Jones v Dunkel Inferences

Jones v Dunkel [1959] HCA 8; 101 CLR 298

The rule in Jones v Dunkel rule operates where there is an unexplained failure by a party to give evidence, to call witnesses or to tender documents or other evidence. In appropriate circumstances, this may lead to an adverse inference that the uncalled evidence would not have assisted the party.

Every lawyer in NSW should understand the principle in order to advise and represent their clients effectively. This paper is designed to assist legal practitioners in the state of NSW.

Facts of Jones v Dunkel

Mr Jones was killed in a two car accident. The other car was driven by an employee of Mr Dunkel. Mrs Jones sued Mr Dunkel for negligence by his employee. The employee was not called by the Defence. When considering their verdict, the jury asked the judge whether they should regard the failure to call the employee as a weakness in the defendant's case.

The judge instructed the jury that they should find the facts alleged by the plaintiff as they were uncontested. The only issue for them to determine was whether they should draw an inference of negligence from those proven facts. The jury found for the Defendant.

This was later overturned by the High Court, Kitto J holding at [5]:

> *. . .*
> *But what should have been added, and not being added was in the circumstances as good as denied, was that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence . . .'*

The Rule

So, an adverse inference may be more confidently drawn if the following conditions are met:

1. The uncalled witness would be expected to be called by one party rather than the other,
2. Their evidence would elucidate the matter, and
3. The absence is unexplained.

However, where the inference is drawn, the rule cannot be used to fill gaps in the evidence or to convert conjecture into suspicion:

> 'The failure cannot fill gaps in the evidence, as distinct from enabling an available inference to be drawn more comfortably.'[1]

Application in Criminal Law

The rule does not apply to the Defendant in criminal proceedings. The burden of proof falls on the prosecution and is never shifted to the defence. This means that no comment can be made as to the failure of the defence to call a witness who might have been able to assist the defence.[2] If any comment is to be given it is that the jury should not speculate about what a witness not called might have said.[3]

However, where the prosecution fails to call a witness whom they might have been expected to call, then the jury may properly take that into account when deciding whether they have a reasonable doubt about the guilt of the accused.[4] So, negative inferences can be drawn against the prosecution but not the Defence.

Where Adverse Inferences Not Drawn

In Mamo v Surace,[5] a vehicle collided with a cow owned by the defendant. The defendant had made a written statement but was not called at the hearing. An issue arose as to whether the court could make an inference that his evidence would not have assisted his case.

The Court of Appeal firmly rejected this argument. The defendant's statement was substantially consistent with the plaintiff's evidence. There was, in fact, no other evidence that called for an answer on the defendant's part. There had been sufficient evidence to enable the court to determine the primary issue.

In the Party's Camp

In RHG,[6] the Iannis' case had been that they were misled by their son Joseph when they entered into a loan agreement and mortgage with the appellant. Their son had told them their liability would not exceed $100,000 when it was actually in excess of $900,000. The critical point was that neither party had called Joseph Ianni to give evidence. The trial judge regarded this as essentially neutral in the circumstances and failed to draw an adverse inference.

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1 Jagatramka v Wollongong Coal Ltd [2021] NSWCA 61 at [49]; Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361 at [64]

2 Dyers v The Queen (2002) 210 CLR 285

3 Dyers v The Queen (2002) 210 CLR 285 at [15]

4 Mahmood v Western Australia (2008) 232 CLR 397 at [27]

5 Mamo v Surace (2014) 86 NSWLR 275,

6 RHG Mortgage Ltd v Rosario Iannis [2015] NSWCA 56

The case was overturned by the Court of Appeal which held that the Iannis should have call their son as he was the obvious witness who could have corroborated their evidence. It could reasonably be expected that he was in their camp and that they would call him. No satisfactory evidence was provided as to his absence as a witness.

Failing to Ask Questions

In *Commercial Union Assurance*,[7] the Court of Appeal extended the rule to the situation where a party fails to ask questions of a witness Evidence in Chief. In particular, Handley JA suggested that a court should not draw inferences favourable to a party where questions were not asked in chief.

I am available every day if you have any interesting issues.

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[7] Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389