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# *Morrison v. Department of Public Welfare* and the Pennsylvania Revolution in Scope and Standard of Review

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# *Morrison v. Department of Public Welfare* and the Pennsylvania Revolution in Scope and Standard of Review

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Others have spoken and written at length about various aspects of Chief Justice Ralph Cappy's influence on the administration of justice and his many accomplishments as an administrator—accomplishments that have led judges, lawyers, and journalists to call him the "modernizer"[1] and "reformer"[2] of Pennsylvania courts. These achievements demonstrate the Chief Justice's goal-orientation and focus on the "big picture" as an administrator. As a jurist, Chief Justice Cappy also maintained and achieved clear, coherent, and considerable goals, and it is this facet of his legacy into which I have particular insight as one of his former law clerks. One objective to which the Justice[3] adhered relentlessly was the desire to provide clear guidance to the bench and bar through opinions that were well-considered, well-organized, and expressed in plain language. My experience working with him on one opinion, in particular, illustrates how he carried out this mission and the significance and lasting effect of his work.

As do all of his former law clerks, I have fond memories of my time working with "The Boss." Those who are familiar with his reputation as an outstanding administrator will not be surprised to learn that he—supported by his indomitable Chief Law Clerk, Betty Minnotte—ran a tight ship. His chambers were characterized by logic, order, and efficiency, but above all, by goodwill and the spirit of teamwork. The variety of matters on which the Court granted allocatur made the work diverse and exciting. The regular meetings of the Justice and his clerks were lively, engaging affairs with true give-and-take among all participants. As easygo-

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1. Peter Hall, *The Modernizer*, Pennsylvania Law Weekly, Mar. 3, 2008.
2. Peter Hall, *The Reformer*, Pennsylvania Law Weekly, Mar. 3, 2008.
3. I clerked for the Justice from 1991 to 1994, relatively early in his term on the Supreme Court of Pennsylvania and long before he became Chief Justice.

ing and congenial a leader as he was, however, Justice Cappy would not tolerate a clerk's obfuscating or making an issue or opinion more complicated than it needed to be. If one of us offered an analysis that was unduly convoluted or expressed a view in terms that were unclear, the Justice would be quick with a quizzical look and a good-humored admonition to " 'splain it to me, Lucy!"[4]

Justice Cappy required clarity and precision from us clerks, not just for his own gratification, but primarily for the benefit of coherence in the development of Pennsylvania law and guidance to lower courts and practicing lawyers. As he explained in an interview shortly after his retirement from the bench:

> In my chambers, my clerks were directed and learned how to write an opinion that could be understood by a sophomore in high school and thoroughly understood. . . . The law can be very complex. If you can find a way to write what I call plain-speak opinions, there is more of a likelihood that the lawyers and the judges of the lesser courts will understand it and you'll have a coherent body of law.[5]

Of the many opinions on which I worked with Chief Justice Cappy, the one that, to me, best exemplifies this objective is the 1994 case, *Morrison v. Department of Public Welfare*.[6] While the underlying facts of the *Morrison* case are dramatic,[7] the significance of the opinion itself lies in its discussion of matters that do

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4. With apologies, I am sure, to Desi Arnaz, who frequently and famously said on the 1950s television show, *I Love Lucy*: "Lucy, you got some 'splainin' to do!" (*See* Memorable Quotes for "I Love Lucy," http://www.imdb.com/title/tt0043208/quotes (last visited Feb. 4, 2009).

5. Peter Hall, *Simple opinions make good law*, Pennsylvania Law Weekly, Mar. 17, 2008, at 5.

6. *Morrison v. Dep't of Public Welfare*, 646 A.2d 565 (Pa. 1994).

7. *Morrison*, 646 A.2d at 567. Morrison was a wrongful death and survival action that Shirley Morrison, widow of George Morrison, filed against Schleifer Ambulance Service alleging that the defendant negligently caused her husband's death based on the following events:

> Mr. Morrison . . . was a mental health patient at Woodville State Hospital. On July 29, 1986, while Mr. Morrison was on a brief visit home, he began to hallucinate and became violent. Mrs. Morrison requested that her husband be returned to Woodville. The Office of Mental Health ("OMH") arranged for the local Chief of Police to transport Mr. Morrison from his home to the police station, and for Appellant Schleifer Ambulance Service ("Schleifer") to transport Mr. Morrison from the police station to Woodville. During Schleifer's transport, while the ambulance was crossing the Fort Pitt Bridge over the Monongahela River, Mr. Morrison escaped from the ambulance, ran to the railing at the side of the bridge, and fell over the railing to his death.

