

“Wagatha Christie”: Adverse Inferences Can Be Drawn Where Evidence Has Been Lost

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In the recent (and widely publicised) case of *Vardy v Rooney* [2022] EWHC 2017 (QB), the High Court provided useful guidance as to how it will deal with the issue of lost or missing evidence.

Key Takeaways.

- The Court can draw adverse inferences against a party where data has been lost; particularly where the loss appears deliberate. This can have a significant impact on the outcome of civil litigation.
- Document retention and preservation procedures should therefore be strictly adhered to in order to minimise the risk of such inferences being drawn.

Background. Although the facts are well known, in brief, the claimant, Ms Rebekah Vardy, a footballer’s wife, brought a libel claim against the defendant, Ms Coleen Rooney, an ex-footballer’s wife, in respect of a post published by the latter on her social media, which alleged that Ms Vardy had leaked her private posts and stories to *The Sun* newspaper (the “Reveal Post”). This had come to light as a result of a sting operation where Ms Rooney had disclosed to Ms Vardy’s (and only Ms Vardy’s) Instagram account titillating but fabricated information. As Ms Rooney conceded that the Reveal Post was defamatory and had caused serious harm to Ms Vardy’s reputation, the outstanding issues for the High Court to determine were: (i) whether Ms Rooney had established a defence of truth to the claim; and, if not, (ii) the appropriate quantum of damages. The court ultimately held that the Reveal Post was “substantially true” and therefore that the statutory defence of truth was satisfied. The claim was dismissed.

The public-interest defence (that Ms Rooney had sought to rely on in the alternative) was rejected on the basis that it was not reasonable to believe that it was in the public interest to publish the Reveal Post without giving Ms Vardy an opportunity to respond to the allegation.

Background: Missing Evidence. In reaching the above conclusion, the court carefully considered allegations concerning a volume of missing evidence: namely, WhatsApp media files (i.e., photos, videos and GIFs but not the messages themselves, which were disclosed) between Ms Vardy and her agent, Ms Caroline Watt, whom Ms Rooney alleged was the conduit through which Ms Vardy leaked the posts and stories to the press. Ms Rooney alleged that the loss of the media files had been deliberate.

Ms Vardy denied this, stating that the files were lost when she tried to transfer her WhatsApp data to her lawyers via a document-sharing platform; an explanation the respective experts in the case found “*surprising*” and “*impossible*”. In addition to this, Ms Vardy also had disposed of the laptop she used to transfer the files, claiming that “*it had been damaged beyond repair*”. Meanwhile, Ms Watt’s explanation for the loss of the files at her end was that she had accidentally dropped her phone into the North Sea during a family holiday in August 2021, shortly after an order had been made requiring inspection of Ms Watt’s device.

Decision: Missing Evidence. Steyn J noted that the timing of the loss of Ms. Watt’s phone was “*striking*”. She went on to note that “*even taking this evidence on its own, the likelihood that the loss Ms Watt describes was accidental is slim*”

Steyn J went on to find that “*the reasons that Ms Vardy and Ms Watt have given for the original WhatsApp chat being unavailable are each improbable. But the improbability of the losses occurring in the way they describe is heightened by the fact that it took the combination of these improbable events for the evidence to be unavailable: cf. The Atlantik Confidence [2016] EWHC 2412 (Admlty), Teare J, [296]-[297].*” On this basis, she found that: (i) it was “*likely*” that the loss of the files was “*not accidental*”; (ii) Ms Vardy had deliberately deleted the WhatsApp media files exchanged with Ms Watt; and (iii) Ms Watt had deliberately dropped her phone in the sea.

Case Law: Adverse Inferences. Various cases have established that the court may draw adverse inferences if a “*wrongdoer*” has “*parted with relevant evidence*”. In *Armorie v Delamirie* (1721) 93 ER 664 (as summarised in *Gulati v MGN Ltd [2017] QB 149*), where the value of a missing jewel was in question in the trial, the jury was directed that “*...unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages*”.

There are, nonetheless, certain limits to this principle that “*all things are presumed against the wrongdoer*”. In *Malhotra v Dhawan* [1997] EWCA Civ 1096, the Court of Appeal held that:

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- **It would apply the principle if it had difficulty in deciding which party's evidence to accept but not if it formed a clear view as to which side is telling the truth (as the court should not be required to accept evidence it does not believe or to reject evidence it finds to be truthful).** It is clear from this that the question of whether to apply the principle and draw an adverse inference is at the court's discretion. Adverse inferences are not to be lightly drawn and will depend on the specific circumstances of the case.
 - **If it found that the destruction of the evidence was carried out deliberately so as to hinder the proof of the plaintiff's claim, this would impact the credibility of the responsible party and enable the court to disregard its evidence.** As such, although this principle applies regardless of whether the loss of evidence is deliberate, adverse inferences are likely to be more forcefully drawn in such cases.

The Court formed a dim view of the credibility of Ms Vardy's testimony, referring to it as "*implausible*" and finding it "*necessary to treat [her] evidence with very considerable caution*". This combined with the findings of deliberate destruction paved the way for the finding of adverse inferences.

Going a step further (though this was not an issue in *Vardy v Rooney*), where the deliberate destruction of documents means that "*a fair trial of the action cannot then take place, the destroying party's case should be struck out*"; however, this would be "very rare" (*Active Media Services Inc v Burmester, Duncker & Joly GmbH & Co Kg & Ors* [\[2021\] EWHC 232](#)).

Decision: Adverse Inferences. In the absence of the evidence, Steyn J drew the significant adverse inference that "*both Ms Vardy and Ms Watt have engaged in destroying relevant information which would undermine Ms Vardy's case*". This—along with other factors such as Ms Rooney's belief that there was no reason to suspect any of her other followers of publishing the posts and stories—contributed to Steyn J's finding that it was probable that Ms Watt had provided certain stories to the press "*with the knowledge and approval of Ms Vardy*", with the result that the statutory truth defence applied to the defamatory Reveal Post.

Comment. This case confirms the existing position that: (i) the court may (but is not required to) draw adverse inferences if a party has lost relevant evidence; and (ii) where the loss of evidence appears deliberate, the court will be more likely to draw the adverse inferences. In light of the risk of these inferences being drawn, this case serves as a welcome reminder of the need for parties to litigation to strictly adhere to document retention and preservation notices and to remember that such notices apply to WhatsApp data and data from social media sites as well as data from more traditional sources. A litigant who chooses to destroy relevant evidence should not be taken aback

to discover that such actions may represent an “own goal” in relation to the outcome in the case.

Finally, we expect that the growing ease of data recovery in today’s world may increase the likelihood that the court will draw adverse inferences where data has been totally (and, ostensibly, conveniently) put out of reach of recovery specialists, such as where devices have seemingly been deliberately lost or destroyed.

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