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# Improper Argument to Juries in Civil Cases

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# Improper Argument to Juries in Civil Cases

*The author of this Note sets forth the rules used by appellate courts in deciding appeals based on improper argument to juries in civil cases, and then analyzes those rules to determine whether or not they fulfill their function — assuring the litigants a fair trial. The author concludes that probably the rules are not very effective in assuring fair trials, and he suggests possible ways of improving the law dealing with improper arguments.*

"Next to perjury, prejudice, as taken advantage of by the unworthy and as fostered and utilized where bad legal methods prevail, is the main cause of miscarriages of justice." Osborn, *The Mind of the Juror* 87 (1937).

A COMMON way, used by some attorneys, to take advantage of and foster prejudice in a trial is by improper argument to the jury. Whether or not Osborn's comment about "miscarriages of justice" is true, there *are* a substantial number of cases arising each year which end in appeals based on improper argument.[1] An improper argument exposes to the jury's consideration material which either could not or has not been admitted into evidence,[2] and increases the possibility that the jury will be prejudicially influenced in reaching their decision.[3] If the jury is so influenced, the losing party

1. See the hundreds of cases cited in 88 C.J.S. *Trial* § 200 (1951); 64 C.J. *Trial* § 310 (1929).

2. One of the few attempts to generally define "improper argument" is found in Jones, *Reversible Error in Argument to the Jury*, 2 ALA. LAW. 152, 153 (1941):

> [A]ny argument of counsel to the jury stating a fact pertinent to the issue unsupported by the evidence, and having a tendency to influence the finding of the jury, and which is not in keeping with the law, is improper. Arguments should be confined to facts shown by the testimony and to fair and reasonable deductions therefrom.

However, this definition does not make any apparent attempt at being all inclusive.

3. Many factors other than the argument of counsel may prejudice the jury. The parties or their witnesses may volunteer inadmissible material. Even the appearance of the parties may create prejudice, where, for example, one of the parties is a foreigner or a Negro. But as the court said in Hesse v. The St. John Ry., 80 S.C.R. 218, 239 (1899), *as cited in* ORKIN, LEGAL ETHICS 47 (1957):

> It is perhaps impossible to prevent jurors looking at a case in this way ["If I were the plaintiff, under the evidence, how much ought I to be paid if the Company did me an injury?"], but at least they ought not to be invited to do so, and such direct resorts or appeals to the feelings and interests of the individual jurymen can only exercise a disturbing or misleading influence.

has been deprived of the fair trial to which he is entitled.[4] Courts have formulated certain rules intended to maintain the fair trial standard in cases where improper argument occurs. The purpose of this Note is to set forth the rules used by appellate courts in deciding appeals based on improper argument to juries in civil cases,[5] and to analyze whether or not those rules fulfill their function — assuring the litigants a fair trial.

## I. Types of Improper Argument

The most common types of improper argument are: An appeal to the jury to consider the opposing party's race, religion, nationality[6] or social or political preferences;[7] an argument framed on the "deeper pocket doctrine," contrasting the financial status of the parties[8] or informing the jury that the defendant is or is not covered

A somewhat contrary view is represented by the following excerpt from Fields v. Metropolitan Life Ins. Co., 119 S.W.2d 463, 467–68 (Mo. App. 1938):

> It may be taken for granted that the statement in question was designed by counsel to be an appeal to what he deemed or hoped to be the sympathies or economic prejudices of the jurors. It is conceivable that in the case of a weak or ignorant juror the statement might have had the effect which plaintiff's counsel desired for it, but in the case of an average juror of the ordinary intelligence we would think that the effect would more likely have been just the opposite. Jurors who value the responsibilities of their office are wont to resent any argument directed to them which implies that the attorney making the argument holds but little regard for either their intelligence or integrity, and if the truth were known we have no doubt that appeals to sentimental emotions harm quite as often as they help.

4. See, *e.g.*, Loftin v. City of Kansas City, 164 Kan. 412, 190 P.2d 378 (1948); Strother v. McClave, 264 Ky. 121, 94 S.W.2d 310 (1936); Maher v. Roisner, 239 Minn. 115, 57 N.W.2d 810 (1953). See also McWilliams v. The Sentinel Pub. Co., 339 Ill. App. 83, 89 N.E.2d 266 (1949) ("grave miscarriage of justice").

5. The principles governing improper argument in *criminal* cases are not identical to those in *civil* cases. Since the prosecutor's argument may be given more credence by the jury, because of his seemingly impartial status as an official of the state, the trial judge must more readily interfere to protect the rights of the criminal defendant than to protect those of the parties in a civil case. See generally Note, 54 Colum. L. Rev. 946 (1954); Annot., 45 A.L.R.2d 303 (1956).

6. See generally Annot., 78 A.L.R. 1438 (1932). *Race*: Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 611, 193 S.E. 458, 465 (1937) ("negro-stealing society"); Texas Employers' Ins. Ass'n v. Haywood, 266 S.W.2d 856, 858 (Tex. 1954) ("why then didn't they bring . . . some white fellow that you could see and know was telling the truth"); *Religion*: Nemet v. Friedland, 273 Mich. 692, 696, 263 N.W. 889, 890 (1935) ("Jew Shylock"); Peck v. Bez, 129 W. Va. 247, 261, 40 S.E.2d 1, 9 (1946) ("Mohammedan"); Morgan v. Maunders, 34 S.W.2d 791, 794 (Tex. Civ. App. 1930) ("Plaintiff would not be able to attend her Methodist Church"); *Nationality*:Panteles v. Arsht, 227 Ill. App. 488, 492 (1923) ("this poor, ignorant Greek has rights just as sacred as this Jew"); Fathman v. Tumilty, 34 Mo. App. 236 (1889) ("it [the case] is nothing but an attempt on the part of an 'Irishman' to beat a 'Dutchman' out of an honest debt").

7. See, *e.g.*, Louisville Ry. v. Mitchell, 138 Ky. 190, 200, 127 S.W. 770, 773 (1910) ("strike breaker"); Robinson v. Casey, 272 S.W. 536, 538 (Tex. Civ. App. 1925) ("free love").

8. See, *e.g.*, Griego v. Conwell, 54 N.M. 287, 291, 222 P.2d 606, 608 (1950) ("whether the loss suffered by . . . [deceased's] widow and her six children should

by liability insurance;[9] an argument directed against a party because of its status as a corporation;[10] or an argument couched in unfounded, derogatory statements against the opposing party, his counsel or witnesses.[11] Courts regard some types of improper argument as more likely than other types to have a prejudicial effect upon the jury; for example, courts generally agree that prejudice is apt to result from a reference to the fact that the defendant is or is not protected by liability insurance, or an argument directed at the opposing party's race, religion or nationality.[12] Courts generally do not think that prejudice is very likely to result from an argument directed at a party because of his nonlocal residence or from an argument contrasting the financial status of the parties.[13] But since a highly inflammatory argument contrasting the financial status of the parties may be as prejudicial, if not more so, than a mild reference to a defendant's race, courts generally apply the same rules to

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be borne by the public relief agencies or by . . . [defendants] who caused and were responsible for [it]"); Texas & N.O.R.R. v. Lide, 117 S.W.2d 479, 480 (Tex. Civ. App. 1938) ("All of the railroads in the country are 'owned by New York millionaires'").

9. See, *e.g.*, Fleet Carrier Corp. v. Lahere, 184 Pa. Super. 201, 132 A.2d 723 (1957); King v. Starr, 43 Wash. 2d 115, 260 P.2d 351 (1953).

10. See, *e.g.*, Swift & Co. v. Rennard, 128 Ill. App. 181, 186 (1906), ("the defendant was a corporation without a soul to answer hereafter"); Montgomery-Ward & Co. v. Wooley, 94 N.E.2d 677 (Ind. Ct. App. 1950); Hoffman v. Berwind-White Coal Min. Co., 265 Pa. 476, 485, 109 Atl. 234, 238 (1920) (defendant called "octopus" and "sneaking, hiding, sulking . . . company").

11. See, *e.g.*, Belfield v. Coop, 8 Ill. 2d 293, 312, 134 N.E.2d 249, 259 (1956) (defendants called "thieves," "usurpers," and "defrauders"); Dannals v. Sylvania Twp., 255 Pa. 156, 162, 99 Atl. 475, 476 (1916) ("The slums of the community were dug over to dig out that drunkard [defendant's witness] that has slept in the jails more nights than you or I can tell it. Don't you think I don't know that drunkard and gutter-snipe that has been a disgrace to our community since he come there"); Texas & N.O.R.R. v. Wilkerson, 260 S.W.2d 912, 923 (Tex. Civ. App. 1953) (referred to defendant's attorney as "Baby Bill").

