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LAW REFORM BY REJECTION OF STARE DECISIS

RALPH W. AIGLER*

The ARIZONA LAW REVIEW in Volume 4, page 39, *et. seq.* published a paper entitled "Stare Decisis and Legal Education" prepared by the writer of this paper. The primary point sought to be made in that paper was that judges of courts of last resort in concluding whether they should repudiate a decision, or a line of decisions, or should apply them on the basis of stare decisis, ought to consider the effect of such repudiation not only upon the public, the members of the bar, and trial courts, but also upon law teachers.

Certainly that paper warranted no opinion that its writer looked upon earlier decisions as sacrosanct. He did, however, indicate that some judges might well exercise a bit more restraint, in the interest of stability and dependability in the law, upon their zeal for reform, leaving more to the legislative process.

Many judges, though unsatisfied and impatient with the law as established by earlier cases, have been reluctant to overrule them because the law thus established has been relied upon perhaps by many. The correction is thus left to the legislature, the products of which normally operate prospectively and with which the public may be assumed to have become acquainted.

Other judges, just as honest and sincere as those to whom reference has been made, may, in arriving at a decision in a controversy, deem it more important to apply the law as they think it ought to be rather than to follow the path indicated by earlier decisions, even though in the earlier stages of the transaction that had clearly appeared to be the applicable course.[1]

* Professor of Law, University of Arizona. Ll.B. 1907, University of Michigan; author, CASES ON NEGOTIABLE PAPER AND BANKING (1937); CASES ON BILLS AND NOTES (1955); co-author, CASES ON BANKRUPTCY (1939); CASES ON PROPERTY (1960); BILLS AND NOTES (1962).

[1] In Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105, 163 A.L.R. 697 (1946), the court repudiated a rule that it had applied in many cases — the doctrine of imputing to the plaintiff the negligence of another, such as the driver of the car in which the plaintiff was a guest. Considerable reliance was placed on the views expressed by Chief Justice Moschziker of the Pennsylvania's court in an article in 37 HARV. L. REV. 409 (1924). The author there pointed out:

> When, however, the prior decisions do not relate to titles, established rules of trade, property, or contract, support public institutions, or fall into any other of the categories above suggested, and the court concludes, after mature deliberation in a subsequent case, that its earlier views were inherently wrong, or the rulings relied on have become inapplicable through lapse of time and change of condition, it should not hesitate thus to hold, if the call of justice in the controversy before it so requires.

Assuming a statute to be constitutional, no court would refuse to apply it however strongly they felt that it was unwise legislation. Of course, in the guise of construction they might do a lot in the way of shaping its application. But in dealing with a legal doctrine established by earlier decision or decisions, they may say, as did the Washington court[2] in rejecting a doctrine of immunity from tort liability established by earlier decisions: "We closed our doors without legislative help, and we can likewise open them."[3]

As is well known, an outstanding characteristic of the common law system is the dual operation of a court decision, particularly when it comes from a court of last resort. Presumably, first of all, it settles the controversy between the parties to the litigation. At the same time it becomes a precedent indicating the course of future decisions involving similar circumstances. That, of course, is the familiar doctrine of stare decisis.

To the extent that the doctrine is given force, courts do make law. When they reject the doctrine in situations in which it would normally be applicable, again they are making, or remaking, law. It seems unrealistic to say, as has sometimes been done, that what is repudiated simply never was the law.[4]

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[2] Pierce v. Yakima Hosp. Ass'n, 43 Wash. 2d 1962, 260 P.2d 765, 774 (1953).

[3] The court may have done a laudable thing in its overturn of what seems to have been settled law in the state; but the quoted words, though striking, fall far short of telling the whole story.

Exactly a month later the Washington court announced its decision in Kilbourn v. Seattle, 43 Wash. 2d 373, 261 P.2d 407 (1953), in which the court's attention was directed to "the rule of immunity from liability for negligence by a municipal corporation while engaged in the exercise of a governmental function." The appellant had strenuously urged that the immunity rule should be changed. The court commented that such an argument had been considered and rejected in Hagerman v. Seattle, 189 Wash. 694, 66 P.2d 1152, 110 A.L.R. 1110 (1937), the court then stating that ". . . the doctrine has become fixed as a matter of public policy, regardless of the reason upon which the rule is made to rest, and . . . any change therein must be sought from the legislature." The court in the *Kilbourn* case went on to say that the rule of government immunity "has become so firmly fixed as a part of the law of municipal corporations that it is not to be disregarded by the courts until the legislature announces a change in public policy." In a very late case in Oregon the court obviously thought well of the *Pierce* case, but it made no reference to the *Kilbourn* decision. Hungerford v. Portland Sanitarium & Benevolent Ass'n, 384 P.2d 1009 (Ore. 1963).

The Washington court's expression of deference to the legislature in the *Kilbourn* case was in relation to the liability of a municipal corporation, while the *Pierce* case involved the liability of a charitable, non-profit hospital. The immunity in each instance had, however, been established by earlier decisions, and in both cases the question was the degree of respect that should be given to stare decisis. See also Hargrove v. Cocoa Beach, 96 So. 2d 130, 60 A.L.R.2d 1193 (Fla. 1957); McAndrew v. Mularcheck, 33 N.J. 172, 162 A.2d 820 (1960); Macy v. Town of Chelan, 59 Wash. 2d 610, 369 P.2d 508 (1962); Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[4] For this view Blackstone is at least partially responsible. At page 69 of volume I of his Commentaries, he says: "For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady . . . . Yet this rule admits of exception,

That courts can thus make and remake law is clear. Whether they ought to do so in a particular situation is quite another matter. When the law is changed, whether by statute or by court decision, constitutional questions may arise. Much has been written regarding them. This paper is not intended as a discussion of that feature, important as it can be.[5]

The guidelines found in the written law — constitutions, statutes, ordinances, etc. are the result of planning. The lines indicated by the "common law" are deductions from decisions. A remote analogy may be found in the streets of a city, particularly a rather old one, such as Boston, where some of the streets have been laid out on something like a drawing board. Other Boston streets developed out of simple paths which seemed to be convenient ways to get from here to there. The first use of the route demonstrated that one could get there. That led to others using the same course, and thus a path, perhaps in time a street, came into being.

