PROSPECTIVE OVERRULING – IT'S ABOUT TIME

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"It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes law for his dog. When your dog does anything you want to break him of, you wait till he does it, and then [discipline] him for it. This is the way you make laws for your dog: and this is the way judges make laws for you and me."

- Jeremy Bentham, *Truth versus Ashhurst* (1823).

INTRODUCTION

"The past is a foreign country; they do things differently there".[1] The past has different standards, different values and different expectations flowing from different rules. It is as if it is a foreign jurisdiction. Time is therefore an important factor concerning how we should view the legal consequences of conduct. However, the courts, as adjudicators, determine the legal consequences of events well after they occur. When applying the common law, the courts are sometimes forced to cross temporal borders into the past and apply contemporary rules. This creates, I shall argue, a problem for the rule of law in the form of 'retrospective common law'.

The purpose of this dissertation is two-fold: to identify a problem in the common law and propose a possible solution. I shall argue in Part A that when a court overturns a prior precedent the court enacts[2] retrospective law. In Part B I shall assess the cogency of 'prospective overruling' as a solution to this problem. My primary question is whether prospective overruling solves the problem of providing both certainty and fairness in common law adjudication.

Part A will be divided into three chapters. Chapter 1 will illustrate how the common law operates with retrospective effect and how this offends against the rule of law. However, this claim relies upon the views of two schools of thought, namely, Legal Positivism and Legal Realism. Accordingly, Chapter 2 will discuss the relationship between Legal Positivism and retrospective common law and Chapter 3 will discuss Legal Realism and retrospectivity.

Part B will then assess whether prospective overruling is an appropriate judicial tool to mitigate the harm of retrospective common law. Chapter 4 will discuss possible forms of prospective overruling and instances in which prospective overruling could be legitimate. Chapter 5 will assess the objections to it. It is my contention that, if certain assumptions are accepted, there is a real problem with the way the common law currently operates and that prospective overruling is, in appropriate circumstances, a legitimate judicial tool which courts ought to employ to address that problem.

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[1] L P Hartley, *The Go Between* (Hamish Hamilton, 1953) 1.

[2] I recognise that the use of the term *enact* in reference to judge-made law is unorthodox since the term is usually reserved for legislation. However, as will be discussed in Chapter 3, I contend that the courts fulfil a quasi-legislative function, and hence I contend that it is appropriate to use the term *enact* when describing judge-made law.

PART A: THE PROBLEM

Chapter 1: Retrospective (Common) Law

a. The tradition against retrospective law

The idea that there is something wrong with punishing people for conduct which they performed before it became unlawful is ancient.[3] The democratic Athenian polity was based upon the ideal of *isonomia*, the 'equality of laws to all manner of persons and a certainty of being governed in accordance with known rules'.[4] Jurists of the Roman Republic promoted the twin maxims *Nulla peona sine crimen* (no penalty without a crime) and *nulla crimen sine lega* (no crime without a law). In contrast, the concept of Natural Law in the Christian tradition appeared to avoid the harm of retrospective law. It was accepted that "where there is no law, neither is there any transgression"[5] but the Natural Law, being "written in [the Gentiles'] hearts, their conscience also bearing witness",[6] could still provide a timeless source of law.

Early equity adopted the policy that persons who relied upon earlier statements of law that were overruled ought to be protected. As Lord Chancellor Nottingham stated in 1675:[7]

> But then in Chancery when men act according to an opinion which hath long been current for law, they are to be protected, although a latter resolution have controlled the former opinion.

These ancient and classical notions have survived in modern constitutions, statutes and international law, albeit mostly confined to penal offences. The United States Constitution[8] and the French Declaration of the Rights of Man and of the Citizen[9] both prohibit retrospective criminal laws.[10] Article 11 of the 1948 Universal Declaration of Human Rights guarantees that no person shall be guilty of a penal offence which was not one at the time it was committed. This was amplified in the 1966 International Covenant of Civil and Political

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[3] C Sampford, *Retrospectivity and the Rule of Law* (Oxford University Press, 2006) 9.
[4] G Q Walker, *The Rule of Law: Foundations of Constitutional Democracy* (Melbourne University Press, 1988) 93.
[5] Romans 4:15.
[6] Romans 2:15.
[7] M L Friedland, Prospective and retrospective judicial lawmaking (1974) 24 *University of Toronto Law Journal* 170.
[8] Article I, Section 9 (applying to federal law) and Section 10 (applying to state law) of the U.S. Constitution.
[9] 1789, Article 8.
[10] The *ex post facto* clause in the United States Constitution was interpreted to be limited to criminal law in *Calder v Bull* 3 US 386 (1798), Chase J at 391 and Paterson J at 396.

Rights and given effect to in Section 26 of the New Zealand Bill of Rights Act 1990. Moreover, by virtue of Section 7 of the Interpretation Act 1999, all legislation is presumed not to have retrospective application unless stated otherwise.

The presumption against retrospective law reflects the 'rule of law' tradition. All twentieth century theories of the rule of law include some kind of prohibition on retrospective law. Friedrich Hayek defines the rule of law as requiring that it be possible to foresee "with fair certainty how [an] authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge".[11] The rule of law, according to Hayek, requires the law to be foreseeable or predictable. Furthermore, Cass contends that "predictability allows adjustments of individual behaviour that increase societal well being".[12] Lon Fuller[13] and Joseph Raz[14] conceive the rule of law as comprising of eight 'virtues of law'. One of these requires the law to be prospective on the grounds that "the law should be such that people will be able to be guided by it".[15]

Whereas prospective legal change allows for rearrangement of individual affairs to align with the new state of the law, retrospective change undercuts our ability to plan our affairs in reliance on the law promulgated at the time. The 'harm' of retrospective law is therefore the injury that it inflicts on the rule of law. The law cannot be predictable, and people are unable to be guided by it if it can be changed after the fact. Hence, the rule of law tradition carries a strong presumption against retrospective law.

b. The meaning of 'retrospective law'

Despite the tradition against retrospective law, there remains some disagreement as to its meaning. Elmer A Dreidger[16] has identified two categories of retrospective law. First, a law may be *retroactive* because it 'operates as of a time prior to its enactment'. Second, law can be *retrospective* so that it 'operates for the future only but it imposes new rules in respect of a past event'. Although this is a valid semantic distinction, it is not a normative one as the

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[11] FA Hayek, *The Road to Serfdom* (University of Chicago Press, 1944) [1975] 72.
[12] RA Cass, Judging: norms and incentives of retrospective decision making (1995) 75 *Boston University Law Review* 954, 960.
[13] LL Fuller, *The Morality of Law* (Yale University Press, 1969) 39.
[14] J Raz, The Rule of Law and its Virtue (1977) 93 *Law Quarterly Review* 196.
[15] Ibid, 198.
[16] E A Dreidger, Statutes: retroactive retrospective reflections (1978) 56 *Canadian Bar Review* 268.

consequences of the two types of law are the same in all cases. Hence, we can distil the two parts into a general definition of retrospective law as *laws that attach new consequences to an event that occurred prior to the enactment of the law*. This definition embraces both Dreidger's retroactive and retrospective law and it is this meaning of 'retrospective law' that will be used here.

c. How retrospective law is created in the common law

Most discussion has focussed on instances of retrospective statutory law (legislation that attaches new legal consequences to an event that occurred prior to its enactment). Such events are rare and unorthodox. What the remainder of this chapter will illustrate is that when a court overturns a prior precedent 'retrospective common law' is enacted.

Retrospectivity is the result of a tension between two conflicting aims of the common law. On one hand, the common law, in accordance with the rule of law tradition, is expected to be consistent, predictable and certain. On the other hand, it should also be malleable so as to arrive at fair and just outcomes. This tension between certainty and fairness operates beneath the surface of all judicial reasoning but it surfaces most abruptly when a court is considering overturning a prior precedent.

In order to ensure consistency and certainty one of the basic principles in the administration of justice is to treat like cases alike.[17] Hence a prior precedent represents a statement of law that can be relied upon if a sufficiently analogous case were to arise. However, in order to achieve a just and fair result the court may find it necessary to depart from the precedent case and replace it with a new statement of law. The aims of certainty and fairness may therefore conflict in a particular case.

However, the conflict above does not cause retrospective law. The further catalyst is the courts' *adjudicative function*.[18] That is, retrospectivity arises because the courts' function is to decide the legal consequences of past acts or omissions. This means that when a court departs from a prior precedent, the new statement of law determines the legal consequences of past acts or omissions. Yet the old statement of law (embodied in the prior precedent)

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[17] R Cross & J W Harris, *Precedent in English Law* (Clarendon Press, 1991) 228.
[18] *National Westminster Bank Plc v Spectrum Plus Ltd* [2005] UKHL 41, Lord Nicholls at paragraph 4.

arguably was the law when the act or omission was performed. By overturning a prior precedent, courts announce and apply law that attach new legal consequences to past events, and thus apply a form of retrospective law whenever they overturn a prior precedent.

d. Case Study: *National Westminster Bank Plc v Spectrum Plus Ltd*

The House of Lords' decision in *National Westminster Bank Plc v Spectrum Plus Ltd*[19] is a useful illustration of retrospective common law. The case concerned a debenture which Spectrum Plus had created over its debts in favour of National Westminster. In particular, it concerned whether National Westminster had a fixed or floating charge. If it was a floating charge, Spectrum Plus' creditors would have priority over the bank; if not, the bank would be entitled to the whole of the proceeds. This question of law was governed by the rule in *Siebe Gorman v Barclays Bank*[20] that such a debenture operates as a fixed charge over the debt.[21]

The law prior to *Spectrum Plus* was therefore that such debentures create a fixed charge in accordance with the law set out in *Siebe Gorman*. However, the House of Lords unanimously held *Siebe Gorman* was wrong in law and should be overruled.[22] Their Lordships held that, contrary to *Siebe Gorman*, the key distinction between a fixed and floating charge was whether or not the asset was finally appropriated as security for the debt until a future event.[23] As a consequence, the debenture was held to be a floating charge.

The new statement of law concerning the characteristics of a floating charge in *Spectrum Plus* attached new consequences in terms of the priority of creditors. The debenture had been arranged prior to the annunciation of the new statement of law and in reliance on the old statement in *Siebe Gorman*. The new statement in *Spectrum Plus* thus operated retrospectively to change the status of the debenture and to upset reliance on law that was expressed at the time of its formation.

However, as Lord Devlin extra-judicially commented at an earlier time, "A judge-made change in the law rarely comes out of a blue sky. Rumblings from Olympus in the form of

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[19] *National Westminster Bank Plc v Spectrum Plus Ltd* [2005] UKHL 41.
[20] *Siebe Gorman v Barclays Bank* [1979] 2 Lloyd's Rep. 142.
[21] Lord Scot of Foscote held that there was no material difference between the debenture in *Siebe Gorman* and in *Spectrum Plus* at paragraph 105.
[22] *Spectrum Plus*, Lord Nicholls at paragraph 2.
[23] *Spectrum Plus*, Lord Scot at paragraph 111.

obiter dicta will give warning of unsettled weather".[24] Even before *Spectrum Plus* there were "rumblings from Olympus". The English Court of Appeal in *Re New Bullas Trading*[25] supported the *Siebe Gorman* decision. However, the Privy Council in *Agnew v Commissioners of Inland Revenue*[26] held that the decision in *Bullas Trading* was wrongly decided. This cast doubt upon the validity of the reasoning in *Siebe Gorman*.

Such "unsettled weather" does not avoid the retrospective effect of the judicial change in law enacted by the overruling of *Siebe Gorman*. Despite the developments in law that questioned the validity of *Siebe Gorman*, the House of Lords nonetheless felt compelled to *overturn* the Court of Appeal's decision in *Siebe Gorman*. This suggests *Siebe Gorman* was the law until it was retrospectively changed, and that it was reasonable to previously rely on *Siebe Gorman* as the law.

