# Retrospective Application of New Duty in Torts



Keywords
due process, duty, ex post facto, hindsight, prospective, retroactive, retrospective, tort, torts

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## Introduction

Torts is a broad area of law in the USA in which the plaintiff sues a defendant for a personal injury or damage to property caused by the negligence or wrongful conduct of the defendant. I have sketched some of the basic principles of tort law at http://www.rbs2.com/torts.pdf .

This essay considers a tiny, obscure detail in tort law — the unfairness of finding a new duty and then retroactively applying the new duty to the defendant in that case. The reader is warned that this essay is on an esoteric and controversial topic. Judicial concern about retroactive application of holdings in tort cases seems to be nonexistent in most states.

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm . From reading e-mail sent to me by readers of my essays since 1998, I am aware that readers often use my essays as a source of free legal advice on their personal problem. Such use is *not* appropriate, for reasons given at http://www.rbs2.com/advice.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook.*

## Duty determined after the fact

criminal law

In criminal law, the concept of due process in the Fifth Amendment to the U.S. Constitution requires[1] that (1) criminal acts must be specifically prohibited by statute (i.e., no common law of crimes[2]) and (2) statutes criminalizing an act can *not* have retroactive effect.[3] Another way of stating the prohibition of ex post facto statutes is to say that criminal statutes operate prospectively (i.e., after their enactment), *never* retroactively (i.e., before their enactment).

In searching Westlaw for cases explaining the differences between criminal law and civil law on retroactive application of new law, I found an interesting opinion of the Indiana Supreme Court written in a criminal case in June 2006:

> Article I of the United States Constitution provides that neither Congress nor any state may pass any ex post facto law. See U.S. Const. art. I, § 9; U.S. Const. art. I, § 10. An ex post facto law is one which applies retroactively to disadvantage an offender's substantial rights. See *Weaver v. Graham,* 450 U.S. 24, 29–30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Over two hundred years ago, Justice Samuel Chase explained that "[t]he Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime...." *Calder v. Bull,* 3 U.S. 386, 388, 3 Dall. 386, 1 L.Ed. 648 (1798). But, as is clear from the Constitutional text, "[t]he Ex Post Facto Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government." *Marks v. United States,* 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); see also *Rogers v. Tennessee,* 532 U.S. 451, 462, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) ("[T]he Ex Post Facto Clause does not apply to judicial decisionmaking."). Nonetheless, the prohibition on ex post facto laws embodies "one of the most widely held value-judgment[s] in the entire history of human thought," that is, that there should be no punishment without a law authorizing it. *Rogers,* 532 U.S. at 468, 121 S.Ct. 1693 (Scalia, J., dissenting) (quotation omitted). This principle — "the notion that persons have a right to fair warning of that conduct which will

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[1] See, e.g., *Buckley v. Valeo,* 424 U.S. 1, 77 (1976) ("Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' *United States v. Harriss,* 347 U.S. 612, 617 (1954)."); *U.S. v. Lanier,* 520 U.S. 259, 266 (1997) (explaining "fair warning" requirement); *Rogers v. Tennessee,* 532 U.S. 451, 457 (2001).

[2] *U.S. v. Hudson,* 11 U.S. 32, 7 Cranch 32 (U.S. 1812) ("... all exercise of criminal jurisdiction in common law cases [by federal judiciary] we are of opinion is not within their implied powers."). For state law, see, e.g., *People v. Ingber,* 162 N.E. 87, 89 (N.Y. 1928) (New York Penal Law, § 22, "abolish[ed] common-law crimes and common-law punishments."); *Pennsylvania v. Jarowecki,* 985 A.2d 955, 967, n.17 (Pa. 2009) ("... prior to the passage of the Crimes Code in 1972, which abolished common law crimes, ...." 18 Pa.C.S. § 107(b).).

[3] See the explicit prohibition against ex post facto statutes in the U.S. Constitution at Article I, § 10, clause 1.

give rise to criminal penalties" — "is fundamental to our concept of constitutional liberty." *Marks,* 430 U.S. at 191, 97 S.Ct. 990; see also *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). Therefore, the Due Process Clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, protects offenders from judicial decisions that retroactively alter the import of a law to negatively affect the offender's rights without providing fair warning of that alteration. See *Marks,* 430 U.S. at 192, 97 S.Ct. 990.

*Bouie v. City of Columbia* first explained the similarity between ex post facto laws passed by a legislature and judicial decisions that, if applied retroactively, impact due process rights. *Bouie* involved a "sit-in" by civil rights activists at a lunch counter in South Carolina. 378 U.S. 347, 348, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). South Carolina's criminal trespass statute prohibited "[e]ntry upon the lands of another ... after notice from the owner" prohibiting such entry. Id. at 349–50, 84 S.Ct. 1697 (quoting S.C. Code § 16–386 (1952 & Cum.Supp. 1960)). However, the South Carolina Supreme Court "construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." *Id.* at 350, 84 S.Ct. 1697. The United States Supreme Court held that the South Carolina Supreme Court's "unforeseeable judicial enlargement of a criminal statute, applied retroactively, operated precisely like an ex post facto law" and therefore violated the petitioners' due process right of fair warning. *Id.* at 353, 84 S.Ct. 1697. Just as legislatures are barred by the Ex Post Facto Clause from passing laws that unforeseeably enlarge criminal statutes, so too are courts "barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353–54, 84 S.Ct. 1697.

*Marks v. United States* clarified the due process implications of judicial constructions which unforeseeably expand the reach of statutes. Petitioners in that case were convicted of transporting "obscene materials." After petitioners' arrest, but before their trial, the Supreme Court expanded the definition of "obscenity" in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The trial court read jury instructions using the new, broader standard instead of the prior, narrower definition of obscenity that was in place at the time of the petitioners' activities. *Marks,* 430 U.S. at 190–91, 97 S.Ct. 990. The United States Supreme Court held that these jury instructions denied petitioners due process of law because, at the time of their actions, they had "no fair warning that their products might be subjected to the [*Miller*] standards." *Id.* at 195, 97 S.Ct. 990. As such warning is "fundamental to our concept of constitutional liberty," it is "protected against judicial action by the Due Process Clause of the Fifth Amendment." *Id.* at 191–92, 97 S.Ct. 990. Therefore, the Court overturned the petitioners' convictions not because the jury instructions violated any specific category of ex post facto law delineated in *Calder,* but because of the fundamental right of all defendants to have "fair warning" that their contemplated conduct is illegal.

In *Rogers v. Tennessee,* the Unites States Supreme Court reasserted that the due process limitations upon retroactive application of judicial decisions do not "incorporate jot-for-jot the specific categories of *Calder,*" but rather apply "in accordance with the more basic and general principle of fair warning." 532 U.S. at 459, 121 S.Ct. 1693. According to the Court, *Bouie's* "rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right of fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct. And we couched its holding squarely in terms of that established due process right...." *Id.* (citation omitted); see also *United States v. Lanier,* 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope....").

> In sum, the central question to be asked in deciding whether retroactive application of a judicial decision violates due process is whether the defendant had fair warning that his conduct was criminal at the time he engaged in it. Armstrong [the Defendant in this case] essentially argues he had no such fair warning because *Honeycutt,* the only Indiana decision on point, declared that his conduct was not criminal.

*Armstrong v. Indiana,* 848 N.E.2d 1088, 1092-1094 (Ind. 2006).

tort law

Consider a person does some act (or failure to act) that might be negligent. A few years *after* the act, at trial, the defendant learns what his/her duty was, and whether he/she was negligent. The explicit determination of duty *after* the act might seem to violate the prohibition against ex post facto laws in the U.S. Constitution at Article I, § 10, clause 1. However, the U.S. Supreme Court has held that the ex post facto clause *only* prohibits criminal statutes,[4] i.e., prohibits prosecuting an innocent defendant for an act that was legal when done.

The law on this topic shows that there are different rules for (1) criminal cases and (2) civil cases. Criminal law in the USA is statutory, while civil law (i.e., torts and contracts) is mostly made by judges. Statutory law is generally applied only prospectively, while judge-made law is generally applied both retroactively and prospectively.[5] In other words, law recognizes the unfairness of retroactivity to criminal defendants, but the law is blind to the same unfairness to tort defendants.

In the following paragraphs, I discuss a famous medical malpractice case to show the problem:

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[4] See, e.g., *Rogers v. Tennessee,* 532 U.S. 451, 462 (2001) (ex post facto clause in Constitution only limits statutes from legislature, does *not* apply to judicial decisionmaking. Cites *Marks v. U.S.,* 430 U.S. 188, 191 (1977); *Carmell v. Texas,* 529 U.S. 513, n.14 (U.S. 2000) (*Calder v. Bull,* 3 U.S. 386 (U.S. 1798) held that "the Ex Post Facto Clause applies only to criminal laws, not to civil laws."). See also *Marcello v. Bonds,* 349 U.S. 302, 319-320 (U.S. 1955) (Douglas, J., dissenting) ("The Court, however, has stated over and again since *Calder v. Bull,* 3 Dall. 386, 1 L.Ed. 648, that the Ex Post Facto Clause applies only in criminal cases. [citing four cases]").

