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# The Foundations of the Jurisprudence of Chief Justice Ralph J. Cappy: Reflections of Three Law Clerks

*Jeffrey P. Bauman, Leslie Kozler, & Joy G. McNally\**

The foundations of a judge's jurisprudence include many factors—the law, the times, and the views and experiences the judge brings to the bench. An in-depth analysis of Chief Justice Ralph J. Cappy's jurisprudence is far beyond the scope of this tribute, and other contributors have engaged in a more detailed review of discrete decisions he penned. Those who clerked for Chief Justice Cappy, however, have the benefit of a unique insight into the foundations that underlay his jurisprudence. From this point of view, and upon reflection, it is evident that several factors played a primary role in the formulation of Chief Justice Cappy's legal legacy: a deep and abiding respect for the rule of law; an insistence that the law evolve to meet the needs of the community; a dedication to the fair and efficient administration of justice; and a profound humility, best reflected in a heartfelt concern for the difficulties facing the common citizen.

The rule of law, and all that it means, stood foremost in Chief Justice Cappy's approach to decision-making. In his mind, stability in the law was an essential component in upholding the rule of law. He believed it critical to provide individuals with the comfort of knowing that the law was not going to change radically or arbitrarily. He also believed that the rule of law was dependent upon an independent judiciary that enforced the common law and statutory law and guaranteed the rights and liberties provided by the state and federal constitutions consistently. In a 2003 speech at St. Francis University, Chief Justice Cappy remarked:

[T]he rule of law acts as a guiding hand with respect to conduct by demanding the application of existing substantive legal standards in resolving disputes. Whether in constitutional, statutory, or decisional form, the requirement of application of these established legal principles not only prevents *ad hoc* rulings, but also offers some modicum of predictability

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in decision-making. Thus, people can gauge their future conduct and possibly avoid disputes altogether.

While the rule of law was a significant concern, Chief Justice Cappy did not follow earlier rulings reflexively. He viewed the law not as an immutable force, but rather as a living organism that, when appropriate, had to change to better serve society. He sometimes had heated debates with his law clerks over whether to join another Justice's opinion, or over how a particular issue should be resolved. As was his custom, he did not make a display of his keen intellect, preferring instead to argue his point with a joke or good story. For example, in the face of arguments based upon long-standing precedent, Chief Justice Cappy would regale us with one of his favorites.

He would begin with "Remember Pope Leo," which was his way of expressing his beliefs as to the proper and necessary evolution of the law. The story he would tell was about an edict that Pope Leo had issued.<sup>1</sup> As Chief Justice Cappy told it, Pope Leo declared that absolute silence was required of the engineers and workers who were erecting an obelisk in St. Peter's Square, and that infractions of the rule would be punishable by death. A Genovese sailor who was knowledgeable about ropes and the hoisting of sails witnessed the work and observed the ropes attached to the block and tackle used to lift the spire. The ropes were straining under the weight of the monument. The sailor knew that the solution to avert catastrophe was to douse the ropes to give them added flexibility; otherwise, the ropes would snap, the Obelisk would fall, and many workers would be crushed. While knowing that he would die for breaking Pope Leo's edict, the sailor cried out, "Water on the ropes!" thereby averting disaster. The grateful Pope, as the story went, disregarded his own edict and spared the sailor's life.

Thus, to Chief Justice Cappy, the moral of the story was that one should not only speak out and say what was necessary, rather than stay silent, but that one should not blindly follow the law, when common sense and the betterment of society pointed in a different direction.

However, Chief Justice Cappy was concerned with not only the substantive law; he was also mindful that the fair administration of justice depended on proper procedures. Indeed, he was viewed

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1. This story is attributed by some to Pope Sixtus V.

as particularly gifted in administrative matters. Early in his judicial career as a judge on the Court of Common Pleas, he was given the Herculean task of remedying the Allegheny County Court of Common Pleas Civil Division's backlogged docket. His success in reorganizing the Civil Division resulted in a system that not only became one of the most efficient civil court systems in the country, but one that ensured that justice was administered in an even-handed and efficient manner. This administrative talent infused his decision-making and opinion writing. Always, Chief Justice Cappy would consider the practical impact of the Court's decisions on attorneys, judges, and litigants. In any opinion he authored, he would aim not only to answer the immediate question before the Court, but also to provide the bench and bar with a clear blueprint for correctly addressing the issue at hand in future cases.