The decision of the New Zealand Supreme Court in *Chamberlains v Lai*[27] is another instance of the overruling of a prior precedent operating with retrospective effect and parallels the approach of the House of Lords in *Spectrum Plus*. When the events occurred that gave rise to the proceeding in *Chamberlains* "everyone would have said that under New Zealand law as it stood then barristers were immune from suits for negligence in relation to protected conduct".[28] Yet, eleven years after the event the Court found that barristers' immunity ought to be abolished, and, as a consequence, the immunity was removed retrospectively. The Supreme Court held that the House of Lord's decision in *Arthur J S Hall v Simons*[29] rendered the position of barristers' immunity in New Zealand law uncertain. So, as in *Spectrum Plus*, the court used the 'gathering of clouds' to obscure the retrospective effect of common law change.

It is important to note that both counsel for National Westminster and counsel for Chamberlains submitted in the alternative that if the Court were to overturn the prior precedent, the Court ought to do so with prospective effect only. *Siebe Gorman* would then be the law governing debentures formed prior to the judgment of the House of Lords,

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[24] Lord Devlin, Judges and Lawmakers (1976) 39 *Modern Law Review* 1, 10.
[25] *Re New Bullas Trading* [1994] 1 BCLC 485.
[26] *Agnew v Commissioners of Inland Revenue* [2001] UKPC 28.
[27] *Chamberlains v Lai* [2007] 2 NZLR 7.
[28] *Chamberlains*, Tipping J at paragraph 132.
[29] *Arthur J S Hall v Simons* [2002] 1 AC 615.

including the National Westminster's debenture, and the new law would only apply to debentures formed after the date of the Court's decision.[30] Similarly, barristers' immunity would remain in relation to all events up to the judgment of the Supreme Court. However, even though both the House of Lords and the Supreme Court recognised that prospective overruling may be within their powers, neither courts were willing to take that approach.[31]

e. Summation: The problem of retrospective common law

The common law systems have inherited a general presumption against retrospective law as an aspect of the rule of law tradition. These systems also assign two competing aims to the law: certainty as to the rules and fairness in the particular case. The courts' adjudicative function, when combined with the tension between these competing aims, creates the problem of retrospective common law. This problem arises when an appellate court overturns a prior precedent, as, in overruling an established statement of the law, the court announces and applies new law that attaches new legal consequences to past acts or omissions.

The House of Lords in *Spectrum Plus*, and the Supreme Court in *Chamberlains,* identified the problem of retrospectivity in the common law whilst dismissing prospective overruling as a possible method in the particular case. However, in my view, prospective overruling is an attractive solution to the problem of retrospectivity in the common law. Once we recognise that the courts enact retrospective law, which undermines the rule of law, we ought to consider whether the courts should limit the effect of overturning a prior precedent to conduct after the court's decision. I will therefore argue that prospective overruling is a judicial tool that could successfully mitigate the blunt retrospective effects of common law adjudication without any collateral damage to its fundamental principles.

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[30] *Spectrum Plus*, Lord Nicholls at paragraph 9.
[31] Ibid, at paragraph 53.

Chapter 2: Rules and Retrospectivity

a. Conceptions of law

In chapter 1, I made the claim that when a court overrules a prior precedent it enacts 'retrospective common law'. This analysis rests on two fundamental assumptions. First, it assumes a Positivist conception of law, to be discussed in this chapter. Secondly, it assumes that the courts fulfil a quasi-legislative function. This will be discussed in chapter 3. I do not seek to demonstrate conclusively that these assumptions are true; I merely seek to demonstrate that these are reasonable premises on which to proceed.

The way one views retrospectivity in the common law depends on how one conceives the law itself. The problem is only perceived from certain jurisprudential standpoints. In particular, it is a problem if the law is viewed through the conceptual framework of Legal Positivism. In contrast, from a Dworkinian perspective, the common law should not be viewed as changing retrospectively. This chapter will discuss these two competing conceptions of the law and illustrate how they lead to different perspectives on retrospectivity.

b. Legal Positivism

H L A Hart provides perhaps the best explanation of the Positivist account of law. According to Hart, the law is essentially a union of primary rules of obligation and secondary rules of adjudication, recognition and change. The primary rules relate to the substance of the law and secondary rules to the procedure for determining the law. The way the law can change, according to Hart, is specified through secondary rules. "The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules…and to eliminate old rules".[32] For example, the rule that legislation may introduce new primary rules that defeat earlier primary rules arising out of custom or precedent is an example of a secondary rule of both recognition and change. The rule that the Privy Council (prior to the New Zealand Supreme Court) could restate the common law in a way that bound the New Zealand Court of Appeal was a further secondary rule of the same kind.

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[32] HLA Hart, *The Concept of Law* (Clarendon Press, 1961) 92-93.

There are, however, sources of ambiguity in rule following. First, when we come to *identify* which rule applies, not all cases fall squarely under existing primary rules. Rather, some cases may fall within the gaps in the rules. It may be said that this leaves areas of legal uncertainty caused by our inability to foresee all "possible combinations of circumstances".[33] In such cases the outcome cannot be determined by a pre-existing rule. Instead, the judge may be forced to choose between competing interests to enact 'subordinate legislation'[34] or 'interstitial legislation'[35] through judicial decision making. Second, in terms of *interpretation*, some cases will fall into the penumbra of legal uncertainty concerning the meaning of a particular rule. In these cases the court is asked to choose between competing interpretations of the rule.

A set of events, to be governed by a prior precedent, must be seen as falling within the nucleus of current legal rules. Then the precedent can clearly determine the outcome of the case. The jurisdiction of a later court to depart from that prior precedent must then derive from a secondary rule that enables legal change. For example, in its *Practice Statement (Judicial Precedent)*,[36] the House of Lords declared that it was able to depart from its earlier decisions, recognising its ability to introduce new primary rules and eliminate old ones.

According to this conception of law, prior precedent (*a*) represents the primary rule (*x*) which can be identified through various secondary rules as *the law*. However, when a court relies on a secondary rule of change to create new precedent (*b*), the court overturns prior precedent (*a*) to eliminate rule (*x*) and introduce new primary rule (*y*).

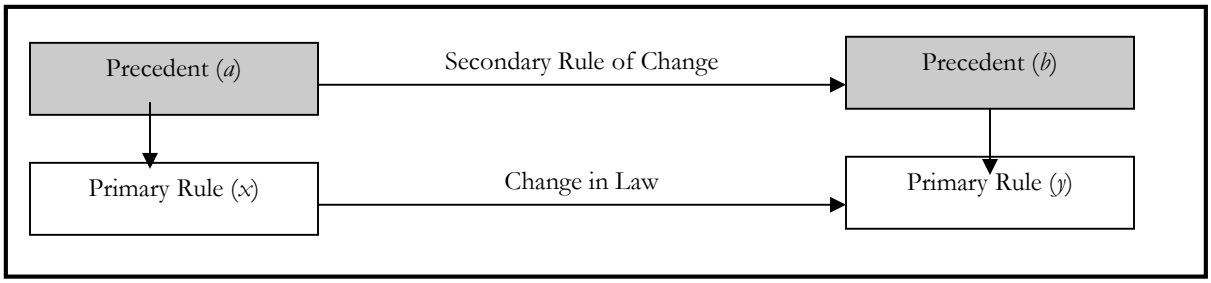

Figure 1.

[33] Hart, *The Concept of Law*, 128.
[34] Ibid, 134.
[35] J Bell, *Policy Arguments in Judicial Decisions* (Oxford University Press, 1982) 17.
[36] *Practice Statement (Judicial Precedent)* [1962] 1 WLR 1234.

The law that could be determined through the secondary rules of recognition before decision (*b*) was primary rule (*x*). However, decision (*b*), in overturning a prior precedent, attaches new legal consequences to past conduct by applying primary rule (*y*) to acts and omissions that were performed whilst the secondary rules of recognition would pick out primary rule (*x*) as the law in force. Therefore, if we perceive the legal system as operating as Hart's conception of law suggests then retrospective change occurs.

c. A Dworkinian conception of the law

One of the main reasons for Ronald Dworkin's rejection of Hart's conception of law was that it enabled just this kind of judicial retrospective law-making in 'hard cases'.[37] Under Dworkin's conception of law the common law can operate without retrospectivity both in hard cases at the margins of the law and when clear prior precedents are overruled.

Dworkin offers a wider ontology of the law. According to Dworkin, the law applicable to a case goes beyond the clearly recognisable rules found in the governing precedents in the immediate field of law. Dworkin argues that the law includes principles and other standards and that Positivism "forces us to miss the important roles of these standards that are not rules".[38]

There are three key characteristics of Dworkinian principles. The first is that principles may be derived from sources beyond the immediate applicable precedents, such as a collateral area of law. Second, these principles have legal pedigree and can be relied upon to set aside a rule when the rule does not 'fit' into the fabric of the legal system. Lastly, and most importantly, Dworkinian principles are already embedded in the law. When rules and principles conflict, one is held to be more important than the other in a particular context, but if a principle is defeated it is not necessarily excluded from our legal system. It is simply that in that particular case the principle was outweighed by another rule or principle. According to Dworkin, rules, in contrast, do not have this characteristic: "If two rules conflict, one of them cannot be a valid rule".[39]

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[37] R Dworkin, Hard Cases, in *Taking Rights Seriously* (Duckworth, 1987) 81.
[38] R Dworkin, Is the Law a System of Rules? in *The Philosophy of Law* (Oxford University Press, 1977) 39.
[39] R Dworkin, *The Philosophy of Law*, 48.

What this means for the alleged retrospectivity of the common law is that Dworkin would contend that a rule may be set aside in favour of an *existing* principle (as was the case in Dworkin's example of *Riggs v Palmer*).[40] But the change does not operate with retrospective effect as the principle already existed in the fabric of the law.

Dworkin contends that Hart's rules of recognition cannot identify principles and cannot balance and prioritise them or direct us when they should be relied upon to set aside a rule. This requires a normative assessment of the competing principles derived from moral or political theory. Hence, Dworkinian principles are well outside the mechanical rule-based concept of law that Legal Positivists defend.

In terms of retrospective common law, the key difference between Hart and Dworkin emerges when a principle provides the impetus to overturn a rule: in essence, when rules and principles conflict. Hart would contend that, since rules have the right pedigree, *the law* is the rule, and to overturn the rule is to (unexpectedly) change *the law*. For Dworkin, *the law* includes the principle. Overturning the rule is not therefore a change in law, since the principle (with legal pedigree) is merely prioritised over the rule.

As Dworkin's ontology of law suggests, to view overturning precedent as merely rule (x) in precedent (a) being changed for rule (y) in case (b) may be too simplistic. There is, according to Dworkin, more than just rule (x) in the legal fabric. There may be other principles that conflict with existing rule (x). This conflict may cause "rumblings from Olympus". If we view changes in common law through this lens we can see more clearly the role that "unsettled weather" plays in predicting judge-made changes in the law.

Moreover, these other principles may point toward a new rule that would better fit and integrate into the legal fabric. When a court overturns a prior precedent, it is removing a legal rule that was inconsistent with higher principles already present in the law. The law as a whole does not change when the prior precedent is overruled. The law is simply re-declared as if the new decision had always been the law but previous courts had failed to adequately apply the right principles in that situation. The newly stated legal rule is not 'new' because it

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[40] *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889); see R Dworkin, Is the Law a System of Rules? 44.

was based upon 'law', including principles, that existed prior to the decision and pointed toward the current result.

d. Case Study: *Attorney General v Ngati Apa*

The New Zealand Court of Appeal decision in *Attorney General v Ngati Apa*[41] may be used to illustrate the difference between a Legal Positivist and a Dworkinian conception of law in terms of retrospectivity.