[5] *United States v. Security Industrial Bank,* 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").

*Helling v. Carey* (Wash. 1974)

This case involves a patient, Barbara Helling, who used the services of an ophthalmologist, Dr. Carey, since 1959. Ms. Helling visited her ophthalmologist eight times between Feb 1967 and Oct 1968. In the Oct 1968 visit, the ophthalmologist measured her intraocular pressure for the first time, and discovered that she had "primary open-angle glaucoma". At that time, her vision had already suffered severe and permanent damage. The defendant, Dr. Carey, estimated at trial that Helling had suffered from glaucoma for "ten years or longer"[6] (i.e., since 1958 or earlier, which means that Dr. Carey had cared for Ms. Helling during the time she developed glaucoma). The reason the ophthalmologist did not measure her intraocular pressure earlier was that glaucoma is rare in people under 40 y of age, and Ms. Helling was only 32 y old in Oct 1968. Ms. Helling sued the ophthalmologist[7] for malpractice, but the defendant won at trial and the defendant won again on appeal to an intermediate court, in an unpublished decision.

The Washington Supreme Court described the standard of care applied at the trial court:

> During trial, the testimony of the medical experts for both the plaintiff and the defendants established that the standards of the profession for that specialty in the same or similar circumstances do not require routine pressure tests for glaucoma upon patients under 40 years of age. The reason the pressure test for glaucoma is not given as a regular practice to patients under the age of 40 is that the disease rarely occurs in this age group. Testimony indicated, however, that the standards of the profession do require pressure tests if the patient's complaints and symptoms reveal to the physician that glaucoma should be suspected.

*Helling v. Carey,* 519 P.2d 981, 982 (Wash. 1974).

It is the last sentence, about the ophthalmologist's failure to suspect glaucoma — a problem with the diagnosis process — that should be the real issue.[8] Instead, the courts focused on the failure to measure intraocular pressure. The Washington Supreme Court said:

> The issue is whether the defendants' compliance with the standard of the profession of ophthalmology, which does not require the giving of a routine pressure test to persons under 40 years of age, should insulate them from liability under the facts in this case where the plaintiff has lost a substantial amount of her vision due to the failure of the defendants to timely give the pressure test to the plaintiff.
>
> The defendants argue that the standard of the profession, which does not require the giving of a routine pressure test to persons under the age of 40, is adequate to insulate the defendants from liability for negligence because the risk of glaucoma is so rare in this age group.

*Helling v. Carey,* 519 P.2d 981, 982 (Wash. 1974).

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[6] *Helling v. Carey,* 519 P.2d 981, 983 (Wash. 1974).

[7] Technically, Helling sued a partnership of two ophthalmologists, Drs. Carey and Laughlin, but Dr. Carey seems to have administered most of the care to Helling.

[8] The defendant assumed — incorrectly — that Helling's symptoms were caused by irritation from contact lenses that defendant had prescribed.

The Washington Supreme Court held that the intraocular pressure test should be given routinely by ophthalmologists to patients of all ages.

> The incidence of glaucoma in one out of 25,000 persons under the age of 40 may appear quite minimal. However, that one person, the plaintiff in this instance, is entitled[9] to the same protection, as afforded persons over 40, essential for timely detection of the evidence of glaucoma where it can be arrested to avoid the grave and devastating result of this disease. The test is a simple pressure test, relatively inexpensive. There is no judgment factor involved, and there is no doubt that by giving the test the evidence of glaucoma can be detected. The giving of the test is harmless if the physical condition of the eye permits. The testimony indicates that although the condition of the plaintiff's eyes might have at times prevented the defendants from administering the pressure test, there is an absence of evidence in the record that the test could not have been timely given.
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> ....
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> Under the facts of this case reasonable prudence required the timely giving of the pressure test to this plaintiff. The precaution of giving this test to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of its disregard by the standards of the ophthalmology profession, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma.
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> We therefore hold, as a matter of law, that the reasonable standard that should have been followed under the undisputed facts of this case was the timely giving of this simple, harmless pressure test to this plaintiff and that, in failing to do so, the defendants were negligent, which proximately resulted in the blindness sustained by the plaintiff for which the defendants are liable.

*Helling v. Carey,* 519 P.2d 981, 983 (Wash. 1974).

Note the benefit-risk test. On one hand, the pressure test is simple, harmless, painless, and inexpensive. On the other hand, undiagnosed glaucoma leads to irreversible blindness.

The Washington Supreme Court — as a matter of law — determined the duty in this case. Breach of the duty and causation were both obvious. On remand to the trial court, the only issue was to determine how much money the defendant would pay to Ms. Helling.

My concern here is that the ophthalmologist behaved reasonably, according to the medical and legal standards of 1968, in not giving a routine intraocular pressure test to every patient on every visit. In March 1974, the Washington Supreme Court changed the legal standard of duty in this case and applied the new duty retroactively to conduct in 1968. I have no problem with the change of the legal standard, but I think the change should apply prospectively (i.e., apply to conduct *after* the Court's opinion in March 1974). On the other hand, such a prospective change would deny damages to the plaintiff who successfully argued for a change in the duty, which removes the financial incentive for an attorney on contingency fee to argue for a change in duty.

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[9] Note by Standler: The court also seems bothered by the conventional discrimination against patients under the age of 40 y, even though statistics supported the conventional practice.

A concurring opinion notes that the majority is effectively imposing strict liability on the defendants. *Helling v. Carey,* 519 P.2d 981, 984-985 (Wash. 1974) (Utter, J., concurring). Neither the majority nor the concurring opinion in *Helling* recognizes the retroactive or hindsight problem.

Twelve years after *Helling,* the Washington Supreme Court tersely summarized the reasoning in *Helling:*

> Where the burden of prevention is small compared to the probability and magnitude of the foreseeable harm, the failure to provide the preventative measures cannot be excused. See *The T.J. Hooper,* 60 F.2d 737, 740 (2dCir. 1932) (Hand, J.).

*Dickinson v. Edwards,* 716 P.2d 814, 824 (Wash. 1986). There are problems with this reasoning too, as explained below, beginning at page 28.

About a year after the Washington Supreme Court's decision in *Helling*, the Washington state legislature passed a statute that, in medical malpractice cases, returned Washington to a standard of care determined by testimony of physicians. *Meeks v. Marx,* 550 P.2d 1158, 1162, n.3 (Wash.App. 1976); *Harbeson v. Parke-Davis, Inc.,* 656 P.2d 483, 489 (Wash. 1983) ("In May 1975, the Legislature enacted a statute designed to reestablish pre-*Helling* standards of negligence. Law of 1975, 1st Ex.Sess., ch. 35, codified as RCW 4.24.290."). **But see** *Harris v. Groth,* 663 P.2d 113, 116 (Wash. 1983) ("The language of these statutes is somewhat ambiguous. The prevailing view among the commentators has been that they were intended to overrule our decision in *Helling* and reestablish in toto the traditional standard of care. See, e.g., Physicians and Surgeons: Standard of Care, 15 Gonz.L.Rev. 931, 939-40 (1980); 51 Wash.L.Rev. 167, 168 (1975). In *Gates v. Jensen,* [...] 595 P.2d 919 [, 924] (Wash. 1979), however, we rejected the contention that RCW 4.24.290 had overruled *Helling.*").

California has rejected *Helling:*

- *Barton v. Owen,* 139 Cal.Rptr. 494, 498-502 (Cal.App. 1977) ("We thus disapprove of the Washington case of *Helling v. Carey* (1974) 83 Wash.2d 514, 519 P.2d 981.");
- *Truman v. Thomas,* 155 Cal.Rptr. 752, 755-756 (Cal.App. 1979) ("Moreover, the *Helling* case has been soundly criticized .... **....** The *Helling* holding was rejected by the only California case to consider it, *Barton v. Owen* .... We agree with the analysis of *Barton.*"), *rev'd on other grounds,* 165 Cal.Rptr. 308, 611 P.2d 902 (Cal. 1980);
- *Osborn v. Irwin Memorial Blood Bank,* 7 Cal.Rptr.2d 101, 126 (Cal.App. 1992) ("Most of the commentary on this case [*Helling*] has been unfavorable.").