Of course, in deciding a controversy a court made up of wise judges will be influenced to a degree by the realization that judges in later cases will be inclined, under the doctrine of stare decisis, to follow the path indicated by that earlier decision. One may find interest in speculation as to what would be the effect if those earlier judges were to incorporate in their opinion a statement in substance: "This decision shall not constitute a precedent," or, the contrary: "This decision shall stand as a precedent."

In remaking the law by rejecting earlier decisions by the same court, the judges are bound to realize that this is precisely what they are doing — that they are formulating new law and not merely deciding a controversy by applying existing law. The cases show clearly that while some judges fully recognize their power to take such steps, they feel that the new law should come from the legislature, the mandates of which are effective prospectively and perhaps are more representative of the will of the people. The main purpose of this paper is to direct attention to some of the devices utilized by courts in their remaking of the law, but with features that one associates

where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law;* but that it was *not law.*" Under this philosophy, constitutional problems, it would seem, should not arise. See also Legg's Estate v. Comm'r, 114 F.2d 760 (4th Cir. 1940); 60 HARV. L. REV. 437 (1947).

[5] For a discussion of possible constitutional questions, see 15 STAN. L. REV. 163, 223, *et seq.* (1963). When a new law, statutory or by court decision, nullifies a cause of action that has already accrued, the contention may be made that to that extent a right has been extinguished, and a possible constitutional question may be involved; when the new law has the effect of destroying a defense, the question, while not the same, is, however, a related one. See, *inter alia,* the preceding note; also, POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 73 (5th ed. 1959); 35 ILL. L. REV. 121 (1940); 38 MICH. L. REV. 30 (1939); 18 N. CAR. L. REV. 199 (1940).

more definitely with the legislative process.

The bar generally and specialists in the field of tort law have long been intrigued, even distressed, by the venerable doctrine that certain bodies and their representatives acting within the scope of their duties are immune from tort liability. The doctrine has been applied in a multitude of decisions.

Millions of words have been published in criticism of this doctrine of immunity[6] and many courts have had to decide whether they should break away from it.[7] In the opinion of the writer of this paper, for what it may be worth, the doctrine is not only based on questionable ancestry but ought to be repudiated, at least in part. Whether the doctrine is right or wrong is not the subject of this paper. Cases involving that field do, however, furnish ample basis for the point sought to be presented here.

While courts generally, no doubt, would agree with the view above quoted from the Washington court as to the freedom of the courts to accept or reject the law as established by their earlier decisions, they will vary as to whether that freedom to reject should be exercised or whether, on the other hand, the step should be left to legislative action.

In 1958, the Supreme Court of Arizona affirmed a judgment denying recovery for damages arising out of the death of a child caused by the negligent act of an attendant in a county hospital.[8] The hospital rendered services both to indigent and paying patients; there was, however, no allegation that the injured child was a paying patient. The court, through Mr. Justice Johnson, said:

> We hold with the majority rule that the operation of a county hospital is a governmental function, and that the county as an arm of the state is immune from suit and liability by and to indigent patients for the negligence of its officers or employees.

After pointing out that the "rule of law" applied by the court in denying recovery is harsh and that "the trend of recent judicial decisions is to restrict the doctrine of governmental immunity," the court went on to declare:

> However, whether the doctrine of governmental immunity should be modified in this state is a legislative question and such policy should be declared and the extent of liability definitely fixed by that body and not by judicial fiat.

[6] The similar immunity of public hospitals has also been critically reviewed many times.

[7] That the doctrine should not apply to the exercise of functions, usually by cities and villages, that are proprietary in character as distinguished from those that are governmental, has commonly been held. It is possible that the difficulty, in an actual case, in classifying the particular activity as the one or the other has contributed to the disposition to abolish the immunity completely.

[8] Lee v. Dunklee, 84 Ariz. 260, 326 P.2d 1117 (1958).

Four years later in *Hernandez v. County of Yuma*,[9] the Court had before it another case involving an injury suffered by a patient in a county hospital. Here, though, the patient was a paying one. The Court reversed a judgment of dismissal, emphasizing the fact just stated. Obviously this was only a partial rejection of the broad doctrine relied on in the *Dunklee* case. While the *Hernandez* case, strictly speaking, holds that a county in operating a county hospital is not immune from liability for harm suffered by a paying patient due to the negligence of attendants, it is clear that the Court is impatient with the general rule of immunity of public corporations from tort liability as applied in many cases. The Court, through Mr. Justice Struckmeyer, said:

> In Lee v. Dunklee this Court refused to recede from the doctrine of governmental immunity, stating that the problem was legislative. We now express doubts concerning that statement. Concededly a Court adopting a rule of law has the power[10] to abrogate it. When the reason for the rule no longer exists, the Court's responsibility does not terminate because the legislature through indifference or otherwise has not acted.[11]

More recent developments in the Arizona law will be noted below.

The situation in Florida is an interesting example of the difficulties in which people and their advising lawyers, as well as trial judges, etc., may find themselves when the judiciary yield to the understandable urge to reform the law as it was seemingly settled by earlier decisions.

In *Hargrove v. Town of Cocoa Beach*[12] an action was brought against the defendant, to recover damages resulting from the negligence of a jailor, a member of defendant's police force.[13] The reviewing court pointed out that they were "faced squarely with an appeal to recede from our previously announced rule which immunizes a municipal corporation against liability for torts committed by police officers." Then, after reference to a number of earlier Florida decisions in some of which liability had been imposed upon municipal corporations and in some of which liability was denied, the court declared that "subject to the limitations above announced, we here

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[9] 91 Ariz. 35, 369 P.2d 271 (1962).

[10] See note 3 *supra*.

[11] The court cited cases from various states in which the conclusion had been reached, or, on the other hand, rejected, as to liability for harm done to paying patients.

[12] See note 3 *supra*.

