On Trial

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invites the witness to engage in an analysis of the strengths and weaknesses of both sides of the case and/or an attempt to tailor his or her evidence to fit the existing documentation. Thus the materials provided to the witness ought to be only that which the witness was personally involved in creating or receiving because these are the only documents which truly assist the witness in the refreshment of his or her memory.

Finally, it is useful to remember that privilege is effectively waived with respect to any document that the witness uses to refresh his memory.[4] Counsel will accordingly want to reflect upon the documents to be placed before the witness for the purpose of assisting the witness in refreshing his memory. Clearly, if the witness's evidence is consistent with the document without same being shown to him, then it is best to leave the document alone and maintain the privilege.

9.06 THE PREPARATORY MEETING WITH COUNSEL

The quintessential element of preparing a witness for trial is the actual review with counsel of the witness's proposed evidence to be given in the courtroom. There is absolutely no substitute for counsel personally reviewing the story with the witness as many times as necessary and in as complete detail as may be possible all in order to enhance the ability of the witness to accurately relate the events in question in a credible fashion.

It is completely unsatisfactory preparation to simply sit down with the witness and review the story with him or her, generally using leading questions and eliciting rather cursory "yes" or "no" type of answers. This gives no indication as to how the witness will perform in the actual courtroom, nor does it really assist the witness in being a good witness. The witness is not forced to search into and refine his or her own memory, which is the essence of good preparation.

Beyond that, however, there are many different appropriate styles of preparing a witness for trial. The style employed will often depend upon the individual counsel as well as the experience of the witness, the significance of his or her evidence and the confidence level of the witness.

Two methods are most commonly used in the actual face-to-face preparation of a witness. The first involves going over the witness's story much the same as one would employ in examination-in-chief with such pauses at each answer as may be necessary from time to time to assist the witness in refining that answer.

A second method of preparing a witness for trial that has frequently been employed with success is to deliberately engage in a forceful review

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[4] See Chapter 21, section 21.02.

the actual opinions of experts on the basis of putting the opinions of other experts to them,[15] especially in today's climate of pre-trial disclosure.

14.02 THE RATIONALE FOR THE RULE

The rule in *Browne v. Dunn* is founded upon a desire both to promote a fair trial and to exercise elementary fair dealing with witnesses. The rule has the following benefits:

(i) It is fair to witnesses. They are not subject to "ambush".[16] They do not run the risk of having their credibility publicly denounced in a judgment without the opportunity to advance a possible legitimate explanation for facts apparently contradicting their evidence. Lord Halsbury put the matter in the following terms: "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."[17]

(ii) The party calling the witness has the opportunity of adducing corroborating evidence to support the witness's story,[18] which that party may presumably not otherwise do if lulled into a false sense of security with respect to the apparent unchallenged evidence given.

(iii) The trier of fact is placed in a more satisfactory position to assess credibility when the witness is given an opportunity to advance any possible explanation.

It goes without saying that such benefits as preventing the ambush of a witness and placing the court in a better position to judge credibility all promote the fair trial of an action. This is surely the principal reason behind the rule.

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[15] *R. v. Moke* (1918), 38 D.L.R. 441 (Alta. C.A.).

[16] *R. v. Verney* (1998), 87 C.C.C. (3d) 369, at 376 (Ont. C.A.), *per* Finlayson J.A.

[17] *Browne v. Dunn*, *supra*, note 1, at 71, *per* Lord Halsbury.

[18] *R. v. Dalton*, *supra*, note 12; *New Hamburg Manufacturing Co. v. Webb* (1911), 23 O.L.R.

absence of concern over the liberty of the subject and the burden of having to recall witnesses, expose them to further cross-examination and extend the trial may tilt the balance in civil cases in favour of harsher treatment for those who breach the rule.

14.06 RELATIONSHIP OF THE RULE IN *BROWNE V. DUNN* TO CROSS-EXAMINATION UPON PRIOR INCONSISTENT STATEMENTS

Section 10 of the *Canada Evidence Act*[50] and its provincial equivalents[51] set as a pre-condition to the admission of extrinsic evidence proving the existence of a prior inconsistent statement, the requirement that counsel in cross-examination give the witness notice both of the parts of the statement to be used to contradict the witness and the circumstances of the making of the supposed statement, all in order that the witness will have an opportunity to explain or elaborate on the statement both in cross-examination or re-examination.[52]

There is no doubt that both cross-examination and subsequent proof of such prior inconsistent statements is governed by the relevant statutes.[53] The treatment, however, of any failure to abide by these sections is dealt with on the same principles as are inherent in the rule in *Browne v. Dunn*. There is a discretion in appropriate circumstances to permit the proof of prior inconsistent statements even where s. 11 or its provincial equivalents have not been complied with. The trial judge has to take into account all of the circumstances and particularly the following considerations: "whether affording the witness the opportunity to testify by reopening the defence case or in surrebuttal comes too late to fairly allow the witness, especially the accused, to adequately respond; Crown counsel's explanation for failure to comply with s. 11; whether the witness was given some notice of the issue during cross-examination and thus had an opportunity to explain or elaborate; and the nature of the evidence and its importance to other issues in the case."[54] The Ontario Court of Appeal recognized the close relationship between these statutory provisions and the rule in *Browne v. Dunn* and the following statement:

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50 R.S.C. 1985, c. C-5.

51 See, *e.g.*, ss. 20 and 21 of the Ontario *Evidence Act*, R.S.O. 1990, c. E-23; ss. 23 and 24 of the Alberta *Evidence Act*, R.S.A. 1980, c. A-21.

52 *R. v. P. (G.)* (1996), 112 C.C.C. (3d) 263 (C.A.).

53 For a full explanation of the application of these statutory provisions to prior inconsistent statements, see Chapter 19, below; *R. v. P. (G.)*, *ibid.*

54 *R. v. P. (G.)*, *ibid.*, at 287, *per* Rosenberg J.A.; *Stewart v. Canadian Broadcasting Corp.*, *supra*, note 6; *MacCabe v. Westlock Roman Catholic Separate School District No. 110* 1998