The Court of Appeal in *Ngati Apa* revisited two related legal questions that were earlier addressed by the Court of Appeal in *Re: the Ninety Mile Beach.*[42] The primary question was whether the Maori Land Court was prohibited from investigating Maori customary ownership of the foreshore because the common law already vested ownership of this zone in the Crown. This primary question is determined by a deeper secondary question: whether 'English common law' principles or 'colonial common law principles' apply to determine land title in New Zealand in the absence of a statutory rule.

The Court of Appeal in *Ninety Mile Beach* held that the Maori Land Court did not have jurisdiction to investigate and grant title to land within the tidal zone of the beach[43] on the grounds that that the only source of land title in New Zealand was the Crown.[44] This principle was grounded in English common law:

> There is no doubt that it is a fundamental maxim of our laws that the Queen was the original proprietor of all lands in the Kingdom and consequently the only legal source of private title, and that this principle has been imported with the mass of the common law into New Zealand; that it "pervades and animates the whole of our jurisdiction in respect to the tenure of land".

This position precluded the Maori Land Court from recognising the existence of any Maori customary rights in foreshore that were not derived from the Crown. Most of the reasoning employed by the Court in this case can be traced to earlier High Court decisions, such as *Waipapakura v Hempton*[45] and *Wi Parata v Bishop of Wellington.*[46] These decisions held that

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41 *Attorney General v Ngati Apa* [2003] 3 NZLR 643.
42 *Re: the Ninety Mile Beach* [1963] NZLR 461.
43 *Re: the Ninety-Mile Beach,* 466.
44 Ibid.
45 *Waipapakura v Hempton* (1914) 33 NZLR 1065.

indigenous customary rights could only be recognised by positive legal authority such as statute and had no basis in the common law (unless supported by a Crown grant). This approach represents the adoption of 'English common law' land principles.

However, the Court of Appeal held in *Ngati Apa*, overturning the decision in *Ninety Mile Beach,* that indigenous land rights could exist in New Zealand common law, which operated in the colonial setting:[47]

> When the common law of England came to New Zealand its arrival did not extinguish Maori customary title. Rather, such title was integrated into what then became the common law of New Zealand. Upon acquisition of sovereignty the Crown did not, therefore, acquire wholly unfettered title to all the land in New Zealand. Land held under Maori customary title became known in due course as "Maori customary land".

To understand the 2003 decision we need to briefly survey the prior legal landscape concerning the recognition of common law customary rights. *Waipapakura* and *Wi Parata* were not the only authorities in New Zealand on customary rights prior to the *Ninety Mile Beach* decision. In *Nireaha Tamaki v Baker*[48] the Privy Council in 1901 had upheld the notion that the common law in a colonial setting could recognise the existence of indigenous customary title.

This authority was subsequently ignored by the New Zealand Courts which refused to recognise the Privy Council as a legitimate source of law regarding indigenous title in New Zealand. This refusal was dramatically pronounced in the *Protest of Bench and Bar*,[49] made by the New Zealand Judiciary and legal profession, issued in the wake of such decisions as *Nireaha Tamaki*. The authority of the Privy Council was effectively displaced from the court hierarchy in New Zealand in this extraordinary manner, at least on this aspect of law. Upon this change in hierarchy, the Court of Appeal in *Ninety Mile Beach* applied the contrary reasoning in the *Waipapakura* and *Wi Parata* decisions.

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[46] *Wi Parata v Bishop of Wellington.* (1877) 3 NZ Jur (NS) SC 72.
[47] *Ngati Apa*, Tipping J at paragraph 183.
[48] *Nireaha Tamaki v Baker* [1901] AC 561; [1900] NZPCC 371.
[49] *Protest of the Bench and Bar* (1903) NZPCC 730.

However, twenty years after the *Ninety Mile Beach* decision in 1963 the law of indigenous rights began to develop in a different direction. The landmark High Court decision of *Te Weehi v Regional Fisheries Officer*[50] recognised that Maori customary fishing rights had been in existence since 1840 and could be recognised under the common law. Two later decisions of the New Zealand Court of Appeal in *Te Runanga o Muriwhenua Inc v Attorney-General*[51] and *Te Runanganui O Te Ika Whenua Inc Society v Attorney-General*[52] also recognised the possibility of indigenous property interests in fisheries and waterways deriving from the common law. These cases, including the earlier decision in *Nireaha Tamaki*, represent common law principles developed in a colonial setting recognising the customary rights of indigenous people.

From the stand point of a Legal Positivist, the decision in *Ngati Apa*, acknowledging that Maori rights can be recognised in the common law, could be explained simply as the correct application of secondary rules. In particular, it applies correctly the secondary rule concerning the New Zealand court hierarchy that Privy Council decisions bind the Court of Appeal. On this view, the law was correctly stated in the *Nireaha Tamaki* decision in 1901 and the 2003 Court of Appeal merely applied the secondary rules properly to pick out the rule in *Nireaha Tamaki* as the correct primary rule displacing the later incorrect primary rule announced in *Ninety Mile Beach*. This is a 'technical' application of Legal Positivism. It corrects the extraordinary departure from the orthodox rules of recognition applicable in the New Zealand legal system affected by the *Protest of the Bench and Bar*, which purported to throw off the authority of the Privy Council in this area.

However, I believe that Hart's version of Legal Positivism would give a slightly different account of the *Ngati Apa* decision. Hart's conception of law is more concerned with the secondary rules that are actually followed:[53]

> For the most part the rule of recognition is not stated, but its existence is *shown* by the way in which particular rules are identified, either by the courts or other officials or private persons or their advisors.

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[50] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.
[51] *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.
[52] *Te Runanganui O Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20.
[53] Hart, *The Concept of Law*, 101.

This reading of Hart's conception of law treats secondary rules as sociological facts rather than technical legal rules. From this perspective, *Ngati Apa* can be viewed as affecting a 'counter-reformation'[54] in secondary rules. The initial reformation began with the *Protest of the Bench and Bar,* which repudiated the authority of the Privy Council in this area of law, and continued with the *Ninety-Mile Beach* decision. That reformation changed a secondary rule: instead of Privy Council decisions being considered superior to that of the New Zealand Court of Appeal in the area of indigenous peoples' rights, the decisions of the New Zealand Court of Appeal were accorded the highest pedigree in fact. From 1903 to the 1980s this unorthodox, yet accepted, secondary rule of recognition operated in this particular area of law.

The *Ngati Apa* decision then effected a counter-reformation in the secondary rules by returning to the orthodox position based on the traditional court hierarchy: that is, that Privy Council decisions prevail. This enabled the 2003 Court of Appeal to affirm the Privy Council position in *Nireaha Tamaki* which therefore trumped the later decision of the New Zealand Court of Appeal in *Ninety Mile Beach*. This was the predominant framework adopted by the Court of Appeal in *Ngati Apa*. As the Chief Justice states:[55]

> *Re Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, which was rejected by the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561. This is not a modern revision, based upon developing insights since 1963. The reasoning the court applied in *Ninety-Mile Beach* was contrary to other higher authority and indeed was described at the time as "revolutionary".

Nonetheless, regardless of the differences between the 'technical' Positivist account of *Ngati Apa* and a 'sociological' Positivist account, virtually all of the players in the New Zealand legal system considered in 2003 that the law was changed in *Ngati Apa*. In reality, the courts had moved from the proposition that all land title must be derived from the Crown or statute to recognising the possible existence of Maori customary rights under the common law (that were not derived from the Crown). Moreover, the later rule was applied in *Ngati Apa* as if it had always been the law, despite the fact that the contrary "decision in *Ninety Mile*

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[54] L Fraser & J Wall, *Ngati Apa*: A Counter Reformation (2007) 1 *New Zealand Law Students' Journal* 279
[55] *Ngati Apa*, Elias CJ at paragraph 53.

has stood for 40 years".[56] A Positivist conception of the law would recognise that overturning such a prior precedent had retrospective effect.

The Positivist view point is only one way of looking at the *Ngati Apa* decision. Dworkin's conception of the law would provide a very different account. The rule in *Ninety-Mile Beach*, that Maori customary title cannot be derived from the common law, can be supported by certain principles. There is the principle that the public interest is best served by not disrupting the established property regime by recognising non-statutory sources of title,[57] as well as the principle in *Wi Parata*: that Maori (during the establishment of Crown sovereignty) were (in the words of Prendergast CJ) "incapable of performing the duties, and therefore of assuming the rights, of a civilised community"[58] and thus incapable of possessing property rights prior to Crown sovereignty. Although unattractive to modern eyes, these principles were well-embedded in New Zealand law.

On the other hand, there was conflicting authority from the Privy Council in *Nireaha Tamaki*, supported by different principles. For instance, there is the principle (affirmed in *Te Weehi*) that for the pre-existing property rights of Maori to be extinguished there must be explicitly clear statutory language to that effect. These principles were later affirmed in analogous cases, such as *Muriwhenu* and *Te Ika Whenua*. These are common law principles that have been developed in a colonial context.

The conflicting *rules* followed before and after *Ngati Apa* seem irreconcilable. However, from a Dworkinian perspective, there is more to law than rules. There are also principles that may not be found in the most directly relevant precedents and these may suggest that a court may recognise customary rights in the foreshore and seabed. These principles constituted part of the legal fabric which enabled the Court of Appeal in 2003 to prioritise some of these principles (namely the colonial common law principles) and then recognise possible common law native title in the foreshore and seabed.

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[56] *Ngati Apa*, Tipping J at paragraph 209.
[57] North J considered that non statutory land rights would be "startling and inconvenient": *Ninety-Mile Beach* at 467.
[58] *Wi Parata*, 77.

According to this account of *Ngati Apa*, the Court of Appeal in 2003 did not retrospectively change the law, as the rules and principles that determined the case were already part of the legal fabric prior to the decision. In this sense, *Ngati Apa* was always the law regardless of how most people viewed the decision at the time. This analysis of the *Ngati Apa* decision demonstrates that the problem of retrospective common law may exist if we view the law from a Positivist standpoint, but not from a Dworkinian perspective. The fact that the New Zealand Court of Appeal clearly recognised in *Ngati Apa* that it was changing the law suggests it was adhering to a Positivist, not a Dworkinian, jurisprudence.

e. Summation: retrospective common law and Legal Positivism

One way of refuting the claim that overturning a prior precedent enacts retrospective law is to contend that the law is more than the union of primary and secondary rules. This is because retrospectivity in common law reasoning can be avoided by viewing the law through a Dworkinian lens. My discussion must therefore proceed largely on a Positivist assumption: that when a court overturns a prior precedent it is applying a secondary rule that enables change in primary rules and is not simply re-balancing legal rules and principles that already exist in the law.

Chapter 3: Realism and Retrospectivity

a. Conceptions of judicial decision making

The claim that when a court overturns a prior precedent the court enacts retrospective law not only rests on Positivist assumptions about rules, it also assumes a certain conception of judicial decision making. It assumes that judges perform a quasi-legislative function, that judges make the law and they may do so (in appropriate cases) by reference to policy factors and values.[59] This assumption underlies my explanation of retrospective common law: that 'in order to achieve a *fair* and *just* result the court may find it necessary to depart from the statement of law in the precedent case'.

