Adverse Inference for Not Calling an Expert or Witness

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Introduction

Often counsel will find themselves in a situation at trial where opposing counsel has not called an expert who authored an expert report. In this situation of an expert report being entered at trial without the expert testifying, should an adverse inference be drawn? There are other situations in which counsel might want to argue that an adverse inference should be drawn – for example, if a witness has material evidence to provide, which might be construed as the "best evidence" available, and this witness is not called. What is the law governing the drawing of an adverse inference?

Case Law

The Supreme Court of Canada considered the principles of adverse inferences in the seminal case of ***Levesque v. Comeau***, [1970] SCR 1010. The plaintiff was in a car accident and later went deaf; at issue was whether or not her deafness was the result of the accident. The plaintiff called only one medical expert, and he never stated that the accident was the probable cause of the plaintiff's deafness. Writing for the majority, Pigeon J held:

> Appellant Lola Levesque's expert examined her for the first time more than a year after the accident, and after she had consulted several doctors and undergone different examinations in the meantime. **She alone could bring before the Court the evidence of those facts and she failed to do it. In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case**. …Under the circumstances, her testimony and that of her husband respecting her good state of health before the accident could properly be considered insufficient evidence for the purpose of excluding the other possible causes of the deafness [emphasis added] (para. 6).

The leading case on adverse inferences in Alberta is ***Howard v. Sandau***, 2008 ABQB 34. The parties had a relationship between 1998 and 2006. When they met, the woman had no money and was separated from her husband; the man owned an auto repair shop. The man invited the woman to stay at his home, which she did for a few months. After that, she lived in the home off and on. They separated, and the woman brought an application for determination of her entitlement to spousal support. The woman took the position that she was entitled to a constructive trust by reason of unjust enrichment of the man and that their relationship was an adult interdependent partnership. The woman testified that, with

respect to an apartment rented in her name during one of the disputed residency periods, the apartment was actually a residence for her 18-year old son. The son was not called as a witness, although he attended at court during at least part of the trial. Wittmann ACJQB held:

> The failure of a party to call a witness in a civil case may result in an adverse inference being drawn against that party. This principle has been well documented in both case law and academic sources. A number of cases have adopted the following statement from *Wigmore, Evidence in Trials at Common Law, 1979* as the "leading statement" on adverse inference:
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> > **The failure to bring before the tribunal some circumstances, documents 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 circumstance 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** [emphasis added] (para. 39).

The discretion as to whether or not to draw an adverse inference is in the discretion of the trial judge and will depend on the specific circumstances:

> In their book *Witnesses*, Toronto: Thompson Carswell, 2007, Mewett and Sankoff identify at page 2-23 the following circumstances as particularly significant:
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> • whether there is a legitimate explanation for the failure to call the witness
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> • whether the witness has material evidence to provide
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> • whether the witness is the only person or the best person who can provide the evidence.
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> • whether the witness is within the "exclusive control" of the party and is not "equally available to both parties" (para. 44).

One of the determinative factors is whether the witness has material evidence to provide. Courts have declined to draw an adverse inference due to the fact that the testimony of the absent witness would not be probative in the action. With respect to best evidence, Wittmann ACJQB held:

> **When the witness does have material evidence to provide, particularly when that evidence constitutes the "best evidence" available, it is likely that the Court will draw an adverse inference**. (Metcaff 2-23). In *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.*, [1996] A.J. No. 1159 (Alta. Q.B.), Moore, J. was called on to determine whether a law firm could continue to represent a defendant, Canadian Southern Petroleum (CSP) after a lawyer who had previously been a member of the plaintiff's firm joined the defendant firm. The Court noted the failure of the plaintiffs to provide evidence from the defendant company's American counsel, Largay, who was made aware of the move. Moore, J. held at para. 95 that:

> I am satisfied that at least I can draw the inference that Largay came to the conclusion that Hutzel's move to BJV would not create real mischief or prejudice to CSP. The best evidence that CSP could offer on this point would be Largay's affidavit evidence.

He went on to state at para. 97:

> Simply, CSP did not put forward its best evidence on the application. Largay is not a notional bystander. Largay is a person who uniquely can give evidence on an important point and failed to do so [emphasis added] (paras. 47-48).

