The Law Of "Adverse Inference" Exlpained In BC Brain Injury Case

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One of the most important decisions a personal injury lawyer needs to make when going to court is deciding which witnesses to call in support of the claim. This is particularly true when it comes to deciding what medical experts will be called in support of an injury claim.

Typically a seriously injured plaintiff will have seen many medical practitioners (GP, specialists, physiotherapists etc.) If you fail to call some of these witnesses can that harm your case? The answer is yes and is contained in the law of 'adverse inference'. The law of adverse inference means that the judge or jury are permitted to, in certain circumstances, presume that you failed to call a certain witness (such as your doctor) because that witness would not have helped your case.

Reasons for judgment were released yesterday by the BC Supreme Court, Nanaimo Registry, (Hodgins v. Street) explaining and applying this legal principle in a BC brain injury case.

In this case the Plaintiff was injured in a serious accident in 2004 in Courtenay, BC. The Plaintiff suffered a moderate brain injury which was expected to have permanent consequences. In awarding just over $650,000 in total damages for the Plaintiff's losses Mr. Justice Kelleher summarized the Plaintiff's injuries and their effect on her life as follows:

[81] In this case, the plaintiff has suffered constant headaches and continues to do so.

[82] Her emotional and other difficulties arising from the brain injury are permanent and affect many aspects of her life.

[83] I am persuaded that Ms. Hodgins' pleasure in life has been significantly reduced. Both the plaintiff's cognitive and physical conditions limit what she can do outside the home. Her ability to be a mother will be complicated by these injuries. She will have a loss of opportunity of engaging with her children while they are growing up. I accept, as well, Dr. Anton's opinion that neurological recovery after a traumatic brain injury is usually maximal within two years and therefore further recovery cannot be expected. I accept, as well, neurologist Dr. Donald Cameron's opinion that she is "functionally disabled to a significant degree". Her fatigue, hypersomnilance and dizziness will be permanent. She is more vulnerable than before to episodes of depression.

In reaching his judgement Mr. Justice Kellehar was asked to draw an adverse inference because the Plaintiff failed to call her GP of many years as a witness. The judge did in fact draw this adverse inference and in doing so did a great job summarizing this area of the law as follows:

Adverse Inference

[51] The defendant argues that I should draw an adverse inference from the failure of the plaintiff to have Dr. Law, the plaintiff's family doctor, provide a report or to call him as a witness.

[52] Dr. Law is the only physician (other than the chiropractor Dr. Kippel) who treated the plaintiff extensively before and after the accident. A central issue in this case is the plaintiff's pre-accident medical history and the extent to which the accident is the cause of the plaintiff's difficulties today.

[53] Dr. Law's clinical records were produced. But they are, by the terms of a document agreement between the parties, simply records kept in the ordinary course of business. They do not contain any opinion.

[54] The principle was stated in Wigmore on Evidence, (Chadbourn rev. 1979) vol. II at 192:

...The failure to bring before the Tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.

[55] Sopinka and Lederman in The Law of Evidence in Canada, 2nd ed., (Toronto: Butterworths Canada, 1999), describe the principle at para. 6.321:

In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[emphasis added]

[56] There have been recent developments in the application of this principle in British Columbia.

*[57] In **Barker v. McQuahe** (1964), 49 W.W.R. 685 (B.C.C.A.), the Court of Appeal stated an adverse inference may be drawn if a litigant fails to call a witness who might be expected to give supporting evidence. Mr. Justice Davey stated at 689 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".*

*[58] That approach was modified in **Buksh v. Miles**, 2008 BCCA 318, 83 B.C.L.R. (4th) 162, at para. 34:*

[34] Taking the admonition of Mr. Justice Davey to the extreme in today's patchwork of medical services raises the likelihood of increased litigation costs attendant upon more medical reports from physicians or additional attendances of physicians at court, with little added to the trial process but time and expense, and nothing added to the knowledge of counsel. Perhaps the idea that an adverse inference may be sought, on the authority of Barker, for the reason that every walk-in clinic physician was not called fits within the description of "punctilio" that is no longer to bind us, referred to by Mr. Justice Dickson in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, in a different context.

*[59] Mr. Justice Macaulay considered this issue in **Prato v. Insurance Corporation of British Columbia**, 2003 BCSC 76, in circumstances similar to those before me.*

*[60] In that case, the defendant had access to the clinical records. Mr. Justice Macaulay noted that in **Barker**, the plaintiff failed to call the specialist and the inference was that the specialist did not support the view of the general practitioner. In **Prato**, the specialists were called but not the general practitioner. His Lordship said at para. 26: "I am less concerned about the lack of supporting evidence from a general practitioner than I would be if the situation were reversed".*

*[61] The defendant points to **Djukic v. Hahn**, 2006 BCSC 154, aff'd 2007 BCCA 203, 66 B.C.L.R. (4th) 314, where Josephson J. at para. 60 gave five reasons for declining to draw an adverse inference:*

1. Both parties have produced volumes of medical evidence from a number of doctors;

2. The 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 had disclosure of these records, it was open to the defence 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.

[62] As the plaintiff points out, the decisions in ***Prato, Djukic*** *and* ***Buksh*** *are consistent with the initiative to streamline trials and make them less costly.*

[63] However, there were two peculiarities in the ***Prato*** *case that bear mentioning. Of concern was the evidence or lack of evidence from two family doctors. One of them, Dr. Leong, was not available to testify at trial. Therefore, the records that were sought to be admitted, which contained opinion evidence, were not admitted. In the circumstances, Mr. Justice Macaulay declined to infer that the doctor held views inconsistent with those of the specialist.*

[64] The other physician was Dr. Hayes. He had provided a medical report directly to an adjuster at ICBC. (This was an action for temporary total disability benefits.) Thus, the defendant had the opinion of Dr. Hayes but declined to call Dr. Hayes.

[65] In all the circumstances of this case, I infer that the plaintiff did not call Dr. Law because he would not have provided evidence helpful to the plaintiff's position on these points:

1. The plaintiff's medical condition, both physical and psychological, at the time of the accident.

2. The medical cause for the plaintiff's fatigue before and after the accident.

3. How the plaintiff progressed following the accident with the effects of the brain injury and the other soft tissue injuries.