Challenging Opposing Witnesses: The Rule In Browne V. Dunn

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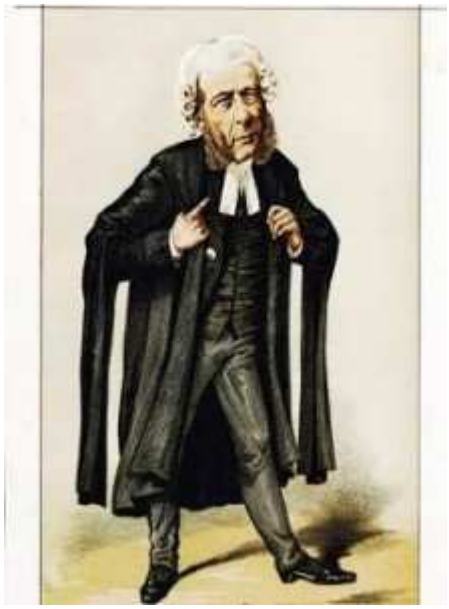

Browne v. Dunn is an English case that's almost 120 years old. Despite it's vintage its a case all British Columbian's should be familiar with when going to trial.

The rule in *Browne v. Dunn* states that if you intend to contradict an opposing witness on a significant matter you must put the contradictory version of events to the witness on cross examination. Failure to do so permits the Court to prefer the witness' version over the contradictory version. In practice, failure to follow the rule of *Browne v. Dunn* can prove damaging to a case and this was demonstrated in reasons for judgement released today by the BC Supreme Court, Vancouver Registry.

In today's case (Wahl v. Sidhu) the Plaintiff was involved in a significant collision in Surrey, BC in 2006. The Plaintiff sustained various injuries. At trial he sought over $1.1 million dollars. Much of his claim was dismissed but damages of $165,000 were assessed to compensate him for physical and psychological injuries from the crash.

During the course of the trial the Defence lawyer argued that the Plaintiff was not credible and was exaggerating his claim. The lawyer relied on evidence from various treating medical practitioners who had negative opinions about the Plaintiff's efforts and argued that "*the plaintiff is intentionally faking symptoms*". The Defence lawyer did not, however, cross examine the Plaintiff with respect to these witnesses allegations. Mr. Justice Chamberlist relied on the rule in Browne v. Dunn and refused to place any weight on these challenges to the Plaintiff's credibility. Specifically the Court provided the following useful comments:

[213] ... I wish to comment on what occurred and what did not occur with respect to the evidence of Mr. Wahl at trial. My notes of his evidence, particularly his evidence given under cross-examination, indicate that negative comments made by the various treators and Mary Richardson and Gerard Kerr were not put to him under cross-examination so that he would have an ability to deal with that evidence. It is my view that the witness must be confronted with these opinions before the opinion can be properly dealt with (Browne v. Dunn, (1893) 6 R. 67 (H.L.)). This is especially required in a case such as this where the defence submits that the plaintiff, in this case, is not motivated to get better and that the credibility of the plaintiff is at issue.

[217] The defence, in this case, called Dr. Bishop as a witness. ...As indicated earlier Dr. Bishop was originally retained by the plaintiff but did not call Dr. Bishop at trial. The defence made a point of filing Dr. Bishop's reports and defence called her evidence as part of its case. In the defence written submissions, the defence maintains that "her evidence makes it clear that she is of the opinion that the plaintiff is intentionally faking symptoms"....

[219] It is important to note the first lines of the evaluation of effort where Dr. Bishop said, and I repeat:

. . . Although effort testing of itself cannot determine motivation as submaximal effort may be multifactorial in origin (e.g. fear of pain, anxiety with regard to performance, perception of dysfunction, need to demonstrate distress, etc) . . .

That finding cannot be relied upon, in my opinion, by the defence when the particulars of those conclusions were not put to the plaintiff when he was on the stand....