The Retroactivity of Minnesota Supreme Court Personal Injury Decisions
THE RETROACTIVITY OF MINNESOTA SUPREME COURT PERSONAL INJURY DECISIONS

When a court overrules substantive case law, it must decide whether to apply the new rule of law retroactively or prospectively. This judicial determination has a substantial impact on litigants whose cause of action arose prior to the date of the overruling decision but whose case comes to trial after the date of the overruling decision. In the areas of property, contract, and criminal law, Minnesota has followed the majority rule of prospective overruling. In the area of tort law, however, Minnesota recently has departed from the majority view that substantive tort law should be overruled only retroactively. This Note examines the policies underlying prospective and retroactive overruling in the personal injury setting and traces the Minnesota Supreme Court decisions leading to the adoption of prospective overruling of substantive tort law in Minnesota.

I. INTRODUCTION

In the past twenty years, tort law has undergone dramatic reform. A

1. See Report of the California Citizens Commission on Tort Reform, Righting the Liability Balance 4 (1977); Henderson, Expanding the Negligence Concept: Retreat From the Rule of Law, 51 Ind. L.J. 467, 468 (1976). But see Pedrick, Does Tort Law Have a Future?, 39 Ohio St. L.J. 782, 783-84 (1978). In this era of tort reform, Minnesota has emerged as one of the leaders in the advancement of tort law. Minnesota's first tort reform decision occurred in 1920 when the court abolished charitable immunity. See Muliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 398, 175 N.W. 699, 701 (1920). In the past twenty years, the Minnesota Supreme Court has been extremely active in the reform of tort law. For example, the court has abolished sovereign immunity, see Nieten v. Blondell, 306 Minn. 122, 132, 235 N.W.2d 597, 603 (1975); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962), abrogated parent-child immunity, see Silesky v. Kelman, 281 Minn. 431, 442, 161 N.W.2d 631, 638 (1968); Balts v. Balts, 273 Minn. 419, 433, 142 N.W.2d 66, 75 (1966), eliminated the doctrine that imputes the negligence of a servant to a master so as to bar a third-party suit by the master, see Weber v. Stokely-Van Camp, Inc., 274 Minn. 482, 491, 144 N.W.2d 540, 545 (1966), applied strict liability in products liability cases, see McCormack v. Hankscraft Co., 278 Minn. 322, 339-40, 154 N.W.2d 488, 501 (1967), allowed a wife to recover for her loss of consortium, see Thill v. Modern Erecting

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necessary result of this reform has been the judicial overruling of prior decisions. When a court changes substantive rules of law by overruling previous case law, the court must decide when the new rules of law will become effective. The law of a particular case may be applied either prospectively or retroactively. Retroactive overruling means that a new rule of law is applied to the case before the court and to all cases that reach final adjudication after the date of the overruling decision. When
a decision is prospectively overruled, application of the new rule of law is limited to the case before the court and to causes of action arising after the date of the decision.5

Obviously, the choice between prospective and retroactive overruling has a significant impact on future litigation. If a decision is prospectively overruled, causes of action arising prior to the date of the overruling decision that come to trial after the date of the overruling decision will not be judged under the new rule of law.6 In contrast, if a decision is retroactively overruled, all cases decided after the overruling decision will be tried under the new rule of law.7 Therefore, an examination of the policies underlying prospective and retroactive overruling is necessary to understand the circumstances under which either theory may properly be applied.

This Note will examine the policies underlying prospective and retroactive overruling and discuss how these policies affect the choice between the two approaches.8 In particular, this Note will focus on the decisions of the Minnesota Supreme Court that have overruled substantive tort law.9 In addition, Minnesota’s approach to prospective and retroactive

5. In B.F. Griebenow, Inc. v. Anderson, 287 Minn. 174, 177 N.W.2d 395, 397 (1970), the court stated, “'Retrospective' is the antonym of 'prospective.' A prospective law is defined ... as: 'One applicable only to cases which shall arise after its enactment.'” Id. at 176 n.1, 177 N.W.2d at 397 n.1 (citation omitted). Professor Friedmann defined prospective overruling as the “overruling of a well-established precedent limited to future situations, and excluding application to situations which have arisen before the decision and are therefore presumed to be governed by reliance on the overruled principle.” Friedmann, supra note 3, at 602.

Prospective overruling does not require application of the new rule to the cause of action before the court; however, the practice of applying the new rule to the parties litigating the issue is pervasive. See notes 23-24 infra. Therefore, for the purposes of this Note, prospective overruling will mean that the new rule of law is applied to the case before the court and to causes of action arising after the date of decision.

