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When and How an "Adverse Inference" should be drawn – the decision in Miller v. Carley, 2009 CanLII 39065 (On. S.C.)

In the recent case of *Miller v. Carley*, the Honourable Justice J.W. Quinn, provides reasons for decision that evoke the spirit of Lord Denning himself, and an overview of the law regarding when and how the Court will draw an "adverse inference" from the failure of a party to call a witness to testify.

The reasons begin:

> *"After a busy day conducting illegal drug transactions, the plaintiff, the defendant and a mutual friend stopped at a corner store where the defendant purchased some "scratch" lottery tickets. One of the tickets proved to be a $5-million winner.*
>
> *The parties dispute ownership of the winning ticket. If the ticket were a child and the parties vying for custody, I would find them both unfit and bring in Family and Children's Services.*
>
> *The case is awash in untruths and curiosities. It is a study in good fortune squandered and generosity abused."*

There are other terrific quotes, such as:

> *"The defendant is aged 28. He is nicknamed "Ears."…Mr. Mahoney argues that the plaintiff has a limited intellectual capacity and that he was easily influenced by the defendant. I do not agree that Ears was the brains of this duo…"*
>
> *"It was annoying to learn from the defendant that, as of the date of the trial, less than half of the $5-million remains, with nothing to show for what has been spent…"*
>
> "*During this trial, truth was only an occasional visitor…*"

The Law regarding Adverse Inferences

In paragraphs 198 to 206, Justice Quinn thoroughly reviews the law regarding adverse inferences, and in summary, the principles stated are:

- All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

- The 'adverse inference' principle is derived from ordinary logic and experience.

- The party affected by the inference may explain it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for nonproduction.

- The explanation for not calling a witness must come from the evidence, rather than the submissions of counsel (unless the circumstances permit the court to safely deduce the probable explanation).

- One must also be precise about the exact nature of the 'adverse inference' sought to be drawn.

- The failure to call evidence may, depending on the circumstances, amount 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.

- The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate 'adverse inference.' Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanor, or other factors unrelated to the truth of the testimony.

- The law is clear that the circumstances in which an adverse inference may be drawn by a trier of fact based on a failure to call a witness or adduce certain evidence will be rare and should only be done with 'the greatest of caution,' particularly where an explanation for not introducing the evidence has already been provided to the court.

- An adverse inference can be drawn against a party for failure to call a witness who may give material evidence when that party alone could bring the witness before the court. Where those uncalled witnesses are equally available to the other parties, an adverse inference will be unwarranted.

- The consequences of a party failing to call a witness may be greater where the party has the burden of proof.

- Much depends upon whether it is the plaintiff or the defendant who has failed to call a witness since the effect may depend upon who has the burden of proof. If it is the plaintiff, it may result in the court not being satisfied that the burden of proof has been met; whereas, if it is the defendant, while failure on his or her part, being of a negative character, cannot supplement the case for the plaintiff, it may, if the plaintiff has at least made out a *prima facie* case, strengthen that case or weaken whatever defence he or she chooses to introduce.