*Id.* at 567.

not typically capture attention: identification and application of the appropriate scope and standard of review on appeal. Inattention to those matters in the lower appellate court had resulted in the Commonwealth Court's addressing the wrong question in reversing the trial court's decision to grant the defendant a new trial.[8] Specifically, because it failed to identify the proper question for review, the Commonwealth Court applied an erroneous standard of review to the trial court's decision to grant the defendant a new trial where the trial court had based that decision on its determination that it had committed "very serious trial error" in *exercising its discretion* to allow the plaintiff to present specified evidence and argument.[9] Rather than applying *an abuse of discre-*

8. *Id.* at 569.

9. *Id.* at 568. The trial court had denied Schleifer's motion in limine to exclude evidence that the ambulance crew had left the scene of the accident after Mr. Morrison fell. *Morrison*, 646 A.2d at 567. The defendant argued that "the attendants' leaving the scene did not affect their ability to assist Mr. Morrison, because they could have done nothing to help him after he fell," and that the prejudicial effect of the evidence would outweigh its probative value. *Id.* at 567. Ms. Morrison, on the other hand, argued that the evidence should be admitted because it "was probative of the ambulance crew's lack of proper training and showed a continuous course of negligent conduct." *Id.* at 567. The parties introduced evidence concerning the ambulance crew's actions, local and national standards of care and whether the crew's conduct conformed with the standard of care, and the cause of death. *Id.* at 567-68. At the close of the evidence, the trial court instructed the jury on the "sharp conflict" regarding the attendants' leaving the scene and stated, "Of course, if you were to determine that it wouldn't have saved the deceased's life, in other words, that it wouldn't have done any good for the ambulance driver to remain if in fact he died from the blow to the head so quickly, then, of course, their failure to remain, whether right or wrong, wouldn't have anything to do with his death." *Id.* at 568. The jury found in favor of Mrs. Morrison, assigning 75% of the causal negligence to Schleifer, 25% to OMH, and none to Mr. Morrison, and awarded $450,000 in damages. *Morrison*, 646 A.2d at 568.

The trial court granted Schleifer's motion for a new trial on the basis that it had committed "very serious trial error" in allowing evidence and argument concerning the ambulance crew's conduct following the accident. *Id.* The court noted that the crew had driven through the tunnel after the accident to telephone for help because they could not reach Mr. Morrison to help him and that no evidence was presented to show that Mr. Morrison could have survived the fall, though evidence was presented to show that it was "extraordinarily unlikely" that he would have survived even if a rescue crew had reached him in a matter of seconds. *Id.* "Nevertheless," the trial court stated:

> [T]he conduct of Schleifer which was most forcefully and repeatedly condemned by both counsel and witnesses for the Plaintiff was returning to their workplace and at a later hour handling a dialysis case which had been scheduled for the same day . . . .
>
> The owner of Schleifer was castigated in the strongest terms for not instructing his men to go back to the bridge so that any rescue squad would be told where to look for Morrison. The argument even suggested that he might be found alive despite the admissions and evidence to the contrary. Permitting this despite numerous objections, beginning with a motion in limine, was a very serious trial error. The action of Schleifer in this respect was presented as cold and callous indifference to life and it probably was ill advised from the viewpoint of conventional opinion, but it did not contribute to the death of Morrison. The error in permitting the representation of the contrary requires a new trial.

*tion* standard in reviewing the trial court's decision to grant a new trial for the cited reason, the Commonwealth Court had treated the trial court's reason for granting a new trial as a purely legal question—"whether, in a negligence case, evidence which is offered to prove breach of a duty need also be probative of causation to be relevant and therefore admissible"[10]—and then reviewed it *de novo*, the appropriate standard for reviewing a pure question of law.[11] Instead, the Commonwealth Court should have identified the decision for review as the trial court had characterized it: as resting upon discretionary matters. Then, the Commonwealth Court should have applied an abuse of discretion standard in reviewing that decision—that is, it should have reviewed the record "to determine whether the trial court's reasons found support," rather than conducting a *de novo* review and searching, as the court did, "for an argument to counter the trial court's decision."[12]

Application of an erroneous standard of review by the Commonwealth Court "appear[ed] to have originated from confusion regarding [the Supreme] Court's [prior case law articulating] the scope and standard of review of a trial court's decision to grant a new trial."[13] Accordingly, the Supreme Court clarified the "proper application of the scope and standard of review," as follows:

> "Scope of review" and "standard of review" are often—albeit erroneously—used interchangeably. The two terms carry distinct meanings and should not be substituted for one another. "Scope of review" refers to "the confines within which an appellate court must conduct its examination." *Coker v. S.M.*

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*Id.* at 568-69 (quoting Trial Court Opinion at 5). The trial court found that the admission of the "abandonment evidence" alone was sufficient basis for granting a new trial. *Morrison*, 646 A.2d at 569.

10. *Id.* at 569 (quoting *Morrison v. Dep't. of Public Welfare*, 610 A.2d 1082, 1086 (Pa. Commw. 1992)).