[13] The jailor had locked a drunken offender in a cell and had gone away for the night leaving no other attendant on duty. This inebriated prisoner was suffocated by smoke during the night.

merely hold that when an individual suffers a direct personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the individual is entitled to redress for the wrong done."

The "limitations" just referred to were stated as follows:

> We think it advisable to protect our conclusions against any interpretation that would impose liability on the municipality in the exercise of legislative or quasi-judicial functions as illustrated in such cases as Elrod v. City of Daytona Beach, 132 Fla. 24, 180 So. 378, 118 A.L.R. 1049; and Akin v. City of Miami, Fla. 1953, 65 So. 2d 54.

The language and decisions in the *Cocoa Beach* case clearly warrant the conclusion that the doctrine of immunty from tort liability by "municipal" corporations was repudiated even as to harm done by their representatives in the exercise of some governmental functions. Surely the operations of the police in activities within that area are governmental and not proprietary, an area in which the immunity has quite uniformly been denied.

But in what sense did the court use the terms "municipal corporation" and "municipalities"?[14] Was the court's rejection of immunity applicable only to cities and villages? In a late case[15] the Minnesota court said, after referring to the *Cocoa Beach* case:

> Thereafter the same state beat a judicial retreat by holding that it had not overruled tort immunity as to the state, its counties, or its county school board. It denied recovery to a spectator injured at a high school baseball game. The Court based its decisions both on constitutional grounds and on the theory of sovereignty.

That later case which led the Minnesota court to say that Florida had "beat a judicial retreat" is *Buck v. McLean*[16] in which the court said:

> Regardless of our personal views, we feel that a proper administration of justice invites respect for the admonition of Alexander Hamilton who once wrote that courts 'must declare the sense of the law; and if they should be disposed to exer-

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[14] The term "municipal corporation" is somewhat ambiguous. It may be applied to a corporation that is "public" in the sense that it is not "private." But the word "municipal" is sometimes used not as interchangeable with "public" but as an identification of a particular kind of public corporation, namely, a city or village. See Sayers v. School Dist., 366 Mich. 217, 114 N.W.2d 191 (1962); Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); McDowell v. State High Comm., 365 Mich. 268, 112 N.W.2d 491 (1961); State v. Parker, 13 Utah 2d 65, 69, 368 P.2d 585 (1962).

[15] Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962).

[16] 115 So. 2d 764 (1959). The decision there by the Florida Appellate Court was approved by the Supreme Court of the state in Kaulakis v. Boyd, 138 So. 2d 505 (Fla. 1962).

> cise *Will* instead of *Judgment*, the consequences would equally be the substitution of their pleasure to that of the legislative body.' If, therefore, a change in the long established rule of immunity prevailing in this State is to be made, it must come as it did in the States of New York, Washington and California either by constitutional amendment, or by enactment of appropriate legislation, or both.

In a 1963 case, *Clark v. The Ruidoso-Hands Valley Hosp.*,[17] the New Mexico court was called upon to decide whether the trial court should be sustained in dismissing a suit in which recovery was sought against the defendant hospital, which in committing the act that resulted in harm to the plaintiff "was engaged in the performance of a governmental function." It was frankly conceded by the appellant that under a decision[18] announced nine years earlier, his appeal should be rejected.

The New Mexico court noted appellant's urge that the *Elliott* case be reconsidered "because in recent years, 'a dynamic trend has developed' in some jurisdictions, rejecting entirely the doctrine of governmental immunity to tort liability." The court went on to say that appellant's argument found at least some degree of support in cases decided in California, Florida, Colorado, Washington, Illinois, Michigan, Wisconsin and Minnesota.[19] However, the court added, Michigan, Florida, Colorado and Washington seem to have had some second thoughts on the subject, to the extent that they apparently have modified their rulings in subsequent cases; in California the legislature suspended the effect of the decision, and in Illinois the legislature promptly reinstated tort immunity as to certain governmental subdivisions.[20] There are, however, many other

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[17] 380 P.2d 168 (1963).

[18] Elliott v. Lea County, 58 N.M. 147, 267 P.2d 131 (1954).

[19] Citing Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 157 (1960); Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 60 A.L.R.2d 1193 (Fla. 1957); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89, 86 A.L.R.2d 469 (1959); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962); Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

[20] The court here cites the following: CAL. CIV. CODE ch. 1404, § 22.3 (1961); Corning Hosp. Dist. v. Superior Court of Tehama County, 57 Cal. 2d 408, 20 Cal. Rptr. 621, 370 P.2d 325 (1962); City and County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960); Liber v. Flor, 143 Colo. 205, 353 P.2d 590 (1960); Buck v. McLean, 115 So. 2d 764 (Fla. App. 1959); Stevens v. City of St. Clair Shores, 366 Mich. 341, 115 N.W.2d 69 (1962); Sayers v. School Dist., 366 Mich. 217, 114 N.W.2d 191 (1962); McDowell v. Mackie, 365 Mich. 268, 112 N.W.2d 491 (1961); Lyon v. Tumwater Evangelical Free Church, 47 Wash. 2d 202, 287 P.2d 128 (1955); Kilbourn v. City of Seattle, 43 Wash. 2d 373, 261 P.2d 407 (1953); 1 ILL. REV. STAT. ch. 34, § 301.1 (1959); 2 ILL. REV. STAT. ch. 57½, § 3a (1959); 2 ILL. REV. STAT. ch. 105, § 821 (1959).

jurisdictions which have in recent years declined to overrule their prior decisions, and continue to follow the rule of sovereign immunity, particularly with reference to hospitals."[21]

At almost the same time the Court in New Mexico's neighbor, Arizona, was considering the case of *Stone v. Arizona Highway Comm'n.*[22] The action had arisen out of an accident on a highway, it being claimed that defendants had been negligent in its operation. The trial court had dismissed the action as to the Highway Commission and its employees as well as to the State Highway Engineer and his staff on the ground that they were free of liability under the doctrine of governmental immunity from tort liability.