6. See note 5 supra and accompanying text; notes 22-34 infra and accompanying text.

7. See note 4 supra and accompanying text; notes 12-21 infra and accompanying text.

8. See notes 12-39 infra and accompanying text.

9. See notes 40-72 infra and accompanying text.
overruling in tort decisions will be compared and contrasted with the
approach of other jurisdictions. Finally, this Note will analyze the
Minnesota approach in light of the relevant policy considerations under-
lying prospective and retroactive overruling.

II. GENERAL PRINCIPLES GOVERNING APPLICATION OF NEW RULES
OF LAW

A. Retroactive Application

Retroactive overruling has its origins in the doctrine, formulated by
Blackstone, that courts discover the law. Under this doctrine, the over-
ruled precedent, being an erroneous interpretation of the law, is treated
as if it never existed. Therefore, the new rule of law is applied to all
cases that are decided after the date of the overruling decision. Even
though courts no longer subscribe to the doctrine that the law is discov-
ered, retroactive overruling remains the prevailing view.

The United States Supreme Court has held that state courts are free to
apply a decision retroactively or prospectively without offending the
Constitution. In the context of this freedom, a majority of jurisdictions

10. See notes 73-91 infra and accompanying text.
11. See notes 73-99 infra and accompanying text.
12. See 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69-70
(1765); Rogers, supra note 3, at 40-42; Traynor, supra note 3, at 535-36; Note, supra note 3,
at 79-80. In Hoven v. McCarthy Bros., 163 Minn, 339, 204 N.W. 29 (1925), the Minne-
sota court acknowledged the Blackstone doctrine. The court stated that "the overruled
decision is regarded in law as never having been the law, but the law as given in the later
case is regarded as having been the law, even at the date of the erroneous decision." Id. at
431, 204 N.W. at 30. The Hoven court avoided the practical problems of retrial that pure
retroactive overruling would create by limiting its decision to cases that had not been
finally adjudicated. See id.
13. See note 12 supra.
14. See note 4 supra and accompanying text.
15. See Griffin v. Illinois, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring) ("We
should not indulge in the fiction that the law now announced has always been the law
and, therefore, that those who did not avail themselves of it waived their rights."); Rogers,
supra note 3, at 35, 42; Traynor, supra note 3, at 535-36; Note, supra note 3, at 80.
16. See, e.g., Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dis-
senting) ("Judicial opinions have had retroactive operation for near a thousand years.");
(1978); Olson v. Augsburger, 18 Wis. 2d 197, 199, 118 N.W.2d 194, 196 (1962); Peck, THE
ROLE OF THE COURTS AND LEGISLATURES IN THE REFORM OF TORT LAW, 48 MINN. L. REV. 265, 300 (1963);
note 4 supra; notes 18, 29 infra.
17. See Linkletter v. Walker, 381 U.S. 618, 629 (1965) ("the Constitution neither pro-
hibits nor requires retrospective effect"); Great Northern Ry. v. Sunburst Oil & Ref. Co.,
287 U.S. 358, 364 (1932) ("A state in defining the limits of adherence to precedent may
make a choice for itself between the principle of forward operation and that of relation
backward"). The Minnesota Supreme Court has cited these propositions with approval.
See State v. Olsen, 258 N.W.2d 898, 907 n.15 (Minn. 1977) (citing Linkletter), noted in 5
WM. MITCHELL L. REV. 251 (1979); Peterson v. Balach, 294 Minn. 161, 173 n.6, 199
hold that the overruling of a judicial decision is given retroactive effect.\textsuperscript{18} There are two modern justifications for this approach. First, changes in the law do not occur abruptly. Normally, these changes are painstakingly slow.\textsuperscript{19} Accordingly, when a court declares a new rule of law it is often a reflection of values and beliefs that have become so pervasive in the law or society that it may be said that the court is merely recognizing preexisting law.\textsuperscript{20} Second, when a court determines that a rule of law no longer serves the ends of justice, it does not make sense to continue to apply the old rule of law after the date of the decision.\textsuperscript{21} Therefore, when a new rule of law is applied retroactively to all cases decided after the overruling decision, the ends of justice are properly served.

