Improper Jury Argument and Professionalism: Rethinking *Standard Fire v. Reese*

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This article considers whether the current law about improper jury argument impairs professionalism in terms of the perception lay people have about lawyers. It is one thing to espouse professionalism in bar organization pronouncements; it is another to consider how law is actually practiced in the trenches. We talk the talk, but how often do we walk the walk? My conclusion is that the supreme court's well-intentioned decision in *Standard Fire v. Reese*[2] let loose the dogs of war. By limiting the notion of incurable jury argument, by restricting the concept of harmless error, and by presenting counsel with a dilemma about whether to object, *Reese* unwittingly encourages improper argument. Because jury service is the primary contact lay people have with the legal system, the exposure to improper argument probably lessens their respect for lawyers. All is not necessarily lost, however, since a remedy already exists. But that remedy is contained in what is perhaps the most overlooked and certainly the most underutilized of all the trial rules.

Under* Standard Fire v. Reese*, almost anything goes.

In *Reese*, the defense attorney in a workers' compensation case argued that the plaintiff's attorney has sent him past "a thousand doctors" to get to one who was in cahoots with his attorney to run up physical therapy bills, so that the jury would think the injury must be more incapacitating that it really was.[3] No objection was made at that time. As the defense attorney warmed to his cause, he continued to argue that there was a "combination" between the doctors and the plaintiff's attorney.[4] An objection was made to that argument, but the closest thing to a ruling was the court's comment that counsel could "reply to that on closing argument."[5] The jury found for the plaintiff, but awarded less than he wanted.

The plaintiff appealed. The court of appeals, in an opinion by Chief Justice J. Curtiss Brown, reversed the judgment and remanded the cause for a new trial based on improper jury argument.[6] Because there was no evidence to support the accusations of a sham or plot, the court held the argument both improper and incurable. Thus, the failure to object did not waive the error. Because it probably affected the jury's verdict, the argument was improper.[7]

The Supreme Court of Texas reversed the court of appeals and reinstated the trial court's judgment. The supreme court's opinion, by Justice Pope, is unusually broad. First, the supreme court held the argument was proper, because the evidence supported it.[8] Usually that would be the end of the story. But the supreme court added a discussion about hyperbole being one of the traditional "figurative techniques of oral advocacy."[9] To the dissenters' dismay,[10] the majority then quoted from Shakespeare, Milton, Pope, Burns, Wordsworth, Byron, Coleridge, Tennyson, Thoreau, Kipling, and others—including Ed McMahon to Karnak.[11] This discussion, of course, begs the question—was the argument supported by the evidence or not. If the argument was supported by the evidence or reasonable inferences from it, which is what the court held, then the argument was not really hyperbole and the court's discussion of hyperbole is pure dicta. If the argument was not supported by the evidence, then the court's endorsement of hyperbole in argument would have been necessary to its holding. In either event, that should have been the end of the opinion.

But the supreme court then turned its attention to the harmless error rule.[12] In the context of jury arguments, the supreme court commented that the appellant "has the burden to prove (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand

by the judge."[13] Of course, not a one of the enumerated requirements has anything to do with whether an error is reversible; they all deal with whether an error occurred and whether a complaint was preserved. Even then, the court forgot to include the requirement of a ruling on the objection, request for an instruction, or motion for mistrial. And note the court's express requirement of an objection or motion *even if* the argument is incurable.

The supreme court then continued with some additional requirements that actually speak to harm. The supreme court continued that the appellant "has the further burden to prove (5) that the argument by its nature, degree and extent constituted reversible harmful error. . . . (6) the argument's probable effect on a material finding. (7) Importantly, a reversal must come from an evaluation of the whole case . . . .".[14]

As stated, the supreme court's test is bizarre. The court said: "*Harmless error* creeps back into the practice when subjective evaluations replace a more objective and structured testing of error."[15] (emphasis added). Yet the court says this in the context of moving *away from* the presumed error rule and *toward* a harmless error rule by adopting the enumerated tests. Surely the court must have meant just the opposite—that "*presumed* error creeps back . . . ." Equally confusing, however, is that the court's tests are not so objective as the court apparently believes. For instance, the reviewing court is encouraged to determine whether *it* thinks the case was "weak, strong, or very close."[16] Thus, in *Reese* the supreme court concluded that "[t]he probabilities are that the jury would have reached its same conclusion from the evidence without regard to Standard's argument."[17] That sounds subjective. Also, try squaring that conclusion with the following rule: "The court of appeals is not a fact finder. Accordingly, the court of appeals may not pass upon the witnesses' credibility or substitute its judgment for that of the jury, even if the evidence would clearly support a

different result."[18]

