The Rule in Browne v Dunn

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Introduction

This paper will traverse the rule in Browne v Dunn and how it applies to modern trials. A brief history of the rule will be offered first, followed by an outline of its application.

The case itself

The rule comes from the British House of Lords decision of ***Browne v. Dunn (1893) 6 R. 67, H.L***. The rule essentially entails that a cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness to allow them to attempt to explain the contradiction. The rule has been adopted in most common law countries, including South Africa, Australia and Fiji, and it remains one of the primary rules of consideration during cross-examination.

In practice this means that if a witness gives testimony that is inconsistent with what the opposing party wants to lead as evidence (or make a closing argument on), they must raise the contention with that witness during cross-examination. The rule does apply when cross examining expert witnesses.[1]

At its core this rule should be viewed as prohibition on 'ambushes' because it prevents a party from putting forward a case without first affording opposing witnesses the opportunity of responding to it. Should an advocate fail to meet their obligations under the rule they cannot later bring evidence to contradict the testimony of the witness.

Browne v Dunn (1893) 6 R 67 was an action for damages for libel. The defendant was a solicitor. He was given instructions by a number of people to have the plaintiff bound over to prevent a breach of the peace. The plaintiff said that there had been no such instructions. At the libel hearing those who said they instructed the defendant gave evidence. The cross-

[1] *Bush v R (*1993) 43 FCR 549;

examination did not challenge the evidence that they had instructed the defendant to act for them in the way he did. Lord Herschell said (at 70–71):

> *My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice, but is essential to fair play and fair dealing with witnesses … Of course I do not deny for a moment that there are cases in which [notice of intention to impeach credibility] has so distinctly and unmistakably been given, and the point on which he is impeached, and is to be impeached, is so manifest that it is not necessary to waste time in putting questions to him upon it. All that I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story has not been accepted.*

In ***Bulstrode v Trimble [1970] VR 840***, Newton J said (at 846):

> *A typical formulation is that set out in Cross on Evidence, 3rd ed, pp 211, 212, which is in the following terms: In the cross-examination of a witness "any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief".*

Newton J went on to say that the rule had two aspects:

1. *it is based on general principles of fairness (at 847);*
2. *it affects the weight or cogency of the evidence (at 848).*

The rule applies in most courts across Queensland, including some administrative tribunals. It does not apply in the Refugee Review Tribunal because of its inquisitorial character.[2] The rule also does not apply in the Administrative Appeals Tribunal.[3] Furthermore the rule does not apply during committal proceedings.[4]

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[2] *Re Ruddock; Ex parte Applicant* S154/2002 [2003] HCA 60
[3] *Calvista Australia Pty Ltd v Administrative Appeals Tribunal* (2013) 216 FCR 32
[4] *R v Birks* (1990) 19 NSWLR 677

Application in criminal trials

In Queensland the rule applies in criminal proceedings as well as civil. Its practical application may differ in criminal cases, not least where the accused is unrepresented. Importantly, the rule does not compel the defence to clear up inconsistencies in the prosecution case.[5]

It was said in ***Ghazal v GIO (NSW) (1992) 29 NSWLR 336*** at 345:

> *"In a trial, the duty arises most clearly where what is being suggested is fraud and false testimony on the part of a witness … [Such] contentions must be clearly identified and not raised accidentally, peripherally and nonchalantly in the course of litigation".*

In reality the extent to which detailed cross examination is required will depend upon the circumstances of the case. You should give witnesses the opportunity to respond to the essential features if an allegation you will later seek to make, or an inference you will draw. An example of some essential features may include:

- the time;
- the place
- the circumstances of an event, for detail may assist the witness to remember it and qualify the testimony or reject the allegation convincingly.

The rule does not encourage or condone excessive cross-examination. It does not require that the witness be cross-examined on every point.

