

The rule in *Browne v Dunn*- essential or anachronistic¹

Introduction

Jeremy Bentham was not only a fierce critic of the laws of England,² but the legal profession as well.³ Of the law of England he described it as “fathomless and bondless chaos made up of fictions, tautology and inconsistency, and the administrative part of it a system of exquisitely contrived chicanery which maximized delay and denial of justice.”⁴

The history of the development of the law of evidence is marked by a series of long running debates.⁵ At one extreme, Bentham argued that all binding rules of evidence should be abolished.⁶ At the other extreme, it has been argued that the law of evidence embodies both the accumulated wisdom of centuries of practical experience and some fundamental notions of procedural fairness, especially in respect of safeguards of persons accused of crime. The latter includes notions such as the presumption of innocence; the right to silence; and the privilege against self-incrimination; exclusion of evidence of character (or disposition - including evidence of past convictions); and of course the hearsay rule itself. These debates have not been confined to England, but indeed have taken place in all common law jurisdictions including Canada and Australia. No jurisdiction has been tempted yet by Bentham’s proposal, although over the past century, many common law jurisdictions have either codified the law of evidence or put codification on the agenda.

The common law of evidence is a fairly clear example of Anglo-Saxon pragmatic evolution. Change has taken place more through case by case decision and piecemeal legislative intervention than through radical or principled reform. Fundamental changes have occurred in nearly all

¹ Justice John Sackar, judge of the Supreme Court of NSW.

² Frederick N Judson, ‘A modern view of the law reforms of Jeremy Bentham’ (1910) 10 *Columbia Law Review* 41, 42

³ H L A Hart, ‘Bentham and the demystification of the law’ (1973) 36 *Modern Law Review* 2, 12

⁴ Frederick N Judson, ‘A modern view of the law reforms of Jeremy Bentham’ (1910) 10 *Columbia Law Review* 41, 42

⁵ John H Langbein, ‘The historical foundations of the law of evidence: A view from the Ryder Sources’ (1996) 96 *Columbia Law Review* 1168; Nicholas Rescher and Carey B. Joynt, ‘Evidence in history and in the law’ (1959) 56 *Journal of Philosophy* 561

⁶ Frederick N Judson, ‘A modern view of the law reforms of Jeremy Bentham’ (1910) 10 *Columbia Law Review* 41; H L A Hart, ‘Bentham and the demystification of the law’ (1973) 36 *Modern Law Review* 2; Adrian A Zuckerman, ‘The transformation of English law of evidence’ in W E Butler (eds) *Justice and Comparative Law; Anglo-Soviet Perspectives on Criminal Law, Evidence, Procedure, and Sentencing Policy* (Martinus Nijhoff Publishers, 1987) 65

common law jurisdictions as the jury is slowly but surely disappearing from civil litigation. Changes have occurred even in the criminal context in respect of non-jury trials. In some jurisdictions however, trial by jury in the criminal context is still mandatory without any discretion being given to the accused.

However it must be accepted that if one were tempting to detect a general trend in the law of evidence across numerous common law jurisdictions, it has consistently been in the direction advocated by Bentham. For example there are many legislative provisions which permit judges to exercise a discretion to reject or qualify the character of the evidence in certain circumstances especially, for example, where a judge may determine that the prejudicial value of the evidence overshadows its probative value. The intrusion of judicial discretion has significantly modified the previously held position where evidence was either relevant or determined to be irrelevant and admitted or rejected accordingly.

Although the title of this lecture would suggest it is of narrow focus the point does raise some general questions of principle which are important in the conduct of trials. For example the respective roles and obligations of judges and legal representatives in the conduct of a trial and in that context, the obligations of the judge clearly and adequately to explain the result.

The aim of this lecture will be devoted to a consideration of the rule largely in a civil law context although the rule has clear application in the criminal and also the administrative law context.

The conduct of the trial

Proceedings in the common law courts are adversarial. That means it is for the parties to determine the issues and perhaps more importantly the evidence which each side seeks to adduce and which is asserted to be relevant to one or other issues in the trial. Although the judge is generally constrained by the pleadings and the evidence it is the obligation of the trial judge to ensure a fair trial to all parties concerned. Ultimately by giving judgment they provide certainty to the parties and effectively quell the dispute. That of course is always subject to any appellate rights that may be exercised.

The evidence adduced by either side in litigation is designed to establish the existence or non-existence of some fact in issue to the satisfaction of the court. The degree of satisfaction otherwise known as the standard of

proof in a civil context requires proof on the balance of probabilities. Evidence is a means of proof. This can take the form of statements of witnesses or documents which are presented to a court as a basis for determining the relevant issues of fact. The rules of evidence have been developed over time by Courts in order to ensure as far as can be that a fair trial occurs. The peculiarities of the common law rules of evidence are also attributable not just to the adversarial system but also the institution of the jury.

Professor Sir Jack Jacob described as the “doyen”⁷ of English Proceduralists identified as what he saw to be the most fundamental principles underlying English civil procedure as follows:

- 1 *The principle of party autonomy*: subject to overall regulation by the Court, the parties and their lawyers retain the main initiative and control over the determination of issues; the collection, selection and questioning of witnesses; and presentation of the suit (including negotiated settlement without approval or direction of the court). This principle is treated by most commentators as the main basis for distinguishing between ‘adversarial’ and ‘inquisitorial’ proceedings.
- 2 *The Court as umpire*: the role of the Court is ‘inactive, passive, remote, neutral, independent’. This is the converse aspect of the active role granted to parties and their lawyers by the first principle.
- 3 *The principle of specialisation of functions*, with quite sharp divisions of functions between decisions on questions of law, questions of fact and questions of disposition (e.g. sentencing); and between the role of different participants at pre-trial, trial and appeal; and, in England, between the role of solicitors and barristers. One important example of such distinctions is that, in jury trials, questions of law and procedure are for the judge, but the final determination of questions of fact is for the jury. Determinations of fact are only exceptionally subject to review or appeal.
- 4 *The principle of orality*, especially in respect of argument and of the cross-examination of witnesses in open court. It is sometimes claimed that the ‘dialectical immediacy’ of oral

⁷ William Twining, *Rethinking Evidence; exploratory essays* (Basil Blackwell, 1990) 183

presentation and confrontation is the best means of arriving at rectitude of decision on questions of fact and law. It is important to keep the idea of dialectical exchange conceptually distinct from that of adversarial autonomy- although, in practice, the two are often combined.

- 5 *The principle of publicity* at the stage of trial and appeal. Bentham wrote: 'Without publicity all other checks are insufficient: in comparison of publicity all other checks are of small account.' Trials held 'in camera' and restrictions on reporting of court proceedings are considered to be deviations from this principle and require justification. Sometimes such restrictions become a matter of political controversy. On the other hand, pre-trial proceedings, both in civil and criminal litigation, generally fall outside this principle. For example, civil pre-trial applications are held in private ('in chambers') and the arcane nature of pre-trial proceedings is a major point of concern about the fairness of our system of criminal justice. One reason why many disputants prefer 'alternative' methods of dispute-resolution such as arbitration, mediation and settlement out of court is that these are less public than judicial trials.
- 6 *The principle that adjudicative decisions should be based on the issues, the evidence and the arguments presented 'in open court'*, rather than on a judgment of the whole person or on personal general knowledge or on knowledge of particular matters relating to this case obtained outside the courtroom.
- 7 *The principle of procedural fairness*: this elusive idea, embodied in such notions as 'due process of law', 'the rules of natural justice' and 'procedural rights,' has been the subject of much theoretical concern and has been a source of recurrent controversy, especially where considerations of fairness have been thought to conflict with 'rectitude of decision' or with efficiency in implementation of the law.

These principles form the theoretical cornerstone of civil procedure in the English Court system. They have been adopted and adapted elsewhere. None of the principles is absolute; much doubt and controversy have surrounded the weight and extent that should be given to each of them and how far they are in fact respected in practice in different kinds of

proceedings. Similar principles in simpler form characterise proceedings before administrative tribunals. The same basic principles govern criminal proceedings. In the criminal context different concerns arise, namely the principle of the protection of the accused against mistaken conviction, and the protection of the suspect from illegal, unfair or improper treatment.

The central purpose of adjudication is “rectitude of decision”, that is the correct application of substantive law to facts proved to be true on the basis of relevant evidence presented to the tribunal. The pursuit of the truth, however, as a means to justice under the law is to be pursued by rational means.