However, such a 'Realist' conception of the function of judicial decision making is contestable. Alternative accounts of the function of judicial decisions may yield different accounts of retrospectivity in the common law. This chapter will set out two main conceptions of judicial decision making, the declaratory theory of judgment and Legal Realism. I will then demonstrate why retrospective common law only seems to be a problem if we perceive the overturning of a prior precedent as a judge-made change in the law, as the Realists do.

b. The declaratory theory of judgment

The declaratory theory of judgment, as well as Legal Realism, seeks to describe the phenomenon of judicial decision making. According to the declaratory theory, the entire common law already exists awaiting judicial declaration. As a consequence, "if the judges change their mind about a particular common law rule or principle, they are not changing the law".[60] Rather, judges are declaring the true state of the common law. Just as the Natural Law is written in the hearts of Gentiles and can be discovered by the conscience, so too the common law exists prior to its announcement and can be discovered by the court.

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[59] A Mason, Legislative and judicial law-making: can we locate an identifiable boundary? (2003) 24 *Adelaide Law Review* 15, 21.
[60] Mason, 18.

Any theory of judgment is ultimately premised upon a particular judicial method for approaching legal problems. The declaratory theory reflects a method that might be called Legalism. This method considers that the "law consists largely of posited precepts laid down in legislation or leading judicial reasoning"[61] and that legal questions can be answered through "logical reasoning based on the text of the relevant law, to the exclusion of social, political and economic considerations".[62] On this view, by adopting a Legalist approach to judicial decisions, a judge is able to work within a body of legal materials to find the correct rule and doctrine which were always part of the common law.

Since, according to this declaratory theory of judgment the court does not change the law, the common law does not operate with retrospective effect. This is because, when a court departs from a prior precedent, it is not doing so in an effort to arrive at a fair and just result. Rather, the court is removing erroneous decisions from the law. The erroneous decision (the prior precedent) was never the law *per se*, which means reliance on the precedent was not reliance on *the law*. Instead, the law has always been the rule that is later declared by the court. As Tipping J noted:[63]

> The traditional (declaratory) theory involved the proposition that in deciding what the law was the courts were deciding what it had always been…hence the courts could not, or at least should not, state that at the time of the relevant events the law was X but from the date of judgment onwards it was to be Y.

However, to some members of the judiciary, the declaratory theory of judgment is a fiction. As Lord Reid stated:[64]

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave is hidden the common law in all its splendour, and that on a judge's appointment there descends on him knowledge of the magic words 'open sesame'. Bad decisions are given when judges muddle their passwords and the wrong doors open. But we do not believe in fairy tales any more.

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[61] J Smillie, Formalism, fairness and efficiency: civil adjudication in New Zealand [1996] *New Zealand Law Review* 254, 255.
[62] Mason, 18.
[63] *Chamberlains*, Tipping J at paragraph 130.
[64] Lord Reid, The judge as lawmaker (1972) *The Journal of Public Teachers of Law,* 22.

Furthermore, with particular regard to retrospectivity, Lord Browne-Wilkinson has stated that:[65]

> the theoretical position has been that judges do not make the law; they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed; its true nature is disclosed, having existed in that form all along. This theoretical position is… a fairy tale in which no one believes… . But while the underlying myth has been rejected, its progeny – the retrospective effect of change made by judicial decision – remains.

The declaratory theory of judgment seems unpopular. Rather than exclusively confining their method to existing legal materials, most members of the judiciary seem to have "accepted direct responsibility for adapting and developing the law to meet current needs".[66]

c. Legal Realism

An alternative theory of judicial decision making is often called Legal Realism. This theory holds that judges make the law and do so by reference to policy factors and values. The court's function is still only *quasi*-legislative; it is still constrained to an extent by the existing law. Nonetheless, it is still accepted that the courts engage in some moral or political judgment when determining the law.

Just as the declaratory theory of judgment needs to be premised upon a judicial method, so does Legal Realism need a method of addressing legal questions. After all, if judges are to depart from strictly legal materials and shape the common law towards 'just and fair' outcomes, there needs to be a 'philosophical touchstone' or 'analytical framework' to guide the law toward that end.[67] As Sir Ivor Richardson has noted, for judges to make value judgments they need "a frame of reference against which to probe and test the economic, social and political questions involved".[68] This is because 'just' and 'fair' are rather vacuous terms without a framework or method for substantiating their meaning.

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[65] *Kleinwort Benson Ltd v Lincoln City Council (No. 8)* [1999] 2 AC 349.
[66] Smillie, 258.
[67] Ibid.
[68] Sir Ivor Richardson, The role of the appellate judge (1981) 5 *Otago Law Review* 1, 9.

For example, the 'philosophical touchstone' that informed Lord Atkin's decision in *Donoghue v Stevenson*[69] was arguably Christianity's neighbour principle. For Lord Cooke, the 'philosophical touchstone' was a form of fairness based on societal expectations: "that once the facts of any given case have been fully elicited most people would agree on the fair result".[70] In contrast, Sir Ivor Richardson has been sceptical of the 'fairness' framework. Instead, Sir Ivor purported to adopt an objective approach to legal change, first, in the form of functional utilitarianism, then, later, in the form of economic analysis.[71]

Regardless of the particular touchstone that judges adopt to give content to their notion of 'justice' or 'fairness', if judges are to depart from legal materials and engage in political and moral judgment, they need a method or framework in order to make judicial decisions. Under this general conception of judgment – Legal Realism – a judge performs a slight legislative function by shaping the law in accordance with a particular philosophical touchstone. When a court is overturning a prior precedent, the court is *changing* the law in order to achieve 'justice'. The adjudicative function of the judiciary means that the new statement of law is then applied as if it had always been the law. Therefore, if we view the function of judicial decision making through a Legal Realist lens, we can perceive the retrospective effects of a court overturning a prior precedent.

d. Case Study: *Ross v McCarthy*

The Court of Appeal decision of *Ross v McCarthy*[72] has been cited as an instance of Legalism in action.[73] However, it could also be viewed as an example of Legal Realism. In this case, the appellant sustained damages from a collision between his car and a cattle beast during the hours of darkness on the main highway between Auckland and Helensville.[74] The Court was asked whether the owner of the adjacent land owed a duty to the motorist to prevent livestock wandering on the highway.

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[69] *Donoghue v Stevenson* [1932] AC 562.
[70] Sir Robin Cooke, Fairness (1989) 19 *Victoria University of Wellington Law Review* 421, 422.
[71] Smillie, 269.
[72] *Ross v McCarthy* [1970] NZLR 449.
[73] Smillie, 256.
[74] *Ross v McCarthy*, 451.

The leading case directly on point in New Zealand was *Miller v O'Dowd*[75], from 1917, in which the Court of Appeal held that "in New Zealand, as at common law, the owner and occupier of land adjacent to a highway has no duty to keep his animals off the highway".[76] This decision was supported by the House of Lords in *Searle v Wallbank*[77] which found that "the owner of a field abutting on a highway is under no *prima facie* legal obligation to users of the highway…to prevent his animals from straying on to it".[78]

Counsel for the appellant submitted that the Court ought to disregard these authorities for two main reasons. First, the general tort of negligence in *Donoghue v Stevenson* had subsequently embraced this situation, rendering *Searle* wrong in law. Alternatively, even if *Searle* represented the English common law, New Zealand presented different matters of fact and law warranting a different approach to the duties of land owners adjacent to highways.

The first submission was rejected by the Court on the grounds that *Miller* had always been the law and that if "it is not a matter *res integra* it would be wholly wrong for this court at this point in time to declare the law of New Zealand to be other than it has always been understood to be".[79] In terms of differences in fact, the Court held that there were neither sufficient differences in the state of the roads nor traffic in New Zealand to justify a different approach to that in England. Lastly, although the legislature may have recognised the danger of wandering stock in the criminal law, the Court held this did not provide any justification for altering the civil legal duties of occupiers of land. Accordingly, the Court of Appeal upheld the 1917 precedent of *Miller*.

It is therefore possible to read the decision in *Ross v McCarthy* as an instance of logical reasoning based on strict application of the most directly relevant precedents, namely, the simple application of the precedent of *Miller* affirmed by *Searle*. As Turner J stated:[80]

> Only in *exceptional* circumstances will the Courts be willing to entertain an application to strike out [on] a new line differing completely from established long *settled principles* [emphasis added].

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[75] *Miller v O'Dowd* [1917] NZLR 716.
[76] *Ross v McCarthy*, 454.
[77] *Searle v Wallbank* [1947] AC 341.
[78] *Ross v McCarthy*, 453.
[79] Ibid, 454.
[80] Ibid, 557.

However, the 1932 decision in *Donoghue v Stevenson* must have unsettled the rule in *Miller*. The recognition in that case of a general common law duty to take care might have enabled the court to arrive at a different legal conclusion than in *Miller*. It was thus not necessarily a case of simply applying the only precedent available. Instead, the New Zealand Court arguably decided in favour of the approach in *Miller* over the approach in *Donoghue*, when both options were open to the Court. That is, it chose between two applicable precedents at the same level of authority.

Furthermore, according to Turner J's statement above, to conclude that the case was determined by long settled principles first requires a decision as to whether or not the case is exceptional. To determine whether circumstances are exceptional must require some degree of moral, social or economic judgment. In reasoning his decision, Turner J made the assertion that "this is a country of farmers"[81] and recognised that the issue ultimately turned upon whether the interests of motorists should outweigh "the established interests of the farming community in a country such as this".[82] Yet, to even make the assertion that *New Zealand is a country of farmers* when farmers were at the time a small minority of the population was to make a socio-economic judgment about New Zealand independent of any legal authority.

A Legal Realist can therefore provide an alternative account of the judicial method in *Ross v McCarthy*. The Court of Appeal chose between two possible legal solutions: imposing no duty on the land owner (*Searle*) or imposing a general duty of care (*Donoghue)*. In particular, the decision may be based on social claims that New Zealand is a country of farmers and that developments in transport (such as greater traffic density) should not, as a matter of political judgment, displace the 'established' interests of the farming community.

This way of viewing *Ross v McCarthy* suggests that the Legalist view of judicial decision making may be untenable. It at least demonstrates that there are different ways of viewing the legal method that courts use when deciding cases. It also illustrates that the claim that common law change acts retrospectively is largely premised upon a Legal Realist conception

[81] Ibid, 456.
[82] Ibid.

of judicial decision making as well as Legal Positivism. This is because the decision whether to overrule a prior precedent is ultimately informed by policy considerations.

e. Summation: a theoretical overview

In chapters 2 and 3 we have identified the jurisprudential premises that underlie my claim of common law retrospectivity. So far, we have addressed three layers of theoretical questions: (1) what is the law; (2) what is the proper analytical method for solving legal problems; and (3) what is the appropriate judicial function? At face value, the two assumptions that my claim rests upon (Legal Positivism and Legal Realism) seem irreconcilable: if the law is the union of primary and secondary rules there may be no need to engage in moral or political judgment. However, there are at least three instances in which Judges resort to moral and political judgment even when operating within the framework of Positivism. The first two instances are when 'rules run out': either, in terms of their identification or their interpretation.[83]

The third instance is when the court opts to use its jurisdiction to depart from a prior precedent.[84] In doing so the court employs a secondary rule of legal change. However, the decision to depart from a prior precedent is not made with sole reference to existing law. The court, in deciding to change the common law, shapes it in accordance with a particular philosophical touchstone or concept of fairness. This may have been apparent in *Ross v McCarthy*. Even though the law did not change there, the court's decision not to depart from the 1917 precedent, and not to change the primary rule, may ultimately have been premised upon a socio-economic judgment.