Another consideration prior to drawing an adverse inference is whether the witness is equally available to both parties and in the exclusive control of one party. In ***Howard v. Sandau***, it was unreasonable to expect that a party adverse to the woman would bring forward the evidence of her son at trial. Wittmann ACJQB held that because the woman did not file a notice under former Rule 296.1, she can be taken to have assumed the risk that such an inference would be drawn: her son's evidence was a material point that was in dispute and was the best evidence available on that point. These factors all pointed in favor of an adverse inference being drawn. In the result, the woman's application was dismissed.

In ***Beger v. MacAstocker Estate*** (1996), 192 AR 241, 1996 CarswellAlta 954, additional reasons at 1996 CarswellAlta 1033, the plaintiff was injured in a motor vehicle accident. She had seen a number of doctors, and her story of the accident was not entirely consistent. In addition, she testified after two expert witnesses, whose testimony she had heard, and she did not call some of her examining doctors. The plaintiff sued the defendant's estate. With respect to an adverse inference, Ritter J held that the general rule is that the party alleging a fact should prove it to the degree appropriate in the circumstances; this is particularly so when the party had within their control clear proof available of any fact in issue. The parties should call that evidence or explain why it is not called and the court is entitled to expect, in the case of a disputed fact, that the party who has control over the proof will call it: courts are entitled to clear proof of such if available and the expense is not prohibitive. The defendant argued that an adverse inference should be drawn for the plaintiff's failure to call several treating physicians. Ritter J held:

> The Defendant suggested an adverse inference should be drawn in relation to the Plaintiffs failure to call Dr. Dewhurst, a psychiatrist, and also Dr. William Bobey, another psychiatrist. The evidence was that the Plaintiff saw each of these psychiatrists once. She really didn't know why she saw one of them and the psychiatrist who did testify on behalf of the Plaintiff testified that the other one immediately referred the Plaintiff to him as his preferred area of practice encompassed the Plaintiffs complaints. Further there is no significant discord between the psychiatric evidence offered by the Plaintiff's witness and the Defendant's witness. Their conclusions are essentially the same. In these circumstances I do not feel I can draw an adverse inference because the

> Plaintiffs evidence explains away the necessity of calling one of the psychiatrists and with respect to the other there is general accord between the Plaintiff and the Defendant as to the Plaintiff's psychiatric condition. It is difficult to imagine what another psychiatrist who very briefly saw the Plaintiff on one occasion could add to the Plaintiffs treating psychiatrist who saw her on many occasions and to the Defendant psychiatrist who conducted a thorough "independent" medical examination of her.
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> The Defendant also alleges that an adverse inference should be drawn with respect to the Plaintiff having seen a psychologist Dr. Haroun at least twice. This psychologist presumably attempted to treat the Plaintiff's psychological difficulties. Again there does not appear to be any substantial disagreement between the Plaintiffs and the Defendants witnesses as to the Plaintiffs psychological difficulties. Further the Plaintiff did present evidence of a treating psychiatrist who dealt with her psychiatric and psychological difficulties on an ongoing basis. I do not feel it is necessary to draw an adverse inference in relation to a psychologist who saw her on two occasions a long time before trial (paras. 56-57).

In the result, no adverse inference was drawn for not calling the witnesses.

In ***Schuttler v. Anderson***, 1999 ABQB 321, 243 AR 109, additional reasons in 1999 ABQB 576, the plaintiff brought an action for damages and injuries sustained in a motor vehicle accident. The defendant argued that the plaintiff's failure to call medical evidence should lead to an adverse inference being drawn. Lee J held:

> The Supreme Court of Canada has laid down the following rule with respect to a plaintiff's failure to call medical evidence in a personal injury case *Levesque v. Comeau*, [1970] S.C.R. 1010 (S.C.C.), at 1012: -
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> > Appellant Lola Lévesque's expert examined her for the first time more than a year after the accident, and after she had consulted several doctors and undergone different examinations in the meantime. **She alone could bring before the Court the evidence of those facts and she failed to do it. *In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case*. ...** Under the circumstances her testimony and that of her husband respecting her good state of health before the accident could properly be considered insufficient evidence for the purpose of excluding other possible causes of deafness. [emphasis added]
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> The Plaintiff cites *Smith v. Smart*, *supra*, for the proposition that there is no adverse inference because a defendant is at liberty to call the plaintiff's physicians at para.[15] and [16] which reads:
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> > I do not find it appropriate to consider an adverse inference regarding the failure of Dr. Tai and Dr. Russell to testify. Their consult reports were admitted in evidence and their findings and opinions are not relevant to the issues before me. I similarly do not find this to be an appropriate case to call an adverse inference as a result of the Plaintiff's failure to call the two physicians who saw him after his slip and fall.
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> > The reports of the two physicians and the ambulance report were all marked as exhibits. This was by agreement between counsel. It was only in argument that defence counsel took the position that the reports so admitted were not admitted for the truth of the statements

> contained within them. He took the position Mr. Smith ought to have called the witnesses. I note that it is a defence allegation that the slip and fall was a significant intervening cause of Mr. Smith's present condition and they have the onus of proving that defence. They had the ability to call these witnesses as part of their case and failed to do so (paras. 111-112).