The ultimate rationale for the maintenance of any technical rules of evidence can only be justified upon the basis of ensuring a fair trial. The Federal Court of Australia has attempted recently to identify the necessary elements of a fair trial in *Sullivan & Ors v Trilogy Funds Management Ltd*,⁸ at [264]:

Elements of a fair trial

The following basic principles are relevant to this appeal:

1. *A trial that departs from the pleadings is not necessarily an unfair trial. It is necessary to consider what issues were fairly fought between the parties at the trial: Gould v Mount Oxide Mines Ltd (in liq) [1916] HCA 81; 22 CLR 490 at 517 (Gould v Mount Oxide Mines); Vale v Sutherland [2009] HCA 26; 237 CLR 638 at [41] (Vale v Sutherland); Banque Commerciale SA (en liquidation) v Akhil Pty Ltd v New South Wales [2010] FCAFC 133; 189 FCR 356 at [51] (Betfair v NSW); NRM Corporation Pty Ltd v Australian Competition and Consumer Commission [2016] FCAFC 98 at [26] (NRM Corporation v ACCC)*
2. *Generally, a party has a broad (but not unfettered) right to cross-examine a witness, including on un-pleaded matters: Evidence Act 1995 (Cth) s 27; Moore v Wilson [2006] FCA 79 at [76]; Australian Securities and Investments Commission v Rich [2009] NSWSC 1229; (2010) 75 ACSR 1 at [183]–[194] (ASIC v Rich); cf GPI Leisure Corporation Ltd v Herdsman Investments Pty Ltd (No 3) (1990) 20 NSWLR 15 at 22.*
3. *A party who is exposed to a potential finding of impropriety is generally given an opportunity to explain why that conduct was not dishonest or improper. It is a rule of professional practice that, unless notice has already clearly been given of the cross-*

⁸ [2017] FCAFC 153

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 *Browne v Dunn* (1893) 6 R 67; Heydon JD, *Cross on Evidence* (10th ed, LexisNexis Butterworths Australia, 2015) pp 605–606.

4. *The cross-examiner is not obliged to give notice of lines of questioning or documents proposed to be put in cross-examination unless ordered to do so: ASIC v Rich at [185]–[194].*
5. *Ambush usually involves deliberate concealment: ASIC v Rich at [192]. Ambush is discouraged for reasons of efficiency and not necessarily because it is unfair, although it may cause procedural unfairness: cf. White v Overland [2001] FCA 1333 at [4]; Nowlan v Marson Transport Pty Ltd [2001] NSWCA 346; 53 NSWLR 116 at [21]–[32]; Glover v Australian Ultra Concrete Floors Pty Ltd [2003] NSWCA 80 at [59]–[60];*
6. *As a general rule, litigants are bound by the conduct of their counsel: Crampton v R [2000] HCA 60; 206 CLR 161 at [18] per Gleeson CJ; Rondel v Worsley [1969] 1 AC 191 at 241; [1967] 3 All ER 993 at 1007 per Lord Morris of Borth-y-Gest; R v Birks (1990) 19 NSWLR 677 at 683–4. It is the role of counsel of raise objections to avoid an unfair trial.*
7. *There must be exceptional circumstances to allow an appeal based on the tender of evidence to which no objection was taken by counsel at trial: cf Patel v R [2012] HCA 29; 247 CLR 531 at [114] per French CJ, Hayne, Kiefel and Bell JJ. Where it can be seen that a failure to object was a rational, tactical decision, the Court is entitled to conclude that no unfairness attended the judicial process: Suresh v R [1998] HCA 23; 102 A Crim R 18 at [13], [22]–[23], [55]–[56]; Ali v R [2005] HCA 879; ALJR 662 at [7], [98]–[99]; Tully v R [2006] HCA 56; 230 CLR 234 at [149]; Nudd v R [2006] HCA 9; 80 ALJR 614 at [9].*

In Gould v Mount Oxide Mines at 517, Isaacs and Rich JJ set out the following basic principle concerning fairness in the conduct of a trial:

Undoubtedly, as a general rule of fair play, and one resting on the fundamental principle that no man ought to be put to loss without having a proper opportunity of meeting the case against him, pleadings should state with sufficient clearness the case of the party whose averments they are. That is their function. Their function is discharged when the case is presented with reasonable clearness. Any want of clearness can be cured by amendment or particulars. But pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is

impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.

Similarly, in Vale v Sutherland at [41], the High Court adopted the following statement by Dawson J in Banque Commerciale SA. Dawson J noted:

But modern pleadings have never imposed so rigid a framework that if evidence which raises fresh issues is admitted without objection at trial, the case is to be decided upon a basis which does not embrace the real controversy between the parties. ... cases are determined on the evidence, not the pleadings.

In Betfair v NSW at [51], a Full Court comprising Keane CJ, Lander and Buchanan JJ said:

At trial a party is entitled to have the opposing party confined to that party's pleadings because the first party is entitled to come to trial to meet only the issues raised on the pleadings. However, if the first party does not seek to so confine the opposing party but allows the other party to raise other material facts and issues for the determination of the Court, then in our opinion the Court is permitted and possibly obliged to decide the proceeding on the further material facts and issues raised and addressed at trial: Banque Commerciale at 296–297; Gould v Mount Oxide Mines Ltd (in liq) (1916) 22 CLR 490 at 517. If it were otherwise, the party who has failed to plead all of the material facts or issues upon which the party's case relies, but has brought those material facts or issues to the attention of his or her opponent at trial, would be denied natural justice if at the end of the trial the Court decided the proceeding on the pleadings without notice to that party. The first party in those circumstances would have been denied the opportunity to apply to amend those pleadings so as to formalise what was in fact addressed at the trial.

The decision in Browne v Dunn

No doubt because that decision is to be found only in an obscure series of law reports (called simply The Reports and published briefly between 1893 and 1895), reliance upon the rules said to be enshrined in that decision seems often to be attended more with ignorance than with understanding. The appeal was from a defamation action brought against a solicitor and based upon a document which the defendant had drawn whereby he was to be retained by a number of local residents to have the plaintiff bound over to keep the peace because of a serious annoyance which it was alleged he had caused to those residents. Six of the nine signatories to the document gave evidence on behalf of the defendant that they had genuinely retained him as their solicitor and that the document was really intended to be what it appeared on its face to be. No

suggestion was made to any of these witnesses in cross-examination that this was not the case and, so far as the conduct of the defendant's case was concerned, the genuineness of the document appeared to have been accepted. However, the defence of qualified privilege relied upon by the defendant depended in part upon whether the retainer was in truth genuine or whether it was a sham, drawn up without any honest or legitimate object but rather for the purpose of annoyance and injury to the plaintiff. This issue was left to the jury. The plaintiff submitted to the jury that the retainer was not genuine and was successful in obtaining a verdict in his favour. In support of that submission, the plaintiff asked the jury to disbelieve the evidence of the six signatories who had said that the retainer was a genuine one.

Lord Herschell LC said (at pp 70, 71): “Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. 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 a case, but is essential to fair play and fair dealing with witnesses.”

His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is perfectly clear that the witness has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. His speech continued (at p 71): “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.”

Lord Halsbury said (at pp 76, 77): “My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial

should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.”

Lord Morris (at pp 78, 79) said that he entirely concurred with the two speeches which preceded his, although he wished (at p 79) to guard himself with respect to laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. The fourth member of the House, Lord Bowen, is reported (at pp 79, 80) to have said that, on the evidence of the six signatories, it was impossible to deny that there had been a real and genuine employment of the defendant. But his Lordship made no statement of general principle.

These statements by the House of Lords led to the formulation of a number of so-called rules. They have been stated in various ways in the cases and by text-book writers, and it is fair to say that there is some room for debate as to their correct formulation.⁹

Over the years exceptions have been identified.

So what?

The consequences of a failure to adhere to the rule depend upon the issues, the number of witnesses that might have given evidence relevant to those issues, and clearly the context in which those issues arise. More severe consequences may be expected to follow a relevant transgression in a criminal context than might in an administrative context. In the latter as I have already observed, there are many statutory provisions governing administrative hearings which remove the need to apply the rules of evidence strictly or at all. In a criminal context a great deal is at stake, particularly the liberty of the accused, and it is understandable in some cases strict adherence to the rule has been expected and applied.

In a civil context, again implications may vary depending upon whether the proceeding is before a judge alone or judge and jury.