Another dictum in *Reese* is equally troubling—and much worse for professionalism. Despite having held the argument was supported by the evidence and therefore proper, despite having stated in dictum that the argument was legitimate as hyperbole, and despite having stated in further dictum that the argument was harmless, the supreme court also went on to hold that the argument was waived because it could have been cured at the time it was made.[19] The supreme court then observes that "there are only rare instances of incurable harm from improper argument."[20] When one parses through the authorities cited by the court, the only two that emerge are appeals to "racial prejudice" and an "unsupported charge of perjury."[21] This, in fact, has become the legacy of *Reese*: Almost anything goes.

Even after clarification, the problem* Reese *poses for professionalism remains.

In *Texas Employer's Ins. Ass'n v. Guerrero*,[22] the trial counsel urged the largely Hispanic jury to "unite" and "stick together as a community."[23] The appellate court, in a majority opinion by Justice Peeples, reversed by placing appeals to ethnic prejudice in the same category as appeals to racial prejudice.[24] The court further observed that Texas traditionally also condemns arguments based on religion and national origin.[25]

The importance of Justice Peeples's majority opinion, however, lies in its clarification of *Reese*. This clarification concerned both procedural and substantive issues. To clarify the procedural muddiness of *Reese*, Justice Peeples pointed to a prior precedent,[26] which for unknown reasons had not been cited by the majority opinion in *Reese*. That supreme court case clearly explained that, when an argument is deemed incurable, then no objection at trial is necessary, because no admonition from the trial court can cure the impropriety.[27] (The complaint must be preserved in a motion for new trial, if no trial objection was made.[28]) On

the other hand, when an argument is curable, then trial counsel must object and request a curative instruction; otherwise, the complaint is waived.[29]

To clarify the substance of *Reese* Justice Peeples determined that the only sensible way to read it is to consider the concept of incurable with the concept of harm.[30] As he stated, to "hold that an argument can be incurable and yet harmless is a contradiction in terms."[31]

Given the clear statement in *Reese* that there are only rare instances of incurable argument,[32] and the enumeration in *Guerrero* (based on a reading of precedents) of only "jury arguments based on race, ethnicity, religion, and national origin,"[33] the current state of Texas law suggests that unless trial counsel objects to an improper argument that is based on something other than those four factors, the complaint is waived.[34]

More recent cases have expanded the list, but only slightly. An attempt to link cervical cancer to immoral conduct was said in dicta to require reversal on the grounds that no evidence supported the argument, but there was no analysis of whether an instruction could have cured the error, and the senior justice on the panel rejected the dicta.[35] A better example is *Howard v. Faberge, Inc*.[36] There, defense counsel contested the product's supposed inflammability by pouring it on his arm and lighting a match, while asking God to burn him if what he argued was not true. The court reversed on other grounds, but stated alternatively that no instruction could have cured this improper argument.

The* Reese *rule actually encourages improper argument

The restriction of what is considered incurable jury argument is not necessarily good for professionalism, and the logic of Justice Peeples's reasoning demonstrates why. Certain arguments are improper, even though they are not considered incurable. For instance, the

supreme court has condemned arguments calling the other side a "liar," "fraud," "faker," "cheat," and "imposter"—unless supported by the evidence.[37] "Criticism, censure, or abuse of counsel are not permitted. Appeals to passion and prejudice are improper, as are calls to punish a litigant for the acts of counsel. Charges that opposing counsel manufactured evidence, suborned perjury, or was untruthful are highly improper and are generally considered to be incurable."[38] Likewise, improper is an argument based merely on gender.[39] Also improper is any argument not supported by the evidence or reasonable inferences from the evidence.[40] And counsel may not state their personal belief as to the credibility of any witness, though they can state what they believe the evidence demonstrates.[41]

But what is counsel to do when the opposing lawyer makes an improper argument? If the lawyer objects and the objection is sustained, the arguing lawyer may look like one who has violated the rules. But will that outweigh the emphasis made in the jury's mind by the court's then instructing the jury to disregard what they have just heard? Probably not. And if the objection is incorrectly overruled, then the objecting lawyer looks to the jury as the one who is trying to keep something from them. Even worse, the overruling of the objection gives the court's imprimatur to the improper argument. Faced with this dilemma, most trial lawyers choose not to object at all.