The Court, early in its opinion by Justice Lockwood, disposed of the defense on which the dismissed defendants relied, by this terse observation:

> We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled.[23]

Later in the opinion, after referring to earlier cases in Arizona and cases in several other states, the Court continued:

> After considering all the facets of the problem, we feel that the reasoning used by the California Court in Muskopf v. Corning Hospital District, *supra,* has more validity and therefore we adopt it.[24] The substantive defense of governmental immunity is now abolished not only for the instant case, but for all other pending cases, those not yet filed which are not barred by the statute of limitations and all future causes of action. All previous decisions to the contrary are specifically overruled.[25]

Observing that it had been argued that any such change in the law ought to come by action of the legislature and referring to the earlier case of *Lee v. Dunklee,*[26] the Court declared that "upon reconsideration we realize that the doctrine of sovereign immunity was originally judicially created. . . . This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed

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[21] Citing many cases. See also Tesone v. School District No. RE-2, 384 P.2d 82 (Colo. 1963).

[22] 93 Ariz. 384, 381 P.2d 107 (1963).

[23] *Id.* at 387, 381 P.2d at 109. *Cf.* Lockwood, J., 387 P.2d 816 (1963).

[24] The *Muskopf* case is cited *supra* (see note 19).

[25] Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 392, 381 P.2d 107, 112 (1963).

[26] See note 8 *supra.*

or abrogated by the same process."[27] The Court here relied upon the *Pierce* case in Washington.[28]

The decision in this *Stone* case was, in a measure, forecast a year earlier by the *Hernandez* case, referred to above. The *Hernandez* case did not involve any injury on a highway; it grew out of an injury suffered in a hospital. But both cases involved governmental functions.

It must be clear at this point that judicial opinion is not uniform as to whether reforms in judge-made law, particularly when it has been applied over a considerable period of time, may come by court action, as well as by legislation.

A number of recent cases are of peculiar interest, not because the judges have taken it upon themselves to effect reforms by rejecting the doctrine of stare decisis, but because they try to do it in such a way that the harsh results of such repudiations are avoided and the desirable effects of legislation are attained.

Change in the law by court action in repudiating an earlier decision, or a line of decisions, can operate harshly upon a person who has shaped his course of action upon the assumption that his actions were in accord with the applicable law. At the same time, his lawyer, on whose advice he acted, and the trial judge who heard the case below suffer deep embarrassment. Even in sports the rules are not supposed to be changed after the game has started! Legislation, on the other hand, operates prospectively and presumably everyone is or can be aware that the rules have been changed. The concern felt by the Supreme Court of New Mexico obviously was not shared by its counterpart across the state line in Arizona.

Not a few members of the Arizona bar were surprised when the decision in the *Stone* case was announced. Persons responsible for the operation of organizations theretofore under the protection of the immunity doctrine were more than surprised. Those organizations had commonly protected themselves by insurance covering those torts for which they might be liable under the law as it was before the *Stone* decision. A news item in an Arizona paper not long after the *Stone* decision was announced, stated that "All public liability and property damage insurance for the City of Tucson will be cancelled effective June 5." No doubt it may be assumed that substitute insurance will be available at a distinctly higher premium.

Considering the published flood of vehement, some of it almost vitriolic, criticism of the immunity doctrine, particularly as applied to governmental and charitable activities, together with the not infrequent observations by courts that the subject was one to which the

[27] *Id.* at 393, 381 P.2d at 118.

[28] The Washington situation is referred to in note 3 *supra*. It is there pointed out that the *Pierce* case is at least a doubtful representation of the law of that state.

legislatures might well direct their attentiton, one may wonder what the general inaction by the legislatures has signified. At least one thing seems pretty clear: legislative bodies have not been distressed by the immunity doctrine as have the pundits.[29] This, however, does not mean that the views of the latter are thought here to be unwarranted. As noted below, there have been instances of rather prompt legislation restoring the immunity, at least in part, after court action had wiped it out. Whatever may be the implications of non-action by the legislature, the effect of positive legislation within constitutional limits cannot be ignored.

A very recent decision in Oregon[30] is of interest in this connection.

The action was one to recover damages caused by the negligence of a nurse's aid employed by a charitable hospital. The action was dismissed by the trial court on the basis of earlier decisions which had applied the doctrine of immunity of such organizations as the defendant from liability for tort. The Supreme Court of Oregon, taking the position that the immunity doctrine should be rejected, reversed the lower court.

As usual, the point was urged that such a change in the supposedly settled law of the state should come by legislative action. It appeared that in the legislative sessions of 1957, 1959 and 1963, bills designed to abolish the immunity had been before the legislature, but none had gotten sufficient support to become law. Indeed, it was pointed out by a dissenting justice that while the *Hungerford* case was pending before the Supreme Court "the 1963 bill was pending before the legislature and that body was asked to terminate the exemption." As to this point the majority opinion states: "Legislative indifference to remedies for private wrongs may be common enough in times when the assembly is occupied with a multitude of matters of grave public concern, but failure to enact a bill is not one of the constitutional methods by which the assembly makes law."

It seems pertinent to observe that the continued inaction of the legislature of Oregon was not a *making* of law; it was a *leaving* the law as it had been.

The "Daddy-knows-best" attitude of the court is not limited to Oregon! And it is not confined to the tort immunity situation.

A number of courts have endeavored to combine reform by overruling prior decisions, with avoidance or lessening of the harshness

[29] Unlike legal scholars and some judges, legislators are not likely to be distressed by the dubious ancestry of a legal doctrine, and they are not apt to be readers of legal periodicals.

That the legislature has taken no action despite the court's invitation to do so may mean: (1) the legislature was unaware of the invitation, or (2) it was satisfied with the law as established by the decisions, or (3) simple inertia.

[30] Hungerford v. Portland Sanitarium & Benevolent Ass'n, 384 P.2d 1009 (Ore. 1963).

resulting from changing the applicable rules after the events in which parties had presumably relied on them.

Let us assume that the court of last resort in State *X* has before it a case turning upon the application of a line of earlier decisions that established for that state the immunity doctrine. The members of the court are agreed that the law ought to be otherwise and that they are not going to wait for the legislature to take the step.

