ADVERSE INFERENCE:

CONSEQUENCES OF THE FAILURE TO CALL TREATING AND INDEPENDENT MEDICAL EXPERTS

***By Nevin Fishman, Catherine Best and Kimberley Robertson**[*]*

1. FAILURE TO CALL TREATING MEDICAL PRACTITIONERS

It is a long recognized common law principle that the failure to produce evidence which would "naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause.*"[1] This principle has been applied by the courts in British Columbia, the seminal case being the B.C. Court of Appeal Decision of ***Barker v. McQuahe***[2].

In ***Barker***, the Court of Appeal considered whether an adverse inference could be drawn from the failure by the plaintiff to call evidence from medical practitioners who had treated him in the capacity as consultants to his family physician. Mr. Justice Davey upheld the trial judges' adverse inference from the plaintiff's failure to call those treating physicians.

In making its ruling, the court in ***Barker*** referred to the Saskatchewan Court of Appeal decision in ***Murray v. City of Saskatoon***[3], specifically where it cited from *Wigmore* as follows:

> … 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 circumstances or document or witness, if brought, would have exposed facts unfavourable to the party ….
> (at 240)

As a general statement of principle, the court in ***Barker*** ruled at 689:

> In my opinion, a plaintiff who seeks damages for personal injuries ought to call all doctors who attended him in respect of any important aspect to the matters that are in dispute, or explain why he does not do so. . .
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> Drs. Devlin and Bogoch were called in for consultation by Dr. Walker concerning the diagnosis and treatment of the appellant's chest condition. No explanation was given for not calling them, and it is a fair inference that they were not called because they would not, or could not, support Dr. Walker's diagnosis of cardio-spasm.

Following the B.C. Court of Appeal decision of ***Barker***, the Supreme Court of Canada decided ***Levesque v. Comeau***[4] which has subsequently been cited as authority for the proposition that a

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[1] *Wigmore*, Evidence in Trials at Common Law, Vol. 2 (1979: Little, Brown & Company), at §285 (hereinafter "*Wigmore*")

[2] *Barker v. McQuahe* (1964), 49 W.W.R. 685 (B.C.C.A)

[3] *Murray v. Saskatoon (City)* (1951), 4 W.W.R. (NS) 234 (Sask.C.A.)

court must presume an adverse inference in cases where a party has failed to call evidence from a prominent treating practitioner (at 432). However, this proposition has not been followed in the more recent cases, and was specifically noted to be incorrect in ***Ritchie v. Thompson***[5], despite it not being expressly overturned by the Supreme Court of Canada.

It is now clearly accepted that the court may exercise discretion as to whether or not to make the adverse inference as the finding in ***Barker***, despite ***Levesque***, has subsequently been upheld and interpreted to mean that an adverse inference *may* be drawn, not *must* be drawn.

In ***McTavish v. MacGillivray***[6] ,while setting out a summary of the law, Mr. Justice Burnyeat stated at 313 – 314:

> It is clear that a plaintiff who seeks damages should ordinarily call all doctors who have been consulted: *Barker v. McQuahe* (1964), 49 W.W.R. 685 (B.C.C.A.) at 689. At the same time, it is clear that the plaintiff can provide an explanation as to why one of the doctors is not called. As well, it is clear that the court may and not must draw an adverse inference from the failure of the plaintiff to call such a witness.
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> What constitutes 'sufficient' explanation such that an adverse inference should not be drawn has been reviewed in a number of British Columbia decisions.
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> ….
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> In this case, there is a clear explanation as to why the two letters of Dr. Jaworski are not part of the evidence submitted on behalf of the plaintiff. Counsel for the defendant was fully within his rights to object to the letters being admitted pursuant to Rule 40A. Counsel for the defendants has also been successful in his submissions that the letters should not be admitted as part of the clinical records of Dr. Beck. However, it would then be ludicrous to accede to him submission that an adverse inference should then be drawn because the two letters are not introduced into evidence.