⁹ *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* (1983) 44 ALR 607, 623-625

As explained in the eleventh Australian edition of *Cross on Evidence*, various consequences may flow from non-compliance with the rule. The learned author sets out some as follows:¹⁰

1. If a 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.
2. 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, particular if it is un-contradicted by other evidence.
3. The trial judge may accede to an application by counsel for the party who called the witness who was not questioned in conformity with the rule to call evidence in rebuttal or to have the witness recalled for further cross-examination.
4. A failure to comply with the rule may cause the party in default to become disentitled from relying on evidence against the witness.
5. It is possible that the jury may be discharged, or a curative direction given.
6. The court may be inclined to disregard a submission which was not tested by putting it to the person best able to deal with it.
7. If a party in breach of the rule calls evidence inconsistent with that of the witness who was not cross-examined, it may be open to infer that the inconsistent evidence was not in accordance with instructions given to counsel about how the cross-examination should proceed and should be disbelieved as a recent invention.

The law in England

The English textbooks

By the early 20th century most text books in England at least had adopted the rule by merely quoting Lord Herschell's famous passage.¹¹ The eighth edition of Powell's *Principles and Practice* (1904) merely quoted Lord Herschell. By 1910, although the quotation remained, in the ninth edition, it was described as "the general rule as to impeaching the veracity of ones opponent's witnesses". The tenth edition in 1921 was to the same effect. In *Cockle Leading Cases and Statutes on the Law of Evidence* (1911, 2nd Ed), again Lord Herschell's statement was quoted and portions emboldened, but also a portion of Halsbury's statement was quoted.

¹⁰ JD Heydon, *Cross on Evidence* (Lexis Nexis Butterworths, 11th ed, 2017) [1742]

¹¹ See for example; *Powell's Principles and Practice of the Law of Evidence* (8th ed 1904); (9th ed 1910); (10th ed 1921)

In the third edition of *Phipson on the Law of Evidence* (1902) the discussion on *Browne v Dunn* took place under a heading “Omission to cross-examine; effect”. Phipson’s discussion was much more elaborate because it picked up some case law and commentary of other persons such as Odgers in his fourth edition on pleadings. This edition of the work described the obligation as applying “as a rule”. It also made the statement that if no question was asked it would be taken that the witnesses account was accepted. The text went on to state that failure to cross-examine will “not always amount to an acceptance of the witnesses’ testimony”. For example if the witness had had previous notice to the contrary beforehand or the story “is itself of an incredible character” or “the abstention arises from motives of delicacy, as with young children called as witnesses for their parents in divorce cases. And where several witnesses are called to the same point it is not always necessary to cross-examine them all”. In succeeding editions of *Phipson*,¹² statements to the same effect were made. By the sixth edition of *Phipson* (1921) some authorities were referred to in Ireland which had departed from the notion developed in England that failure to challenge would lead to acceptance of the testimony. Further editions of *Phipson*,¹³ had statements again substantially similar to those in previous editions. However in the twelfth edition (1976) some additional authorities were referred to, and in particular *R v Bircham*, where Defence Counsel was stopped in his closing speech when he suggested that a co-defendant and a prosecution witness were the real perpetrators not his client. The judge’s decision was upheld on appeal. Later editions again of *Phipson* (17th ed) made explicit that the rule applied in both civil and criminal contexts.

The English cases

The first thing to observe is that the terminology used by their Lordships in *Browne v Dunn* itself varies ever so slightly but not in unimportant respects. Lord Herschell thought that it was “absolutely essential” to the proper conduct of the case to put the assertion of untruthfulness directly in cross-examination. He qualified that clearly by stating that the absolute nature of the obligation arose unless it had otherwise been made perfectly clear that there was an intention to impeach the credibility of the story. Lord Halsbury expressed his hearty concurrence with what Lord Herschell had said. But again made it clear that credibility alone is not the issue but the challenge should also appropriately be put if the factual account asserted by the witness is said to be inaccurate. Lord Morris on the other hand did not wish to talk in absolute terms and did not wish to

¹² 4th ed 1907; 5th ed 1911

¹³ See for example; 7th ed, 1930 and 9th ed, 1952

be seen as laying hard and fast rules with regards to cross-examination in the context of impeaching a witness's credit. He confined his speech to the facts of the particular case. Lord Bowen of course made no comment at all.

For whatever reason, at least at the appellate level, there is a dearth of material in the English cases on the question. But when one examines the position over a number of recent decades one can detect a more liberal attitude being adopted to the failure to cross-examine. Partly that is due to the absence of juries as I have already mentioned, but it is also due to the common practice of providing written materials by way of statements or affidavits filed well in advance of a trial in which, for example, it becomes reasonably obvious if and when disputed factual issues about which witnesses can give admissible evidence is or is not in dispute.

Clearly in some cases, factual disputes will not necessarily give rise to issues of credit. A person simply may have an erroneous recollection of events and readily concede that in cross-examination. In a case of a contract for example, which turns upon oral representations, or perhaps in a case where rectification of a contract is sought, credit issues are more likely to arise. That is particularly so because of the self-interest aspect of the litigation. Each party to the contest has a particular interest and therefore motive in persuading a court that his or her version of a contractual term, or the subjective intention of a contracting party, ought to be accepted. The difficulty for trial judges in England and elsewhere, however, is in determining when the so called rule should have application and when it should not. Many counsels, certainly in the jurisdiction where I preside, attempt as it were, to come to some accommodation with each other in the running of the trial. It is not uncommon for counsel to announce that they have reached an agreement between each other that neither will take the point against the other, by reason of the fact that there has been no cross-examination on some factual contention in issue between the parties. In some instances that agreement can be acknowledged by the court without any further ado.

But there are contexts in which an agreement of that sort cannot be accepted by the Court. The obvious and prime example is the case of relevant and disputed conversations, especially if neither side has any documentary or other relevant corroboration for the conversations. There it may be a simple matter of credit versus credit. In that event, a judge who is entitled to believe or disbelieve one version or the other may need to base part of his or her findings or evaluation of the evidence on what may be described as demeanour. Although this is a crude tool, in the

absence of objectively verifiable contemporaneous materials corroborating the competing versions, it may be all a judge has available in order to separate the competing versions. Clearly a case which turns entirely upon a written agreement which can otherwise not be gainsaid will usually be determined purely as a given fact, or if it be a contract, an objective test employed for the construction of the document. Oral testimony is very often relevant not just to the main issues, but to issues which are peripheral but not unimportant in terms of the ultimate factual context in which the Court needs to resolve issues in dispute. Disputes as to the timing of events can often be important as a prelude to the Court being able to draw reasonable inferences so as to make ultimate findings of facts.

The cases I have selected from the English vantage point do disclose over time a more flexible approach being taken to *Browne v Dunn*. As I have said, there are many good reasons why this is so.

Given the rather strict adherence to the words particularly those of Lord Herschell used in the early textbook, although it is difficult to find any reported cases, it is a little hard to imagine that anything other than a fairly strict view would have been taken, acknowledging however that the outcome was case specific.

*Kapgold Limited & Anor v Colonia Insurance Company (UK) Limited*¹⁴ was a case involving a fire at a property in Hackney. Stock belonging to two companies was destroyed or damaged and inevitably a claim was made on the insurer. The Court had no difficulty finding that the fire at the premises was undoubtedly caused by arson, but the police were unable to bring any charges against anyone. Although the defendant insurers did not suggest that the company nor its director were implicated in the arson, it was nonetheless suggested that they knew that certain documentation purporting to support the claim for the damaged stock was false. The trial judge had found for the insurer. The important point that arose on appeal was whether the knowledge of falsity or fraud had clearly enough been put to the plaintiff. It was accepted that the plaintiff's principal witness did not have full command of the English language. It was put here on appeal, that the claim for damaged stock was too high and that the principal plaintiff's witness knew or must have known that the figures were false. Unsurprisingly it was argued on appeal, that the pleading in and of itself was sufficient to raise the question of falsity and hence fraud. Lord Justice Lloyd said:¹⁵

¹⁴ [1990] Court of Appeal Civil Division- Lloyd, Stocker, Waller

¹⁵ Pg 4

Of course Counsel does not have to say in so many words, that a witness is lying. But he must make it clear to the witness where he does not accept the truth of that he has said and in what respect. When the charge is fraud he must bring home to the witness, the dishonest knowledge (or recklessness) on which he relies to make good his case.

Lord Justice Stocker said:¹⁶

...these matters should have been put to Mr Atilla in detail, so he could deal with the essential allegation that he knew of them and of the consequent falsity of the February management accounts.

The third member of the Court, Sir George Waller, agreed.¹⁷

In the result the Court set aside the findings of the trial judge in favour of the defendant insurer and dismissed a cross-claim by the plaintiffs on damages. The judgment on an adjusted basis given certain other considerations was entered by way of judgment for the plaintiff.