Justice Peeples succinctly stated the dilemma: "Because an instruction could cure the harm—and failure to seek an instruction would waive any error—the offending lawyer would have almost nothing to lose."[42] In other words, the procedural posture permits, even encourages, improper jury arguments—so long as they are not incurable. Since the supreme court has severely restricted the types of arguments that are considered incurable, counsel have multiple incentives to "take the gloves off" and engage in any other improper argument

that they think might bias the jury toward their client or prejudice it against their adversary. And not surprisingly, this is just what happens.

While probably most trial lawyers abide by the rules of professional conduct, many don't, especially when it comes to jury argument. Some of it is understandable. The lawyers are tired; the case is almost over; the risk of subsequently second-guessing oneself—"would I have won if I had said this?"—can be overwhelming. Then there are the financial factors—plaintiffs' lawyers on contingent fees who make money only if they win, and defense lawyers who may not get hired again by this client if they lose. Further, the best way to secure a large punitive damages award is to ignite the jury's emotions against a defendant. Even with the restrictions on punitive damages, a huge punitive verdict exerts tremendous settlement pressure. In short, there are a lot of incentives to do whatever it takes to win, and a little slippage in the highest standards of professionalism may be an expected casualty.

Jury arguments involving appeals to regional, wealth, or socio-economic prejudices happen daily in courtrooms throughout Texas, and both sides are guilty of it. In a recent record, an attorney railed against a New York corporate defendant, because it had a Park Avenue address and its members had attended Harvard, supposedly wore $3000 suits and $500 shoes, and did not know what it was like to perform the blue-collar jobs in Texas's heat that most of the jurors had to do. This is only one example, but variations on this theme occur frequently in courtrooms throughout Texas—from both sides of the bar.

The rationale of* Reese *would bar appeals to regional and socio-economic prejudices

Let us return to the logic of Justice Peeples in *Guerrero*. In explaining why appeals to racial and ethnic prejudice are considered incurable, he states most eloquently:

> The *Reese* court condemned such appeals to prejudice as "exceptional" and as "an affront to the court and the equality which it must portray." . . . When a

> racial or ethnic appeal is made, the dispute is no longer confined to the litigants; there has been an attack on the social glue that helps bind society together. *Reese* characterized it as an affront *to the court.* The offense is against society, and it makes no difference whether the victimized-litigant has shown harm. Lawyers have no right to undermine the ethnic harmony of society simply to win a lawsuit.
> . . .
>
> That course would demean the law and perhaps deepen the divisions from which society already suffers.[43]

How are appeals to regional or socio-economic prejudice any different? Both seek to influence the jury to decide the case on something other than the facts, namely on the basis of prejudice. Both attack "the social glue that helps bind society together."[44] Both "undermine the . . . harmony of society" and "deepen the divisions from which society already suffers."[45]

In fact, nearly three decades before *Reese*, the Texas Supreme Court had already made this comparison:

> [T]here can be but a small difference between the error involved in the 'Golden Rule' type of argument or the type in which emphasis is laid on the obvious corporate character or nonresident status of a party or the generally obvious disparity of economic standing between the parties and, on the other hand, an argument which makes its appeal for favor through passion or prejudice aroused by abuse, 'name calling', or other types of excessive language.[46]

Consequently, we must confront the issue raised at the beginning of this article: While we talk the talk of professionalism, how often do we walk the walk—particularly when it comes to jury arguments? And what toll do improper arguments take on the public's perception of lawyers?

Improper arguments actually work, which is why counsel resort to them. Perhaps some jurors are occasionally turned off by blatant appeals to emotion and prejudice, but many more may not be. My issue is not with whether appeals to prejudice are effective for

winning; great trial lawyers can debate that. I'm interested in the effect those arguments have on professionalism.

