THE ART AND SCIENCE OF ADVOCACY

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important to remember that the collateral fact rule applies in this area. As we have seen, you will be bound by the witness's answer unless the question goes to the issues between the parties.[89]

As noted above, the cross-examination of an accused in a criminal trial is governed by different considerations. Cross-examination calculated to show that the accused has been guilty of criminal acts other than those with which he is charged is forbidden. An accused cannot be cross-examined as to offences he is suspected of having committed. Nor can he be questioned about offences with which he was charged but not convicted.[90] There are certain exceptions to this rule. Where the accused puts his character in issue, as we have seen, the prosecution is entitled to lead evidence of bad character. Another exception is the similar fact evidence rule.

The rule against cross-examination of the accused as to misconduct or discreditable associations only applies to cross-examination by the prosecution.[90a] A co-accused is under no such limitation; counsel for the co-accused is entitled to attack the accused's character. It is part of the co-accused's right to full answer and defence.[90b]

(i) The Rule in Browne v. Dunn

This is a relatively obscure rule. Do not become one of its victims. It is a relatively simple and fair rule. If you intend to lead evidence that will contradict the witness, it must be put to the witness in cross-examination so that he or she has an opportunity to explain the contradiction. In short, the rule is designed to avoid an ambush of the witness by contradicting the witness later in the trial by other evidence on an essential matter.[90c] Failure to put the contradiction to the witness while he or she is under cross-examination may be

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impropriety is remote in time, and (iv) the seriousness of the allegation. The question will be disallowed if there is a substantial disproportion between the importance of the imputation and the importance of the evidence to the issue to be decided. Cross & Tapper point out that this still leaves the cross-examiner considerable latitude. See above, §12.6(f), for a more comprehensive discussion of the collateral fact rule. The Canadian authorities on this point are collected in 3A Wigmore, *Evidence*, Chad. Rev., §986 at 858, note 12. See also the comments of L'Heureux-Dubé J. in *Howard v. R.* (1989), 48 C.C.C. (3d) 38 at 52-53 (S.C.C.), as to the trial judge's general discretion to control cross-examination and the delicate balance the trial judge must strike to reconcile the different interests in the trial process.

[89] Cross & Tapper, *Cross*, at 290; 3A Wigmore, *Evidence*, Chad. Rev., §979 at 826; McCleary, *McCormick*, §42.

[90] 3A Wigmore, *Evidence*, Chad. Rev., §979.

[90a] *R. v. Jackson* (1992), 68 C.C.C. (3d) 385 at 433-436 (Ont. C.A.).

[90b] *Ibid.* The accused's remedy is to move for severance (at 127). In fact, the co-accused is at liberty to call evidence of the co-accused's bad character: see *R. v. Kendall* (1987), 35 C.C.C. (3d) 105 at 119-120, 127 (Ont. C.A.).

[90c] *R. v. Verney* (1993), 87 C.C.C. (3d) 363 at 376 (Ont. C.A.).

deemed to be an acceptance of his evidence-in-chief.[91] Or your evidence contradicting the witness may be rejected because you failed to confront the witness with the impeaching testimony.[92] This does not mean that you have to put to the witness in cross-examination every detail that you do not accept. It is sufficient if you give the witness an opportunity to state his or her position about evidence you will be adducing later to contradict him or her.[92a] As long as you give sufficient notice to the witness, then you have met the requirements of the rule.[92b] It is unclear whether this rule is without exception; it has been suggested that there is discretion in the trial judge to grant relief from this rule.[93]

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[91] There is conflicting case law as to the consequeces flowing from the failure to cross-examine. Some of the authorities suggest that the failure to cross-examine a witness will result in a presumption that the witness has told the truth: *Peters v. Perras* (1909), 42 S.C.R. 244; *Jarvis v. Hall* (1912), 4 O.W.N. 232 (C.A.); *Jarvis v. Connell* (1918), 44 O.L.R. 264 (C.A.). This debate has now been put to rest in Canada. The more recent cases have concluded—and they probably represent the better view—that the trier of fact may reject such evidence even though it has not been the subject of cross-examination. In particular, in *Palmer v. R.* (1979), 50 C.C.C. (2d) 193 (S.C.C.), the court adopted the reasoning of the British Columbia Court of Appeal and held that "the absence or brevity of cross-examination depends upon the circumstances of each case." A similar conclusion was reached in *Hurd v. Hewitt* (1994), 20 O.R. (3d) 639 at 652 (C.A.). For a collection of some of the other authorities, see Williston & Rolls, *Conduct of an Action*, at 107, note 44.