Fast-forward to 2005. One of the most important cases in this year was determined by the Court of Appeal in *Markem Corp v Zipher Ltd*¹⁸. This was a patent case, complicated essentially by reason of the fact that certain employees, once employed by one company, had left to go to another, and there was a question of what if any contribution various employees had made. The claimants asserted that certain inventions had been devised during a period when employees now working for the defendant had been employed by the one of the claimants. In his judgment the trial judge had made a number of adverse findings against the defendant's witnesses and one witness in particular.

Lord Justice Jacob wrote the judgment. An important factual inquiry was precisely which employee at which point in time made what contribution to which patent. Interestingly enough it would appear from the report that the *Browne v Dunn* point was not originally part of the appeal process, although perhaps in substance it was. The Court in fact drew the parties' attention to it. And then:

Zipher say it was not open for the judge to make such findings. In their skeleton argument they relied upon art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and English v Emery Reimbold & Strick

¹⁶ At pg 11

¹⁷ At pg 11

¹⁸ [2005] EWCA Civ 267

Ltd [2002] EWCA Civ 605, [2002] 3 All ER 385. The argument was that the judge had not given adequate reasons for his adverse findings. But there is a second ground which we consider first, namely that procedural fairness not only to the parties but to the witnesses requires that if their evidence were to be disbelieved they must be given a fair opportunity to deal with the allegation.

*Prior to the hearing before us we drew the attention of the parties to the decisions of the House of Lords in *Browne v Dunn* (1893) 6 R 67 and the Australian case of *Allied Pastoral Holdings Pty Ltd v Federal Commr of Taxation* [1983] 1 NSWLR 1. One member of the court was aware that Australian practitioners were very alive to the rule in *Browne v Dunn* (so also, he has ascertained, are Canadian practitioners). The case reference and the *Allied Pastoral Holdings* decision were supplied to him through the helpfulness of Justice Heerey of the Australian Federal Court.*

*Browne v Dunne is only reported in a very obscure set of reports. Probably for that reason it is not as well known to practitioners here as it should be although it is cited in *Halsbury's Laws of England* para 1024 for the following proposition:*

'Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.'

Their Lordships then quoted at great length from the judgment of Justice Hunt in the NSW decision of *Allied Pastoral*.

At [61]: their Lordships said

*We think all that applies here. It is not necessary to explore the limits of the rule in *Browne v Dunn* for this case falls squarely within it. Indeed the position is stronger here, for the judge was not even asked to disbelieve the witnesses. Mr Watson was right not to support the judge's findings—the only puzzle is why he did not take that position earlier.*

This case is important because it determined that procedural fairness, not only to the parties but to the witnesses, required that if their evidence was to be disbelieved they be given a fair opportunity to deal with the allegation. The claimants therefore failed in a number of their claims by reason of the trial judge having made adverse determinations about a number of witnesses without the precise allegations of their respective involvement in the inventions having been put to them. The claimants eventually failed for other reasons as well, but certainly by reason of this defect in the running of the case.

But a trial judge who does not, for example, find a witness untruthful but simply unreliable because of lack of detail in their account will have his or her findings upheld even though Counsel did not robustly cross-examine the witness as to the witness's truthfulness. This was the outcome in *Favor Easy Management Ltd & Anor v Wu & Anor*.¹⁹ The case turned upon who between numerous persons had the beneficial ownership of a number of disputed assets. In short in this case, it was submitted that because a principal witness's evidence was in effect untested, the trial judge should have accepted the evidence on the principle issue of possession or ownership of relevant assets. However, upon analysis of conduct of the trial, Lord Justice McCombe thought although intent cross-examination of the relevant witness was required, in the end the trial judge did not dismiss the relevant witnesses evidence on the basis that she was lying, but rather that her evidence was lacking in detail and hence unreliable. That was in contrast to other witnesses, when balanced the judge accepted as more reliable on the relevant issue of ownership.

*In re W (a child) (Care Proceedings; Non Party Appeal)*²⁰ involved a local authority which had brought care proceedings in respect of children on the basis of allegations that they had been sexually abused by family members. The judge made certain findings and in doing so criticised the actions of the authority, a social worker and a police officer, effectively accusing the latter two of a conspiracy to obtain evidence to prove allegations irrespective of any underlying truth in them. This was rather unusual because although there was no appeal against the judge's determination dismissing the sexual abuse allegation, two witnesses neither of whom had been formal parties to the proceeding, together with the local authority, appealed against the judge's adverse, what was submitted were extraneous, findings against them. The Court of Appeal determined that they relevantly had standing as interveners for reasons not relevant to the current discussion, but advanced their appeal rights. After discussing *Browne v Dunn*, and in particular the Court of Appeal's decision in *Markem*, Lord Justice McFarlane, said:²¹

The statement of the law in Browne v Dunn must however be read alongside the authoritative description of the role of a judge given by Lawton LJ in Maxwell v Department of Trade and Industry [1974] QB 523, 541:

“The researches of counsel have not produced any other case which has suggested that at the end of an inquiry those likely to be criticised

¹⁹ [2012] EWCA Civ 1464

²⁰ [2016] EWCA Civ 1140

²¹ [90]-[91], [93], [95]

in a report should be given an opportunity of refuting the tentative conclusions of whoever is making it. Those who conduct inquiries have to base their decisions, findings, conclusions or opinions (whichever is the appropriate word to describe what they have a duty to do) on the evidence. In my judgment they are no more bound to tell a witness likely to be criticised in their report what they have in mind to say about him than has a judge sitting alone who has to decide which of two conflicting witnesses is telling the truth. The judge must ensure that the witness whose credibility is suspected has a fair opportunity of correcting or contradicting the substance of what other witnesses have said or are expected to say which is in conflict with his testimony. Inspectors should do the same but I can see no reason why they should do any more.”

During the detailed submissions made on behalf of PO by Mr Brandon and of SW by Mr Samuel, we were taken to the transcript of the oral evidence which demonstrated beyond doubt that the matters found by the judge were not current, even obliquely, within the hearing or wider process in any manner. None of the key findings that the judge went on to make were put by any of the parties, or the judge, to any of the witnesses and there is a very substantial gap between the cross examination, together with the parties' pleaded lists of findings sought, and the criticisms made by the judge. In this respect this is not a matter that is finely balanced; the ground for the criticisms that the judge came to make of SW, PO and the local authority, was simply not covered at all during the hearing.

...

It can properly be said that by keeping these matters to himself during the four-week hearing, and failing to arrange for the witnesses to have any opportunity to know of the critical points and to offer any answer to them, the judge was conducting a process that was intrinsically unfair.

...

Where, during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following: (a) ensuring that the case in support of such adverse findings is adequately “put” to the relevant witness(es), if necessary by recalling them to give further evidence; (b) prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material; (c) investigating the need for, and if there is a need the provision of, adequate legal advice, support in court and/or representation for the witness.

Because of the very nature of the proceeding being in part alleged breaches of the Human Rights Act 1998, the question of remedy posed

some exquisite complexity in and of itself. Ultimately, all references to the matters that were found by the judge against the witnesses were redacted from the judgment, as if the findings or potential findings, had never been made in any form by the judge. This was done so as not to affect his overall ruling rejecting allegations of sexual abuse.

In a solicitors' disciplinary matter in *Williams v Solicitors Regulation Authority*²² (in the Administrative Court), Justice Carr with whom Sir Brian Leveson agreed:²³

*As for the need for cross-examination, the need to put allegations fairly and squarely in cross-examination is based on what is said to be the rule in **Browne v Dunne** (supra) (and **Allied Pastoral Holdings v Federal Commissioner of Taxation** [1983] 44 ALR 607), considered and applied in **Markem Corp v Zipher Ltd** [2005] EWCA Civ 267; [2005] RPC 31. Allegations need to be put to ensure “fair play and fair dealing with witnesses” (at [59]). A witness must be cross-examined on those parts of his evidence said to be untrue.*

The rule is not an absolute or inflexible one: it is always a question of fact and degree in the circumstances of the case so as to achieve fairness between the parties. Civil litigation procedures have of course moved on considerably since the 19th Century. Witnesses now have the full opportunity to give their evidence by way of written statement served in advance, and then verified on oath in the witness box.

*What matters is the giving of notice to a witness of the allegation in question, and the proper opportunity for the witness to respond. Thus in **Markem** (supra), the Court of Appeal adopted (at [60]) the following statement from **Browne v Dunn** (supra):*

*“... unless notice had already been given 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 ...” (per Hunt J, in **Allied Pastoral Holdings** (supra)).*

*Equally, Lord Herschell LC stated (in **Browne v Dunn** (supra)) that there was:*

“... no obligation to raise a matter in cross-examination in circumstances where it is perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.”