Lee J held that the plaintiff was faced with an adverse inference with respect to both his pre- and post-accident condition and had failed to prove this aspect of his case. The plaintiff's case relied upon the presence of symptoms in the immediate post-accident time period that were not documented; without calling the physician, causation could not be proven. Lee J cited the rule from ***Beger*** and held that the disputed facts in the case at bar were within the plaintiff's control and the onus was therefore on the plaintiff to prove them:

> In *Beger v. MacAstocker Estate*, *supra*, the Court declined to draw an adverse inference because the evidence of the defendant on the same points was not in dispute with the evidence of the plaintiff. Therefore, the Rule did not apply. Here, the Plaintiff's pre-Accident condition and immediate post-Accident complaints are in issue and, therefore, the adverse inference Rule applies (para. 125).

Lee J held that the preponderance of evidence did not weigh in the plaintiff's favor.

In ***Carrier v. Wan***, 2007 ABQB 279, affirmed by 2008 ABCA 318, the plaintiff had been involved in several minor motor vehicle accidents. In 1997, he was diagnosed with degenerative disc disease in his neck and was diagnosed with sciatica in his right leg in April of 1999. In July of 1999, he was struck from behind by the defendant's vehicle, which was then struck by another vehicle. The plaintiff drove away and did not miss any work; shortly after, he was diagnosed with significant pre-existing back problems. In December of 2000, his vehicle was struck in a head-on collision. The plaintiff brought an action against the defendants from the first accident and at trial, he did not call the surgeon who performed his hip surgery. The defendant asked the court to draw an adverse inference. Coutu J held:

> In fact, I was expecting to hear from Dr. Mackenzie, as in my view he would have been in the position to give the best evidence concerning the condition of Mr. Carrier's hip and specifically whether there was evidence of necrosis, among other relevant matters. The Plaintiff knew that the defence was calling Dr. Bouchard to testify that his opinion was that Mr. Carrier's arthritis was not post traumatic. In order to prove his case on the causation issue, on a balance of probabilities, the evidence of Dr. Mackenzie was, in my view, crucial. I accept the submission by Defence Counsel that since Dr. Mackenzie was not called, I should assume that his evidence on causation would have been detrimental to the Plaintiff's case. In other words, I find there is an adverse inference to be drawn (para. 71).

Coutu J held that the evidence of the surgeon was important, given the plaintiff's complicated medical history:

> Lastly, I am mindful that Rule 296.1 appears to have been put into place to allow Plaintiff's Counsel to cut down on the number of witnesses called at trial. If a party decides that a witness's testimony is not necessary to prove a case, but also realizes that failing to call the witness may lead to an adverse inference, they can serve on the other side a notice indicating that they do not intend to call a witness. If the other side fails to reply, then a trial judge may not make an adverse inference for the failure to call the witness. This notice was not given in this case (para. 73).

In ***Simmons v. Koenig***, 2001 ABQB 152, 12 MVR (4th) 263, the plaintiff had been driving on the highway when the defendant changed lanes directly in front of him and cut him off. The defendant's vehicle struck a ridge of snow and spun out of control, causing the plaintiff's car to spin out of control and strike the defendant's car. The plaintiff suffered soft tissue injuries to his neck and shoulder that eventually turned into chronic myofascial pain and depression. The plaintiff brought an action for damages, but he did not call several doctors and treatment providers. The defendant argued that an adverse inference should be drawn for the failure to call the witnesses. Nash J cited J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworth's, 1999), 2nd ed., at 297, and held:

> **In civil cases, an unfavorable 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 who 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] (para. 100).