11. *Id.* The Commonwealth Court found that the abandonment evidence "was relevant and admissible to prove that Schleifer had failed to conform to local and national standards of conduct by not providing properly trained attendants," even if it was not relevant to causation, and that any prejudice to the defendant was sufficiently cured by the trial court's instruction that the crew's failure to remain at the scene did not cause Mr. Morrison's death if he had died as the result of a head injury. The court then reversed the trial court's grant of a new trial. *Morrison*, 646 A.2d at 569.

12. *Morrison*, 646 A.2d at 572. The Supreme Court described the inquiry to be made in reviewing a decision to grant a new trial by applying an abuse of discretion standard as focusing on "whether the trial court's stated reasons and factual basis find support in the record. . . In considering whether the record supports the trial court's decision, the appellate court is to defer to the judgment of the trial court, for the trial court is uniquely qualified to determine factual matters" *Id.* at 571 (citations omitted).

13. *Id.* at 569.

> *Flickinger Company, Inc.*, 533 Pa. 441, 450, 625 A.2d 1181, 1186 (1993). In other words, it refers to the *matters* (or "what") the appellate court is permitted to examine. In contrast, "standard of review" refers to the *manner* in which (or "how") that examination is conducted. In *Coker* we also referred to the standard of review as the "degree of scrutiny" that is to be applied. *Id.*, 625 A.2d at 1186.[14]

By misapprehending its *scope* of review—that is, by "erroneously convert[ing] the trial court's stated basis for granting a new trial into a pure question of law, when it is plain that the trial court's decision rested upon discretionary matters"[15]—the Commonwealth Court was led to apply an incorrect *standard* of review as well. As the Supreme Court in *Morrison* explained, the scope of appellate review of a trial court's decision to grant a new trial depends upon the reasons the trial court gives for that decision. If, as in *Morrison*, the trial court indicates that a finite set of reasons formed the only basis for its decision, the appellate court is limited to examining only the stated reasons.[16] Each identified reason should be reviewed using the standard appropriate to the type of decision it comprised—for example, discretionary decisions should be reviewed using an abuse of discretion standard, while questions of law should be reviewed as a matter of law.[17] Arching over the individual standards applicable to each issue raised in an appeal is the ultimate question of the trial court's decision to grant a new trial, where the standard of review applied by the appellate court "is always an abuse of discretion standard."[18] At first blush, this multiplicity of standards may be confusing, but the confusion clears as we recognize the simple fact that the trial court's decision as to whether its underlying "mistakes" warrant the grant of a new trial "is always a discretionary matter because it requires consideration of the particular circumstances of the case."[19]

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14. *Id.* at 570 (emphasis in original).

15. *Id.* at 572.

16. *Id.* at 570. If, on the other hand, the trial court indicates that other reasons than those specified might have warranted the grant of a new trial, the appellate court's scope of review is broader: it may examine "the entire record for any reason sufficient to justify a new trial." *Morrison*, 646 A.2d at 570 (citing *Coker v. S.M. Flickinger Co.*, 625 A.2d 1181, 1186 (Pa. 1993)).

17. *Morrison*, 646 A.2d at 571. If the appellate court determines that the trial court made no underlying error, no basis supports the grant of new trial and the decision to grant a new trial should be reversed. *Id.*

18. *Id.* at 570.

19. *Id.* at 571.

*Morrison* is now cited routinely by Pennsylvania appellate courts and litigants[20] and its above-quoted passage drawing a distinction between the scope and standard of review led to the requirement in the Pennsylvania Rules of Appellate Procedure that the brief of the appellant include a statement "of both the scope of review and the standard of review."[21] In emphasizing the importance of these questions and establishing the expectation that courts and lawyers will attend to them, Justice Cappy was building upon one well-known contribution to appellate methodology of his longtime friend and mentor, Senior Judge Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit—what one writer has called "the Aldisert Revolution": establishing the now-standard practice among appellate courts and lawyers of identifying, defining, and applying the appropriate standard of review.[22] Through the "hallmark" of his many opinions—emphasizing the importance of and setting forth "[a] clear and precise statement of the standard of appellate review for each issue in an appeal,"[23] his teaching of other judges, lawyers, and law students,[24] and his several books and articles on appellate practice and the judicial process,[25] Judge Aldisert transformed what had been the haphazard, occasional, and often result-oriented invocation by appellate courts of "boilerplate expressions" used as "mechanistic incantations inserted to justify a predetermined result" into a well-established, uniform practice of appellate courts' stating and applying clearly defined and meaningful standards appropriate to the questions under review.[26] He also, in his words,

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20. A February 27, 2009, citation count of *Morrison* using the Westlaw KeyCite function retrieved 2,474 documents, comprising mostly appellate court opinions and briefs.

