32 The Rule in *Browne v Dunn*

32.1 Legislation

[Last reviewed: February 2025]

Nil.

32.2 Commentary

[Last reviewed: February 2025]

The rule in *Browne v Dunn* is a rule of practice.

In any trial – civil or criminal – if a party intends to contradict the evidence of a witness – either by way of submission to the judge or jury, or by other evidence – then the party (via their barrister) is required to put the substance of the contradictory evidence to the witness during cross-examination, so that the witness might comment on it: *(Browne v Dunn* (1893) 6 R 67 at [70], [76]). See also ***Cross On Evidence*, Aust ed. [17435]** ff.

As McMurdo JA put it in *R v JAE* (2021) 294 A Crim R 146: 'The rule in *Browne v Dunn* is a general rule of practice by which a cross-examiner should put to an opponent's witness matters that are inconsistent with what that witness says and which are intended to be asserted in due course.' (This decision contains a thorough analysis of the rule and the consequences of its breach).

There will be non-compliance with the rule if –

(a) a party fails to challenge the evidence of a witness on some point;

but later

(b) makes assertions, or calls evidence to show, that the witness should not be believed:

The trial judge is then to determine what ought to be done.

In *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR 551 at [556], Clarke JA said that the trial judge 'may, for example, require the relevant witness to be recalled for further cross-examination before allowing the contradictory evidence to be given or he may decline to allow the party in default to address upon a particular subject upon which the opposing party was not cross-examined.'

Alternatively, the trial judge may give the jury a direction about drawing an inference of 'recent invention' against the party who failed to put the contradictory version to a relevant witness.

Considerable caution is required in applying the rule in criminal trials against a Defendant since there may be any number of reasons for the failure to cross-examine a witness on a point, including counsel's error or oversight: (*R v Birks* (1990) 19 NSWLR 677; *R v Manunta* (1989) 54 SASR 17.)

The High Court has emphasised the need for care on the part of a trial judge in directing a jury to attribute significance to the failure of counsel to put an aspect of his client's case to a witness on the other side, especially where it is otherwise apparent that the proposition which is not put is in issue: (*MWJ v The Queen* (2005) 80 ALJR 329; *R v MAP* [2006] QCA 220.)

Caution should also be exercised in deciding whether to give a direction where the party who called the witness who was not cross-examined does not complain: *McDowell* [1997] 1 VR 473.

The rule applies against the prosecution. The Crown should put any inconsistent versions to the accused during cross-examination: (*R v Lewington* [2021] QCA 258). As Freeburn J explained in that case –

> *[61] Whilst prosecutors may present their case fully and firmly, prosecutorial fairness requires prosecutors to fairly assist the court to arrive at the truth. In Whitehorn v The Queen, Deane J described the prosecutorial fairness duty as one of "fairness and detachment":*
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> > *"Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and helping to ensure that the accused's trial is a fair one."*
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> *[62] The duty of fairness emerging from Browne v Dunn affirms that "it is necessary [for the prosecutor] 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/her] evidence, particularly where the case relies upon inferences to be drawn from other evidence in the proceedings."*
>
> *[63] In R v Foley this court held that failure to put the essential elements of an eventual case to a witness will result in a fair trial being jeopardised.*

R v Hart (1932) 23 Cr App R 202 shows that the prosecution stands to be embarrassed by the rule in *Browne v Dunn* as much as the defendant. At [206], the Court of Appeal commented on a 'remarkable feature of the case', that three defence alibi witnesses were not cross-examined.

As to the way in which a jury ought to be directed when a Defendant has been cross-examined on the failure of their counsel to question a Crown witness on a certain point: in *R v Foley* [2000] 1 Qd R 290, the Court of Appeal explained:

> *Where defence counsel in a criminal trial failed to put his case to Crown witnesses, the judge in summing up ordinarily should point out that:*
>
> > *the particular matter was not put to the relevant witness;*
> >
> > *it should have been put, so that the witness could have the opportunity of dealing with the suggestion; and*

the witness has been deprived of the opportunity to give that evidence and the court had similarly been deprived of receiving it.

In exceptional cases, such as where there seems to be a tenable case of recent invention, it is appropriate for the judge to instruct the jury in a way which would permit an adverse inference to be drawn against the credibility of the accused, but such instructions should include an explanation of the rules and practices of preparing for trial and counsel's duties and responsibilities to the court in conducting a case, and mention the possibility of other explanations such as misunderstanding or error on the part of counsel. It should also be made clear that before drawing an adverse inference, the jury should be satisfied that there was no other reasonable explanation for the omission to cross-examine.