\textsuperscript{18} See Peck, supra note 16, at 300; Note, supra note 3, at 80. Minnesota at one time conformed to the majority rule giving retroactive effect to overruled decisions. See, e.g., Canton v. United States, 265 F. Supp. 1018, 1021 (D. Minn. 1967), aff'd, 388 F.2d 985 (8th Cir. 1968) ("judicial decisions usually operate retroactively unless the Court specifically determines to give them only prospective application"); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355, aff'd in part, vacated in part on rehearing, 261 Minn. 361, 113 N.W.2d 364 (1962) (per curiam) (prospective overruling not applied to negligence actions because parties do not plan their conduct in advance to conform with existing law); Hoven v. McCarthy Bros. Co., 163 Minn. 339, 341, 204 N.W. 29, 30 (1925) ("It is the law that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation"). Recently, however, the Minnesota court has not observed the majority rule. See notes 44-72 infra and accompanying text.

\textsuperscript{19} See, e.g., B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 14 (1928); Henderson, supra note 1, at 477; Pedrick, supra note 1, at 783-84; Thayer, Judicial Legislation: Its Legitimate Function in the Development of the Common Law, 5 HARV. L. REV. 172, 188-90 (1891).

\textsuperscript{20} Several commentators have modified the Blackstone doctrine, see note 12 supra and accompanying text, and have discarded its mystical trappings. Instead of asserting that courts discover the law as if a body of law existed in and of itself, these commentators have taken the position that judge-made law merely reflects the values and beliefs of society. One author stated:

[Indeed, even when "new law" must be made, it is often in fact a matter of the court articulating particular clear implications of values so generally shared in society that the process might well be characterized as declaring a preexisting law. Moreover, this must inevitably be so. For it is the basic role of the courts to decide disputes after they have arisen. That function requires that judicial decisions operate (at least ordinarily) with retroactive effect. In turn, unless those decisions (at least ordinarily) reflect preexisting rules or values, such retroactivity would be intolerable.]

Mishkin, supra note 3, at 60 (footnotes omitted). Other authorities have agreed with Professor Mishkin that the law reflects society's values and beliefs. See, e.g., Green, The Thrust of Tort Law, Part I: The Influence of Environment, 64 W. VA. L. REV. 1, 2 (1969); Henderson, supra note 1, at 483.

\textsuperscript{21} See Berghammer v. Smith, 185 N.W.2d 226 (Iowa 1971), in which the Iowa Supreme Court, applying Minnesota law, held that a Minnesota decision prospectively overruling the bar to a wife's cause of action for loss of consortium would be applied to a cause of action that arose prior to the date of the Minnesota decision in order to serve the ends of justice. See id. at 232-33. For a further discussion of Berghammer, see note 82 infra.
B. Prospective Application

The basic premise underlying prospective overruling is that the parties who have justifiably relied on the state of the law should not be penalized when a court decides to change that rule of law. Typically, however, the new rule of law is applied to the case before the court. This procedure is followed because public policy considerations encourage litigants to challenge obsolete legal doctrines and because application of the new rule of law to the parties before the court eliminates the possibility that the application of the new rule will be deemed dictum.

When the overruling decision involves contract law, property law, or criminal law, an exception to retroactive overruling is generally recognized and the decision is prospectively applied. In these areas, reliance on prior law can easily be demonstrated because conduct is affected by the state of the law. For example, when parties make contracts or transfer property, the legal requirements for executing the agreements and the duties and obligations as they exist at the time of the transaction are an integral part of the bargaining process. Because the law as it exists is

22. See, e.g., Schultz v. Chicago & N.W. Ry., 286 Minn. 231, 235-36, 175 N.W.2d 177, 180 (1970); Hollinshead v. Von Glahn, 4 Minn. 190 (Gil. 131) (1860). Hollinshead involved the assessment of damages for a breach of a money contract. The court stated, "[w]hen the highest court in the state has decided a point, parties have a right to act upon it as settled, and we will not allow any injury to result to suitors in consequence of such dependence, when we feel bound in duty to change our decisions." Id. at 191 (Gil. at 132). See generally Rogers, supra note 3, at 51-55; Traynor, supra note 3, at 543-47.


24. See generally Keeton, supra note 23, at 491 n.74; Rogers, supra note 3, at 46-49 (discussing Naftalin v. King, 257 Minn. 498, 102 N.W.2d 301 (1960) and Naftalin v. King, 252 Minn. 381, 90 N.W.2d 185 (1958)); Note, supra note 3, at 79. For authority criticizing the argument that the new rule of law is dictum if it is not applied to the parties before the court, see Currier, supra note 3, at 216-27; Snyder, supra note 3, at 151; Traynor, supra note 3, at 560.

incorporated into every contract, the rights of parties that have entered into an agreement assuming that the existing law will govern the transaction should be determined by that law when disputes arise under the contract.

In criminal law, the policy underlying prospective overruling also is rooted in the reliance principle. Public policy dictates that a person should be able to rely on the law as it exists without fear of subsequent sanction.

