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THE MISSING WITNESS: WHEN SILENCE SPEAKS AGAINST A PARTY

Introduction



Civil cases are decided on the evidence placed before the Court. A party is generally free to choose which witnesses to call, but that choice may carry consequences. Where a party fails to call a person who was directly involved in a disputed transaction and offers no satisfactory explanation for that absence, the Court may infer that the missing evidence would not have assisted that party.

Witnesses play a central role in the administration of justice by providing evidence concerning facts within their personal knowledge. Their testimony enables the Court to determine the truth of the matters in dispute and allows the opposing party to test that evidence through cross-examination.

Section 101 of the Evidence Act 1950 ("**EA 1950**") provides that a person who asks the Court to give judgment based on the existence of certain facts must prove that those facts exist. **Sections 102 and 103 of the EA 1950** further provide that the burden lies on the party who would fail if no evidence were given and on the person who wishes the Court to believe in the existence of a particular fact.

The Missing Witness

How may a failure to call a witness affect a party's ability to prove its case?

Consider a claim arising from a loan agreement where the alleged borrower denies signing the relevant documents. The party relying on the loan agreement must generally prove its execution. **Section 67 of the EA 1950** provides that where a document is alleged to have been signed by a particular person, that signature must be proved to be in that person's handwriting.

At the same time, a party who positively alleges that a signature was forged may bear the burden of proving that allegation, depending on the pleadings and the particular facts in issue.



In such circumstances, the person who witnessed the signing may be a material witness because that witness can give direct evidence as to who signed the document, when and where it was signed, and who was present at the time. This is consistent with **Section 60 of the EA 1950**, which requires oral evidence concerning a fact that could be seen to be given by a witness who personally saw it.

The failure to call the person who allegedly witnessed the signing may therefore leave a material gap in the evidence. However, the failure is not automatically fatal. The execution

of the agreement may still be established through other admissible evidence, including admissions, contemporaneous correspondence, original documents, other eyewitness testimony or expert handwriting evidence.

Adverse Inference under Section 114 Illustration (g) EA 1950

Section 114 illustration (g) of the EA 1950 permits the Court to presume that evidence which could have been produced, but was not produced, would have been unfavourable to the person withholding it.

The word ***"may"*** is important. It shows that the drawing of an adverse inference is discretionary and depends on the particular circumstances of each case. The inference does not arise automatically whenever a witness is not called.

At the same time, **Section 134 of the EA 1950** provides that no particular number of witnesses is required to prove any fact. A solicitor therefore cannot rely on **Section 114 illustration (g) of the EA 1950** merely because another witness could also have been called. The absent witness must be important and material, and the omission must create a genuine evidential concern rather than a complaint about the number of witnesses called.

When may an Adverse Inference arise?



The following considerations, distilled from the authorities, generally guide the Court:-

1. *A Case to Answer*

There must first be some evidence, however weak, concerning the disputed issue. An adverse inference cannot be used to create a case where no evidence has been adduced in the first place.

In **Takako Sakao v Ng Pek Yuen & Anor [2009] 6 MLJ 751** the Federal Court explained that there must be a case to answer on the relevant issue before an adverse inference may be drawn.

2. *Materiality of the Witness*

The absent witness must be an important and material witness with direct knowledge of the facts in dispute. The failure to call a witness whose evidence would merely be formal, peripheral, repetitive or cumulative will not ordinarily justify an adverse inference.

This requirement was emphasised in **Munusamy Vengadasalam v Public Prosecutor [1987] 1 MLJ 492** and **Takako Sakao (supra)**.

3. *Availability and Control*

The witness must be reasonably available and be someone whom the party would naturally be expected to call because the relevant matters are within that witness's knowledge. The Court may consider the witness's relationship with the party, whether the witness was within that party's knowledge or reach, and whether the party was reasonably capable of producing the witness.

In **Takako Sakao (supra)**, the absent party was one of only two persons who possessed intimate knowledge of the material transaction. Her unexplained failure to testify justified the drawing of an adverse inference.

4. *Absence of a Satisfactory Explanation*

Where a satisfactory reason is provided for the witness's absence, no adverse inference may arise. Even where the explanation is credible but not entirely satisfactory, it may reduce or neutralize the effect of the witness's absence.