Hence, the claim that a court enacts retrospective law when overturning a prior precedent seems largely to rest on two jurisprudential claims. First, that the law is the union of primary and secondary rules; second, that Judges resort to moral and political judgment in deciding to depart from a prior primary rule and establish a new one. Elements of Legal Positivism and Legal Realism therefore seem to be involved. When we view these theoretical claims alongside the Court's inherent adjudicative function, the problem of retrospective common law surfaces quite abruptly: the Courts occasionally change the law (akin to legislation) whilst

[83] See Chapter 2 (b) 'Legal Positivism'.
[84] *R v Chilton* [2006] 2 NZLR 341, *Practice Statement (Judicial Practice)* [1962] 1 WLR 1234.

in the same move determining the legal consequences of past conduct (adjudication) so that the law applied is distinct from that previously promulgated. On this view, there is a problem of retrospectivity in the common law and any retrospective law abrogates the core principle that "the law should be such that people will be able to be guided by it".[85]

[85] Raz, 198.

PART B: THE SOLUTION

Chapter 4: The Prospect of Prospectivity

a. Prospective overruling – an outline

Part A has identified the problem of retrospectivity in the common law. Part B will outline and assess a possible solution. In particular, this chapter will discuss the principles that enable and constrain the court's discretion to overrule a prior precedent. I shall contend that since the court already recognises that justified reliance on prior law can constrain overruling, the same principle may inform decisions to prospectively overrule.

First, however, what prospective overruling entails needs to be outlined. Prospective overruling can take various forms. The most common form is "pure" prospective overruling. In this form the effect of the court's ruling applies exclusively to events that occur *after* the date of the decision.[86] All events occurring before that date are governed by the prior precedent, including the events that gave rise to the current proceeding. This pure approach is the orthodox form of prospective overruling in appellate courts in the United States[87] and India.[88] As will be discussed in Chapter 5, it has been criticised for removing the incentive for litigants to challenge the prevailing view of the law, as, even if the litigant is successful, the change in law will not apply to their claim.

There are permutations of the pure form. The court may find that the circumstances require "selective" prospective overruling so that the ruling is generally prospective in its effect although retrospective with regards to the parties to the current proceeding. This was, in essence, the approach was taken by the Supreme Court of Ireland in *Murphy v Attorney General*.[89] The Supreme Court held certain tax provisions to be unconstitutional and void but restricted the restitutionary right to recover payments made by way of taxes to plaintiffs in the proceeding. It has been contended that this form of overruling, as will be later discussed,

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[86] *Spectrum Plus*, Lord Nicholls at paragraph 9.
[87] See *Chevron Oil Co v Hudson* (1971) 404 US 97; *Linkletter v Walker* (1965) 381 US 618; *Bingham v Miller* (1848) 17 Ohio 445.
[88] See *Golak Nath v State of Punjab* (1967) 2 SCR 762; *IndiaCement Ltd v State of Tamil Nadu* (1990) 1 SCC 12.
[89] *Murphy v Attorney General* [1982] IR 241.

fails to treat like cases alike since it discriminates between the parties to the proceeding and non parties even though the relevant facts may be identical.

Alternatively, a court may find it appropriate to overrule a precedent with "delayed" prospective effect so that the ruling will not take effect until a future date. For instance, the European Court of Justice delayed the effect of its ruling in *Banca Popolare di Cremona v Agenzia Entrate Ufficio Cremona*[90] to allow the State a reasonable opportunity to introduce new legislation.

In contrast to the Supreme Courts of the United States and India, and the European Court of Justice, prospective overruling has not found favour in Australia or Canada. In *Re: Edward and Edward*[91] the Saskatchewan Court of Appeal held prospective overruling to be "a dramatic deviation from the norm in both Canada and England". The High Court of Australia in *Ha v New South Wales*[92] went as far as declaring that it had *no power* to overrule cases with only prospective effect.

The position in New Zealand and the United Kingdom is uncertain. The House of Lords in *Spectrum Plus* kept the door open to the concept of prospective overruling. However, the House of Lords refused to recognise any legitimate forms or legitimate instances of it. Tipping and Thomas JJ in *Chamberlains* also entertained, in the abstract, the possibility of prospective overruling and Tipping J strongly favoured the selective form.

In my opinion, the particular form of the prospective overruling should vary with the circumstances, as is proper for a discretionary tool designed to mitigate the adverse effects of retrospective change.[93] Accordingly, I propose that courts should have the discretion to prospectively overrule decisions. Although the form may vary depending on the circumstances, I disagree with Tipping J in *Chamberlains* and contend that *pure* prospective overruling ought to be the orthodox form. I will discuss this final conclusion further in Chapter 5(f).

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[90] *Banca Popolare di Cremona v Agenzia Entrate Ufficio Cremona* (Case C-475/03), 17 March 2005.
[91] *In Re: Edward and Edward* (1987) 39 DLR (4th) 654, 660.
[92] *Ha v New South Wales* (1997) 189 CLR 465.
[93] *Spectrum Plus*, Lord Nicholls at paragraph 8.

b. Constraining and enabling principles

However, courts ought not to invoke prospective overruling in all instances. Only in certain circumstances will prospective overruling be appropriate.[94] To identify these circumstances we must first survey the factors which a court considers when deciding whether or not to overrule a prior precedent. We can distil from these factors the instances in which prospective overruling would be appropriate.

In chapter 3, I suggested that the court, when overruling, performs a *quasi*-legislative function. The court's legislative function is constrained because "the permissible limits of judicial law-making are closely associated with the doctrine of precedent".[95] Hence, when departing from a prior precedent the court needs to provide a justification.

The following chart roughly describes the principles that may enable a court to, or limit a court from, overruling a prior precedent.[96] The chart demonstrates a three stage analysis, with case examples, that the courts appear to use when deciding whether to overturn a prior precedent. The first stage shortcuts the enquiry by providing a conclusive justification for overturning a prior precedent. The second and third stages represent a balancing exercise and have a list of factors that substantiate the propositions.

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[94] See *Dalton v St Luke's Hospital* 141 A 2ed 273 (1958) N.J. for the approach taken by United States Courts in justifying the limitation of the retrospective effect of its decisions.

[95] A Mason, Legislative and judicial law-making: can we locate an identifiable boundary? (2003) 34 *Adelaide Law Review* 15, 23.

[96] The chart is based upon a synthesis of: A Mason, Legislative and judicial law-making: can we locate an identifiable boundary?, (2003) 34 *Adelaide Law Review* 15, 23; B V Harris, Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle, (2002) 118 *Law Quarterly Review* 408**;** J W Harris, Towards Principles of Overruling – When a Final Court of Appeal Second Guess? (1990) 10 *Oxford Journal of Legal Studies* 135; L V Prott, When Will a Superior Court Overrule its Own Decision, (1978) 52 *The Australian Law Journal* 305; J Hodder, Departure from "Wrong" Precedents by Final Appellate Courts: Disagreeing with Professor Harris, (2003) *New Zealand Law Review* 161.

1. Conclusive Justification: the change would remove an unacceptable proposition in law

Mabo v Queensland (No. 2) (1992) 175 CLR 1
R v L (1991) 174 CLR 529

2. Enabling Principles: The change would improve the law, because:

a. Circumstances have changed
Miliangos v George Frank Textiles Ltd [1976] AC 443

b. The Precedent was *per incuriam*
Queensland v The Commonwealth (1978) 139 CLR 585
Attorney General v Ngati Apa [2003] 3 NZLR 643

c. The change would remove an injustice to an identifiable class of persons
Dick v Burgh of Falkirk 1976 SLT 21
Vesty v Inland Revenue Commissioners [1980] AC 1148

d. The change would remove uncertainty in the law
The Johanna Oldendorff [1974] AC 479

e. The change would align with collateral developments in the law
Caltex Oil Pty Ltd v The Dredge Willemstad (1976) 136 CLR 529
Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR

f. The change would remove incoherence in the law
Pfeiffer v Rogerson (2000) 203 CLR 503
Zecevic v Director of Public Prosecutions (1987) 162 CLR645

g. The precedent is merely wrong (doctrinal disagreement)
Parker v R (1963) 111 CLR 610
Cardy v Commissioner for Railways (1960) 104 CLR 274
National Westminster Bank v Spectrum Plus [2005] UKHL 41
Chamberlains v Lai [2007] 2 NZLR 7

3. Constraining Principles: The precedent should remain, because:

a. The question is moot
Food Corporation of India v Antclizo Shipping [1988] 2 All ER 513

b. The precedent has been implicitly affirmed by the legislature
Knuller v DDP [1973] AC 435
President of India v La Pintada [1985] AC 104

c. There has been justified reliance on the precedent
Geelong Harbour Trust v Gibbs, Bright and Co (1970) 122 CLR 504
R v Shivpuri [1987] AC 1
R v Secretary of State for the Home Department, ex parte Khawaja [1984] AC 74

d. There are no new reasons to change the rule (finality)
R v National Insurance Commissioner, ex parte Hudson [1972] AC 944
Jones v The Commonwealth (1987) ALJR 348
Fitzlett Estates Ltd v Cherry (Inspector of Taxes) [1977] 3 All ER 996

Figure 2.

The first justification (1) is *conclusive*, so if the precedent contains an unacceptable proposition in law, then, regardless of any possible constraining factors, the precedent should be overturned. For instance, the High Court of Australia in *Mabo v Queensland (No. 2)* overturned the Privy Council decision in *Cooper v Stuart*[97] which stated the unacceptable proposition that at the time of settlement Australia was "practically unoccupied without settled inhabitants or settled law".[98]

Alternative justifications require a *balancing exercise* between enabling principles (2) and constraining principles (3). Principles 2a to 2f are settled factors that may create the impetus for a court to depart from a precedent. It is, however, contentious whether principle 2g (the precedent is merely wrong), as a principle distinct from principles 2a to 2f, is a legitimate means of justifying a departure from established law.[99]

However, even if there are enabling principles to justify the change, there may also be constraining principles that outweigh the impetus for change. Accordingly, principles 3a to 3e operate to constrain the court from overturning a prior precedent. For example, the House of Lords in *President of India v La Pintada*[100] unanimously declined to overrule *London, Chatham and Dover Railway v South Eastern Railway Co*[101] on the grounds that, despite the rule in *London, Chatham* being unjust, Parliament has enacted a statutory code partially dealing with the issues of interests on damages and reversal of the old rule would not cohere with the code.

It is my opinion that, with the exception of the rare circumstance of an unacceptable proposition in the law, the decision whether or not to overturn a prior precedent is ultimately determined by the balancing of certain factors that would improve the law against particular principles that constrain change. Accordingly, in most situations, for the court to justify a departure from a precedent it must, first, identify an enabling principle that provides the impetus for change, and second, demonstrate that none of the constraining principles outweigh the enabling principle.

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[97] *Cooper v Stuart* (1889) 14 App. Cas. 286.
[98] *Mabo v Queensland (No.2)*, 291.
[99] See J Hodder, B V Harris above n 96.
[100] *President of India v La Pintada* [1985] AC 104.
[101] *London, Chatham and Dover Railway v South Eastern Railway Co* [1893] AC 909.

c. Principles relevant to prospective overruling

Of most immediate relevance are the constraining and enabling principles that relate to prospective overruling. Of primary concern is (3c) *there has been justified reliance on the precedent*. This is because the central harm of retrospective law is that it undercuts reliance on the rule of law. If prospective overruling is intended to mitigate the adverse effects of common law change, then it should primarily be targeted towards instances in which persons relied on the common law and were justified in doing so.

As Tipping J noted:[102]

> Decisions should continue to speak retrospectively for all purposes unless they can be said to change the law… [and] the decision being overruled must have been of a kind which could fairly be regarded as settling the law on the point.