Winning a trial does not automatically equate with improving the public's perception of the legal system. For many people, perhaps most, jury service is their only encounter with the legal system (other than fictional television programs). Do unprofessional jury arguments impair the public's confidence in the integrity of the system? Are some jurors turned off by appeals to regional and socioeconomic prejudices? If so, what happens to their opinion of the legal system and lawyers? Is it similar to the apathy of American voters who become so disgusted by the low level of political discourse that they exit the system altogether?

Trial courts have the power to stop improper arguments and uphold professionalism

All is not necessarily lost, for as Justice Peeples noted, for more than a century the procedural rules have provided a remedy. The problem is either that most judges do not know the remedy is there, or they lack the ability to apply it. Maybe they do not recognize the slick or subtle improper appeals that Justice Peeples warned about:

> The law should not stoop to evaluating subtle distinctions such as whether an argument was too crude and revolting, or on the other hand sufficiently slick and artful to pass muster. To permit the sophisticated ethnic plea while condemning those that are open and unabashed would simply reward counsel for ingenuity in packaging. Inevitably, lawyers representing their clients zealously within the bounds of the law would test the limits and fine-tune their arguments to avoid being too explicit. Courts would be asked to label some arguments permissible and uphold them with a wink when everyone knew that an ethnic appeal had been made.[47]

Maybe the judge is performing another judicial task and not concentrating on the argument. Maybe political pressures under the circumstances inhibit interruption of the argument. Or, most likely, the judge sincerely believes it is the role of opposing counsel in our adversary system to complain if the argument is objectionable.

But a trial judge is *required* to stop an improper argument *before* an objection is made:

> Under *Reese* many arguments are considered curable and harmless. But that does not mean that they are proper or that the trial court should permit them. *Reese* did not suggest in the slightest that *trial courts* should adopt a passive "anything goes" attitude toward improper jury argument.[48]

Justice Peeples then looked to Texas Rules of Civil Procedure 269, which "commands courts to correct improper argument *sua sponte*"[49]: "Mere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court."[50] More explicitly:

> The court will not be required to wait for objections to be made when the rules as to arguments are violated; but should they not be noticed and corrected by the court, opposing counsel *may* ask leave of the court to rise and present his point of objection. But the court shall protect counsel from any unnecessary interruption made on frivolous and unimportant grounds.[51]

Justice Peeples pointed out that this has been the law in Texas for more than a century.[52]

Even earlier, the Texas Supreme Court had emphasized the duty of trial judges to police improper jury arguments. In one case in which an attorney castigated the opposing parties for being Jewish, the supreme court expressed astonishment that the trial court had sat on its hands during argument:

> The course pursued in this case was one that no court of justice ought for a moment to tolerate; and it certainly must be true that the judge who tried this cause did not fully understand the language of counsel, or he would not have permitted it,—would have rebuked it, and ought to have punished its author.[53]

Again, in 1954, the supreme court urged trial judges to keep arguments within their proper bounds:

> We realize that in the course of a hotly contested trial lawyers are apt, even prone, to "pull off the gloves"; but lawyers are officers of the court and proper and ethical conduct requires that there be limitations on the extent to which counsel may go in the injection of prejudicial and inadmissible matters, whether by way of cross-examination of witnesses or by way of jury argument. When these limits are transgressed a trial ceases to be a test of right and wrong

> by standards of law in a court of justice and becomes a "catch-as-catch-can, no-holds-barred" spectacle not unlike a modern wrestling match. It is not only the province but the duty of the trial judge, acting on his own volition if necessary, to prevent any such deterioration of judicial dignity.[54]

In *Guerrero*, Justice Peeples also reaffirmed a San Antonio decision that had faced a trial court's abdication of its duty to control the courtroom during jury arguments:

> We . . . emphasiz[e] to the trial courts their duty to protect litigants and witnesses and parties who are forced against their will in court trials from unnecessary abuse at the hands of enthusiastic and too energetic counsel. There are many, yes, the great majority of trial judges, who control their courts and rebuke counsel who indulge in such practices, as the rules of court require, without waiting for opposite counsel to arise and stop the proceedings to present his objections. So it is the duty of a watchful trial judge to quickly act in such cases.[55]

Conclusion

Justice Peeples's conclusion in *Guerrero* is the best: "The time is ripe for the enforcement of law and order and due respect for constituted authority. Trials in courts must proceed in an orderly way and command respect, so that they shall mean something, not only to those litigating in the courts, but to mankind." [56] Trial judges are the ones charged with enforcing law and order—and dignity—in their courtrooms. When they abdicate that duty, professionalism suffers even more than when a lawyer makes an improper argument, for what is permitted is considered proper by the jury. All judges who do not stop improper arguments, and all trial lawyers who make improper arguments, have no business lamenting the public's low perception of lawyers. They need only look in the mirror.

