

Adverse Inferences

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Evidence Law Refresher

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ADVERSE INFERENCES

Introduction

This overview is meant to provide a practical guide to the law of adverse inferences associated with a failure to call certain evidence.

The Rule

The Rule relating to adverse inferences is summarized well in the leading texts on evidence. J Sopinka, A W Bryant, N Lederman, and M K Furest, *The Law of Evidence in Canada*, 3rd ed, (Markham: Ont, LexisNexis Canada Inc, 2009) defines it as follows:

§6.449 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 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.

Wigmore, *Evidence in Trials at Common Law*, Chadbourn Revision (1979), Vol 2, at p 192 summarized the Rules as follows:

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 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.

These summaries are very frequently quoted with approval in the case law.¹

It should be noted from the outset that the adverse inference Rule is most often engaged in personal injury or medical negligence matters, as issues often arise in these matters as to which physicians

¹ See, for example, *Simmons v Koenig*, 2001 ABQB 52, at para 100 for *Sopinka* and see *Canadian Southern Petroleum v Amoco Canada Petroleum Co*, (1996) 195 AR 1 (QB), 1996 CarswellAlta 1050 (WL), at para 91 for *Wigmore*