12. See, *e.g.*, Jonte v. Key System, 89 Cal. App. 2d 654, 659-60, 201 P.2d 562, 566 (1949) ("The censured expressions in this case did not contain an appeal to dangerous prejudices, racial or otherwise, as in some cases in which reversal was held necessary, and it seems probable that the jury saw through the unsupported rhetorical attacks of plaintiff's counsel and did not permit them to influence their verdict"); Angelina Casualty Co. v. Ryan, 282 S.W.2d 310, 312 (Tex. Civ. App. 1955) ("Where the argument is improper only because its nature is calculated to inflame the minds and arouse the passion of prejudice such argument is usually regarded as being of the 'curable' type. However, this is not an invariable rule. Appeals to National, racial or religious prejudice are apt to be held not curable by instruction to disregard the same."). See also Cox, *Errors in Jury Argument*, 6 TEX. BAR. J. 536, 552 (1943), for individual argument classification; Comment, 10 OKLA. L. REV. 359, 362 (1957) (insurance).

13. Attempts at a hard and fast classification based on the subject matter of improper arguments have not been successful, because of the many variables of each particular case. But a jury's prejudice against a certain race or religion is apt to be far stronger than a prejudice against wealthy people or people from a different state. This is well illustrated by recent Southern Negro maltreatment; while no one would expect to see a Californian mistreated for being a Californian, or a wealthy person's house being bombed for being a wealthy person.

all forms of improper argument irrespective of the subject matter of that argument.[14]

## II. The Rules Regarding Improper Argument: Summarized

If the jury has not been prejudicially influenced by the improper argument, neither party has been denied a fair trial.[15] Thus the courts have developed rules based principally on that factor—jury reaction—although it is questionable how accurately, if at all, courts can measure a jury's reaction to improper argument.[16] To some extent, however, these rules are probably based on a desire to directly curb counsel's misconduct by punishing him for intentional improper argument.[17]

The rules used to guide appellate courts in improper argument cases can be summarized as follows:

### *A. Trial judges' discretion*

A trial judge has broad discretion in determining the effect of an improper argument upon the jury, and his ruling on the matter will withstand all but an abuse of such discretion.[18]

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14. See generally Annots., 32 A.L.R.2d 9 (1953); 4 A.L.R.2d 761 (1949); 78 A.L.R. 1438 (1932): See, *e.g.*, Tri-State Transit Co. of Louisiana Inc. v. Westbrook, 207 Ark. 270, 180 S.W.2d 121 (1944); Wade v. Texas Employers' Ins. Ass'n, 150 Tex. 557, 565, 244 S.W.2d 197, 201 (1951) ("We judge by the degree of vice, not merely the subject matter of the argument").

15. In other words there has been at most harmless error. *E.g.*, Minn. R. Civ. P. 61 provides:

> No error . . . or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.

16. There are several ways to attempt to find whether the jury was influenced. They might be required to defend their verdict, but:

> The court protects the jury from all investigation and inquiry as fully as the temple authorities protected the priestess who spoke to the supplient votary at the shrine.

Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 60 (1948) (Judge Frank). It would seem possible, though impractical, to ascertain the prejudices of the jury by using psychological tests. See generally, Redmount, *Psychological Tests for Selecting Jurors*, 5 Kan. L. Rev. 391 (1957).

17. If trial courts, upon the happening of such a circumstance [a prejudicial remark], would declare a mistrial and assess the costs to the transgressor, it would have a salutory effect upon lawyers who know better, or if they did not know better, would pay for the lesson then learned.

Lewis v. Oliver, 129 Colo. 479, 482–83, 271 P.2d 1055, 1057 (1954).

18. This is so when he refuses to grant a new trial, *e.g.*, Falzone v. Gruner, 132 Conn. 415, 45 A.2d 153 (1945); Patton v. Minneapolis St. Ry., 247 Minn. 368, 77 N.W.2d 433 (1956). And also when he grants a new trial, *e.g.*, Frohlich v. City of New Haven, 163 Atl. 463 (Conn. 1932).

> Arguments to the jury become along with many other things a part of the atmosphere of the case. The atmosphere of a case is difficult to ascertain from the record. It is composed not only of the words which are used, but also of the inflections of the voice and the conduct of the participants, even at times the

*B. Weight of the evidence*

An appellate court will review the evidence presented at the trial to determine whether or not it is sufficient to sustain the jury's verdict, irrespective of the improper argument.[19]

*C. De minimis and per se*

An improper argument will be deemed harmless, and will afford no grounds for reversal, if the argument was extremely unlikely to have influenced the jury in the particular case.[20] On the other hand, a flagrantly improper argument which is clearly prejudicial against the opposing party will necessitate a new trial, and the trial judge's failure to declare a mistrial on his own initiative is reversible error.[21]

*D. Curative action*

If action is taken at the trial level that is intended to neutralize any prejudicial effect of an improper argument, it is presumed to have been successful and that consequently the jury did not consider the argument.[22] The "curative action" may be any one or more of the following, depending upon the nature and degree of the argument and other circumstances of the case:

(1) The court may sustain an objection.[23]
(2) The court may instruct the jury to disregard the argument.[24]
(3) The court may reprimand the offending counsel for his conduct.[25]
(4) The offending counsel may withdraw the improper argument.[26]

*E. Waiver*

If the offended party's counsel fails to object to the improper

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audience reaction. . . . The trial judge, who breathed the atmosphere of the case, is far more able to determine whether the parties received a fair trial than we are.

Dura Seal Prod. Co. v. Carver, 181 Pa. Super. 377, 381–82, 124 A.2d 438, 440 (1956). See generally Kunin, *The Duty or Discretion of the Trial Judge to Declare a Mistrial*, 10 N.Y.U. INTRA. L. REV. 285 (1955).

19. See, *e.g.*, cases cited notes 32–36 *infra*.

20. See, *e.g.*, Stanley v. Kawakami, 127 Cal. App. 2d 277, 273 P.2d 709 (1954); Angle v. Bilby, 25 Neb. 595, 41 N.W. 397 (1889).

21. See, *e.g.*, McWilliams v. Sentinel Pub. Co., 339 Ill. App. 83, 89 N.E.2d 266 (1949); *In re* Widening of Woodward Ave., 297 Mich. 235, 297 N.W. 468 (1941); Maher v. Roisner, 239 Minn. 115, 57 N.W.2d 810 (1953).

22. See, *e.g.*, Devine v. Chicago City Ry., 167 Ill. App. 361 (1912).

23. See Brush v. Laurendine, 168 Miss. 7, 150 So. 818 (1933).

24. See, *e.g.*, Day v. Ferguson, 74 Ark. 298, 85 S.W. 771 (1905); Anderson v. Enfield, 244 Minn. 474, 70 N.W.2d 409 (1955).

25. See, *e.g.*, Dabbs v. Richardson, 137 Miss. 789, 102 So. 769 (1925); Dixon v. Business Mens' Assur. Co., 285 S.W.2d 619 (Mo. 1955).

26. See, *e.g.*, Cochran v. Gritman, 34 Idaho 654, 203 Pac. 289 (1921); James Smith Woolen Machinery Co. v. Holden, 73 Vt. 396, 51 Atl. 2 (1901).

argument or retaliates with an improper argument of his own, the alleged error will generally be deemed to have been waived.[27]

## III. The Rules Regarding Improper Argument: Analyzed

### A. Trial Judge's Discretion

The broad scope of the trial judge's discretion underlies all other rules applied in improper argument cases. Since the judge is present when the argument is made, the appellate courts generally abide by his determination as to the impact the argument had on the jury.[28] And in most cases reaching appellate courts the trial judge has had an opportunity to rule on the argument upon objection by the opposing counsel. If the trial judge overruled the objection and also denied other relief requested, and the appellate court determines that there was improper argument, the case will probably be reversed on the ground that the trial judge abused his discretion. His implied approval of counsel's argument may have unduly influenced the jury.[29] But if the trial judge adopted the other extreme and declared a mistrial or a new trial, the appellate court will seldom reverse the lower court's ruling.[30] More frequently than not, however, the trial judge adopts a middle position and takes "curative" action intended to remove the prejudicial effect of an improper argument from the minds of the jury. Some appellate courts have noted that the reluctance of trial courts to grant mistrials may be a factor in the increasingly large number of cases in which improper arguments are made.[31]

### B. Weight of the Evidence

The most important question in any improper argument case is whether or not the improper argument prejudicially influenced the jury so that the losing party was deprived of a fair trial. If the

27. See, *e.g.*: *Objection*: White v. Gregory, 126 Ind. 95, 25 N.E. 806 (1890); Hilton v. Thompson, 360 Mo. 177, 227 S.W.2d 675 (1950); *Retaliation*: Donovan v. Richmond, 61 Mich. 467, 28 N.W. 516 (1886); *Invitation*: Brann v. F. W. Woolworth Co., 181 Va. 213, 24 S.E.2d 424 (1943).

28. See, *e.g.*, Hulburd v. Worthington, 57 Cal. App. 2d 477, 134 P.2d 832 (1943); Lee v. Lee, 248 Minn. 496, 80 N.W.2d 529 (1957); Douglas v. Lang, 124 S.W.2d 642 (Mo. 1939).

