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THE CUMULATIVE EVIDENCE RULE AND HARMLESS ERROR

I. INTRODUCTION

The delicate task facing the appellate courts is to provide for the judicious administration of disputes and to insure a fair trial. To be sure, a litigant is not entitled to an errorless trial. Reversal should be required, however, whenever justice would not be served and the integrity of the judicial process would be undermined by affirmation of the trial court. Although these tenets go to the very essence of the appellate courts' function, they are often given too little consideration. This indifference is often apparent where an appeals court summarily dismisses erroneously admitted or excluded evidence as being "merely cumulative."¹

This article will examine the tests used by Missouri appellate courts to determine the prejudice from error. It will also examine these standards as they have been applied to specific situations where evidence, defined as cumulative, has been the subject of error.

II. HARMLESS ERROR IN GENERAL

It is axiomatic that a judgment will not be reversed unless the error at the trial level was prejudicial.² In deciding whether the error was harmless or prejudicial, the appellate court must determine the effect of the error on the verdict.³ To prevent reversals for mere technical or trivial errors, harmless error statutes have been enacted.⁴ In Missouri, reversal is precluded by statutes unless error was committed against the appellant "materially affecting the merits of the action."⁵ As a corollary to these guidelines, it is evident that the courts are more likely to reverse where the error in admis-

1. See, e.g., *State v. Brown*, 404 S.W.2d 179 (Mo. 1966); *Robinson v. Ross*, 47 S.W.2d 122 (K.C. Mo. App. 1932).

2. *Smith v. St. Louis Pub. Serv. Co.*, 277 S.W.2d 498 (Mo. 1955).

3. R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 16 (1970).

4. § 512.160(2), RSMo 1969, provides:

No appellate court shall reverse any judgment, unless it believes that error was committed by the trial court against the appellant, and materially affecting the merits of the action.

28 U.S.C. § 2111 (1970) provides:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

5. *Schraedel v. St. Louis Pub. Serv. Co.*, 248 S.W.2d 25, 33 (St. L. Mo. App. 1952), quoting from § 512.160(2), RSMo 1949.

sion or exclusion of evidence concerns a vital⁶ or the principal contested issue.⁷ The admission of evidence "entirely immaterial to the issues and without probative force"⁸ cannot constitute prejudicial or reversible error unless it has a natural tendency to inflame or arouse hostile passions.⁹

The proper test for the harm of error has been the subject of much debate. Justice Traynor advocates that the verdict be reversed unless it is "highly probable" that the error did not affect the judgment.¹⁰ Others advocate that the test for harm should reflect the standard of proof used at trial.¹¹ Thus, to assure the same degree of certainty demanded at trial, reversal would be required in criminal cases where it is "reasonably possible" that the error affected the judgment.¹² In civil cases, a less strict standard would require reversal only where it is probable or more probable than not that the error affected the decision below.¹³ Missouri purports to follow different standards for criminal and civil cases. For criminal cases, Missouri decisions state that "error should not be declared harmless unless it is so without question."¹⁴ The Missouri test for prejudice in civil cases has not been clearly stated. The test appears to be whether the error "had any reasonable tendency to influence the verdict,"¹⁵ although the language typically found in the decisions is: "We cannot say . . . it is unlikely that the testimony was prejudicial."¹⁶

The Missouri cases consistently point out that the appellant has the burden of establishing prejudicial or reversible error.¹⁷

6. See *State v. Harris*, 64 S.W.2d 256, 259 (Mo. 1933).

7. See *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 320 (Mo. En Banc 1962); *State v. Burchett*, 302 S.W.2d 9, 15 (Mo. 1957); cf. *Martin v. Martinous*, 219 S.W.2d 667 (Spr. Mo. App. 1949) (admission of incompetent evidence cannot be regarded as harmless when it tends to prove a material issue in the case). See generally Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 VILL. L. REV. 48, 58 (1957).

8. *Span v. Jackson, Walker Coal & Mining Co.*, 16 S.W.2d 190, 200 (Mo. 1929).

9. *Kunz v. Munzlinger*, 242 S.W.2d 536, 538 (Mo. 1951).

10. TRAYNOR, *supra* note 3, at 35, 49.

11. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 999 (1973).

12. *Id.* at 1021.

