07/10; [2010] VSC 56

SUPREME COURT OF VICTORIA

BAKER v NORCROSS PTY LTD (Ruling No 2)

Kaye J

23 February 2010

EVIDENCE – CLAIM FOR DAMAGES FOR PERSONAL INJURIES – FAILURE OF PARTY TO CALL WITNESSES – WHETHER OPPOSING PARTY MUST PROVE AVAILABILITY OF WITNESSES – WHETHER THE PRINCIPLE OF *JONES v DUNKEL* [1959] HCA 8; (1959) 101 CLR 298 SHOULD BE APPLIED.

1. The principle of *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 296 applies if two conditions are satisfied, firstly, if the person who had not been called as a witness was available to give evidence and, secondly, if that person was a person who the other party would reasonably be expected to have called as a witness on the particular topic.

2. Whilst there was no direct evidence as to the availability of supervisors and charge hands who were responsible for directing the plaintiff at the defendant's premises, there was sufficient evidence to conclude that there were available persons who could give evidence in relation to the plaintiff's work.

KAYE J:

1. In this matter, final addresses have been concluded and I have commenced my charge. Mr Curtain of Queen's Counsel, who appears, with Ms Taaffe, for the defendant, has asked me that when I summarise counsels' addresses I should give particular directions to the jury about two aspects of the final address made by Mr Philbrick of Senior Counsel, who appears with Mr Gorton for the plaintiff.

2. The central issue in this case concerns the condition of the plaintiff's back between the date of his initial injury on 1 August 1991, and the time when he suffered more florid symptoms in the late 1990s. During that period, the plaintiff continued to work in the defendant's premises on light duties. He has told the jury in his evidence that during that time he suffered pain and restriction and that, in particular, he was not able to involve himself in any lifting or twisting activities.

3. In his final address, Mr Philbrick referred to the failure of the defendant to call as witnesses the plaintiff's supervisors during that time to give evidence in relation to the plaintiff's testimony relating to his condition and restrictions during that period. Accordingly, in accordance with the principles in *Jones v Dunkel*[1] he put to the jury that they could readily accept the plaintiff's evidence on that topic, and that they should infer that such persons would not be able to assist or give evidence advantageous to the defendant.

4. I have, in the course of my charge and before Mr Curtain raised this matter, given to the jury what might be described as the orthodox directions relating to the principles in *Jones v Dunkel*. In doing so, amongst other matters, I instructed the jury that the principle invoked by Mr Philbrick would only apply if two conditions were satisfied, firstly, if they were satisfied that the person who had not been called as a witness was available to give evidence and, secondly, if they were satisfied that that person is a person who the other party would reasonably be expected to have called as a witness on the particular topic.

5. Mr Curtain has submitted to me that there has been no evidence in the trial as to the availability of the supervisors. The plaintiff ceased work with the defendant some ten years ago, and accordingly it should not be open to the jury to infer that any such supervisors, who observed the plaintiff during his work in that time, would be available to give evidence as to his capabilities in 2010. He submitted that when I summarise Mr Philbrick's address I should remind the jury of the requirement that the person who is not called to give evidence should be available to give

evidence and I should also refer to the absence of any direct evidence as to the availability of that witness.

6. Mr Curtain also submitted that I should give instructions to the jury that the *Jones v Dunkel* inference only applies in relation to a witness who the defendant could reasonably expected to have called in relation to the topic.

7. I agree with the submission of Mr Curtain that there is no direct evidence as to the availability of the supervisors and charge hands who were responsible for directing the plaintiff during the 1990s at the defendant's premises. However, in re-examination Mr Baker did say that he remained on light duties from when he returned to work and afterwards he was moved into a different office to work. He gave evidence in relation to his physical incapacities and difficulties during that period.

8. Further, in re-examination he said that at any particular time, and depending on the roster, there were two or three supervisors responsible for his work and also four or five charge hands. He also gave evidence that Mr Preston, the general manager, gave him specific advice in September 2000 that he should cease work with the defendant because of his disabilities. In my view, that evidence is sufficient to entitle the jury to infer that there were available persons who observed the plaintiff in his work with the defendant who could give evidence in relation to that topic.

9. In *O'Donnell v Reichardt* Gillard J[2] and Newton and Norris JJ[3] each observed that commonly the issue of the availability of a witness in relation to the *Jones v Dunkel* principle is determined by a process of inference.

10. Their honours also observed that in Victoria it is not common practice for a party seeking to rely on the *Jones v Dunkel* inference, to undertake to adduce evidence as to the availability of such a person. More commonly, indeed, the opposite party, in order to forestall the *Jones v Dunkel* inference, has called evidence as to the unavailability of such persons. I must say that over the last three decades, and up to the present time, my experience has generally been that that practice has continued to apply in Victoria, and indeed I apprehend that there is good reason for it. By definition, *Jones v Dunkel* only applies to a witness who the opposing party might be expected to call. *A fortiori*, it is the opposing party who ordinarily is in the better position, and often the unique position, to call evidence, if need be, as to the availability or unavailability of that person.

11. Conversely, the party relying on the inference is generally at a disadvantage in seeking to adduce any evidence as to the availability or otherwise of the witness in relation to whom the party seeks to have the inference drawn.