29. See, *e.g.*, Brotherhood of Painters v. Trimm, 207 Ala. 587, 93 So. 533 (1922).

30. See, *e.g.*, Dura Seal Prod. Co. v. Carver, 181 Pa. Super. 377, 124 A.2d 438 (1956). Such an order may not be appealable, however, as in Minnesota. Cunningham, *Appealable Orders in Minnesota*, 37 Minn. L. Rev. 309, 331 (1953).

31. See, *e.g.*, Lewis v. Oliver, 129 Colo. 479, 271 P.2d 1055 (1954); Owensboro Shovel & Tool Co. v. Moore, 154 Ky. 431, 157 S.W. 1121 (1913); Goucher v. Woodmen Acc. Co. of Lincoln, Neb., 231 Mo. App. 573, 104 S.W.2d 289 (1937); Davis v. Stowe Twp., 256 Pa. 86, 100 Atl. 529 (1917). *But see* Eizerman v. Behn, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956); Barrell v. Dickinson, 82 Vt. 551, 74 Atl. 234 (1909).

weight of the evidence is such that the winning party would have won even had there been no improper argument, the losing party has not been harmed.[32] Similarly, if the weight of the evidence is clearly against the winning party, the judgment should be reversed without even considering the improper argument.[33] Some appellate courts, reviewing the weight of evidence presented at a trial have arrived at doubtful conclusions. For example, in a recent Texas case, in which the defendant's attorney accused the plaintiff's attorney of bribing his medical witness, the Court of Civil Appeals reversed a verdict for the defendant on the ground that "the argument . . . 'probably influenced the verdict unfavorably to petitioner.' The issue between the parties . . . was very closely drawn."[34] The Texas Supreme Court in turn reversed the civil appeals court decision, saying "We believe that any fair jury would have reached the same verdict regardless of the argument of counsel for the petitioners."[35]

Where the evidence is close, as it apparently was in the Texas case, and more than a de minimis improper argument is made, it is difficult to see why the probability is not just as great that the jury were prejudiced as that they were not, unless, of course, effective "curative" action is taken at the trial level. Thus it is doubtful that the fair trial standard is met in such cases without reversing and remanding for a new trial. The Minnesota Supreme Court has reasoned:

> Plaintiff's evidence to sustain recovery is not strong. There was so much evidence to contradict his claim, given by so many apparently credible witnesses, that his right to recover is a close and doubtful question. In

32. See, *e.g.*, Hulburd v. Worthington, 57 Cal. App. 2d 477, 134 P.2d 832 (1943); Lumbermen's Lloyds v. Loper, 153 Tex. 404, 269 S.W.2d 367 (1954).

33. See, *e.g.*, Ball v. Murray, 93 Ga. App. 682, 92 S.E.2d 562 (1956); Shurdut v. John Hancock Mutual Life Ins. Co., 320 Mass. 728, 71 N.E.2d 391 (1947). Of course, the evidence must be greater to sustain an order for judgment n.o.v. than is necessary for the granting of a new trial for insufficiency of evidence.

34. Loper v. Lumbermen's Lloyds, 269 S.W.2d 353 (Tex. Civ. App. 1953).

35. Lumbermen's Lloyds v. Loper, 153 Tex. 404, 411, 269 S.W.2d 367, 371 (1954). But this did not end the troubles of the court of appeals, for in Southern Pac. Co. v. Hubbard, 290 S.W.2d 547, 549 (Tex. Civ. App. 1956) that court affirmed a judgment for the plaintiff where plaintiff's counsel made improper argument against railroads, and said: "The facts of the accident are uncontradicted . . . the verdict is by no means excessive. The verdict is amply supported by the evidence." The Texas Supreme Court held on appeal that the evidence did not support the plaintiff's verdict and remanded the case. Southern Pac. Co. v. Hubbard, 156 Tex. 525, 297 S.W.2d 120 (1956). See also Romann v. Bender, 184 Minn. 586, 239 N.W.596 (1931), where the Minnesota Supreme Court reversed a judgment for plaintiff because improper argument had been made and the evidence was close; at the second trial improper argument was again made by the plaintiff's counsel, but the supreme court affirmed holding that no prejudice resulted. The dissenting justice recommended reversal for misconduct because the evidence for plaintiff was "very unsatisfactory." Romann v. Bender, 190 Minn. 419, 426, 252 N.W. 80, 83 (1934).

> that situation, the recovery of a verdict, after serious misconduct of his counsel, is a sufficient showing of prejudice.[36]

Instead of weighing the evidence supporting the finding of liability some courts may look *only* to the amount of the plaintiff's verdict to determine whether or not the jury was adversely prejudiced. A finding that the verdict is not excessive raises an inference that the improper argument was harmless.[37] But some courts have criticized this test:

> It is suggested that as no claim is made that the damages are excessive there was no prejudice to the defendant. If the argument prejudiced the jury against the defendant, that prejudice was as likely to affect their judgment in regard to the defendant's liability as in regard to the amount of the liability.[38]

The jury may award the plaintiff a verdict limited to reasonable compensation for the injury he suffered, even though he is not entitled to a verdict at all. A similar argument is also persuasive where the court finds the verdict to be excessive due to prejudice and reduces the amount of the judgment or remands the case for retrial of the damages issue; "obviously such means [improper argument] may be quite as effective to beget a wholly wrong verdict as to produce an excessive one."[39]

The same criticism cannot be made of the many cases in which courts have found improper argument and an excessive verdict, but have held that the excessive verdict was *not* due to prejudice stemming from the improper argument.[40] In some of these cases, how-

36. Romann v. Bender, 184 Minn. 586, 589, 239 N.W. 596, 597 (1931).

37. See, *e.g.*, Finn v. City of Adrian, 93 Mich. 463, 53 N.W. 614 (1892); Harris v. Breezy Point Lodge, 238 Minn. 322, 56 N.W.2d 655 (1953).

38. Appel v. Chicago City Ry., 259 Ill. 561, 102 N.E. 1021, 1024 (1913). See also Loftin v. City of Kansas City, 164 Kan. 412, 190 P.2d 378 (1948); Jeddeloh v. Hockenhull, 219 Minn. 541, 18 N.W.2d 582, 588 (1945); Hanley v. Milwaukee Electric Ry. & Light Co., 220 Wis. 281, 263 N.W. 638 (1935); Smith v. Boston & M.R.R., 88 N.H. 430, 191 Atl. 833 (1937); Comment, 10 OKLA. L. REV. 359 (1957).

39. Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin, 283 U.S. 520, 521 (1931). The Minnesota Supreme Court had found the verdict excessive due to prejudice caused by an improper argument on defendant's insurance, but refused to remand for a new trial. The court did require the plaintiff to agree to a remittitur. The United States Supreme Court reversed and remanded.

40. See, *e.g.*, Railway Express Agency v. Gee, 197 Ark. 925, 125 S.W.2d 802 (1939); LaCombe v. Minneapolis St. Ry., 236 Minn. 86, 51 N.W.2d 839 (1952); Gunter v. Whitener, 75 S.W.2d 588 (Mo. 1934). See also Cosar v. Bemo, 282 P.2d 222 (Okla. 1955) (dissenting opinion). In *LaCombe* the court stated:

> In the exercise of a sound discretion, the trial court may, by reason of passion and prejudice exhibited in the award of excessive (or inadequate) damages, grant a new trial upon the sole issue of damages when it appears upon the evidence that the other issues, wholly unaffected by passion and prejudice, have been thoroughly litigated and justly determined, so that a right of recovery has been clearly established.

236 Minn. at 93, 51 N.W.2d at 844.

For a general discussion of excessive verdicts see Note, 16 MINN. L. REV. 185

ever, it may be arguable that there was no other possible cause for the excessive verdict.[41] Perhaps an excessive verdict should raise an inference that the improper argument prejudicially influenced the jury.

### C. De Minimis and Per Se

The de minimis and per se rules define the extremes of improper argument. Where it is apparent to the court that the improper argument is so slight it is extremely unlikely to unfairly influence the jury, the argument will be deemed to be harmless;[42] the improper argument has been de minimis.

> Courts are not justified in assuming that the mind of the jury is of such plastic and unreliable material as to at any unjustified word of debate neglect the instructions, abandon the evidence and disregard their oaths.[43]

Of course, if the trial judge has erroneously overruled an objection by the opposing counsel, he may have created prejudice by underscoring the argument and giving the jury the impression that they can properly consider it in reaching a verdict. And a reversal may be necessary to afford the opposing party a fair trial.[44]

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(1932), and for a criticism of appellate court review over size of verdicts, see Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957).

41. The following excerpt is taken from Cleveland Ry. v. Crooks, 130 Ohio St. 255, 256–58, 198 N.E. 867, 868–69 (1935):

> Although the Common Pleas Court found the verdict excessive to the extent of practically one-third, and the Court of Appeals found the same to be excessive to the extent of practically two-thirds, it was found by each court that such excessive damages were not the result of passion or prejudice. [T]he record clearly discloses such improper statements of counsel . . . as were well calculated to mislead the jury and induce it to return [an excessive verdict]. . . . The record in this case not only warranted but required the conclusion that the verdict of the jury found to be so grossly excessive was the result of passion or prejudice.