13. *Id.* at 991; TRAYNOR, *supra* note 3, at 29.

14. *State v. Degraffenreid*, 477 S.W.2d 57, 64 (Mo. En Banc 1972); *State v. Hayes*, 204 S.W.2d 723, 725 (Mo. 1947). See also *State v. Shipley*, 174 Mo. 512, 74 S.W. 612 (1903).

15. *Chester v. Shockley*, 304 S.W.2d 831, 835 (Mo. 1957).

16. *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 320 (Mo. En Bac 1962). See also *Krez v. Mickel*, 431 S.W.2d 213 (Mo. 1968); *Hayes v. Kansas City South. Ry.*, 260 S.W.2d 491 (Mo. 1953).

17. *McCandless v. Manzella*, 369 S.W.2d 188, 190 (Mo. 1963); *Nash v. Plaza Elect., Inc.*, 363 S.W.2d 637, 641 (Mo. 1962); *McDill v. Terminal R.R. Ass'n*, 268 S.W.2d 823, 828 (Mo. 1954).

Where the error concerns the improper admission or rejection of evidence, however, a differing presumption arises.¹⁸ "Incompetent evidence on a material issue is presumed to be prejudicial . . . unless clearly shown to be otherwise."¹⁹ The rule is the same where competent evidence is excluded.²⁰ The decisions also state that unless the error affirmatively appears to be inconsequential,²¹ the burden of showing that the error was harmless is on the respondent.²² Initially, it is always the duty of the appellant to call attention to the error in admission or exclusion of evidence and show how it was prejudicial.²³ After this burden is met, the appellant, in theory, is then aided by the presumed prejudice rule.²⁴ Occasionally, reversal of a decision actually is predicated on the failure of the respondent to meet his burden of proof in overcoming this presumption of prejudice.²⁵ In general, however, it appears that the Missouri courts state the presumption of prejudice rule where the judgment is to be reversed but do not mention it where the incompetent evidence admitted is considered to be merely cumulative and harmless.

III. CUMULATIVE EVIDENCE RULE

A. *In General*

Under the cumulative evidence rule, the improper admission or exclusion of evidence which is merely repetitious or duplicative is deemed harmless error on the theory that it did not affect the verdict. The rule is applicable in a wide variety of situations where evidence on a certain issue has been admitted during the trial and other related evidence on the same matter has been improperly admitted or excluded. For example, the rule has been applied where one witness testified on a subject and another witness was erroneously permitted or prevented from testifying on the same sub-

18. *Hamilton v. Missouri Petrol. Products Co.*, 438 S.W.2d 197 (Mo. 1969); *Holmes v. Terminal R.R. Ass'n*, 257 S.W.2d 922, 927 (Mo. 1953). See also *State ex rel. Berberich v. Haid*, 333 Mo. 1224, 64 S.W.2d 667 (1933).

19. *Hamilton v. Missouri Petrol. Products Co.*, 438 S.W.2d 197, 201 (Mo. 1969).

20. *Reed v. Reed*, 101 Mo. App. 176, 70 S.W. 505 (St. L. Ct. App. 1902).

21. *Fred Bauer Engr. & Cont. Co. v. Arctic Ice & Storage Co.*, 186 Mo. App. 664, 172 S.W. 417 (St. L. Ct. App. 1915).

22. *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 318 (Mo. En Banc 1962).

23. *Martin v. Bulgen*, 111 S.W.2d 963 (Spr. Mo. App. 1938).

24. Analysis based upon presumptions and burdens of proof is not suited to appellate review of error. Presumptions and burdens of proof are procedural devices used to expedite the finding of fact in the trial court. At the appellate level, the court is generally not concerned with new evidence, but must decide whether the alleged error was prejudicial. Presumptions and burdens of proof are not needed for this latter task. TRAYNOR, *supra* note 3, at 25, 26.