Nash J held that an adverse inference will not be drawn if there is an adequate excuse for not calling the witness and that it is within the discretion of the court to decide whether the excuse is adequate. He said that a plaintiff can avoid the consequences of the adverse inference by serving a notice under Rule 296.1 [now Rule 8.15]:

> The object of Rule 296.1 is to reduce the length of the trial and the number of witnesses required to testify at a trial. If a litigant decides that a witness is not necessary to prove a case, but realizes that failing to call the witness may result in an adverse inference, a notice can be served on the opposing side that the witness will not be called to testify. If the other side objects, then the cost of calling that witness will be borne by opposing counsel unless the court determines that the objection is reasonable (para. 107).

In this case, the defendant was served with a notice; however, Nash J drew an adverse inference from the plaintiff's refusal to call as a witness a physiotherapist who had remarked that the plaintiff's subjective complaints did not correlate with the physiotherapist's objective findings.

In ***Diakow v. Hughes***, 2008 ABQB 567, 98 Alta LR (4th) 111, award varied in 2009 ABCA 206, 6 Alta LR (5th) 10, the plaintiff was injured in a motor vehicle accident in a vehicle driven by an employee of a company. The plaintiff had a 23-year distinguished career with the provincial government and later with a benefits carrier. The plaintiff's position with the benefits carrier ceased several months before the accident when it was discovered that she had misappropriated funds from her employer to support a gambling habit. At the time of the accident, the plaintiff was trying to establish a residential cleaning business and was on her way to an outpatient therapy program at the hospital where she was receiving treatment for anxiety and depression. However, overall, the plaintiff was healthy at the time of the accident. In the course of her action for damages, the plaintiff requested that the trial judge draw an adverse inference from the fact that the defendants did not call a certain witness as an expert in psychiatry and mental health. This witness had examined the plaintiff. The defendants argued that they saw no necessity in calling the expert as a witness and invited the plaintiff to call the doctor as her own witness (which the plaintiff declined to do). Yamauchi J held:

> The testimony of Drs. Blom and McManus is clear and, for tactical or other reasons, the parties chose not to call Dr. Morhaliek. Dr. Morhaliek was available to both parties. As well, **Dr. Morhaliek's report was available to both parties, so one or the other could have called him. As stated by the court in *Dwyer v. Fox*, [1996] A.J. No. 769 (Alta. Q.B.) at para. 40), "if the missing evidence could have equally been called by either party, no adverse [inference] should be drawn against either party,"** see also, *Niitamo v. Insurance Corp. of British Columbia*, 2003 BCSC 608 (B.C. S.C.) at para. 57. Because the testimony of Drs. Blom and McManus is clear, one questions what, if anything, Dr. Morhaliek would have added, other than to reinforce what they said. Dr. McManus was the Plaintiff's treating psychiatrist, whereas Dr. Morhaliek saw the Plaintiff on only one occasion. As stated by the court in *Beger v. MacAstocker Estate*, [1996] A.J. No. 985 (Alta. Q.B.) at para. 56, "It is difficult to imagine what another psychiatrist who very briefly saw the plaintiff on one occasion could add to the plaintiff's treating psychiatrist who saw her on many occasions ..." [emphasis added] (para. 79).

Yamauchi J held that the defendants had explained why they chose not to call the doctor as a witness, and their explanation was adequate. The court did not draw an adverse inference.

In ***Wade v. Baxter***, 2001 ABQB 812, 302 AR 1, the plaintiff hired the defendant to help her move into a new house. The plaintiff was seriously injured during the move when the defendant struck her with a truck. The defendant admitted liability, but he disputed the amount of damages. Prior to the trial, the defendant properly served the plaintiff with a notice pursuant to Rule 296.1 that he would not be testifying at trial. The plaintiff served a reply in response indicating that she would object to the

defendant not testifying and argued that the court should draw an adverse inference from this. Slatter J held:

> Prior to the enactment of this Rule, counsel often had a difficult decision to make with respect to the calling of witnesses. A witness might not be necessary to prove the case, but a party might call that witness just to avoid the risk of an adverse inference. If a witness was not called, the opposing party might be tempted to request an adverse inference, even if the witness was of minimal importance. This sometimes resulted in witnesses being called that no one really wanted, thereby lengthening trials.
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> The Rule is designed to provide a mechanism to help the parties identify which witnesses are really needed for the trial, and which can be safely excluded. The Rule itself does not create any adverse inference; it states that it applies "when, in law, an adverse inference might be drawn" (paras. 18-19).

