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Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol45/iss4/8
Appellate Review—Prospective Overruling—Charitable Immunities

In *Rabon v. Rowan Memorial Hosp., Inc.*, the North Carolina Supreme Court overruled its prior decisions and held that public hospitals may no longer rely on the common law tort immunity doctrine. In so doing the court announced that the decision would have no retroactive effect but would apply only to the case before it and to causes of action arising after the filing date of the opinion. The decision in part reflects an increasing awareness of the courts in recognizing the hardships that can result from retroactivity.

It is the common law tradition that a judicial decision overruling an established precedent has retroactive as well as prospective effect. However, when courts strictly adhered to this theory, problems arose in relation to parties who had based their conduct on the prior decisions. As a result many courts adopted exceptions to the general rule of retroactivity. The most common exceptions involved criminal cases or cases where contract or property rights .

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3 The court otherwise professes to maintain charitable immunity as applied to “churches, orphanages, rescue missions, transient homes for the indigent, and other similar institutions which remain charitable institutions in fact.”
4 Mr. Justice Holmes in 1910 wrote “I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years.” *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Dissenting opinion). See generally, Currier, *Time and Change In Judge-Made Law: Prospective Overruling*, 51 VA. L. Rev. 201 (1965) [hereinafter cited as *Currier*].
5 *E.g.*, State v. O’Neil, 47 Iowa 513, 126 N.W. 454 (1910); State v. Jones, 44 N.M. 623, 107 F.2d 324 (1940). But see, Warring v. Colpoys, 122 F.2d 642 (D.C. Cir. 1941) (writ of *Habeas corpus* denied even though construction of statute under which accused was convicted had been altered by a later decision). See generally, Freeman, *The Protection Afforded Against the Retroactive Operation of an Overruling Decision*, 18 COLUM. L. Rev. 230 (1918); Snyder, *Retrospective Operation of Overruling Decisions*, 35 ILL. L. Rev. 121 (1941); Note, 60 HARV. L. Rev. 437 (1947).
6 *E.g.*, Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1868); World Fire & Marine Ins. Co. v. Tapp, 279 Ky. 423, 130 S.W.2d 848 (1939); Payne v. City of Covington, 276 Ky. 380, 123 S.W.2d 1045 (1938); Gentzler v. Smith, 320 Mich. 394, 31 N.W.2d 668 (1948).
7 *E.g.*, Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1892).
had been acquired in reliance on court construction of statutes or constitutions.

North Carolina was an early advocate of these exceptions. In 1904 the supreme court in *State v. Bell* held that its earlier decision interpreting a criminal statute should be changed, but that the defendant could not be convicted for conduct which would not have been criminal under the prior interpretation. The court stated:

> While it is true that no man has a vested right in a decision of the Court, it is equally well settled that where, in the construction of a contract or in declaring the law respecting its validity, the Court thereafter reverses its decision, contractual rights acquired by virtue of the law as declared in the first opinion will not be disturbed.

Two years later, in a case involving the question of whether a lease executed by a corporation was *ultra vires* or not, the court applied the decision prospectively since the parties had relied on a prior interpretation of a statute by the court. The court cited *Bell* with approval stating that it was the only "fair and proper course to pursue" and that the "opposite ruling would have met with strong condemnation, as being contrary to the plainest principles of justice." The following year the court continued this reasoning to apply prospective overruling where a common law precedent was involved. However, in 1908 the court attempted to restrict the broad language of the prior decisions. In *Mason v. Nelson Cotton Co.* it stated that the only exception to retroactive application should be where construction of a constitution or statute was involved. It felt it should not be extended to an "erroneous decision on general mercantile law which is contrary to accepted doctrine and recognized business methods."

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Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948); Haskett v. Maxey 134 Ind. 182, 33 N.E. 358 (1893). But cf., Carter Oil Co. v. Weil, 209 Ark. 653, 192 S.W.2d 215 (1946) (decision on which buyer of land relied invalidated reservations in deeds; prospective overruling would have been unfair to seller, who conveyed thinking mineral rights had been reserved).