Hence, in my opinion, there are secondary principles that should also shape the instances in which the law is 'settled' so as to make only prospective overruling appropriate. These are the related principles (3d) *there are no new reasons to change the rule* and (2g) *the precedent is merely wrong*. The two principles are related because if there are no new reasons then the justification for change can only be on the grounds that the precedent was merely 'wrong'. Most instances of a precedent being deemed 'merely wrong' occur when the court disagrees with the prior precedent on the grounds of statutory construction or general doctrine or policy. As Cooke P noted:[103]

> it could not be right for this Court to overrule a prior precedent of its own…merely on the ground that on a finely balanced point of statutory construction the later Bench preferred a different view. Some more cogent reason must be necessary to justify departure from such degree of uncertainty as the doctrine of *stare decisis* achieves.

It may be that the benefit of improving the law in finely balanced questions of doctrine and construction may not outweigh the detriment of changing the law when there are no external factors prompting the change. This *no new reasons/merely wrong* principle can act to strengthen the *justified reliance* principle. If there are no new reasons for departing from established law

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[102] *Chamberlains*, Tipping J at paragraph 143.
[103] *Dahya v Dayha* [1991] 2 NZLR 150, 155.

then the judge-made change is "falling from a blue sky". In other words, if there are no new reasons, and the impetus for change is a mere doctrinal dispute, the change in law would be even more unforeseeable and unpredictable. Reliance on the precedent may have been entirely justified. Constraining principle 3d (no new reasons) therefore strengthens or gives greater content to constraining principle 3c (justified reliance).

Thus, it is appropriate for a court only to prospectively overrule a prior precedent when there was justified reliance on the precedent. However, when the impetus for change relates to the enabling principles 2a-2f, the reliance on the prior precedent may not be reasonable. This is because principles 2a-2f are external factors that cast doubt on the validity of the precedent.

Ultimately, therefore, deciding whether to prospectively overrule requires a similar analysis to that required when the court decides to overrule a prior precedent. Namely, the approach would require an assessment of whether there was sufficient reliance on the prior precedent to justify prospective overruling.

d. Case study: *Geelong Harbour Trust v Gibbs, Bright & Co*

In my opinion, the judgment of the High Court of Australia in *Geelong Harbour Trust v Gibbs, Bright & Co*[104] (affirmed by the Privy Council)[105] is an example where it would have been appropriate to overrule the prior precedent with pure prospective effect.

Gibbs, Bright & Co were the agents of the vessel the *Octavian*. Due to no fault on part of the agents, but rather due to strong winds and severe squalls, the *Octavian* broke free of its moorings and damaged a beacon.[106] The Harbour Trust sued Gibbs, Bright & Co under Section 110 of the Geelong Harbour Trust Act 1951(Vic.) (hereafter the 'Victorian Act'). The Court was asked to overturn *Townsville Harbour Trust v Scottish Shire Line*[107] which concerned the interpretation of Section 196 of The Harbour Boards Act 1982 (Q.) (hereafter

[104] *Geelong Harbour Trust v Gibbs, Bright & Co* (1970) 122 CLR 504 (HCA).
[105] *Geelong Harbour Trust v Gibbs, Bright & Co* (1974) 2 ALR 362 (PC).
[106] *Geelong Harbour,* 504 (HCA).
[107] *Townsville Harbour Trust v Scottish Shire Line* (1914) 18 CLR 306.

the 'Queensland Act'). The Queensland Act had "the same general character"[108] as the Victoria Act. The High Court of Australia in *Townsville Harbour* read into s 196 of the Queensland Act a requirement that the collision be the result of negligence or another tortious act or omission for liability under the section to arise.[109] The appeal to the High Court in *Geelong Harbour* thus concerned whether s 110 of the Victorian Act ought to be interpreted in accordance with *Townsville Harbour* so as to read into the section a requirement of negligence.

The majority of the High Court (McTiernan, Menzies, Kitto JJ), although suggesting that the *Townsville Harbour Board* construction was wrong, held that it had stood so long unchallenged in Australia that the High Court ought to follow it: [110]

> Nevertheless in Australia a decision of this Court has stood without question for over fifty years and has, inevitability, been present to the minds of those responsible for legislation made during this time, including the Act now under consideration. *Moreover, commerce has, no doubt, been conducted on the correctness of what this Court has decided.*
>
> In developing branches of the law a court of appeal, not absolutely bound by previous decisions, should not be too closely fettered by what has been decided earlier, but the *construction of legislation* seems to us to be part of the law where change, by court order, carries no premium. In this field, reform is best left to Parliament by means of amending legalisation *with prospective effect only*. [Emphasis added].

Three important points can be taken out of this decision. First, although 'comity with the legislature' in part constrained the court from overturning the precedent, another key factor was also the (presumed) justified reliance on *Townsville Harbour Trust*. Second, the court concludes that statutory construction is an area of law where judicial change 'carries no premium', probably because there are 'no new reasons' for a new interpretation that were not addressed in the prior decision. Third, the court preferred legislative change, over judicial change, because of the harm of retrospectivity inherent in courts overturning prior precedents.

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[108] Ibid, 505.
[109] *Geelong Harbour Trust* (PC) 363.
[110] *Geelong Harbor Trust* (HCA), McTiernan and Menzies JJ, 515.

It is my opinion that, in a case such as this, it would be appropriate to overrule *Townsville Harbour Trust* with pure prospective effect. Even if it would deny the successful applicant immediate relief, the Harbour Trust would still benefit from the precedent value of the decision. The judicial gloss on s 110 of the Victorian Act, and s 196 of the Queensland Act, that requires negligence for liability to flow, would be removed for all incidents that occur after the date of the judgment whereas the claim before the court would be governed by the prior precedent. This would achieve the same outcome in terms of the parties to the proceeding since the prior precedent would still be applied in the case. But prospective overruling would also remove the erroneous construction of s 110 for any future application of the section.

e. Summation: when a court may prospectively overrule

With regard to questions of overruling, Lord Diplock in *Geelong Harbour Trust* noted that: [111]

> Under a system of law which admits exceptions to the strict rule of *stare decisis* there is no simple answer to these questions. It depends upon striking a balance between many factors whose relative importance may vary considerably from case to case.

Accordingly, it is not possible to provide a hard and fast rule as to when a court may prospectively overrule. However, we can distil out of the court's general approach to overturning precedents the relevant principles. I contend that when there has been justified reliance on the prior precedent the court ought to look to prospective overruling. Moreover, the absence of new reasons should strengthen the claim that reliance on the precedent was justified. Furthermore, there is nothing novel about this judicial assessment. As the case study of *Geelong Harbour Board* demonstrates, courts already engage in this type of enquiry.

[111] *Geelong Harbour Trust* (PC) 367.

Chapter 5: Crossing the Rubicon

a. Objections to prospective overruling

So far I have argued that, to avoid the harm of retrospective common law-making, when there has been justified reliance on a prior precedent which the court finds it necessary to overturn, the court ought to overrule the precedent with prospective effect only. However, it could be contended that prospective overruling would create more problems that it solved. I disagree. This chapter will set out the various objections to prospective overruling and attempt to refute them.

There are five general categories of objections, some of which are more pertinent than others. Prospective overruling can be objected to on (1) constitutional grounds, contending that prospective overruling is outside the legitimate function of a judiciary. It can also be argued that (2) prospective overruling would be overused or would abrogate certainty in the common law. Alternatively, it has been argued that (3) there is no need for prospective overruling as the courts already adopt a 'two stage law making' process which achieves the same outcome. A further concern is that pure prospective overruling may (4) remove the incentive to challenge the prevailing view of the law. Lastly, it has been argued that (5) selective prospective overruling discriminates as it fails to treat like cases alike.

There are adequate responses to the first four objections. Although I find the 'discrimination objection' the most problematic barrier to prospective overruling, the objection only relates to the selective form of prospective overruling.

b. Constitutional objection

Lord Devlin considered prospective overruling to be "the Rubicon that divides the judicial and the legislative powers".[112] Accordingly, the constitutional objection represents a cluster of claims that the Judiciary, because of its institutional features, should not prospectively overrule. These institutional features include: insulation from political pressure and accountability, restricted access, the limited perspective of viewing only the facts before the

[112] Lord Devlin, *The Judge* (Oxford University Press, 1979) 12.

court, and the provision of relief that "looks backward and compensates, punishes or invalidates an act which has already been committed".[113] Because of these institutional characteristics, it is argued that the courts should not prospectively overrule as (i) the court would be making new law without applying it to the case before the court, and in doing so, the court is (ii) looking beyond the facts before the court which (iii) usurps the role of the legislature.

I do not consider these objections to be cogent. First of all, I doubt it is accurate to characterise a common law Judiciary as having a purely retrospective viewpoint. Instead, they play a dual role: deciding the legal status of past events, but also developing and determining the law as it will apply on future occasions. Each pronouncement of law is "descriptive of what the judge believes the law to be, and prescriptive of what it should be in the future".[114] Moreover, it could be contended that part of the constitutional function of the Judiciary is to uphold the rule of law which entails removing erroneous and 'wrong' decisions from the law. So that it is constitutionally legitimate for the courts to develop the law and prospective overruling enables the courts to perform their judicial function without harming the reliance aspect of the rule of law.

More importantly, the constitutional objections lose their weight once we recognise, as we did in Chapter 3, that a court performs a quasi-legislative function when deciding cases. The constitutional objections ultimately rest upon the declaratory theory of judgment. The harm of (i) 'making new law without immediate application' and (ii) 'looking beyond the facts before the court' is that it requires the court to engage in some moral or political speculation and judgment. The essence of the objection is that, a court, insulated from political pressure and not directly responsive to society, is not the best institution to engage in such speculation and judgment.

Putting aside for a moment this normative claim (the courts *ought* not to engage in political judgment), it cannot be said, in a descriptive sense, that judicial decisions conform to the declaratory theory of judgment. Therefore, if it is the case that courts resort to moral and political judgment then it is appropriate for the court to occasionally prospectively overrule a

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[113] A G L Nichol, Prospective overruling: a new device for English courts? (1976) 39 *Modern Law Review* 548.
[114] Nichol, 542.

decision. Only if the declaratory theory were, in the minds of the judiciary, more than a mere 'fairytale'[115] would the constitutional objections have force.

Accordingly, it is my opinion that once we recognise the quasi-legislative function currently being performed by the court, regardless of our normative assessment of this state of affairs, we ought to recognise the applicability of prospective overruling in such a state of affairs. Therefore, I do not accept that it is constitutionally illegitimate for a court to overrule a prior precedent with prospective effect only.

c. Certainty objection

An initial concern with prospective overruling with regards to the certainty of the law is that judges will resort to the remedy too frequently. However, as set out in Chapter 4, prospective overruling should only be used in certain circumstances, namely, where there has been justified reliance on the prior precedent and this principle of reliance is not outweighed by the enabling principle concerning the injustice of the old rule.

A more relevant objection is that the availability of prospective overruling would make overruling more common and thus upset certainty in the common law. It is true that the availability of prospective overruling would replace the constraining principle of justified reliance, which means that there may be a slight increase in the number of decisions that overrule prior precedents. For example, the High Court of Australia could have prospectively overturned, instead of affirming, *Townsville Harbour* in *Geelong Harbour* since justified reliance on the prior precedent would no longer be a constraining principle. But the increase in overruling should not be overstated. It should only occur when there has been justified reliance and upsetting that reliance would be a greater injustice than applying the old rule to the current case.

In terms of uncertainty in the common law, even in a judicial system where overruling is rare, the outcome of a particular dispute is not necessarily certain. As Hart identified, there is uncertainty born out of unclear *identification* and unforeseen *application* of legal rules. Uncertainty also arises from the possibility of the court departing from a prior precedent.

[115] In reference to the statements of Lord Reid and Lord Browne-Wilkinson at Chapter 3 (b).

Removing one constraining factor from one of the sources of uncertainty in the common law will, in my opinion, have only a small impact on the degree of certainty in a common law system.