[92] *Browne v. Dunn* (1893), 6 R. 67 (H.L.); Buzzard, *Phipson*, §33-69.

[92a] *R. v. Verney* (1993), 87 C.C.C. (3d) 363 at 376 (Ont. C.A.); *R. v. Henderson* (1999), 134 C.C.C. (3d) 131 at 142 (Ont. C.A.).

[92b] *Ibid.* at 376.

[93] In *R. v. Foxton* (1920), 34 C.C.C. 9 (Ont. H.C.), Middleton J. held that this was a mandatory rule; in *R. v. Dyck*, [1970] 2 C.C.C. 283 at 290-291 (B.C. C.A.), the court indicated that failure to cross-examine was "tantamount to an acceptance of the complainant's version and was wrong, if the defence intended to call evidence to contradict the complainant." See also *United Cigar Stores Ltd. v. Buller* (1931), 66 O.L.R. 593 at 599 (C.A.); and *R. v. Speid* (1988), 42 C.C.C. (3d) 12 at 30-31 (Ont.C.A.). The better view is that if there has been failure to cross-examine, the trial judge has discretion to permit the prosecution to recall the witness in reply to rebut the alleged statement made by the witness: *R. v. MacDonald* (1989), 48 C.C.C. (3d) 230 at 250-251 (N.S. C.A.). In *R. v. Jackson* (1974), 20 C.C.C. (2d) 113 (Ont. H.C.), the accused were permitted to give the impeaching evidence, but the trial judge instructed the jury as to the rule in *Browne v. Dunn* and left the evidence with the jury as a matter of weight. Generally, see McWilliams, *Criminal Evidence*, §37:10300, and Sopinka, Lederman & Bryant, *Evidence*, at 876-879, for a collection of the Canadian cases in this area. But see Cross & Tapper, *Cross*, at 277, where it is suggested that the rule is not an absolute one. See also Ewaschuk, *Criminal Pleadings*, §15.67 at 379-380, who suggests that there is a discretion to permit the adduction of contradictory evidence subject to a right of reply. At 3A Wigmore, *Evidence*, Chad. Rev., §1027, the author points out the unfairness of this rule, especially where the cross-examiner may not be aware of the inconsistency until after the examination is concluded, and that an inflexible rule makes the impeaching party suffer. For this reason, Wigmore recommends the adoption of a flexible rule in the court's discretion where the cross-examiner has acted in good faith and where the putting of the question to the witness is not possible. In *R. v. Grant* (1989), 49 C.C.C. (3d) 410 (Man. C.A.), the court discussed the foundational requirements under the rule in *Browne v. Dunn*, namely, that the witness has an opportunity to explain the inconsistency. In

There are several policy reasons for this rule. First, this procedure is designed to be fair to the witness. It gives the witness an opportunity to explain the impeaching testimony. Just as important, this rule leads to judicial efficiency. If the witness admits the impeaching evidence in cross-examination, then the testimony does not have to be led.[94]

Does defence counsel have to put the accused's version of the events to the complainant? In other words, does the rule in *Browne v. Dunn* apply in such circumstances? The British Columbia Court of Appeal held that there is no absolute rule requiring defence counsel to put to the complainant such matters. The failure is a matter of weight to be decided by the trier of fact.[94a]

This rule applies to all types of evidence, including demonstrative evidence.[94b] Does the *Browne v. Dunn* rule apply to previous contradictory statement made by the witness? As we saw earlier, section 11 of the Canada Evidence Act governs what you must put to the witness if you intend to impeach the witness with a prior inconsistent statement.[94c] Some argue that rule applies to the closing argument. In other words, your failure to put the contradictory evidence to the witness in cross-examination may prevent

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Machado v. Berlet (1986), 15 C.P.C. (2d) 207, 57 O.R. (2d) 207 at 210-211 (H.C.), the court held that there was an obligation on the cross-examiner to put the impeaching material to the witness and to point out the inconsistency. The trial judge permitted the impeaching evidence to be given despite the failure to comply with the rule in *Browne v. Dunn*, and then permitted the plaintiff to call reply evidence to explain the impeaching evidence.

[94] Cleary, *McCormick*, §40; 3A Wigmore, *Evidence*, Chad. Rev., §1025.

[94a] *R. v. MacKinnon* (1992), 72 C.C.C. (3d) 113 at 120 (B.C. C.A.).