Their repudiation may take the form of (a) overruling the case or cases which established the objectionable doctrine and deciding the pending case accordingly. That would mean that other causes of action involving the same question on facts that occurred before or after the current case are to be decided according to the new rule. That was the effect of the late Arizona decision in the *Stone* case.

Another course of action is: (b) Apply the doctrine established by the earlier cases, but couple with such ruling a pronouncement that all future cases will be decided in accordance with the contrary doctrine. This was the way the North Carolina court proceeded in the case referred to below. The "future cases" sometimes are those that arise after a fixed or determinable future date. Some of these will be referred to.

A third course of action (c) is to decide the current case according to the new rule, but with a declaration that other cases except those arising thereafter, or after a certain or determinable date in the future, are to be ruled by the repudiated doctrine. An instance of this will be found in the Illinois litigation referred to below.

The second course — (b) — is a clear-cut example of "Prospective Overruling." The third course — (c) — is partially that. This type of overruling is carefully considered in 109 U. OF PA. L. REV. 1-30. The fact that the court decides the case before it by applying the doctrine established by earlier cases but at the same time announces that that doctrine is repudiated so far as future cases are concerned raises no problems of federal constitutional law.[31]

In a criminal case in North Carolina,[32] the decisive question was whether certain testimony was admissible. According to a case decided by the highest court in the state three years earlier, the answer would be in the affirmative. But in the pending case the court was satisfied that their conclusion in the earlier case was erroneous. The court, however, applied to the current litigation the doctrine of the repudiated case. The court said:

> It may be that these defendants have acted upon the advice of counsel based [upon the earlier case]. If so, to try them

[31] Great No. Ry. v. Sunburst Oil and Ref. Co., 287 U.S. 358 (1932).

[32] State v. Bell, 136 N.C. 674, 49 S.E. 163 (1904). See also Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1892).

> by the law as herein announced would be an injustice. . . . We have diligently searched for authority by which courts have been governed in cases such as the one before us. We find nothing very satisfactory. . . . If the defendants shall be able to establish their defense in accordance with the ruling in [the earlier case] they are entitled to do so; but the construction now put upon the statute will be applied to all future cases.

While it is not clear as to what the court meant by "all future cases," it is probable that they meant those based on occurrences after this decision.

In *Parker v. Port Huron Hospital*,[33] the court repudiated a line of cases holding that a charitable hospital was not liable for the negligent conduct of its staff. The court, however, said that

> In the interest of justice and fairness, in view of the new ruling and the reliance that some, albeit few, charitable, non-profit hospital corporations may have placed on the old ruling, and may have failed to protect themselves by the purchase of available insurance, we believe the new rule should apply to the instant case and to all future cases of action arising after September 15, 1960, the date of the filing of this opinion.

It is interesting to compare the teachings of the North Carolina and Michigan courts. Each one repudiates earlier cases, the doctrine to be applicable to all future cases. The striking difference, however, is that while the North Carolina court felt that it would be unfair to the affected party to apply the new rule to him, the Michigan court included the comparable party among those made subject to the new rule; this, despite the obvious reluctance to apply the new doctrine to one who had had no advance notice, hence no opportunity to take protective steps. This Michigan case is an example of the method above referred to as (c).

In the following year, 1961, the Michigan court,[34] consisting of eight justices, had to pass on a case in which the trial court had dismissed on action by a city employee who had fallen down an elevator shaft in a building used by the city in its governmental capacity. The dismissal had been prompted by a line of earlier decisions by the state's highest court establishing the immunity doctrine for such cases. On the ground that any repudiation of the immunity doctrine should come from the legislature rather than the court, three of the eight members flatly refused to reverse the lower court. Four of the eight, though not voting for reversal, announced that "From this date forward the judicial doctrine of governmental immunity from ordinary torts no longer exists in Michigan. In this case we over-

[33] 361 Mich. 1, 105 N.W.2d 1 (1960). Relying on this case as persuasive, the Wisconsin court adopted the same technique. Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 131, 292 (1961).

[34] In Williams v. Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).

rule preceding court-made law to the contrary. . . . By so doing, we join a major trend in this country toward the righting of an age-old wrong."

The eighth member of the court (who, when the opinion of the four was being prepared, evidently was expected to make the group one of five), in a separate opinion, expressed vigorously his approval of the view that the law ought to be changed and that it was within the province of the court to do it. But he was unwilling to reverse the trial court if the new doctrine was to be applicable only to claims that would arise "From this date forward."[35] He was firmly of the opinion that the overruling of the earlier cases should be either wholly prospective or retroactive.

Six months later, the same court, six members sitting, upheld a lower court that had dismissed an action for the recovery of damages suffered by a small pupil who was hurt on a school playground.[36] Only one of the five justices who in the *Williams* case found the immunity doctrine wholly indefensible dissented.

In what seems to be the principal one of three short opinions upholding the dismissal it is said by one of the five justices who in the *Williams* case was so impatient with the immunity doctrine:

> We are asked to reverse the trial court by holding the doctrine of governmental immunity is no longer available to a school district. To do so we would have to reverse a number of decisions of our Court dealing with the doctrine of governmental immunity as applied to school districts. Under our decisions the school district as an agency of the State has been clothed with the State's immunity from liability [citing cases]. If we were dealing with the obsolete 'King can do no harm' edition of governmental immunity established by the courts, we would not hesitate to strike it down, etc.

One, in reading this paper, might imagine himself a lawyer or a trial judge in Michigan. Would he be baffled? Perhaps he would hope to be lucky enough to find a statute that covered his problem.[37]

One of the most frequently cited cases involving not only the matter of judicial overruling but also the taking effect of that step is *Molitor v. Kaneland Community Unit Dist.*[38] The action was by a

[35] Observing that they had lost the vote of one colleague necessary for a majority, the group of four incorporated in their opinion the following:

> The choice in this regard is, of course, difficult — but it is deliberate. We have pointed out that any date or point of change involves the application of the old (and unjust) rule to some, and its alteration as to others. This court has overruled prior precedents many times in the past and in each such instance the court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change.