Predictably, the medical community has been critical of *Helling.* In Dec 1974, nine months after the Washington Supreme Court decision in *Helling,* the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION reported on the *Helling* opinion and worried that, in the future, physicians might be strictly liable (i.e., liable without proof of negligence).[10] The end result of *Helling* is that measurement of intraocular pressure is "a routine part of every eye examination", regardless of age.[11]

Several surveys of optometrists and ophthalmologists have shown an increasing frequency of measurement of intraocular pressure (tonometry) since 1973, which suggests that the *Helling* decision in 1974 had little effect on clinical practice. There are several possible reasons for the increasing routine measurement of intraocular pressure:

1. Failure to diagnose glaucoma is one of the most common medical malpractice complaints against optometrists and ophthalmologists, so defensive medicine — not a response to the new duty of care in *Helling* — may have motivated routine measurement of intraocular pressure in all patients.

2. In June 1972, American Optical introduced a machine that measures intraocular pressure by flattening an area of the cornea with a puff of air.[12] This method requires no topical anesthetic and can be used by optometrists in states that prevent optometrists from using or prescribing drugs.

3. Beginning in the early 1970s, optometrists began to seek changes in state optometric practice laws to allow the use of ophthalmic diagnostic drugs, such as topical anesthetic required in contact tonometry.[13]

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[10] Veronica M. O'Hern, "Medicolegal Rounds," 230 JAMA 1577 (16 Dec 1974).

[11] *Ibid.* at 1578.

[12] Joseph P. Ruskiewicz, et al., "Cost and Quality Implications of Changes in Tonometry Use by Optometrists," 54 Journal of the American Optometric Association 339, 341-342 (April 1983).

[13] *Ibid.* at 341.

## Hindsight is not appropriate in duty

In theory, the duty is supposed to be independent of the injury. But human nature invites the judge to consider the severe injury to plaintiff, and be motivated by that severe injury to find a duty in hindsight that was breached by defendant, so plaintiff can recover damages. This hindsight is unfair to defendant. My search of tort cases in June 2011 shows that this concern about after-the-fact determination of duty is rarely mentioned by judges.

- *Shore v. Town of Stonington,* 444 A.2d 1379, 1384 (Conn. 1982) ("We do not think that the public interest is served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman's discretionary professional duty.");

- *Erickson v. Curtis Investment Co.,* 447 N.W.2d 165, 169 (Minn. 1989) ("Though resolution of most tort actions involves some hindsight (a fact which the law accepts but prefers not to discuss), the hindsight problem in duty to protect cases is exacerbated.");

- *Vassallo v. Baxter Healthcare Corp.,* 696 N.E.2d 909, 922 (Mass. 1998) (rejecting hindsight analysis of duty to warn in products liability cases);

- *Canesi ex rel. Canesi v. Wilson,* 730 A.2d 805, 827 (N.J. 1999) (" 'Foresight, not hindsight, is the standard by which one's duty of care is to be judged.' 57A AM.JUR.2d Negligence § 136 (1989); ....").

In the year 2000, a U.S. District Court quoted the Restatement Second of Torts, § 4, comment *c*: "In addition, the actor's duty in tort is often to be determined ex post facto by the jury in their determination as to whether the actor has or has not used reasonable care." and then commented:

> Implicit in these principles is that to achieve the protective ends of the more expansive scope of the duty of care, especially in unique situations, the reach of potential liability for breach of that duty may encompass acts or omissions that cannot always be either specifically predetermined nor pre-excluded. Given special factors, obligations that by the parties' manifest intent may be excluded by commitments of contracts or fiduciary duties may be deemed to be encompassed by breach of the duty to exercise reasonable care in light of the circumstances. The pertinent legal obligation then extends not to precisely defined and catalogued, pre-existing tasks, but to the exercise of due care demanded by given conditions in order to avoid injury to others, in other words, what is actually done or not done by a defendant that was either called for or not under all the circumstances.

*de Kwiatkowski v. Bear Stearns & Co., Inc.,* 126 F.Supp.2d 672, 694-695 and n.14 (S.D.N.Y. 2000), *rev'd,* 306 F.3d 1293 (2dCir. 2002) (Appellate opinion mentions neither "ex post facto" nor "predetermined", so the trial court's opinion was probably reversed on other grounds.). The only other reported case that I found in June 2011 that mentions this concern is *Prudential Ins. Co. of America v. L.A. Mart,* 68 F.3d 370, 375 (9thCir. 1995) (Quoting RESTATEMENT and observing: "Not surprisingly, Prudential is unable to cite any tort case dealing with judicial enforcement of

precautionary measures *prior* to the occurrence of an injury and an attendant complaint asserting damages.").

## Retrospective application of holding in torts

In tort cases, the decision of a court generally applies to the case being litigated. There are a very few exceptions, where the court declares that its decision will apply only to future cases (i.e., apply only prospectively). However, in contract cases, the parties may have relied on the law at the time the contract was signed, and changes in law during the duration of the contract may be unfair to one party. One could make a similar argument that creation of new liability in tort should only have prospective effect, but the actual law in many states disagrees with this argument.

U.S. Supreme Court

There are a few U.S. Supreme Court decisions in this area of torts:

- *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364-366 (1932) (holding that state common law can be applied retroactively);
- *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-107 (1971) (three factors to consider in prospectively applying a holding);
- *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529 (1991);
- *Harper v. Virginia Dept. of Taxation,* 509 U.S. 86 (1993) (overruling *Chevron*).

In December 1971, the U.S. Supreme Court in *Chevron Oil* considered a tort case under a federal statute. Plaintiff was injured in Dec 1965, but did not file suit until Jan 1968. During the early litigation, the courts below used the statute of limitations in federal admiralty law, but that rule was overturned by *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969). According to *Rodrigue,* the court should use the statute of limitations of the nearest state, which in this case was Louisiana, which has a one-year statute of limitations. So, should the courts use the pre-*Rodrigue* law, which would allow Plaintiff's claims? Or should Rodrigue be given retroactive effect, so that Louisiana's one-year statute of limitation would bar Plaintiff's claims? The important part of *Chevron Oil* says:

> Although we hold that Louisiana's one-year statute of limitations must be applied under the Lands Act as interpreted in *Rodrigue,* we do not blind ourselves to the fact that this is, in relevant respect, a pre-*Rodrigue* case. The respondent's injury occurred more than three years before the announcement of our decision in *Rodrigue.* He instituted the present lawsuit more than one year before *Rodrigue.* Yet, if the Louisiana statute of limitations controls in this case, his action was time barred more than two years before *Rodrigue.* In these circumstances, we must consider the respondent's argument that the state statute of limitations should be given nonretroactive application under *Rodrigue.*
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> In recent years, the nonretroactive application of judicial decisions has been most conspicuously considered in the area of the criminal process. [citing four cases] But the problem is by no means limited to that area. The earliest instances of nonretroactivity in the decisions of this Court — more than a century ago — came in cases of nonconstitutional, noncriminal state law. E.g., Gelpcke v. City of Dubuque, 1 Wall. 175, 17 L.Ed. 520;

Havemeyer v. Iowa County, 3 Wall. 294, 18 L.Ed. 38; Railroad Co. v. McClure, 10 Wall. 511, 19 L.Ed. 997.**FN9** It was in a noncriminal case that we first held that a state court may apply its decisions prospectively. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360. And, in the last few decades, we have recognized the doctrine of nonretractivity outside the criminal area many times, in both constitutional and nonconstitutional cases. Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647; Allen v. State Board of Elections, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1; Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231; Simpson v. Union Oil Co., 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98; England v. State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440; Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329.

FN9. These cases were decided in the era before *Erie R. Co. v. Tompkins,* supra, n. 5. The first case involving non-retroactive application of state law concerned interpretation of the Mississippi Constitution. *Rowan v. Runnels,* 5 How. 134, 12 L.Ed. 85.

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. **First,**[14] the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* supra, 392 U.S., at 496, 88 S.Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen v. State Board of Elections,* supra, 393 U.S., at 572, 89 S.Ct., at 835. **Second,** it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter v. Walker,* supra, 381 U.S., at 629, 85 S.Ct., at 1738. **Finally,** we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.' *Cipriano v. City of Houma,* supra, 395 U.S., at 706, 89 S.Ct., at 1900.

Upon consideration of each of these factors, we conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case. Rodrigue was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act. See, e.g., Pure Oil Co. v. Snipes, 293 F.2d 60; Movible Offshore Co. v. Ousley, 346 F.2d 870; Loffland Bros. Co. v. Roberts, 386 F.2d 540. When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most the could do was to rely on the law as it then was. 'We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights.' *Griffin v. Illinois,* 351 U.S. 12, 26, 76 S.Ct. 585, 594, 100 L.Ed. 891 (Frankfurter, J., concurring in judgment).

To told that the respondent's lawsuit is retroactively time barred would be anomalous indeed. A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies.

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[14] Boldface added by Standler three times in this paragraph, to highlight the three factors.

> *Rodrigue v. Aetna Casualty & Surety Co.,* supra, 395 U.S., at 361, 365, 89 S.Ct., at 1840, 1842. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress.