25. See *State ex rel. State Highway Comm'n v. Baker*, 505 S.W.2d 433 (Mo. App., D. Spr. 1974).

ject.²⁶ It has been applied where testimony or an affidavit was admitted into evidence and a deposition on the same matter was wrongfully excluded.²⁷ It also has been applied where pictures of an injury have been admitted and slides of the same injury have been excluded.²⁸

Essentially, the cumulative evidence rule is based on the premise that reversal is not required where there is evidence in the record which "neutralizes" the prejudice resulting from the improper admission or exclusion of evidence on the same subject.²⁹ However, the error is not harmless in a cumulative sense unless the neutralizing evidence has the same probative effect as the evidence improperly excluded or admitted.³⁰ That is, to be truly cumulative, the evidence must be of the "same kind tending to prove the same point."³¹ Evidence tending to prove the existence of a fact circumstantially is not cumulative of evidence which tends to establish the same fact directly.³² In addition, the prejudice is not neutralized if the competent evidence in the record is of less "persuasive quality" or less likely to impress the jury than the evidence wrongfully excluded or admitted.³³

B. *Exclusion of Cumulative Evidence*

Arguably, the improper exclusion of competent evidence is more likely to be held prejudicial than the admission of incompetent evidence, it being more difficult to determine what effect excluded evidence has on a judgment.³⁴ However, in Missouri it has been held that the exclusion of evidence is "harmless where it is merely cumulative"³⁵ and the "same facts" have been shown by other evidence.³⁶

In *State v. Nibarger*,³⁷ testimony of the defendant's son was

26. See *State v. Hardy*, 225 S.W.2d 693 (Mo. 1950).

27. See *Spivak v. Spivak*, 283 S.W.2d 137 (Spr. Mo. App. 1955); *Barnett v. Western Union Tele.*, 287 S.W. 1064 (St. L. Mo. App. 1926).

28. See *Long v. Hooker*, 443 S.W.2d 178 (Mo. 1969).

29. Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 VILL. L. REV. 48, 55 (1957).

30. TRAYNOR, *supra* note 3, at 70.

31. *State v. Harris*, 334 Mo. 38, 43, 64 S.W.2d 256, 258 (1933); *cf. Rol Miller & Sons, Inc. v. Schultz Products Co.*, 418 S.W.2d 721 (St. L. Mo. App. 1967) (Incompetent evidence is not merely cumulative where it is used to prove a material point not otherwise established).

32. *State v. Harris*, 334 Mo. 38, 43, 64 S.W.2d 256, 258 (1933).

33. *Eichenberg v. Magidson's Estate*, 170 S.W.2d 105, 110 (St. L. Mo. App. 1943).

34. See TRAYNOR, *supra* note 3, at 69.

35. *Steele v. Yacovelli*, 419 S.W.2d 477, 481 (St. L. Mo. App. 1967).

36. *Long v. Hooker*, 443 S.W.2d 178, 181 (Mo. 1969). See also *Spivak v. Spivak*, 283 S.W.2d 137 (Spr. Mo. App. 1955); *Steffen v. Southwestern Bell Tel. Co.*, 331 Mo. 574, 56 S.W.2d 47 (1932).

37. 391 S.W.2d 846 (Mo. 1965).

offered to show an eyewitness' prejudice against the defendant. Although the son's testimony was improperly excluded, the error was ruled harmless since the defendant and another witness had previously testified about the defendant's statements to the eyewitness which resulted in the animosity between them. It was held that, "the improper rejection of evidence is not prejudicial error when the same or substantially the same evidence is otherwise admitted."³⁸ This is so whether such evidence is admitted prior or subsequent to such rejection.³⁹ Application of the cumulative evidence rule will depend on the peculiar circumstances of each case. Courts must consider the excluded evidence's materiality to the issues.⁴⁰ Accordingly, reversal should be required whenever the excluded evidence would have been more persuasive than or would have lent needed corroboration to other evidence in the record.⁴¹

C. Admission of Cumulative Evidence

The cumulative evidence rule has been more frequently applied where evidence was improperly admitted. For example, the improper admission of a letter was held harmless error where the subject matter of the letter was also found in the testimony of witnesses.⁴² In a criminal case, the improper admission of a witness's testimony concerning a prior crime by the defendant was not prejudicial error where the defendant admitted the conviction on cross-examination.⁴³ Accurately stated, the rule is: "the admission of improper evidence is harmless where the fact thereby sought to be shown is otherwise fully and properly established"⁴⁴ by competent evidence.⁴⁵ However, the Missouri courts have also applied this doctrine in two collateral areas which are not consistent with the theory on which the rule is based.