Alternatively, even if it does lessen certainty, by both recognising the retrospective effect of the common law and by protecting justified reliance on the law, prospective overruling upholds the rule of law to a significant degree. It is a double-edged sword: the use of the tool tends to undermine the rule of law in judicial decision making, in some respects, yet it is used to mitigate the threats to the rule of law in the particular case.

It is therefore my opinion that the certainty objection to prospective overruling is overstated. Although there will be a slight increase in overruling, I contend that judicial reform of the law is central to the development of the common law and that this should proceed whilst we also recognise justified reliance on the law as far as possible. Overall, the benefits of prospective overruling therefore outweigh any marginal decrease in certainty.

d. Necessity objection

It has been argued that prospective overruling is unnecessary since common law courts apply what Karl Llewellyn calls "two stage law making"[116] which achieves the same ends as prospective overruling.[117] The first stage occurs when a court suggests, in *obiter*, that a prior precedent ought to be reconsidered at a later time. Such judicial criticism makes further reliance on the prior precedent unreasonable. In some cases the court may go as far as suggesting an alternative rule that may replace the precedent when it is reconsidered. The second stage of reform occurs when a later court overturns the criticised prior precedent to apply a new rule, or adopt the rule previously suggested.

This 'two stage technique' allows the common law to develop organically whilst avoiding most of the harms of retrospective common law. This is because the court can (at stage one) discredit the prior precedent so as to prevent any justified reliance on the overturned precedent while also (at stage two) overturn the prior precedent and formulate a new rule. It

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[116] K Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown, 1960), 305.
[117] See M L Friedland, Prospective and retrospective judicial law making, (1974) 24 *University of Toronto Law Journal*, 170; W Friedmann, Limits of judicial lawmaking and prospective overruling, (1966) 29 *Modern Law Review*, 593.

has been argued that this technique achieves the same outcome as prospective overruling, rendering it unnecessary.

However, there are two key distinctions between the 'two stage technique' and prospective overruling: first, the two stage technique produces less certainty in the law in the intervening period, and second, it also fails to fully avoid instances of retrospective law making.

In terms of certainty, under the two stage technique, the stage one *obiter* only casts doubt on the prior precedent and only occasionally suggests the direction the law will take. There is no guarantee that the stage two *decision* will depart from the prior precedent in a manner that is consistent with the prophecy at stage one. Furthermore, the effect of the stage one *obiter* is to muddy the waters so as to make reliance on the precedent precarious. Hence, the status of the law between the stage one and stage two is uncertain (see Time T_3 below).

In terms of retrospectivity, the key distinction between the two stage technique and prospective overruling is that the former applies the new rule to all *proceedings adjudicated* in and after the second decision. To that extent, the two stage technique still involves retrospectivity. Retrospective common law will be enacted when an event occurs at T_1, when it was reasonable to rely on the old rule, but the legal consequences of the event are adjudicated at T_4 or T_5, when the new rule is applied. By applying the new rule at T_4 or T_5, the court is attaching new legal consequences to an event that occurred prior to the enactment of the new rule (T_1).

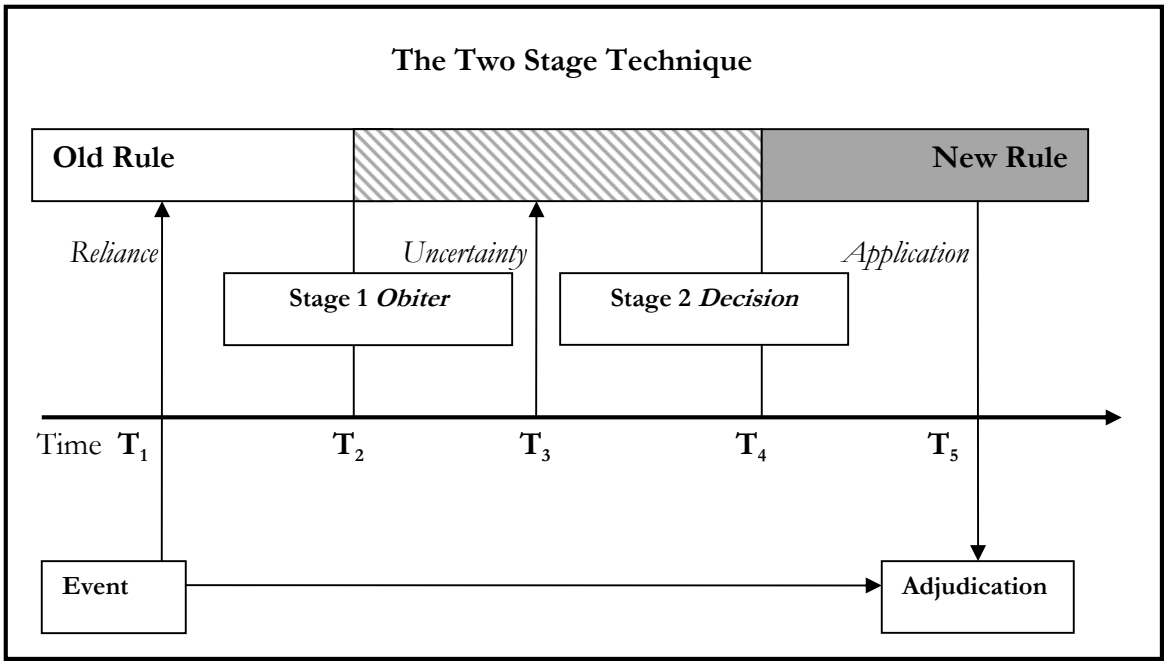

Figure 3.

In contrast, prospective overruling applies the new rule only to *events* that occur after the decisions. Events before the decision are still determined in accordance to the old rule. This avoids all instances of retrospective common law. Moreover, prospective overruling does not create the uncertainty that is inherent between stage one and stage two of the two stage technique.

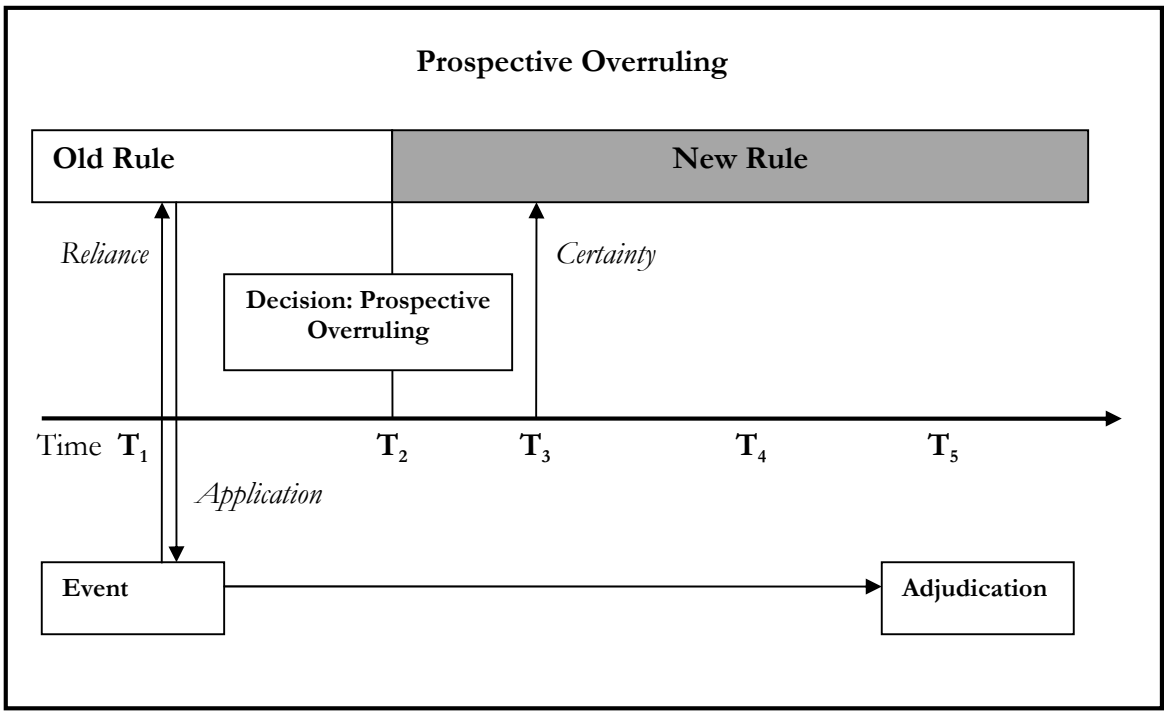

Figure 4.

It cannot be said that the two stage technique achieves the same ends as prospective overruling. Therefore, since prospective overruling has two key advantages over the two stage technique, the latter is an inadequate substitute.

e. Pragmatic objection (to pure prospective overruling)

The most salient argument against pure prospective overruling is the twin objection that prospective overruling (i) leaves a successful litigant without a remedy and (ii) removes any incentive to challenge the prevailing view of the law.[118] The criticism is that although a court may agree with a litigant's contention that the law ought to be changed, were the court to enact the change with prospective effect only, the litigant would not benefit from the change. In the immediate case, this means that a court may agree that the old rule is unfair, yet still apply the old rule to the parties to the proceeding. From a broader perspective, this also means that there is no incentive to ask the court to depart from a prior precedent. The absence of the incentive, it is argued, will stifle the development of the common law.

It is worth noting that this objection applies only to *pure* prospective overruling and it is this criticism that directs Tipping J in *Chamberlain* to favour the *selective* form. This form of prospective overruling avoids this objection as it confers the benefit of the change in law on the immediate parties. However, as we shall see below, there are also compelling objections to the selective form.

There are two responses to the pragmatic objection. The first response distinguishes between different 'types of litigants', and the second, more general, response compares the incentives under prospective overruling to those operative under the current (retrospective) approach of the courts.

One way to address this objection is to distinguish between two types of litigants. A litigant may be only interested in the outcome of a particular dispute[119] (a one-off litigant). Alternatively, a litigant may be interested in the long term effect of the outcome (an institutional litigant). These institutional litigants, like Harbour Boards, may be interested in

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[118] *Spectrum Plus*, Lord Nicholls at paragraph 27.
[119] Nichol, 549.

the long term effect as they are 'repeat players' in the enforcement of the law and are concerned about the precedent value of the decision and how it will apply in future cases.

The pragmatic objection does not negate the value of prospective overruling with regards to institutional litigants. If an institutional litigant is successful in convincing the court to overturn a prior precedent, although it will not immediately benefit from the outcome of the particular dispute, it will nonetheless benefit from the change in the long term. It follows that there is still an incentive for institutional litigants to challenge the prevailing view of the law even when the court can prospectively overrule because of their interest in the precedent value of a particular decision.

A more general response to the objection addresses the valid concern of both one-off and institutional litigants: that pure prospective overruling leaves them without a remedy. This concern needs to be compared with what occurs when a court faces the retrospective overruling of a decision. Here the court may be constrained from overturning the precedent at all because of past reliance on it. This means that, under the retrospective approach, the one-off litigant seeking a departure from a prior precedent may also be unsuccessful in obtaining a remedy because the court felt constrained by the principle of justified reliance. The outcome would be the same: the litigant seeking change in the common law would not be awarded an immediate remedy.

Similarly, although it is a reasonable concern that pure prospective overruling may disincentivise a one-off litigant from challenging the prevailing view of the law, since the outcome under both approaches may be the same (no remedy in the immediate case) there is no change to the incentive structures of litigation.