Mr. Justice Burnyeat went on to consider various cases where there was a reasonable explanation found for the failure to call treating practitioners, and therefore it was inappropriate to draw an adverse inference, for example:

1. Where the plaintiff, without explanation, failed to call certain medical experts who treated her and failed to reveal her involvement in an earlier accident because the plaintiff had proved her case on the balance of probabilities and the defendants had access to pre-trial discovery and had not seen fit to call these witnesses themselves (***Ritchie v. Thompson***[7]);

2. Where a doctor was not called because the plaintiff saw him only once and the doctor did not report to the referring physician who was a witness at the trial (***Xavier v. Nobreago***[8]);

3. Where the physician treated the plaintiff only once and there was a great deal of evidence from other doctors (***Gyorffy v. Johal***[9]);

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[4] *Levesque v. Comeau* (1970), 16 D.L.R. (3d) 425 (S.C.C.)

[5] *Ritchie v. Thompson*, (1994), 35 C.P.C. (3d) 333; 155 N.B.R. (2d) 35 (N.B.C.A.)

[6] *McTavish v. MacGillivray* (1997), 38 B.C.L.R. (3d) 306 (B.C.S.C.)

[7] *Ritchie,* supra at Note 5

[8] *Xavier v. Nobrega*, [1994] B.C.J. No. 1007 (B.C.S.C.) (online: QL)

4. Where a plaintiff failed to call the doctor as a witness because defence counsel had obtained the medical records from that doctor and had filed them (***Morton v. McCracken***[10], however, it should be noted that this may have been referred to by the court in error. In ***Morton***, the plaintiff failed to call Dr. Harris who had been her personal physician for ten or eleven years. She had, however, discontinued seeing Dr. Harris about 2 _ year after the accident. Counsel for the defenant had obtained copies of Dr. Harris' clinical records and a medical report, and filed those in the course of trial. The trial judge directed the Jury that "it's open to you to draw an adverse inference when a certain witness isn't called but whether you do or not is entirely up to you." Counsel for the plaintiff did not object to this statement being made to the Jury. The plaintiff subsequently appealed on the ground, *inter alia,* that there should not have been such a charge. The appeal was dismissed); and

5. Where counsel for the plaintiff did not tender a medical report of which notice had been given to counsel for the defendant because the defendant could have tendered the medical report in evidence if he had wished to do so (***Austin v. Jim Pattison Industries***[11]).

In ***Ritchie v. Thompson,***[12] noted above to have been referenced by the Court in ***McTavish***, the plaintiff had been in a snow mobile accident five weeks prior to trial, but failed to submit reports from Canadian Back Rehab, a chiropractor, Dr. Porter, and a treating physiotherapist, and failed to call them as witnesses. The trial judge, however, did not draw an adverse inference as he accepted the other physician's evidence and found them credible, noting the defendants could have called these practitioners as witnesses. The court considered the Supreme Court of Canada's decision of ***Levesque***[13] finding that the trial judge did not err in refusing to make an adverse inference:

> ¶11 The Levesque and Comeau [sic] case has been cited for more than two decades as authority for the principle that a court 'must presume' an adverse inference in cases where a party has failed to call certain witnesses. This is not the principle at al.
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> ¶12 The circumstances in Levesque and Comeau are unusual. Levesque's sole medical expert did not testify that her deafness was caused by the accident. What he said was the deafness was not an impossible result. …
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> ¶13 Put in this perspective, the strong words of Pigeon, J. 'that a Court must presume that such evidence would adversely affect her case' do not have application to the case on appeal, nor as a matter of fact, to most cases.
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> ¶14 Further weakening the overuse of the 25 year old case is a valid point raised by the trial judge concerning the pre-trial discovery available to the appellants. When Levesque and Comeau was decided the Rules of Court were much more restrictive. Now, disclosure is open, there is a freer exchange of documents and discovery of witnesses. In fact, persons other than parties can be questioned on examination for discovery before trial and parties may be required to disclose the names of witnesses they intend to call.

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[9] *Gyorffy v. Johal,* [1991] B.C.J. No. 763 (B.C.S.C.) (online: QL)

[10] *Morton v. McCracken* (1995), 7 B.C.L.R. (3d) 220; 57 B.C.A.C. 47 (B.C.C.A.)