C. Retroactive and Prospective Overruling in Personal Injury Decisions

When substantive tort doctrines are overruled, the general rule is to give retroactive effect to those decisions. As with the areas of criminal,


27. The public policy underlying prospective overruling in criminal cases is identical to the policy underlying the constitutional prohibition against ex post facto laws. See Marks v. United States, 430 U.S. 188, 192 (1977) ("an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law such as Art. I, § 10, of the Constitution forbids.") (quoting Bouie v. City of Columbia, 378 U.S. 347, 353 (1964)). See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 25-26, 474-82 (1978). The Constitution prohibits the enactment of ex post facto laws by Congress or by any state. U.S. CONST. art. I, § 10. Even though the prohibition applies only to legislative acts and not to judicial decisions, judicial attempts retroactively to expand criminal sanctions have been held to violate due process. See L. TRIBE, supra, at 477-78; Traynor, supra note 3, at 548.

28. See generally L. TRIBE, supra note 27, at 477-84.

29. See, e.g., Kaatz v. State, 540 P.2d 1037, 1050 (Alaska 1975) (abolition of last clear chance doctrine will apply to causes of action that arose prior to decision but have not gone to trial); Li v. Yellow Cab Co., 13 Cal. 3d 804, 829-30, 532 P.2d 1226, 1244, 119 Cal. Rptr. 858, 876 (1975) (abrogation of contributory negligence and adoption of comparative negligence will have limited retroactive application); Linder v. Combustion Eng'r, Inc., 342 So. 2d 474, 476 (Fla. 1977) (doctrine of strict liability announced in West v. Caterpillar Tractor Co., 336 So. 2d 80 (Fla. 1976), to be retroactive); Ryter v. Brennan, 291 So. 2d 55, 57 (Fla. Dist. Ct. App. 1974) (newly created rule that a wife may bring an action for loss of consortium will be retroactively applied); Winnett v. Winnett, 9 Ill. App. 3d 644, 645, 292 N.E.2d 524, 525 (1973) (doctrine of strict liability announced in Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), to be retroactive), rev'd on other grounds, 57 Ill. 2d 7, 310 N.E.2d 1 (1974); Kotsiris v. Ling, 451 S.W.2d 411, 413 (Ky. Ct. App. 1970) (retroactively overruled rule against wife's cause of action for loss of consortium; "there is no good reason for a new rule of tort law not to be applied retrospectively") (emphasis in original); Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, 223 (1971) (recognition of action for prenatal injuries held retroactive); Roth v. Roth, 571 S.W.2d 659, 672 (Mo. Ct. App. 1978) (abandonment of "active-passive" negligence standard to have retroactive effect as an overruling decision dealing with substantive principles of law); Gelbman v. Gelbman, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969) (decision abolishing defense of intrafamily tort immunity for nonwillful torts will be applied retroactively); Rice v. Argento, 59 A.D.2d 1051, 1051, 399 N.Y.S.2d 809, 810 (1977) (trilogy of New York Court of Appeals cases imposing the duty of reasonable care on a landowner regardless of the status of the entrant held retroactive); Cole v. Woods, 548 S.W.2d 640, 651 (Tenn. 1977) (retroactive abolition of doctrine that imputes contributory
contract, and property law,30 when considering tort law, a majority of courts recognize an exception to the general rule requiring retroactive overruling when there has been a clear showing of justifiable reliance.31 These jurisdictions, however, are loath to apply the exception because principles of tort liability have little, if any, impact on a defendant's conduct.32 Therefore, the reliance principle generally cannot be used to justify prospective overruling in the tort area.33

When the abolition of a tort immunity is involved, however, a majority of courts recognize an exception and apply the overruling decision prospectively.34 Again, the reliance principle justifies the different treat-

negligence in automobile accident cases); Bielski v. Schulze, 16 Wis. 2d 1, 19, 114 N.W.2d 105, 114 (1962) (decision abolished doctrine of gross negligence and was applied retrospectively); Peck, supra note 16, at 300.

In the above cited cases, the new rule of law was generally applied to the case before the court and to all cases pending or coming to trial or retrial after the date of the decision. The only restriction on this retroactive effect is that cases in the process of appeal must not be based solely on the overruling decision. See, e.g., Daly v. General Motors Corp., 20 Cal. 3d 725, 743-44, 575 P.2d 1162, 1173, 144 Cal. Rptr. 380, 391 (1978); Li v. Yellow Cab Co., 13 Cal. 3d at 829, 532 P.2d at 1244, 119 Cal. Rptr. at 876.

