The Rule in Browne v Dunn

Browne v Dunn (1893) 6 R. 67 HL
s46 Evidence Act (NSW) 1995

If a witness gives evidence that is inconsistent with what the opposing party wants to lead in evidence, the opposing party must raise the contention with that witness during cross-examination and give them an opportunity to respond to it. Every lawyer in NSW should understand the principle in order to represent their clients effectively. This paper is designed to assist legal practitioners in the state of NSW.

Facts of Browne v Dunne

The case was a defamation action in which Mr Browne claimed to have been libelled in a document signed by the defendants. The jury found in favour of Mr Browne but the House of Lords quashed the judgment because the document was not shown to the signatories in cross examination. The jury could not make the finding of fact sought by the plaintiff unless those facts were put to the witnesses at the hearing.

The Rules

The rule is well described by Hunt J in Allied Pastoral Holdings: [1]

> *It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, 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 that other evidence, or the inferences to be drawn from it, and to allow the other party the inference sought to be drawn.*

So, the rule will be satisfied where the opposing party (and his witnesses) have been given notice of the nature of the opposition case to be met. I should emphasise that the duty to be fair applies to the witness as well as the opposing party.[2]

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1 Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation [1983] 1 NSWLR 1 at 16
2 SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd [2017] NSWCA 132

Leading Case

The rule was emphasised by the NSW Court of Appeal in *State of NSW v Hunt*.[3] This was an action for assault, battery, malicious arrest and misfeasance in public office by a police officer. The trial judge found for the plaintiff and held that the defendant was vicariously liable for the conduct of its employee.

The trial judge found that the officer had completely fabricated his evidence in a number of material particulars. However, this decision was overturned by the Court of Appeal because the allegations had not been put to the officer when he gave his evidence. The Court of Appeal emphasised at [32] that two conditions needed to be satisfied before such a finding could be made:

1. Reasons must be given for concluding that the truth has not been told, **AND**
2. The witness (or party) must be given an opportunity to answer the criticism.

Excluded by Agreement?

The Court of Appeal held in *SAMM Property Holdings Pty Ltd* [4] that the parties to litigation cannot by agreement (even where the court acquiesced) authorise a course which denies elementary procedural fairness to a witness. Counsel is obliged to put to the witness 'the nature of the case upon which it was proposed to rely.' The rule requires fairness be afforded to the witnesses as well as the opposing party. In addition, it facilitates the court's ability to assess reliability and credibility of the witness.

Putting the Case Before the Hearing

In *Oneflare Pty Ltd v Chernih* [5] the primary judge rejected evidence given by the appellant's directors. The appellants appealed and argued that they had been denied procedural fairness as the defendant's case was not put to the directors at the hearing. The Court of Appeal found that notice had been given in the affidavit evidence exchanged before the hearing, the parties' opening statements and the cross-examination of each of the directors made plain that the truthfulness of their evidence was under challenge.

The Court of Appeal emphasised that the crux of the rule in *Browne v Dunn* is that the witness must have been given 'full notice beforehand that it is intended to impeach the credibility of the story he is telling.'

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[3] State of NSW v Hunt (2014) 86 NSWLR 226.

[4] SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd [2017] NSWCA 132

[5] Oneflare Pty Ltd v Chernih [2017] NSWCA 195

Mistaken Or Lying?

In *Lardis v Lakis,*[6] the primary judge found that property was transferred with intent to defraud creditors. It was put to the appellant's solicitor that he was mistaken as to the date he received instructions to effect the transfer. The primary judge found that he was mistaken and rejected his evidence.

The appellant appealed on the basis that the primary judge had erred by making an adverse credibility finding absent cross-examination directed to the credibility of witness' evidence. In short, it wasn't put to the solicitor that he was lying. The Court of Appeal held that the rule in *Browne v Dunn* had not been infringed.

They held that, without trespassing into the realm of credibility, there was ample evidence justifying the primary judge's rejection of the solicitor's evidence. White JA agreed but held that:

> '*In my view the further findings that cast doubt on the veracity as distinct from the reliability of Mr Macaulay's evidence were not open to the primary judge having regard to the limited scope of cross-examination.*'[7]

So, counsel should put to every unfavourable witness that they are, firstly mistaken, and secondly, that they are lying.

Section 46 Evidence Act

The *Evidence Act* s 46 overlaps with the rule. It permits a witness to be recalled where there has been a failure to cross-examine on a contested matter.[8]

I am available every day if you have any interesting issues.

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[6] Lardis v Lakis [2018] NSWCA 113
[7] Lardis v Lakis [2018] NSWCA 113 at [77]
[8] MWJ v The Queen (2005) 222 ALR 436