*Chevron Oil Co. v. Huson,* 404 U.S. 97, 105-108 (1971).

Twenty-two years after *Chevron Oil,* the U.S. Supreme Court in *Harper* changed the rule in *Chevron Oil.* The important part of *Harper* says:

> *Griffith* [*v. Kentucky,* 479 U.S. 314 (1987)] and *American Trucking* [v. *Smith,* 496 U.S. 167 (1990) (plurality opinion)] thus left unresolved the precise extent to which the presumptively retroactive effect of this Court's decisions may be altered in civil cases. But we have since adopted a rule requiring the retroactive application of a civil decision such as *Davis.* Although *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), did not produce a unified opinion for the Court, a majority of Justices agreed that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law. In announcing the judgment of the Court, Justice SOUTER laid down a rule for determining the retroactive effect of a civil decision: After the case announcing any rule of federal law has "appl [ied] that rule with respect to the litigants" before the court, no court may "refuse to apply [that] rule ... retroactively." Id., at 540, 111 S.Ct., at 2446 (opinion of SOUTER, J., joined by STEVENS, J.). Justice SOUTER's view of retroactivity superseded "any claim based on a *Chevron Oil* analysis." Ibid. Justice WHITE likewise concluded that a decision "extending the benefit of the judgment" to the winning party "is to be applied to other litigants whose cases were not final at the time of the [first] decision." Id., at 544, 111 S.Ct., at 2448 (opinion concurring in judgment). Three other Justices agreed that "our judicial responsibility ... requir[es] retroactive application of each ... rule we announce." Id., at 548, 111 S.Ct., at 2450 (BLACKMUN, J., joined by Marshall and SCALIA, JJ., concurring in judgment). See also id., at 548–549, 111 S.Ct., at 2450–2451 (SCALIA, J., joined by Marshall and BLACKMUN, JJ., concurring in judgment).
>
> *Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam:* **When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.**[15] This rule extends *Griffith's* ban against "selective application of new rules." 479 U.S., at 323, 107 S.Ct., at 713. Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, id., at 322, 107 S.Ct., at 712, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam,* supra, 501 U.S., at 543, 111 S.Ct., at 2447 (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants

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[15] Boldface added by Standler.

> differently." *American Trucking,* supra, 496 U.S., at 214, 110 S.Ct., at 2350 (STEVENS, J., dissenting).
>
> The Supreme Court of Virginia "appl[ied] the three-pronged *Chevron Oil* test in deciding the retroactivity issue" presented by this litigation. 242 Va., at 326, 410 S.E.2d, at 631. When this Court does not "reserve the question whether its holding should be applied to the parties before it," however, an opinion announcing a rule of federal law "is properly understood to have followed the normal rule of retroactive application" and must be "read to hold ... that its rule should apply retroactively to the litigants then before the Court." *Beam,* 501 U.S., at 539, 111 S.Ct., at 2445 (opinion of SOUTER, J.). Accord, id., at 544–545, 111 S.Ct., at 2448 (WHITE, J., concurring in judgment); id., at 550, 111 S.Ct., at 2451 (O'CONNOR, J., dissenting). Furthermore, the legal imperative "to apply a rule of federal law retroactively after the case announcing the rule has already done so" must "prevai[l] over any claim based on a *Chevron Oil* analysis." Id., at 540, 111 S.Ct., at 2446 (opinion of SOUTER, J.).

*Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 96-98 (1993).

In summary,

> In accord with *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), we hold that this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.

*Harper v. Virginia Dept. of Taxation,* 509 U.S. 86, 90 (1993).

*Harper's* inexorable command that "rules of federal law" decided by the U.S. Supreme Court always have retroactive effect seems to say that the Court is saying what the law truly always was.[16] This fictional rewrite of legal history offends me. Law is the creation of men, men can change the law whenever they wish, and those men who changed the law should not pretend that they have not changed the law.

Note that *Chevron Oil* was overruled by the U.S. Supreme Court in *Harper,* however this overruling does not affect use of the *Chevron's* three factors by state courts to decide matters of state common law.

In a case overruling prior interpretation of civil damages for violations of the federal wiretap statute, the Eleventh Circuit had a long discussion of prospective vs. retrospective application of the new holding, then decided to apply the new holding retroactively. *Glazner v. Glazner,* 347 F.3d 1212, 1216-1221 (11thCir. 2003).

In addition to the obvious due process argument about lack of notice, there can be an "equal protection of laws" concern under the Fourteenth Amendment, because similarly situated defendants are treated differently by a change in law that applies to some defendants but not to

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[16] *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 365 (1932). ("On the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. [citing three cases]").

other defendants. *Griffith v. Kentucky,* 479 U.S. 314, 323 (1987); *Crowe v. Bolduc,* 365 F.3d 86, 93 (1stCir. 2004) ("A court in a civil case may apply a decision purely prospectively, binding neither the parties before it nor similarly situated parties in other pending cases, depending on the answers to three questions. [citing *Chevron Oil*]").

**state courts**

In July 2011, I searched Westlaw for judicial opinions from the highest court of each of the fifty states for cases from Jan 2004 to June 2011 that satisfy the queries:

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(retro! prospectiv!) /s hold! /s (tort duty)

(retro! prospectiv!) /s (hold! appl!) /s (tort duty liability
rule) & "404 u.s. 97"
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In the second query, the `"404 U.S. 97"` finds citations to *Chevron Oil v. Huston,* the leading U.S. Supreme Court case on this topic. When I found an interesting case, I looked at some of the older cases cited in it. This essay quotes a few of the major cases on this topic in each of the states that have addressed this topic. I emphasize that the cases quoted below are *not* a complete list of all relevant cases in the USA, but are just a sample of relevant cases. Courts in most states seem to have ignored this topic.

California

In May 1989, the California Supreme Court was requested to limit a holding in a tort case only to prospective application. The court declined, but wrote an excellent discussion of the law:

> The general rule that judicial decisions are given retroactive effect is basic in our legal tradition. We recently reiterated in *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207, 246 Cal.Rptr. 629, 753 P.2d 585, Justice (now Chief Justice) Rehnquist's observation that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." (*United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235.) This rule of retroactivity, however, has not been an absolute one. In fact, at times, language regarding the potential for exceptions to the rule has threatened — at least semantically, although not necessarily in application — to overwhelm the rule itself. This case is an appropriate vehicle for us [footnote omitted] to reexamine and reaffirm the basic principles regarding retroactivity in the tort context. As we shall explain, virtually all of this court's previous ground-breaking tort decisions have been applied retroactively, even when such decisions represented a clear change in the law. Exceptions have been rare and we will find no reason to add to that short list in this case.
>
> How did the general rule of retroactivity arise? One early rationale for retroactive application of decisions stemmed from the idea adhered to by Blackstone that "judges do not 'create,' but instead 'find' the law. A decision interpreting the law, therefore, does no more than declare what the law had always been. An overruling decision, under this theory, also does no more than declare the law — albeit in a more enlightened manner. From this declaratory nature of a judicial decision, the following rule emerges: An overruled decision is only a failure at true discovery and was consequently never the law; while the overruling one

was not 'new' law but an application of what is, and had been the 'true' law. (*Linkletter v. Walker* (1965) 381 U.S. 618, 623 [85 S.Ct. 1731, 1734, 14 L.Ed.2d 601].)" (*Casas v. Thompson* (1986) 42 Cal.3d 131, 140, fn. 3, 228 Cal.Rptr. 33, 720 P.2d 921.)

This "myth" of discovered law, as former Chief Justice Roger Traynor characterized it (*Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility* (1977) 28 HASTINGS L.J. 533, 535), has long been criticized as unrealistic and out of touch with practical judicial realities. (See, e.g., Levy, Realist Jurisprudence and Prospective Overruling (1960) 109 U.PA.L.REV. 1, 4–5 ("No sophisticated legal scholar today would fail to agree that 'the fiction of mere law-finding by courts is being relegated to the shelf of forgotten things by both judges and jurists,' and that the 'creative nature of much judicial activity has become a commonplace' "); *Casas v. Thompson,* supra, 42 Cal.3d at p. 140, fn. 3, 228 Cal.Rptr. 33, 720 P.2d 921.) But, although the underlying "Blackstonian" rationale has fallen into disrepute, the rule of retroactivity nonetheless has retained its vitality.

....

