The Rule in *Browne v Dunn*

'What?', 'Why?', 'Who?' and 'How?'

by Dr Jason Harkess 16 October 2019

What is the rule?

The rule in *Browne v Dunn* came about as a result of a courtroom practice obliging a party to:

- 'put' a particular matter to an opposing party's witness in cross-examination;
- if that party intends to lead its own evidence on that matter that contradicts or challenges the evidence of the opposing party's witness; and
- the party intends to invite the tribunal of fact to reject the evidence of the opposing party's witness in favour of its own.

The standard formula involving an application of the rule may be expressed as follows:

1. Party A alleges that *X occurred* as part of its case against Party B.
2. Party B as part of its case *denies X occurred (and that Y occurred instead)*.
3. Party A calls AW1. Party A's counsel leads evidence from AW1 who states '*X occurred*'.
4. Party B intends to call BW1 to give evidence that '*X did not occur (and that Y occurred instead)*.'
5. In anticipation of its own evidence to be led from BW1, Party B must, at some point in the cross-examination of AW1, put to AW1 *'X did not occur (and that Y occurred instead)'* and allow AW1 the opportunity to comment on the alternative conflicting proposition.
6. If Party B in cross-examination fails to put to AW1 that '*X did not occur (and that Y occurred instead)*', and Party B subsequently calls BW1 who gives evidence to that effect, Party B has then breached the rule in *Browne v Dunn.*
7. As a corollary, if Party A in cross-examination of BW1 fails to put to BW1 that '*X occurred*', Party A has then also breached the rule in *Browne v Dunn.*

The accepted practice that this formula represents became entrenched as a common law rule following the adjudication by the House of Lords of the case on appeal brought by James Browne against Cecil Dunn (see summary of case, on **right**). The rule has not been re-stated in the *Evidence Act 2008* (Vic) ('the Act'), and so it remains a significant common law rule that operates alongside the uniform evidence regime (although s 46 of Act is intended to supplement the common law).

Browne v Dunn

(1893) 6 R 67 (House of Lords)

Facts

James Browne was a 'neighbour from hell'. He would sneer, grunt, sputter and occasionally burst into a brutal guffaw at a neighbour when nobody else was around to to witness his outbursts. One of the neighbours, who was a solicitor, organised proceedings to be brought on behalf of all the neighbours to put a stop to the behaviour once and for all. That neighbour was Cecil Dunn. Mr Dunn drafted a retainer letter for the neighbours to sign. The letter referred to Mr Browne as having 'seriously annoyed' residents for many months and that he had 'endeavoured to provoke a breach ... of the peace'. The letter authorised Mr Dunn to act on the neighbours' behalf in seeking a court order against Mr Browne. Mr Dunn presented the letter to neighbours to sign. Nine neighbours signed it. Mr Browne became aware of the letter and sued Mr Dunn for defamation. It was alleged that the words in the letter were defamatory, causing him reputational damage. Mr Dunn defended the action by claiming the letter was protected by solicitor-client privilege. Mr Browne responded to that claim by arguing that the letter was a sham because none of the neighbours had a genuine intention of retaining Mr Dunn as their lawyer, and that the defamatory words were therefore gratuitious without any honest or legitimate object - the letter served only to damage Mr Browne's reputation.

Evidential Issue

Mr Dunn called 6 of the neighbour signatories to give evidence in support of his defence. Each witness gave evidence in examination-in-chief to the effect that:

- Mr Dunn had been instructed to act on their behalf;
- they held a genuine grievance towards Mr Browne;
- the letter of retainer and its contents were genuine;
- they had signed the letter .

In cross-examination, Senior Counsel for Mr Browne did not cross-examine any of the witnesses about this aspect of their evidence. He did not put to any of these witnesses that the letter was a sham. Nevertheless he invited the jury to find that the letter of engagement was a sham in closing submissions.

If their evidence was never challenged in cross-examination, how could a jury, in all fairness, disbelieve them?

Held (Lord Herschell)

If an opposing party intends to suggest a witness is not telling the truth on a particular point, they must:

1. direct the witness's attention to that fact by putting questions to the witness to show that is what is being suggested;
2. direct the witness's attention to the facts/circumstances which suggest their version of events should not be believed;
3. give the witness an opportunity to comment on/explain the conflict if they are able to do so.

What happens when the rule is breached?

There is no single solution for a breach of the rule in *Browne v Dunn*. The remedy will largely depend on the circumstances of the case, including the nature of the breach, at what point in the trial it occurs, what the parties propose by way of remedy, and the discretion of the trial judge. If opposing counsel fails to cross-examine a witness on the point in dispute, remedies include:

