MEDICAL MALPRACTICE

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ADVERSE INFERENCE – FAILURE TO CALL A TREATING PHYSICIAN

The law of adverse inference allows the court, in certain circumstances, to presume that a party has failed to call a certain witness because that witness would not have helped the party's case. In medical malpractice, as well as other injury litigation, adverse inferences are often sought against a plaintiff for failing to call his or her treating physician as a witness. In this paper, we examine the circumstances in which an adverse inference will be drawn for a failure to call a treating physician to testify, and what factors the court will consider in making such a determination.

It is well settled that an adverse inference may be drawn against a party who fails to call a material witness at trial. The failure to call a material witness may amount to an implied admission that the evidence of the absent witness would not support, or would be contrary to, that party's case. This principle is subject to many conditions, however, and the party against whom an

adverse inference is sought may provide an adequate explanation for the failure to call the witness. As endorsed by the BC Court of Appeal in *R. v. Rooke*, 1988 CanLII 2946 (BCCA):

> In any event, the party affected by the inference may of course explain it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for non-production.

A witness may be equally available to both parties, or the party against whom an adverse inference is sought may have special access to the witness. In the latter case, there is a stronger basis for an adverse inference to be drawn.[1] Further, a trial lawyer may have many reasons for deciding against calling an available witness, such as if the point of evidence in question has been adequately covered by other witnesses, or because a witness may simply not present well in court. Therefore, it cannot be said that every failure to call an available witness should result in an adverse inference being drawn.

The notion of adverse inference is related to the "best evidence rule," which states that parties should put forth the best evidence that the nature of the case will allow. As such, an adverse inference should only be drawn in situations where the evidence of the witness not called would be superior to the other evidence at trial in respect to the facts to be proven.[2]

THE EVOLUTION OF THE LAW ON ADVERSE INFERENCE

Levesque v. Comeau, [1970] SCR 1010, is often cited for the proposition that a court must presume an adverse inference in cases where a party failed to call evidence from a prominent treating physician. In *Levesque*, the main issue before the court was whether the motor vehicle accident in which the plaintiff was involved was the cause of her serious hearing impairment. The plaintiff called only one expert to opine that trauma was a potential cause of her hearing loss, and that expert had examined her more than a year after the accident. She had consulted several other doctors and undergone examinations in the meantime, but none of these doctors was called to testify. As the plaintiff alone could bring this evidence before the court, Pigeon J. held that the court must presume that she did not do so because the evidence from these treating doctors would have adversely affected the plaintiff's case.

The application of the adverse inference rule for the failure to call a treating physician has evolved in British Columbia over the years. In *Barker v. McQuahe*, (1964) 49 W.W.R. 685 (BCCA), Davey J. stated that a plaintiff seeking damages for personal injuries "ought to call all doctors who attended him in respect of any important aspect of the matters that are in dispute, or explain why he does not do so."[3] Today, however, given the various medical practitioners that an injured plaintiff may see, the courts have recognized that requiring a plaintiff to call every medical professional consulted as a witness would raise litigation costs by requiring more reports from physicians or additional attendances of physicians in court, with nothing added to the knowledge of counsel, but with time and expense added to the trial process.[4]

The rationale for drawing an adverse inference for failing to call a treating or primary care physician is that the physician would be the individual best able to give evidence as to the plaintiff's condition throughout the relevant periods of time. When a treating physician is not called to testify on behalf of the plaintiff, courts have the discretion to draw an adverse inference, but are not required to do so.[5]

Although most case law deals with an adverse inference being drawn against a plaintiff for failing to call a treating physician as a witness, the inference may be drawn against the defendant in certain circumstances. In *Norris v. Burgess*, 2015 BCSC 2200, the plaintiff attended a defense medical examination by a psychiatrist, but the defendant chose not to obtain an opinion from the psychiatrist and did not call him as a witness. Speaking for the court, Funt J. held that the plaintiff could lead evidence as to her attendance and surrounding circumstances of the independent medical examination. In coming to this conclusion, Funt J. noted that civil litigation is an adversarial process, and where one party requests "that the other party attend an interview or examination with a third person (whether or not that person is an expert) and the other party so attends, the requesting party should not be surprised that the interview or examination may be relevant with evidentiary consequences."[6]

In *Buksh v. Miles*, 2008 BCCA 318, the BC Court of Appeal set out a number of factors the court should consider in determining whether an adverse inference should be drawn against a party if a treating physician is not called to testify:

a) The evidence before the court;
b) The explanation for not calling the witness;
c) The extent of disclosure of the doctor's clinical records; and
d) The circumstances of the trial, such as where there has been an agreement to introduce clinical records that may be contrary to the inference, or where the witness's views are apparent in the report of another witness.[7]

In the following sections, we look at how these factors have been applied in case law when deciding whether the adverse inference will be drawn.