* Id. at 677, 49 S.E. at 164.
* Id. at 677, 49 S.E. at 164.
* Id. at 578, 55 S.E. at 868.
* Hill v. Brown, 144 N.C. 117, 56 S.E. 693 (1907). However, the case involved property rights.
* 14 Id. at 511, 62 S.E. at 632. Other North Carolina cases that have
Courts that have felt the need to apply a decision prospectively have generally advanced 2 reasons: (1) a justifiable reliance by the defendant on the prior law and (2) an undue hardship resulting from such reliance. Although these same two reasons can be advanced in decisions involving common law interpretations as easily as in statutory construction, few courts have prospectively overruled common law decisions. The doctrine as a whole received a great impetus from Mr. Justice Cardozo speaking for the United States Supreme Court in Great N. Ry. v. Sunburst Oil & Ref. Co. Although the case involved the interpretation of a statute and the prospective overruling of a prior interpretation, Cardozo made it clear that it did not matter whether the decision involved common law or statutory construction.

However, most cases after Sunburst that applied a decision prospectively still involved contract, property or criminal law. In the field of tort law the rule continued to be one of retroactive application of decisions. Recently common law doctrines of sovereign and charitable immunity have been vigorously attacked resulting in numerous decisions discarding the previous announced rule. The Illinois Supreme Court in Molitor v. Kaneland Community Unit applied a decision prospectively have also involved contract, property or criminal law. E.g., Wilkinson v. Wallace, 192 N.C. 156, 134 S.E. 401 (1926); Fowle v. Ham, 176 N.C. 12, 96 S.E. 639 (1918). However, after this flurry of cases at the beginning of the century, the court has failed to apply the doctrine in any recent cases. See generally, Note, 11 N.C.L. Rev. 323 (1932-33); Note, 5 N.C.L. Rev. 170 (1927).

Cardozo also made it clear that prospective operation did not conflict with the due process clause of the fourteenth amendment. He stated that a state could decide for itself between prospective or retroactive operation. 287 U.S. at 364.

For an extensive list of citations see Note, 60 Harv. L. Rev. 437, 441-47 (1947).

Tort cases that have applied a decision prospectively have involved changes in rules of procedure. E.g., Dempsey v. Thompson, 363 Mo. 339, 251 S.W.2d 42 (1952) (instructions on damages in personal injury suit). See generally, Currier at 244 for the reasoning behind the absence of prospectiveness in tort cases.

The court in Rabon lists all the jurisdictions. See 269 N.C. at 17-19, 152 S.E.2d at 496-98.
Dist. No. 302,22 therefore, felt this situation clearly called for an application of prospective overruling. The reliance factor was clear. School districts relying on the immunity had for years failed to purchase any liability insurance and if the decision were applied retroactively, the result would have been unjust. In Rabon the North Carolina Supreme Court specifically recognized this injustice and prospectively overruled the immunity of charitable hospitals.23

However, the court in Rabon took another step that seems to stand on more tenuous ground. Since Sunburst was wholly prospective, many critics claimed this left the plaintiff unrewarded and was little incentive for others to commence actions to change existing, outmoded laws.24 As a result, the court in Molitor announced that the new rule of liability would extend not only to all cases arising after the filing date of the opinion but also allowed the plaintiff in that case to recover. The North Carolina Supreme Court followed this position.

This practice produces results which are not easily justified. First of all reliance is the main argument the courts have used to justify applying decisions prospectively and clearly the defendant before the court has relied on the rule as much as anybody. Moreover, there seems little justification for rewarding this plaintiff because he is before the court and failing to allow numerous other injured parties to recover—especially where their suits have been commenced before this one.25

