

The Jones v. Dunkel Inference

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Introduction

1. The so-called *Jones v. Dunkel* inference is often talked about in litigation, but not so often well understood. At its most fundamental, it is usually understood as an inference that can arise against a party who elects not to adduce evidence on a matter in issue.
2. I will examine the *Jones v. Dunkel* inference with particular reference to three decisions, namely the High Court's decision in the case itself (*Jones v. Dunkel & Anor.*¹) and the subsequent decisions of the New South Wales Court of Appeal ("NSWCA") in *Payne v. Parker*² and *Manly Council v. Byrne & Anor.*³
3. I will then attempt to draw out some practical "do's" and "don'ts" about preparing for trial and conclude with a list of further useful authorities.
4. I will deal with the law as it applies in civil litigation. Caution should be exercised in applying the principle in criminal litigation⁴.

¹ [1959] 101 CLR 298.

² [1976] 1 NSWLR 191.

³ [2004] NSWCA 123.

⁴ See for example *Dyers v. The Queen* (2002) 210 CLR 285.

Jones v. Dunkel & Anor. (hereafter “Jones”)

5. The litigation involved a motor vehicle accident on 15 January 1953 on the Hume Highway near Berrima in southern NSW.
6. The plaintiff was the wife of one Jones who was killed in the accident. She sued pursuant to the *Compensation to Relatives Act 1897* (NSW).
7. The evidence as to the accident was “*both vague and meagre*” (Dixon CJ at page 303). There were no skid marks. The driver of Dunkel’s vehicle⁵ survived but had no useful memory of the accident.
8. There were some incontrovertible facts. Jones had been driving his International truck in a northerly direction towards Sydney. Dunkel had been driving his truck in a southerly direction. It was dark and the road was wet. The Hume Highway in 1953 was a winding road. The road was about 28 feet wide, with a 20 feet wide bitumen strip surrounded by two dirt verges each 4 feet wide. The dimensions of the trucks were also in evidence.
9. There was, clearly enough, a collision between the trucks as they drove towards each other in opposite directions (Dixon CJ at page 303).
10. Dunkel’s vehicle must have turned around completely on impact or shortly thereafter for it was found south of Jones’ vehicle, on the same side of the road and facing in the same (generally northerly) direction.
11. Dunkel’s truck was badly damaged across its front and its nearside door had been torn away and was missing. Jones truck was damaged on the offside. The` mudguard of the front wheel was torn away and pushed back against the` offside door. The windscreen was broken and the cabin and the steering wheel were pushed back towards the front seat.
12. The trial was before a jury. Dunkel was not called to give evidence.
13. The controversies in the case were (a) whether the proved facts furnished an inference of negligence (an inference that Dunkel was on the wrong side of the road at the time of impact) and (b) the significance, if any, of Dunkel’s failure to give evidence.

⁵ It was being driven by one Hegedus. It was owned by Dunkel. Both Dunkel and Hegedus were sued. I will refer to Dunkel as if he was the driver.

14. After enquiring of the trial judge as to the significance of Dunkel's failure to give evidence, and receiving a further direction, the jury returned a verdict for the defendants.
15. The High Court divided three to two on the first issue (availability of inference of negligence). The majority (Kitto, Menzies and Windeyer JJ) considered that, having regard to the dimensions of the trucks and the road, and the fact that there were no skid marks on the eastern dirt verge of the road, Dunkel's vehicle must have been on Jones' side of the road when it slewed around at or immediately after impact.
16. On the second issue (failure of Dunkel to give evidence), Menzies and Windeyer JJ both stressed, in effect, the need for the plaintiff to raise a prima facie case before any adverse inference could be drawn.
17. At page 311, Menzies J cited with apparent approval the first portion of the trial judge's direction to the jury :

"the fact that [Dunkel] has not been called does not absolve [Jones] from adducing some evidence of the facts"

18. At page 319, Windeyer J said that until facts were proved from which an inference of negligence could be drawn, Dunkel was not called upon to say anything. At page 321, Windeyer J cited with approval the words of Abbot CJ in *R v. Burdett*⁶ :

"No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends ? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected"

19. Turning then to the significance of Dunkel's failure to give evidence, Kitto J, at page 308, said the following about the trial judge's direction to the jury :

⁶ (1820) 4 B. & Ald. 95; 106 E.R. 873.

“It was right enough to point out, in effect, that the evidence given might be the more readily accepted because it had been left uncontradicted, and that the omission to call [Dunkel] as a witness could not properly be treated as supplying any gap which the evidence adduced for the plaintiff left untouched. But what should have been added . . . 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 jury should at least have been told that it would be proper for them to conclude that if [Dunkel] had gone into the witness-box his evidence would not have assisted the defendants by throwing doubt on the correctness of the inference which I consider was open on the plaintiff’s evidence.”