30. See notes 25-28 supra.

31. See Keeton, supra note 23, at 490; Rogers, supra note 3, at 52-55, 70; Traynor, supra note 3, at 543; Note, supra note 3, at 82; Note 34 infra and accompanying text.

32. Fussner v. Andert, 261 Minn. 361, 113 N.W.2d 364 (per curiam) (prospective application denied when wrongful death statute was construed to include loss of society and companionship in addition to pecuniary loss), aff'd in part, vacated in part on rehearing, 261 Minn. 347, 113 N.W.2d 355 (1962); Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 26, 141 A.2d 273, 275 (1958) (abolition of charitable immunity applied retroactively because there was no justifiable reliance on the immunity; court stated that "reliance has very little place anywhere in the field of torts"); see Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 578, 157 N.W.2d 595, 598 (1968) ("The degree of reliance a tortfeasor might have placed on a wife's inability to recover consortium damages would be insignificant if existent. Certainly the tort was not committed with this in mind and the degree to which it may have influenced the decision whether or not to purchase liability insurance would be less than minimal.")'; Bielski v. Schulze, 16 Wis. 2d 1, 18, 114 N.W.2d 105, 113 (1962) ("The argument is made that the doctrine of gross negligence is needed to deter such conduct, but it is doubtful that potential tortfeasors were aware of the rule and, if they were, whether they reflected upon it or their conduct was deterred by it."). See generally Keeton, supra note 23, at 490; Peck, supra note 16, at 300.


ment of immunity cases. Even though it is generally accepted that parties do not commit torts merely because their actions are immune from suit, 35 most jurisdictions recognize that a party may have refrained from purchasing insurance or may have purchased deficient amounts or kinds of insurance in reliance upon the immunity. 36 The prospective abrogation of a tort immunity gives a party the opportunity to purchase or adjust liability insurance. 37 An additional justification for the immunity exception to retroactive overruling is the argument of insurance companies that their rates are affected greatly by changes in the law 38 and that retroactive overruling would deny them the opportunity to make a

433, 142 N.W.2d 66, 75 (1966) (abolition of parent-child immunity); Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599, 606 (Mo. 1969) (abolition of charitable immunity); cf. Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962) (abolition of government immunity to be applied only after next session of legislature); Widell v. Holy Trinity Catholic Church, 19 Wis. 2d 648, 657, 121 N.W.2d 249, 254-55 (1963) (abolition of religious institution immunity to be applied two months after date of decision and to instant case). But see Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (abolition of governmental immunity to be applied to instant case as well as to future cases); Haney v. Lexington, 386 S.W.2d 738, 742 (Ky. 1964) (abolition of governmental immunity given retroactive effect); Myers v. Gennesee County Auditor, 375 Mich. 1, 133 N.W.2d 190 (1965) (abolition of municipal immunity to be applied to instant case, and to all pending and future cases); Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 26, 141 A.2d 273, 275 (1958) (abolition of charitable immunity given retroactive effect). See generally Keeton, supra note 23, at 490; Littlefield, Stare Decisis, Prospective Overruling and Judicial Legislation in the Context of Sovereign Immunity, 9 ST. LOUIS L.J. 56, 76-77 (1964); Rogers, supra note 3, at 70-71; Traynor, supra note 3, at 547; Note, Prospective-Retroactive Overruling: Remanding Pending Legislative Determination, 58 B.U.L. REV. 818, 826-27 (1978); 35 Mo. L. REV. 418 (1970) (charitable immunity).

35. See, e.g., Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 26, 141 A.2d 273, 275 (1958) (abolition of charitable immunity; "reliance has very little place anywhere in the field of torts"); Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 578, 157 N.W.2d 595, 598 (1968) (decision recognizing wife's cause of action for loss of consortium held to have retroactive effect); Bielski v. Schulze, 16 Wis. 2d 1, 18, 114 N.W.2d 105, 113 (1962) (abolition of gross negligence doctrine; "it is doubtful that potential tortfeasers were aware of the rule, and, if they were, whether they reflected upon it or their conduct was deterred by it").


37. Balts v. Balts, 273 Minn. 419, 431, 142 N.W.2d 66, 74 (1966); see Keeton, supra note 3, at 490.

38. See Keeton, supra note 23, at 492-93. Some legal scholars maintain that changes in substantive tort doctrines have little if any impact on rating practices. See Keeton, supra, at 493; Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 YALE L.J. 554, 580-81 (1961); Peck, supra note 16, at 300-01.