The rule applies to the crown. Always bear in mind that prosecutors are 'ministers for justice' and fairness to the accused must permeate all criminal proceedings. The crown can meet their obligations under the rule in five main ways (be cognisant of these in case they slip):

1. Putting critical facts from crown witnesses to the defence witnesses other than the accused;
2. Putting the defence on notice of the crown case during the opening address;
3. Putting any accusations of recent invention to the defendant and other witnesses;

[5] *MWJ v R* [2005] HCA 74

4. Putting critical facts from the crown witnesses to the defence; and
5. Putting the crown case theory to the defendant (not always required or necessary).

In the case of ***R v Kay [2006] QCA 302*** the Court of Appeal made some interesting observations with regards to cross examination of the defendant. Whilst the court assumed that not crossing the defendant was an irregularity of no great moment, the following comments were made at [44]:

> *Also, the prosecutor did not cross-examine the appellant when he gave evidence, an unusual feature of the case perhaps prompted by the fact that the appellant had already, in his evidence in chief, denied matters that might have been put to him by the prosecutor. No attempt was made by the defence counsel to seize on that omission to argue to the jury that the prosecution must, therefore, have accepted the appellant's evidence. Nor was anything said about it by the trial judge in her directions to the jury. It seems to us that this feature of the case can only have worked to the advantage of the appellant and does not, in itself, provide a reason for concluding that a miscarriage of justice occurred.*

This statement can be viewed as a common-sense approach to the rule, given that the defendant is normally on notice of the charges against them, and therefore would not ordinarily be taken by surprise during the prosecutors closing. Though unless questions are 'put' to the defendant the jury will be deprived of seeing the defendant's response.

R v Wilson [2014] QCA 350 was an appeal against conviction. The appellant had been convicted after a trial for the rape of a young girl. The offence was alleged to have been committed when the mother of the child went on a shopping trip with a friend, leaving the child with the appellant (the mother's de facto partner). The date of the rape was unclear, and the Crown particularised it as between 1 July 2009 and 6 February 2011.

The case theory relied on by the Crown was that the rape occurred on 20 January 2011. The preliminary complaint witnesses gave conflicting evidence regarding the date upon which the offence was said to have occurred. A key defence witnesses, the friend who was said to have gone on the shopping trip with the child's mother, gave unequivocal evidence that the child had not come shopping with them on that date. However, the witness was not cross-examined on her evidence by the prosecutor. It was not put to her by the prosecutor that the

shopping excursion on 20 January had not happened as she described, or that there was some other occasion while C's mother was pregnant when she went to Toowoomba with her, X and Y. Despite this in their closing address the Crown left open the date upon which the offence was alleged to have occurred.

At the close of the defence case, there was some discussion between the trial judge and counsel about when the offence was said to have been committed. The prosecutor said that the Crown case was that the offence happened when C's mother was pregnant, on the day of a shopping trip with Vanessa to "town", by which she no doubt meant Toowoomba. That was consistent with the recollection of both X and Y that C's disclosure to them and their mother was made after a shopping trip with Vanessa, which on Y's account happened while the latter was pregnant with A, and C's statement that the incident and her disclosure of it occurred before A's birth.

Consequently, it was necessary that the Crown prove an offence which happened before 15 January 2010, because that was the date of A's birth. The case was left to the jury on that basis. In accordance with the position she had earlier taken, the prosecutor's contention in her closing address was that 20 January 2010 was not the only relevant shopping day. That was, she suggested, known from Vanessa's concession as to other shopping and from the fact that X and Y said there was another shopping excursion when they were at a different shopping centre. There might have been a shopping trip on 20 January, but it did not matter because it was not the relevant trip.

In allowing the appeal and setting aside the guilty verdict and substituting a verdict of acquittal the court held at [33]:

> *The rule in Browne v Dunn is not rigorously applied to an accused in a criminal trial, but there is no reason to deny its application to the Crown, which bears the onus of proof. The fact that Vanessa was not cross-examined did not oblige the jury to accept her evidence, but it did go to its weight and mean that it could more readily be accepted.*

And at [35] and [36]:

Paying due regard to the jury's advantage, it is nonetheless difficult to see how it could properly have rejected Vanessa's evidence or regarded it as not at least raising a reasonable doubt as to the appellant's guilt. There was nothing inherently implausible in what she said and nothing was put to her, or otherwise raised by the Crown, which would detract from its cogency. If her evidence were correct, it was impossible for the offence to have been committed on the scenario relied on by the Crown.

