The spectre of *Browne v Dunn*:

CRIMINAL PROCEEDINGS IN THE ERA OF PRE-TRIAL DISCLOSURE

The so-called "rule in *Browne v Dunn*" is famous, although the case from which it is derives its name is hardly ever read[1] and the rule "seems often to be attended more with ignorance than with understanding".[2] While *Browne v Dunn* was a defamation case, the rule applies to criminal prosecutions,[3] including criminal proceedings which are litigated summarily in the Magistrates'[4] or Children's Courts. It does not apply to committals.[5] It can apply in favour of the Crown against the accused.[6] As such the rule, which comes to us from England, has outlived its equally famous colonial counterpart, the rule in *Jones v Dunkel*,[7] at least insofar as that later rule cannot now ordinarily be invoked against the interests of the accused in criminal proceedings.[8]

The rule in *Browne v Dunn* has been described as "a rule of professional practice" which is based on a requirement of "procedural fairness".[9] As a rule of professional practice it is imperative that legal practitioners are alive to its operation. That the rule is the province of legal professional expertise has been implicitly acknowledged by the courts in relaxing its strict operation in cases where a party is not represented by a lawyer.

The rule has also been described as a rule which "haunts cross-examiners".[10] In particular, it poses practical problems for defence practitioners who must cross-examine prosecution witnesses before their own witnesses are called. With only the benefit of foresight, the defence practitioner must ascertain (and remember) precisely what to put to prosecution witnesses to ensure compliance with the rule. Moreover, any experienced defence lawyer will be familiar with the client whose instructions are a "moveable feast", where the dishes change in reaction to the testimony of the most recent prosecution witness. The operation of the rule imperils the client who undertakes such a course.

WHAT IS THE RULE IN *BROWNE V DUNN*?

The rule has been given its most eloquent expression in Australia by Hunt J in the NSW case of *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*:

"It has in my experience always been a rule of professional practice that, *unless notice has already clearly been given of the cross-examiner's intention to rely upon such 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".[11] [emphases added]

Two reasons are commonly advanced to justify the existence of the rule: first, the need to give the witness who is cross-examined the opportunity to deal with other evidence yet to be called or any inferences to be drawn from that evidence; and second, to allow the other party who is calling the witness who is cross-examined the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

Fundamentally, adherence to the rule ensures that the parties are well and truly joined on the evidence: "there is nothing more frustrating to a tribunal of fact than to be presented with two important bodies of evidence which are inherently opposed in substance but which, because *Browne v Dunn* has not been observed, have not been brought into direct opposition, and serenely pass one another by like two trains in the night".[12]

The consequences of breaching the rule can be severe. They range from (i) allowing the prosecution to recall witnesses to provide them with an opportunity to explain evidence which is sought to be contradicted by the other side;[13] (ii) the drawing of adverse inferences to correct any

unfairness arising out of the failure to comply with the rule;[14] (iii) the reluctance to reject evidence which has not been contradicted in compliance with the rule;[15] and (iv) lastly and most severely, arguably the power to refuse to admit contradictory evidence of which the substance has not been put in cross-examination in compliance with the rule.[16]

A REVOLUTION IN CRIMINAL PROCEDURE

The practice of criminal procedure in Victoria has experienced a revolution since the 1990s. Traditionally, criminal proceedings have placed no obligation on the defence to disclose its case prior to trial. This "right to pre-trial silence" is a species of the hallowed "right to silence" in the face of criminal prosecution of the subject by the state. It has been criticised as allowing "trial by ambush". Where there is no pre-trial disclosure by the defence, strict adherence to the rule in *Browne v Dunn* often provides the first notice to the prosecution of the defence case.