[36] Sayers v. School Dist., 366 Mich. 217, 114 N.W.2d 191 (1962).

[37] See McDowell v. State Highway Comm'n, 365 Mich. 268, 112 N.W.2d 491 (1961), pointing out that the legislature had "moved to abolish the judicial doctrine of governmental immunity" and had then returned the law of the state "to its prior posture" by repeal of that earlier legislation.

[38] 18 Ill. 2d 11, 163 N.E.2d 89, 86 A.L.R.2d 469 (1959).

child, a pupil in the defendant's school, to recover damages for an injury suffered while a passenger in a school bus operated by defendant's employee, the injuries claimed to have resulted from the negligence of that employee.[39] Defendant's motion to dismiss on the ground that a school district is immune from liability for tort was granted by the trial court, and on appeal to the appellate court was sustained. On a "Certificate of Importance" the case was considered by the Supreme Court.

The court recognized that the lower court's conclusion had to be upheld if the doctrine established by its earlier decisions were to govern. After a rather comprehensive review of the immunity doctrine, the court concluded that the "rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society."[40]

The court then went on to observe that since "retrospective application of our decision may result in great hardship to school districts . . . we feel justice will best be served by holding that, except as to the plaintiff in the instant case, the rule herein established shall apply only to cases arising out of future occurrences."[41]

Two reasons were given for applying the new rule to the instant case while otherwise limiting its operation to future cases: (1) if the new rule is not deducible from the *decision,* the mere announcement of such new rule is sheer *dictum;*[42] (2) the plaintiff in the current case who carried the burden in getting the new rule established, should get some compensating benefit therefrom.[43]

The *Molitor* decision became public May 22, 1959. On rehear-

[39] The bus hit a culvert, exploded and burned. Though not alleged in the plaintiff's complaint, the fact appeared in the case record that defendant carried public liability insurance limited to $20,000 for each person injured. The damage suffered by plaintiff was alleged to be $56,000.

[40] The court disagreed with the contention "that if said immunity is to be abolished, it should be done by the legislature, not by this court." The doctrine of immunity having been "created by this court" and the court having found the doctrine to be unsound, "we consider," the court said, "that we have not only the power, but the duty, to abolish that immunity," citing the Washington court's language in the case cited above in note 2.

[41] At this point the court refers to many cases and papers supporting the theory that "an overruling decision should be given only prospective operation whenever injustice or hardship due to reliance on the overruled decision would thereby be averted."

The Arizona Court in the recent *Stone* case obviously felt no such urge.

[42] There would seem to be real force in this point. An almost desperate effort is made by law teachers to get law students to realize that the primary significance of a case is found in what the court did in disposing of the controversy before it. This, however, must not be pressed too far. No future case with precisely the same facts will ever arise; so what the court has said or implied as to the factors that induced the decision, in other words, the *ratio decidendi,* must necessarily be taken into account in determining the law of the case. See the discussion by Professor Goodhart in 3 CAMB. L.J. 195 (1928) and by Professor Francis in 14 ST. LOUIS L. REV. 11 (1928). See also text accompanying notes 21 and 22 *supra.*

[43] The court ignores the fact that in compensating the plaintiff a burden that was unforeseeable is imposed upon the defendant.

ing the court adhered to its view that the immunity doctrine should be discarded. Apparently, it was on this hearing, the result of which was announced December 16, 1959, that the court introduced the prospective element into its decision. See *Peters v. Bellinger*,[44] in which the court said that "Those municipal and quasi-municipal corporations which have enjoyed immunity in the past continue to enjoy it until December 16, 1959."

In another Illinois case against a public corporation the latter was deemed immune from liability because the suit was based on occurrences prior to December 16, 1959. It there appeared that between May, when the *Molitor* doctrine of liability was announced, and December, when the result of the rehearing was made known, the Illinois legislature had enacted a statute, effective in July, to the effect that park districts — the defendant was such a district — should not be liable for injuries arising out of park operations. It was not necessary to base the defendant's non-liability on that statute.[45]

But the most interesting by-product of the *Molitor* decision is found in *Molitor v. Kaneland Community Unit District*, decided on rehearing May 23, 1962.[46] The *Molitor* case decided in 1959 is entitled *"Norma Molitor et al. v. Kaneland Community Unit Dist.* (Thomas Molitor, Appellant.)" The case decided in 1962 is entitled the same except for the reference to Thomas Molitor.[47] The opinion states that the trial court, affirmed by the appellate court, had dismissed the complaints of the plaintiffs on the ground that they were based on an accident occurring prior to December 16, 1959, and were, therefore, barred by "the decision" in the earlier *Molitor* case.[48] It is, then, obvious that since the claimed causes of action arose before December 16, 1959, they were barred unless they could be considered a part of the hearing in which the immunity doctrine was declared overruled, in other words, the initial *Molitor* decision.

In this later case[49] it is pointed out that "Suits were filed against

[44] 19 Ill. 2d 467, 166 N.E.2d 581 (1960).

This Peters case was a tort action for damages caused by a policeman. The employing city was the active defendant. The acts upon which the action was based were committed long before December 16, 1959, the effective date of the *Molitor* decision. See also Ludwig v. Board of Educ., 35 Ill. App. 2d 401, 183 N.E.2d 32 (1962).

[45] List v. O'Connor, 19 Ill. 2d 337, 167 N.E.2d 188 (1960). The striking thing about this case is the rapid action taken by the legislature repudiating, in part at least, the court's position in the *Molitor* case.

[46] 24 Ill. 2d 457, 182 N.E.2d 145 (1962).

[47] In 18 Ill. 2d 11, 163 N.E.2d 89 (1959), it is stated that "Plaintiff Thomas Molitor, a minor, by Peter his father and next friend, brought this action . . . for personal injuries," etc.

[48] The later report discloses that fourteen of the children on the bus operated by the careless driver were injured. The dissenting opinion in the earlier case states that there were eighteen children on the bus. So apparently four were not injured.