[11] *Austin v. Jim Pattison Industries Ltd.*, [1995] B.C.J. No. 1569 (B.C.S.C.) (online: QL)

[12] *Ritchie,* supra at Note 5

[13] *Levesque,* supra at Note 4

However, it should be noted that the court in ***Doerksen v. Koo***[14], which was not referred to by the court in ***McTavish***[15], specifically discounted this argument, stating:

> ¶ 44 … The failure to advance a medical opinion from Dr. Grant is significant, and from that failure I draw an inference adverse to the Plaintiff's interest.
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> ¶ 45 The clerical notes of Dr. Grant are no substitute for an expert Report or viva voce evidence. Had a report been submitted, the Defendant could have compelled Dr. Grant's attendance for the purpose of cross-examination. …
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> ¶ 47 The Plaintiff submits that is was open to the Defendant to call Dr. Grant to give evidence if the Defendant hoped to establish that the Plaintiff had a pre-existing disabling condition of the neck. With respect, that begs the point: the burden of proof lies with the Plaintiff. Had the Defendant called Dr. Grant, he would have been limited to an examination in chief.

The ultimate discretion for the trier of fact, as found by Mr. Justice Bunyeat in ***McTavish***, was confirmed in ***Vieczorek v. Peirsma***[16], where the Ontario Court of Appeal allowed the appeal, stating that the trial judge's charge to the jury regarding drawing an adverse inference for failure to call various medical experts was inadequate and inaccurate. Mr. Justice Cory stated at 141:

> That the plaintiffs elected not to call any of the medical evidence from Pennsylvania nor to take that evidence upon commission might well have been of considerable significance to the jury. The inferences that might be drawn from the failure to call that evidence should have been carefully pointed out. …
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> … It is perfectly appropriate for a jury to infer, although they are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [them] was an indication that such evidence would not have been favourable to them. It is a common sense conclusion that may be reached by any trier of fact. There are no authorities which cast any doubt upon the proposition.

Vieczorek has been both distinguished and followed. In ***Japra v. Montgomery*** [17] where the plaintiff failed to call one of his treating physicians, the court noted that ***Viezaorek*** involved the failure to call evidence regarding *pre-existing* injuries. As those were not the circumstances in the case at bar, the B.C. County Court judge rejected the suggestion that an adverse inference should be made from the plaintiff's failure to call a physician who was specifically treating the plaintiff for a back injury.

The approach in ***Vieczorek*** was, however, cited with approval by the B. C. Supreme Court. In ***Staples v. Monacelli***[18] the plaintiff failed to introduce medical evidence from two treating physicians. This case involved a hearing regarding the charge to the jury that it was "open to them to infer that the evidence of the two doctors would not have supported the plaintiff's evidence and the other medical evidence on which she relies"

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[14] *Doerksen v. Koo,* [1994] BCJ No. 700 (BCSC) (online: QL)

[15] *McTavish,* supra at Note 6

[16] *Vieczorek v. Peirsma* (1987), 36 D.L.R. (4th) 136 (Ont.C.A.)

[17] *Japra v. Montgomery* [1989] B.C.J. NO. 1992 (B.C. Co. Ct.) (online: QL)

[18] *Staples v. Monacelli*, [1997] B.C.J. No. 986 (BCSC) (online: QL)

The Court looked at ***Levesque***[19] and ***Vieczorek***[20], and adopted the statement from ***Vieczorek*** with approval:

> ¶At p. 141 of Vieczorek v. Piersma this statement appears:
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> > It is perfectly appropriate for a jury to infer, although they are not obligated to do so, that the failure to call material evidence which was particularly and uniquely available to [them] was an indication that such evidence would not have been favourable to them.
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> I regard that approach (in the absence of an appropriate excuse) to the adverse inference issue arising from the failure of a party to call (or adduce evidence from) a material witness to be the correct one.

Accordingly, it is clear that the current authorities suggest that a judge has the discretion to draw an adverse inference from a plaintiff's failure to call medical evidence but where there is a reasonable explanation of why the experts have not been called, the discretion may be exercised not to do so.