42. Obviously, classifying the argument de minimis must in part be dependent upon the context in which it was made. The classification of harmless error is more apt to be found where the evidence preponderates in the wrongdoer's favor or where the argument is not directed against the parties involved in the suit. A bare reference to the fact that defendant is a "corporation," an "exserviceman," or a "Democrat," while improper, probably will be disregarded by the jury as fast as the reference is made. But if this factor is stressed and allowed to linger in the jurors minds it may influence them.

43. Devine v. Chicago City Ry., 167 Ill. App. 361, 364 (1912).

44. See, *e.g.*, Brotherhood of Painters v. Trimm, 207 Ala. 587, 588, 93 So. 533 (1922), a contract action for death benefits in which the plaintiff's attorney argued that the local union "would gladly pay . . . if they had charge of the disbursement of the money. Gentlemen, you are not rendering a verdict against the local union here, but these people up in Indiana." Upon objection the court ruled that this was a "matter of argument" and denied a requested instruction to disregard. In Anderson v. Hawthorne Fuel Co., 201 Minn. 580, 581–82, 277 N.W. 259, 260 (1938), plaintiff's attorney argued that he was no match for the defendant's attorney, an "outstanding trial lawyer" of a 24 man firm who appears in court in cases where "there is no defense," and that "it is only large corporations like . . . [defendant] that can

The other extreme is improper argument so flagrant that the court must conclude that it very probably prejudicially influenced the jury, and that no action at the trial could have avoided its harmful effect to the opposing party.[45] These arguments are considered prejudicial per se,[46] and such conduct *is* grounds for the immediate declaration of a mistrial. Failure of the trial judge to so declare on his own motion will be reversible error.[47] The determination whether or not an argument is prejudicial per se must be made by examining the facts of the particular case and the context in which the argument was made.[48] Only an extremely flagrant argument—for example, a vehement attack against a party because of its status as a "soulless, heartless corporation,"[49] because the party "is a Jew,"[50] or because the parties are "sweet scented apple blossoms from Russia,"[51]—is in this classification.

Courts often say that an attorney's good faith or inadvertence is no excuse for making improper argument, and that reversals are

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obtain the services of men like Mr. ———." Counsel continued, "Poor men, like . . . [plaintiff]," but at this point opposing counsel objected and requested that the jury be instructed to disregard the argument; the judge said to plaintiff's attorney, "I think that is probably true."

45. See, *e.g.*, Watts v. Espy, 211 Ala. 502, 101 So. 106 (1924); King v. Starr, 43 Wash. 2d 115, 260 P.2d 351 (1953).

46. The courts often used the term "incurable" to indicate that the argument had prejudicial affect upon the jury, which could not be removed by any action at the trial level short of declaring a mistrial.

47. See, *e.g.*, Watts v. Espy, 211 Ala. 502, 101 So. 106 (1924); Sleeper v. World of Mirth Show, Inc., 100 N.H. 158, 121 A.2d 799 (1956).

48. See, *e.g.*, Tri-State Transit Co. v. Westbrook, 207 Ark. 270, 180 S.W.2d 121 (1944) (intent of counsel and combined effect of argument requires reversal); Loftin v. City of Kansas City, 164 Kan. 412, 190 P.2d 378 (1948) (repeated violation and intent); Ellwein v. Holmes, 243 Minn. 397, 68 N.W.2d 220 (1955) (type of case makes argument incurable); Halton v. Fellows, 157 Ore. 514, 73 P.2d 680 (1937) (repetition).

> We think the argument complained of can be properly evaluated only when it is borne in mind that a verdict for a large amount was returned after only a short deliberation by the jury in favor of a woman in dire physical and financial circumstances, a resident of the community where the case was tried and where the jurors lived, on evidence which we believe was insufficient to support the finding that the appellant railroad company caused the injuries to this unfortunate woman.

Texas & N.O.R.R. v. Wilkerson, 260 S.W.2d 912, 922–23 (Tex. Civ. App. 1953).

49. See Western & A.R.R. v. Cox, 115 Ga. 715, 717, 42 S.E. 74, 75 (1902): "The only way to reach a railroad is to make it pay money. A railroad has no soul, no conscience, no sympathy, and no God." The court said it was reversible error for the trial judge to refuse to declare a mistrial. *But compare* Galvenston, H. & S.A.R.R. v. Smith, 93 S.W. 184, 185 (Tex. Civ. App. 1906). The court here held no reversible error as there was nothing in the language to inflame the jury where plaintiff's attorney argued "This is a suit by a person against a corporation,—a suit by one of God's creatures against one of law's creatures . . . [a corporation] is without conscience, without feeling, without heart, and without soul."

50. McWilliams v. Sentinel Pub. Co., 339 Ill. App. 83, 89 N.E.2d 266 (1949).

51. Trachenberg v. Castillo, 257 S.W. 657 (Tex. Civ. App. 1923).

not granted for the purpose of punishing counsel.[52] But this does not mean they will not consider the intent with which the argument was made, and improper arguments made with a purpose to instill prejudice have proved more susceptible to being classified as per se prejudicial than those made through inadvertence.[53] Perhaps the reason courts consider the attorney's intent relevant is discernible from the opinion of the Supreme Court of Texas in *Southern Pacific Co. v. Hubbard.*[54] The plaintiff's attorney, who was accused of improper argument in the trial court, had argued on an appeal by the opposing counsel that anyone present at the trial would realize that the jury would have reached the same verdict no matter what arguments had been made. The Texas court held that improper argument to be per se prejudicial, saying:

> [The argument by plaintiff's counsel] seems less convincing when we remember that he himself was present at the trial and presumably observed and evaluated all the circumstances and conditions existing just before he made his arguments. At that time with all the conditions fresh before him, their evaluation present in his mind, and the possibilities of an adverse verdict looming before him, he decided to make the improper arguments. So he made them, and won. What he now argues with his victory secure and the memory of the fear of defeat grown dim, is not any more convincing than his res gestae action at the time of the trial.[55]

Cases in which the appellate court has learned that the offending counsel has used improper argument in prior trials generally have been reversed and remanded for a new trial,[56] although it is not at all clear that this factor was decisive.

### D. Curative Action

Courts presume that the prejudicial effect of an improper argument that is not per se prejudicial can be removed by action at the trial level.[57] The type of action deemed capable of rendering the

52. See, *e.g.*, Maher v. Roisner, 239 Minn. 115, 57 N.W.2d 810 (1953); Paska v. Saunders, 103 Vt. 204, 153 Atl. 451 (1931); Brown v. Swineford, 44 Wis. 282 (1878).

53. See Loftin v. City of Kansas City, 164 Kan. 412, 190 P.2d 378 (1948); Cluett v. Rosenthal, 100 Mich. 262, 58 N.W. 1009 (1894); Hall v. Rice, 117 Neb. 813, 223 N.W. 4 (1929). Compare Samuelson v. Olson Transp. Co., 324 Mich. 278, 36 N.W.2d 917 (1949).

54. 156 Tex. 525, 297 S.W.2d 120 (1956).

55. *Id.* at 533–34, 297 S.W.2d at 126.

56. See, *e.g.*, Dunn v. Terminal R.R. Ass'n of St. Louis, 285 S.W.2d 701, 709 (Mo. 1956); Mooney v. Terminal R.R. Ass'n of St. Louis, 352 Mo. 245, 261, 176 S.W.2d 605, 612 (1944); Lindsay v. Pettigrew, 3 S.D. 199, 52 N.W. 873 (1892), *on second trial*, 10 S.D. 228, 72 N.W. 574 (1897). See also Eizerman v. Behn, 9 Ill. App. 2d 263, 287, 132 N.E.2d 788, 799 (1956). *But see* Romann V. Bender, 184 Minn. 586, 239 N.W. 596 (1931), *on second trial*, 190 Minn. 419, 252 N.W. 80 (1934).

57. See, *e.g.*, James Smith Woolen Mach. Co. v. Holden, 73 Vt. 396, 51 Atl. 2 (1901): "The great weight of authority holds that the mischief is cured when the offending counsel withdraws his statement or the court at once rules out the objec-

improper argument impotent depends on the nature and degree of the argument itself.[58] But it is doubtful that this desired "curative" effect can be achieved. Prejudice, both by legal and psychological definition, is a forejudgment; a preconceived opinion formed before sufficient information or knowledge is obtained to enable the person to make an impartial judgment.[59] The prejudice originates unconsciously, so that the person is not aware of its formation. Although it is irrational, the prejudiced opinion will probably be defended vehemently as being based upon the facts.[60] This is not to suggest that the individual either consciously allows his prejudices to influence his decision or intentionally defends a decision knowing it to be based upon prejudice, but rather that prejudice is so skillfully camouflaged by the mind that the person may not realize its presence or influence.[61]

No one is without some prejudices, but it is almost impossible to discern whether or not the jurors have the type of prejudices the improper argument is directed toward.[62] And it is also very possible that jurors who are in fact prejudiced *cannot disregard* an argument directed to that prejudice, no matter how conscientious they may be.[63] One court has aptly observed: "The red hot iron of prejudice

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tionable matter and instructs the jury not to consider it." *But see* Brown v. Swineford, 44 Wis. 282, 292–93 (1878) where the court said: "But it is not so certain that a jury will do so [follow an instruction to disregard all statements of fact not in evidence]. Verdicts are too often found against evidence and without evidence, to warrant so great a reliance on the discrimination of juries."

