On Trial

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> check counsel should not be deemed such an abuse of discretion as to require a reversal.[19]

(c) Language: The General Principles

That famous phrase "a jury trial is a fight and not an afternoon tea"[20] penned by Justice Riddell decades ago (and oft repeated in modern cases)[21] reflects the laws tolerance and even approval of impassioned closing addresses that are within the boundaries of ethics and advocacy. The Supreme Court of Canada has recognized the futility of attempting to keep emotion out of a case and that the object of a trial might even be defeated by doing so.[22] The matter was perhaps best put in *Dale v. Toronto Rwy. Co.*[23]

> Counsel has the right to make an impassioned address on behalf of his client — nay, in no few cases it may be a duty to make an impassioned address — mere earnestness, fervour, or even passion, is not in itself objectionable — so long as counsel does not transgress the decorum which should be observed in His Majesty's Court and does not offend in other respects — Courts do and must give considerable latitude even to extravagant declamation.[24]

This wide latitude is not, however, without limits. Submissions that tend to draw the jury away from their task of deciding the case on the evidence are always improper. Submissions of this nature include attempts by counsel to have the jury identify with his or her client; comments inviting the jury to decide the case in accordance with their own interests; submissions intended to sway the jury on irrelevancies such as the wealth or beliefs of a party and unfair or discriminatory comment including that which is beneath the dignity of the courtroom, and the like.

Language that appeals to emotion or otherwise attempts to stir the passions of the jury is quite acceptable. Such submissions go too far, however, when counsel resorts to language or suggestion that tends to steer the jury away from their proper course of deciding the case on the evidence or invites them to give consideration to extraneous facts or circumstances or to approach their decision making function on a wholly erroneous basis. The general principles are well summarized in the following words:

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[19] (1915), 34 O.L.R. 104, *per* Riddell J., quoting from *Combs v. The State* (1881), 75 Ind. 215.

[20] *Ibid.*, *per* Riddell J.A. at 415-16.

[21] See, for *e.g.*, *Campbell v. Jones*, *supra*, note 14 at para. 389.

[22] *Ross v. Lamport*, [1956] S.C.R. 366 at 376, *per* Rand J.

[23] *Supra*, note 19.

[24] *Ibid.*, *per* Riddell J.A. at 415-16.

> Although rhetoric which verges on the extravagant may be made use of by counsel, there is a general rule which common sense alone dictates, and that is that the language of counsel to a jury should not be of such character as is likely to prejudice the cause of an opponent in the minds of honest men of fair intelligence to such an extent as to work an injustice.[25]

> On the former ground I am constrained to observe that, as it was once, in effect, put in the Court of Appeal for Ontario by Riddell J.A., a lawsuit is not a tea party, and except where there has been a clear and objectionable excess, we should hesitate to put shackles on the traditional scope allowed counsel in his plea to the tribunal of his client's countrymen. The attempt to divest a trial of any feeling would not only be futile, but might defeat its object which is to ascertain the reality of past events. In libel damages case be punitive or exemplary, and malice can be an ingredient, and from these it is impossible to dissociate all feeling. The objectionable elements in inflammatory remarks are primarily irrelevant ideas which are highly provocative of hostility; but I should have found difficulty in finding anything in Mr. Starr's address of this character. The reference to the tendency of present day administration bodies to become arbitrary and to resent interference with their action is surely legitimate: the illustration of the particular by the general has been a useful and effective device since the institution of the jury. In many cases, it is almost necessary to convey a real appreciation of the full nature and significance of the action assailed.[26]

An example serves to demonstrate how far counsel may go in stirring the passions of the jury without being considered outside the proper boundaries of advocacy. The defendant's counsel in the case of *Auld v. Wallace's Moving & Storage Limited*[27] made his point to the jury in this fashion:

> There is a story told long ago, a man on his way to Samaria who had a problem along the road and some kind man came by and helped him and it comes to us as the story of the Good Samaritan that we all known — and we all know well. But today, in New York and the major cities such as Montreal and, I presume, in Toronto, there is the doctrine of non-involvement — "Let thy brother perish by the side of the road but don't bother me — don't get me involved — don't get me involved — don't bother me with your troubles — you look after your own and don't bother me.
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> James Landry, at his own personal risk, because there was a fire already started there, helped haul Webb out of the cab to safety and I think that photograph very graphically shows the wreckage of that cab. And he helped haul him out to safety, so that he could get back to Ontario to sue him; put out the flames so that the Wallace van wouldn't be destroyed or the Ontario furniture company wouldn't

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[25] *Stewart and Stewart v. Speer*, [1953] O.R. 502 at 508 (C.A.), *per* Hogg J.A.
[26] *Ross v. Lamport, supra*, note 22, *per* Rand J. at 375-76.
[27] (1973), 6 N.S.R. (2d) 214 at 228 (C.A.).

> have their material burnt and, as it turned out, so they could later sue him and bring him into this court today.

The most compelling reason for avoiding unduly extravagant or inappropriate declaration to the jury lies in the fact that such excesses of advocacy all too often detract from the advocate's case. As Riddell J. once said "I am confident that unfair argument and 'mudslinging' hurt rather than helped those who indulged in them."[28]

30.03 THE CLOSING ADDRESS: SPECIFIC RESTRICTIONS

The application of the foregoing general principles is never an easy matter during the heat of a trial. Transgressions may not be immediately recognized for what they are or may pass before counsel or the trial judge have an opportunity to interject. Not every inappropriate submission warrants judicial intervention. Whether a particular comment brings correction or rebuke will often depend upon the context in which it is delivered and the perceived effect it may have upon reasonable jurors.