20. Menzies J, at page 312, said:

“. . . a proper direction should have made three things clear : (i) that the absence of [Dunkel] as a witness cannot be used to make up any deficiency of evidence; (ii) that evidence which might have been contradicted by [Dunkel] can be accepted the more readily if [Dunkel] fails to give evidence; (iii) that when an inference is open from facts proved by direct inference and the question is whether it should be drawn, the circumstance that [Dunkel] disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference”

21. Windeyer J, at pages 320 to 321, took it a little further and embraced the notion of “fear of exposure” on the part of the party who fails to call the witness, quoting *Wigmore on Evidence*:

“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 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”

22. The minority (Dixon CJ and Taylor J) thought there was insufficient evidence to ground a finding that Dunkel’s vehicle was on Jones’ side of the road. They thought that the paucity of information left them to guess as to how the

accident had occurred and in those circumstances Jones had failed to discharge his onus of proof.

23. On the issue of Dunkel's failure to give evidence, the minority expressed no opinion. In fact, they passed no comment whatsoever.

Payne v. Parker ("Payne")

24. This case was another action pursuant to the compensation to relatives legislation. It was also a jury trial. It also produced a split decision in the NSWCA.
25. On 14 May 1970, the deceased, Mr Payne, underwent hernia repair surgery at the hands of Dr Parker. Subsequently, Mr Payne's condition deteriorated. A specialist surgeon ("the surgeon") was called in. The surgeon operated on Mr Payne three times. Mr Payne died on 21 June 1970.
26. The plaintiff's case against Dr Parker, was, essentially, that during the course of the first operation Dr Parker had negligently perforated Mr Payne's caecum, thereby permitting faecal matter to escape into the peritoneal cavity, causing peritonitis.
27. Neither party called the surgeon to give evidence. Both parties asked for a favourable direction in terms of *Jones*. The trial judge said he did not regard the case as a *Jones* case. The trial judge said nothing to the jury about either party's failure to call the surgeon. The jury returned a verdict for the defendant.
28. By majority (Hutley JA and Mahoney JA), the NSWCA rejected the plaintiff's appeal.
29. Hutley JA, at page 194, confirmed that the *Jones* direction is one as to the weight which can be given to inferences to support evidence already available to support the case of the party seeking the benefit of the direction. He also cited Windeyer JA's quotation of the Wigmore passage about the fear of exposure on the part of the party who fails to call the witness.
30. At page 196, Hutley JA said that before a *Jones* direction could be given, there must be evidence sufficient to be submitted that the surgeon was not in a real and practical sense available to the party seeking the benefit of the direction and, at page 197 :

“A [Jones] direction should not be given, unless there is evidence before the jury that the witness whose absence is to be the subject of comment is not available to the party seeking the benefit of inferences from his absence”

31. Also at page 197, Hutley JA said :

“Similarly . . . the evidence should point to the witness not only being available, but having relevant knowledge to put before the Court.”

32. Hutley JA considered that none of these “*fundamental conditions*” existed and therefore the plaintiff was not entitled to the direction (page 198).

33. Mahoney JA, at page 210, doubted that it could be assumed that the surgeon was unavailable to the plaintiff. He considered it would have been open to the trial judge to give a *Jones* direction in the plaintiff’s favour, but he was under no obligation to do so, and he did not err by not doing so.

34. Glass JA, in dissent, considered, in effect, that the surgeon was in the defendant’s camp and the direction should have been given in the plaintiff’s favour.

35. Glass JA differed on the facts. However, his statement of the general principles at pages 200 to 202 has generally been endorsed⁷. This can be summarised, for present purposes, as follows :

- the rule is a principle of the law of evidence whereby a particular form of reasoning is authorised;
- the reasoning which is permissible involves the treatment of a failure to adduce evidence as a reason for increasing the weight of the proofs of the opposite party or reducing the weight of the proofs of the party in default;
- the failure to call a particular witness is merely one instance of evidentiary deficiency which brings the principle into operation. Other instances are the failure to adduce any evidence at all . . . ; the failure to produce a particular document, and the failure to prove a particular fact . . . ;
- the three pre-conditions for the operation of the principle are (a) the missing witness would be expected to be called by one party rather than the other, (b) his evidence would elucidate a particular matter, (c) his absence is unexplained;

⁷ *Manly Council v. Byrne & Anor.* [2004] NSWCA 123, per Campbell J at paragraph 53.