[49] That is, later heard and reported.

the school district on behalf of the injured children, including the four Molitor children and the other four children who are all plaintiffs herein." The court found the record in such shape that it could be reasonably concluded the claims of at least eight children[50] had been before the court in the earlier *Molitor* decision and that therefore the dismissal of those claims was not called for. The court was careful to point out that "We are dealing here only with claims which, as clearly appears from the record now before us, the parties contemplated would be adjudicated in accordance with the disposition of the claim of Thomas Molitor."[51]

In *State v. Parker*[52] the matter of tort immunity was indirectly involved. Henriod, J., who wrote the prevailing opinion referred to in the earlier *Molitor* opinion. He said that "subsequent history demonstrates the weakness of this case as precedent. Within 40 days of the next legislative session, the Illinois Legislature passed five bills that in effect recognized the doctrine of sovereign immunity as to local agencies."[53]

In an action on behalf of a small child to recover damages for injuries suffered as a result of alleged negligence on the part of a school district and a principal and a teacher employed by it, a motion to dismiss was granted. On appeal, the Minnesota court upheld the dismissal, the court pointing out that the only issue before it was "Whether the doctrine of governmental tort immunity" should be "overruled by judicial decision."[54]

After examining many of the authorities referred to above, the court announced its unanimous intention:

> to overrule the doctrine of sovereign tort immunity as a defense with respect to tort claims against school districts, municipal corporations and other subdivisions of government on whom immunity has been conferred by judicial decisions arising after the next Minnesota legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims.[55]

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[50] Clearly this conclusion took care of the other three Molitors and four other children unnamed. It looks as if the status of the remaining six who were injured in the same accident is left undetermined. See note 51 *infra.*

[51] The court pointed out that "The cost of the Thomas Molitor appeal and the payment of counsel was borne by the Molitor children and the other plaintiffs through their parents." See note 47 *supra.*

[52] 13 Utah 2d 65, 368 P.2d 585 (1962).

[53] See also the comment on the *Molitor* case in 54 Nw. U.L. REV. 588 (1960).

[54] Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962).

[55] The court declared that it was not its intention to abolish the immunity rule as to (1) the state itself or (2) activities that are discretionary as distinguished from ministerial or (3) judicial, quasi-judicial, legislative or quasi-legislative functions.

The court recognized that by denying relief to the appellant,[56] its observations regarding the immunity doctrine and its intentions not to apply it except as just indicated became dictum.[57]

Whether it was spurred to action by the "dictum" or not, the fact remains that the Minnesota legislature, during its 1960 session, did enact a rather comprehensive statute (on May 22, 1963)[58] that had the effect, *inter alia*, of keeping alive the law as it was applied to the plaintiff's claim in the *Spanel* case.[59] Section 2 of that statute declares that "Subject to the limitations of sections 466.01 to 466.17, every municipality[60] is subject to liability for its torts . . . whether arising out of a governmental or proprietary function." Section 3 states that Sec. 2 "does not apply to any claim enumerated in this section. As to any such claim every municipality shall be liable only in accordance with the applicable statute and where there is no such statute, every municipality shall be immune from liability." Section 12 deals with the liability of school districts. It goes on to state that "The doctrine of 'governmental immunity from tort liability,'[61] as a rule of the decisions of the courts of this state is hereby enacted as a rule of statutory law . . . in the same manner and to the same extent as it was applied in this state to school districts . . . on and prior to December 13, 1962." Section 14 is much the same except that it applies not merely to school districts but to all the instrumentalities of government enumerated in section 1.

The Minnesota development is stated this fully not only because it shows that the legislature may view the public interest quite differently from the way the court does, but it also emphasizes what the court said in the *Spanel* opinion:

> While the court has the right and the duty, to modify rules of the common law after they have become archaic, we readily concede that the flexibility of the legislative process — which is denied the judiciary — makes the latter avenue of approach more desirable.

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[56] "It may appear unfair to deprive the present claimant of his day in court." The court continued: "However, we are of the opinion it would work an even greater injustice to deny defendant and other units of government a defense on which they have had a right to rely." See notes 35 and 37 *supra*.

[57] In Moore v. Murphy, 119 N.W.2d 759 (Iowa 1963), a concurring justice, after referring to the *Spanel* case and other cases dealing with the same general question, said that "With such a wide trend established . . . those who rely on immunity as a defense must realize our court-made doctrine of governmental immunity may be subjected to a re-examination in the near future."

[58] Ch. 798 of the Laws 1963 Regular Sessions.

[59] Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962).

[60] The term "municipality" is stated in Sec. 1 of 466.01 to cover not only cities and villages but also counties, school districts, etc.

[61] The legislature is explicit that the phrase means the doctrine "as a part of the Common Law of England as adopted by the courts of this state as a rule of law exempting from tort liability the instrumentalities of government named in § 466.01, subject, however, to such modifications thereof made by statutory enactments heretofore enacted."

Perhaps the members of the Minnesota court, whatever element of rebuke the legislation implied, felt a degree of satisfaction in the realization that they had moved the legislature to action.

The developments in one more state — California — may be found interesting, perhaps instructive.

Prior to February 27, 1961, it seemed quite clear that excepting specific types of situations in which the legislature had provided otherwise, the general rule of the state, established by many decisions,[62] was that public instrumentalities were immune from tort liability for harm suffered as a result of their governmental activities. On that date the Supreme Court announced its decision in *Muskopf v. Corning Hosp. Dist.*[63] In the trial court a demurrer to the plaintiff's claim was sustained on the ground that the defendant was immune from tort liability. The court, at the threshold of its opinion (by Mr. Justice Traynor), announced that "After a revaluation of the rule of governmental immunity from tort liability, we have concluded that it must be discarded as mistaken and unjust." The conclusion of the trial court was reversed. The long observed doctrine of immunity was overruled, so far as the court's action was concerned, not only for future occurrences but also for the current case and all others.[64]

The court, after noting the genesis of the immunity doctrine, went on to say that "The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . . It has been judicially abolished in other jurisdictions." The court further pointed out that in California the doctrine had become "riddled with exceptions, both legislative . . . and judicial . . . and the exceptions operate so illogically as to cause serious inequality."[65]

Along with the *Muskopf* case some consideration must be given to *Lipman v. Brisbane Elementary School Dist.*,[66] which was before the court at the same time. The action "for damages was brought by the plaintiff, superintendent of defendant district, against the district, three trustees, the county superintendent of schools and the district attorney." The trial court sustained a demurrer to the complaint and plaintiff appealed. Plaintiff's claim was based primarily upon alleged derogatory statements regarding plaintiff.