What constitutes a reasonable explanation is very fact dependent but may, in addition to those factors set out in ***McTavish***[21] include that:

1. There has been minimal treatment by that physician;

    - The Court in ***Melynchuk v. Brown***[22] did not make an adverse inference from the plaintiff's failure to call two treating practitioners who did not provide significant treatment, noting:

        > ¶11 … and on the issue of her injuries the plaintiff should have called Dr. Coutler and a Dr. Yelland. She cited Barker v. McQuahe (1964), 49 W.W.R. 685 (B.C.C.A.) for the principle that an adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call as a witness a person who might be expected to give supporting evidence if such party's case were sound.
        > …
        > ¶13 The plaintiff consulted Dr. Coulter twice shortly after the accident. Thereafter she was consistently under the care of Dr. Fahrni. In my view that explains why Dr. Coulter was not called as a witness.
        >
        > ¶14 The plaintiff had been in the habit of consulting Dr. Yelland once a year for an annual physical check-up. She continued to consult him once a year after the accident for the same purpose quite unrelated to the injuries she sustained.
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        > ¶15 Under the foregoing circumstances I am not prepared to draw an inference adverse to the plaintiff for failing to call the foregoing witnesses.

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[19] *Levesque*, supra at Note 4

[20] *Vieczorek*, supra at Note 16

[21] *McTavish*, supra at Note 6

[22] *Melynchuk v. Brown*, [1984] B.C.J. No. 1299 (BCSC) (online: QL)

2. The evidence would likely not add to that of the testifying doctors and would not say anything more than do the admitted clinical records;

- In ***Swedgan v. Jackson***[23] the court did not draw an adverse inference by the plaintiff's failure to call one specialist and a chiropractor, stating that the nature of the case was not such that he was being "left with residual suspicions."

- The defendant in ***Lawson v. Vu***[24] argued that the plaintiff failed to prove on a balance of probabilities that the injury to his knee was caused by the subject motor vehicle accident, and sought an adverse inference on the issue of causation because of the plaintiff's failure to call Dr. Boileau, his wife's general practitioner, who the plaintiff saw on a couple of occasions for treatment including that specific to the knee. Dr. Boileau had prepared two reports, which were given to defence, but not tendered into evidence by the plaintiff. The court looked at ***Barker***[25] but distinguished the facts as there the physician had not provided any written reports, concluding:

> ¶51 It is not suggested that Dr. Boileau disagrees that Mr. Lawson had symptoms he claims to have had, or that he would disagree with the diagnosis which was made tentatively by Dr. Ortynsky, and confirmed by Dr. Sabiston. Dr. Boileau's clinical records reveal that he found effusion in the knee, withdrew fluid from the knee with a syringe, and directed Mr. Lawson to return for reassessment. The only issue is whether the court should infer that Dr. Boileau would cast doubt on the plaintiff's assertion that the knee was injured in the motor vehicle accident.
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> ¶52 The explanation provided by the plaintiff's counsel for not calling Dr. Boileau was that Dr. Boileau could and would say nothing more than what his clinical records reveal; and that the defendant has all of Dr. Boileau's reports and could therefore safely call him as a witness for the defence.
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> ¶53 I accept this explanation and conclude that the court should not infer that Dr. Boileau's testimony would be detrimental to the plaintiff on the issue of causation. In my view, Dr. Boileau's records speak for themselves. The records reveal that Dr. Boileau was the first medical doctor to record a complaint by Mr. Lawson about knee pain; that the complaint was made on March 17, 1994, almost two months after the accident; and Dr. Boileau recorded that the knee pain developed about two weeks after the accident. No suggestion of any cause other than the motor vehicle accident appears in Dr. Boileau's records.
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> ¶54 Three of the specialists who provided medical legal opinions to the court, two of whom were cross-examined, had access to Dr. Boileau's reports when they prepared their own.

