learned Judge is open to any exception, it is certainly not that of being too favourable to the defendants. I think, therefore, the learned Judges of the Full Court were wrong in directing a new trial on this ground. Another point taken was, in effect, that the learned Judge in commenting upon the evidence referred to some parts in detail, but did not refer to other parts. Now, you cannot take isolated passages from a summing up, and so establish misdirection on the ground that both sides of the case were not properly put to the jury. The learned Judge very carefully told the jury that

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he was not attempting to refer to all the details of the case, and said that many points had been fully discussed by counsel which they might consider of more importance than he did. He said: "It by no means follows that the points with which I am not dealing are issues with which you should not deal when you are considering the conclusion you will come to on the questions left." The learned Judge then called the attention of the jury to such matters as he thought were of the most importance. At the conclusion of the summing up no objection was taken, and he was not asked to correct anything he had said, or any error in fact which it is now suggested he made. Both parties were apparently quite satisfied with the summing up. In my opinion, if there were no more in the case, that would be sufficient to preclude the defendant from asking for a new trial. There is a long series of cases, many of which were cited by Mr. Russell yesterday, ending with *Nevill* v. *The Fine Art and General Insurance Co.* (1), establishing that you cannot have a new trial on the ground of misdirection because the learned Judge has laid stress on one point more than another; and further establishing that you cannot have a new trial for misdirection unless the attention of the learned Judge has been called at the trial to the alleged misdirection, and opportunity has been given to correct it. I think therefore that the appeal must be allowed.

BARTON J. I am entirely of the same opinion on both points.

HIGGINS J. I am of the same opinion. I should like to add that I cannot find any difference of opinion as to the law as between this Court and the Full Court, although we are allowing the appeal. We are agreed as to the major premiss; but we think that the Full Court has wrongly regarded *McMillan* J. as having assigned to motive a place in evidence to which it is not entitled. The application made to us now is for a new trial on the ground of misdirection only; and that has to be borne in mind. The Full Court seems to have said that *McMillan* J. has, in his summing up to the jury, attached undue importance to motive—that is the mode in which the matter is expressed by

(1) (1897) A.C., 68.

the Chief Justice and *Burnside* J. I think that the degree of importance attached to a particular fact by a Judge in summing up is not ground, and never has been ground, for a new trial. If the whole facts have been fairly left to the jury, and they were told that it was for them to decide upon the whole of the facts as to whether or not the deceased committed suicide, there is no ground for a new trial on the ground of misdirection. It is quite true that motive for suicide is not *per se* evidence of suicide. There must be some evidence of the *corpus delicti*, but there was substantial evidence in that direction. Different minds may attach different degrees of importance to particular facts such as motive—motive, in this case, which might have pressed upon the mind of the deceased. Even if the jury were believed by this Court to have given far too much importance to any particular fact, that would not be ground for a new trial; neither is the fact that the Judge has given undue importance to a particular fact a ground for a new trial. But I agree with the learned Chief Justice that *McMillan* J. has given no undue importance to the evidence of motive on the part of the deceased.

Appeal allowed. Judgment appealed from discharged, and motion for new trial dismissed with costs. Judgment of McMillan J. restored.

Solicitors, for the appellants, *Haynes, Robinson & Cox.*
Solicitors, for plaintiff respondent, *Ewing & Co.*

N. G. P.