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Arthur M. Sherwood
University of Michigan Law School

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CIVIL PROCEDURE—TRIAL PRACTICE—INTRODUCTION OF INADMISSIBLE EVIDENCE TO CURE IMPROPER ARGUMENT BY COUNSEL—In a suit to recover damages for wrongful death arising out of an automobile accident, plaintiff's counsel offered in evidence the official report of a police officer, which included the officer's opinion that defendant's parked car had contributed to the collision. Defendant's objection to this evidence was sustained on the grounds that the report was hearsay and that it set forth a conclusion which only the jury could draw. Defendant's counsel, during his summation, asserted that no police officer had said that defendant's car had in any way caused the accident. The court, *sua sponte*, admitted into evidence the officer's report which had previously been excluded. On appeal from a judgment for plaintiff, *held*, reversed and remanded for a new trial. The trial judge abused his discretion by admitting previously excluded evidence in order to cure a misleading argument by counsel in his summation. *Harrington v. Sharff*, 305 F.2d 333 (2d Cir. 1962).

Improper arguments by counsel are usually made in an attempt to prejudice or mislead the jury by diverting its attention from evidence which has been properly admitted at trial.¹ Illustratively, counsel may hope to arouse the jury's sympathy or prejudice by emotional appeals to matters of race, religion, or nationality;² he may misstate the evidence actually presented in a manner favorable to his client's position; or he may attempt to add new evidence not previously introduced since inadmissible or perhaps because there was no basis in fact for the assertion.³ Traditionally, a judge has had power to cure improper argument by objecting *sua sponte*, by sustaining an objection to counsel's remarks, and by instructing the jury to disregard or to avoid being misled by the argument.⁴ However, these remedial measures may be inadequate when there is no evidence in the record that is contrary to the incorrect or otherwise inadmissible statements made by counsel for the first time in his summation. For instance, instructions to disregard the remarks may only call them to the jury's attention, especially if the jury is not informed as to why it

¹ Counsel is required to "confine his argument to the evidence in the case and to the inferences to be drawn therefrom . . ." *Duchaine v. Ray*, 110 Vt. 313, 321, 6 A.2d 28, 32 (1939). See Note, *Improper Argument to Juries in Civil Cases*, 43 MINN. L. REV. 545 (1959).

² See Annot., 78 A.L.R. 1438 (1932). Cf. Annot., 32 A.L.R.2d 9 (1953).

³ Statements of counsel which are unwarranted by the evidence on record are considered improper. *Fidelity & Cas. Co. v. Niemann*, 47 F.2d 1056, 1059 (8th Cir. 1931). See 6 WIGMORE, EVIDENCE § 1806 (3d ed. 1940).

⁴ See *Viereck v. United States*, 318 U.S. 236, 248 (1942); *Anderson v. Enfield*, 244 Minn. 474, 481, 70 N.W.2d 409, 414 (1955) (instructions to jury); *Brush v. Laurendine*, 168 Miss. 7, 12, 150 So. 818, 819 (1933) (sustaining objection); *Knight v. Willey*, 120 Vt. 256, 264, 138 A.2d 596, 602 (1958) (*sua sponte* objection by court). In extreme cases of improper argument, a judge may also resort to such measures as rebuking counsel and granting a mistrial. See *Berger v. United States*, 295 U.S. 78, 85 (1934) (granting a mistrial); *Dixon v. Business Men's Assur. Co. of America*, 365 Mo. 580, 598, 285 S.W.2d 619, 632-33 (1955) (reprimanding counsel).

should disregard the remarks.⁵ On the other hand, an instruction that a statement is not supported by fact will probably lead the jury to assume that the attorney's assertion is false. This assumption, if unjustified, could be even more prejudicial to the offending counsel's case than his uncorrected statement would have been to the other party.

In circumstances where judicial instructions create the risk of confusing the jury and arousing undue interest in a statement it should ignore, the court may wish to consider the appropriateness of a possible alternative remedy—bringing in previously excluded evidence to rebut counsel's remarks. Obviously, such evidence will not be available in all cases. However, in those instances where evidence is available, although ordinarily inadmissible, which could mitigate the prejudicial effect of counsel's remarks, its introduction may be more effective than instructions by the judge in preventing a jury from being misled by the improper remarks. Certainly this will be true when the evidence presents sufficient facts for the jury to understand why the remarks were improper.

The use of previously excluded evidence to cure improper argument by counsel during summation may be supported by analogy to two well-established rules of evidence. First, evidence which is otherwise inadmissible can be used for the purpose of impeaching the credibility of a witness.⁶ Since counsel is thought to become a witness when he makes an assertion as to which no evidence has been introduced,⁷ it would not seem inappropriate to permit the use of previously excluded evidence to impeach his credibility when he is guilty of improper argument during his summation. Perhaps a closer analogy can be drawn to a second evidentiary rule. A trial judge has discretionary power, where counsel has introduced inadmissible evidence without objection, to permit his adversary to introduce other inadmissible evidence concerning the same factual matter.⁸ The purpose of this "curative evidence" is to prevent the jury from being unfairly prejudiced or misled by the prior inadmissible evidence.⁹ For ex-

⁵ See 10 OKLA. L. REV. 359 (1957), urging that a new trial be granted where prejudice might have resulted from counsel's remarks, on the ground that curative instructions to the jury are often ineffective. Cf. Kalven, *Report on the Jury Project*, in CONFERENCE ON AIMS AND METHODS OF LEGAL RESEARCH 155 (1955). A study of experimental jury verdicts indicated that when defendant disclosed that he had no insurance the mean verdict award was \$33,000; when it was disclosed that defendant had insurance but no further mention of it was made by either the court or counsel the mean award was \$37,000; but where defendant had insurance and the court explicitly told the jury to disregard it, the mean award increased to \$46,000. *Id.* at 169.

