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Courts--Prospective Overruling

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CASE COMMENTS

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P brought an action against his foster father and insurer of his foster father. *P's* injuries were sustained while he was riding on the drawbar of a tractor operated by the foster father on a public highway. Trial court entered judgment adverse to *P*. *P* appealed. *Held,* affirmed for insurer; reversed against foster father. Foster father was not relieved from liability under the parental-immunity rule. The parental-immunity rule was abolished as to causes on or after June 28, 1963, except where the negligent act involved an ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. *Goller v. White,* 122 N.W.2d 193 (Wis. 1963).

Traditionally, when a court handed down a decision that overruled the old law, the effect was to make the new law apply retroactively except in cases where the principle of res judicata or a statute of limitation prevented this. Fairchild, *Torts,* 46 MARQ. L. REV. 1 (1962). The court in the principal case has gone against tradition and made the overruling apply prospectively and not retroactively. Prospective overruling has come into existence because of the problems that exist if the overruling is applied retroactively. When the courts made an overruling prospective only, they are taking it upon themselves to promulgate a new law and it is debatable whether they have the power to do so. Herein lies the main opposition to prospective overruling.

The real beginning of prospective overruling was stated in *Great Northern Ry. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358 (1932). The Court provided that a state court violated no federal rights by applying a doctrine of an older case to the case at bar although deciding that the doctrine was wrong and would not be followed in the future. Mr. Justice Cardozo, writing for the Court said, "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."

The court stated in *Falconer v. Simmons,* 51 W. Va. 172, 41 S.E. 193 (1902), that if a common law right was overruled, the old decision was never law and the transaction, though dating prior to

the later decision, is governed by the later decision. The court went along with tradition and made the overruling of the old law apply retroactively. It was noted that there was an exception to the above rule. The exception occurred when the right affected was statutory and there was a decision construing it. If a valid contract was made under the construction of the statute, a later decision overruling the prior construction would not affect the validity of the contract. The Court in *Douglas v. County of Pike,* 101 U.S. 677 (1879), supported the above exception and provided that the same effect should be given to a change of judicial construction in respect to a statute in its operation on contracts and existing contract rights. This would make the overruling prospective only.

In another West Virginia case, *In the Matter of Town of Chesapeake,* 130 W. Va. 527, 45 S.E.2d 113 (1947), the court, in determining if a circuit court had the right to grant a corporation charter to a town of over 2000 population, said that the circuit court never had the right and the right always belonged to the legislature. The court further stated that the legislature could make other provisions for the incorporation of towns by a statute prospective in effect, but these same provisions could not be made prospective only by judicial action.

A majority of the problems will arise in the tort area if the overruling is not made prospective only. The court in *Parker v. Port Huron Hosp.,* 361 Mich. 1, 105 N.W.2d 1 (1960), stated that the new law overruling the common law rule of charitable immunity would be applied prospectively only because it would not be fair to hospitals and other charitable groups to be held liable for their torts when they did not have the opportunity to take out liability insurance. If the overruling was applied retroactively the charitable groups would be liable for past torts unless the statute of limitations had expired on the complaining party. Most of the courts today that are beginning to hand down overrulings that are to be applied prospectively only are doing so with tort cases. The court in *Holytz v. City of Milwaukee,* 17 Wis.2d 26, 115 N.W.2d 618 (1962), said that the common law immunity to municipalities was abolished and the overruling would be prospective only.

When a person has contracted, acquired rights, or acted in reliance on the prior decision, and operation of the new holding retrospectively would result in much harm to such persons, the

court has generally made the new overruling prospective only and not retroactive. *Safarik v. Udall,* 304 F.2d 944 (4th Cir. 1962).

If the overruling is made retroactive the parties having contracted or relied on the old decision have some protection. It is provided in the United States Constitution that no state shall pass any bill of attainer, expost facto law or law impairing the obligation of contracts. U. S. CONST, art. I, § 10.

The court stated in *Hernandez v. County of Yuma,* 91 Ariz. 35, 369 P.2d 271 (1962), when determining if a court had the right to change an old rule, if there was no reason for an old rule to continue to exist, that it was the responsibility of the courts to change the rule. The court further stated that the responsibility of the courts does not end just because the legislature has not acted. There can be no justification to continue to apply an old rule that is outdated and without a rational basis. In opposition to the *Herandez* case, the proposition was stated in Note, 37 HARV. L. REV. 409 (1924), that if a court applied a rule prospectively only it would be plain legislation on the part of the judiciary. One branch of the government has no right to perform the duties of another. The duty of the legislature is to make the law and the duty of the courts is to determine what the law was at the time of the dispute between the parties and apply the law to the facts before them.

Generally when a court has rendered a decision that changes the old rule and the effect is to make the new ruling apply prospectively only, the new law also applies to the case at bar when the decision is made. The reason for this is twofold. First, if a court merely announced the new law without applying it to the instant case, it would amount to a mere dictum. Second, and most important, if the new rule was not applied to the case at bar it would deprive the party of all benefit of the incentive he had in getting the old rule changed. *Molitor v. Kaneland Community Unit Dist. No. 302,* 18 Ill.2d 11, 163 N.E.2d 89 (1959).

A few courts in the past several years have started using the idea of prospective overruling. The main reason these courts have made the effect of their overrulings prospective only has been to protect the innocent parties that have relied on an old ruling. As was shown in *Molitor v. Kraneland Community Unit Dist. No. 302, supra,* the whole idea behind prospective overruling is in the "reliance test". There is a settled proposition that if the court

overruling the old decision makes no reference that the application is to be prospective only, then the application is to have a retroactive effect. Because there have been no cases in West Virginia where an overruling was made to apply prospectively only, it would seem that West Virginia still follows the traditional view that overrulings by the courts have to be applied retroactively.

William Walter Smith

Criminal Law—Disqualification of Jurors

D was indicted for the receipt, concealment, and sale of heroin in violation of 21 U.S.C. § 174 (1959), convicted by a jury, and sentenced to fourteen years imprisonment. In *D's* trial ten of the twelve jurors had served in previous cases of a similar nature in which the government had used the same witnesses who testified in *D's* case. *D* contended that this raised a presumption of law that the entire jury was partial and prejudiced, thus depriving him of his right to a trial by an impartial jury as guaranteed by the Sixth Amendment. On appeal from district court conviction, *held*, affirmed by an equally divided court. Three judges were of the opinion that prior service by jurors in similar cases developed by idential witnesses is not prejudicial to *D* when the case arose out of separate, distinct, and independent actions. The three dissenting judges reasoned that a prospective juror or jurors, who have heard a similar but disconnected case based upon testimony of the same prosecuting witnesses, should be discharged for implied bias or prejudice. *Casias v. United States*, 315 F.2d 614 (10th Cir. 1963).

The courts are in disagreement in fact situations similar to those in the principal case. The federal courts and the majority of the state courts which have passed upon the point hold that prior service of jurors in similar cases where the same witnesses are used is not prejudicial to the defendant. In *Wilkes v. United States*, 291 F.2d 988 (6th Cir. 1923), the *D* was indicted for violation of the Reed Amendment. The court stated that the fact that some of the jurors had served in similar cases in which the same government witnesses were used did not entitle *D* to dismissal where it was shown that the jurors on their *voir dire* had stated they had formed no opinions about the guilt or innocence of the *D*. Similarly, in *State v. Mays*, 74 Ohio L. Abs. 43, 139 N.E.2d 639 (1956), the *D*