- the first pre-condition is also described as existing where it would be natural for one party to produce the witness, or the witness would be expected to be available to one party rather than the other⁸, or where the circumstances excuse one party from calling the witness but require the other party to call him⁹, 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 him¹⁰, or where the witness's knowledge may be regarded as the knowledge of one party rather than the other¹¹;
- 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 his adversary;
- evidence capable of satisfying the first pre-condition has been held to exist in relation to a party's foreman¹², his safety officer¹³, his accountant¹⁴ and his treating doctor¹⁵;
- the second pre-condition is otherwise formulated as being made out when the witness is presumably able to put a true complexion on the facts¹⁶, or might have proved the contrary¹⁷, would have a close knowledge of the facts¹⁸ or where it appears he had knowledge¹⁹;
- unless, upon the evidence, the court is entitled to conclude that the witness probably would have the knowledge, there would seem to be no basis for any adverse deduction from the failure to call him;
- the third pre-condition is satisfied if no satisfactory explanation is offered for the absence of the witness;

Manly Council v. Byrne & Anor. ("Manly")

36. The plaintiff sustained personal injuries when she dived into a public swimming pool managed by the defendant and struck the bottom of the pool. The accident happened at about 8:30 pm on 27 October 2000 in darkness. The plaintiff alleged at the trial that one of the main floodlights was turned off and visibility was poor which caused her to misjudge the depth of the water into which she dived.

⁸ *O'Donnell v. Reichard* [1975] V.R. 916

⁹ *O'Donnell*, at page 920.

¹⁰ *O'Donnell*, at page 920.

¹¹ *Earle v. Castlemaine District Community Hospital* [1974] V.R. 722.

¹² *Café v. Australian Portland Cement P/L* (1965) 83 W.N. (Pt. 1) (NSW) 280.

¹³ *Earle*. .

¹⁴ *Steele v. Mirror Newspapers Ltd* [1974] 2 NSWLR 348.

¹⁵ *O'Donnell*, at page 921.

¹⁶ *Jones* at page 308.

¹⁷ *Jones* at page 312.

¹⁸ *O'Donnell*, at page 921.

¹⁹ *Nuhic v. Rail & Road Excavations* [1972] 1 NSWLR 204.

37. The trial proceeded before a judge sitting without a jury. There was evidence from the plaintiff that the light was off. There was also evidence from the plaintiff's friend, Ebony, and from Ebony's mother, that the light was off. Another friend and mother (Melissa and Mrs Pratt) were present at the time of the accident, but they were not called to give evidence. The trial judge declined to draw a *Jones* inference in respect of the plaintiff's failure to call the Pratts and found liability in favour of the plaintiff.
38. On appeal, Campbell J, with whom Beazley JA and Pearlman AJA agreed, delivered a comprehensive review of the authorities.
39. At paragraph 45, Campbell J commenced his review by saying that the Australian law derived from appeals involving jury decisions and that some "adaptation" was needed to derive a statement of the law which a judge sitting alone should apply.
40. The first adaptation related to the notion that the *Jones* inference was one that the party against whom the inference is sought feared to call the witness (Wigmore, Windeyer J in *Jones*, Hutley JA in *Payne*). At paragraph 50, Campbell J cited the joint judgment of Gibbs A-CJ, Stephen, Mason and Aickin JJ in the High Court's decision in *Brandi v. Mingot*²⁰ to support the proposition that :

"Insofar as the passage from Wigmore approved the drawing of an inference that a witness if called would have exposed facts unfavourable to the party who failed to call that witness, it is not the law in Australia . . . [L]ater cases confirm that the fullest extent of the inference which can be drawn is that the evidence which was not called would not have helped the party who failed to call the witness"

and at paragraph 51 :

"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 any 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."

²⁰ (1976) 12 ALR 551 at pages 559-560.

41. At paragraphs 54 to 55, Campbell J confirmed that the inference is only engaged when there are other proved facts or inferences to support the case of the party seeking the inference :

“The inferences licensed by [Jones] are ones which are drawn, if at all, once all the evidence in the case is in. This has significance in two ways. The first is that, though [Jones] licenses drawing more confidently, an inference available against the party who has failed to call the evidence, before that can happen there must first be available to be drawn, on the evidence which has been admitted, an inference against that party . . . [T]he second matter of significance is that if the evidence which has been admitted is enough to prove the case of the party who has not called the witness, the tribunal of fact could be justified in not counting the failure of that party to call that witness as something that reduces the strength of that case . . .”

42. The second matter received more attention at paragraphs 60 to 67 under the heading “*Cumulative Witnesses*”. At paragraph 61, the following passage from *Cross on Evidence* was quoted :

“The rule does not operate to require a party to give merely cumulative evidence . . . [I]f five people attended a relevant meeting and some are called, no [Jones] inference can normally arise in respect of those who are not : the rule does not compel time to be wasted by calling unnecessary witnesses.”

and at paragraph 64 the following passage from Wigmore was quoted :

“ . . . possible witnesses whose testimony would be for any reason comparatively unimportant, or cumulative, or inferior to what is already utilised, might well be dispensed with by a party on general grounds of expense or inconvenience, without any apprehension as to the tenor of their testimony . . . the inference cannot be fairly drawn except from the non production of witnesses whose testimony would be superior in respect to the fact to be proved.”