[94b] For example, a surveillance video may have to be put to the witness if you are using the video tape to impeach the witness: *Youssef v. Cross* (1991), 80 D.L.R. (4th) 314 at 318 (Ont. Gen. Div.). In *Machado v. Berlet* (1986), 57 O.R. (2d) 207 (H.C.) the court held that if opposing counsel has an impeaching photograph, the photograph must be put to the witness for comment and possible explanation. In the case of impeaching films (or videos) they do not have to have been shown to the witness during his cross-examination. However, it was incumbent on the cross-examiner to put to the witness the fact that the films had been taken of the plaintiff, and to have particularized the films' contents so as to give the plaintiff an opportunity to explain his conduct as they related to his injuries. A similar conclusion was reached in *Clark v. O'Brien* (1995), 39 C.P.C. (3d) 133 at 151 (N.S. C.A.) where the court held that fair advocacy and the Civil Procedure Rules r. 31.15(2) required that the witness be directed to the videotapes after a proper foundation had been laid. The court indicated that although it is preferable that the relevant portion of the videotapes be put to the witness, at minimum the witness should be advised that the tapes exist, and the witness should be directed to the activities or events on the tape which the cross-examinaer suggests contradicts the witness's testimony. For a discussion of this point, see chapter 11, §11.8(c).

[94c] In *R. v. Grant* (1989), 49 C.C.C. (3d) 410 (Man. C.A.), the court concluded that s. 11 governed prior inconsistent statements and that the *Browne v. Dunn* governed other impeaching testimony.

you from relying on this evidence in your closing address.[94d] The modern rule seems to be more flexible. Under this new approach the evidence will not be excluded if you fail to comply with the rule, but your failure to confront the witness with the impeaching evidence will merely go to weight.[94e]

Don't take a chance. If you have evidence that can be characterized as impeaching testimony, confront the witness with it. The last thing you want is to be prevented from advancing this testimony as a result of your failure to comply with the rule. Nor do you want to risk weakening your case because you neglected to follow the rule.

There is one additional critical question. If you have failed to cross-examine on a particular point, can you argue at the end of the case that the evidence of the witness should be rejected? In *R. v. Mete*[95] the court concluded that the rule did not extend that far, particularly, where there is other evidence inconsistent with the evidence of the witness, even though the witness was not challenged in cross-examination.[96] On the other hand, others suggest that failure to cross-examine an opposing witness on a specific point bars you from attacking that testimony or from explaining away that testimony.[97]

(j) The Hearsay Rule and Cross-Examination

The hearsay rule applies in cross-examination just as it does during the examination-in-chief.[98] Simply put, hearsay evidence is not admissible in

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[94d] See Sopinka, Lederman & Bryant, *Evidence*, at 877. In *R. v. Letourneau* (1994), 87 C.C.C. (3d) 481 at 522 (B.C. C.A.) the court suggested that the failure to put the evidence to the witness went to the credibility of the contradicting witness. If you are cross-examining an accused and you intend to lead impeaching prior inconsistent evidence in reply, the prosecution must give the accused notice during cross-examination in accordance with section 11 of the *Canada Evidence Act*.

[94e] *R. v. P. (G.)* (1996), 112 C.C.C. (3d) 263 at 283ff (Ont. C.A.). However, this discretion will be exercised more cautiously in favour of the Crown, especially where the witness is the accused.

[95] [1973] 3 W.W.R. 709 (B.C. C.A.).

[96] See Sopinka, Lederman & Bryant, *Evidence*, at 877-878. Buzzard, in *Phipson*, suggests that failure to cross-examine does not amount to acceptance of the witness's testimony in certain cases such as, for example, where the witness has had notice in advance, where the testimony is incredible, where the cross-examiner refrains due to matters of delicacy, or where the cross-examination would be repetitive where several witnesses have been called to make the same point. In such cases, the author suggests that you seek leave of the trial judge not to put these matters to the witness. Reference should also be made to *Palmer v. R.* (1979), 50 C.C.C. (3d) 193 at 210 (S.C.C.). See also *R. v. Jackson* (1974), 20 C.C.C. (2d) 113 (Ont. H.C.); and Ewaschuk, *Criminal Pleadings*, §16:2410.

[97] *R. v. Bircham*, [1972] Crim. L.R. 430 (C.C.A.); Buzzard, *Phipson*, §33-69.

[98] *R. v. Graham* (1972), 7 C.C.C. (2d) 93 at 99 (S.C.C.); *R. v. Laverty (No. 2)* (1979), 47 C.C.C. (2d) 60 at 63 (Ont. C.A.); Cross & Tapper, *Cross*, at 277; McWilliams, *Criminal Evidence*, §8:10400 and §37:10600; *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 at 312-319 (Ont. C.A.).