58. See, *e.g.*, Metropolitan Life Ins. Co. v. Carter, 212 Ala. 212, 102 So. 130 (1924) (withdrawal by counsel did not cure); Brush v. Laurendine, 168 Miss. 7, 150 So. 818 (1933) (sustaining objection did not cure).

59. BLACK, LAW DICTIONARY (4th ed. 1951); SIMPSON & YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 14–19, 265–66 (Rev. ed. 1958).

60. CROW & CROW, UNDERSTANDING OUR BEHAVIOR 94–95 (1956). An idea that has been recognized for a long time. See WILSON, THE AMERICAN JUROR 77 (1868):

> It is one of the peculiarities of prejudice, whenever it has obtained a complete lodgment in the mind, that it enables us to believe that which we *wish* to believe. Under its influence, we may, without any regard to right reason, in a certain sense *honestly*, believe or disbelieve false propositions.

61. *Ibid.*; CROW & CROW, *op. cit. supra* note 60.

62. Acting upon the same propositions and under the same apparent conditions one individual will decide one way, and another, another way. . . . It means that there is a bias in every personality. The nature of this bias is a composite of hereditary tendencies, parental influences, personal experiences, and the particular environmental pressure.

. . . .

The presence of this unconscious bias makes every person a prejudiced individual. No matter how fair we try to be, the prejudice is there. 'An unprejudiced individual does not exist.'

McCARTHY, PSYCHOLOGY FOR THE LAWYER 102–03 (1929).

63. If one of the jury realizes that he is prejudiced, he may conscienciously try to erase this prejudice from his consideration of the case. Such a conscious attempt may result in overcompensation and subsequent injustice to the other party. "There of course may be one here and there who is so afraid he will do an injustice that,

has been thrust into the case; merely withdrawing it still leaves a festering wound."[64] Of course, if in fact the jurors are not so prejudiced, the improper argument can be disregarded in their consideration of the case unless the argument itself *creates* a prejudice in them.[65] These factors should be kept in mind when examining the various methods used to "cure" improper argument.

*Sustained objection*

The principal benefit of the sustained objection is that it stops a line of improper argument. But it is also regarded as sufficient to "cure" an improper argument which is mild in nature and degree. For example the Oklahoma Supreme Court has held:

> The remarks of counsel were improper in so far as they might be construed as tending to argue or imply that the judge favored plaintiff's side, however, any such effect of the remarks appears undone in the fact that the court promptly sustained an objection to the remarks.[66]

Apparently the sustained objection is thought to have "curative" effect because it "impliedly carries with it an indication of disapproval."[67] But the value of a sustained objection standing alone as a "curative" act can be seriously questioned since it is doubtful that jurors fully understand its legal significance.[68] So the ruling on the objection ordinarily is accompanied by one of the other forms of "curative" action, usually an instruction that the jury disregard the improper argument.

*Instruction to disregard*

The instruction to disregard an improper argument is based on the presumption that juries do what judges tell them to do.[69] How-

as it is said, he leans over backwards and thus does the opposite injustice." OSBORN, THE MIND OF THE JUROR 88 (1937).

64. O'Hara v. Lamb Construction Co., 197 S.W. 163, 165 (Mo. App. 1917). Many courts, on the other hand, seem very reluctant to recognize that probability, and generally resort to observations such as: "[M]odern juries generally are keen and alert and usually sift the 'wheat from the chaff' when they retire to a jury room to consider the case in its entirety." Jurgensen v. Schirmer Transp. Co., 242 Minn. 157, 167, 64 N.W.2d 530, 536 (1954).

65. A very mild reference (de minimis), though improper, probably can be disregarded by the jury.

66. Otis Elevator Co. v. Melott, 281 P.2d 408, 416 (Okla. 1954).

67. Rogers v. Broughton, 277 S.W.2d 121, 124 (Tex. Civ. App. 1955).

68. See Brush v. Laurendine, 168 Miss. 7, 13, 150 So. 818, 819 (1933) ("the jury might not be impressed with objections and rulings thereon as having any particular force save as between counsel and the judge").

69. See Petticrew v. Petticrew, 129 N.E.2d 194 (Ohio 1953). "[N]o reason to doubt that the jury accepted the instructions of the court as given and disregarded the statement of counsel." Hart v. Lewis, 187 Okla. 394, 397, 103 P.2d 65, 69 (1940). "In view of the instructions . . . , and in view of the size of the verdict we feel justified in assuming that, even if the argument was objectionable, the jury properly disregarded the statements of counsel." Yet at the same time courts

ever, there are many adherents to the "realistic theory" of the jury system, formulated by the late Judge Jerome Frank, which challenges the validity of the blind obedience presumption:

> [The realistic theory] is based on what anyone can discover by questioning the average person who has served as a juror — namely that often the jury are neither able to, nor do they attempt to, apply the instructions of the court.[70]

Despite this "realistic theory," the presumption that the argument will be disregarded has a pronounced effect on the trial judge. When the opposing counsel objects to an improper argument, the judge may be forced to decide whether or not granting a mistrial is necessary to avoid prejudice, and, if the presumption is that the prejudicial effect of the argument will be removed by an instruction to disregard, a mistrial will rarely be granted.[71] Two undesirable results may follow from the courts' reluctance to declare mistrials: (1) intentional improper arguments may be encouraged, and (2) the particular litigant may be deprived of a fair trial.

Furthermore, perhaps instead of removing prejudice, the instruction may instill it in the minds of the jurors by specifically calling the argument to their attention, and sometimes repeating its substance. In fact, a jury is normally instructed twice to disregard the argument, once at the time the misconduct occurs and again when the judge makes his charge to the jury.[72] Such repetition tends to

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recognize with respect to per se improper argument that the instruction is useless as a cure. See Georgeson v. Nielsen, 218 Wis. 180, 185, 260 N.W. 461, 463 (1935). Where the court after commenting how the objection and instruction increase the prejudice said: "Even a reprimand . . . 'does not cure the wrong' . . . with more reason may it be said that the Homeopathic dose here administered by the trial court did not effect a cure." [Homeopathy: The theory or system of medical practice holding that disease is cured by remedies which produce on a healthy person effects similar to the symptoms of the complaint of the patient, the remedies usually administered in minute doses. WEBSTER, NEW COLLEGIATE DICTIONARY (2d ed. 1953).]

70. FRANK, COURTS ON TRIAL 111 (1949). It is interesting that counsel for plaintiff in one Minnesota case, Romann v. Bender, 184 Minn. 586, 587–88, 239 N.W. 596, 597 (1931), argued in his closing argument to the jury:

> I moved the court to instruct the jury to disregard it [defendant's counsel's improper argument] and the court did that. The court did that because it was not fair, and it was not just and it was not decent, ladies and gentlemen, it was not clean. Strike it out if you please, but it was there before this jury and you cannot remove from the minds of the jury something that has improperly and indecently crept into a lawsuit. . . ."

Plaintiff's counsel himself was later reversed for making improper argument of which the quoted portion was part, but principally because he argued: "But I want to tell you ladies and gentlemen, when . . . [defendant's counsel] made that statement here in court he knew that it was not true."

71. Graphic illustration that courts regard most improper argument curable is found in *Corpus Juris* and *Corpus Juris Secundum* which list twenty-two full columns of cases holding improper argument cured by an instruction to disregard, and only four columns of cases holding argument incurable by such an instruction. 88 C.J.S. *Trial* § 200 n.75; § 202 n.10 (1951); 64 C.J. *Trial* § 310 n.15; § 312 n.38 (1929). This does not include arguments that were cured by other commonly used measures.