12. That consideration also brings into play an additional principle, which would apply in this case. As I stated, the availability or otherwise of the relevant supervisors and charge hands of the defendant in the relative period from 1991 to 2000 is a fact very much within the knowledge of the defendant. In such a case, insofar as the plaintiff is required to prove the availability of those persons, it would only be necessary for the plaintiff to call slight evidence in order to satisfy the burden on him. See for example *Darling Island Stevedoring & Lighterage Co*[4]; Jordan CJ in *Bellia v Colonial Sugar Refining Co Limited*.[5]

13. In light of the above principles, in my view it is open on the facts, which have so far been adduced in evidence, for the jury to infer that at least some of the defendant's supervisors and charge hands, who were responsible for the plaintiff's work from 1991 to 2000, might be available to give evidence. It has been well recognised that the drawing of inferences is essentially a matter for a jury. In my view, in the circumstances of this case, and particularly in light of the legal principles to which I have just referred, such an inference would be open to the jury.

14. As I have stated, I have already given the jury instructions that, in order that the *Jones v Dunkel* principle apply, they must be satisfied that the particular person who has not been called would have been available, and I have also directed the jury that the principle only applies if that person is someone who it could be expected that the other party should have called.

15. In my view, having given those instructions, and in light of the matters which I have just discussed, I do not see any need to revisit the topic, or to repeat it. Indeed, if I were to do so, and to give more specific instructions relating to this particular aspect of the case, it would seem to me as a matter of fairness I would also need to instruct the jury: firstly, that generally the question of availability of a witness for the purposes of the *Jones v Dunkel* inference is a matter established by a process of inference in Victoria; secondly, that that is so because generally the availability of such witnesses is a matter very much in the knowledge of the other side; and thirdly because this is so, the plaintiff would only need to adduce slight evidence in order to establish that fact. In my view it is undesirable that I give those further directions. I do not think it would assist the jury, rather I think that they would divert the jury from their task. I consider the jury has already received adequate and appropriate instruction on the matter, and any further instruction would not only be unnecessary but I think undesirable.

16. For the same reasons, in my view it is a matter for the jury to assess whether they should have expected the defendant to call the supervisor and charge hands who observed the plaintiff in his work during the relevant period. That is very much a matter for their judgment. I have instructed the jury that that requirement is a prerequisite for the application of the *Jones v Dunkel* principle. Indeed, in doing so, I have used the time honoured phrase that the witness should be one who could be properly considered to be in the camp of the opposite party. In my view, that instruction is sufficient.

17. In my view, it is open to the jury to conclude from the facts of this case that the supervisor and charge hands are witnesses who they might have expected the defendant call. I express no views about that, that is entirely a matter for the jury, but that is a conclusion which I consider to be properly open to the jury in this case. For those reasons, I do not intend to give any further direction on that point.

18. The second point raised by Mr Curtain relates to a comment made by Mr Philbrick in final address, relating to the failure of the defendant to produce the Victorian WorkCover records relating to the treatments of the plaintiff paid for by WorkCover between 1991 and 1998.

19. Mr Philbrick in doing so contrasted that with the apparent availability of records relating to travel undertaken by the plaintiff for the purposes of such treatment during that period, which records were the basis of matters put in cross-examination to the plaintiff by Mr Curtain.

20. Mr Curtain has submitted that there is no evidence that the documents, relating to the plaintiff's treatment during the relevant period, exist and he also submitted that issue was not sufficiently flagged to entitle Mr Philbrick to have raised it on a *Jones v Dunkel* basis.

21. Certainly, as I say, the plaintiff did refer in cross examination to the fact that WorkCover paid his medical and life expenses, see transcript p309. In re-examination (p314), he stated that he claimed medical expenses and in doing so provided to WorkCover the names, dates and kilometres travelled in relation to those expenses.

22. In my view, there is sufficient evidence that the documents referred to by Mr Philbrick might be available to the defendant. I also consider that the issue was suitably flagged, particularly in re-examination by Mr Philbrick. Therefore, I consider that Mr Philbrick was entitled to refer to the matter in his final address.

23. In reaching that conclusion, I should say that Mr Philbrick's reference to that issue was particularly fleeting. It was in a sense not much more than an aside at the end of a more detailed reference to other matters of the evidence.

24. If I were to give any direction in relation to it, which I shall not in any event, I could only do so by referring to the totality of the evidence, which I have just referred to. Again, I do not consider that that would assist the jury or either of the parties. For those reasons, I do not consider it necessary to give any further direction in relation to either of those matters.

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[1] [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395.
[2] [1975] VicRp 89; [1975] VR 916, at 921 and 923.
[3] At pp 937 and 938.

[4] (1941) 42 SR (NSW) 1 at pp 4 and 11; 59 WN (NSW) 22.
[5] (1961) 61 SR (NSW) 401, 407 to 8; [1961] NSWR 139; 78 WN (NSW) 238.

APPEARANCES: For the plaintiff Baker: Mr J Philbrick SC and Mr J Gorton, counsel. Maurice Blackburn, solicitors. For the defendant Norcross Pty Ltd: Mr D Curtain QC and Ms M Taafe, counsel. Wisewoulds, solicitors.