Furthermore, the entire reliance argument in immunity cases has been attacked by legal scholars and courts. See Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 26, 141 A.2d 273, 274-75 (1958); Keeton, supra, at 490-93; Peck, supra note 16, at 300-01.
proper investigation with full knowledge of the extent of liability.39

In summary, the general rule is to give retroactive application to decisions that overrule substantive tort doctrines. An exception exists, however, in the immunity cases in which justifiable reliance may exist.

III. THE MINNESOTA APPROACH

Minnesota has consistently followed the general rule of retroactive overruling,40 recognizing an exception to the rule in the areas of criminal,41 contract, and property law when there has been a clear showing of justifiable reliance on prior law or vested rights.42 In addition, the Minnesota court has recognized an exception to retroactive overruling when an immunity has been abolished.43 In the area of tort law, however,

40. See notes 48-57 infra and accompanying text.
41. In the area of criminal law, the Minnesota court uses a balancing formula to determine whether an overruling decision is to be given prospective or retroactive application. See State v. Olsen, 258 N.W.2d 898, 907 n.15 (Minn. 1977) (applying prospectively a procedure whereby multiple defendants are clearly informed of the inherent problems in dual representation of defendants by a single attorney). This balancing approach was developed by and adopted from the United States Supreme Court. See Adams v. Illinois, 405 U.S. 278, 280 (1972); Stovall v. Denno, 388 U.S. 293, 297 (1967). The factors that are considered in making the determination include the purpose to be served by the new standards, the extent of reliance by law enforcement authorities on the old standards, and the effect upon the administration of justice. See State v. Olsen, 258 N.W.2d at 907 n.15 (Minn. 1977).
42. See Hoven v. McCarthy Bros. Co., 163 Minn. 339, 342, 204 N.W. 29, 30 (1925) (“contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision.”); Lovejoy v. Stewart, 23 Minn. 94, 101 (1876); note 22 supra. In Lovejoy, which involved a controversy over a contract for the sale of land, the court refused to apply the principle *actus curiae neminem gravabit* (an act of the court shall prejudice no man), because a decision holding that U.S. treasury notes were not legal tender was rendered after the act in question. 23 Minn. at 101.
43. See Nieting v. Blondell, 306 Minn. 122, 132, 235 N.W.2d 597, 603 (1975) (abrogation of state tort immunity to be applied after August 1, 1976, or until the State Legislature acts); Beaudette v. Frana, 285 Minn. 366, 371-73, 173 N.W.2d 416, 420 (1969) (abrogation of interspousal tort immunity to be applied to the instant case and to all causes of action arising after date of decision); Silesky v. Kelman, 281 Minn. 431, 443, 161 N.W.2d 631, 638 (1968) (abrogation of child-parent immunity in negligence cases to be applied to the instant case and to all causes of action arising after the date of decision); Balts v. Balts, 273 Minn. 419, 434, 142 N.W.2d 66, 75 (1966) (abrogation of parent-child immunity to be applied to the instant case and to all causes of action arising after date of decision); Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962) (abolition of governmental immunity to be applied to tort claims arising after next legislative session).

A unique and interesting use of the reliance principle in an immunity case occurred in Eicher v. Jones, 285 Minn. 409, 173 N.W.2d 427 (1970). In *Eicher*, a case in which a minor child sued one of his parents for negligence that caused an automobile accident, the court considered whether to apply *Silesky* to a cause of action that arose before the filing date of the *Silesky* decision. See id. at 411, 173 N.W.2d at 429. The principles of prospec-
when the abolition of an immunity is not involved, the Minnesota court has not applied the principles underlying prospective and retroactive overruling consistently. As noted previously, the majority of jurisdictions, when overruling a substantive tort doctrine, apply the decision retroactively. Minnesota, in contrast, applies the new rule of law prospectively. This anomalous treatment is the result of a series of cases overruling substantive tort law that apparently failed to apply Minnesota precedent and failed to address the policies underlying prospective and retroactive overruling.