72. The second instruction is often only a general charge for the jury "to disregard

emphasize the improper argument in the minds of the jurors.[73] The results of the Jury Project of the University of Chicago Law School, in which thirty different lay juries were subjected to three almost identical versions of a personal injury action, provide some evidence that juries become more influenced as the argument is recalled to their attention. The only differences among the three versions of the evidence were that in the first the defendant disclosed on cross examination that he *had no* insurance; the mean award was $33,000. In the second version the defendant disclosed on cross examination that he *had* insurance, no objection was made and there was no further mention of insurance; the mean award was $37,000. In the third version, the defendant once again disclosed on cross examination that he *had* insurance, the remark was objected to and the trial judge explicitly instructed the jury to disregard the statement; the mean award was $46,000.[74]

> Assuming these figures to be an accurate reflection of the reaction to insurance, they document the common suspicion that juries react more prejudicially to the defendant as insurance receives greater emphasis, whether that emphasis comes by instruction to disregard or otherwise. . . . The curative effect of an instruction to disregard, then, may be seriously doubted, for apparently it serves only to further prejudice the defendant's insurance company. . . .[75]

*Reprimand*

The third type of "cure"—the reprimand—is used less frequently than the instruction to disregard, and it is more disciplinary in nature. However, many courts quite consistently say that

> the purpose of a rebuke to counsel is not so much to reflect upon him, criticize him or discipline him, as to impress the jury with the gravity of his impropriety, whether he committed it in ignorance, unwittingly or deliberately.[76]

To be at all effective as a "cure," the judge must, of course, give the

any statements of counsel concerning the evidence not borne out by the evidence." See, 1 REID'S BRANSON INSTRUCTIONS TO JURIES, § 77 (3d ed. 1936).

73. Some courts have recognized this. See, *e.g.*, Wolfson v. Baltimore Bank of Kansas City, 157 S.W.2d 560 (Mo. App. 1942); Bratt v. Smith, 180 Ore. 50, 175 P.2d 444 (1946). In a Pennsylvania case the court volunteered the following: "Unless attention is called to improper remarks at the time they are made, trial judges sometimes elect not to refer to them later on the theory that ignoring them may be less prejudicial than bringing them again into the jury's mind by directing the jury to disregard them." Dura Seal Prod. Co. v. Carver, 181 Pa. Super. 377, 381 n.1, 124 A.2d 438, 440 n.1 (1956).

74. The facts reported here were taken from Note, 10 U. FLA. L. REV. 68, 74 n.31, (1957), which cites "mimeographed text of a speech, entitled, 'Report on the Jury Project of the University of Chicago Law School,' delivered at a conference on legal research at the University of Michigan Law School on Nov. 5, 1955, by Prof. Harry Kalven, Jr., of the University of Chicago Law School."

75. Note, 10 U. FLA. L. REV. 68, 74–75 (1957).

76. Atlantic Coca Cola Bottling Co. v. Childers, 60 Ga. App. 868, 871, 5 S.E.2d 388, 390 (1939).

reprimand in the presence of the jury, and it must be neither too slight nor too severe; if the censure is not severe enough, the jury may still be prejudiced by the argument, but if the censure is too severe it may *create* prejudice against the party whose counsel is reprimanded.[77]

To the extent that the reprimand has a second purpose — criticizing or disciplining counsel to deter future misconduct — the intent with which the argument was made is an important factor in determining the severity of the reprimand. If the improper conduct was inadvertent, there is no deterrent value in a rebuke.

*Withdrawal*

The offending counsel may be able to cure his own misconduct by withdrawing his own improper argument.[78] This "curative" action is subject to the same criticism made of all the other "curative" methods: The jury has heard the prejudicial argument, and it might weigh heavily in their minds while they are reaching their decision.[79]

## E. Waiver

Generally the courts will hold that a party has waived his opportunity to raise improper argument as a ground for reversal if (1) he has failed to object to the misconduct at the trial level, or (2) he has resorted to improper argument of his own. But this waiver rule does not apply to argument which is per se prejudicial.[80]

*Necessity for objection*

Although the trial judge is said to have a duty to control the conduct of attorneys, a review of the cases shows that it is only where any action, other than the declaration of a mistrial, would be ineffective to "cure" the improper argument that the trial judge is required to take the initiative in counteracting the argument.[81] So,

77. See Kern County Finance Co. v. Iriart, 26 Cal. App. 2d 483, 79 P.2d 763 (1938) (where the court committed counsel to jail overnight for improper conduct); *In re* Parkside Housing Project, 290 Mich. 582, 287 N.W. 571 (1939); Roy v. United Elec. Railways, 52 R.I. 173, 159 Atl. 637 (1932).

78. See note 26 *supra.*

79. See Magoon v. Boston & M.R.R., 67 Vt. 177, 200, 31 Atl. 156, 162 (1894).

80. See, *e.g.*, Aetna Life Ins. Co. v. Kelley, 70 F.2d 589 (8th Cir. 1934); Hinman v. Gould, 205 Minn. 377, 286 N.W. 364 (1939).

81. See, *e.g.*, Taylor v. James, 85 A.2d 62 (Mun. Ct. of App. D.C. 1951); Montgomery-Ward & Co. v. Wooley, 121 Ind. App. 60, 94 N.E.2d 677 (1950); Moran v. Dumas, 91 N.H. 336, 18 A.2d 763 (1941); Texas Employer's Ass'n v. Haywood, 153 Tex. 242, 266 S.W.2d 856 (1954). See also Jurgensen v. Schirmer Transp. Co., 242 Minn. 157, 166, 64 N.W.2d 530, 536 (1954), where the court said:

> [T]here was neither a timely request for appropriate corrective action nor a failure on the part of the trial court to act on such a request which would permit us now to review the alleged misconduct, unless it was so flagrant and

generally, an objection must be made *and overruled* at the trial level before the misconduct can be raised on appeal.[82] Some courts require this objection to be made at the time the improper argument is being made[83] while other courts regard the objection as timely if it is made at the close of the entire argument.[84]

The theory behind requiring the offended party to object is that he ought not to be allowed to remain silent hoping for a favorable verdict and then be able to appeal if he loses, when on prompt objection the trial court could have taken the necessary action to render the argument harmless.[85] Courts often rationalize their decisions by describing the attorney's silence as a determination by him that the argument did not influence the jury,[86] although this rationalization is not very persuasive. One criticism of the objection requirement is that the offended party's objection may encourage an adverse prejudicial effect by calling the jury's attention to the improper argument or by creating the impression that he has some-

reprehensible that the trial court should have acted on its own motion to correct it.

In Patton v. Minneapolis St. Ry., 247 Minn. 368, 375, 77 N.W.2d 433, 438 (1956), the same court observed that misconduct requiring the trial court to act on its own motion "is rarely the situation."

82. Lindroth v. Walgreen Co., 338 Ill. App. 364, 87 N.E.2d 307 (1949); Seward v. First Nat'l Bank, 193 Miss. 656, 8 So. 2d 236 (1942); Patton v. Minneapolis St. Ry., 247 Minn. 368, 375, 77 N.W.2d 433, 438 (1956):

> Unless the misconduct is so flagrant as to require the trial court to act on its own motion, which is rarely the situation . . . in order to raise the claim of misconduct there must be an objection at the time of the alleged misconduct, or at the close of the argument when it has been taken down by the reporter, and before the jury retires; also a request for corrective action and the failure of the court to act.

83. See, *e.g.*, Harlan v. Taylor, 139 Cal. App. 30, 33 P.2d 422 (1934); Lindroth v. Walgreen Co., 338 Ill. App. 364, 87 N.E.2d 307 (1949); Hilton v. Thompson, 360 Mo. 177, 227 S.W.2d 675 (1950); Heavy Haulers v. Jones, 304 P.2d 292 (Okla. 1956).

84. See, *e.g.*, London Guarantee & Acc. Co. v. Woelfle, 83 F.2d 325, 343 (1936); Beebe v. Kleidon, 242 Minn. 371, 65 N.W.2d 614 (1954). The objection must be made at the close of the argument, if a record is kept, otherwise objection must be made at the time the argument is made. Sandomierski v. Fixemen, 163 Neb. 716, 81 N.W.2d 142 (1957). See text at note 87 *infra*.

85. See, *e.g.*, Bryant v. Tulare Ice Co., 125 Cal. App. 2d 566, 270 P.2d 880 (1954); Patton v. Minneapolis St. Ry., 247 Minn. 368, 375, 77 N.W.2d 433, 438 (1956) ("A party is not permitted to remain silent, gamble on the outcome, and, having lost, then for the first time claim misconduct in opposing counsel's argument"); Safety Casualty Co. v. Wright, 140 S.W.2d 923 (Tex. Civ. App. 1940), *affirmed*, 160 S.W.2d 238.