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[23] *Swedgan v. Jackson*, [1983] B.C.J. No. 1268 (B.C.S.C) (online: QL)

[24] *Lawson v. Vu*, 2000 BCSC 0206

[25] *Barker,* supra at Note 2

3. The defence has successfully applied to have letters authored by that physician rendered inadmissible (***McTavish v. MacGillvray***[26]); and

4. The absent physician's findings had been rejected by the attending experts, the rejection of which was the basis of their opinions, but the physician had been examined for discovery and portions of that transcript were read into evidence (***Nash v. Olson***[27]).

A reasonable explanation may *not* be found where:

5. The physician is the usual treating practitioner or a practitioner who provided significant treatment;

   - In ***Ammerlaan v. Drummond***[28] the plaintiff failed to call his treating general practitioner. The court made the inference that the frequency of the plaintiff's symptoms were less than as testified to, confirming that the principles set out in ***Barker***[29] puts the onus on the plaintiff:

     > ¶ 10 … counsel for the defendant urged that I should draw an adverse inference against the plaintiff on this issue of quantum of her damages because she did not call her general practitioner who saw her much more frequently than did specialists. … Here, quantum of damages was at issue and the plaintiff's counsel knew there were conflicting professional views on her degree of recovery and residual pain. … In my judgement, this is an occasion where the plaintiff, seeking damages for personal injuries, ought to have called those doctors who could prove her case in respect of his important aspect of the matters in dispute between her and the defendant.

   - Similarly, in ***Kinnersley v. Sansregret***[30] the plaintiffs, husband and wife, sued for damages with their trials being heard together. Both failed to call various treating physicians. Evidence showed the wife to be malingering, but the Court did not make specific statement that they were making an adverse inference, but comments to that affect:

     > ¶ 10 Furthermore, the plaintiff did not call a number of attending doctors who saw and treated her in the period immediately after the accident. These include Dr. Chan, who attended upon her at the hospital and whom she attended afterwards; Dr. Tallan, who was treating her up to the time of the second accident, and who treated her afterwards, but whose report is confined to her condition before the accident; Dr. Bell, who was the general practitioner and who referred her to many specialists, and apparently saw her many times in the first year or more; and Dr. Warren, who was the first specialist to whom she was referred after Dr. Tallan. Nor is there evidence from the physicians who attended during her pregnancies. Some, at least, of these doctors must have been in a good position to testify as to the genuineness of her complaints and as to whether there is a relationship between them and the accident.

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[26] *McTavish*, supra at Note 6

[27] *Nash v. Olson*, [1984] B.C.J. No. 1497 (B.C.C.A.) (online: QL)

[28] *Ammerlaan v. Drummond*, [1981] B.C.J. No. 1481 (online: QL)

[29] *Barker*, supra at Note 2

[30] *Kinnersley v. Sansregret* [1981] B.C.J. No. 136 (B.C.S.C.) (online: QL)

The Court did, however, specifically draw an adverse inference against the husband.

> ¶20 There is no evidence from Dr. Chan, Dr. Warren, or his family doctor, all of whom treated him in the weeks after the accident. That, in the circumstances, is a factor which justifies an adverse inference against the plaintiff.

- In ***Hearn v. ICBC***[31] the Court also drew an adverse inference where the Plaintiff failed to call several treating practitioners. While there was no real discussion, the court noted:

> ¶ 8 … I do not think she is a malingerer. On the other hand, for reasons unknown, she is probably not as sick as she pretends to be. There is a psychological overlay to the whole thing which cannot be easily identified. Medical reports of several other doctors she visited were not produced. Nor were they called as witnesses. In these circumstances, I may draw an adverse interest against her allegations of discomfort.

- Also, see ***Staples v. Monacelli***[32] as referred to above.

6. The claim for disability and lost income rests on advice given to the plaintiff by the medical practitioner who is not testifying; and

- In ***Dutt v. Van Gobel***[33], the plaintiff's treating general practitioner referred the plaintiff to two specialists, Dr. Caines and Dr. Fahrni, Orthopaedic Surgeons. The general practitioner was called and did comment on their findings. Plaintiff claimed privilege over Dr. Fahrni's report. The Court drew an adverse inference from the plaintiff's failure to call them.