First, Missouri courts have taken the approach that the erroneous admission of cumulative evidence will not allow reversal, "when without it there is ample uncontradicted evidence to support

38. *Id.* at 849.

39. *State v. Wells*, 305 S.W.2d 457, 459 (Mo. 1957).

40. *Welp v. Bogy*, 277 S.W. 600, 604 (St. L. Mo. App. 1925). *See also State v. Harris*, 334 Mo. 38, 64 S.W.2d 256 (1933), where the court stated that in criminal cases, the judicial discretion of the trial court concerning cumulative testimony should be cautiously exercised. Where the evidence tended to more definitely prove the defendant's alibi, it should have been admitted rather than excluded as being cumulative. *Id.* at 259.

41. *Gibbs*, *supra* note 29, at 59.

42. *See Murphy v. Buschman-Jennings, Inc.*, 382 S.W.2d 29 (St. L. Mo. App. 1964).

43. *See State v. Carpenter*, 436 S.W.2d 748 (Mo. 1969).

44. *Boten v. Brecklein*, 452 S.W.2d 86, 96 (Mo. 1970).

45. *Shouse v. Dubinsky*, 38 S.W.2d 530, 5e4 (K.C. Mo. App. 1931). *See also Thienes v. Harlin Fruit Co.*, 499 S.W.2d 223 (Mo. App., D. Spr. 1973).

the judgment and it is apparent that the result would have been the same without such evidence."⁴⁶ This approach is similar to the severely criticized appellate court practice of affirming where the court is of the opinion that the "judgment was for the right party."⁴⁷ The use of either of these tests involves the appellate court in weighing the evidence without knowledge of the factors which may affect the credibility and probative value of the testimony.⁴⁸ If abused, this practice deprives the litigant of his right to trial by a jury of his peers.⁴⁹

The second questionable approach to the cumulative evidence rule is used where the appellant has failed to object to the first introduction of improper evidence. Although the appellant is not precluded from objecting to like incompetent evidence later,⁵⁰ the court's overruling of this objection is not reversible error.⁵¹ It has been uniformly held in Missouri that a party "will not be heard to complain of the admission of testimony over his objection where testimony of the same tenor"⁵² has previously been admitted without his objection.⁵³ In *Carroll v. Missouri Power & Light Co.*,⁵⁴ the court held that, after a failure to make a proper objection in the first instance, a second admission of similar excludable evidence was only cumulative. Though an attempt was made to object to the first admission of incompetent evidence, the court held that the attempted objection was too general. The court then reasoned that since it could not determine which admission of the evidence had influenced the verdict, admitting the evidence the second time was not reversible error.⁵⁵ This rationale seems illogical since both influenced the jury and both were technically inadmissible. Even though inadmissible evidence once received without objection is given probative effect as if it were admissible,⁵⁶ this approach seems inconsistent with the cumulative evidence rule since improper evidence

46. *Zeppenfeld v. Morgan*, 185 S.W.2d 898, 903 (St. L. Mo. App. 1945); *Drake v. Kansas City Pub. Serv. Co.*, 333 Mo. 520, 534, 63 S.W.2d 75, 81 (1933).

47. *Havens v. Brown*, 208 Mo. App. 473, 480, 237 S.W. 126, 128 (K.C. Ct. App. 1922).

48. TRAYNOR [supra note 3, at 20.

49. Saltzburg, supra note 11, at 1019.

50. Some jurisdictions refuse to allow the second objection. See *Rash v. Waterhouse*, 124 Vt. 476, 207 A.2d 130 (1965). See generally, C. McCORMICK, EVIDENCE 128 (2d ed. 1972).

51. *Powers v. Kansas City*, 18 S.W.2d 545, 551-52 (K.C. Mo. App. 1929).

52. *Keyes v. Chicago, B. & Q. R.R.*, 31 S.W.2d 50, 62 (Mo. 1930).

53. *Bennette v. Hader*, 337 Mo. 977, 983, 87 S.W.2d 413, 416 (Mo. 1935).

54. 96 S.W.2d 1074 (K.C. Mo. App. 1936).

55. *Id.* at 1079.

