

The Rule in *Browne v. Dunn*

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Evidence Law Refresher

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THE RULE IN *BROWNE v. DUNN*

The Rule:

The century-old rule in *Browne and Dunn* (1893), 6 R. 67 (HL) (**Rule**) has been described in the following way:

As originally conceived, the rule imposed on the examiner a duty to confront a witness with the examiner's theory of the case on any factual matter that would expressly undermine the witness' credibility and, by inference, his or her ability to tell the truth.¹

Put another way, if the cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence, he or she must give that witness notice of his intention.²

Justice Salhany, in *Kane v Law*, 1991 CarswellOnt 1545 (Ontario Court of Justice – General Division) provided an apt definition of the purpose of *cross-examination*, which helps to illustrate the importance of the Rule, at para. 26:

When a trial judge instructs a jury on how they should assess the credibility of witness, he generally tells them that they should consider such things as the witness' demeanour and manner while testifying, the witness' power of recollection, any bias, prejudice, inconsistencies and the reasonableness of the testimony. The purpose of cross-examination is to test all of these considerations.

Salhany, J. went on to say that when cross-examination of a witness is passed on a crucial issue, the trier of fact is denied the opportunity of making an assessment of credibility on that issue based on the above considerations. Without adequately testing the witness, the trier of fact may not be able to properly and fully assess the evidence.

This might be an argument in favour of the strict approach to an interpretation of the Rule.

On the other hand, applying the Rule strictly might require the cross-examiner to afford every witness the opportunity to explain away any factual inconsistency in his or her testimony,³ without consideration of whether doing so would meet or further the underlying purpose of the Rule. In other words, it could make cross-examination a liability for the examiner rather than an asset.

¹ Joseph Griffiths, "How the Witness Rule Lost its Way" (2011), Vol.31, No.16 The Lawyers Weekly.

² Sopinka, A W Bryant, N Lederman, and M K Furest, *The Law of Evidence in Canada*, 3rd ed, (Markham: Ont, LexisNexis Canada Inc, 2009), p.1160

³ *Supra*, note 1.