APPLICATION OF THE LAW ON ADVERSE INFERENCE

A. The Evidence Before the Court

This first factor considers what evidence was before the court through other means, and what the witness who was not called would have been expected to provide evidence on. If the evidence of the treating physician was available through other witnesses that were called, this would have a significant impact on the court's analysis. However, as stated in *Lurtz v. Duchesne*, [2003] O.J. No. 1541, if "the evidence provided was available through other means, but it is not the best evidence available, the court

may still draw an adverse inference."[8]

The court will also consider the nature and extent of the evidence that the treating physician could be expected to bring. A party is free to dispense with relatively unimportant or repetitive evidence, but an adverse inference may be drawn if the witness's evidence is critical to the plaintiff's case. In *Keech v. Chang*, [2009] O.J. No. 1614, the plaintiff alleged the defendant physician pierced her spinal cord while administering anesthetic in preparation for hip replacement surgery. It was her position that the negligence caused serious neurological deficits, as well as significant depression, anxiety, and sleep deprivation. The court drew an adverse inference against the plaintiff for failing to call two of her physicians who had been treating her for approximately 25 years, as these physicians would have "been in the position to comment on how this surgery has affected her mental health and general outlook on life." [9]

Buksh v. Miles involved a scenario in which the plaintiffs failed to call evidence from two physicians at walk-in clinics who saw the plaintiffs within days of the accident. They did, however, call their family doctor, who treated them prior to the accident, and continued to treat them afterwards. Since the absent witnesses were not longstanding family doctors, and all their clinical records had been admitted into evidence, the court declined to draw an adverse inference for the failure to call the walk-in clinic doctors.

Whether the treating physician in question is a specialist or a general practitioner may also impact whether an adverse inference will be drawn. In *Barker v. McQuahe*, the plaintiff did not call his treating specialist, and the court drew the inference that the specialist did not support the opinion of the plaintiff's general practitioner, who had been called to testify. Since the specialist would have presumably been better qualified to opine on the plaintiff's injury than the general practitioner, the court concluded that his evidence would not have helped the plaintiff's position. *Prato v. Insurance Corporation of British Columbia*, 2003 BCSC 76, involved the opposite scenario: the plaintiff's specialists were called to testify, but a general practitioner was not. The court found that there was less of a concern about the lack of supporting evidence from a general practitioner than if the situation was reversed, and declined to draw an adverse inference.

B. Explanation for Not Calling the Witness

Mohamud v. Yu, 2016 BCSC 1138, involved a claim for damages resulting from two motor vehicle accidents. Of concern to the court was an absence of any objective evidence from any treating physician confirming the plaintiff's injuries. Most notable from the court's perspective was the failure of the plaintiff's trusted family doctor to testify or provide an expert report. The plaintiff's explanation was that she had called witnesses she had considered the most necessary, she did not have the means to obtain every medical report possible, and that a family doctor is not necessarily the best to provide an opinion. She further argued that it was open to the defendant to call her family doctor.

The court did not agree that the plaintiff's family physician was not the best witness to provide evidence as to her injuries, as he was "the only person who could have given the court an opinion about the plaintiff's condition, informed by a longstanding relationship and observations throughout the relevant periods of time."[10] The court also did not accept the fact that the defendant could have called the doctor as a witness to be adequate in explaining the plaintiff's failure to do so.

Similarly, in *Keech v. Chang*, counsel for the plaintiff suggested that the court did not need medical testimony from the plaintiff's longstanding treating doctors as to the effect of the alleged negligence on her mental health, as the plaintiff herself was the best able to testify as to the effects of the injury on her life. The court disagreed: "This ignores the fact that even if Ms. Keech honestly believes most of her current problems are attributable to the lesion, she may well be mistaken, and lacks the objectivity and medical perspective needed to tease apart her pre- and post-surgical complaints."[11]

In *Chappell v. Loyie*, 2016 BCSC 1722, the plaintiff did not call his family doctor as a witness even though this doctor had treated the plaintiff around the time of the accident and for many years prior. As causation was the primary issue in the case, the defendant urged the court to draw an adverse inference, submitting that the family physician was the witness best able to provide evidence as to the plaintiff's pre-existing injuries, and opine on what injuries were caused by the accident. Counsel for the plaintiff pointed out that it was open to the defendant to call the doctor as a witness, but that there had not attempted to do so. Counsel for the defendant countered that it was not usually feasible to obtain an opinion from a plaintiff's treating family doctor as he or she is usually unwilling to undermine the trust of a doctor-patient relationship. The court agreed that while this may be a real and practical consideration, because the plaintiff had stopped seeing the doctor regularly after July 2012, it was open to the defendant to at least approach the doctor and consider calling him as a witness. Considering the entire circumstances, the court declined to draw an adverse inference against the plaintiff.