In his analysis, Justice Traynor suggested that a rigid rule of retroactive application might delay formal overruling of "bad law." A judge may feel obligated to weigh against overruling a bad rule "the traditional antipathy toward retroactive law that springs from its recurring association with injustice. He must reckon with the possibility that a retroactive overruling could entail substantial hardship. He may nevertheless be impelled to make such an overruling if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent." (28 HASTINGS L.J. at p. 540.) This weighing process may on occasion prevent an overruling of unsound precedent for reasons unrelated to the law itself. (*Id.,* at p. 542.) In order to accommodate this concern, Justice Traynor advocated a technique of "prospective overruling" to be used "[o]nly occasionally," and "[i]n the hands of skilled judicial craftsmen, acting under well-reasoned guidelines." (*Ibid.*)

Reviewing instances of prospective application of decisions, Justice Traynor observed that in most of those cases "prospective overruling was essential to preclude the injustice that retroactive application of the new rule would have entailed." (28 HASTINGS L.J. at p. 543) Most relevant to our analysis today, in discussing tort cases in particular, he asserted "it is my opinion that the hardship on parties who would be saddled with an unjust precedent if the overruling were not made retroactive, ordinarily outweighs any hardship on those who acted under the old rule or any benefits that might be derived from limiting the new rule to prospective operation. Neither the tortfeasor nor the victim normally takes account of expanding or contracting rules of tort liability except tangentially in the course of routinely insuring against such liability." (*Id.,* at pp. 545–546.) These fundamental concepts hold as true today as they have traditionally.

With few exceptions and even after expressly considering suggestions to the contrary, California courts have consistently applied tort decisions retroactively even when those decisions declared new causes of action or expanded the scope of existing torts in ways defendants could not have anticipated prior to our decision. (See, e.g., *Peterson v. Superior Court,* (1982) 31 Cal.3d 147, 181 Cal.Rptr. 784, 642 P.2d 1305 [applying retroactively *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 157 Cal.Rptr. 693, 598 P.2d 854, which overruled prior decisions precluding recovery of punitive damages from an intoxicated driver]; *Mark v. Pacific Gas & Electric Co.* (1972) 7 Cal.3d 170, 177–178, 101 Cal.Rptr. 908, 496 P.2d 1276 [applying retroactively *Rowland v. Christian* (1968) 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, rejecting prior common law rules limiting duty of a landowner to a trespasser or invitee]; *Corning Hospital Dist. v. Superior Court* (1962) 57 Cal.2d 488, 491,

494, 20 Cal.Rptr. 621, 370 P.2d 325 [noting court, in denying petition for rehearing, rejected suggestion that *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457, which abrogated the previously recognized common law governmental immunity doctrine, be applied prospectively only]; *Cummings v. Morez* (1974) 42 Cal.App.3d 66, 71–74, 116 Cal.Rptr. 586 [applying retroactively *Brown v. Merlo* (1973) 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212, which invalidated the "guest statute" limiting recovery by automobile guests]; *Archibald v. Braverman* (1969) 275 Cal.App.2d 253, 79 Cal.Rptr. 723 [applying retroactively *Dillon v. Legg* (1968) 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912, which rejected the "zone of danger" limitation on bystander recovery for negligently inflicted emotional distress].)

*Newman v. Emerson Radio Corp.,* 772 P.2d 1059, 1062-64 (Cal. 1989). It is simply astounding that, after the myth that judges find law was demolished, the rule of retroactive application of new law continues.

In April 1991, the California Supreme Court wrote:

> Unlike statutory enactments, judicial decisions, particularly those in tort cases, are generally applied retroactively. (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978, 981–982, 258 Cal.Rptr. 592, 772 P.2d 1059.) But considerations of fairness and public policy may require that a decision be given only prospective application. [citing four cases] Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule. [citing three cases]
>
> Reliance by litigants on the former rule and the unforeseeability of change support prospective application of the rule adopted here.

*Woods v. Young,* 807 P.2d 455, 621-622 (Cal. 1991).

## Florida

In a criminal case, the Florida Supreme Court held that judicial decisions generally have retroactive effect. *Smith v. Florida,* 598 So.2d 1063, 1066 (Fla. 1992) ("Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final."). *Smith* was limited by *Wuornos v. Florida,* 644 So.2d 1000, 1007, n. 4 (Fla. 1994) (reading *Smith* "to mean that new points of law established by this Court shall be deemed retrospective with respect to all non-final cases unless this Court says otherwise"). *Windom v. Florida,* 886 So.2d 915, 940 (Fla. 2004) and *Johnson v. Florida,* 904 So.2d 400, 407 (Fla. 2005).

Massachusetts

In June 1982, the Massachusetts Supreme Court wrote:

> Since the general rule is in favor of retroactive application of a change in decisional law, *Tucker v. Badoian,* 376 Mass. 907, 918–919, 384 N.E.2d 1195 (1978) (Kaplan, J., concurring), *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed. 228 (1910) (Holmes, J., dissenting) ("[j]udicial decisions have had retrospective operation for near a thousand years"), we would have to be satisfied that special circumstances exist to limit our answer here to only prospective application. No such special circumstances have been demonstrated to exist in this case.
>
> Primarily because of concern for litigants and others who have relied on existing precedents, judicial changes in Massachusetts contract and property law have been given only prospective effect.[footnote 11: "We are not here concerned with the retroactive application of overruling decisions in the field of criminal law."] *Johnson Controls, Inc. v. Bowes,* 381 Mass. 278, Mass.Adv.Sh. (1980) 1831, 409 N.E.2d 185 (insurance contracts); *Rosenberg v. Lipnick,* 377 Mass. 666, 389 N.E.2d 385 (1979) (antenuptial contracts); *Whitinsville Plaza, Inc. v. Kotseas,* 378 Mass. 85, 390 N.E.2d 243 (1979) (covenants not to compete in deeds and leases). Cf. *Tucker v. Badoian,* supra, 376 Mass. at 918–919, 384 N.E.2d 1195 (Kaplan, J., concurring) ("common enemy" rule of property law).[footnote omitted]
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> In the area of tort law, however, reliance plays a much smaller part. [FN13] See *Dalton v. St. Luke's Catholic Church,* 27 N.J. 22, 26, 141 A.2d 273 (1958). Tort law, especially that dealing with negligence, does not concern itself with business decisions in the same way as does property and contract law: it would be unreasonable to assert that potential tortfeasors often reflect upon possible tort liability before embarking on a negligent course of conduct, or that they frequently are deterred from negligent conduct by the rules of tort law. See *Fitzgerald v. Meissner & Hicks, Inc.,* 38 Wis.2d 571, 578, 157 N.W.2d 595 (1968); *Bielski v. Schulze,* 16 Wis.2d 1, 18, 114 N.W.2d 105 (1962); Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 YALE L.J. 907, 945–946 (1962).
>
> FN13. Indeed, some commentators argue that considerations of reliance should play no part, and that all judicial decisions affecting tort law should be given retroactive effect. W. Seavey, COGITATIONS ON TORTS 69 (1954). Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 HASTINGS L.J. 533, 545–546 (1977). Former Chief Justice Traynor of the California Supreme Court, believes that "most judges would agree with [Justice Benjamin] Cardozo: 'My impression is that the instances of honest reliance and genuine disappointment are rarer than they are commonly supposed to be by those who exalt the virtues of stability and certainty.' Address by Justice Cardozo, New York State Bar Association, Jan. 22, 1932, in 55 N.Y.ST.B. ASS'N REP. 295 (1932)." Id. at 542 n.17.
>
> The reliance interest that features most prominently in personal injury cases involves insurance against tort liability. R. Keeton, VENTURING TO DO JUSTICE 42 (1969). See *Molitor v. Kaneland Community Unit Dist. No. 302,* 18 Ill.2d 11, 29, 163 N.E.2d 89 (1959), *cert. denied,* 362 U.S. 968, 80 S.Ct. 955, 4 L.Ed.2d 900 (1960); *Parker v. Port Huron Hosp.,* 361 Mich. 1, 28, 105 N.W.2d 1 (1960); *Balts v. Balts,* 273 Minn. 419, 431, 142 N.W.2d 66 (1966); *Fitzgerald v. Meissner & Hicks, Inc.,* supra; Traynor, Quo Vadis, Prospective Overruling: A question of Judicial Responsibility, 28 HASTINGS L.J. 533, 545–546 (1977) (hereinafter Traynor) ("[n]either the tortfeasor nor the victim normally takes account of

expanding or contracting rules of tort liability except tangentially in the course of routinely insuring against such liability"). The defendants in this case base their arguments against retroactive application of the rule we enunciate above largely on the ground that they relied on Massachusetts law, as it existed at the time the acts complained of by the plaintiffs occurred, in determining the appropriate amount of tort liability insurance to obtain. They assert that, regardless whether their conduct was negligent, it would be inequitable to subject them to possible tort liability in excess of the amount of liability insurance they choose to obtain.

