

CURATIVE ADMISSABILITY: TWO WRONGS CAN MAKE A RIGHT

By Douglas Rallo

Despite the best efforts of trial lawyers to prevent the introduction of inadmissible evidence by an opponent, the reality of courtroom life is that improper evidence is sometimes admitted. The lawyer whose case has been damaged by such inadmissible evidence thus faces a dilemma: how to rebut this evidence while complying with the rules of evidence in which he was trained and by which he has conducted his practice. The solution of the problem may lie in breaking the rules. The doctrine of "curative admissibility" allows a litigant to introduce otherwise inadmissible evidence to rebut the admission of improper evidence by an opponent – in effect, allowing two wrongs to make a right. This article examines the evolution of the doctrine of "curative admissibility," and explains the present standards by which courts and trial attorneys should be guided.

Origins of the Doctrine

In *Chicago City Railway Co. v. Bundy*, 210 Ill. 39, 71 N.E. 28 (Ill. 1904), the plaintiff alleged that she was a passenger in one of the defendant's cable cars and had asked the conductor to let her off at a certain destination. She claimed that as the train slowed she rose from her seat, took one or two steps toward the side of the car and waited for it to come to a full stop. Without warning the train suddenly jerked forward, causing her to lose her balance and fall out of the car onto the street. At trial, the defendant was allowed to introduce the testimony of a Mrs. McDonald who overheard a conversation between the plaintiff, her husband, and two women (called "Samaritans") who advised the plaintiff to commence a suit for damages and who offered to prosecute it for her. McDonald testified that when this statement was made, plaintiff's husband replied, in his wife's presence, that the accident was due to plaintiff's own fault and he did not see what was the use of bothering with it. The object of McDonald's testimony was to show that plaintiff, by her silence in the face of her husband's remark, acquiesced in those remarks and admitted that the accident was her own fault rather than the result of defendant's negligence.

Over defendant's objection, the plaintiff testified in rebuttal to Mrs. McDonald. Plaintiff testified that the two women told her they came to settle the claim for Two Hundred (\$200.00) Dollars, but that if she wanted more, it might take four or five years before the case came up. The defendant's objection to this testimony was based on the principle that offers or attempts to settle claims are not admissible as against the party making the offer. The Supreme Court upheld that introduction of plaintiff's rebuttal testimony since "proof as to the conversation with the women was first offered by ... (sic) the defendant, and it cannot, therefore, complaint that plaintiff was permitted to explain what occurred, and to give her version of what actually took place."

Similarly, in *Mash v. People*, 220 Ill. 96, 77 N.E. 92 (1906), the court upheld improper closing argument in a criminal case, where the prosecutor's comments were invited by the improper comment of the defendant's attorney. In *Bogart v. Brazee*, 331 Ill. 160, 162 N.E. 877 (1928), the parties litigated heirship of an intestate decedent and ownership of his real estate. The Supreme Court upheld the trial court's refusal to exclude inadmissible census reports, because the objecting party offered in evidence their own inadmissible census reports. It stated that "appellants cannot complain of an error which they also committed." In *Jones v. Sanitary District of Chicago*, 265 Ill. 98, 106 N.E. 473 (Ill. 1914), plaintiff brought suit alleging that the Sanitary District had damaged her farm by flooding the waters of the Illinois River, which then overflowed onto her property. Evidence was introduced at trial, over objections, regarding the effect of turning waters of the Sanitary District into the Illinois River upon lands other than those of the plaintiff in the lawsuit. Since similar testimony had been introduced by the objecting party, the Supreme Court held that, "[a] party cannot complain of an error committed against him when a like error appears to have been committed in his favor."

