

# **NZ EVIDENCE LAW**

## **CASE NOTES**



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Sample

## ***Browne v Dunn (1893) 6 R. 67 H.L.***

**Source:** Hard copy via your law library or electronically via a subscription service

**Court details:** House of Lords

**Facts:**

- The case arose out of a civil case involving the parties James Loxham Browne and Cecil W. Dunn (solicitor).
- The case stemmed from a document issued by Dunn on behalf of others addressed to Browne.
- The document indicated that the signatories, all residents of The Vale, Hampstead, requested Dunn apply for an order against Browne to keep the peace.
- At a subsequent Breach of the Peace hearing, Browne became aware of the document and commenced libel proceedings against all parties.
- During that hearing the document was never shown to any of the signatories by Browne during his cross examination.
- During the hearing Browne produced the document citing it "a sham".
- The jury eventually found in favour of Browne and ordered damages of 20 shillings.

**Procedural history:**

- Dunn appealed to the Court of Criminal Appeal and the verdict was set aside.
- Browne then appealed to the House of Lords.
- During that appeal it was discovered that a number of the signatories were present at the original trial and none of them was asked if the document was anything but genuine.

**Reasoning / Decision (Commentary):**

- The House of Lords created the Browne v Dunn rule.
- The rule entails that a cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction.
- Under this rule if a witness gives testimony that is inconsistent with what the opposing party wants to lead as evidence, the opposing party must raise the contention with that witness during cross-examination.
- This rule can be seen as an anti-ambush rule because it prevents a party from putting forward a case without first affording opposing witnesses the opportunity of responding to it.
- This not having been done, that party cannot later bring evidence to contradict the testimony of the witness.

**Ratio:**

- Lord Herschell explained the principal as follows:

“... 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.”

**Order:**

- From this case came the common law rule known as the "Browne v Dunn rule" or "The rule in Browne v Dunn".
- The rule in Browne v Dunn entails that a cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction.
- In New Zealand the Browne v Dunn rule has been codified as section 92 of the Evidence Act 2006.

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