The defendants point out, correctly, that the court has taken into account problems involving insurance coverage in determining whether decisions effecting changes in tort law should be applied only prospectively. Our review of these decisions, however, reveals that only where the discarded rule afforded complete immunity from suit to a large class of defendants has the court indicated that prospective application of a new rule would be warranted. See *Whitney v. Worcester,* 373 Mass. 208, 366 N.E.2d 1210 (1977) (municipal immunity); *Ricker v. Northeastern Univ.,* 361 Mass. 169, 279 N.E.2d 671 (1972) (charitable immunity).[footnote omitted] In these cases, the court assumed that the institutions involved reasonably might have relied on their immunity in making a choice not to obtain liability insurance. Other courts have made the same assumption. See cases collected in Note, The Retroactivity of Minnesota Supreme Court Personal Injury Decisions, 6 WM. MITCHELL L.REV. 179, 186–187 n.34 (1980); Traynor, supra at 546; R. Keeton, VENTURING TO DO JUSTICE, supra.

*Payton v. Abbott Labs,* 437 N.E.2d 171, 185-186 (Mass. 1982).

In July 2010, the Massachusetts Supreme Court explained why common-law decisions in torts were applied retroactively:

The defendants have urged that, if we were to abolish the rule of natural accumulation [of snow or ice], we should apply our new rule only prospectively. We conclude that the circumstances do not warrant an exception from the normal rule of retroactivity. "In general, changes in the common law brought about by judicial decisions are given retroactive effect." *Halley v. Birbiglia,* 390 Mass. 540, 544, 458 N.E.2d 710 (1983). See *Tamerlane Corp. v. Warwick Ins. Co.,* 412 Mass. 486, 489, 590 N.E.2d 191 (1992); *Schrottman v. Barnicle,* 386 Mass. 627, 631, 437 N.E.2d 205 (1982). See also *Tucker v. Badoian,* 376 Mass. 907, 918–919, 384 N.E.2d 1195 (1978) (Kaplan, J., concurring). "[T]he class of decisions given only prospective application is usually limited to contract and property law cases, in which reliance upon existing judicial precedent often influences individual action." *Halley v. Birbiglia,* supra at 545, 458 N.E.2d 710, and cases cited. Reliance plays a much smaller part under tort law than under contract and property law, because it "would be unreasonable to assert that potential tortfeasors often reflect upon possible tort liability before embarking on a negligent course of conduct." *Id.,* quoting *Payton v. Abbott Labs,* 386 Mass. 540, 565–566, 437 N.E.2d 171 (1982). Therefore, changes to the common law that have the potential to expand tort liability should be limited to prospective application only where it is likely that decisions involving insurance coverage have been made in substantial reliance on the previously existing common law. See *Payton v. Abbott Labs,* supra at 566–567, 437 N.E.2d 171.[footnote omitted] Consistent with this practice, we did not limit to prospective application those decisions where we abolished the common-law distinctions in premises liability among licensees, invitees, tenants, or guests of tenants. See *Young v. Garwacki,* 380 Mass. 162, 172, 402 N.E.2d 1045 (1980); *King v. G & M Realty Corp.,* 373 Mass. 658, 663 n. 9, 370 N.E.2d 413 (1977); *Bouchard v. DeGagne,* 368 Mass. 45, 49, 329 N.E.2d 114 (1975); *Jordan v. Goddard,* 14 Mass.App.Ct. 723, 730, 442 N.E.2d 1162 (1982). See also *Soule v. Massachusetts Elec. Co.,* 378 Mass. 177, 184–185, 390 N.E.2d 716 (1979)

> (applying retroactively new common-law rule imposing on property owners duty of reasonable care to child trespassers). We see no reason to limit our holding today to prospective application, where it is based on similar considerations. [footnote omitted]

*Papadopoulos v. Target Corp.,* 930 N.E.2d 142, 155 (Mass. 2010) (overruling three cases involving premises liability slip-and-fall claims).

Ohio

In October 2008, the Ohio Supreme Court wrote:

> Accordingly, the general rule is that an Ohio court decision applies retrospectively unless a party has contract rights or vested rights under the prior decision. *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 57 O.O. 411, 129 N.E.2d 467, syllabus. However, an Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions; (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision; and (3) whether retroactive application of the decision causes an inequitable result. *Chevron Oil,* 404 U.S. at 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296.

*DiCenzo v. A-Best Prods. Co., Inc.,* 897 N.E.2d 132, 139-140, 2008-Ohio-5327 at ¶25 (Ohio 2008) (judicial decision in 1977 imposing strict liability on nonmanufacturing sellers of defective products applies only prospectively).

Pennsylvania

In August 2004, the Pennsylvania Supreme Court wrote:

> Our general principle is that we apply decisions involving changes of law in civil cases retroactively to cases pending on appeal. We have articulated that:
>
> > [t]he United States Constitution and the Pennsylvania Constitution neither mandate nor preclude a retroactive application of a new decision. *Blackwell v. Commonwealth, State Ethics Commission,* 527 Pa. 172, 589 A.2d 1094 (1991). **Normally, we apply a new decision to cases pending on appeal at the time of the decision.** *Id.* at 182, 589 A.2d at 1099 ("The general rule followed in Pennsylvania is that we apply the law in effect at the time of the appellate decision"); *McHugh v. Litvin, Blumberg, Matusow, & Young,* 525 Pa. 1, 8, 574 A.2d 1040, 1043 (1990) (**"[A]t common law an overruling decision was normally held to be retroactive")** ...; *August v. Stasak,* 492 Pa. 550, 554, 424 A.2d 1328, 1330 (1981) (**"At common law, an overruling decision is normally retroactive"**). However, a sweeping rule of retroactive application is not justified. *Blackwell*; *August.* Retroactive application is a matter of judicial discretion and must be exercised on a case by case basis. *August* ....
>
> *Cleveland v. Johns-Manville Corp.,* 547 Pa. 402, 690 A.2d 1146, 1151-52 (1997) (emphasis added [by Pennsylvania Supreme Court]).
>
> This practice of retroactive application arises out of precedent established by the United States Supreme Court. The role of retroactivity in civil cases was originally set forth by the Supreme Court in *Chevron Oil v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), where the Court outlined three factors to consider when deciding whether to apply a new decision retroactively. First, the decision to be applied non-retroactively must establish a new principle of law; second, the court must weigh the merits and demerits in each case by looking

> to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation; and third, the court must weigh the inequity imposed by retroactive operation. *Id.* at 106-07, 92 S.Ct. 349. However, with the Court's decision in *Harper v. Virginia Department of Taxation,* 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993), the *Chevron Oil* three-step test lost its hold as the dominant approach for retroactive application of new decisions in current civil cases. In *Harper,* the Court held that "this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Id.* at 90, 113 S.Ct. 2510. Further, the Court observed that **"[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions ... for near a thousand years.' "** *Id.* at 94, 113 S.Ct. 2510 (quoting *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372, 30 S.Ct. 140, 54 L.Ed. 228 (1910) (Holmes, J., dissenting) (emphasis added [by Pennsylvania Supreme Court])). While Pennsylvania has traditionally used the analysis set forth in *Chevron Oil,* [footnote citing three cases] the decision of the Supreme Court in *Harper* further strengthens the general principle that changes in law are to be applied retroactively to pending cases.

*Christy v. Cranberry Volunteer Ambulance Corps, Inc.,* 856 A.2d 43, 51-52 (Pa. 2004).

In May 2011, the Pennsylvania Supreme Court wrote:

> "While retroactive application of a new rule of law is a matter of judicial discretion usually exercised on a case-by-case basis, the general rule is that a decision announcing a new rule of law is applied retroactively so that a party whose case is pending on direct appeal is entitled to the benefit of changes in the law." *Kituskie v. Corbman,* 552 Pa. 275, 714 A.2d 1027, 1030 n. 5 (1998). See also *Leland v. J.T. Baker Chemical Co.,* 282 Pa.Super. 573, 423 A.2d 393, 397 n. 7 (1980) (citing Note, The Retroactivity of Minnesota Supreme Court Personal Injury Decisions, 6 WM. MITCHELL L.REV. 179, 196–97 (1980)) ("by applying the new law to the case before the court, the policy of providing incentive for challenging outmoded legal doctrines is served"). "Courts will deviate from the general rule of retroactivity and apply a new rule of law purely prospectively where: (1) the decision to be applied non-retroactively established a new principle of law; (2) a retrospective application will retard application of the old rule of law; and (3) retroactive application will lead to an inequitable result which imposes an injustice or hardship." *Kituskie,* 714 A.2d at 1030 n. 5.

*Walnut Street Associates, Inc. v. Brokerage Concepts, Inc.,* 20 A.3d 468, 479 (Pa. 2011) (Adoption of rule from Restatement Second of Torts was not "an entirely new rule of law" and was not an improper retroactive application of law.).

*Leland v. J. T. Baker Chemical Co.,* 423 A.2d 393, 397, n. 6 (Pa.Super. 1980) cites *United States v. Schooner Peggy,* 1 Cranch (5 U.S.) 103, 110 (1801), which hints that the law in this area has more than two-hundred years of history. But my quick searches of Westlaw for cases before *Chevron Oil v. Huson* in 1971 have been fruitless. Most of the early cases involved criminal law, *not* tort law.