The ability of a party to introduce otherwise inadmissible evidence in response to an opposing party doing so, may depend on whether he has previously objected to the other party's evidence. *Maxwell v. Durkin*, 185 Ill. 546, 57 N.E. 433 (Ill. 1900), is illustrative. In *Maxwell* a team of carriage horses which were being unharnessed in a barn escaped into a public street where one of them trampled the plaintiff, a minor child on her way home from school. No issue was made that the defendants were negligent in employing an incompetent coachman. Nevertheless, the defendant introduced testimony that the coachman was a good driver and a careful man. This evidence was admitted without objection by the plaintiff. The plaintiff sought to rebut this evidence by showing the coachman's general habits of carelessness. The court

refused, since the defendant's improper evidence went in without objection. The court ruled that the parties cannot create the right to "introduce irrelevant evidence by mere silence or consent, when they might have had the adverse evidence kept out or stricken out," by objection or an instruction to the jury to disregard it.

This principle has been applied in criminal cases as well. In *People v. Newman*, 261 Ill. 11, 103 N.E. 589 (Ill. 1913), the defendants were indicted and convicted of robbery. At trial the defendant Dutkowiak testified, without objection, that he had never robbed anyone in his life and that he had been wrongfully arrested, persecuted and beaten by the police both in the past and in this case. On cross-examination Dutkowiak was asked whether he had robbed a saloon owned by Frank Fait, and whether he had previously been arrested for rape and robbery. The prosecution also offered the rebuttal testimony of Fait who testified that his saloon had been robbed by Dutkowiak. The Supreme Court noted that a party cannot be impeached by showing that he has been arrested or charged with a crime, as opposed to being convicted. Since the prosecution introduced evidence of Dutkowiak's mere indictments and an alleged felonious act for which he was never charged, the testimony was inadmissible. The court ruled this way despite the fact that the evidence was rebuttal to the prior testimony of Dutkowiak that he was not a criminal and was the victim of police malice. The court held that Dutkowiak's original testimony, although incompetent, was never objected to by the opponent. Thus, "[T]he proper defense against incompetent evidence is an objection, and its introduction without objection does not make evidence competent to contradict it." The conviction was reversed.

In *Wickenkamp v. Wickenkamp*, 77 Ill. 92 (1875), plaintiff brought suit to recover a promissory note for payment for labor performed by him. One note was given in 1869, but was superseded by another note given in 1871. At trial the plaintiff sought to show that the 1869 note contained a promise to pay plaintiff's claimed damages. The defendant interposed three "specific" objections to the admission of that evidence. The court overruled these objections and admitted the evidence even though the 1869 objections and admitted the evidence even though the 1869 note was irrelevant. The court found that defendant's "specific" objections had waived other, valid objections to plaintiff's incompetent evidence. The defendant then sought to introduce its own evidence that the 1869 note did not contain a promise to pay plaintiff for his services. The court rejected defendant's attempt, and reasoned that "the fact that the court had allowed improper evidence...cannot be regarded as a reason to justify defendant (sic) in resorting to the same character of proof to rebut it...He had it in his power to exclude the improper evidence.. from the jury..." Since the defendant did not make a proper objection or motion to exclude the plaintiff's inadmissible evidence, the defendant was not allowed to introduce inadmissible evidence of his own. The Supreme Court adhered to this rule in *Levinson v. Fidelity & Casualty Company of New York*, 348 Ill. 495, 181 N.E. 321 (1932) where the plaintiff attempted to prove that a certain witness was a criminal, but did so in an improper manner. The defendant failed to object to this testimony and sought to rebut it with improper evidence of his own. The court rejected defendant's efforts, found them to be prejudicial and ordered a new trial.

Thus, older case decisions fall into two groups: those that allow curative evidence per se, and those that require an objection to the opponent's inadmissible evidence as a foundation of one's own use of curative evidence. These early opinions do not seem to base their rulings on whether the curative admissibility is needed to eradicate an unfair prejudice which might ensue from the original evidence (i.e., in *Mash v. People*, prejudice was raised as an issue in respect of comments made by the trial judge, not evidence offered by a party).