56. *Fellows v. Farmer*, 379 S.W.2d 842, 846 (Spr. Mo. App. 1964); *Turner v. Yellow Cab Co.*, 361 S.W.2d 149, 154 (Spr. Mo. App. 1962); *Edmisten v. Dousette*, 334 S.W.2d 746, 753 (Spr. Mo. App. 1960) and cases collected note 13 therein.

is only harmless where it is cumulative of other competent and admissible evidence in the record. But in not allowing the appellant to benefit from his failure to object in the first instance, *Carroll* may still be properly viewed as an application of the general principle that a party waives his right to a reversal based on a late objection.

D. *Specific Areas of Application*

Accepting the principle that improper evidence must be of the same degree of persuasiveness as the evidence in the record to fall under the cumulative evidence rule, it has been held that the improper admission of expert testimony is not merely cumulative to lay testimony on the same matter.⁵⁷ This situation frequently arises where a police officer, who was not an eyewitness to an automobile accident, is improperly permitted to give his opinion as to the point of impact of the vehicles. This testimony is not "rendered harmless because it is cumulative of other evidence properly admitted"⁵⁸ and reversal is required.⁵⁹ However, in *State v. Hinojosa*,⁶⁰ a physician's improper testimony concerning defendant's intoxication was held harmless where the fact was so "overwhelmingly established by other testimony," as to make it certain that no prejudice could possibly have resulted.⁶¹

Similarly, problems have arisen where a physician is improperly allowed to testify concerning statements made to him by a patient concerning his past physical condition or manner in which an injury was received. As pointed out in *Schears v. Missouri Pacific Railroad*,⁶² even though this testimony may be to the same effect as competent testimony otherwise in the case, the error must be held prejudicial⁶³ because the influence of the physician's testimony on the jury is unascertainable.⁶⁴ In the same light, it was held in *State*

57. *Housman v. Fiddymont*, 421 S.W.2d 284 (Mo. En Banc 1967).

58. *Duncan v. Pinkston*, 340 S.W.2d 753, 758 (Mo. 1960).

59. *Chester v. Shockley*, 304 S.W.2d 831 (Mo. 1957).

60. 242 S.W.2d 1 (Mo. 1951).

61. *Id.* at 8. *But see State v. Burchett*, 302 S.W.2d 9 (Mo. 1957) (Testimony of officer that defendant was intoxicated was not merely cumulative and harmless where it was based on illegal blood test).

62. 355 S.W.2d 314 (Mo. En Banc 1962).

63. *See Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314 (Mo. En Banc 1962); *Holmes v. Terminal R.R. Ass'n*, 363 Mo. 1178, 257 S.W.2d 922 (Mo. 1953). *But see Hunter v. St. Louis S.W. Ry.*, 315 S.W.2d 689 (Mo. 1958) (Physician's testimony concerning the past physical condition of the plaintiff was not prejudicial since it was fully and properly testified to by plaintiff). *Schears* states that even though *Hunter* may allow the admission of a doctor's opinion, a hearsay statement of a patient concerning his past physical condition is still prejudicial error if admitted through a physician's testimony. 355 S.W.2d at 319.

64. *Zarisky v. Kansas City Pub. Serv. Co.* 186 S.W.2d 854 (K.C. Mo. App. 1945).

*v. Degraffenreid*⁶⁵ that admission into evidence of an officer's testimony concerning an eyewitness' identification of the defendant in a line-up was reversible error. The court reasoned that to hold the error harmless merely because it was cumulative would be to "indirectly abolish the evidentiary rule against such testimony as it is the very nature of such testimony to be cumulative."⁶⁶

There are common characteristics underlying the *Schears* line of Missouri cases which have required reversal even though the improperly admitted evidence duplicated similar evidence properly admitted in the case.⁶⁷ Ostensibly, the reversals have been based on the respondent's failure to meet his burden of proof to overcome the presumption of prejudice.⁶⁸ However, it is also apparent that the prejudicial evidence in these cases has nearly always been hearsay statements. Prejudicial error has resulted in an accident case where a highway patrolman was allowed to testify that the defendant told him that the plaintiff was on the wrong side of the road.⁶⁹ In a condemnation proceeding, it was prejudicial error for a witness to testify as to statements made by a highway engineer concerning the value of the defendant's land.⁷⁰ It should also be noted that the hearsay statements requiring reversal had a direct bearing on the principal, paramount, or crucial issue in the case.⁷¹

Cases which cursorily state that the evidence was "clearly cumulative and . . . not prejudicial"⁷² lose sight of the scope of the rule. Albeit cumulative, every restatement of facts also has independent probative value⁷³ and is to some extent corroborative.⁷⁴ Thus, as was correctly stated in the concurring opinion to *State v. Degraffenreid*,⁷⁵ "the fact that evidence is cumulative does not automatically make its admission harmless."⁷⁶ Each case must be examined "to determine whether the particular cumulative evidence

65. 477 S.W.2d 57 (Mo. En Banc 1972).