The plaintiff and defendant were the only witnesses to the accident and only the plaintiff testified. Slatter J held that without any contradictory evidence, there was hardly any room for an adverse inference to operate:

> I note that when the notice of intention not to testify was served, the Defendant had not yet formally admitted liability. Subsequently he did admit liability, although he continued to place contributory negligence in issue. One of the main reasons for the Plaintiff's objection to the Defendant not testifying was that liability was still in issue. Accordingly, the reasons for the Plaintiff's objection had been considerably undermined by the time of trial (para. 23).

Slatter J held that there was no need to draw an adverse inference in the case, and he did not believe that it would have an effect on the outcome in any event.

In ***M. (N.) v. Drew Estate***, 2003 ABCA 231, 330 AR 233, the plaintiff was injured in a motor vehicle accident where the other driver died. The plaintiff alleged that the accident caused him to suffer depression, PTSD, and a permanent disability; the defendant argued that the plaintiff only suffered minor injuries and that his symptoms and disability resulted either from a pre-existing or subsequently caused condition or of his failure to mitigate. Prior to the trial, the plaintiff issued a notice to the defendant pursuant to Rule 296.1 that the plaintiff would not be calling several of his physicians. Two weeks before trial, the defendant asked permission to interview these physicians; the plaintiff granted permission on the condition that plaintiff's counsel be present. The defendant made a motion to compel the interview, which was granted on the condition that plaintiff's counsel was permitted to be there. The defendant appealed. Cote JA held that Rule 296.1 was not relevant, but he went on to hold:

> Rule 296.1 lets a party, such as an injured plaintiff, give notice that he does not plan to call a certain person to testify at trial. The opposing party then has to give advance notice before he or she asks the trial judge to draw an adverse inference from not calling that testimony. **The**

> **defendant can still call any of the plaintiff's treating physicians at trial if he wishes. And he can still ask the trial judge to draw an adverse inference if the plaintiff does not call any of those physicians whom he specifies. The defendant merely has to warn the plaintiff that he will seek an adverse inference. So the defendant's maximum exposure under rule 296.1 is some costs because it forces the plaintiff to call a professional witness.** But often even that cannot happen. The trial judge should not make the defendant pay any of those costs if its objection to not calling them was reasonable: R. 296.1. The defendant's counsel need only be reasonable. And if a defendant was refused an interview with a treating physician, would the defendant act reasonably in not waiving her right to call for an adverse inference? So even the costs penalty might be very unlikely [emphasis added] (para. 41).

The appeal was dismissed.

<u>Summary</u>

- With respect to adverse inferences, the general rule is that the party alleging a fact should prove it to the degree appropriate in the circumstances. This is particularly so when the party had within his or her control clear proof available of any fact in issue. The parties should call that evidence or explain why it is not called, and the court is entitled to expect, in the case of a disputed fact, that the party who has control over the proof will call it. Courts are entitled to clear proof of such if available and the expense is not prohibitive (***Beger v. MacAstocker Estate***).
- Rule 8.15 of the Alberta *Rules of Court* was formerly Rule 296.1 under the former *Rules of Court*; the bulk of the commentary on the Rule comes from this prior version, which is substantially the same as the current Rule 8.15.
- The purpose of this rule is to cut down the number of witnesses called at a trial. If a party decides that a witness' testimony is not necessary to prove their case but they realize that failing to call that witness might lead to an adverse inference, the party can serve notice on the other party that they are not calling the witness. If the other party does not respond, the trier of fact may not make an adverse inference for the failure to call the witness. If the other side responds to the notice and objects, then the cost of calling that witness will be borne by opposing counsel.
- Rule 8.15 does not create an adverse inference; it simply states that it will apply when an adverse inference might be drawn and provides a way for parties to avoid the adverse inference.
- The trial judge has discretion as to whether or not to draw an adverse inference from a party's failure to call a witness; whether or not an adverse inference is drawn will depend on specific circumstances including:
    - Whether there is a legitimate explanation for failing to call the witness;

    - Whether the witness has material evidence to provide;
    - Whether the witness is the only person or the best person who can provide the evidence; and
    - Whether the witness is within the exclusive control of the party and is not equally available to both parties.
- The factor weighted most heavily is whether the witness has material evidence to provide.
- A factor that mitigates against the drawing of an adverse inference is if it is open to both parties to call the expert to question them on their report. As stated in ***Diakow v. Hughes***, 2008 ABQB 567, award varied in 2009 ABCA 206, the report was available to both parties: if the missing evidence could have equally been called by either party, no adverse inference should be drawn against either party.

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