What he was saying was 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

²² [2017] EWHC 1478 (Admin)

²³ At [72]-[76]

reason of there having been no suggestion whatsoever in the course of the case that his story is not accepted.”

*As was stated in **Seven Individuals v HMRC [2017] UKUT 132 (TCC); [2017] STC 874** (at [114]), the rule should not be applied in an over-technical way. Provided that a witness is on notice that his account is being challenged as untruthful in the relevant respect, there is no requirement mechanistically to challenge each and every statement of fact (see **Hussain v Mukhtar [2016] EWHC 424 (QB)** at [45]). In **Seven Individuals** (supra), Nugee J went on to say this:*

“So long as it is clear from the thrust of the cross-examination (or from notice given beforehand) that a witness' evidence will be challenged, I do not see that it is necessary to continue exploring a point in detail when the witness has already had an opportunity to state his case.”

On the facts of that case, Nugee J held that further cross-examination would have been an “empty technicality”(again at [114]).

In an important case in the Privy Council in *Chen v Ng*,²⁴ which was an appeal from the British Virgin Islands, Lords Neuberger, Mance, Clarke, Sumption and Hodge (with Lord Neuberger and Lord Mance writing the judgment), made some important statements about the application of the rule. Again this was a case about a dispute over the ownership of certain shares in a British Virgin Island company:²⁵ ([52]-[57])

In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.

*Mr Parker relies on a general rule, namely 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', as Lord Herschell LC put it in *Browne v Dunn* (1893) 6 R 67 at 71. In other words, where it is not made clear during (or before) a trial that the evidence, or a*

²⁴ [2017] UKPC 27

²⁵ [52]-[57]

significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment. A relatively recent example of the application of this rule by the English Court of Appeal can be found in Markem Corp v Zipher Ltd [2005] EWCA Civ 267 , [2006] IP & T 102 .

The judge's rejection of Mr Ng's evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng's evidence as to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen. Indeed, Mr Ng was cross-examined on the basis that he was not telling the truth about this issue. The challenge is therefore more nuanced than if it was based on the general rule: it is based on an objection to the grounds for rejecting Mr Ng's evidence, rather than an objection to the rejection itself. It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.

At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds.

It is also worth an appellate court having in mind in this context what was said by Lord Hoffmann in Piglowska v Piglowski [1999] 3 All ER 632 at 643:

'If I may quote what I said in [Biogen Inc v Medeva plc [1998] 1 LRC 21 at 39]:

“ ... [S]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact

expression, but which may play an important part in the judge's overall evaluation."

... The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed.'

In the instant case, the Board is of the view that it would not be fair to let the rejection of Mr Ng's evidence stand, given that the two grounds upon which the judge reached his decision were not put to Mr Ng. The ultimate factual dispute between the parties in the litigation was the basis upon which, and circumstances in which, the Transfer of the Shares took place, and therefore the issue on which Mr Ng was disbelieved was central to the proceedings.

Clearly where motive is a central if not critical issue, factually the basis for that must obviously be expressly tested. Lord Justice Newey thought so in *Travel Document Service & Ladbroke Group International v Commisioners for Her Majesty's Revenue & Customs*,²⁶ (Lady Justice Arden and Lord Justice Breen agreed) where he said:²⁷

The principle that a witness's evidence should be challenged in cross-examination if the Court is to be asked to disbelieve him is plainly very important. In cases in which HMRC wish to contend that a company had a tax avoidance motivation in the face of evidence along the lines of that given by Mr Turner, it will always be wise, and must commonly be vital, to raise the issue in terms with the witness. It would, I think, have been better if the parts of Mr Turner's witness statement that I have quoted had been the subject of specific cross-examination.

However in *Edward Lifesciences LLC & Ors v Boston Scientific Scimed Inc*,²⁸ another a patent case, importantly observed:²⁹

*As made clear by cases from **Browne v Dunn (1894) 6 R. 67 HL** to **Markem v Zipher [2005] EWCA Civ 267; [2005] R.P.C. 31**, the rule is an important one. However, it is not an inflexible one. Procedural rules such as this are the servants of justice and not the other way round.*

I would start by accepting two of the points on which Mr Meade relies. In a case where it is proposed to save time by not cross-examining two witnesses in relation to the same or similar subject matter, it is good practice for the matter to be raised with the judge beforehand so that he can give directions in the light of the parties' submissions. The judge should in general give directions so as to ensure fairness to the parties without incurring unnecessary costs by extending the length of the trial. However, the fact that

²⁶ [2018] EWCA Civ 549

²⁷ [44]

²⁸ [2018] EWCA Civ 673

²⁹ [63]-[68]

such a direction is not sought or given does not automatically require the judge to accept an unchallenged reason given by one expert.

*Secondly I would agree, as a general matter, that the rule requiring important positive evidence to be challenged is a rule which is not simply for the benefit of the witness (whose honesty or professional reliability is challenged) but is also designed to ensure the overall fairness of the proceedings for the parties. In **Markem Jacob LJ**, giving the judgment of the Court of Appeal, with which **Mummery and Kennedy LJ** agreed, put it this way at [56]:*

*“... procedural fairness **not only to the parties but to the witnesses** requires that if their evidence were to be disbelieved they must be given a fair opportunity to deal with the allegation.”
(emphasis supplied).*

The rule applies with particular force where a witness gives direct evidence of a fact of which he has knowledge and which it is proposed to invite the court to disbelieve. Fairness to the witness and to the parties demands that the witness should be challenged on his factual evidence so as to give him the opportunity of affirming or commenting on the challenge, or on a positive matter which it is proposed to set against his evidence.

Not every situation however calls for a rigid application of the rule. At least part of the unfairness which the rule is intended to address is the lack of any opportunity for a witness to respond to a challenge to his evidence. In the present case there was more than one round of expert evidence. Boston put in three rounds, so each expert had more than ample opportunity to comment on the views of the other. The battle lines between the experts were clearly drawn in the pre-trial exchange of reports. The potential for unfairness to the witness in such circumstances is much reduced.

*Even in the case of evidence of fact, it is no longer the law that every aspect of a witness' evidence needs to be challenged head-on. Foskett J expressed this in terms with which I agree in **Various Claimants v Giambrone & Young [2015] EWHC 1946** at [21].:*

“I do not accept that merely because the suggestion that what he said in his witness statement was untrue (or simply misguided) was not put specifically to him (a proposition that inevitably he would deny) means that I am bound to accept his position. It is, of course, important to be fair to a witness, particularly if serious imputations as to the witness' honesty and integrity are being made, and there may be other areas of a witness' evidence that need to be challenged head-on, but the days of the “I put it to you” cross-examination on other matters have long since gone.”

Here for various reasons the court did not believe the judge's decision was rendered in anyway unsafe by the failure to cross-examine.

Lastly in *B (a child)*,³⁰ Lord Justice Peter Jackson in reviewing all the authority and relying in particular upon *Chen* said:³¹

In Chen, the process had been unfair because the two grounds given by the judge for disbelieving a party had not been put to him in evidence. *Re W* was a very different situation where completely unheralded findings were made against professional witnesses. Those findings were described by Mr Geekie, who also appeared in that case, as being outside the four corners of the case.

*In assessing fairness, what is important is substance not form. The question of whether an adverse case has been sufficiently put to a witness is likely to be informed by the five factors set out in Chen at [55]. It is case-specific and rooted in the real world of litigation in which overall fairness can be achieved in a range of ways. In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point; if a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting the evidence should be rejected: see Phipson on Evidence 19th ed. 12.12. However, the rule is not an absolute one, and there will be cases in which it will be pointless to put formal challenges to a witness who knows perfectly well that his or her evidence is disputed, and where the challenge could in reality go no further than “I put it to you that you are lying”. As my lord, Lord Justice Newey, put it in *Howlett v Davies* [2017] EWCA Civ 1696 at [39]:*

“... where a witness' honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words “dishonest” or “lying” will give a witness fair warning. That will be a matter for the trial judge to decide. ...”

The law in Canada

The Canadian textbooks

A selection of textbooks again makes it abundantly plain that the relevant rule has always had status in Canada. In the 1974 edition of the *Law of Evidence in Civil Cases* by Sir Pinkar & Anor, there is a discussion about the rule in somewhat detached terms, indicating merely that it appears that such a rule exists. *Glasbeek, Evidence Cases and Materials* (1977) speaks of the heavy obligation on cross-examiners, by reference to a

³⁰ [2018] EWCA Civ 2127

³¹ [17]-[18]

Supreme Court of Canada decision, which in turn made reference to the rule. The later edition of the *Law of Evidence by Sir Pinkar & Ors* (1992) sets out again the relevant passage of Lord Hershall. *The Law of Evidence* (Paciocco & Anor, 4th ed, 2005) again speaks about the rule in mandatory terms but in a more detailed analysis of the rule, unsurprisingly speaks about the various exceptions. The textbook makes the point, as is obvious, that there is no proscribed consequence and that the particular consequence will be determined by the judge depending on the circumstances of the case. In *Evidence, Principles and Problems* by Dellisel & Ors (8th ed, 2007) the rule is discussed under the heading 'Duty to cross-examine'. Numerous authorities are therein referred to in the Canadian context where both in criminal and civil cases the rule has been applied.