At the outset the court pointed out that in *Muskopf* it was held "that the rule of governmental immunity may no longer be invoked

[62] The most recent one being Talley v. Hospital Dist., 41 Cal. 2d 33, 257 P.2d 22 (1953).

[63] 55 Cal. 2d 211, 359 P.2d 457 (1961). The decision as stated in the case in the next footnote became final February 27, 1961.

[64] In Corning Hosp. Dist. v. Superior Court, 57 Cal. 2d 488, 370 P.2d 325 (1962), the court pointed out that in denying a petition for rehearing in the *Muskopf* case, they had "rejected a suggestion that the decision be made to apply only prospectively."

[65] The court here refers to Illinois, Colorado and Florida, as to which see *supra.*

[66] 55 Cal. 2d 224, 359 P.2d 465 (1961).

to shield a public body from liability for the torts of its agents who acted in a ministerial capacity. But it does not necessarily follow that a public body has no immunity where the discretionary conduct of governmental officials is involved." While sound policy supports the doctrine that a representative of a public body is not liable in tort for harm done by his conduct in the performance of discretionary functions, even though the conduct is malicious,[67] it does not, the court said, mean that the immunity of the agency is coextensive "with the immunity of the officials in all instances."[68] In the case before the court, however, it was concluded that in so far as the acts of the agents were within the scope of their authority, there was no tort liability on the district, and the decision of the trial court was affirmed, so far as the district was concerned.

As to the trustees individually, it will suffice to report that in view of the fact that some of the alleged defamatory statements were to outsiders, the trustees might be found liable for defamation, or for inducing a breach of contract. So as to this, the lower court's ruling was reversed.

A few months after the *Muskopf* and *Lipman* decisions, the legislature in California enacted Chapter 1404 of the 1961 Statutes. Section 1 of that statute, standing by itself, reinstated the doctrine of governmental immunity from tort liability "as a rule of decision in the courts of this state" to the same extent as it was applied in California on January 1, 1961. But Section 3 of the same statute declares that Section 1 "shall remain in effect until the 91st day after the final adjournment of the 1963 Regular Session of the legislature, and shall have no force or effect on and after that date."[69]

The Minnesota court, as observed above, stirred the legislature of that state to give its attention to the immunity doctrine in general. In California, the legislature in effect said to the court: Hold everything until we have had a chance to study this problem![70] It will be interesting to see what the legislature does.

As was pointed out above, not a few courts that announced sweep-

[67] The court said: "The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave this injury unredressed than to subject honest officials to the constant dread of retaliation."

[68] "Although it may not be possible," the court said, "to set forth a definitive rule which would determine in every instance whether a governmental agency is liable for discretionary acts of its officials, various factors furnish a means of deciding whether the agency in a particular case should have immunity," etc.

[69] This led the defendant in the *Muskopf* litigation to seek a writ of prohibition to prevent further proceedings in that case. The denial of the writ is reported in the case cited in note 64 *supra*. That case upheld the constitutionality of the legislation.

[70] In 15 STAN. L. REV. 163, 253 (1963) will be found a comprehensive study of the matter. The article is said to be based upon a research study prepared for the California Law Revision Commissions.

See also the reflections of Mr. Justice Traynor, who wrote the prevailing opinions in the *Muskopf* case, in 19 U. CHI. L. REV. 223, 229, *et seq.* (1961).

ing repudiations of the immunity have felt it necessary or desirable to restrict the operation of their own actions.

Perhaps a few tentative general observations may be ventured:

First: General observance of the doctrine of stare decisis does not necessarily mean that a reviewing court lacks the power to reform (or remake) the law as established by earlier decisions, even though those decisions have been numerous and spread over a long period of time.[71]

Second: In a considerable number of cases in recent years involving the immunity doctrine the courts have differed sharply as to whether the needed correction in the law should be made by themselves or should be left to the legislatures. Those that have taken the step themselves appear to have found encouragement in the catchy expression: What the courts have put into the law they can take out. No doubt, over and beyond this, is a feeling that the legislatures have either been unaware of the need for reform or have been simply remiss in taking appropriate action.

Third: The courts that prefer to leave the reform to legislative action are influenced, no doubt, by a variety of factors, the most weighty probably being the feeling that such changes should operate not retroactively but wholly prospectively. They recognize that a pronouncement by the court that in later cases the old rule will no longer be applied is sheer *dictum*, unless the case in which such language is used is decided according to the new rule.[72] But the application of the new rule, even in that limited way, is objectionable because at least as to that one litigant, the applied rule is retroactive and thus unfair. In addition, the *decision* is not a general pronouncement but is limited to the circumstances of the decided case. The legislative process, on the other hand, involves, or ought to involve, a broad examination of the entire problem, without undue emphasis on a particular fact situation.

Fourth: Why is it that legislatures can be so complacent with a status of the law that causes courts to struggle for words that will adequately express their distress that it is so? Indeed why is it that when the legislature is moved to act, perhaps by the urging or invitation of the court, the product is not what the court obviously thought it ought to be? A possible explanation is offered earlier in this paper.[73]

Fifth: While it is obvious that the law may be remade by rejecting stare decisis, it is equally clear that the process raises quite a few potential questions.

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[71] In the type of situation with which this paper chiefly deals the effect of the change in the law is a denial of a defense by a public or quasi-public body.

[72] Such a pronouncement by a court is quite like a resolution adopted by the legislature to the effect that at our next session we shall enact a bill providing thus and so!

[73] See *supra*, p. 164.