> ¶ 38 … Neither Dr. Caines nor Dr. Fahrni were called to offer an opinion on the extent of disability caused by Mr. Dutt's injuries, to confirm that his absences from work during the relevant periods were due to disability resulting from the accidents, or to support Dr. Kothari's prognosis or recommendation for future care. In *Barker v. McQuahe*, (1964) 49 W.W.R. 685 (B.C.C.A.), it was held that a plaintiff who seeks 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. A claim of solicitor client privilege is an inadequate explanation where a significant portion of the plaintiff's claim for lost income is said to rest on advice given to the plaintiff by a physician and physiotherapist who do not testify.

7. The absent physician's notes had been referred to and incorporated by another physician.

- In ***Collyer v. Leonardon***[34] the defence sought an adverse inference from the plaintiff's failure to call a prior treating general practitioner. The plaintiff argued that doctor's clinical notes were attached to and incorporated into the

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[31] *Hearn v. ICBC,* [1981] B.C.J. No. 932 (B.C.S.C) (online: QL)

[32] *Staples v. Monacelli*, supra at note 18

[33] *Dutt v. Van Gobel*, [1995] BCJ No. 155 (B.C.S.C.) (online: QL)

[34] *Collyer v. Leonardon*, [1998] B.C.J. No. 2050 (B.C.S.C.) (online: QL)

subsequent general practitioner's report, thus it was inappropriate to make adverse inference, however the court did so, noting:

> ¶31 … Here, while Dr. Matsyk's notes were incorporated in Dr. Ranger's report, unfortunately the two physicians had not spoken about Ms. Collyer's case and Dr. Ranger misinterpreted the other doctor's notes (reading "C3" for "L3") in a manner which slightly undermined her own conclusions. Although the plaintiff was straightforward about her reason for changing doctors in October, that reason (disagreement about whether Ms. Collyer was ready to return to work) inevitably gives rise to the inference that if Dr. Matsyk had been called her evidence would not have been supportive of the plaintiff's case. I do draw that inference.

2. FAILURE TO CALL INDEPENDENT MEDICAL EXPERTS

While, it is clear that no adverse inference will be drawn where the evidence of a witness would be superfluous because other medical witnesses had reached similar conclusions (see ***Rokanas v. John Doe***[35]), it is still not entirely clear in British Columbia whether an adverse inference will be drawn as a result of a failure to call the evidence of a practitioner who conducted an independent medical examination ("IME"). There is, however, a suggestion that there will not.

Due to the facts of ***Barker***[36] and the wording of its principle, the decision has been applied with respect to treating physicians only and has not yet been applied to medical specialists conducting an IME at the request of the defendant. The general approach in British Columbia is that an adverse inference will not be made where one party decides not to call an expert specifically retained by it for the purpose of the specific action.

This approach was upheld in ***Beaudoin v. Winder***[37], where the B. C. Supreme Court considered whether an adverse inference should be drawn because of the defendant's failure to call two engineering firms which it had retained as experts to investigate an accident. The plaintiff argued that an adverse inference should be drawn, based on the passage from *Wigmore* relied on in ***Murray***[38] at 240 and cited above. Mr. Justice Hood declined to apply the principle to expert witnesses, stating as follows:

> To apply the Wigmore statement to the facts of this case would result in a counsel always having to call any experts retained to assist in the advancement or defence of a case. The only alternative would be to face the adverse inference to be drawn from the failure to call the expert. I do not believe that that should be the law in this province. Counsel has not referred me to any British Columbia cases. In my opinion the aforesaid principles enunciated in Wigmore are not applicable in the present case. In any event I decline to draw the adverse inference requested.

In ***Harris v. Kuntz,***[39] a medical malpractice case, the plaintiff argued that an adverse inference should have been drawn from the defendant's decision not to call two of its medical experts to give evidence. Madame Justice Kirkpatrick held that the adverse inference rule should not apply where

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[35] *Rokanas v. Doe*, [1993] B.C.J. No. 303 (B.C.S.C.) (online: QL)

[36] *Barker v. McQuahe*, supra at Note 2

[37] *Beaudoin v. Winder*, [1990] B.C.J. No. 1583 (B.C.S.C.) (online: QL)

[38] *Murray*, supra at note 3

[39] *Harris v. Kuntz*, [1993] B.C.J. No, 1682 (B.C.S.C.) (online: QL)

the plaintiff has had full access to the defendant's evidence through examinations for discovery. At ¶142 she went on to state that:

> No authorities were cited to me by counsel for the plaintiff to support the proposition that an adverse inference may be drawn from the failure to call an expert witness who is not a treating physician. In my view, the most that can be said about such failure is that it may influence the weight which the Court accords their evidence.