All this has changed. In 1993 the Victorian government introduced the *Crimes (Criminal Trials) Act* which for the first time sought to force the defence to provide discovery to the prosecution of its case. This Act was replaced by the *Crime (Criminal Trials) Act* 1999 (the Act). While there was heated discussion at the time of passing of these Acts as to their implications for the right to silence, there was no mention in any of the Parliamentary debates that surrounded the passing of these Acts of their effect on the operation of the rule in *Browne v Dunn* in criminal proceedings. It is the author's contention that the Act has a significant effect on the operation of the rule in criminal proceedings in Victoria.

THE RELATIONSHIP BETWEEN THE RULE AND THE ACT

If one returns to the formulation of the rule in *Browne v Dunn*, it is apparent that the rule only needs to be complied with where notice has not clearly been given of the nature of the case on which the cross-examiner intends to rely in contradiction of an opponent's witness. This qualification to the rule has been acknowledged in civil proceedings where the parties reduce their case to pleadings which are finalised before the commencement of the trial.[17] Thus, the plaintiff in a civil proceeding cannot be heard to say that it did not have notice of the nature of the case of the defence when the nature was disclosed in the defendant's pleadings. Conversely, where an allegation is not pleaded, it must be put clearly and unambiguously to an opponent's witness.[18] It is the author's contention that the provisions of the Act place criminal proceedings on a similar footing to civil proceedings for the purposes of the application of the rule.

Under s7 of the Act, the defence must serve on the prosecution a "defence response" 14 days prior to trial. It must, pursuant to sub-s(2) of s7, "identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken" and pursuant to sub-s(3) state, with respect to the notice of pre-trial admissions filed by the prosecution, "what evidence is in issue and, if issue is taken, the basis on which issue is taken". Where a party intends to depart from its written pleadings, pursuant to sub-s(4) of s8 of the Act, it must inform the court and the other party in advance of any such intention.

If the defence complies with the provisions of the Act and runs its case in accordance with the case it has disclosed pre-trial, the prosecution cannot be heard to say that it did not have notice of the defence case. Moreover, the courts have made it clear that the rule is not an absolute one to be applied inflexibly – "to be added to the obstacle course of litigation".[19] Arguably, there should be more leniency in the strict application of the rule as against the interests of the defence in criminal proceedings than in civil proceedings. As Sully JA observed when comparing the operation of the rule in criminal as opposed to civil proceedings:

"I well understand that criminal justice cannot be administered in precisely the same way and with precisely the same priorities and procedures as civil litigation. I accept unhesitatingly that the liberty of the subject demands in many ways the protection of the law in forms fashioned differently from those which might be thought appropriate in litigation involving civil rights of property and the like".[20]

Prosecutors appear as "ministers for justice" and should be disinterested in the outcome of criminal prosecutions. They should not seek to gain an advantage over the defence where matters have not been put in cross-examination, provided those matters are in essence disclosed in the defence's written pleadings prepared in accordance with the Act. Simply put, in those circumstances there has been no breach of the rule.

SUMMARY PROSECUTIONS

The overwhelming majority of criminal prosecutions in Victoria are brought summarily in the Magistrates' and Children's Courts. The Act does not apply in those courts. However, in summary prosecutions over the past several years an informal system of pre-trial disclosure has developed through the contest mention system.

Lawyers appearing for defendants in criminal proceedings who do not plead guilty at an early stage find themselves in a contest mention court before a magistrate who will expect to be told an outline of the defence case and what matters are in issue in an effort to manage the case and ensure that appropriate court time is allocated to it. Where at a contest mention a defence lawyer indicates what matters are in issue or indicates that the record of interview is not in dispute and that the defence will be run in accordance with whatever admissions or denials were made in it by the defendant, it is the author's contention that this places the prosecution "on notice" as to the nature of the defence case. Therefore, the rule cannot be invoked against the defence, provided that the defence case is run in accordance with that notice.

It is therefore important to have any admissions made by the defence reduced into writing, preferably on the court file, given that almost invariably the contest mention magistrate does not hear the ultimate summary contest and that frequently the contest mention prosecutor is not the prosecutor who appears to prosecute the matter at contest.