Finally, a driving force behind virtually all of Chief Justice Cappy's decisions was his humility—he possessed that rare feel for the common person. Ralph Cappy was not born with a silver spoon in his mouth. He hailed from Brookline, Pennsylvania, a gritty, blue-collar area near Pittsburgh. Working every summer, not at the country club but in the steel mill, (and sometimes, as he would describe, “defending a point with a baseball bat”) would color his approach to the law in later years. He carried his background with him as he rose to the position of Chief Justice. Indeed, while he embraced the power of his position, he worked to keep it in perspective. For example, Chief Justice Cappy not only enjoyed his motorcycle trips across the country but also appreciated them. While he surely wanted time to recharge his drained batteries, he also recognized that these trips kept him humble and in touch. He knew that the position of Supreme Court Justice carried with it the potential for becoming too impressed with one's own importance. Speaking about one of his motorcycle trips to the western United States, he quipped, “Here [in Pennsylvania as a Supreme Court Justice] every joke is funny, and every putt is a gimmie, but out there, I am just another *bunyak* on a motorcycle.”<sup>2</sup>

Chief Justice Cappy's humility led to a deep and passionate caring for the poor and disadvantaged, as reflected in his service as a public defender. Yet, his empathy for those in need was not lim-

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2. Chief Justice Cappy had his own Brookline-born stock of terms to describe individuals in humorous fashion. Among our favorite Cappyisms were the labels *bunyak* and *nudnik*. A *bunyak* is an ordinary Joe, a down-to-earth person. A *nudnik* is a person who insists on remaining oblivious to the obvious.

ited to criminal law; his concern for the common person reached to all areas of the law. As a trial judge, Chief Justice Cappy witnessed the travails and triumphs of ordinary people day-in and day-out. He did not forget them. In sum, Chief Justice Cappy's ability to embrace his humble beginnings and his concern for the common citizen had a significant formative impact on his jurisprudence.

These driving forces are reflected, to one extent or the other, in Chief Justice Cappy's opinions.

While numerous decisions authored by Chief Justice Cappy could exemplify his respect for the rule of law, one perhaps-pedestrian aspect of appellate jurisprudence may best represent his struggle to uphold and preserve it. Chief Justice Cappy's mentor and former law-school professor, Judge Ruggero J. Aldisert of the United States Third Circuit Court of Appeals, was one of the first judges to place a fundamental emphasis on the proper standard of review, i.e., the deference that an appellate court accords a lower tribunal's decision. Like his mentor, the Chief Justice championed discerning and adhering to the proper standard of review when resolving an appeal. Nowhere was this more of an ongoing struggle during his tenure than in the arena of labor relations.

Soon after certain public employees of the Commonwealth were permitted to organize for purposes of collective bargaining through the 1970 Pennsylvania Employee Relations Act, the issue arose regarding the proper deference to be paid by the judiciary when reviewing a grievance arbitrator's award. The Supreme Court of Pennsylvania in the 1970s adopted the federal approach of embracing a very deferential standard of review, which came to be known as the "essence test." The inquiry that informed this test was whether the arbitrator's award drew its essence from the collective bargaining agreement. If the arbitrator's award could in any rational way be derived from the agreement between the parties, then the reviewing court was required to affirm the award. In the mid-1980s, however, a series of decisions by the Pennsylvania high court eroded this deferential standard and embraced one that focused on the reasonableness of the grievance award. This less-deferential standard of review resulted in an increased number of arbitration awards being reversed by the judiciary. As this, in turn, frustrated the policies that undergird arbitration, namely, speed, lack of expense, and finality, and undermined the stability of the rule of law, Chief Justice Cappy attempted to direct the Court back to the previously settled deferential standard.

Persevering for almost a decade, Chief Justice Cappy struggled to reaffirm the essence test as the rule of law and to preserve it as the proper standard of review in this area. In his 1999 decision in *State System of Higher Education v. State College and University Professional Ass'n*,<sup>3</sup> he made clear that the essence test was the proper analysis by which to consider an appeal of a labor arbitration award. The integrity of the test was challenged in subsequent years, with the Court staggering between a vibrant application of the essence test and a watered-down version expressed as the “core-functions” exception that threatened to swallow the rule. Ultimately, as his tenure on the Court came to an end, Chief Justice Cappy’s 2007 majority opinion in *Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educational Support Personnel Ass’n*<sup>4</sup> steered the Court’s view of the proper standard of review back to the original essence test. His insistence on reaffirming the essence test as the proper standard of review for considering an appeal of a grievance arbitration award not only supported the policies underlying labor arbitration but, more importantly, represented his strong commitment to upholding the rule of law.

There is no case more emblematic of Chief Justice Cappy’s willingness to depart from precedent in the interest of justice than his opinion in *Commonwealth v. Grant*.<sup>5</sup> In *Grant*, the absolute requirement set down in *Commonwealth v. Hubbard*<sup>6</sup> that a claim of trial counsel’s ineffectiveness must be raised at the time a defendant had new counsel or be deemed waived, was overruled, and a new rule—that a defendant should wait to raise claims of ineffective assistance of trial counsel until petitioning for collateral review—was announced. For Chief Justice Cappy, this result was most gratifying. As a former public defender who represented the criminally accused, and as a former trial judge who sentenced the convicted, he viewed the change he had championed as critical to protecting the Sixth Amendment’s guarantee of effective representation. The change had the added benefit of streamlining the collateral review process by clarifying that claims of trial-counsel ineffectiveness could be raised in a first petition for post-conviction relief, even when the petitioner had new counsel on direct appeal.