Texas

In April 1983, the Texas Supreme Court wrote:

> The general rule is that a decision of a supreme court is to be retrospective in its operation. *Storrie v. Cortes,* 90 Tex. 283, 38 S.W. 154 (1896). However, exceptions are recognized when considerations of fairness and policy preclude full retroactivity. Resolution of the issue turns primarily on the extent of public reliance on the former rule and the ability to foresee a coming change in the law. See *In Re S/S Helena,* 529 F.2d 744, 754 (5thCir. 1976); *City of Farmers Branch v. Matushita Electric Corp.,* 537 S.W.2d 452, 454 (Tex. 1976).

*Sanchez v. Schindler,* 651 S.W.2d 249, 254 (Tex. 1983). Cited in *Carrollton-Farmers Branch Independent School Dist. v. Edgewood Independent School Dist.,* 826 S.W.2d 489, 515-516 (Tex. 1992) ("Generally, judicial decisions apply retroactively. *Sanchez v. Schindler,* 651 S.W.2d 249, 254 (Tex. 1983). This rule is not without exceptions, however, and we have occasionally departed from it to apply a decision prospectively. **....**").

In December 1992, the Texas Supreme Court concisely explained its factors for considering whether a judicial decision would apply only prospectively:

> Although our decisions usually apply retrospectively, exceptions are recognized when considerations of fairness and policy dictate prospective effect only. *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 434 (Tex. 1984). In *Carrollton Farmers Branch Ind. School Dist. v. Edgewood Ind. School Dist.,* 826 S.W.2d 489, 518–19 (Tex. 1992), we adopted the three factors from the United States Supreme Court's decision in *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106–07, 92 S.Ct. 349, 355–56, 30 L.Ed.2d 296 (1971) to determine whether to apply a decision prospectively or retroactively. These factors are: (1) whether the decision establishes a new principle of law by either overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether prospective or retroactive application of the particular rule will further or retard its operation through an examination of the history, purpose, and effect of the rule; and (3) whether retroactive application of the rule could produce substantial inequitable results. *Id.*

*Elbaor v. Smith,* 845 S.W.2d 240, 250 (Tex. 1992).

smaller states

Kentucky

In March 2010, the Kentucky Supreme Court wrote:

> While we may occasionally exercise our discretion to make application of a holding prospective only,FN36 we, nonetheless, generally embrace the idea that although legislation may only apply prospectively, judicial decisions generally apply retroactively.FN37 And we have generally made decisions prospective only when overruling old precedent upon which the losing party has relied.FN38 This case does not overrule precedent so we see no reason to limit application prospectively.
>
> FN36. See *Hagan v. Farris,* 807 S.W.2d 488, 490 (Ky. 1991) ("It is within the inherent power of a Court to give a decision prospective or retrospective application. It is further permissible to have a decision apply prospectively in order to avoid injustice or hardship. This is true where property rights are involved and parties have acted in reliance on the law as it existed, and a contrary result would be unconscionable.") (citations omitted).
>
> FN37. See *United States v. Security Industrial Bank,* 459 U.S. 70, 79, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").
>
> FN38. See *Lasher v. Commonwealth ex rel. Matthews,* 418 S.W.2d 416, 419 (Ky. 1967) ("The chief reason for denial of retrospective application has been to preserve property rights acquired in reliance upon the law that is being changed by the new decision. Another reason has been to prevent confusion and expense arising from the unsettling of matters deemed to have been settled under the old law.") (citation omitted).

*Branham v. Stewart,* 307 S.W.3d 94, 102 (Ky. 2010).

New Mexico

In September 1994, the New Mexico Supreme Court listed the factors to consider in retroactively applying new civil law:

> Because of the compelling force of the desirability of treating similarly situated parties alike, we adopt a presumption of retroactivity for a new rule imposed by a judicial decision in a civil case, in lieu of the hard-and-fast rule prescribed for federal cases in *Harper* [v. *Virginia Dept. of Taxation,* 509 U.S. 86, 113 S.Ct. 2510 (U.S. 1993)]. As with the converse presumption of prospectivity in the legislative arena, the retroactivity presumption for judicial decisions can be overcome by an express declaration, in the case announcing the new rule, that the rule is intended to operate with modified or selective (or even, perhaps, pure) prospectivity. See, e.g., *Lopez,* 98 N.M. at 632, 651 P.2d at 1276 (applying decision to parties in case "for having afforded us the opportunity to change an outmoded and unjust rule of law" and to parties in future cases "in which the damages and injuries arise after the date of the mandate in this case"). Absent such a declaration, the presumption may be overcome by a sufficiently weighty combination of one or more of the *Chevron Oil* [*v. Huson,* 404 U.S. 97, 92 S.Ct. 349 (U.S. 1971)] factors, which we espoused in *Whenry* and which, by today's decision, we continue to favor. To determine whether one or more of the *Chevron Oil* factors

dispels the presumption of retroactivity in this case requires an analysis of those factors — to which we now turn.

In *Whenry* [*v. Whenry*], ..., 652 P.2d [1188] at 1190 [(NM 1982)], we quoted the "retroactivity guidelines" articulated in *Chevron Oil,* 404 U.S. at 106-07, 92 S.Ct. at 355, as follows:

> *First,* the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> *Second,* it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."
>
> *Finally,* we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

[Emphasis and spacing added by NM Supreme Court; citations omitted by NM Supreme Court]

*Beavers v. Johnson Controls World Servs.,* 881 P.2d 1376, 1383 (N.M. 1994).
Cited in *Marckstadt v. Lockheed Martin Corp.,* 228 P.3d 462, 473, 2010-NMSC-001 at ¶31 (N.M. 2009) ("Generally speaking, there is a presumption that the holding of a civil case will apply retroactively. [citing *Beavers*]").

In an insurance **contract** case in May 2004, the New Mexico Supreme Court wrote:

> Although we have set forth the policy language requirements for future stacking cases, we must now determine whether the particular contract at issue in this case effectively limits Plaintiff's right to stack to "two, but no more than two" coverage limits. We recognize that our holding described above is a new, and not easily foreshadowed, aspect to our jurisprudence on stacking and that it would be inequitable to apply it against Allstate before it has had an opportunity to alter its policy language; for those reasons, we choose to give it a purely prospective application.

*Montano v. Allstate Indem. Co.,* 92 P.3d 1255, 1261, 2004-NMSC-020 at ¶22 (N.M. 2004) (New Mexico Supreme Court changed law of interpreting insurance contracts.).

South Carolina

In March 1989, the South Carolina Supreme Court answered a certified question from the U.S. District Court in that state: "Is the holding in *Small v. Springs Industries, Inc.,* 292 S.C. 481, 357 S.E.2d 452 (1987), to be given retroactive effect so as to permit a plaintiff whose employment was terminated before June 8, 1987, the date the *Small* opinion was filed, to bring an action for breach of contract based on the provisions of an employee handbook?" The South Carolina Supreme Court summarized the law in that state:

> "[T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." McCaskey v. Shaw, 295 S.C. 372, 368 S.E.2d 672, 673 (Ct.App.1988) citing Bartlett v. Nationwide Mutual Fire Ins. Co., 290 S.C. 154, 157, 348 S.E.2d 530, 532 (Ct.App. 1986). "Prospective application is required when liability is created where formerly none existed." Hupman v. Erskine College, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984).
>
> To limit Small to prospective application, we must agree that it created a new cause of action, with liability where none previously existed. An inspection of previous cases involving prospective application is helpful. In Ludwick v. This Minute of Carolina, 287 S.C. 219, 337 S.E.2d 213 (1985), an employment law case, we first recognized the tort of retaliatory discharge, thereby creating a new cause of action and a new substantive right. Clearly, prospective only application was mandated, and this Court included a statement so directing in the body of the opinion itself. **....**
>
> **....**
>
> The above-cited cases are examples of situations where retroactive relief would have been unfair and inappropriate. Small differs markedly from these situations. In Small we recognized no new right or cause of action; we abolished no previous immunities. Small involved an action for breach of contract. It is elementary that a cause of action for breach of contract is not a new one. Respondent argues that Small "substantially altered the doctrine of employment at-will to create contractual obligations ... where none had existed before." (Resp. brief p. 3). We do not agree that a new contractual obligation has been created. The companies themselves previously created the contractual obligations through promises made in employee handbooks. Small allowed the introduction of these handbooks as evidence of a contract. Employers cannot now be allowed to retract their promises and ignore handbooks they have drafted.

*Toth v. Square D Co.,* 377 S.E.2d 584, 585-586 (S.C. 1989). The court concluded: "By our holding today, we explicitly hold that *Small* is to be retroactively applied to causes of action arising prior to the date it was filed." *Toth* 377 S.E.2d at 587.