Burns (1999) 107 A Crim R 330 provides an example of the application of *Foley*.

In *Hofer v The Queen* (2021) 274 CLR 351 the High Court explained at [36] that cross-examination of a Defendant by a prosecutor about the failure on the part of their barrister to put their case to a relevant witness will have a dual purpose. It will be concerned with identifying unfairness to a Crown witness as well as seeking to have the Defendant's evidence disbelieved.

However, a Defendant ought not to be put in a position where they feel obliged to explain the omission by refence to the instructions they have given. They carry no such onus: [35].

Where there are a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a line of questioning directed to impugning a Defendant's credit.

Proceeding on the basis of an assumption that instructions were not given is likely to be productive of further unfairness in cross-examination. However, where cross-examination has occurred, a trial judge must warn the jury about any assumptions made by the cross-examination (about the content of instructions) and draw to the jury's attention the possible reasons why the matter has not been put and to direct the jury as to whether any inferences are available: [37].

It may be necessary for the trial judge to put the omissions into perspective, to discount any assumption as to why they occurred by reference to other possibilities and to warn the jury about drawing any inference on the basis of a mere assumption: [47].

Rebuttal evidence may be permitted. In particular, the witness treated unfairly may be recalled and given the opportunity to make appropriate comment.

For a recent example of where a miscarriage of justice arose by reason of the trial judge failing to give a necessary direction which warned the jury about the assumptions made by the cross-examiner and drew attention to the possible reasons why the matter had not been put and to direct the jury as to whether any inferences were available, see *R v Saraghi-Smith* [2024] QCA 180 at [51]-[57].

3.3 Suggested Directions

[last reviewed: February 2025]

The Defendant gave evidence that [state evidence: for example, the Complainant's injury was the result of a fall rather than having been inflicted by him/her**]. That proposition was not put to the [**Complainant**]. In other words, [**he/she**] was not asked to comment on whether that was the case.**

The result is that [he/she**] has not had the opportunity to respond to the suggestion [**that he/she injured herself in a fall**], and you do not have the benefit of the evidence [**he/she**] might have given had [**he/she**] been asked.**

(Where there is a tenable case of recent invention, the following may be added**):**

Also, you might find that there is another potential consequence.

But first, let me give you some context.

In preparation for trial, usually, defence counsel is given what we call the Defendant's 'instructions.'

'Instructions' are what the Defendant has to say, if anything, about the evidence of each witness called in the prosecution case.

Usually, instructions are taken by a Defendant's solicitor and provided in written form to the Defendant's barrister. They may also be given orally by the Defendant to [his/her**] solicitor or barrister.**

If a Defendant's instructions reveal that they contest or challenge the evidence of a certain Crown witness – if the Defendant has a different version of events – then, it is a rule of practice, designed to achieve fairness that defence counsel put that challenge or different version to the relevant Crown witness, so that they might comment upon it.

In that sense, the cross-examination of Crown witnesses is based on a Defendant's instructions. And that includes questioning relevant Crown witnesses about the Defendant's version of events.

In this case, a Crown witness [the Complainant**] was not cross-examined about [**the fall**] which the Defendant says occurred.**

The failure to question the Crown witness about that matter *may* be used by you to draw an inference that that challenge/version of events was not in the Defendant's instructions.

That in turn may have a bearing on whether you accept what the Defendant said on the point – you might infer that the challenge/version of events was not in the Defendant's instructions *because* [his/her**] story has changed or their evidence was made up recently.**

However, before you draw such an inference you must consider other possible explanations for the failure of counsel to put questions about [a fall**] to the [**Complainant/witness**]. You must not simply assume that the reason for the omission was that the Defendant had changed, or recently made up, their story.**

You will appreciate that communication between individuals is seldom perfect; misunderstandings may occur. The solicitor or the barrister may have missed something of what the Defendant told them. Also, under the pressures of a trial, counsel may simply forget to put questions on an important matter.

You should consider whether there are other reasonable explanations for defence counsel's failure to ask the [Complainant**] whether [**there was such a fall**].**

You should not draw any inference adverse to the Defendant's credibility unless there is no other reasonable explanation for that failure.