43. At paragraph 67, Campbell J concluded that the Pratts were “*merely extra witnesses, beyond the three eyewitnesses who had been called*” and for that reason the trial judge “*would have been justified in drawing no such inference unfavourable to the plaintiff from the absence of Melissa and Mrs Pratt*”.

44. As in *Payne*, the inferences sought by the defendant in respect of the Pratts were inferences in respect of witnesses who were not parties to the litigation. Similar questions inevitably arose as to precisely which party was obliged to call the Pratts. The trial judge's reason for declining the *Jones* inference sought by the defendant was that "*it was equally open to both parties to call [the Pratts]*".

45. At paragraph 70, Campbell J said :

"There was no reason to believe that there were any obligations of confidentiality or other legal inhibitions on [the Pratts] talking to the lawyers for [the defendant]. There is no evidence of any attempt by the lawyers of [the defendant] to speak to [the Pratts], where those attempts were met with a refusal to co-operate. There was no evidence of hostility of [the Pratts] to [the defendant]. In these circumstances . . . his Honour was right to conclude that [the Pratts] were equally available to the plaintiff and the defendant as witnesses."

46. At paragraphs 71 to 74, Campbell J said that it might be different if the evidence already before the Court in the plaintiff's case was weaker than it in fact was, for example had Ebony and Mrs Grose not been called and had there been doubts about the plaintiff's credibility :

". . . the strength, or weakness, of the case made out by the evidence actually presented in the case bears on whether the inferences should be drawn from other evidence having not been presented . . ."

Some Practical "Do's" and "Don'ts" Regarding Jones Inferences When Preparing for Trial

47. If your client bears the onus of proof, don't think that you can win a case merely by relying upon the opposition not calling a witness or witnesses. A *Jones* inference does not fill in the missing holes in a case. It is only engaged when facts have already been proved or inferences already established.

48. Don't think that the absence of a witness (or document, fact or circumstance) will be construed as representing a fear of exposure on the part of the non-producing party. That notion is no longer part of the law.

49. Do remember that, as a general rule, there is no property in witnesses (who are not parties). That is to say, there is generally nothing stopping you from

seeking to interview witnesses who at first blush may seem to be in, or linked to, the opposite camp. You will usually be barred from the benefit of a *Jones* inference if you cannot prove that the witness is unavailable to you. This does not apply to parties, and may not apply to persons who are very closely linked to parties, such as employees of parties, where the natural inference may be that such persons are unavailable.

50. Do ask your own witnesses if they have been interviewed, or subpoenaed to give evidence, by the opposition. If they have been interviewed or subpoenaed, you may be able to thwart your opponent's request for a *Jones* inference by proving that the witness was equally available to your opponent.
51. As a general rule in trials, the less witnesses you have to call in order to make out your case, the better. Don't feel compelled by *Jones* to call every possible witness. The "inferior" or less important ones can be left out. But it depends upon the strength of the case that you have already presented, and that may not always be an easy judgment to make.
52. Do remember that the principle in *Jones* operates not only in respect of the failure to call witnesses to give evidence. The inference may arise in respect of the failure to tender documents. It may arise in respect of the failure to ask a particular question²¹, or to prove a particular fact or circumstance.
53. If seeking to avoid a *Jones* inference, prepare to prove that the missing witness was not, or is no longer, someone high in the confidence of your client. A common example is where the missing witness may be a disgruntled ex-employee of your client.
54. Conversely, if you're seeking the benefit of a *Jones* inference, be prepared to prove that your opponent's missing witness is someone who is high in the confidence of your opponent's client.
55. If you're seeking to avoid a *Jones* inference, is there a plausible explanation for the absence of the witness? The witness may be dead, sick or overseas. Prepare to prove these things.

²¹ *Commercial Union Assurance Co. of Australasia Ltd. v. Ferrcom P/L* (1991) 22 NSWLR 389, per Handley JA at pages 418 to 419.

Other Useful Authorities

56. *Brandi v. Mingot* (1976) 12 ALR 551.
57. *Archer v. Richard Crookes Constructions P/L* (1997) 15 NSWCCR 297.
58. *White Constructions (ACT) P/L (in liq) v. White* [2005] NSWCA 173.
59. *Fabre v. Arenales* (1992) 27 NSWLR 437.
60. *Ho v. Powell* [2001] 51 NSWLR 572.
61. *State Bank of NSW v. Brown* [2001] NSWCA 22.