The Canadian cases

The earliest reported case, at least in the Supreme Court, is *Peters v Perras*.³² It is breathtakingly cryptic in its report running for a whole page and a half. The action was on a promissory note which had been obtained by fraud and transferred by the payee to the plaintiff, who sought to recover upon it as a holder in due course for valuable consideration without notice of invalidity. The plaintiff lost at trial, and the Supreme Court of Alberta confirmed the trial judge's ruling. The Supreme Court of Canada gave no reasons beyond simply observing that the trial judge and the Court of Appeal were in error because they had refused to accept the un-contradicted testimony of the plaintiff as to the particular facts, and in particular that he had not been given any notice of an allegation of bad faith and therefore was given no opportunity to explain or qualify the fact. On that basis, *Browne v Dunn* was applied and the plaintiff succeeded.

The rule has been applied across numerous jurisdictions in Canada, for example in *Thambiah v Maritime Employers Association*,³³ the Federal Court of Appeal applied it to Counsel in submission, and stated:³⁴

In the course of the hearing of this appeal, Counsel for Mr. Thambiah repeatedly and without any shadow of proof, called an MEA witness a liar, and suggested, once again without any proof, that the witness was motivated by racism. This type of pleading is totally unacceptable and deserves to be denounced by this Court. If a witness' integrity is to be challenged, the witness must be given the chance to explain himself: see R v. Giroux, 210 O.A.C.

³² (1909) 42 SCR 361

³³ [2014] FCJ No 347

³⁴ [15]

50, [2006] O.J. No. 1375 (C.A.) (Q.L.) at paragraphs 40-49, applying *Browne v. Dunn*, (1893), 6 R. 67 (H.L.) In this case, there was an opportunity to cross-examine the witness at the tribunal on the testimony which counsel found objectionable, but it was not taken. In those circumstances, it was improper for counsel to make the attacks he did.

A different Federal Court of Appeal in *David v Canada*³⁵ (a tax matter) upheld a trial judge's refusal to permit an argument going to the 'donative intent of the tax payer' since those matters were not sufficiently notified and the tax payer had not prepared the evidentiary materials it might otherwise have prepared.³⁶

It was taken as a given by the Court of Appeal of Ontario in *Yan v Nadarajah*.³⁷ The Court of Appeal of British Columbia,³⁸ on the other hand, excused the failure to cross-examine, suggesting that the rule did not require Counsel to ask contradicting questions about what the court described as 'straight forward matters of fact on which the witness had already given evidence that he or she is very unlikely to change' (at [44]). *Ianarella & Anor v Corbit*,³⁹ taken together with the rule in *Browne v Dunn*, requires the defendant to give prior warning in a personal injuries case that it proposes to use surveillance evidence so as to avoid trial abuse (at [114]). In that case damages awarded were set aside because of the unfairness created at the trial (at [115]).

Again the application or misapplication of the rule must be viewed in context and if a failure to employ the rule leads to an inconsequential result, no special order is required. This was made clear by the Court of Appeal for British Columbia in *Coast Mountain Aviation v AKS Trucking*.⁴⁰

In a very interesting decision of the Court of Appeal of Yukon in *North American Construction (1993) Ltd v Yukon Energy Corporation*,⁴¹ the question before the court was whether in that case the trial judge had erred by invoking the rule in the relevant dispute. The case involved a claim for damages for breach of contract in relation to some construction on a generating station in Yukon. The trial judge had applied the rule of *Browne v Dunn* in a number of evidentiary contexts and in doing so awarded compensation on a particular basis. The Honourable Madame

³⁵ [2015] FCJ No 1237

³⁶ At [39]

³⁷ [2017] OJ No 1187

³⁸ In *R. v. Khuc* 2000 BCCA 20; cited with approval in *Kirton v Mattie* [2014] B.C.J. No. 3163 at [30]

³⁹ 2015 ONCA 110

⁴⁰ [2014] B.C.J. No. 597

⁴¹ [2018] YJ No 37

Justice MacKenzie, who wrote the leading judgment, set out some principles so far as Canadian Courts are concerned.⁴²

The Rule in Browne v. Dunn

The Supreme Court of Canada summarized the rule in Browne v. Dunn in R. v. Lyttle, 2004 SCC 5:

[64] ... The rule in Browne v. Dunn requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. The rationale for the rule was explained by Lord Herschell, at pp. 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 in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.

[65] The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. ...

In R. v. Quansah, 2015 ONCA 237 at para. 77, Justice Watt neatly summarized the fairness considerations animating the confrontation principle:

i. Fairness to the witness whose credibility is attacked:

The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: R. v. Dexter, 2013 ONCA 744, 313 O.A.C. 226, at para. 17; Browne v. Dunn, at pp. 70-71.

ii. Fairness to the party whose witness is impeached:

⁴² [15]-[24]

The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and

iii. Fairness to the trier of fact:

Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

The purpose of the rule in Browne v. Dunn is to protect trial fairness: R. v. Podolski, 2018 BCCA 96 at para. 145.

While often referred to as a "rule", its legal application will depend on the circumstances of the case. As the Court in Quansah observed at para. 89, "the rule in Browne v. Dunn is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss".

The jurisprudence reflects that where trial fairness is unaffected by lack of cross-examination, a cross-examiner's failure to confront a witness will not violate the rule in Browne v. Dunn.

This may be the case where it is clear or apparent, on considering all the circumstances, which may include the pleadings and questions put to the witness in examination for discovery, that the witness or opposite party had clear, ample and effective notice of the cross-examiner's position or theory of the case. Therefore, where the other party, the witness, and the court are not caught by surprise because they are aware of the central issues of the litigation, the rule in Browne v. Dunn is not engaged: see Liedtke-Thompson v. Gignac, 2014 YKCA 2 at paras. 42-43; R. v. Drydgen, 2013 BCCA 253 at para. 18; Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP, 2017 ONCA 544 at para. 317; R. v. Paris(2000), 150 C.C.C. (3d) 162 (Ont. C.A.) at para. 23; R. v. Poole, 2015 BCCA 464 at para. 39.

Where the rule is engaged, a trial judge enjoys broad discretion in determining the appropriate remedy, and "there 'is no fixed consequence' for an infringement of the rule": Poole at paras. 43-44.

In Quansah at para. 117, the Court listed the following factors that may inform the appropriate remedy:

- *the seriousness of the breach;*
- *the context of the breach;*
- *the timing of the objection;*
- *the position of the offending party;*

**any request to permit recall of a witness;*

**the availability of the impugned witness for recall; and*

**the adequacy of an instruction to explain the relevance of failure to cross-examine.*

A trial judge may diminish the weight of the contradictory evidence: Drydgen at para. 26. Other remedies include recalling the witness and, in the jury context, giving a specific instruction to the jury about the failure to comply with the rule as a factor to consider in assessing credibility: Quansah at para. 119.

However, as discussed below, it may be impossible to disregard a reference to Browne v. Dunn when a trial judge has erred in concluding that the rule was engaged and the trial reasons show the judge gave the rule some significance that worked to the appellant's disadvantage: Drydgen at para. 27.

The law in Australia

The Australian Text books

In Australia in the first edition of *Cross on Evidence* (1970) similar sentiments are expressed as in English texts.⁴³ However by the third Australian edition (1986) and particularly as a result of a judgment of the Supreme Court of NSW in *Allied Pastoral*,⁴⁴ a whole section was devoted to the rule and Justice Hunt's judgment. Many of the more recent authorities which either applied and/or qualified the rule were also discussed in some detail. The 11th Australian edition (2017), understandably given its current author,⁴⁵ has a much more enlarged and comprehensive discussion of the rule and its application.

The Australian Cases

In the Australian context, it is a little difficult to know where to start. One early case, that discussed the rule in detail, in the High Court of Australia, is *Craine v Colonial Mutual Fire Insurance Company Limited & Anor*.⁴⁶ The case involved a claim under insurance policies in respect of motor cars which had been destroyed by fire at the plaintiff's premises in 1917. The insurer sought to avoid the claim on the basis that it had not been made in accordance with the policy in terms of the timeframe in which

⁴³ See also the 2nd ed.