This principle was recognized by the Federal Court in **Takako Sakao (supra)**.

5. *Withholding or Suppression of Evidence*

There must be circumstances indicating that material evidence was withheld or suppressed. A mere failure to obtain evidence or call every possible witness is insufficient.

In **Munusamy Vengadasalam (supra)**, the Supreme Court cautioned that **Section 114 illustration (g) of the EA 1950** must not be carried beyond its proper limits. It applies to the withholding or suppression of material evidence and not merely to a failure to obtain evidence. The absent witness must be an important and material witness to the case.

The authorities therefore demonstrate that the Court must examine the nature of the missing evidence, the importance of the witness, the party's ability to produce that witness and whether any credible explanation has been given for the witness's absence.

Recent Decision: When the Inference Was Drawn

In **Ocean Glory Seafood Sdn Bhd v GCH Retail (Malaysia) Sdn Bhd**[1], the Court drew an adverse inference against the defendant for failing to call its former Head of Procurement. She had authored material emails concerning the acceptance of the plaintiff's proposal, and her evidence was directly relevant to whether a contract had been concluded. No satisfactory explanation was given for her absence.



How the Rules of Court 2012 Fit In

Order 38 rule 1 of the Rules of Court 2012 ("**ROC 2012**") provides that facts required to be proved by witnesses at the trial of an action commenced by writ shall generally be proved through the examination of witnesses in open Court.

Under **Order 38 rule 2(1) of the ROC 2012**, a witness's evidence-in-chief is ordinarily given by way of a witness statement. Unless the Court otherwise orders or the parties agree, the witness must attend the trial for cross-examination. In default of attendance, the witness statement will not be received in evidence except with the leave of the Court.

These provisions preserve the opposing party's opportunity to test the witness's evidence through cross-examination. A witness statement cannot ordinarily replace the attendance of the witness where the evidence is disputed and cross-examination is required.

Order 38 rules 14 to 23 of the ROC 2012 prescribe the procedure relating to subpoenas to testify or produce documents. A party should consider issuing a subpoena where an important witness is genuinely outside its control but remains available to be called.

However, the availability of the subpoena procedure does not automatically relieve the party bearing the burden of proof from calling the witness necessary to prove its own case. The Court will consider which party would naturally be expected to produce the witness and whether the witness's absence has been satisfactorily explained.

How do we raise Adverse Inference before the Court?

An adverse inference is not proved through a separate application. It is an evidential submission made after the necessary factual foundation has been established during the trial.

During cross-examination, solicitor should, where appropriate:-

1. identify the particular fact in issue;
2. establish the identity and role of the absent witness;
3. demonstrate that the witness had direct and material knowledge of the disputed transaction;

[1] https://mylaw.my/court-decisions/ocean-glory-seafood-sdn-bhd-v-gch-retail-malaysia-sdn-bhd-wa-22ncc-248-04-2024-2026

4. establish whether the witness was available to the opposing party;
5. ask whether there is any explanation for the witness not being called; and
6. show that the evidence given by the witnesses who were called does not adequately address the relevant issue.

At the close of the trial, a solicitor may rely on the evidence elicited during cross-examination, together with **Section 114 illustration (g) of the EA 1950** and the relevant authorities, to submit that the missing witness's evidence would have been unfavourable to the party who failed to call that witness.

Ultimately, it is for the Court to decide whether the circumstances justify drawing the adverse inference and what weight should be given to it.

Conclusion

Section 114 illustration (g) of the EA 1950 is not a shortcut and does not punish a party for failing to call every possible witness. Its purpose is to prevent a party from benefiting where material evidence within its reach has been withheld from the Court. The question is not simply whether a witness was absent, but whether that absence leaves a material gap which the party bearing the relevant burden has chosen not to fill.

References

1. Evidence Act 1950
2. Rules of Court 2012
3. Munusamy Vengadasalam v Public Prosecutor [1987] 1 MLJ 492.
4. Ocean Glory Seafood Sdn Bhd v GCH Retail (Malaysia) Sdn Bhd, Civil Suit No. WA-22NCC-248-04/2024.
5. Takako Sakao v Ng Pek Yuen & Anor [2009] 6 MLJ 751.