Consistent with this reasoning in ***Harris***, there is authority that if the witness in question is an independent witness who could have been readily called by either party, no adverse inference will be drawn against one party for failing to call the witness. There was, for example, no adverse inference drawn in ***Vancouver Photo & Hobby Supplies Ltd. v. Grippo***[40] where the plaintiff failed to call a fire investigator who attended the scene when the defendant could also have called him as a witness.

Similarly, in ***Shaw v. Storey***[41] a police officer who had been on the scene of an accident was not called on to testify. The plaintiff argued that an adverse inference that the defendant was impaired should have been drawn from the defendant's failure to call the officer as a witness. Mr. Justice Hollinrake, writing for the B. C. Court of Appeal, distinguished ***Barker***[42] on the basis that the evidence of the doctors in that case was not - and for practical purposes could not be - known to the defendant. He held that both parties were aware of the officer's involvement and were aware of what evidence he would give. The officer's evidence would be as available to one side as to the other. In those circumstances, he held, it is not open to the court to draw an adverse inference against one of the parties even where that party advances a proposition to which such evidence could be material.

This line of authorities is particularly helpful given the standard practice in British Columbia of reciprocal disclosure in ordering that an IME report be disclosed to the plaintiff in exchange for the plaintiff's medical reports when an Rule 30(1) medical examination is ordered, as was done in ***Bates v. Stubbs***[43]. In ***Stainer v. Plaza***[44], a term of the Order for the IME was that if defence counsel did not request a report from its IME doctor, then defence counsel would provide plaintiff's counsel with a complete copy of the doctor's notes that record any history given to him by the plaintiff on the examination, together with any notes that record the doctor's observations or findings on physical examination.

Even absent a Rule 30(1) Order for disclosure of the IME report, in practice, many plaintiffs' counsel will not consent to having their client attend an IME without a prior agreement for production of the report. Accordingly, it would be rare that the plaintiff would not be aware of the conclusions reached by the defence expert. Therefore, based on the reasoning in ***Shaw v. Storey***[45], a persuasive argument can be made that the adverse inference rule should not apply where the IME report is made available to the plaintiff, but the defendant does not call that expert at trial.

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[40] *Vancouver Photo Hobby Supplies Ltd. v. Gripps*, [1989] B.C.J. No. 2092 (B.C.S.C.) (online: QL)

[41] *Shaw v. Storey* (1991), 53 B.C.L.R. (2d) 257 (B.C.C.A.)

[42] *Barker v. McQuahe,* supra at note 2

[43] *Bates v. Stubbs* (1979), 15 B.C.L.R. 65 (B.C.C.A.)

[44] *Stainer v. Plaza*, 2001 BCCA 133

[45] *Shaw v. Storey*, supra at note 41

The issue has been recently adduced by the B.C. Supreme Court in ***Shobridge v. Thomas***[46]**,** however, no real discussion was provided. In ***Shobridge,*** the plaintiff asked for an adverse inference to be drawn where the defendant did not call their psychiatric IME doctor, and provided no explanation for their failure in that regard. The court, in exercising its discretion not to draw an adverse inference, inferred that the reason counsel for the defendant did not call the expert was because of the poor quality of the evidence of the plaintiff's expert, which it was unnecessary to rebut.

While a good argument can be made on the basis of British Columbia authorities that no adverse inference will be drawn against a party who does not call an independent medical expert, the Court of Appeal has not yet considered the issue. Further it may be said that the trial level decisions were made without the benefit of a full consideration of the authorities, and are distinguishable because of the uniqueness of the IME where the plaintiff themselves are being examined and certainly knows of the existence of the expert.

