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Are Rules Really Better Than Standards?

by
JOSEPH R. GRODIN*

Professor Kelso has provided a useful compendium and evaluation of suggestions for unburdening California's appellate courts, and for the most part I share his views. However, one suggestion that Kelso endorses heartily—indeed, he calls it "the most important thing appellate courts can do to reduce not only their own caseloads, but also the burden placed upon trial courts"[1]—invites more careful scrutiny. It is that appellate courts "[develop] stable, certain, and predictable rules of law";[2] and that they do so through a general preference for "rules" rather than "standards." According to Professor Kelso, courts should have preferred (to use his examples) the old "stop, look, and listen" rule to the standard of "reasonableness" for determining the plaintiff's right to recover for injury at a railroad crossing; they should have stayed with the former "clear rule" forbidding recovery for negligent infliction of emotional distress absent aggravation of personal injury or property damage, rather than move toward the more recent multi-factored balancing test; they should have stuck with contributory negligence rather than adopt comparative negligence standards; and they should have avoided the "confusing" qualities of modern products liability law and assumption of risk doctrines.

It is not my intent here to debate the merits of particular doctrines; what I question, rather, is the wisdom of advising appellate judges that they should routinely opt for the particular *kinds* of doctrines favored by Professor Kelso for their asserted clarity and simplicity as a means of ameliorating judicial workloads. The advice, for a number of reasons, seems problematic.

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1. J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 450 (1994).

2. *Id.*

To begin with, judicial economy seems a questionable basis for formulating common-law legal doctrine. Stability, certainty, and predictability are obvious values in a legal system. Such values promote confidence in the rule of law, and likely make the resolution of disputes a less costly enterprise. Parties to litigation understand that, or they should, and legislatures might well decide that the enforcement of particular principles through litigation costs more than it is worth.[3] But to tell a party that he is going to lose because the *courts* have decided that the application of otherwise appropriate principles would take too much of *their* time is not likely to be seen as a manifestation of justice.

It must also be taken into account that a preference for rules over standards is likely to favor the protection of certain interests over others. In the area of criminal procedure, for example, a preference for clear bright lines (with respect to application of the *Miranda* warning rule or the rule requiring warrants for searches, for example) is likely to favor criminal defendants over prosecutors. One could think of rules that would favor tort plaintiffs over defendants (per se rules of liability, for example), but that is not true of Professor Kelso's examples. The premise underlying Professor Kelso's prescription seems to be that the best means of avoiding tort litigation is by cutting down on the plaintiff's chance for recovery. Indeed, his choice of contributory negligence over comparative negligence does not seem to be justified by a preference for rules over standards at all (since the criteria for determining negligence can hardly be called a rule), nor for certainty over unpredictability, but rather by a preference for the standard that gives the plaintiff less chances of winning, and therefore less incentive (to use Professor Kelso's metaphor for jury trials) "to give a throw of the litigation dice."[4] It is indisputable that cutting back on people's legal rights, and hence on their chance of legal success, will cut back on their incentive to litigate. An enormous body of litigation could be avoided by eliminating the laws that prohibit discrimination in employment, for example. The question is whether cutting back on the plaintiff's chance to recover is a general policy that appellate courts should be advised to adopt.

3. For that matter, a legislature might do a whole lot of things likely to have greater effect in reducing the work of courts than manipulating doctrine. I suspect that the efficiency to be gained by following Professor Kelso's advice is trivial compared to what might be gained by removing whole categories of cases from the courts (drunk driving, prostitution, and debt collection cases, for example) and shifting them to an administrative tribunal.

4. *Id.* at 449.

Apart from the built-in bias effect that a general preference for rules over standards may have in certain areas, there is the question whether what passes for a "rule" really provides greater certainty and predictability. The answer depends, of course, upon how the rule is formulated, and upon the sharpness of its edges. Consider, for example, what Professor Kelso characterizes as the "clear rule" in *Amaya v. Home Ice, Fuel & Supply Co.*[5] requiring aggravation of personal injury or property damage as a condition to recovery for emotional distress. As the dissenting opinion in that case observed, the law may have been "clear" when it simply denied recovery altogether for emotional shock.[6] But as catalogued by the dissenting opinion, state courts had already recognized the unjustified narrowness of the "clear" rule, and had consequently limited and muddied the rule by allowing recovery for shock accompanied by physical "impact," then further allowing recovery for shock even without impact if the plaintiff was in the "zone of danger," and finally allowing recovery in several cases for shock *un*accompanied by impact and outside the zone of danger if an intentional tort to a family member was involved.[7] In sum, the rule's formulation at the time *Amaya* was decided could hardly be said to characterize the sort of clarity that made it easy to predict outcomes.

By characterizing the court's approach in *Amaya* as rule-based, Professor Kelso is then able to criticize the court's subsequent opinion in *Dillon v. Legg*[8] for confusing what was a clear rule with factor balancing.[9] However, as illustrated above, there was no clear rule at the time *Amaya* was decided, and thus what the California Supreme Court did in *Dillon* was not to substitute uncertainty for clarity, but (for better or worse) to move an already fuzzy line a bit further in the direction of plaintiffs.

Leaving aside the problem of bias, and assuming for purposes of discussion that the choice of a rule over a standard does promote efficiency through certainty and predictability, there remains the question whether that choice, in the context under consideration, is consistent with our notions of justice. Certainly an efficient set of criteria is an aspect of a just legal system, but it is just as certainly not the only aspect. A rule disqualifying all persons with serious disabilities from

5. 379 P.2d 513 (Cal. 1963).
6. *Id.* at 527-28 (Peters, J., dissenting).
7. *Id.* The majority opinion provides a full discussion of these cases. *Id.* at 514-25.
8. 441 P.2d 912 (Cal. 1968).
9. Kelso, *supra* note 1, at 449.

employment may be efficient, but society has come to accept that justice requires case-by-case consideration of ability to do particular work.

Indeed, the history of the common law might be described in terms of a continuing tension, and a continuing swing of the pendulum, between rules and standards within various areas of the law. The common-law judges developed a rigid, formalistic view of dispute resolution, and along came the equity courts with a more flexible approach. Then chancellors in equity were accused of making decisions based upon their respective footlengths, or their breakfast menus, and back came some rules. In more modern times, a tension typically develops between the rules and perceived principles of justice, and courts begin to allow for exceptions. Some bright law student writes a law review note observing that the exceptions are so numerous and so vaguely defined as to "swallow the rule," and the courts proceed to adopt the multi-factored standards that the bright student has proposed. And so it goes, until someone suggests that the standards provide insufficient predictability, and that a "clear bright line" is needed. Enter Professor Kelso.

The overall lesson, it seems to me, is that the tension between categorical and individualized decision making cannot equitably be resolved on the basis of a general preference for one over the other. To put the matter differently, the tension cannot be resolved by a rule. What is required, rather, is an area-by-area, doctrine-by-doctrine analysis that takes into account the subtleties of particular legal problems, the extent to which the area is pervaded by principles of general application, the ability of a rule both to provide predictability and to do justice, and the respective competence of courts and legislatures. If that turns out to be a standard, so be it.