⁴⁴ (1983) 44 ALR 607

⁴⁵ The Honourable J D Heydon AC QC

⁴⁶ (1920) 28 CLR 305

notice was to be provided. In the alternative, it alleged that claims were fraudulent. The plaintiffs replied by alleging that any timeframes imposed by the policy had been waived by the defendants and they were thereby estopped from saying they were in breach of that policy. They also denied fraud. The case was heard before a judge and jury. The jury were asked certain questions importantly whether the defendants had represented to the plaintiffs that they did not intend to rely on the time provisions of the policy and secondly, they found that the plaintiffs had suffered loss and fixed a particular sum. The Chief Justice held however, that there was no evidence either of waiver or estoppel, and there couldn't be on the proper construction of the policy, and therefore directed judgment for the defendants. The High Court upheld the plaintiff's appeal, but importantly Justice Isaacs who wrote the judgment in which the other judges agreed, said as follows:⁴⁷

*Having regard to the well-known principles as to the conduct of a party at a trial laid down and acted on in *Browne v. Dunn* (2), in *Nevill v. Fine Art and General Insurance Co Co.* (3) and *Seaton v. Burnand* (4), it must, we think, be taken as against the defendants that they did not really contest, or did not act as if they contested, the two elements of "inducement" and "prejudice," if once the element of "representation" was established, any more than they contested the fact of actual knowledge with reference to waiver. It must be taken, consequently, that they cannot be permitted to raise them now. But we must add that not only was their attitude at the trial on this point a tactically correct and advantageous one, but it was in point of law, having regard to the circumstances, the only possible attitude. A finding by the jury that-supposing the representation made-it was not meant to be acted on, and did not prejudice the plaintiff in face of his submitting to the Company's prolonged possession of his property, could not, in our opinion, be supported. We arrive therefore at this point, that, the only contested element of estoppel having been found against the defendant, the question is whether the evidence was sufficient in law to support the finding of the jury.*

This decision was upheld in the Privy Council.⁴⁸

The case most frequently referred to in recent times at least, and referred to with approval in England, is the judgment of Justice Hunt in *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation*.⁴⁹ That was the case were a factual inquiry before the court involved the determination of a tax payer's dominant purpose in the acquisition of certain property. That in turn determined whether or not any profit made

⁴⁷ At 318-319

⁴⁸ *Yorkshire Insurance Co Ltd v Craine* (1922) 31 CLR 27

⁴⁹ (1983) 44 ALR 607

was taxable or not. The judge with his customary thoroughness reviewed not only the factual material in the case but numerous authorities.

The commissioner of taxation invited the judge to disbelieve certain evidence led by the tax payer as to motive, by reference to the manner in which the tax payer had acquired certain properties over time, the structuring of various corporate entities for that purpose, and commercial considerations which the commissioner asserted were proven on the facts. The tax payer's rebuttal was essentially on the basis that at no time did Counsel for the Commissioner put to any of the tax payer's witnesses, in cross-examination, the so-called strategy or as it was it described in the case 'staged development of various land'. As a result of a detailed consideration of the various cases, His Honour said:⁵⁰

As Browne v Dunn shows, it may be wrong in many cases for a party to suggest that the other party's evidence should not be accepted, if there has been no relevant cross-examination: and, if a tribunal of fact rejects that evidence in those circumstances, the result may be a wrong finding of fact, or, to use other language, an unreasonable: cf Precision Plastics Pty Ltd v Demir, or even a perverse finding of fact. However, even if, in the circumstances, a tribunal ought to accept evidence upon which there has been no cross-examination, its failure to do so is not a mistake of law. A finding of fact based upon a rejection of that evidence will be one which an appellate tribunal having jurisdiction to deal only with errors of law cannot touch." And again (at 427): "... although the failure of the respondent to cross-examine the applicant directly in respect of his readiness and willingness to work could support a submission that the rejection of his evidence, and the failure to draw the appropriate inference was unfair or wrong, no error of law would result, even if the submission was to be accepted. It would not be open to this Court to review the decision."

In my opinion, Poricanin's case provides no support whatever for the Commissioner's argument; on the contrary, it demonstrates that, in order to achieve fairness to witnesses and a fair trial between the parties, it is indeed necessary in cross-examination to give the witness an opportunity to deal with the matters from which an inference can be drawn which contradicts his evidence (although a failure to achieve such fairness does not amount to an error of law).

Diametrically opposed views are held within the profession upon the existence of the rule of professional practice which I formulated at the commencement of this part of my judgment and which I repeat in the next paragraph. That such opposed views are held appears to result from the inaccessibility of the only report of Browne v Dunn itself and from the fact that the relevant application of the rule in that case by the Court of Appeal in Cullen v Ampol Petroleum Ltd, supra, did not lend itself to being reported. So far as I have

⁵⁰ At 633-634

been able to discover, the particular application of that rule in those and in the present circumstances is not the subject of any reported case. That it is not is, in my opinion, a matter of some concern, for it is a situation which is often met in practice, and the view which is now espoused by the Commissioner is productive of grave unfairness.

I remain of the opinion that, unless notice has already clearly been given 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.

*That rule was not complied with in the present case. The consequence of that non-compliance does not, of course, mean that I cannot accept the submission by the Commissioner that, by reason of the inferences available from the evidence as a whole, I should disbelieve the evidence led on behalf of the taxpayer. It is clear from all the cases that it does not mean that. But, as it was said by the Court of Appeal in Poricanin's case, supra, at 426–7, it would in many cases be wrong, unreasonable or even perverse for a tribunal of fact to reject evidence upon which there has been no relevant cross-examination. I am satisfied with the description that it would usually be unfair to do so where the rule in *Browne v Dunn* has not been complied with, and where the witness has not otherwise been given the opportunity to deal with the suggestion now made for the first time in the final address.*

I will refer to only one other Australian case of *Kuhl v Zurich Financial Services Australia Limited*,⁵¹ a decision of the High Court of Australia. This was a personal injuries claim made by a workman who had been seriously injured in the course of his employment where his arm was sucked into a flexible high-pressure vacuum hose. The evidence given as to precisely how the accident had occurred was limited, and the trial judge had indicated he was not satisfied by the workman's evidence and concluded that it was impossible to identify either a breach of any relevant duty of care or the precise cause of the injury. He stated that he considered that the workman had been 'reluctant to say what had happened, and therefore the position was left entirely unclear'. The majority of the High Court, Justices Heydon, Crennan and Bell, determined that a duty of care was owed and that it had been breached., and further, that the breach had caused the injury. In making the finding of the relevant duty, the majority discussed a number of issues including the lack of reasoning process exposed by the trial judge which flowed

⁵¹ (2011) 243 CLR 361

into a discussion of the rule in *Browne v Dunn*. Although it is a lengthy quotation it is worth setting out:⁵²

The lack of reasons. It is not necessary to cite authority for the existence of the first condition. It was certainly not satisfied. The trial judge gave no reasons at all for the view he formed. Nothing on the face of the evidence indicates reluctance. The trial judge's conclusion could have been based on the demeanour of the plaintiff in answering the questions, or perhaps on the plaintiff's demeanour at other times during his testimony, or perhaps on his demeanour during the trial while not in the witness box. In this court the first respondent repeatedly called the trial judge's finding "demeanour based". But the trial judge did not refer to demeanour as a justification for his conclusion. The absence of reasoning is the more serious in the following circumstances. The plaintiff had left school at 15. He was apprenticed as a panel beater and spray painter, and worked in that and other trades in the 34 years before the accident. On one occasion during his testimony he went "blank" and could not think. For him the witness box must have been a more than usually uncomfortable place. His supposed "reluctance" may have resulted from the shock and pain of a terrifying, indeed life-changing, incident. It may have been momentary forgetfulness or inarticulateness. The problem may have been capable of resolution if counsel had paused, or returned to the subject later. To attribute the paucity of his evidence to deliberate suppression without giving reasons for this course excluding all relevant innocent possibilities was an unjustified course.

The lack of warning. The second condition is more controversial. Judges are not entitled to inform themselves before taking judicial notice without giving the parties an opportunity to comment on the material referred to. Judges are not entitled to criticise expert witnesses by reference to expert material not in evidence without those witnesses having an opportunity to respond. Judges are entitled to take into account the demeanour of party-witnesses, not only in the witness box, but while they enter and leave it, and also while they are sitting in court before and after giving evidence; but observations by the judge of conduct outside the witness box which the representatives of the parties may not have observed, should, if they are influential in the result, be drawn to the attention of the parties so that they may have an opportunity of dealing with the problem. There is thus no general duty on a judge to advise the representatives of the parties of what they can see for themselves, namely the demeanour of the party-witness in the witness box. Nor, a fortiori, is there a duty on a judge to advise the parties that the party-witness's evidence is not adequate to make out the case of that party-witness. But there was held to be a breach of the duty of procedural fairness where a party claiming compensation for injury was held to have feigned or exaggerated her symptoms although this had not been suggested in cross-examination and the respondent disavowed that possibility.