The passage from *Wigmore* cited in ***Murray***[47] has been important in the development of the doctrine of adverse inference in Canadian law. Although other passages from *Wigmore* are not cited, *Wigmore* does deal specifically with expert witnesses in the context of adverse inference, stating at §290 (page 216) that:

> The kind of witness or evidence is immaterial. The inference, for example, may be drawn from a failure to use *expert testimony*, or a failure to employ *experiments* or samples or like instructive evidence.
> (emphasis added)

In the footnotes to §285, *Wigmore* refers to several cases involving medical experts who examined the plaintiff at the defendant's request. *Wigmore* expressly states that the adverse inference rule applies equally to expert witnesses, and cites a number of American cases in which an adverse inference has been made where the defendant did not call a medical expert who examined the plaintiff at the defendant's request. The cases cited by *Wigmore* take the position that a medical expert who examines the plaintiff at the defendant's request is not equivalent to an independent witness who can be called by either party. In particular, the American jurisprudence emphasises that it would be more natural for the defendant to produce the doctor as a witness.

In ***Feldstein v. Harrington***,[48] the Supreme Court of Wisconsin acknowledged some division in the authority as to whether the adverse inference rule should be applied where an IME doctor is not called, but concludes that "the general rule is that the failure of a party to call a material witness within his control, or whom it would be more natural for such party to call than the opposing party, raises an inference against such party."

This was confirmed in ***Central Waxed Paper v. The Industrial Commission***[49] where the Illinois Supreme Court upheld the commission's entitlement to draw an adverse inference where the petitioner had been examined by at least 10 physicians at the request of his employer, but only a selective few were called.

Although there is apparently a minority line of authority which takes a different approach [see Annotation, 5 A.L.R. 2d 893], the majority of American jurisdictions which have considered this

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[46] *Shobridge v. Thomas* [1999], B.C.J. No. 1747 (B.C.S.C.) (online: QL)

[47] *Murray*, supra at Note 3

[48] *Feldstein v. Harrington*, 90 N.W.2d 566 (Wisc.S.C., 1958)

[49] *Central Waxed Paper v. The Industrial Commission*, 32 Ill. 2d 154 (Ill.S.C., 1965)

issue hold that when a doctor who examined the plaintiff on the defendant's behalf does not testify at trial, an inference generally arises that the testimony of the witness would be unfavourable to the defendant unless he demonstrates that the testimony would be merely cumulative, the witness was unavailable or not under his control, or that the witness would address matters not in dispute. This principle was upheld in ***Arroyo v. City of New York***[50], ***Brueckner v. Simpson***[51] and ***Rice v. Ninacs.***[52]

The American jurisprudence on this specific issue has not been considered in the British Columbia cases, even though the general passage from *Wigmore* referred to above is cited. If the American authorities are raised, it may be possible to distinguish them on the basis of the British Columbia practice of ordering the IME report to be made available to the plaintiff as the witness is, arguably, not solely within the control of the defendant. However, there is an argument as to whether the medical expert is independent and equally available to both parties as a witness in the same sense as the police officer or fire investigator referred to in the British Columbia cases cited above.

3. CONCLUSION

The courts in British Columbia have consistently held that they have the discretion to draw an adverse inference where a plaintiff fails to call a treating physician who has evidence material to the issues in dispute, unless there is a sufficient explanation as to why the court should not draw such a conclusion. What constitutes a sufficient explanation is fact dependent and, ultimately, is in the discretion of the trier of fact.

The adverse inference rule, however, is arguably not applicable in the situation where a defendant fails to call a medical expert retained on its behalf to conduct an IME. The nature of practice within British Columbia is such that there is generally disclosure of the IME report and knowledge of that evidence is therefore shared by all parties.

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[50] *Arroyo v. City of New York*, 567 N.Y.S.2d 257 (N.Y.S.C., 1991)

[51] *Brueckner v. Simpson*, 614 N.Y.S.2d 553 (N.Y.S.C., 1994)

[52] *Rice v. Ninacs*, 34 A.D. 2d 388 (N.Y.S.C., 1970)