21. Pa. R. App. P. 2111(a)(3). For discussion of the influence of *Morrison* and other questions implicated by scopes and standards of review, see Jeffrey P. Bauman, *Standards of Review and Scopes of Review in Pennsylvania – Primer and Proposal*, 39 DUQ. L. REV. 513 (2001).

22. *See generally* Robert L. Byer, *Judge Aldisert's Contribution to Appellate Methodology: Emphasizing and Defining Standards of Review*, 48 U. PITT. L. REV. xxii (1987).

23. *Id.* at xxiv.

24. In addition to teaching other judges at judicial seminars and lawyers and law students through lectures across the country, *see supra* notes 22-23, Judge Aldisert for many years taught Advocacy and Adjudication to students at the University of Pittsburgh School of Law. *See* W. EDWARD SELL, THE LAW DOWN: A CENTURY REMEMBERED: A 100 YEAR HISTORY OF THE UNIVERSITY OF PITTSBURGH SCHOOL OF LAW 225 (1995).

25. *See, e.g.*, RUGGERO J. ALDISERT, THE JUDICIAL PROCESS: TEXT, MATERIALS AND CASES (2d ed. 1996); RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT (2d ed. 2003); Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence - A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U. L. REV. 445 (1982).

26. *See* Byer, *supra* note 22-23.

"elevate[d] the necessity of correctly stating the review standard to a question of minimum professional conduct"[27] for appellate lawyers due to the standard of review's "critical[] important[ce to] effective advocacy."[28] This revolution was significant, because respecting and adhering to the proper standard of review is not just a technical nicety (albeit one that can mean the difference between victory and defeat for the appellate advocate), but it is integral to maintaining the proper balance of power between the reviewing court and the court reviewed. That is, it determines how readily a reviewing court will substitute its judgment for that of a lower court,[29] or how much deference a higher court must grant the decisions of a lower court.[30]

With *Morrison*, Justice Cappy took Judge Aldisert's revolution one step further, by highlighting the importance of not just the standard, but also the *scope* of review, a more obscure and less developed aspect of appellate review.[31] When it is not simply being overlooked, the scope of review is often confused, conflated, or used interchangeably with the standard of review,[32] but—as recognized especially in Pennsylvania after *Morrison*[33]—it refers to an entirely different aspect of appellate review that is extremely important in itself. Where the standard of review is significant because it determines the balance of power and deference between higher and lower courts, the scope of review is equally significant because it addresses the balance between two specific functions of appellate courts. As Judge J. Dickson Phillips of the United States Court of Appeals for the Fourth Circuit has written:

> Scope [of review] is ultimately controlled by consideration of the specific functions that appellate courts serve. While there have been various formulations, most who have thought systematically about the matter identify the following two basic functions: (1) correction of error (or declaration that no correction is required) in the particular litigation; and (2) declaration of legal principle, by creation, clarification, extension, or

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27. ALDISERT, WINNING ON APPEAL, *supra* note 25, at 57.

28. *Id.* at 56.

29. Bauman, *supra* note 21, at 515.

30. STEVEN A. CHILDRESS & MARTHA S. DAVIS, 1 STANDARDS OF REVIEW § 1.3, at 15 (1986).

31. J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47 L. & CONTEMP. PROBS. 1 (1984).

32. *See, e.g.*, CHILDRESS & DAVIS, *supra* note 30, at 15-16; Bauman, *supra* note 21, at 518-19; Phillips, *supra* note 31, at 1.

33. *See* Bauman, *supra* note 21, at 529.

> overruling. These are, in Dean Pound's terms, respectively the corrective and preventive functions.[34]

Placing greater importance on the corrective function leads to a narrower scope of review, while emphasizing the preventive function promotes a broader scope.[35] In turn, a full constellation of litigation and system values play a role in determining how closely a court should adhere to the traditional design that limits the scope of appellate review to those matters that litigants have properly raised and preserved and that lower courts have had the opportunity to consider.[36]

*Morrison* is characteristic of the work of Chief Justice Ralph Cappy as both a judge and an administrator: it sought and, through a plain-speak opinion giving guidance to lawyers and lower courts, provided a basis for developing system-wide coherence, consistency, and clarity to improve the administration of justice in Pennsylvania. Beyond the dramatic facts of *Morrison*, at its core, the case involved a singular question of negligence. But with the injection and articulation of a revolutionary judicial tenet, Justice Cappy transformed the opinion into a benchmark of appellate jurisprudence. Chief Justice Cappy's legacy is that, in Pennsylvania today, every appellate decision is rendered in terms of the proper scope and standard of review.

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34. Phillips, *supra* note 31, at 2 (citing R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 3 (1941)).

35. Phillips, *supra* note 31, at 2.

36. *See generally* Phillips, *supra* note 31.