Minnesota recognized the reliance principle as early as 1860. In *Hol- lingshead v. Von Glahn,* the court considered whether a case that had changed the rule regarding the damages allowable for breach of a money contract would apply to a contract that specified a different amount based on the prior rule of law. The *Hollingshead* court held that when the highest court in a state has declared what the law is, parties who have justifiably relied on the former law should not be injured by the new rule. In *Hoven v. McCarthy Bros.,* the court stated that overruling decisions are given retroactive effect except when contracts or vested rights would require that causes of action arising prior to the overruling decision be judged under the old rule of law. See notes 5, 23-24 supra. The *Eicher* court, however, ruled that the parties would be judged under the new rule of law as declared in *Silesky.* *Eicher v. Jones,* 285 Minn. at 412-13, 173 N.W.2d at 429-30. The *Eicher* court based its decision on the reliance principle. Although the plaintiff in *Eicher* commenced the action before the action was commenced in *Silesky,* the parties in *Eicher* delayed their appeal and agreed that the decision in *Silesky* would be controlling. *Id.* at 412, 173 N.W.2d at 429. In addition, the court stated that if the parties in *Eicher* had continued their appeal, most likely it would have been consolidated with *Silesky.* *Id.* Therefore the *Eicher* court felt compelled to apply the new rule of law to a cause of action that arose prior to a decision that prospectively overruled the old rule of law. *See id.* at 412-13, 173 N.W.2d at 429-30. The *Eicher* court cited as its primary justification for its unique approach the reliance of the parties on the outcome of *Silesky.* *See id.* at 412-13, 173 N.W.2d at 429-30. Even though the decision in *Eicher* had the same effect as retroactive overruling (applying the rule in an overruling decision to cases coming to trial after the overruling decision) the *Eicher* court made it clear that it still rejected the retroactive overruling of the child-parent immunity doctrine. *See id.* at 413, 173 N.W.2d at 430. Since *Eicher* no Minnesota case has presented circumstances that were unusual enough to warrant the *Eicher* exception to prospective overruling. *See Thoen v. Hatton,* 287 Minn. 545, 177 N.W.2d 815 (1970) (in suit by wife for loss of consortium arising out of accident that occurred one year prior to decision allowing wife to recover damages for injury to husband, court found no facts to place case within *Eicher* exception); *Schultz v. Chicago & N.W. Ry.,* 286 Minn. 231, 175 N.W.2d 177 (1970) (in suit by child against mother for injuries arising out of car-train collision that occurred prior to *Silesky,* court held no special facts to place it in *Eicher* exception).

44. See notes 46-91 infra and accompanying text.
45. See note 29 supra and accompanying text.
46. See notes 58-71 infra and accompanying text.
47. See notes 58-91 infra and accompanying text.
48. 4 Minn. 190 (Gil. 131) (1860).
49. *Id.* at 191 (Gil. at 132); see note 22 supra and accompanying text.
50. 163 Minn. 339, 204 N.W. 29 (1925).
are involved.\(^5\) Thirty-seven years later, the general rule set out in *Hoven* was affirmed in *Fussner v. Andert*.\(^5\) *Fussner* involved a wrongful death action arising out of an automobile accident. The Minnesota wrongful death statute was construed to include recovery for loss of society and companionship in addition to pecuniary loss.\(^5\) Defendant's request that the decision be modified to apply only prospectively was denied.\(^5\) The court stated that prospective overruling would have some merit if the case before it involved a question of contract or property law in which the parties had taken action in reliance on existing law.\(^5\) The court then noted that the reliance principle was inapplicable in negligence actions because the existing law has no effect on the conduct of the defendant.\(^5\) Based upon the case law ending with *Fussner*, the Minnesota rule for non-immunity tort decisions was that an overruling decision was given retroactive operation. This rule was founded on the premise that the law of negligence has little or no effect upon conduct.\(^5\)

The first non-immunity tort decision after *Fussner* to address the issue of retroactive overruling was the 1966 decision of *Weber v. Stokely-Van Camp, Inc.*\(^5\) In *Weber*, the court abolished the rule that the negligence of a servant is imputed to the master so as to bar the master's right to recovery against a negligent third party.\(^5\) The abrogation of the imputed negligence doctrine, however, was limited to automobile negligence cases.\(^5\) Because *Weber* was a tort case that did not involve an immunity, *Fussner* should have dictated retroactive overruling. The new rule of law, however, was applied prospectively.\(^5\) The *Weber* court offered no justification for prospective overruling except to state that it would be unfair to impose liability on defendants who have relied, without notice of a

\(^{51}\) *Id.* at 341-42, 204 N.W. at 30.

\(^{52}\) 261 Minn. 347, 113 N.W.2d 355 (per curiam), aff'd in part, vacated in part on rehearing, 261 Minn. 361, 113 N.W.2d 364 (1962).

\(^{53}\) 261 Minn. at 358-59, 113 N.W.2d at 362-63.

\(^{54}\) *Id.* at 361, 113 N.W.2d at 364.