Notes

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2. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979).

3. 584 S.W.2d at 836.

4. *Id.* at 836-37.

5. *Id.* at 837.

6. *Reese v. Standard Fire Ins. Co.*, 567 S.W.2d 861 (Tex. Civ. App.—Houston [14th Dist.] 1978), *rev'd*, 584 S.W.2d 835 (Tex. 1979).

7. *Id.* at 863.

8. 584 S.W.2d at 837-38.

9. *Id.* at 838.

10. *Id.* at 842 (Steakley, J., dissenting).

11. *Id.* at 838 n.1.

12. *Id.* at 839.

13. *Id.*

14. *Id.* at 839-40.

15. *Id.* at 839 .

16. *Id.* at 840.

17. *Id.* at 841.

18. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998).

19. *Id.* at 840-41.

20. 584 S.W.2d at 839.

21. *Id.* at 840.

22. 800 S.W.2d 859 (Tex. App.—San Antonio 1990, writ denied).

23. *Id.* at 862.

24. Justice Biery (now a federal judge) dissented on the grounds that the argument was not improper. 800 S.W.2d at 571.

25. *Id.* at 866.

26. *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968).

27. *Id.*, *quoted in Guerrero*, 800 S.W.2d at 864.

28. Tex. R. Civ. P. 324(b)(5).

29. *Otis Elevator Co. v. Wood*, 436 S.W.2d at 333, *quoted in Guerrero*, 800 S.W.2d at 864.

30. *Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d at 863-64.

31. *Id.* at 863.

32. 584 S.W.2d at 839

33. *Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d at 866

34. In *Reese* the court also mentioned that the "unsupported charge of perjury was incurable." 584 S.W.2d at 840 (citing *Howsley & Jacobs v. Kendall*, 376 S.W.2d 562 (Tex. 1964)). Although that seems to be the holding in *Howsley*, a review of the opinion puzzles one why the judgment wasn't simply reversed because of an explicit, incurable argument based on race. *See Howsley*, 376 S.W.2d at 565-66.

35. *In re W.G.W.*, 812 S.W.2d 409, 415-16, 421 (Tex. App.—Houston [1st Dist.] 1991, no writ).

36. 679 S.W.2d 644, 649-50 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

37. *Greyhound Lines, Inc. v. Dickson*, 149 Tex. 599 at 607, 236 S.W.2d 115 at 120 (1951), *quoted in Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753, 758 (Tex. App.—Texarkana 1992, writ denied).

38. *Circle Y of Yoakum v. Blevins*, 826 S.W.2d at 758.

39. *See* Order of December 19, 1989, 779-80 S.W.2d XXX, effective December 19, 1989, *quoted in Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d at 866 n.8.

40. Tex. R. Civ. P. 269(e).

41. State Bar Rules, art. X, § 9, DR 3.04(c)(3).

42. *Tex. Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d at 865.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Southwestern Greyhound Lines v. Dickson*, 149 Tex. 599 at 606, 236 S.W.2d 115 at 119 (Tex. 1951).

47. *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d at 865.

48. *Id.*

49. *Id.*

50. Tex. R. Civ. P. 269(e).

51. Tex. R. Civ. P. 269(g) (emphasis added).

52. *Id.* (citing Rules 39-41, *Rules for the Courts of Texas,* 84 Tex. 695, 714-15, 19-20 S.W. v, xiv (adopted by order of the Supreme Court of Texas, October 8, 1892)).

53. *Moss v. Sanger,* 75 Tex. 321, 12 S.W. 619, 620 (1889).

54. *Texas Employers' Ins. Ass'n v. Haywood,* 266 S.W.2d at 859-60.

55. *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d at 867-68 (quoting *Motley v. Lawrence,* 283 S.W. 699, 702-703 (Tex. Civ. App.—San Antonio 1926, writ dism'd)).

56. *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d at 867-68.