Modern Theories of Curative Admissibility

Modern application of the doctrine of curative admissibility can be found in the case of *Werdell v. Turzynski*, 128 Ill.App. 2d 139, 262 N.E.2d 833 (1970). *Werdell* involved a suit by an attorney against a former client for attorney's fees. At trial the defendant gave an unresponsive answer to a question and improperly told the jury that the plaintiff was a dishonest and corrupt man. The court allowed the plaintiff to respond to this with the testimony of five members of the judiciary as witnesses to plaintiff's good character. The court allowed plaintiff's curative testimony, utilizing a test of "fundamental fairness" in determining whether the responsive evidence should be admitted.

People v. Wilbert, 15 Ill.App.3d 974, 305 N.E.2d 173 (1973) continued the trend set by *Werdell* and applied it to criminal cases as well as civil. In *Wilbert* an issue was raised as to whether certain persons

were members of street gangs, whether those gangs were rivals, and whether that rivalry was a motive for the alleged crime on trial. Despite a ruling by the trial court that this issue was irrelevant, defense counsel repeatedly cross-examined all of the State's witnesses concerning gang membership and gang-related matters. In most instances the State did not object to the defense questions. In response the State attempted to cross-examine the defense witnesses on the issue of gang membership and sought to call, as their own rebuttal witness, a member of the Chicago Police Department's Gang Intelligence Unit. The defense objected to the State's efforts, but was overruled. The Appellate Court affirmed the trial court's ruling and stated that by asking its own questions on the subject, "defense counsel opened the door for the State to introduce evidence as to the defendant's gang membership was needed to eradicate an "unfair prejudice" which might otherwise have ensued from the defense counsel's questions. (Accord, *People v. Calderson*, 98 Ill.App.3d 657, 53 Ill.Dec. 880 [1981], *Mazenek v. Rockford Drop Forge Co.*, 98 Ill. App.3d 956, 54 Ill.Dec 368 [1981]). The court's decision relied on the seminal case of *Western Show Co. v. Mix*, 315 Pa. 139 (1934), decided by the Supreme Court of Pennsylvania, which reasoned as follows:

If irrelevant and collateral matter is elicited...without objection, from plaintiff's witnesses on cross-examination, can this plaintiff rebut such collateral matter by the testimony of other witnesses? ...The injection by it of the irrelevant and collateral matter into the case left plaintiff but a single choice; it had either to offer no evidence in answer to it, and thereby risk its possible effect on the jury, which it had no way of measuring; or it could offer the rebutting evidence and take the risk of a reversal...No court of justice should put a litigant to such an alternative; rather it should permit him, by means of the contradictory evidence he had and to rebut, as far as he could, the erroneous evidence elicited by his antagonist. Anything short of this would not even savor of fairness.

The modern rule of "curative admissibility", however, does not automatically entitle a party to respond with improper evidence simply because his opponent has done so. In *Herget National Bank of Pekin v. Johnson*, 21 Ill.App.3d 1024, 316 N.E.2d 191 (1974), the court stated that "prejudice" is the test, and curative evidence is not allowable "merely because the adverse party has brought out some evidence on the same subject." In *Herget*, the plaintiff sued for bodily injuries when, while riding his bicycle, he was struck by a motor vehicle. At trial plaintiff's attorney asked a witness about plaintiff's habits in respect of caring for his bicycle, in order to show that plaintiff rode his bicycle with lights on. The witness answered that plaintiff cared for and kept the bicycle in good condition. The defendant rebutted this evidence with the testimony of a deputy sheriff who stated that several months earlier, in the same general area as where the current accident took place, he almost had an accident with the plaintiff when the plaintiff loomed in front of him with no lights on his bicycle. The trial court allowed the deputy's testimony but the Appellate Court reversed. Even though the testimony was technically curative of a prior evidentiary error, its introduction was "obviously prejudicial," and the verdict in favor of defendant, therefore, could not stand.