In light of the defence evidence as a whole, and, in particular, the effect of Vanessa's evidence in underpinning it, the jury should have entertained a reasonable doubt as to the appellant's guilt. Consequently, the verdict must be regarded as unreasonable. I would allow the appeal, set aside the guilty verdict and substitute a verdict of acquittal.

Failure to observe the rule

The consequences for failing to observe the rule depend upon the circumstances of the case. A trial judge should draw counsel's attention to the effect this may have on the later conduct of the trial,[6] but this will not always occur. Aside from the ethical and professional sanctions for counsel who fail to adhere to the rule, Cross on Evidence outlines the seven primary ways the court may correct a breach of the rule.

1. First, if the witness is not cross-examined on a point, cross-examining counsel may be taken to accept it and may not be permitted to address in a fashion which asks the court not to accept it.[7] This is so even where it is counsel for a co-accused who is in breach.[8]

2. Secondly, if the witness has not been cross-examined on a particular matter, that may be a very good reason for accepting that witness's evidence, particularly if it is uncontradicted by other evidence.[9] It can also affect the weight of the evidence called against the witness. The courts have found that It would usually be unfair to reject evidence on which there has been no cross-examination where the rule in Browne v Dunn has not been complied with and where the witness has not otherwise been given

[6] *Seymour v Australian Broadcasting Commission (*1977) 19 NSWLR 219 at 236
[7] *Cooper v R* (2012) 293 ALR 17; 87 ALJR 32; [2012] HCA 50
[8] *R v Bircham* [1972] Crim LR 430 (CA).
[9] *Smith v Advanced Electrics Pty Ltd* [2003] QCA 432

the opportunity to deal with the suggestion now made for the first time in final address.[10]

3. Thirdly, the trial judge may, on application by counsel for the party who called the witness in respect of whom the rule was broken to call evidence in rebuttal, accede to the application so that matters not put to the witness earlier may be put albeit belatedly. Alternatively, the trial judge may require the relevant witness to be recalled for further cross-examination or grant an application for the recall of the witness. A prosecutor should recall a witness to enable the defence to comply with the rule. In ***MWJ v The Queen (2005) 80 ALJR 329*** Gummow, Kirby and Callinan JJ said (at 339; 448–449 [40]):

> *Reliance on the rule in Browne v Dunn (1893) 6 R 67 can be both misplaced and overstated. If the evidence in the case has not been completed, a party genuinely taken by surprise by reason of a failure on the part of the other to put a relevant matter in cross-examination, can almost always, especially in ordinary civil litigation, mitigate or cure any difficulties so arising by seeking or offering the recall of the witness to enable the matter to be put. In criminal cases, in many jurisdictions, the salutary practice of excusing witnesses temporarily only, and on the understanding that they must make themselves available to be recalled if necessary at any time before a verdict is given, is adopted. There may be some circumstances in which it could be unfair to permit the recalling of a witness, but in general, subject to the obligation of the prosecution not to split its case, and to present or make available all of the relevant evidence to an accused, the course that we have suggested is one that should be able to be adopted on most occasions without injustice.*

4. Fourthly, while in general the court has no, or very limited, discretionary power to reject the tender of relevant and admissible evidence in civil proceedings, if a defendant fails to cross-examine a witness called by the other side on a point, evidence called by the defendant to support it may be rejected.[11]

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[10] *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1 at 26