There are, however, a number of improper submissions identified in the case law that are generally serious enough to require at least some judicial comment or correction, particularly if objection is taken. Many of these inappropriate submissions are listed below.

(a) Misstating the Evidence

It is trite to say that such evidence as is referred to by counsel must be accurately stated to the jury.[29] A trial judge ought to intervene immediately where there is any substantial misstatement of the evidence or where the cumulative effect of minor misstatements becomes an issue. Mere minor slips or errors in dealing with the evidence might best be responded to in the charge or simply left under the catch all instruction to the effect that it is the jury's recollection of the evidence that will prevail.

(b) Stating Personal Opinions

> Neither in his opening address nor at any stage of a trial should a barrister give his personal opinion of the case.[30]

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[28] *Dale v. Toronto Ry. Co.*, *supra*, note 19 at 109.

[29] For an example of flagrantly misstating the facts, see *R. v. Peavoy* (1977), 34 O.R. (3d) 620 (C.A.).

[30] *Halsbury's Laws of England* 4th ed. Vol. 3(1), para. 415; see also *Hall v. Schmidt* (2001), 56 O.R. (3d) 257. If personal opinions are objectionable in opening addresses, they are equally so in a closing address.

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> He must not, when conducting a case, assert a personal opinion of the facts or the law to the court unless invited to do so by the court.[31]

Counsel are not permitted to express their personal opinions on the evidence or on any other aspect of the case, including the credibility of witnesses, *etc.* They may urge the jury by using the phrase "I submit" or some similar invocations, but there is no place for an expression of personal opinion. Such personal opinions are entirely irrelevant. The rationale for prohibiting expressions of personal opinion was put by the Supreme Court of Canada in the following terms:

> Your duty to your client does not call for any expression of your belief in the justice of his cause...The counsel's opinion may be right or wrong, but it is not evidence. If one counsel may assert his belief, the opposing counsel is put at a disadvantage if he does not state that in his belief his client's cause or defence is just. If one counsel is well known and of high standing, his client would have decided advantage over his opponent if represented by a younger, weaker, or less well known man.[32]

Personal opinions are occasionally stated in blatant terms.[33] Most opinions, however, employ oblique phrasing which amounts to nothing more than a thinly veiled expression of personal opinion. For example, in one personal injury case, counsel advised the jury that when he first received the brief from his client, the defendant, he told his client that this was merely a case of a man with a simple broken arm and that he had never since altered that advice to his client. The trial judge ruled that that was an improper expression of personal opinion on the part of the counsel and imposed a sanction when the matter of costs was dealt with.[34]

(c) Inviting the Jury to Consider Irrelevant Matters

Inviting the jury to consider irrelevant matters is generally regarded as a most serious transgression for it tends to sway the jury from their proper task of deciding the case upon the evidence. Such submissions come in many forms including urging the jury to consider irrelevant matters come in a wide variety, many of which are specifically referred to hereinafter including urging the jury to consider the wealth of the defendant or

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31 *Ibid.*

32 *Boucher v. R.*, [1955] S.C.R. 16 at 26 from an address from the late Mr. Justice Rose reported in Vol. XX of the Canadian Law Times at 59.

33 See, for *e.g.*, *R. v. Wildman* (1981), 60 C.C.C. (2d) 289 at 293 (C.A.), revd on other grounds, [1984] 2 S.C.R. 311.

34 *Segreti v. Corp. of City of Toronto* (1981), 20 C.P.C. 110 (Ont. H.C.).

their own interests as citizens or taxpayers or the like. All such submissions are universally regarded as improper.

The high-water mark in inflammatory addresses of this nature by counsel was surely reached in the case of *Sornberger v. CPR*[35] This was a personal injury case brought by father and daughter against the defendant railway company to recover damages for injuries received by them upon being struck by a train as the plaintiffs were in the act of crossing the railway tracks in a sleigh. Apparently, in opening address, counsel for the plaintiffs referred to the amounts being claimed for each plaintiff and called them a very trifling sum and one which the defendants, a wealthy corporation, were well able to pay. In his closing address, the counsel for the plaintiffs continued in the same vein and said of the defendants as follows:

> These are the people to whom your millions were contributed by the Government, one of whose directors has already become a lord and moved to England and purchased himself a baronial castle. Their president, Sir William Van Horne, enjoys a salary of $50,000 a year; he rides in a private car with half a dozen attendants. If you give a verdict for $15,000 or $20,000, the letter goes to Montreal and will be received in the head office by Sir William, who will turn in his easy chair and say, "how well Nesbitt has done, how cheaply Nesbitt has got us off"; a cheque will be brought into him by a clerk; he will sprawl his signature over it, hand it back, and it will be paid as a pure matter of routine, and there will be nothing more about it; not one dollar less of Sir Williams's $50,000; nobody will lose an hour's sleep; and there will be just as many banquets, just as many Pullman cars, just as many palaces as before.
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> You gentlemen, are no doubt poor like myself, and you cannot afford, when you come to Myrtle to take a train to Toronto, to do more than pay your first-class fare. You can afford to look in but not to travel in one of the defendants' luxurious Pullman cars. But, gentlemen, behind that car there is another, a private car, where a man, one of the directors, sits surrounded by half a dozen attendants, and which you cannot even look into. What does a verdict of a few thousand dollars mean to these defendants? The millions are there. Sornberger has been injured by their neglect; he should be given enough to live upon.[36]

There is no doubt that the address was wildly inflammatory, however, an appeal based upon the address was rejected by reason of the fact that no objection had been taken to the address at trial.

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[35] (1897), 24 O.A.R. 263.
[36] *Ibid.*, at 266-67.