Inferences drawn from a **failure** to give **evidence**: the rule in *Jones v Dunkel*

By Gerard Mullins

You are preparing a case for trial. Your client slipped and fell while lifting a heavy weight at work. The employer alleges that immediately before the accident, a supervisor told your client not to lift the weight. Two other witnesses were present: your client's brother (a co-worker) and the supervisor's manager. You decide that your client's brother, who remembers the supervisor saying something to your client but has no recollection of any direction being given, is an unreliable witness. He might be a 'loose cannon' in the witness box. You decide not to call him. Can an adverse inference be drawn against your client and, if so, to what extent?

What is commonly termed 'the rule in *Jones v Dunkel*' is that the unexplained failure by a party to give evidence, to call witnesses or to tender documents or other evidence may (not must) lead to an inference that the uncalled evidence or missing material would not have assisted that party's case.[1]

Glass JA described in *Payne v Parker*[2] that the condition:

> '... exist[s] where it will be natural for one party to produce the witness, or the witness would be expected to be available to one party rather than the other, or where the circumstances excuse one party from calling the witness, but require the other party to call him, or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him, or where the witness' knowledge may be regarded as the knowledge of one party rather than the other, or where his absence should be regarded as adverse to the case of one party rather than the other. It has been observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary. If the witness is equally available to both parties, for example, a police officer, the condition, generally speaking, stands unsatisfied. There is, however, some judicial opinion that this is not necessarily so. Evidence capable of satisfying this condition has been held to exist in relation to a party's foreman, his safety officer, his accountant, his treating doctor.'

The rule has recently been considered in the ACT and NSW Courts of Appeal.

In *O'Meara v Dominican Fathers*,[3] the plaintiff was a 21-year-old fee-paying resident of a college at the Australian National University run by the defendants. During a dinner at the college on 25 October 1996 she and other students adjourned to the Tavern Bar on the first floor of the college. Alcohol had been consumed. At around midnight, the plaintiff joined other people on an outside balcony. She was wearing a ballgown and high-heeled shoes, which she said were uncomfortable. In attempting to lift herself backwards onto a balustrade, she fell over backwards and suffered serious injuries.

At trial, the plaintiff alleged that the defendant knew that students had a tendency to sit on the balustrade but took no steps to prevent this practice.

At first instance, the Master found that some students occasionally used the balustrade as a seat. However, he concluded that it had not been established that the college authorities knew this. The plaintiff called a number of witnesses who said that they had observed students and others sitting on the balustrade on a regular basis.

The defendant called evidence to dispute the plaintiff's contention that the defendants were aware that persons sat on the balustrade. Evidence was led from one witness that between 1981 and 1983, and from 1996 onwards, they were unaware of any such practice. No evidence was led about any practice between 1983 and 1996.

The plaintiff asserted that this period was important – especially since the Tavern Bar and balustrade was renovated between 1989 and 1993 – and that a *Jones v Dunkel* inference ought to be drawn in her favour given the defendant's failure to call other evidence that was known to college authorities regarding the use by students of the balustrade as a seat.

The ACT Court of Appeal agreed. Giles and Weinberg JJ concluded that the evidence led by the plaintiff (that the balustrade had been used as a seat by some students since at least 1994), if left unanswered, was sufficient to found an inference that this practice had existed previously. There was no explanation from the defendant as to why it called no evidence regarding lack of knowledge of this practice during the critical period. The plaintiff was entitled to the benefit of the inference that such evidence was not led because it would not have assisted the defendant on that issue.

The court stated:[4]

'In our view, the present case was one >>

> that cried out for the respondent to meet the appellant's contention that there was a regular practice of students sitting on the ledge that must have been known to at least some members of the college staff. Almost every witness called on behalf of the appellant gave evidence of this practice, and the respondent's witnesses were cross-examined extensively upon the subject. The issue was raised in the pleadings, and the respondent could not claim to have been taken by surprise. There must have been a significant number of members of the college staff who were in a position to give evidence regarding their knowledge of this "practice", yet with the exception of Father Fowler, none were called. There was no explanation for the failure to call these witnesses. The appellant could not have been expected to call them – they were very much in the camp of the respondent.'

