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Introduction to Cleary's Presuming and Pleading: An Essay on Juristic Immaturity

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Introduction to Cleary's Presuming and Pleading: An Essay on Juristic Immaturity

Geoffrey C. Hazard, Jr.*

I liked Ed Cleary's essay on *Presuming and Pleading* the first time I read it, many years ago, and the last time I read it, a few weeks ago. In the first reading, it impressed me as a simply stated analysis of a fundamental procedural problem which I thought I understood but had trouble explaining to students. In the last reading, the essay recalled some of the law's mystery that makes its study fascinating. On both occasions the sensation in reading the piece was like that of watching a venerable whittler at work—skilled hands gently giving shape to a thing at once plain and intriguing. One cannot ask much more of legal writing.

Professor Cleary's analysis describes how the law decides what things a plaintiff has to prove in order to recover, and what things a defendant might have to prove in order to prevent a recovery. Professor Cleary argues, correctly it seems to me, that this decision concerning "allocation" of the burden of presentation rests on considerations of "policy, fairness and probability," noting at the same time that these factors cannot be cleanly differentiated from each other. I understand him to say that the definition of a prima facie case of legal wrong is a construct based on experience and that the relevant experience is of two kinds. One is experience with the world of everyday events that give rise to disputes over claims of right. That experience is the origin of our expectations about people's capacities, limitations, and propensities, and hence what substantive rules we need to make for ourselves. The other body of experience is with legal controversy itself, particularly litigation. It is from that experience that we learn what points are likely to be difficult to resolve in disputes of various kinds, and hence the points on which outcome is likely to depend. Both kinds of experience are exemplified in Professor Cleary's case of dog bites man, but they are implicated as well in every kind of legal case.

Professor Cleary's analysis accords with that of Professors Wigmore and Michael and Judge Clark.[1] However, the point seems to have been original with Professor Cleary that experience with out-of-court events and experience with litigation may yield different conclusions about proper

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1. *See* 9 J. WIGMORE, EVIDENCE § 2486 (3d ed. 1940); C. CLARK, CODE PLEADING 608-609 (2d ed. 1947); J. MICHAEL, THE ELEMENTS OF LEGAL CONTROVERSY 617-636 (1948).

"allocation" of the potentially relevant elements of the controversy.

Subsequently there has been a challenge to Professor Cleary's thesis. In what is the only other serious discussion of issue formulation in the last 20 years, Professor Epstein has advanced a provocative thesis that is quite at variance with Professor Cleary's.[2] Professor Epstein argues that the logic of legal argument itself necessarily implies certain allocation rules. He gives the following as an example: Plaintiff alleges the making of a contract (prima facie case), defendant alleges that he was an infant (affirmative defense), whereupon plaintiff alleges that the goods were necessaries (avoidance of affirmative defense). Professor Epstein observes that the materiality of the fact that the goods are necessaries becomes apparent only if we understand that the goods were sold to an infant. That is true enough. He then says, "it follows that the issue of necessaries should be raised only after the infancy question is pleaded as a defense."[3] This proposition simply does not "follow." Of course, in logical sequence the matter of goods being necessaries should come after the matter of the vendee being an infant. However, logical sequence does not dictate temporal sequence of discussion, nor does it indicate who should bring up the question of necessaries or for that matter the question of infancy. It could be appropriate to require the plaintiff to "anticipate" the possibility that the defendant is an infant and accordingly allege *either* that the defendant is not an infant *or* that the goods were necessaries.[4] By the same token, the pleading rule could be so formulated as to require that a defendant pleading infancy also plead that the goods were not necessaries. The choice between these alternatives cannot be deduced from the logical relation between the legally relevant matters of necessaries, contract, and infancy. In fact, one could imagine a pleading rule, consistent with the present substantive law of contract, in which plaintiff's prima facie case alleges that goods consisting of necessaries were supplied to defendant and in which it is a matter of affirmative defense that defendant had not ordered them (no contract). It would appear, therefore, that Professor Cleary remains correct, that the basis of the allocation rule, in the phrase, has "not been logic: it has been experience."

From a more remote perspective encompassing the law as a whole, Professor Cleary's article also remains of interest, technical as its subject matter may be. Harry Kalven observed, perhaps more than once, that the law as such is a procedure for managing doubt. As I understood Professor Kalven, he meant that rules are a means of moving from dilemma to action without the aid of fully satisfying information. That is, the law recognizes

2. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973).

3. *Id.* at 570.

4. It is therefore surprising to read that "[t]here is, however, no orderly way to raise [the issue of necessaries] if the question of infancy is treated as part of the plaintiff's prima facie case." *Id.* at 573.

that key facts in life may be unascertainable, and contrives to say how life's dilemmas shall be nevertheless resolved. For example, since there is no way of definitely deciding what is a safe driving speed, and since there are foolish people who can't be counted on prudently to make that decision for themselves, the law will say that over 65 is not safe.

The rules of issue formulation epitomize this technique and thus in microcosm display the law itself. And, equally fascinating, the formulation of the rules of issue formulation is also a mirror of the development of the law at large. As Professor Cleary suggests, the rules of allocation are established mostly by credulous adherence to precedent, partly as the product of unconsciously circular reasoning, and only occasionally as the resultant of undeceived consideration of alternative social goals. If one really tries to think about dog biting man, in other words, one has to integrate thoughts about man, animal, property, the importance of getting mail and other messages, civil servants, aggression, lawsuits, the sight of blood, children, autonomy, whether leather leggings are too sweaty in the summer, puppies and watchdogs, sociability, the American Dream, and such. How that is accomplished Professor Cleary does not seem to know. But then who does?