If, in the present case, the first respondent had submitted in final address that the plaintiff had answered his own counsel's questions-in-chief about how his

⁵² At [68]-[76]

arm had been drawn into the vacuum hose by deliberately concealing material adverse to his case and favourable to the first respondent's — an allegation not of inadequacy in evidence but of suppression of evidence supporting an inference that the plaintiff knew his case was bad — a breach of the rule in Browne v Dunn would have taken place.

In Browne Lord Herschell LC said...

An allegation in final address that the plaintiff suppressed evidence would be in substance a suggestion that he was not speaking the truth and ought not to be believed: for he had been asked in effect to describe the whole of what he observed and remembered about what happened when the hose was handed back towards him, and the allegation would be that he had failed to speak the truth by deliberately not describing the whole of what he remembered, but suppressing unfavourable parts of it. So to allege would have been to "impeach" the plaintiff as a witness. The remedies might have included a refusal by the judge to accept or entertain the submission, and a recall of the plaintiff to the witness box to deal with the allegation.

Now if it was not open to counsel for the first respondent to make the postulated allegation, how can it have been open to the trial judge, without warning, to incorporate into his reasons for judgment a finding to the same effect as the allegation?

For those reasons the second condition referred to ought to have been satisfied before the trial judge made the criticism he did.

The second condition was not satisfied. The plaintiff had no opportunity to deal with the criticism. Normally cross-examining counsel will prefigure and lay the ground work for any criticism a judge may feel minded to make of a witness's evidence-in-chief. But here there was no cross-examination on the plaintiff's evidence-in-chief about what happened in the moments before he sustained his injuries. This created a difficulty for the trial judge. The tactical decision of defence counsel not to cross-examine on that topic may well have been shrewd. When Wigmore enunciated his celebrated but controversial proposition to the effect that cross-examination was "beyond any doubt the greatest legal engine ever invented for the discovery of truth", he immediately stated another much less controversial proposition by way of caveat: "A lawyer can do anything with a cross-examination — if he is skillful enough not to impale his own cause upon it". The truth of the second proposition lies in the fact that when a cross-examiner seeks to extract from a witness testimony which is more favourable to the cross-examiner's client than that which the witness gave in chief, the new testimony often turns out to be adverse to the client. If evidence-in-chief is thought to be too feeble to serve its purpose, cross-examiners often think it best to leave it alone, for to cross-examine will do no more than strengthen it: the repeated questions may cause the witness to think harder, may cause the witness to become more determined, may trigger better recollection and may result in the witness giving the more detailed evidence which was not given in chief. But decisions by cross-examiners of

that kind are gambles, and the gambles can be lost. Whether the cross-examiner lost the gamble in this case is discussed below.

There was no point in the trial judge mentioning his conclusion that the plaintiff's evidence was not frank and complete unless it played a role in his decision adverse to the plaintiff. In the absence of any challenge from the cross-examiner to the frankness and completeness of the plaintiff's evidence, it was incumbent on the trial judge, if his conclusion that the plaintiff had not been frank and complete was to play a role in his decision adverse to the plaintiff, to make the challenge himself. Perhaps the criticism in the judgment did not occur to the trial judge until after the plaintiff had left the box, or until after the hearing had concluded and before the judge's reserved judgment was given. It remained necessary either to recall the plaintiff or to have no regard to that aspect of the plaintiff's evidence.

The first respondent repeatedly stressed the trial judge's finding under discussion, and sought to render it immune from appellate examination by calling it "demeanour based". But when the above difficulties were raised with counsel for the first respondent in this court, he raised no strong defence of what happened, and fell back on the different point that the plaintiff's evidence was so scant and meagre as to leave, fatally, an unfilled gap. He described the plaintiff's case as having exhibited a "failure of proof", and he said there was "a lacuna in his evidence", as distinct from the plaintiff being the victim of "an inference adverse to him, drawn by the trial judge or by the Court of Appeal". It must be accepted that the trial judge put the matter in the alternative, but the primary conclusion reached is the adverse inference described above.

In general, it could be said that the Australian jurisdiction seems more obsessed with the rule than the other jurisdictions.⁵³

Statutory innovation

Since the articulation of the rule, various jurisdictions have enacted procedural and evidentiary rules to address some of the issues raised by the decision.

Most jurisdictions have enacted rules so as to provide for the speedy and comprehensive provision of evidence to the opposing parties. This reduces the element of surprise in the trial and essentially puts the parties

⁵³ A cursory look at just one database found the decision in *Browne v Dunn* had been referred to in 30 cases in the High Court of Australia, 77 cases in the Federal Court of Australia, Full Court, 193 cases in the Federal Court of Australia, 220 cases in the New South Wales Court of Appeal, 116 cases in the New South Wales Court of Criminal Appeal, 305 cases in the New South Wales Supreme Court, 74 cases in the Queensland Court of Appeal, 1 case in the Queensland Court of Criminal Appeal, 40 cases in the Queensland Supreme Court, 137 cases in the Victorian Court of Appeal and 113 cases in the Victorian Supreme Court.

on notice as to what the opposing case will be.⁵⁴ It also permits a trial judge effectively to case manage and that will often throw up the very issue raised by the decision so that it can be dealt with prior to the commencement of a trial.

In the federal *Canada Evidence Act* (1985), for example, there are provisions which require cross-examining Counsel distinctly to put prior inconsistent statements prior to being able to tender proof of those prior inconsistent statements.⁵⁵

In Australia, in each jurisdiction which has adopted the Uniform Evidence Acts, there is a section 46, which is specifically intended to give courts, so far as they otherwise might not have it, jurisdiction for witnesses to be recalled to confront the very problem raised by *Browne v Dunn*.⁵⁶

Conclusion

The rule, at least in the jurisdictions here considered, has been it seems universally accepted and more or less uniformly applied, the distinctions here turning upon detailed analyses of the specific factual context in which the rule is said to arise.

The rule is fundamental to the conduct of any trial so that no issue is determined without giving opportunity to persons to tell their side of the story.⁵⁷

In the most recent edition of the *White Book*, the following comments are made (emphasis added):⁵⁸

*In modern times the appeal courts have been concerned to stress that judges should give adequate reasons for their decisions and, where there is a conflict of evidence (whether as to fact or as to expert opinion), should explain why they preferred the evidence of one witness to another. This has left to a **new awareness** of the rule in *Browne v Dunn* (1894) 6 R 67, HL, and its implications.....**The rule is directed at advocates**, rather than at judges, but witnesses may be dealt with unfairly, and judges may be led astray in their fact-finding (e.g. by concluding that certain evidence was uncontradicted when it might well have been, or by disbelieving witnesses on matters on*

⁵⁴ See for example Part 32 of the Civil Procedure Rules 1998 in the United Kingdom

⁵⁵ Sections 10(1), 11 of the *Canada Evidence Act* 1985

⁵⁶ See e.g. s 46 *Evidence Act* 1995 (Cth); s 46 *Evidence Act* 1995 (NSW); s 46 *Evidence Act* 2008 (Vic).

⁵⁷ *Beale v Government Insurance Office* (NSW) (1997) 48 NSWLR 430 per Meagher JJA\

⁵⁸ Sweet & Maxwell, *The White Book Service* 2019, vol 1, [52.21.2]

*which they were not challenged), if advocates ignore the rule, either through **ignorance** or by **sharp practice**. This aspect of the rule in *Browne v Dunn* has achieved a new significance since it has become the practice to allow statements of witnesses to stand as evidence in chief and may form the basis of a challenge, on appeal, to the trial judge's findings.*

I would beg to differ with that observation in an important respect.

In the first instance, the obligation to put contradicting evidence is on the party who wishes to cast doubt on a conflicting account. However, the obligation is ultimately on the trial judge to ensure a fair trial. Often this is done simply by having a witness recalled. However this may not be possible. The trial judge is ultimately responsible for not only ensuring a fair trial but adequately explaining the reasons for judgment, which in turn requires the judge to explain why a witness is accepted or not, in whole or in part.

Counsel may be ignorant or sharp or both. That said the trial judge must remain vigilant and in control of the trial, and at the very least raise any such matters so as to avoid a miscarriage of justice.