As previously mentioned, counsel may have tactical reasons for not calling a witness, such as the witness's demeanor or presentation in court. The BC Supreme Court has stated that when deciding whether to draw an adverse inference, the court can consider the unsworn statements of counsel regarding the reasons for not calling the witness.[12]

C. Extent of Disclosure of the Clinical Records

The extent of the clinical records disclosed will impact whether the adverse inference is drawn. The defendants in *Djukic v. Hahn*, 2006 BCSC 154, urged the court to draw an adverse inference against the plaintiffs for failing to call three treating physicians. Speaking for the court, Josephson J. provided five reasons for declining to do so:

1. Both parties have produced volumes of medical evidence from a number of doctors;
2. Complete clinical records of these doctors were disclosed to the defence;
3. These same records were expressly considered and subsumed in the opinions of doctors whose reports are before me;
4. Having disclosure of these records, it was open for the defense to interview and call these doctors as witnesses without risk of being blindsided;
5. These were not doctors whom Mrs. Djukic consulted on a regular basis.[13]

In *Hodgins v. Street*, the plaintiff failed to call her family physician as a witness or to provide a report, and the defendant asked the court to draw an adverse inference. Although the family doctor's clinical records were produced, they were "simply records kept in the ordinary course of business" and did not contain any opinion evidence. As a result, the court ultimately decided to infer that the plaintiff did not call her family doctor as he would not have provided favorable evidence.

CIRCUMSTANCES OF TRIAL

Lastly, when deciding whether to draw an adverse inference, the court may consider the circumstances of the trial, such as where there has been an agreement to introduce clinical records that may be contrary to the inference, or where the witness's views are apparent in the report of another witness.

In *Beggs v. Stone*, 2014 BCSC 2120, the court declined to draw an adverse inference against the plaintiff for failing to call her family physician and the psychologists who treated her before and after the accident. In coming to the decision, the court emphasized the fact that the clinical records of these physicians were reviewed by defense counsel and the experts who provided opinions based, in part, on those records. The plaintiff's pre- and post-accident condition and progress were well documented, and there was nothing to suggest that anything that was in the records contradicted any of the evidence from the doctors that were called as witnesses. The views of the plaintiff's treating doctors formed part of the reports of the experts and, as a result, an adverse inference was not drawn.

Other circumstances will also be considered by the court. The defendants in *Prato v. Insurance Corporation of British Columbia* sought an adverse inference against the plaintiff for not calling two family doctors to testify. One of these doctors was not available to testify at trial and counsel for the defendant required him to attend for cross-examination. The doctor's records, therefore, which contained opinion evidence, were not admitted. In these circumstances, the court declined to infer that the doctor held views which would negatively impact the plaintiff's case.

CONCLUSION

An adverse inference may be drawn against a party for failing to call a material witness if it is apparent from enough other evidence that the witness would have been able to assist the court by providing evidence on a material issue. In medical malpractice and other injury claims, it is not necessary to call every physician that the plaintiff has seen. However, if a plaintiff's physician is able to provide superior evidence regarding the plaintiff's position, counsel would be prudent to provide this evidence to the court – or be prepared to have a good explanation for not doing so. V

1 *R. v. Jolivet*, 2000 SCC 29, at para. 27.
2 *Buksh v. Miles*, 2008 BCCA 318, at para. 30 [*Buksh*].
3 *Barker v. McQuahe*, (1964) 49 W.W.R. 685 (BCCA) at 689, as cited in *Hodgins v. Street*, 2009 BCSC 673 at para. 57.
4 *Buksh*, supra note 2, at para. 34.
5 *McTavish v. Boersma*, 1997 CanLII 4372 (BCSC) at para. 14.
6 *Norris v. Burgess*, 2015 BCSC 2200 at para. 16.
7 *Buksh*, supra note 2, at para. 35.
8 *Lurtz v. Duchesne*, [2003] O.J. No. 1541 at para. 26.
9 *Keech v. Chang*, [2009] O.J. No. 1614, at para. 209 [*Keech*].
10 *Mohamud v. Yu*, 2016 BCSC 1138, at para. 40.
11 *Keech*, supra note 9, at para. 211.
12 *Tower Waterproofing v. Mondiale Development Ltd.*, 2013 BCSC 1772 at para 24, citing *Fresneda v. Ocean Pacific Hotels Ltd.*, 2008 BCSC 238.
13 *Djukic v. Hahn*, 2006 BCSC 154, aff'd 2007 BCCA 203, at para. 60.

RESTORING THE ART OF ADVOCACY

At TLABC, we are always looking at ways to increase value and improve services to our membership.

'Provide more educational opportunities and resources on the art and science of advocacy' was a recent suggestion of one way that TLABC could do this.

It is therefore my pleasure to introduce you to *the Verdict's* newest column: Restoring the Art of Advocacy.

This column, conceived and hosted by TLABC Governor and recipient of the University of Calgary Milvain Chair in Advocacy (2011), Richard Fowler QC, aims to provide regular and relevant information dealing with the art and science of advocacy for all litigation areas.

Through this column, we hope to be responsive to the needs of our TLABC members. We are now soliciting input on topics to cover. Suggestions for regular and guest contributors are welcomed. Readers, you are encouraged to get in touch.

Suggestions can be emailed to the *Verdict* Publisher Julia Chalifoux at julia@tlabc.org.

We look forward to providing a full column in our upcoming winter 2018 edition. V