In February 2011, the South Carolina Supreme Court summarized the law in that state:

> "The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively." *Toth v. Square D Co.,* 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989). "Prospective application is required when liability is created where formerly none existed." Id.; See also *Marcum v. Bowden,* 372 S.C. 452, 643 S.E.2d 85 (2007) (the holding that an adult social host who knowingly and intentionally

serves an alcoholic beverage to a person between the ages of 18 and 20 created tort liability where formerly there was none, and thus, the Court's decision should be applied prospectively); *Ludwick v. This Minute of Carolina,* 287 S.C. 219, 337 S.E.2d 213 (1985) (employment law case first recognizing the tort of retaliatory discharge, thereby creating a new cause of action and a new substantive right); *McCaskey v. Shaw,* 295 S.C. 372, 368 S.E.2d 672 (Ct.App.1988) (the Court's recognition of a tort for the negligent infliction of emotional distress created a new cause of action and should be applied prospectively).

*Carolina Chloride, Inc. v. South Carolina Dept. of Transp.,* 706 S.E.2d 501, 503 (S.C. 2011).

West Virginia

In July 1979, the West Virginia Supreme Court wrote the factors to consider in applying new common law in civil cases:

> Retroactivity of an overruling decision is designed to provide equality of application to the overruling decision because its new rule has been consciously designed to correct a flawed area of the law. The more egregious the error, the greater the need to extend the benefits of the overruling decision to others occupying the same status. To some extent, although the policy considerations are different, this initial consideration follows *Falconer's* result [footnote 21: "We believe the test set out in *Falconer v. Simmons,* 51 W.Va. 172, 41 S.E. 193 (1902), as to retroactivity, is too narrow."]
>
> Counterbalancing this factor are several considerations. First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, we will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

*Bradley v. Appalachian Power Co.,* 256 S.E.2d 879, 889 (W.Va. 1979).

In July 1996, the West Virginia Supreme Court held that its decision in one torts case would only apply to future defendants:

> As the defendant rightly points out, however, the requirements we put in force today were not part of the West Virginia law at the time these employment decisions were made. **....** Under the circumstances, we are compelled to agree with the defendant that reversal based on a revised interpretation of the reasonable accommodation duty would be inappropriate. To apply our new ruling retroactively in this case would be unfair and would punish the defendant for what may have been an attempt to comply with the law as it existed at the time of the plaintiff's discharge. Therefore, we hold that the ruling in this case will apply prospectively only.

*Skaggs v. Elk Run Coal Co., Inc.,* 479 S.E.2d 561, 580 (W.Va. 1996).

In November 2009, the West Virginia Supreme Court wrote a rare discussion of constitutional law on retroactive application of judicial decisions, which began by quoting a Colorado case:

> The United States Constitution neither prohibits nor requires retroactive application of a judicial decision, and the question of retrospective or prospective application of a state judicial decision to civil litigation in the state courts is a matter of state law when, as here, the rule in question involves a matter of a common-law tort and is not based on federal constitutional or statutory law.

*Martin Marietta Corp. v. Lorenz,* 823 P.2d 100, 112 (Colo. 1992). See also *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 94, 113 S.Ct. 2510, 2516, 125 L.Ed.2d 74 (1993) ("Nothing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions for near a thousand years.' " (citation omitted)); *Great N. Ry. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932) ("We think the federal constitution has no voice upon the subject. 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."). In addition to there being no federal constitutional impediment to a judicial decision being applied retroactively, there is likewise no state constitutional impediment. See *Bradley v. Appalachian Power Co.,* 163 W.Va. 332, 347, 256 S.E.2d 879, 887 (1979) ("We do not find any provision in the West Virginia Constitution which addresses this point.").

The Supreme Court of Appeals of West Virginia, like all courts in the country, adheres to the common law principle that, "[a]s a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases." Crowe v. Bolduc, 365 F.3d 86, 93 (1st Cir. 2004). See also Alaskan Vill., Inc. v. Smalley, 720 P.2d 945, 949 (Alaska 1986) ("Absent special circumstances, a new rule of law will apply in the case before the court and in all subsequent cases."); Citicorp N. Am., Inc. v. Franchise Tax Bd., 83 Cal.App.4th 1403, 1422, 100 Cal.Rptr.2d 509, 525 (2000) ("[T]he general rule as to judicial opinions is that they are fully retroactive."); Findley v. Findley, 280 Ga. 454, 460, 629 S.E.2d 222, 228 (2006) ("[W]e shall continue to apply the general rule that a judicial decision announcing a new rule is retroactive[.]"); Aleckson v. Village of Round Lake Park, 176 Ill.2d 82, 86, 223 Ill.Dec. 451, 679 N.E.2d 1224, 1226 (1997) ("Generally, when a court issues an opinion, the decision is presumed to apply ... retroactively [.]"); Dempsey v. Allstate Ins. Co., 325 Mont. 207, 217 104 P.3d 483, 489 (2004) ("Therefore today we reaffirm our general rule that [w]e give retroactive effect to judicial decisions." (internal quotations and citation omitted)); Ireland v. Worcester Ins. Co., 149 N.H. 656, 658, 826 A.2d 577, 580-81 (2003) ("At common law, appellate decisions in civil cases are presumed to apply retroactively."); Montells v. Haynes, 133 N.J. 282, 295, 627 A.2d 654, 660 (1993) ("The final issue is whether our decision should follow the general rule of retroactive application[.]"); Beavers v. Johnson Controls World Servs., Inc., 118 N.M. 391, 398, 881 P.2d 1376, 1383 (1994) ("[W]e believe there should be a presumption that a new rule adopted by a judicial decision in a civil case will operate retroactively."); Christy v. Cranberry Volunteer Ambulance Corps, Inc., 579 Pa. 404, 418, 856 A.2d 43, 51 (2004) ("Our general principle is that we apply decisions involving changes of law in civil cases retroactively[.]"); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 515 (Tex. 1992) ( "Generally, judicial decisions apply retroactively."); State v. Styles, 166 Vt. 615, 616, 693 A.2d 734, 735 (1997) ("We have previously adopted the common law rule that a change in law will be given effect while a case is on direct review, except in extraordinary cases. This rule applies whether the proceedings are civil or criminal."); In re Commitment of Thiel, 241 Wis.2d 439, 449, 625 N.W.2d 321, 326

> (Ct.App. 2001) ("Wisconsin generally adheres to the 'Blackstonian Doctrine,' which provides that a decision that clarifies, overrules, creates or changes a rule of law is to be applied retroactively.").

*Caperton v. A.T. Massey Coal Co., Inc.,* 690 S.E.2d 322, 350 (W.Va. 2009).

## test in *Carroll Towing*

In 1947, Judge Learned Hand considered a famous case in which a tugboat had broken away from a barge, and the barge later sank:

> ... the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether
>
> $$B < P \times L$$

*U.S. v. Carroll Towing Co.*, 159 F.2d 169, 173 (2dCir. 1947).

This is one of the few reported judicial decisions in the USA that contains an equation. When I first read this case, I was bothered by the retrospective application of the analysis. *After* the loss, L, has occurred, it is easy to identify the specific measure(s) that allegedly *should* have been taken to prevent the loss and focus on just one or two loss-prevention measures. But, *before* the loss, there are N possible losses, $L_1$, $L_2$, $L_3$, $L_4$, ... $L_N$, each of which can be prevented by measures that cost less than the probability of injury times the amount of loss. But the manufacturer or service provider might have an *un*economical product or service if *all* N loss-prevention measures were taken. In this way, the rule in *Carroll Towing* is **not** practical as a guide for avoiding tort liability, unless each of the loss-prevention measures is *in*expensive.

## Conclusion

Since I first studied torts in 1995, I have been bothered that some cases establish a *new* legal duty and then apply that new duty retroactively to a defendant whose conduct was appropriate when judged by the existing legal standards at that time. While this is an interesting topic to discuss, what amazes me more is that this retroactive application of a new duty is *rarely* mentioned in court cases. It seems that practicing lawyers and judges are mechanically applying rules, without considering the fairness.

While judges in most states appear to ignore the unfairness of retroactive application of new duties in torts, there are a few states (e.g., South Carolina, West Virginia) that recognize the problem and sometimes limit holdings in tort cases to only prospective application.

Criminal law and civil law (e.g., torts) serve different interests in society, and have evolved independently during the past several hundred years. Lawyers and judges *know* that one can not mix rules from criminal and civil law. But, repeating the mantra that criminal law is different from civil law does *not* erase the potential unfairness of having duty in torts decided *after* the alleged tortfeasor acts or chooses not to act. That having been said, my legal research shows that it is futile to raise this issue in courts of most states in the USA.

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