Many experienced criminal defence lawyers are aghast at the concept of showing their hand to the prosecution prior to trial. Nonetheless, for better or worse, in Victoria legal practitioners have to grapple with the Act in indictable proceedings, and with the expectation in summary proceedings that the defence will at least, wherever possible, be cooperative with the court in indicating how cases will be run.[21]

All defence practitioners should be aware that with respect to the rule in *Browne v Dunn*, pre-trial disclosure has the potential to exorcise the 19th century ghost which haunts cross-examiners. Prosecutors should not invite a judge or jury to do anything which might disadvantage the defence which has not put matters in cross-examination where the defence has complied with the provisions of the Act and run its case in accordance with that disclosed pre-trial. Additionally, prosecutors in preparing cases for trial must be conscientious about traversing all the matters "at issue" between the parties, based on the pre-trial pleadings prepared in accordance with the Act. Where an issue has been disclosed in those pre-trial pleadings, prosecutors must deal with that issue in evidence-in-chief. They cannot rely on the operation of the rule to agitate for the recall of witnesses when, through the pre-trial pleadings, they had notice that the issue would be raised by the defence. ●

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1. *Browne v Dunn* (1893) 6 R 67. To the author's knowledge the case has only ever been reported in the obscure *The Reports*, a series published briefly between 1893 and 1895.
2. *Allied Pastoral Holdings v Commissioner of Taxation* [1983] 1 NSWLR 1 at 16, per Hunt J.
3. *R v Birks* (1990) 19 NSWLR 677 at 688-9, per Gleeson CJ.
4. *Garrett v Nicholson* (1999) 21 WAR 226.
5. *R v Birks*, note 3 above, at 689, per Gleeson CJ.
6. *Eastman v R* (1997) 158 ALR 107 at 192.
7. (1959) 101 CLR 298.
8. *Dyers v The Queen* [2002] HCA 45; (2002) 210 CLR 285.
9. *Raben Footwear v Polygram Records* (1997) 75 FCR 88 at 101, per Burchett J; see also *Stern v NAB* (2000) 171 ALR 192 at 203.
10. D Ross QC, *Crime*, 2002, Lawbook Co, p143.
11. Note 2 above at 16, per Hunt J.
12. *Reid v Kerr* (1974) 9 SASR 367 at 373-4, per Wells J.
13. *Payless Superbarn v O'Gara* (1990) 19 NSWLR 551 at 556, per Clarke JA.
14. *Seymour v ABC* (1990) 19 NSWLR 219 at 225, per Glass JA.
15. Note 2 above at 15-27, per Hunt J.
16. *R v Schneidas (No 2)* (1981) 4 A Crim R 101 at 107-111; cf. *Seymour v ABC*, note 14 above at 225, per Glass JA.
17. See for example *Seymour v ABC*, note 14 above at 224-225, per Glass JA; *Flower & Hart v White Industries (Qld)* (1999) 87 FCR 134 at 148-149; *Thomas v Van Den Yssel* (1976) 14 SASR 205 at 207, per Bray CJ; *Trade Practices Commission v Mobil Oil Australia* (1984) 3 FCR 168 at 179-181, per Toohey J; cf. *Deputy Commissioner of Taxation v De Vonk* (1995) 133 ALR 303 at 316-7, per Hill and Lingren JJ.
18. *Ghazal v GIO* (1992) 29 NSWLR 336 at 347-9, per Kirby P.
19. Note 18 above , at 345, per Kirby P; see also *R v Birks*, note 3 above at 688, per Gleeson CJ.
20. *R v Hines* (1991) 24 NSWLR 737 at 743.
21. Of course, even in summary proceedings "the conduct of the offender on or in connection with the trial as an indication of remorse or lack of remorse" may be taken into account in sentencing: s5(2C) *Sentencing Act* 1991 (Vic); cf. s5(2D) of the Act.