1. The trial judge may draw cross-examining counsel's attention to the fact, at the conclusion of cross-examination, that a matter has not apparently been put to the witness. Counsel can then immediately remedy non-compliance with the rule, before the witness is excused (e.g. Judge says to Counsel for Party B, "You have not put to AW1 that X did not occur. Do you wish to cross-examine on that point before the witness is excused?") (*a judicial 'interventionist' approach that one should not expect to occur regularly in an adversarial system of justice*).
2. The trial judge may direct that the **unchallenged evidence is to be accepted** and that the opposing party can not now conduct their case on the basis that the evidence of the witness should not be accepted (e.g. Judge prohibits Party B from leading evidence from WB1 that X did not occur and that Y occurred instead) (*a somewhat harsh approach that may potentially lead to a miscarriage of justice, especially if the breach was a result of oversight by counsel).*
3. The trial judge directs the jury that opposing counsel's **failure to cross-examine the witness bears upon the weight** to be given to that aspect of the witness' evidence when they come to form a view as to the facts of the case (e.g. Judge directs jury: "AW1's evidence was not challenged by Party B's Counsel. You may take that into consideration when deciding whether to accept AW1's account or BW1's account of the matter.") (*a less harsh approach, but still potentially unfair if the failure to cross-examine was due to an oversight)*.
4. The trial judge could, on application by the party who called the witness, allow that party to re-open its case and **call rebuttal evidence** *(a fair outcome).*
5. The party who called the witness could propose to **recall the witness** for the purpose of further cross-examination by opposing counsel, or leave could be sought by opposing counsel to do so (see s 46 of the Evidence Act 2008 Vic, **right**) (*a fair outcome*).
6. The party who called the witness could make a point, in cross-examining the opposing party's witness who later introduces the contradicting evidence, that the contradicting evidence is a **'recent invention'** of the witness (*assumes the witness did not instruct opposing counsel on the contrdicting evidence, which may be unfair if opposing counsel was neglectful in giving effect to instructions, or the witness was simply unco-operative in giving instructions*)
7. The party who called the witness could make a point in **closing submissions** that the contradicting evidence/ case of the opposing party should be disbelieved because its witness was not given an opportunity to deal with it (*possibly unfair if opposing counsel was neglectful in complying with the rule*)
8. The trial judge could **discharge the jury** if the breach leads to an unfair trial and injustice which is incapable of being cured by a curative direction (*a last resort*).

Evidence Act 2008

46 Leave to recall witnesses

(1) The court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, if the evidence concerned has been admitted and—

(a) it contradicts evidence about the matter given by the witness in examination in chief; or

(b) the witness could have given evidence about the matter in examination in chief.

(2) A reference in this section to a matter raised by evidence adduced by another party includes a reference to an inference drawn from, or that the party intends to draw from, that evidence.

Why have the rule?

The rule in *Browne v Dunn* is designed to regulate the admission of particular kinds of evidence in an adversarial system of justice. For this reason, it may be regarded as a **rule of evidence**.

However, it should be remembered that its underlying rational is to enhance the fairness of a system that plays host to parties who are inclined to be antagonistic towards another. Because the stakes are so high - there is only one winner in the court's ultimate adjudication - the desire to surprise the opposition with damaging evidence is only natural. The rule in *Browne v Dunn* effectively addresses that desire so that this kind of 'ambush' tactic becomes prohibited in relation to the calling of witnesses and the adduction of evidence. For this reason, the rule may also be seen to be a **rule of procedural fairness.**

There are 3 aspects to this procedural fairness which the rule effectively functions to serve:

- **Fairness to the witness:** A witness may be unaware that the opposing party intends to suggest that their evidence is wrong and that it should not be believed. In fairness to the witness, if that is what is to be suggested, then that should be made clear to the witness. Furthermore, any conflicting account should be put to the witness so the tribunal of fact can make its own assessment of how the witness deals with the evidence when confronted with it. The witness should not be 'stabbed in the back' after leaving the courtroom.
- **Fairness to the party who called the witness:** Litigation by ambush should be avoided - the party should know if their version of events is disputed.
- **Fairness to the court:** Compliance with the rule assists the court in becoming accutely aware of the material issues between the parties that need to be resolved prior to adjudication.

Because of the underlying rationale of fairness, it has also been suggested that the rule effectively gives rise to a professional and **ethical responsibility** on the part of counsel to comply with it.

Exceptions

Arguments may be made that, although there might appear to be a *prima facie* breach of the rule, it should not be applied and a remedy should not be sought in certain circumstances. Whether this is a situation of saying the rule 'does not apply', or whether there is 'an exception' to the rule, is a fine distinction and arguably academic. However, the following circumstances might either be considered situtations where the rule has no application or otherwise constitute an exception to the rule:

- the party who called the witness has already had **notice** that the particular matter is in dispute and it is obvious to all concerned that it is in dispute (e.g. pre-trial disclosure and notice requirements may indicate to the parties and to the trial judge, that whether X occurred is an issue that needs to be resolved by the tribunal of fact);
- similarly, where the general credit of a witness is known to be at issue, there is no requirement to put it ot the witness that they are 'lying', 'making it up', or 'to be disbelieved' (the rule is designed to force the puttage of specific factual propositions to witnesses);
- the evidence of the witness in examination-in-chief relating to the matter is **incredible, unconvincing or internally contradictory**, such that cross-examination on the issue would be of little assistance in advancing the case that this witness should be disbelieved;
- a **forensic decision** is made not to cross-examine on the point because the evidence of the witness, as it currently stands, may not establish, to the requisite standard, that the particular point in dispute occurred (e.g. AW1 does not, in evidence-in-chief, explicitly state 'X occurred', but has only made suggestions or insutations that it might have occurred; cross-examination on the point may invite an explicit statement, which would not be in the opposing party's interests);
- the rule has no application in **committal proceedings**;
- if the case of an Accused in a criminal trial depends on highlighting the material inconsistencies as between prosecution witnesses, the Accused is not under an obligation to put the the account of one prosecution witness to another prosecution witness if there is a conflict between the two.