Therefore, the pragmatic objection ultimately does not negate the value of pure prospective overruling. Institutional litigants still have a long term interest in the proceeding aside from the immediate provision of a remedy. Moreover, the instances in which I contend it is appropriate for a court to prospectively overrule are instances in which one-off litigants and institutional litigants alike are otherwise unlikely to obtain a remedy at all due to the strength of the justified reliance principle. Hence, the outcome for the immediate litigants under the retrospective and pure prospective overruling would usually be the same.

f. Discrimination objection (to selective prospective overruling)

The final objection criticises only *selective* prospective overruling. Lord Nicholls in *Spectrum Plus* held this approach to be discriminatory because it treats persons in like cases differently.[120] This undermines the basic tenet of the administration of justice that like cases ought to be treated alike.[121]

The discrimination occurs when a court decides to overrule a prior precedent so that the new rule applies to all events after the date of judgment as well as to the event that is subject to the current proceeding before the court. Yet another event not before the court may be factually and temporally identical. By virtue of an event being the subject of the proceeding that prospectively overrules the old rule, the new rule is applied to the event. However, the old rule is applied to the identical event that is not subject to the proceeding. Identical events, that occurred at the same time, may attract different legal consequences by virtue of the court using selective prospective overruling, and it may be largely a matter of chance that one event, and not its identical counterpart, came first before the courts.

At face value, it could be contended that enacting any legislative or quasi-legislative change necessarily entails a degree of discrimination since any substantive change in law makes something unlawful today that was lawful yesterday. Every legislative change, therefore, to some extent fails to treat like cases alike. However, a more sophisticated way to look at legislative change is to say that, in fact, two events that occur at different times are not 'like cases'. A characteristic of an event is the time at which it occurred. Hence legislation would not discriminate as different legal consequences would attach to *different* events. This is where the comparison between selective prospective overruling and legislation uncovers a crucial distinction. Unlike legislation, selective prospective overruling fails to treat like cases alike since two identical events that occur *at the same time* can attract different legal consequences.

Although Tipping J prefers the selective form, he notes that "exempting the immediate parties from any general non-retrospective operation is itself somewhat arbitrary".[122] However, Tipping J dismisses this concern on the grounds that a "small degree of

[120] *Spectrum Plus*, Lord Nicholls at paragraph 27.
[121] R Cross & J W Harris, *Precedent in English Law* (Clarendon Press, 1991) 228.
[122] *Chamberlains*, Tipping J at paragraph 140.

arbitrariness must be accepted in the interests of the law as a whole. To do otherwise … would stultify the common law method…".[123] However, where Tipping errs in his analysis is in assuming that prospective overruling uniquely stifles development of the common law. As discussed above, the constraining principle of justified reliance also stifles development. Since prospective overruling is a mere substitute for the constraining principle of justified reliance, Tipping J is wrong to assume that pure prospective overruling would further stifle development. Hence, there are no 'interests of the law as a whole' to justify the arbitrary nature of selective prospective overruling.

The discrimination objection successfully identifies that selective prospective overruling undermines a basic tenet of the common law. Therefore, if a court were to prospectively overrule, the orthodox form ought to be the *pure* prospective form.

g. Case Study: *Royal Bank of Scotland Plc v Etridge*

The House of Lords employed pure prospective overruling, in all but name, in *Royal Bank of Scotland Plc v Etridge* (No 2).[124] This case elucidates the above arguments that attempt to negate the objections to prospective overruling.

Etridge concerned whether a bank had rebutted the inference of undue influence which arose when a wife acted as surety for her husband's loan. The House of Lords in *Etridge* applied the prior precedent of *Barclays Bank Plc v O'Brien*[125] which required banks to communicate to the wife the risks she was taking when she was standing as surety for her husband's loan, and to advise her to take independent legal advice.[126] However, the Lords were dissatisfied with the requirement in *O'Brien* and laid down a new rule requiring further steps to be taken:[127]

> For the future a bank satisfies these requirements if it insists that the wife attend a private meeting with a representative of the bank at which she is told of the extent of her liability as surety, warned of the risk that she is running and urged to take independent advice.

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[123] Ibid.
[124] *Royal Bank of Scotland Plc v Etridge* (No 2) [2002] 2 AC 773.
[125] *Barclays Bank Plc v O'Brien* [1994] 1 AC 180.
[126] *Etridge*, Lord Nicholls of Birkenhead, 805-806
[127] Ibid, Lord Nicholls, 804.

Lord Nicholls went on to confirm the pure prospective application of the new requirements:[128]

> These steps will be applicable to future transactions. In respect of past transactions, the bank will ordinarily be regarded as having discharged its obligations if a solicitor who was acting for the wife in the transaction gave the bank confirmation to the effect that he had brought home to the wife the risks she was running.

The first key point to note in the *Etridge* decision is that it is "a case of the court enunciating the effect of a doctrine which is established entirely by case law"[129], namely, the doctrine of undue influence. This aspect is relevant to the constitutional objection. The court is performing a quasi-legislative function when formulating common law requirements for the formation of a valid contract. When the court changes these requirements, it is again performing a quasi-legislative function. Once we recognise this state of affairs, we can recognise prospective overruling as constitutionally appropriate.

It is also worth noting that at no point was the law, either before or after the *Etridge* decision, uncertain. The rule in *O'Brien* could be relied upon to govern transactions prior to the *Etridge* decision, while future transactions, as Lord Nicholls clearly states, were to be governed by the new rule. This also affirms why the approach taken by the House of Lords in *Etridge* is more appropriate than the two stage technique. This is because the *Etridge* approach leaves no interim period of uncertainty, and also because the new rule applies to future *transactions*, not future *proceedings*, which avoid all instances of retrospective common law.

Etridge is also an example of the interests of both institutional and one-off litigants. The Royal Bank of Scotland had an interest in the outcome of the particular dispute as well as reformulation of the law of undue influence. In contrast, Ms Etridge was only concerned with the validity of the security.

In terms of the incentive to litigate, the outcome in the immediate case was the same as if *O'Brien* was affirmed. Ms Etridge did not obtain a remedy, and the security agreement was

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[128] Ibid, 812.
[129] M Arden, Prospective overruling, (2004) 120 *Law Quarterly Review* 7.

valid, since the rule under *O'Brien* was not broken. The prospective overruling of *O'Brien* would not arrive at a different conclusion, in the immediate instance, than if *O'Brien* had been affirmed since *O'Brien* still governed transactions prior to the date of judgment. Since prospective overruling does not change the immediate outcome, prospective overruling does not affect the incentive structure to litigate.

The last point to note is that the House of Lords did not apply the new (better) rule to the claim before the court (selective prospective overruling). If it had, it would have treated Ms Etridge differently to another aggrieved wife who had been privy to an identical transaction at the same time. Hence, the House of Lords avoided treating like cases differently.

h. Summation: should a court prospectively overrule?

In my opinion, once we recognise that the declaratory theory of judgment is, to the judiciary, a fairy tale, then there can be no legitimate constitutional concerns with prospective overruling as a solution to retrospective common law. Although prospective overruling may slightly increase the instances in which the courts overturn precedents, the impact of this on the certainty of the common law is negligible. Moreover, the two stage technique is not an adequate substitute for prospective overruling and if pure prospective overruling used in the appropriate instances outlined in Chapter 4, it will not deter litigation, nor will it fail to grant the appropriate remedies. Lastly, pure prospective overruling is to be preferred over selective prospective overruling as the later may discriminate between identical events. As a result, I contend that the courts ought to have the discretion to overrule prior precedents with pure prospective effect.

CONCLUSION

There is something wrong with punishing or penalising people for conduct performed before it became unlawful. When a court overturns a prior precedent it runs the risk of doing just that. The competing aims of fairness and certainty in the common law create an underlying tension. When this tension is coupled with the adjudicative function of the court, a court may find it necessary to change the law to achieve a fair outcome yet it is required to apply the change in law with retrospective effect. Such retrospective common law is an affront to the rule of law.

However, this claim that the common law operates with retrospective effect is premised upon two assumptions. First, that the law consists of clear rules laid down in authoritative precedents, meaning that the law will change when the precedents change. Second, that the courts perform a quasi-legislative function both when laying down a precedent for the first time and, more importantly, deciding to depart from a prior precedent at a later time. This quasi-legislative function necessarily involves the exercise of some moral or political judgment. On this view, since the law can be found in rules embodied in precedent cases, and since these rules may change as a result of moral and political discretion, the court acts as both legislator and adjudicator. The outcome is retrospective common law.

If we recognise that the courts do create retrospective common law, then we ought to consider a solution to this problem. A tenable solution is found in prospective overruling. This tool, I have contended, ought to be used when there has been justified reliance on the prior precedent. I have further argued that Courts already recognise that justified reliance on a prior precedent may constrain their discretion to overrule a prior precedent. Hence, there exists an identifiable class of instances in which prospective overruling may be legitimately used as well as a competency on part of the courts to enquire whether a particular case falls into this class.

Overruling prior precedents in this limited way is a legitimate exercise of the court's remedial discretion. Since we assume that the courts perform a quasi-legislative function, there are no overwhelming constitutional objections to prospective overruling. Moreover, prospective

overruling neither disrupts the certainty of the law nor is it inter-changeable with the 'two stage technique'. The selective form of prospective overruling, on the other hand, introduces an unnecessary degree of arbitrariness into adjudication by giving special status to the events that are the subject of the current proceeding. The pure form of prospective overruling may be criticised for stifling the development of the common law. However, where overruling would not otherwise occur due to the strength of the justified reliance principle, the immediate outcome in cases would be the same for the litigants than if the court prospectively overruled, and thus there will be no change in incentives to litigate.

As a means of summation, let us see where my conclusions on prospective overruling would lead in the cases we have studied. On my view, in *Spectrum Plus*, the House of Lords ought to have overruled *Siebe Gorman* with pure prospective effect provided reliance on *Siebe Gorman* was justified in the circumstances. This would mean that the debenture before the court would be viewed as fixed and any other debentures with the same characteristics formed after the judgment in *Spectrum Plus* would be floating. Similarly, in *Ross v McCarthy*, it would have been open to the New Zealand Court of Appeal to impose a general duty of care on occupiers of land adjacent to highways with pure prospective effect.

However, what the *Ngati Apa* decision demonstrates is that, in some cases, prospective overruling cannot address the problems with retrospective common law change. To overrule *Ninety Mile Beach* prospectively would be to affect a massive confiscation of Crown land. It would be to recognise that prior to 2003 the foreshore and seabed had vested in the Crown, but then, as a consequence of a change in legal thought, the Crown would suddenly be deprived of that title. *Ngati Apa* therefore represents a case in which the Court must take an 'all-or-nothing' approach, either reversing the precedent or affirming the correctness of the prior law.

On the other hand, to overrule *Townsville Harbour* prospectively, in *Geelong Harbour*, would be an ideal use of the judicial tool. In *Geelong Harbour*, the court felt constrained from developing the law because of justified reliance on the prior precedent. Moreover, the Harbour Board, as an institutional litigant, would also benefit from the prospective re-interpretation of the legislation. Lastly, in terms of *Etridge*, the only change introduced by

open use of pure prospective overruling would be the House of Lords stating upfront that the old rule in *O'Brien* was overruled with pure prospective effect.

In essence, the twin demands of certainty and fairness placed on common law courts force judges to sail between Scylla and Charybdis: trying to uphold the doctrine of precedent which gives the common law certainty whilst also trying to arrive at a fair and just outcome in the particular case. When the court is asked to overturn a prior precedent this task is made even more difficult. Prospective overruling charts a course that carefully balances the impetus to modify the common law, on one hand, with the presumption against enacting retrospective law on the other. This enables the court to be flexible, and to provide new remedies, whilst disrupting the rule of the law to the least degree possible. After all, "He that will not apply new remedies must expect new evils; for time is the greatest innovator".[130]

[130] Sir Francis Bacon, *Of Innovations*, in B H Levy, Realist jurisprudence and prospective overruling (1960) 109 *University of Pennsylvania Law Review* 1.

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