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3. 743 A.2d 405 (Pa. 1999).

4. 939 A.2d 855 (Pa. 2007).

5. 813 A.2d 726 (Pa. 2002).

6. 372 A.2d 687 (Pa. 1977).

In the analysis, Chief Justice Cappy first showed how the *Hubbard* rule required the Pennsylvania appellate courts to perform functions for which they were not particularly well-suited—entertaining issues raised for the first time on appeal, engaging in fact-finding, or considering matters outside the trial-court record. He then discussed and found meritorious the varying rationales espoused by the many jurisdictions that had postponed review of ineffectiveness claims to collateral proceedings. Moving to Pennsylvania's then-existing system, Chief Justice Cappy demonstrated the almost-insurmountable burdens that an insufficiently developed record and a 30-day appeal period placed upon appellate counsel in the presentation of ineffectiveness claims. For example, under the *Hubbard* rule, counsel was required not only to raise any trial errors but also to consider extra-record claims that were implicated by counsel ineffectiveness, all within the 30-day appeal period. Based on this time pressure, Chief Justice Cappy concluded that the *Hubbard* rule was thwarting the fair adjudication of ineffectiveness of counsel claims. Accordingly, he overruled *Hubbard* and deferred review of trial-counsel ineffectiveness claims until the collateral review stage of criminal proceedings.

Such a postponement of these claims had the added benefit of streamlining first petitions for post-conviction review, which also served Chief Justice Cappy's interest in administrative efficiency. Under the framework set forth in *Hubbard*, a post-conviction petitioner who obtained new counsel for purposes of direct appeal was required to present collateral claims in terms of appellate-counsel ineffectiveness. This argument was necessary because claims of trial-counsel ineffectiveness that were not raised on direct appeal were waived. In other words, the petitioner would have to establish that his or her appellate counsel was ineffective for failing to raise a claim of trial-counsel ineffectiveness. Post-*Grant*, a petitioner would no longer have to "layer" his claims in this manner, as he or she would no longer be required to raise trial-counsel ineffectiveness on direct appeal.

As illustrated in his decision in *Grant*, while Chief Justice Cappy recognized the promise that a change in the law could bring, his zeal was always tempered by concern for the fair and efficient administration of justice. Chief Justice Cappy's pragmatic approach to the evolving law is evident in *J.S. v. Bethlehem Area School District*,<sup>7</sup> a case on the complex issue of student

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7. 807 A.2d 847 (Pa. 2002).

speech. In *J.S.*, the Court was faced with the thorny question of whether a school could discipline a student for showing his Web site, which contained disparaging comments about a teacher and the school principal, to another student at school. Ultimately, the teacher who was the focus of the Web site became so emotionally distraught that she had to take leave from her employment. Recognizing that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” Chief Justice Cappy crafted an approach to dealing with this increasingly frequent problem that balanced the student’s right of free speech with the school’s right to impose discipline and perform its mission. The result was classic Chief Justice Cappy.

Emphasizing the constitutional rights of children, the role of the school authorities acting *in loco parentis* to protect children, and the need to establish order and discipline, Chief Justice Cappy first looked to the patchwork of existing law on the subject and acknowledged the United States Supreme Court’s failure to visit the area in years. In attempting to fill the void created by this dearth of decisional law, Chief Justice Cappy characteristically struck a balanced approach to the issue. He set forth a framework in which the location of the speech, the form of the speech, the effect of the speech, the setting in which the speech was communicated, and finally, whether the speech was part of a school-sponsored activity were considered. Ultimately, in reconciling the competing policies at play and attempting to come to a fair result, Chief Justice Cappy, writing for the majority, determined that the lewd, “on-campus” speech, which was aimed at specific school personnel, accessed by the student in school, and disrupted the school environment, allowed for school disciplinary action.