66. *Id.* at 64.

67. *Schears v. Missouri Pac. R.R.*, 355 S.W.2d 314, 320 (Mo. En Banc 1962).

68. *State ex rel. State Highway Comm'n v. Baker*, 505 S.W.2d 433, 437 (Mo. App., D. Spr. 1974); *Hamilton v. Missouri Petrol. Products Co.*, 438 S.W.2d 197, 201 (Mo. 1969).

69. *Hamilton v. Missouri Petrol. Products Co.*, 438 S.W.2d 197 (Mo. 1969).

70. *State ex rel. State Highway Comm'n v. Baker*, 505 S.W.2d 433 (Mo. App., D. Spr. 1974).

71. *Id.*

72. *See Covey v. Van Bibber*, 311 S.W.2d 112, 117 (K.C. Mo. App. 1958). *See also Creager v. Chilson*, 453 S.W.2d 941 (Mo. 1970).

73. R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 71 (1970).

74. *See Hamilton v. Missouri Petrol. Products Co.*, 438 S.W.2d 197, 201 (Mo. 1969).

75. 477 S.W.2d at 66.

76. *Id.*

admitted therein was harmless."⁷⁷ Erroneously admitted evidence can rarely be deemed harmless where the evidence is closely balanced or affords minimal support for the judgment.⁷⁸

IV. CURATIVE ADMISSIBILITY

By referring to error as being "cured" in a cumulative evidence situation,⁷⁹ the Missouri courts on occasion have totally confused the curative admissibility doctrine with the cumulative evidence rule.⁸⁰ The theories, however, are very different.

In general, where one party introduces inadmissible evidence, the doctrine of curative admissibility allows the opposing party to thereafter introduce similar incompetent evidence solely to meet and negate the effect of the prior incompetent evidence.⁸¹ For example, if the plaintiff improperly questions a police officer—not an eyewitness to the accident—on his opinion as to the point of impact of the vehicles, the defendant may cross-examine the policeman as to his estimate of the speed of the plaintiff's car.⁸² The rationale is that the first party having "opened the door"⁸³ to incompetent evidence on the issue of the cause of the accident, he is estopped from preventing his opponent's rebuttal.⁸⁴

The elements of the Missouri curative admissibility rule are well defined.⁸⁵ First, the original evidence must have been admitted without objection so that the opposing party's only recourse is curative evidence.⁸⁶ Second, the curative rebuttal must have been con-

77. *Id.*

78. TRAYNOR, *supra* note 71. *Degraffenreid* also stated, however, that error "may be disregarded as harmless when the evidence of guilt is strong." 477 S.W.2d at 65. Query whether this statement is not an example of the approach criticized in the text accompanying notes 46-49 *supra*.

79. See *State v. Koelzer*, 154 S.W.2d 84 (Mo. 1941).

80. See *State v. Baldwin*, 399 S.W.2d 22 (Mo. 1966). The court incorrectly held that the admission of hearsay evidence was harmless under the doctrine of "curative admissibility" since the same matter was established by other evidence admitted without objection or contradiction. *Id.* at 24.

81. For an excellent analysis of this doctrine see Beck, *Evidence—Curative Admissibility in Missouri*, 32 Mo. L. REV. 505 (1967).

82. See *Young v. Dueringer*, 401 S.W.2d 165 (St. L. Mo. App. 1966).

83. See C. McCORMICK, EVIDENCE 131 (2d Ed. 1972).

84. Beck, *supra* note 79, at 515. See *Larabee Flour Mills v. West Plains Comm'n Co.*, 216 Mo. App. 257, 262 S.W. 389 (Spr. Ct. App. 1924).