86. See Pelzer v. Lange, No. 132, Minn. Sup. Ct., Dec. 12, 1958; Jurgensen v. Schirmer Transp. Co., 242 Minn. 157, 166, 64 N.W.2d 530, 536 (1954) ("failure to call the court's attention to errors before the jury retires would suggest that errors complained of were not deemed to be prejudicial by counsel at the time"). See also Olson v. Prayfrock, No. 136, Minn. Sup. Ct., Dec. 12, 1958, where the court held plaintiff made a determination by opposing defendant's motion for a mistrial because of misconduct by plaintiff's counsel.

thing he wants to hide. This paradox has been noted by the Eighth Circuit:

> To interrupt the argument of opposing counsel is often a hazardous thing to do. It may create more prejudice than it removes. It leads to controversies between counsel which interfere with the orderly conduct of the trial. Jurors do not ordinarily know the difference between proper and improper argument. They easily obtain the impression that objecting counsel is unfair and is trying to keep them from hearing something of consequence. While the judge is in a better position . . . his interference with argument may have the very opposite effect from that intended. These things are best known to those members of the profession who do not hesitate to appeal to passion and prejudice in the trial of their cases.[87]

Also the requirement gives the unscrupulous attorney a further chance to influence the jury, since he can receive his opponent's objection to improper argument with a retort such as:

> Yes, gentlemen, I have touched a tender spot, the galled jade will wince.[88]

Forty years after this response was recorded in Georgia, it was used by a different attorney in a California case. Dean Wigmore speculates that perhaps the latter attorney had researched types of improper arguments he could safely make.[89]

*Retaliation*

The offended party's counsel is not justified in retaliating to the other's improper argument with one of his own. His only recourse is to object and request curative action or a mistrial.[90] If he does retaliate, the courts generally hold that he has waived any right to raise the issue of misconduct on appeal.[91] Similarly, if the party who made the first improper argument loses the case, the courts generally

87. London Guarantee & Accident Co. v. Woelfle, 83 F.2d 325, 343 (8th Cir. 1936); Franklin v. Nowak, 53 Ohio App. 44, 4 N.E.2d 232 (1935); Markowitz v. Milwaukee Electric Ry. & Light Co. 230 Wis. 312, 284 N.W. 31 (1939). This objection would be eliminated if the attorney were allowed to hold his objection until the close of the entire argument.

88. 6 WIGMORE, EVIDENCE § 1806 n.1 (3d ed. 1940), *citing*, Berry v. State, 10 Ga. 511 (1851), and People v. Ah Len, 92 Cal. 282, 28 Pac. 286 (1899). See Deibler v. Wright, 119 Cal. App. 2d 277, 282, 6 P.2d 344, 346 (1931) ("apparently they don't want that information").

89. 6 WIGMORE, EVIDENCE § 1806.

90. See, *e.g.*, N.Y. Central R.R. v. Johnson, 279 U.S. 310, 317 (1929); Walker v. Penner, 190 Ore. 542, 227 P.2d 316 (1951); Yellow Cab & Baggage Co. v. Green, 268 S.W.2d 519 (Tex. Civ. App. 1954).

91. See, *e.g.*, Railway Express Agency v. Gee, 197 Ark. 925, 125 S.W.2d 802 (1939); Donovan v. Richmond, 61 Mich. 467, 28 N.W. 516 (1886). Counsel may also waive where he elects to answer opposing counsel's argument without retaliating. For example, in Pelzer v. Lange, No. 132, Minn. Sup. Ct., Dec. 12, 1958, the court said:

> We do not condone the tactics adopted or statements made by defendant's counsel in his closing argument as above described. They were entirely uncalled for and had nothing to do with the issues in the litigation or the evidence submitted in connection therewith. Obviously, they were designed to create bias

hold that he too[92] has waived the right to raise his opponent's improper argument on appeal.[93]

However, to constitute waiver by both sides, the arguments must be substantially of the same type and degree;[94] a reference to the defendant's being a corporation will not waive a racial argument against plaintiff. This requirement is to prevent one counsel from waiting for the first sign of an improper argument by the other counsel, and launching into a highly prejudicial argument in reply to any technically improper argument whether or not it would have had any prejudicial effect on the jury.[95] On the other hand, an improper argument with little or no prejudicial effect made in response to a highly prejudicial one will not bar the retaliating attorney from raising the opposing counsel's improper argument on appeal.[96] But where the arguments are about equally prejudicial, courts treat the improper arguments as counterbalancing each other so that one has no greater effect on the jury than the other. Although it is true that each of the arguments might neutralize the prejudicial effect of the other, there is no way of determining precisely what effect the argument had on a particular jury.[97]

## IV. Alternatives and Underlying Considerations

The reluctance of trial judges to declare mistrials in cases where there have been improper arguments probably encourages the use of improper argument. The unscrupulous attorney who intentionally makes an improper argument has little to lose, since he gets the prejudicial material before the jury and there normally will be no

against plaintiff, *and had not the plaintiff's counsel proceeded with the trial and undertaken to answer such statements in his closing argument, they would be deemed reprehensible to the extent of requiring a new trial.*
(Emphasis added.)

92. Courts often say that the first attorney to make improper argument has "invited" opposing counsel to retaliate.

93. See, *e.g.*, Gibson v. Iowa Cent. Ry., 115 Minn. 147, 131 N.W. 1057 (1911); Wood v. New York State Elec. & Gas Corp., 257 App. Div. 172, 12 N.Y.S.2d 947 (1939), *affirmed*, 281 N.Y. 797, 24 N.E.2d 480 (1939); Cosar v. Bemo, 282 P.2d 222 (Okla. 1955).

94. See, *e.g.*, Colquett v. Williams, 264 Ala. 214, 86 So. 2d 381 (1956); Hinman v. Gould, 205 Minn. 377, 286 N.W. 364 (1939); Sanders v. Lowrimore, 73 S.W.2d 148 (Tex. Civ. App. 1934).

95. See, *e.g.*, St. Louis S.W. Ry. v. Dickens, 56 S.W. 124 (Tex. Civ. App. 1900); Kokomo Steel & Wire Co. v. Ramseyer, 190 Ind. 192, 128 N.E. 844 (1921).

96. See, *e.g.*, Jones v. Kansas City, 76 S.W.2d 340 (Mo. 1934).

97. Big Ledge Copper Co. v. Dedrick, 21 Ariz. 129, 185 Pac. 825 (1919); Tomson v. Kischassey, 144 Cal. App. 2d 363, 301 P.2d 55 (1956); Cosar v. Bemo, 282 P.2d 222 (Okla. 1955); MacGregor v. Bradshaw, 193 Va. 787, 71 S.E.2d 361 (1952). In each of these cases, the defendant's attorney made some type of argument implying that the defendant was broke, and the plaintiff's attorney retaliated with a remark which implied the defendant had insurance. See Note, 7 Ohio St. L.J. 281 (1941). Perhaps the best example of the balancing out factor is Samuelson v. Olson Transp. Co., 324 Mich. 278, 36 N.W.2d 917 (1949), where the plaintiff's

reversal of a judgment in his favor,[98] because either the jury will be instructed to disregard the argument or it will be waived by the opposing attorney's failure to object. Furthermore, he has successfully placed his innocent opponent in a dilemma. The opponent may object and move for a mistrial, but the motion will probably be denied. He may object and request that the jury be instructed to disregard the improper argument, but then he runs the risk that the objection and instruction will create greater prejudice to his case by emphasizing the argument. Third, he may gamble that the argument had no effect on the jury and remain silent, in which case he waives any objection to the argument unless it was per se prejudicial. Finally, the offended counsel may consider the argument so harmful that he is forced to resort to improper argument to counteract the one by his opponent. Since retaliating with an improper argument is itself misconduct, the attorney subjects himself to danger of censure by the court and condemnation by the bar and the public.[99] Even after counsel has employed one or more of these possible remedies, the improper argument may still have reduced the offended party's chances of winning or of keeping the verdict at a reasonable sum, for the jury may not be able to disregard the improper argument. At the same time, the unscrupulous attorney who made the argument could not have hurt his chances of winning the lawsuit except in the few cases where a mistrial is granted.

Courts should consider several possible alternatives to the present rules used in improper argument cases. One approach would be to adopt a rule that would consider principally the intent with which the improper argument is made. Under this rule, if the argument were intended to provoke juror prejudice and it were not de minimis,

attorney in a personal injury action said the defendant, having insurance, should pay, and the defendant's attorney retaliated saying that the plaintiff had workmen's compensation.

98. Under the present rules, reversal is generally granted only if the argument is per se prejudicial or the trial judge has failed to apply the proper "curative" action. In Olson v. Prayfrock, No. 136, Minn. Sup. Ct., Dec. 12, 1958, the Minnesota Supreme Court commented:

> It is difficult for us to understand why experienced counsel will hazard the possibility of a reversal of a trial, otherwise free from error, by tactics which they must know are bound to be subject to the condemnation of this court. It is not enough to say that they were overzealous or did not know better. Even a cursory examination of the opinions of this court should be sufficient to disclose the fact that we do not approve of such tactics.

Perhaps the fact that the court in this case *did not reverse* gives some clue to the answer to the problem the court expresses difficulty with.

99. The following appeared in Minneapolis Star Journal: "High Court Scores 3 Lawyers for Conduct in Injury Trials — Conduct of three lawyers was criticized by the Minnesota Supreme Court today in decisions upholding Ramsey County district court verdicts in two personal injury cases." The Mpls. Star, Dec. 12, 1958, § B, p. 9, col. 3.

the trial court should declare a mistrial, and failure to do so should be grounds for reversal. The trial judge could determine whether the argument was made in bad faith by considering (1) the nature and degree of the argument, (2) the conduct of counsel after being instructed that his conduct is improper,[100] and (3) other particular facts of each case. The appellate court could review the trial judge's findings, giving added authoritative weight to his determination, and in addition check the past record of the offending attorney. A past history of intentional improper argument by counsel would increase the likelihood that the improper argument in the present case was made intentionally.