An example of Chief Justice Cappy’s abiding respect for the work of lawyers and judges in the courtroom and his desire to create templates in his opinions that would guide them in the law’s proper application is *Grady v. Frito-Lay, Inc.*<sup>8</sup>

In *Grady*, the plaintiffs claimed that Mr. Grady sustained a life-threatening esophageal tear as a result of eating Doritos corn chips. The plaintiffs sued the manufacturer, alleging that the

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8. 839 A.2d 1038 (Pa. 2003). *Grady* generated an unusual token of appreciation and one that Chief Justice Cappy shared with his law clerks. Following *Grady*’s publication, he received a coffee cup from Common Good, a coalition that believes that basic, common sense is too often missing from our nation’s courtrooms. Although Chief Justice Cappy did not disclose what he thought of Common Good’s perspective, he was certainly pleased that the coffee cup could be taken as an indication that his majority opinion in *Grady* was clear, sensible, and pragmatic.

chips were dangerous and defective. To prove their case, plaintiffs offered the report of an expert who measured the compressive strength of Doritos and concluded that, because of their hardness and strength, the chips were capable of perforating the esophagus while being swallowed. The manufacturer asserted that the expert's testimony did not satisfy the rule articulated in *Frye v. United States*<sup>9</sup> and adopted in Pennsylvania, which provides that novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community. The trial court agreed with the manufacturer on *Frye*; the Superior Court did not. The Supreme Court granted allocatur to review the Superior Court's ruling and to consider whether the *Frye* test should give way to the standard in *Daubert v. Merrell Dow Pharmaceuticals*.<sup>10</sup>

Writing for the majority, Chief Justice Cappy reversed. On the overarching question as to whether *Frye* should be replaced with *Daubert*, he reaffirmed Pennsylvania's commitment to *Frye*, noting that because *Frye*'s general-acceptance test was a proven and workable rule, there was no need for change. Turning to *Frye*'s proper application, he provided instruction on several critical *Frye* issues, clarifying that the proponent of the evidence bears the burden of proof; that *Frye* requires that methodology, not conclusions, be generally accepted; that *Frye* was only one component of admissibility; and that the standard of appellate review was for an abuse of discretion. Next, Chief Justice Cappy determined that the Superior Court did indeed err in substituting its judgment for that of the trial court. Finally, rather than remand for reconsideration, he reviewed the trial court's decision and upheld it. In typical straightforward fashion, he zeroed in on the problem with the expert's conclusion, explaining that the expert's calculations, although shown to be a standard scientific method for assessing the downward force needed to break an object, were not shown to be a generally accepted method for reaching conclusions about food safety. Accordingly, Chief Justice Cappy held that the trial court acted within its discretion in finding the expert's testimony inadmissible under *Frye*.

Finally, Chief Justice Cappy's concern for the consequences of a decision on the lives of ordinary people is evident in *Ieropoli v. AC&S Corp.*<sup>11</sup> In this appeal, the Court was faced with deciding

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9. 293 F. 1013 (D.C. Cir. 1923).

10. 509 U.S. 579 (1993).

11. 842 A.2d 919 (Pa. 2004).

whether a statutory enactment that relieved successor corporations of all liability for the accrued causes of action of individuals who had been exposed to asbestos products violated Article I, Section 11 of the Pennsylvania Constitution.

Article 1, Section 11, otherwise known as the “open courts” or “remedies” clause, has its origins in English law. Thus, Chief Justice Cappy began with the Magna Carta and traced its guarantee of a legal remedy for injuries into Pennsylvania’s own constitution and decisional law. He then showed that, according to long-standing Pennsylvania jurisprudence, an accrued cause of action is a vested right that the remedies clause protects from extinguishment by legislation. Next, following the dictates of the Statutory Construction Act, he determined that the statute operated to relieve successor corporations of all responsibility for any asbestos-related cause of action, including those that had accrued. After demonstrating that a cause of action is a remedy in the eyes of the law, i.e., the vehicle by which one seeks legal redress for the injuries he or she has suffered, Chief Justice Cappy concluded that the statute as applied in the instant case was unconstitutional. In other words, by extinguishing accrued asbestos-related causes of action, the General Assembly’s enactment denied the individuals who held them a vested right in the remedy guaranteed by Article 1, Section 11.

Accordingly, through the use of constitutional, statutory, and decisional law, Chief Justice Cappy was able to forge a majority opinion that set forth the parameters of an acceptable statutory response to the challenge of asbestos litigation. While Chief Justice Cappy was deeply concerned with the heavy toll that such litigation was visiting upon Pennsylvania corporations, he made clear that any statute aimed at alleviating that burden could not offend the protections given to the injured under the remedies clause of the Pennsylvania Constitution.

These opinions are but a few examples of the driving forces that informed Chief Justice Cappy’s jurisprudence. Certainly, his opinions reflect a regard for the rule of law, a concern for the evolution of the law, a dedication to the fair and efficient administration of justice, and an appreciation for the ramifications of the law on the common person. They are his legacy as a jurist. For those of us who worked with him, however, these attributes were always on view. They were evident in not only his decision-making but also in the way he ran his chambers, in the way he led the Court, and in the way he resolved the many issues that he confronted as a public servant. It is abundantly clear that all of us—the judges,

attorneys, and citizens of Pennsylvania—will enjoy the lasting benefits of Chief Justice Cappy's work and the unique set of attributes he brought to the bench.