Who must comply with the rule?

The rule is applicable first and foremost in cross-examination. It is therefore **the cross-examiner** who must comply with the rule by putting to the opposing party's witness so much of their own case as concerns that witness, if it is ultimately to be suggested that what the witness says about the matter is not to be believed. The rule applies in both in **criminal and civil matters**. What this means is that there are a variety of situations that arise in which counsel may have to adhere to the rule, including:

- Defence cross-examining prosecution witnesses;
- Defence cross-examining co-Accused's witnesses;
- Prosecutor cross-examining Defence witnesses;
- Plaintiff cross-examining Defendant's or Third Party's witnesses;
- Defendant cross-examining Plaintiff's, Co-defendant's or Third Party's witnesses;
- Third Party cross-examining Plaintiff's and Defendant's witnesses;
- Cross-examining one's own witness, pursuant to s 38 of the *Evidence Act 2008 (Vic)* (**unfavourable witness**).

The rule applies to the cross-examination of **expert witnesses** and to **child/vulnerable witnesses**, although care needs to be taken in the form in which questions are 'put' to witnesses who fall into the latter cateogry.

Some qualification to the rule may also need to made when it is applied to a Defendant in a criminal matter. The burden is on the prosecution to prove its case beyond reasonable doubt - the Accused is not under a positive obgliation to put various conflicting/alternative hypotheses to prosecution witnesses to prove their innocence. That said, 'positive' defences, and material alternative hypotheses consistent with innocence for which there is an evidential basis, should be put to those witnesses in a position to comment.

How does counsel comply with the rule?

Counsel may take great delight in saying to a witness in court, ***'I put it to you** that X did not occur, but that Y occurred instead?'* if, for no other reason, that it demonstrates to all concerned that they have clearly discharged their duty in accordance with the rule in *Browne v Dunn* and there can be no suggestion that they were neglectful in failing to do so. Nevertheless, there is no requirement that the words *'I put it to you...'* have to be used in order to comply with the rule.

What is important is that the witness' attention is drawn to the material and essential factual contentions about which the witness has given evidence, and about which cross-examining counsel will ultimately suggest to the tribunal of fact that the witness' evidence is not be accepted. Beyond that essential requirement, how Counsel goes about doing that is a fine art and many a Counsel will differ in their approach, and many a trial judge will differ in their perspectives as to how far Counsel needs to go in order to comply with the rule in *Browne v Dunn.* There is much uncertainty associated with Counsel's forensic decision-making relating to compliance with the rule.

Recent Cases

Ritchie v The Queen [2019] VSCA 202
Avwest Aircraft Pty Ltd v Clayton Utz (No 2) [2019] WASC 306
R v Astbury (Ruling No 5) [2018] VSC 637
Deacon v The Queen [2018] VSCA 257
Reeves v The Queen [2017] VSCA 343
Broughton v B&B Group Investments Pty Ltd [2017] VSCA 227
Gant v The Queen [2017] VSCA 104
Masters Home Improvement Australia Pty Ltd v North East Soluctions Pty Ltd [2017] VSCA 88
Ward v The Queen [2017] VSCA 37
Cavanagh v The Queen; Rekhviashvill v The Queen [2016] VSCA 305
Mitchell v The Queen [2016] VSCA 197
Parsons v The Queen [2016] VSCA 17
Kalos v Goodyear & Dunlop Tyres (Aust) Pty Ltd [2016] VSC 715
Wearne v State of Victoria (Ruling No 2) [2016] VSC 603
Mimmo v Fernando [2016] VSC 510
Govic v Boral Australia Gypsum Ltd [2015] VSCA 130
Davies v The Queen [2014] VSCA 284
Woods v The Queen [2014] VSCA 233
C M G v The Queen [2013] VSCA 243
S D v The Queen [2013] VSCA 133
Pasqualotto v Pasqualotto [2013] VSCA 21
Reza v Summerhill Orchards Ltd [2013] VSCA 17
T P v The Queen [2012] VSCA 166
Drash v The Queen [2012] VSCA 33
Frengos v The Queen [2012] VSCA 18
Buchwald v The Queen [2011] VSCA 445
Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11
R v Morrow [2009] VSCA 291
The Bell Group Ltd (in liq) v Westpac Banking Corporation Ltd (No 9) [2008] WASC 239

Commentary

Australian Law Reform Commission, Report No 102, Uniform Evidence Law
Judicial College of Victoria, *Victorian Criminal Charge Book*, 4.12 Failure to Challenge Evidence (Browne v Dunn)
Alexandra McEwan, 'The Rule in *Browne v Dunn* in Australian Criminal Law: MWJ v R and R v MAP' [2006] JCULawRw 8