⁶ *E.g.*, *Walder v. United States*, 347 U.S. 62, 65 (1953), 35 ORE. L. REV. 51 (1955).

⁷ *Turpin v. Commonwealth*, 140 Ky. 294, 298, 130 S.W. 1086, 1088 (1910). See 6 WIGMORE, *op. cit. supra* note 3, § 1806.

⁸ See, *e.g.*, *Crawford v. United States*, 198 F.2d 976, 978 (D.C. Cir. 1952), 41 GEO. L.J. 268 (1953); *cf.* *Commonwealth v. Wakelin*, 230 Mass. 567, 576, 120 N.E. 209, 213 (1918). The majority rule permits use of otherwise inadmissible evidence to rebut prior inadmissible evidence. See 1 WIGMORE, *op. cit. supra* note 3, § 15; 35 MICH. L. REV. 636 (1937).

⁹ *Meyers v. United States*, 147 F.2d 663, 667 (9th Cir. 1945). Wigmore suggests that, if a party would be unfairly prejudiced, he should be entitled to the use of otherwise

ample, if hearsay testimony of one version of a conversation has been admitted, the other party may introduce evidence of another version of the conversation to prevent a distorted understanding of what was said.¹⁰ Counsel, by introducing inadmissible evidence, is said to have "opened the door" to further consideration of the facts he presents.¹¹ Therefore, he cannot object to the admission of curative evidence which may clarify the actual situation for the jury. An attorney's remarks during his summation, which are not based on record evidence, are analogous to inadmissible hearsay testimony by a witness in that neither of the declarations was made under oath or was subject to cross-examination.¹² If counsel's assertions are likely to mislead the jury, previously excluded evidence should be introduced to avoid unfair advantage, just as it would have been admitted to cure the prejudicial effect of inadmissible evidence earlier in the trial. Moreover, the availability of such a discretionary power in the trial court would obviously discourage this type of improper argument.

Although the introduction of inadmissible evidence may frequently be an effective remedy against improper argument, a judge should exercise more restraint in admitting evidence on his own motion than when he allows counsel to admit curative evidence during the trial. Evidence introduced during summation may overcompensate by prejudicing the offending counsel's client to a greater extent than the original misleading assertion prejudiced his opponent. The evidence may be more damaging than other curative evidence in that it is introduced too late in the trial to be subject to the moderating influence of cross-examination. In addition, the jury may well give more weight to evidence introduced by the judge than to curative evidence introduced by counsel. Therefore, this remedial measure should be used only when the judge feels there is a substantial need for correction.

One of the primary purposes of all rules governing trial procedure is to insure a just result through the reduction of trial by battle between counsel. In keeping with this general goal, it should be the courts' duty to see that improper argument does not give one party an unfair advantage which can be prevented or corrected. In those instances where it appears likely that the introduction of previously excluded evidence will prevent a jury from being misled, without creating a new unfair advantage for the other party, this will provide a better tool of judicial control than instructions which may only confuse the jury or inadequately eliminate the advantage gained from the improper argument.¹³ The trial judge who

inadmissible curative evidence as a matter of right. Other rebutting evidence should be admitted in the judge's discretion. 1 WIGMORE, *op. cit. supra* note 3, § 15, at 309.

¹⁰ *Carver v. United States*, 164 U.S. 694, 697 (1896).

¹¹ See, e.g., *Thomas v. State*, 121 Tenn. 83, 87, 113 S.W. 1041, 1042 (1908).

¹² The hearsay rule seeks to insure that only assertions which have been tested for trustworthiness by cross-examination should be considered by the jury. 5 WIGMORE, *op. cit. supra* note 3, § 1362.

¹³ This is the view taken by Judge Clark in his dissent in the principal case at 339-40.

hears the argument and observes its effect on the jury is in a preferred position to determine which remedial measure, if any, should be invoked.¹⁴ It follows that appellate courts, which are unable to observe the effects of counsel's summation, should be reluctant to decide that a judge's decision to admit curative evidence at that stage of the trial constitutes an abuse of discretion.¹⁵ Introduction of otherwise inadmissible evidence as a curative measure should not be prohibited, but should be used sparingly, whenever the trial judge concludes that it is the most effective means of reconciling competing demands of information for the jury and fairness for all the parties.

Arthur M. Sherwood

See also his opinion in *United States v. Appuzzo*, 245 F.2d 416 (2d Cir. 1957): "A trial judge must rule on admissibility quickly and almost by instinct; his instinct ought to be to bring out the truth, rather than to permit a party to cover up a part of his case." *Id.* at 421.

¹⁴ See Annot., 32 A.L.R.2d 9, 56 (1953).

¹⁵ See *Dura Seal Prods. Co. v. Carver*, 181 Pa. Super. 377, 381-82, 124 A.2d 438, 440 (1956).