Sometimes the doctrine has been invoked when improper evidence was introduced gratuitously, rather than through questions deliberately put to a witness by the adverse attorney. In *Saputo v. Fatla*, 25 Ill.App.3d 775, 324 N.E.2d 34 (1975), for example, plaintiff sued for injuries sustained when plaintiff allegedly fell in the restroom of a gas station owned and operated by the defendants. At trial the defendant testified as an adverse witness for the plaintiff, and gratuitously offered testimony that Shell Oil Company held special contests for the cleanliness of its stations. Plaintiff's counsel made no motion to strike the unsolicited remark of his witness. On cross-examination defense counsel pursued that issue by eliciting testimony that the witness did very well with respect to the cleanliness program and received several awards for his operation of his station. The plaintiff objected to this line of questioning, and argued that it was irrelevant and prejudicial in that its effect was to indicate that defendant had a predisposition to maintain a clean washroom. In its analysis, the court found that defendant's original comment about special contests was not sufficiently serious or egregious and did "not warrant" responsive testimony that defendant had received awards therefore. It also acknowledged that information about those prior awards was neither competent nor relevant to the issue of whether defendant knew or should have known of the condition of the floor on the day in question. The court found the rule of "curative admissibility" inapplicable to these facts. It held that the rule "is merely protective and goes only as far as is necessary to shield a party from adverse inferences..." Thus, even though plaintiff did not move to strike defendant's unsolicited original remark, it did "not create any adverse inference which would allow further explanation or rebuttal. Consequently, it was error to allow

defendant to testify to his receipt of cleanliness awards." Although the court found the curative evidence to be improper, it concluded that the error was harmless and affirmed the verdict for defendant. Saputo should be contrasted with *People v. Douglas*, 29 Ill.App.3d 738, 331 N.E.2d 359 (1975). In *Douglas*, unlike Saputo, the court ruled the doctrine of "curative admissibility" inapplicable to gratuitous, non-responsive comments made by a witness in direct examination. The court in *Douglas* held that the doctrine only applied when "opposing counsel" has elicited irrelevant or incompetent testimony and thereby induced the court to enter into that collateral field. Accordingly, where improper evidence was introduced on direct examination rather than through opposing counsel, the *Douglas* court prohibited the direct examiner from resorting to improper curative evidence in response. Finally, in *People v. Higgins*, 71 Ill.App.3d 912, 28 Ill.Dec. 173 (1979), the court ruled that to invoke the doctrine of "curative admissibility" the prejudice which would result from the original evidence must be significant enough to be characterized as "undue," and held that that curative evidence must be "necessary" to eradicate those "undue prejudicial inferences." The decision of whether to admit curative evidence lies within the sound discretion of the trial judge. The court should "weigh the probable influence of the first evidence, the time and distraction incident to answering it, and the possibility and effectiveness of an instruction to the jury to disregard it." In *Higgins*, the state introduced, without objection, evidence that Larry Thompson, a potential defense witness, was in jail at the time of the defendant Donald Higgins' trial. This evidence was admittedly irrelevant. The defendant attempted to cure this error by proving, "that Thompson was arrested when he went to the police station to see why defendant was under arrest." The court ruled that even if the State's evidence was prejudicial, the defendant's proposed evidence would not have alleviated that prejudice – in other words, was not "curative" – and excluded the defendant's evidence as irrelevant. The court's holding was affirmed on appeal.

CONCLUSION

The doctrine of "curative admissibility" may be invoked to remedy an undue prejudicial influence raised by the introduction of inadmissible evidence by an adverse attorney. The remedy must be truly "curative" of the original error and must be "necessary" before it will be admitted. The decision to admit curative evidence involves a balancing test, and the decision of the trial court will be subject to review only for abuse of discretion. A party harmed by inadmissible testimony may not automatically resort to this doctrine and should always object to improper evidence of his opponent. As with other evidentiary errors, mistakes in the application of the doctrine of curative admissibility may be considered harmless unless the complaining party has been deprived of a fair trial.