A rule based on intent would tend to assure fair trials by deterring counsel from intentionally using improper argument. However, basing a rule *solely* on intent would not completely solve the question of whether or not the jury in a particular case was prejudiced by the improper argument, since inadvertent improper argument may be as prejudicial as argument intentionally made. And reversal based solely on intent may be unfair to the party whose verdict is reversed, since intentional improper argument is not necessarily prejudicial.

Instituting contempt proceedings against the attorney who purposely makes an improper argument is a possible second method of curbing intentional improper argument.[101] And at the same time, this measure would not penalize the attorney's client by reversing an otherwise meritorious case. Of course, this method is not designed to afford a fair trial to the other party in the particular case.

100. For example, whether or not he continues the argument or resorts to a new line of improper argument.

101. "The trial court can and should institute contempt proceedings against recalcitrant counsel and impose either a fine or jail sentence." Eizerman v. Behn, 9 Ill. App. 263, 287, 132 N.E.2d 788, 799 (1956). Somewhat related to contempt proceedings would be the following action suggested by the Colorado court: "declare a mistrial and assess the costs to the transgressor." Lewis v. Oliver, 129 Colo. 479, 483, 271 P.2d 1055, 1057 (1954). It is doubtful how significant taxing costs to the attorney would be.

One other alternative of dealing with intentional misconduct would be to handle the matter within local bar associations, since there is little doubt that such conduct is a violation of the Canon of Candor and Fairness:

> The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.
>
> . . . .
>
> It is not candid or fair for the lawyer knowingly . . . in argument to assert as a fact that which has not been proved. . . .
>
> . . . .
>
> A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility. . . . Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

Canons of Professional Ethics, Canon 22. See also, *A Code of Trial Conduct*, 43 A.B.A.J. 223 (1957). Statutory standards are of doubtful value.

And because of the harshness of contempt sanctions, they probably would only be applied where the argument is flagrantly prejudicial. In this per se situation a reversal is already granted. And if an attorney intends to use improper argument, he can make an argument similar to one that has already been allowed by the court,[102] and thus considerably reduce the chance of being reversed.

Another alternative to the present rules would apply both to intentional and inadvertent improper argument.[103] If it is true that an opposing counsel's objection and an instruction to disregard may increase the likelihood of prejudice, the presumption that an improper argument is "curable" and the rule requiring an objection should be discarded.[104] And perhaps, the presumption should go against the party whose counsel makes the improper argument: [105] where improper argument is made it should be presumed to have prejudicially influenced the jury. True, this presumption would place a greater burden on innocent clients for the conduct of an attorney over whom they, in fact, have no control, and "a litigant should not be deprived of a verdict in his favor and thus penalized because of the improper conduct of his counsel unless it is likely that such conduct resulted in prejudice to the adverse party and operated to deprive him of a fair trial." [106] Yet it must be remem-

102. See text at note 89 *supra*.

103. With respect to the intentional improper argument, the disciplinary measures discussed *supra* in the text might also be applied.

104. Also, it is difficult to see why retaliation, at least to some reasonable extent, should not be condoned. This would, of course, be adopting "self-defense" into the law governing argument to the jury. But if counsel for the defendant argues that the defendant is a pauper and an adverse verdict would break him, it is hard to say he has been deprived of a "fair trial" when the plaintiff's attorney answers that the defendant is insured. See note 97 *supra*.

Though to go as far as Lord Macaulay advocated would make many hesitate: "Macaulay said that we obtain the fairest decision 'when two men argue, as unfairly as possible, on opposite sides,' for then 'it is certain that no important consideration will altogether escape notice.'" FRANK, COURTS ON TRIAL 80 (1949). In Yellow Cab & Baggage Co. v. Green, 268 S.W.2d 519, 527 (Tex. Civ. App. 1954), the court said:

> The wrong of one attorney will not justify a like wrong on the part of another by way of retaliation, although an appellate court will not hesitate to set aside a verdict which has been induced by language, not justified by the record, though the opposing counsel may have given the first offense. . . . In every instance the court should consider the action or statement of each attorney in relation to its probable effect upon the verdict. . . . This does not affect the general rule that where improper remarks of counsel for one party are of such nature as to call for a reply, and the language used does not seem to have gone beyond the bounds of a legitimate answer the jury's verdict will not be disturbed.

105. See Southwestern Greyhound Lines v. Dickson, 219 S.W.2d 592, 598 (Tex. Civ. App. 1949); Wilson v. Dyer, 116 Vt. 342, 347, 75 A.2d 677, 680 (1950): "As the argument was prejudicial, it is taken to have prejudiced, for presumptions go against the wrongdoer."

106. Hoffer v. Burd, 78 N.D. 278, 300, 49 N.W.2d 282, 295 (1951) (on rehearing).

bered that the party on the other side, who also has a right to a "fair trial," is totally innocent, and if equities are to be balanced, the weight is in his favor.[107] Also, courts are not overly solicitous of clients who lose cases because of incompetence of counsel,[108] and it is difficult to see why a different rule should apply where clients lose because of impropriety of counsel. The wrongdoer could overcome the presumption in various ways; for example, he could show (1) that the argument was de minimis, (2) that the evidence was so clearly in his favor that the argument made no difference, or (3) that the other side either invited the misconduct or retaliated and that there was no substantial difference in the nature and degree of the improper arguments.

However, if the courts are so firmly committed to the old presumption that they refuse to change it,[109] an improvement in the law on improper arguments should come from the trial judges themselves who should show less reluctance to grant new trials or mistrials when improper argument has been made. Or an improvement could come at the appellate level by expanding the per se prejudicial category of improper argument. Courts at both levels could make more use of sanctions against recalcitrant counsel—more and sterner rebukes, more findings of contempt, and more encouragement of state disbarment or suspension proceedings for serious intentional improper argument.

Of course, any rule that would require more reversals would impose an additional burden on the dockets of an already overworked court system.[110] However, if the theory is sound that more

107. In Rom v. Calhoun, 227 Minn. 143, 148, 34 N.W.2d 359, 362 (1948), the court observed:

> It is unfortunate that litigants must suffer the expense and inconvenience of a new trial on account of misconduct of counsel, but if attorneys persist in doing that which they must know is improper there is no other way of correcting what might well be a miscarriage of justice. We feel that in this case there should be a new trial for misconduct of counsel.

108. See, *e.g.*, Everett v. Everett, 319 Mich. 475, 482, 29 N.W.2d 919, 921 (1947) ("The general rule is that in civil cases incompetence of counsel is not a sufficient reason for granting a new trial") See generally 66 C.J.S. *New Trial* § 82(b) (1950).

109. See Note, 54 COLUM. L. REV. 946, 967 (1954): "The courts, however, are committed to the theory that juries can disregard such appeals to prejudice if properly instructed."

110. Courts may well be considering the crowded court calendar while determining these misconduct cases. See, *e.g.*, Patton v. Minneapolis St. Ry., 247 Minn. 368, 376, 77 N.W.2d 433, 438 (1956). *"There have been three trials* and this long drawn out litigation should come to an end unless prejudice has been shown and an injustice has been done." (Emphasis added.) Murphy v. Bartlow Realty Co., 214 Minn. 64, 73, 7 N.W.2d 684, 690 (1943). ". . . [W]e do not believe that any of the statements complained of are so prejudicial as to require the retrial of a case which took about three weeks to try the first time"; Lumbermen's Lloyds v. Loper, 153 Tex. 404, 405, 269 S.W.2d 367 (1954):

> The assignments of error in this workmen's compensation suit add yet again

reversals would deter future improper argument, the impact on the court system would be only temporary.

A second consequence of stricter rules requiring more reversals for improper argument might be curtailment of some proper jury arguments.[111] For such rules could cause some attorneys to refrain from making arguments which they believe would be proper but which they think a judge might find improper. Thus to the extent that arguments are not made on all the evidence and the inferences to be drawn therefrom, a client is deprived of the full benefits of the adversary system. But it is doubtful that more reversals would impose much if any restriction on proper jury argument by counsel, for the reversals would come in cases having obvious improper argument similar to that in many of the hundreds of cases now holding improper argument to have been "curable." The principal objection to the present rules is not that courts fail to recognize some unfair arguments to be improper, but rather that the courts too often fail to grant new trials or mistrials in cases in which they presently find improper argument.

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to our lengthening list of improper argument cases, which, because of the reticence of trial judges, lack of self-restraint on the part of lawyers, or some other cause, increasingly burden an already heavy docket of personal injury claims.

111. In Foster v. Kurn, 133 S.W.2d 1114, 1120 (Mo. App. 1939), the court said: We have no desire to discourage the becoming ardor that an attorney should have for his client's cause. We conceive the fact that a law suit may credibly be designated as a 'Battle Royal.' However, the best interests of the legal profession are best subserved by placing a prohibition on poison gas.