85. Beck, *supra* note 79, at 514. The foundation cases for the modern Missouri rule are *Young v. Dueringer*, 401 S.W.2d 165 (St. L. Mo. App. 1966), and *Dorn v. St. Louis Pub. Serv. Co.*, 250 S.W.2d 859 (St. L. Mo. App. 1952).

86. In theory, the objection would save the appellant on appeal so there is no need to allow similar inadmissible evidence. *Daniels v. Dillinger*, 445 S.W.2d 410, 416 (Spr. Mo. App. 1969). McCormick, however, states that the remedy by objecting is inadequate and the party

fined to the evidential point or fact to which the original evidence was directed.⁸⁷ Third, the court must find that the curative evidence was required to neutralize and contradict an unfair advantage gained by the opposing party's use of the original improper evidence.⁸⁸ The curative evidence must be confined to the same issue.⁸⁹ If the plaintiff improperly brings in evidence associating the defendant with the consumption of alcohol, curative admissibility does not allow the defendant to thereby attack the plaintiff's drinking habits.⁹⁰

Underlying the curative admissibility doctrine is the policy that one party should not be allowed to profit from his own violation of evidentiary rules.⁹¹ Thus, his opponent is allowed to use similar incompetent evidence to meet the prior incompetent evidence which was admitted without objection.⁹² Application of the true cumulative evidence rule, on the other hand, is not based on possible profiting from a violation of court rules. Under the cumulative evidence rule, either the improper admission or the improper exclusion of evidence may be deemed harmless error where the same fact was established either prior or subsequent to the error by other competent evidence. Thus curative admissibility involves an opponent's retaliation with like incompetent evidence while the cumulative evidence rule involves the duplication of the incompetent evidence by the same party. Further more, curative admissibility is a doctrine which may be consciously applied by the trial court, whereas the cumulative evidence rule is an appellate level concept.

should be given a fair opportunity to win the case at trial with curative evidence. See C. McCORMICK, *supra* note 81, at 132.

87. Daniels v. Dillinger, 445 S.W.2d 410, 417 (Spr. Mo. App. 1969); Dorn v. St. Louis Pub. Serv. Co., 250 S.W.2d 859, 866 (St. L. Mo. App. 1952). The rule does not permit the indiscriminate introduction of like evidence touching other issues. *Id.* It is not totally clear, however, how closely the curative evidence must be confined to the same evidentiary fact. For example, in Young v. Dueringer, 401 S.W.2d 165 (St. L. Mo. App. 1966), the court allowed defendant to question a non-eyewitness police officer as to his estimate of the speed of plaintiff's car. Plaintiff had first improperly asked for the officer's opinion regarding the point of impact of the vehicles. The court of appeals applied the curative admissibility rule, stating that the curative evidence was of the "same general caliber" as the original improper evidence. *Id.* at 167.

88. Ferguson v. Missouri Pac. R.R., 442 S.W.2d 549, 554 (K.C. Mo. App. 1969).

89. See, C. McCORMICK, *supra* note 81, at 133.

90. See Daniels v. Dillinger, 445 S.W.2d 410, 417 (Spr. Mo. App. 1969).

91. Beck, *supra* note 79, at 517.

92. In contrast, the rule in Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074 (K.C. Mo. App. 1936), allows the *same* party to introduce like incompetent evidence a second time where his opponent has failed to object the first time. See text accompanying note 54 *supra*.

V. CONCLUSION

If properly defined and applied, the cumulative evidence rule is an appropriate standard for appellate review. However, it should not be applied casually with only lip service given to its requirements. The evidence in question should be truly cumulative and of the same persuasive quality as that in the record. This is especially true in criminal cases where—given the beyond reasonable doubt standard required for conviction—an error in admission or exclusion of evidence may well have “tipped the scales” against the defendant.⁹³ Since it takes little to constitute the requisite doubt for acquittal,⁹⁴ the risk that improperly excluded or admitted evidence is not cumulative should be borne primarily by the State unless the evidence of guilt on that issue is strong. In any event, the cumulative evidence rule should be applied consistent with its underlying rationale. Appellate courts should not first form their opinions and then justify it with the use of a meaningless verbal formula.

W. DUDLEY McCARTER

93. *State v. Degraffenreid*, 477 S.W.2d 57, 64 (Mo. En Banc 1972).

94. See Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988, 1004 (1973).