An application for special leave to the High Court was refused.

The principle was also applied by the NSW Court of Appeal in *Manly Council v Byrne & Anor.*[5] The plaintiff was a 13-year-old girl who went to the Manly Swimming Pool Complex to participate in an under-14-years water polo competition. The complex contained a 25-metre pool, a 50-metre pool and a combined teaching pool and wading pool. The water polo competition was to be conducted in the 50-metre pool. Soon after she arrived at the swimming complex, the plaintiff dived into the 25-metre pool and hit her head against the bottom of the pool, fracturing her neck.

The trial judge found the council liable. One basis was the failure to illuminate the area in question. The plaintiff alleged that a floodlight designed to illuminate the 25-metre pool was off at the time of the accident.

The trial judge found that the plaintiff arrived at the pool with her friend, Melissa Pratt, and Melissa's mother. While the plaintiff claimed that the light was off and the area was dark at the time she dived into the 25-metre pool, a lifeguard on duty gave evidence that the light was on. The trial judge accepted the evidence of the plaintiff.

The council, on appeal to the Court of Appeal, argued that the finding that the light was off should be overturned. One ground was that the trial judge should have drawn an inference that Melissa Pratt and Mrs Pratt (neither of whom was called) were likely to have given evidence that would not have assisted the plaintiff in her contention that the light was off. Had the trial judge drawn that inference, he should then have concluded that the light was on.

The court identified two consequences of the failure to call a witness.[6]

> 'Thus, if a witness is not called, two different types of result might follow. The first is that the tribunal of fact might infer that the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness. The second is that the tribunal of fact might draw with greater confidence an inference unfavourable to the party who failed to call the witness, if that witness seems to be in a position to cast light on whether that inference should properly be drawn.'

The Court of Appeal considered two specific aspects of the rule in *Jones v Dunkel*.

The first was in respect of cumulative witnesses. After analysing a series of US cases, their Honours accepted in principle that the rule does not operate to require a party to give merely cumulative evidence. If, for example, five people attended a relevant meeting and some are called, no *Jones v Dunkel* inference can normally arise in respect of those who are not: the rule does not compel time to be wasted by calling unnecessary witnesses.[7] Their Honours concluded that in the evidentiary context presented to the trial judge, Melissa and Mrs Pratt were merely extra witnesses beyond the eye of witnesses who had been called, two of whom His Honour expressly found were satisfactory witnesses.

The second aspect was the equal availability of uncalled witnesses to both parties. Although Melissa and the plaintiff were friends who caught the same school bus, saw each other every day at school and nearly every weekend, the trial judge concluded that Melissa and Mrs Pratt were equally available to the plaintiff and the defendant as witnesses. There was no evidence of any attempt by the council's lawyers to speak to Melissa or her mother, where those attempts were met with a refusal to co-operate, or of any hostility of Melissa or Mrs Pratt to the council.

The Court of Appeal found that despite the 'equal availability' of the witnesses, had the judge had any concerns or doubts about the plaintiff's credibility, he would have been justified in concluding that it was 'more natural' for the plaintiff to call Melissa and Mrs Pratt. The failure to do so entitled him to conclude that their evidence would not have helped the plaintiff, and to draw more strongly any inference available to him that the light was on. Again, given the evidentiary context, it was not necessary to do so.

These two cases demonstrate the importance of *failing* to call a witness and the importance of investigating whether a particular witness is prepared to co-operate. Evidence from a lawyer that they have requested an interview with a witness who may be seen to be favourable to the other party, and that the request has been rejected, may be important if that witness is not called by the party to whom they would be regarded as favourable. In the example above, it would be common for the manager of the company to refuse to be interviewed by the lawyers for the plaintiff. Often the request would not even be made. But a request and a refusal may be important evidence if that witness is ultimately not called to the hearing. ■

Notes: 1 *Cross on Evidence*, online edition, para [1215], Lexis Nexis Publications. **2** [1976] 1 NSWLR 191 at 201-2. **3** [2003] ACTCA 24. **4** At para 70. **5** [2004] NSWCA 123. **6** At para 51. **7** Extracted from *Cross on Evidence* (Australian edition, current electronic version, Lexis Nexis Publishing, para. [1215]).

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