ADVOCACY
The rule in *Browne v Dunn*

"Willing to wound, and yet afraid to strike"

Alexander Pope.

The so-called rule in *Browne v Dunn* is a rule based on principles of fairness. It requires a cross-examining counsel to direct the attention of the witness to so much of the cross-examiner's case as relates to that witness. The purpose of so doing is to give the witness an opportunity to address those issues by denial, explanation or other comment.

The rule originated in the speech of Lord Herschell LC in the case of *Browne v Dunn* (1894) 6 R 60. In that case Lord Herschell said (at 70):

> *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 in the conduct of the case, but is essential to fair play and fair dealing with the witness.*

The rule was restated by Hunt J in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation (Cwth)* (1983) 1 NSWLR 1 at 16 where he said:

> *It has in my experience always been a rule of professional practice that, unless notice has already clearly been given by the cross-examiner of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with the other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in Browne v Dunn.*

Hunt J went on to observe:

> *There are many reasons why it should be made clear, prior to final addresses and by way of cross-examination or otherwise, not only that the evidence of the witness is to be challenged but also how it is to be challenged. Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or to qualify the other evidence upon which the challenge is based.*

The rule applies to both criminal and civil proceedings. It applies as between all parties, for example, if one defendant is to suggest that another is not telling the truth then the obligation to comply with the rule arises.

Just how you comply with the rule in *Browne v Dunn* will be a matter for consideration in light of the circumstances in each case. In some cases it will be necessary to baldly confront the witness with the contradictory material. In others you may wish to adopt a more subtle approach, taking the evidence that has fallen from the witness and expanding upon it in order to allow the witness to

Hon Justice Riley

comment upon the information which you propose to use to suggest the evidence is unworthy of credit. For example in a case where the witness gives evidence as to identity you may wish to examine him as to the prevailing circumstances which would reflect upon his capacity to provide a positive identification. You may suggest it was dark, or raining, or his vision was obscured by passing traffic and so on. It is not necessary to confront the witness and accuse him of being unworthy of credit or untruthful. Provided the basis for your attack on his credit is fairly put to him you have complied with the rule in *Browne v Dunn*.

The rule has no application where the challenge to the evidence of the witness is clear from other circumstances. This may result from the pleadings or from the evidence led by the other side in the course of the case or, indeed, from the issues raised in the opening address. The rule will not apply where the story told by the witness is incredible and does not warrant serious challenge. However the rule is one relating to fairness and fairness must be assessed in all of the circumstances. As Lord Herschell went on to say:

> *All 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 is not accepted.*

If the rule is not complied with various consequences may follow. The Judge may, in an appropriate case, discharge a jury. A witness may have to be recalled. The failure may be the subject of

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adverse comment to the jury. In an extreme case the Tribunal may disregard the evidence because it was not tested by allowing the witness to comment upon it.

In summary, if a court is to be invited to disbelieve a witness then the grounds upon which that submission is to be made should be put to the witness in cross-examination to enable the witness to offer any comment or explanation available to him.

In *Reid v Kerr* (1974) 9 SASR 367 Wells J observed that a failure to abide by the rule in *Browne v Dunn* might lead to the situation where issues of fact are not joined in the evidence. The two bodies of evidence led by the parties may "serenely pass one another like two trains in the night".

In that same case Wells J addressed the nature of the challenge that should be made to the evidence of a witness. He referred to cases where the contradictory material was not put fairly and squarely to the witness but rather was hinted at and then went on to say:

> "Then what was sought to be done was that such answers as the witness was able to give with respect to the hinted imputation were used as the basis for an address to the jury inviting them to draw an inference that carried the imputation. I regard such a course of cross-examination and address as unfair. It represents the sort of conduct described by Alexander Pope in the well known passage in which he condemned those who were willing to wound, and yet afraid to strike. I do not for one moment suggest that counsel should abandon the arts and fair devices of cross-examination. I am well aware that there are more ways of taking a fort than by frontal attack, but I also hold it to be a fundamental principle that, when all arts and devices of cross-examination have been exhausted for the purpose of testing whether a particular witness merits adverse criticism, then, at some stage, and in some fair manner, he should be given the opportunity of meeting the implication and answering it."

It is in complying with the rule in *Browne v Dunn* that you most often hear counsel resort to the tired formula: "I put it to you" followed by a series of propositions. This is unfortunate and unproductive advocacy. That manner of putting a question will lead to only one response from the witness and that is a flat denial of the proposition. In approaching the matter in that way counsel is simply going through the motions and complying with the formalities. It gives no prospect of obtaining an admission or a qualification to the evidence already given. It provides no opportunity for positively assisting the case being presented. Rather it permits, even invites, the witness to emphatically and convincingly reject that part of the case for the other side. Issues raised in this way should have been dealt with during the course of the cross-examination in conjunction with other matters being explored with the witness.

CASE NOTES

Newcastle v Coffey

Supreme Court No. JA 14/2000

Judgment of Riley J delivered 13 April 2000

CRIMINAL LAW - SENTENCING - S 81 JUSTICES ACT

Mark Hunter

The appellant was fined $1,000 plus $20 victim levy in the Court of Summary Jurisdiction at Alice Springs after pleading guilty to unlawfully damaging the Julalikari Council Night Patrol vehicle with an iron bar. Damage was estimated at $70.

The magistrate described the offence as trivial and declined to impose a mandatory term of imprisonment. He did, however, specify fourteen days imprisonment in default of payment, pursuant to s 81 of the *Justices Act* ("*the Act*").

The respondent conceded that the fine was manifestly excessive but not also the term of imprisonment imposed in default of payment. The respondent contended that s 81 of the Act did not give the magistrate the power to order the conversion of the fine otherwise than at the maximum rate of one day's imprisonment for each $50 or part thereof remaining unpaid.

HELD

1. Appeal allowed; sentence set aside.

2. Appellant fined $200 plus $20 victim levy; three months to pay; in default two days imprisonment.

Riley J noted that ss 81(1) and 85(3) of the Act clearly express a judicial discretion to impose a term of imprisonment in default of payment of a fine. His Honour rejected the respondent's submission that this discretion was rendered otiose by the wording of the conversion scale in s81.

A court may, in the exercise of the statutory discretion, impose *any* period of imprisonment in default so long as the period does not exceed the conversion scale in s81 (currently $50 per day or part thereof).

Riley J warned against automatic conversions at the maximum rate and stated that matters relevant to the exercise of the s 81 discretion may include those set out in s 5 of the *Sentencing Act*.

Appearances

Appellant - Kilvington / CAALAS

Respondent - Rogers / DPP

Commentary

Where the objective seriousness of an offence punishable by imprisonment is found by the Court to *not* warrant the imposition of a custodial sentence, the application of a fine conversion rate which maximises the default period of imprisonment is arguably unjust.

In the proper exercise of the s81 sentencing discretion, the Court should be assisted by submissions from counsel.

Case Notes is supplied by Mark Hunter, a barrister in Darwin.