MASSACHUSETTS LAWYERS WEEKLY

Abuse-of-discretion standard gets a makeover

By: Alex G. Philipson January 15, 2015

As slip opinions grow longer and longer, it becomes tougher and tougher to keep up with the latest legal trends. We speed through the advance sheets, skipping over familiar legal tests and standards of review — information that generally doesn't change from case to case. And we give short shrift to long footnotes.

But if, in the race to stay current, you skimmed the Supreme Judicial Court's decision in *L.L. v. Commonwealth* (SJC-11721), issued on Dec. 5, you might have missed a historic legal overhaul. Hidden in footnote 27 — of a slip opinion of as many pages — the court rewrote one of the most important standards of appellate review: the abuse-of-discretion standard.

Although I don't think the revision will mean a sea change in how the standard is applied, the new formulation makes for a better-sounding test, and one that is more respectful to trial judges.

The old standard

The abuse-of-discretion standard in Massachusetts is rooted in *Davis v. Boston Elevated Ry. Co.*, 235 Mass. 482 (1920). *Davis* was a tort case, but its articulation of the standard has been used in a wide range of civil and criminal cases involving claims of abuse of discretion.

In *Davis*, the plaintiff persuaded a jury that he suffered an eye injury because of a blown fuse on one of the defendant's streetcars. *Id.* at 493. The defendant moved for a new trial, claiming that newly discovered evidence showed the plaintiff's injury was caused not by a blown fuse but by a bullet. *Id.* at 493-494. The trial judge denied the motion, and the SJC affirmed the denial.

Whether to grant a new trial was, the SJC said, a matter of discretion.

"By such expression is implied the absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just." *Id.* at 496-497.

Whew! That's a mouthful.

But the *Davis* court also provided a shorter version:

"The question is not whether we should take a different view of the evidence or should have made an opposite decision from that made by the trial judge." *Id.* at 502. Rather, "it is necessary to decide that no conscientious judge, acting intelligently, could honestly have taken the view taken by him." *Id.*

The "conscientious, intelligent, honest judge" test has largely defined the abuse-of-discretion standard for nearly a century. Not anymore.

The new standard

What one generation may revere as time-tested another may reject as timeworn. The SJC has taken the latter view

of the *Davis* test. The locution has "earned its retirement." *L.L., supra* at 27, n.27.

L.L. was a case in which abuse of discretion was a central concern. The substantive issue in *L.L.* was how a judge determines whether a juvenile, found to have committed a sex offense for which he or she normally would be required to register as a sex offender, could, under G.L.c. 6, §178E(f), be relieved of that obligation.

Specifically, the question was what standard a judge should use to decide whether a juvenile doesn't pose a risk of re-offense or danger to the public. The answer: (1) a judge must assess the level of risk to see if it was more than hypothetical or purely speculative, but not as definite as what constitutes a "low" risk under G.L.c. 6, §178K(1); and (2) the judge must consider the juvenile's criminal history and circumstances of his or her offense, in light of any relevant expert evidence, and by reference to the risk factors for re-offense set forth in G.L.c. 6, §178K (1)(a)-(l), and in associated administrative regulations.

Having settled those principles, the SJC addressed whether the judge abused her discretion in declining to relieve the juvenile of the obligation to register.

The court said no. But in finding no abuse of discretion, the court did not use the familiar *Davis* test. Instead, it evoked different language from *Davis* — from the long passage I quoted earlier — and concluded that the judge's decision simply "did not lie 'outside the bounds of reasonable alternatives.'" *L.L., supra* at 26, quoting *Adoption of Mariano*, 77 Mass. App. Ct. 656, 660 (2010). See also *Davis*, 235 Mass. at 496 (discretion is "the exercise of discriminating judgment within the bounds of reason").

So why did the court use that phrase instead of the classic *Davis* language about the conscientious, intelligent, honest judge? The answer lies in footnote 27, a lengthy paragraph at the very end of the decision.

The court said that *Davis*'s "conscientious, intelligent, honest judge" test is "so deferential that, if actually applied, an abuse of discretion would be as rare as flying pigs." *L.L., supra* at 27, n.27.

And yet, these abuses are not so rare. Appellate courts have been reversing trial judges for abuses of discretion for many years. So maybe, despite being widely quoted since 1920, the *Davis* test hasn't been "actually applied" after all. And maybe, in *L.L.*, the SJC simply was putting a stop to this persistent fiction.

What's the alternative? Did the SJC ditch the *Davis* test for a less deferential one to make it easier for appellate courts to find that trial judges abused their discretion? If so, losing litigants would have a reason to cheer, believing that now they might have a better chance of winning a reversal on appeal.

But I don't think that's what the court had in mind.

First, a footnote is not usually the place to announce a fundamental shift in the law. Of course there are exceptions, but that's the point: They're exceptions.

Second, if the SJC meant to lower the standard for finding an abuse of discretion, it would have been more powerful to do so in a case in which, unlike *L.L.*, the court found that there was an abuse of discretion. Then, the court could have shown the difference between the absence of an abuse of discretion (under the old *Davis* test), and the presence of such an abuse (under the new *L.L.* test). See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-563, 570 (2007) (announcing higher standard to survive motion to dismiss in case in which court also concluded plaintiffs failed to meet new standard); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-636 (2008) (adopting *Twombly* standard and finding that plaintiffs failed to satisfy older standard and, on remand, would be held to *Twombly* standard).

Third, look at what the court wrote immediately after it equated the *Davis* test with flying pigs: "When an appellate court concludes that a judge abused his or her discretion, the court is not, in fact, finding that the judge was not conscientious or, for that matter, not intelligent or honest." *L.L., supra* at 27, n.27.

That has the ring of description rather than prescription.

The court seems to be saying that, from the time of *Davis* until today, what appellate courts have been doing (and will continue to do) when they find an abuse of discretion is concluding that the trial judge made "a clear error of judgment in weighing the factors relevant to the decision … such that the decision falls outside the range of

reasonable alternatives." *Id.*

That language describes "more accurate[ly]" what appellate courts do when they find abuses of discretion — i.e., more accurately than the "conscientious, intelligent, honest judge" test, which appellate courts have, in fact, not "actually applied." *Id.*

In short, it appears that, although the SJC now prefers terms less caustic than those of the classic *Davis* formulation, the test is basically the same.

So, what constitutes a "clear error of judgment" under the *L.L.* formulation? Perhaps we should consider what the 7th U.S. Circuit Court of Appeals has said.

"To be clearly erroneous, a decision must … strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

A flying pig we can only imagine, but a stinky fish we can smell with our own noses.

Regardless how "clear error of judgment" is defined, what the SJC has done in *L.L.* is all to the good. The *Davis* test always struck me as, well, mean. Why brand a trial judge as unconscientious, unintelligent and dishonest when the judge's decision simply exceeds justifiable bounds? It's enough to say the judge clearly erred in weighing the relevant factors and that his or her choice fell outside the range of reasonable alternatives.

Score one for more dignified appellate review!

Alex G. Philipson is founder of the appellate boutique Philipson Legal in Newton Centre.

Issue: JAN. 19 2015 ISSUE

Full-text opinions online

Copyright © 2015 Massachusetts Lawyers Weekly

10 Milk Street, Suite 1000,

Boston, MA 02108

(800) 451-9998