[11] *R v Schneidas* (1981) 4 A Crim R 101 at 110–11

5. Fifthly, if a jury has been addressed without warning to the effect that a witness should be disbelieved or findings adverse to the witness made, the jury may be discharged, or an appropriately strong curative direction given. However, it is necessary to guard against overstatement of the consequences of any breach of the rule, and to take into account the position of the accused in a criminal trial and the particular circumstances relating to the conduct of the case.[12]

6. Sixthly, on appeal the court will be inclined to disregard a submission which was not tested by putting it to the party best able to deal with it.[13]

7. Finally, where the party whose counsel has breached the rule in Browne v Dunn subsequently calls evidence inconsistent with that of the earlier witness, the party may be exposed to comment that the inconsistent evidence is not in accordance with the party's instructions to counsel and should be disbelieved as a recent invention.[14]

Counsel who wishes to assert non-compliance with the rule should do so during the hearing. Whilst failure to make such a claim is not a waiver, it is relevant to whether there has been unfairness.

Exceptions to the rule

The rule does not apply where the witness is on notice that the witness's version is in contest. Such notice may come from:

- the pleadings;[15]
- a pre-trial document indicating issues;[16]
- the opposing side's evidence,[17] or their opening;[18]

[12] *KC v R* (2011) 207 A Crim R 241; [2011] VSCA 82
[13] *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 at 225
[14] *R v Robinson* [1977]Qd R 387
[15] *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 3 FCR 168 at 181;
[16] *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 at 220;
[17] *Porter v Oamps* Ltd (2004) 207 ALR 635;
[18] *Browne v Dunn* (1893) 6 R 67 at 70

- the general way the case was conducted [19] or from the way an earlier trial between the parties on the same issues was conducted;[20] or
- a case where the evidence is inherently improbable.[21]

If it is clear that the prosecution intends to rely on a statutory presumption in its favour, then compliance may also not be required. In practice this exception should only be used when the issue is clear and obvious.

In cases where there has been a pre-trial exchange of affidavits or statements, a cross-examiner must still put to the witness any non-obvious inferences they wish to later submit can be drawn from the evidence.[22] In this was it can be seen that the rule is not an absolute one. Therefore, it is ordinarily necessary to put to a party matters which are clearly at issue in the proceeding.[23]

Another important exception is challenges to the witness's credit generally. In ***Thomas v Van Den Yssel (1976) 14 SASR 205*** Bray CJ said at 207:

> *The rule cannot be applied without qualification to a challenge to the witness's credit generally, particularly the credit of a plaintiff in an action for damages for personal injuries in relation to his evidence about his symptoms and incapacities. Damages are always in issue. Such a plaintiff knows that the defendant will contend that his injuries do not deserve the sum which he himself has placed on them. And in many other cases the witness must know that the other side will contend that he is not telling the truth, and even in some cases that he is deliberately not telling the truth. I cannot assent to the proposition that counsel cannot argue or the court find that a witness is deliberately giving false evidence unless the witness is asked some such question as, "I put it to you that your evidence is false", or "I suggest that that is a deliberate lie" or the like. Indeed a successful objection might be taken to such questions as needlessly offensive (Evidence Act 1929, as amended, s 25(b)).*

[19] *Gutierrez v R [*1997] 1 NZLR 192
[20] *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 8)* (2008) 75 IPR 557;
[21] *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546
[22] *West v Mead* (2003) 13 BPR 24,431;
[23] *Flower & Hart (a firm) v White Industries (Qld) Pty Ltd* (1999) 87 FCR 134

The rule in Browne v Dunn has much more force when applied to evidence relating to a particular fact or topic than when sought to be applied to the general credit of the witness, though even in the latter case the failure to cross-examine at all may, in appropriate circumstances, be taken as an acceptance of the general credit of the witness as well as the truth of his evidence on particular matters unless that evidence is patently absurd or incredible.

Conclusion

The rule in Browne v Dunn should be viewed as a rule of fairness and common sense. The best way to ensure compliance is to be cognisant of the arguments you will make in your closing address (preparation as always is key). When its doubt its best to play it safe and put the witness on notice of any issues and adverse comments you plan to make at a later stage.