23 Although reliance is generally advanced for applying a decision prospectively, Professor Currier suggests that in the immunity field the courts might not have reached this result without a concern for maintaining institutional stability. Currier at 245. Other jurisdictions have refused to apply their decision discarding immunity prospectively, specifically rejecting the reliance theory. See e.g., Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964) (Sovereign immunity); Dauton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958) (charitable immunity).
24 For an extensive listing of law review articles on Sunburst see Note, 13 MONT. L. REV. 74, 78 n.15 (1952). The other criticism generally advanced against Sunburst is that to announce a new rule to be followed in the future and not apply it to the case before the court would amount to mere dictum. See generally, Note, 14 VAND. L. REV. 406 (1960).
25 See generally Keeton, Creative Continuity In the Law of Torts, 75 HARV. L. REV. 463 (1962). This led to the ironical result in Molitor that the other seventeen children injured in the same accident were denied recovery in the lower court. Although this was reversed on appeal because of the procedure followed in the original case indicating that the plaintiff was representing the other claimants, the expense of an additional appeal was necessary.
Of the other three jurisdictions which have applied the new rule to the plaintiff in the suit before them,26 the Michigan Supreme Court has encountered the most difficulty. When the court in *Parker v. Port Huron Hosp.*27 overturned the charitable immunity doctrine, there was a vacancy on the court reducing the normal membership from eight to seven. The court split four to three in overruling the doctrine. The following year in *Browning v. Paddock,*28 where the plaintiff's cause of action arose prior to *Parker* and was thus theoretically barred, the court was unanimous in denying liability but the same split occurred as to the reason. Four justices applied the prospective rule of *Parker* in barring plaintiff, while three applied the common law immunity rule. Justice Black, the new member of the court, stated that if he had been on the court during *Parker* he would have voted to apply the decision prospectively. However, he felt that it should have been wholly prospective and should not have allowed the plaintiff there to recover. On the same day as *Browning* the court discarded the municipal immunity doctrine in *Williams v. City of Detroit.*29 The lower court had denied recovery based on the common law immunity. The supreme court affirmed this but again split 4-3-1. Justice Black voted with the four to abolish sovereign immunity in the future but felt it should not be applied to the instant case. His vote was therefore counted with the "three" resulting in an affirmance denying liability. The result was, in effect, a wholly prospective decision announcing abrogation of immunity for future litigants but the peculiar split left the status of sovereign immunity unclear. In 1965 the Michigan Supreme Court apparently reached a compromise when it abrogated sovereign immunity as applied to a state subdivision. The court announced that its decision would apply to "pending and future cases" as well as to that case itself.30

Thus, for courts that are reluctant to overrule outmoded decisions because of the reliance of the parties on precedent, prospective overruling is a desirable addition to the range of choices. How-

ever, the North Carolina Supreme Court in Rabon would have done well to have considered the warning enunciated by Justice Black in Williams v. City of Detroit:

If we are to overrule, let us do it outright either way, manfully according to the tried rules of judicial process. That is the only way to avoid what Browning and Molitor already have proven; that an appellate court, having determined to reward one litigant only of a distinct and inseparable class of litigants, naively asks for and gets into no end of trouble.  

To reduce the uneven treatment resulting from partially prospective overruling, the preferable solution would have been for the court to have chosen between wholly prospective and retroactive application.  

James A. Mannino

Bankruptcy: Trustee’s Title to Bankrupt’s Property

In Bank of Marin v. England, a debtor drew five checks upon his commercial account with the defendant bank. The debtor then filed a voluntary petition in bankruptcy before the checks were presented for payment. Six days after the petition was filed, the bank, having no notice of bankruptcy proceedings, paid the checks when presented by the payee. The bankruptcy trustee sought to require the bank to pay him the amount paid by the bank upon the five checks. The referee found the bank and the payee jointly liable to the bankrupt’s estate for the amount of the checks and the district court enforced this finding. The decision was affirmed by the Court of Appeals for the Ninth Circuit holding that a bank that honors checks in good faith without notice of voluntary petition in bankruptcy is liable to the bankruptcy trustee for the amount paid. The Supreme Court granted certiorari because of the importance of the question presented, and reversed.

In 1938 Congress passed the Chandler Act amendments to the Bankruptcy Act. These amendments were made necessary by the

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