\(^{55}\) *Id.*

\(^{56}\) *Id.*

\(^{57}\) The Minnesota court applied the principle of *Fussner* stating that an exception to retroactive overruling exists when there has been a showing of justifiable reliance or vested rights in two subsequent immunity cases. *See* *Balts v. Balts*, 273 Minn. 419, 431, 142 N.W.2d 66, 75 (1966); *Spanel v. Mounds View School Dist. No. 621*, 264 Minn. 279, 292, 118 N.W.2d 795, 803 (1962). Ironically, the court in *Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W.2d 865 (1969) used *Spanel* and *Balts* to justify prospective overruling. *See* *id.* at 514 n.10, 170 N.W.2d at 870 n.10; *notes* 63-68, 79-84 *infra* and accompanying text.

\(^{58}\) 274 Minn. 482, 491, 144 N.W.2d 540, 545 (1966).

\(^{59}\) *Id.* (stating that the rule was defensible only on the grounds of its antiquity).

\(^{60}\) *Id.*

\(^{61}\) *See id.* ("There may be other situations where the same result should follow, but we leave those decisions for the future as they come before us.").
departure, on the imputed negligence doctrine. 62

This apparent abandonment of the Fussner line of cases was perpetuated in Thill v. Modern Erecting Co. 63 In Thill, the court discarded the rule that a wife cannot sue for her own loss of consortium as a result of negligent injury to her husband and remanded the case to district court. 64 Because Thill, like Weber, was a non-immunity tort case, Fussner should have mandated retroactive overruling. The holding of the Thill court, however, was applied prospectively. 65 In a footnote, 66 the Thill court justified prospective treatment by stating that the limitation on prospective application was dictated by two immunity cases, Spanel v. Mounds View School District No. 621 67 and Balts v. Balts. 68

The most significant departure from the Fussner line of cases occurred in Springrose v. Willmore. 69 In Springrose, assumption of the risk in its secondary sense was merged with contributory negligence under the contributory negligence statute. 70 Without any discussion, the Springrose court held that its decision would be prospective. 71 Prospective overruling in Springrose was significant because it led to twenty-one appeals before the Minnesota Supreme Court under pre-Springrose law. 72

62. Id.

63. 284 Minn. 508, 514 n.10, 170 N.W.2d 870 n.10 (1969) (prospective application dictated by prior decisions). On remand, the district court entered judgment for the wife and defendant subsequently appealed. See Thill v. Modern Erecting Co., 292 Minn. 80, 193 N.W.2d 298 (1971).

64. See 284 Minn. at 511-14, 170 N.W.2d at 868-70 (overruling Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935), to the extent inconsistent with Thill).

65. Id. at 514, 170 N.W.2d at 870.

66. See Thill v. Modern Erecting Co., 284 Minn. 508, 514 n.10, 170 N.W.2d 865, 870 n.10 (1969); note 57 supra. In the second Thill case, the court again stated that prospective overruling was dictated by Spanel v. Mounds View School Dist. No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962) and Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966). See Thill v. Modern Erecting Co., 292 Minn. at 82 n.2, 193 N.W.2d at 299 n.2.

67. 264 Minn. 279, 118 N.W.2d 795 (1962) (school district not liable for injuries sustained by student as result of alleged negligence under the prospectively overruled doctrine of sovereign tort immunity).

68. 273 Minn. 419, 434, 142 N.W.2d 66, 75 (1966) (defense of immunity abrogated in all actions by a parent against a child arising out of torts committed from and after this date; as to torts already committed by unemancipated child against parent, immunity shall continue to be given retrospective effect, except only as to the case at hand).

69. 292 Minn. 23, 192 N.W.2d 826 (1971).

70. Id. at 24-25, 192 N.W.2d at 827.

71. See id. at 26, 192 N.W.2d at 828 ("Our decision is prospective, so that it shall apply only to causes of action arising from and after the date of this decision, except that it shall also apply to the case at hand.").

IV. ANALYSIS OF THE MINNESOTA APPROACH

The Weber court attempted to justify prospective overruling by stating that it was necessary to protect defendants who had relied on the imputed negligence doctrine.73 Because the Weber court did not state clearly how the defendants could have relied on the imputed negligence doctrine, it is instructive to examine the possible bases for establishing justifiable reliance.

First, it could be argued that the defendant relied on the imputed negligence doctrine in committing the tort. If defendant had relied on the defense in committing the tort, however, the action would not have been a negligence action but rather an intentional tort. Even if the defendant had relied on the defense in committing the tort, public policy should not allow a defendant to use the law to escape liability for an intentional tort. Second, reliance could have been shown if insurance rates had been based upon the law or if the defendant had refrained from purchasing insurance coverage because of the prior rule of law. However, there was no evidence in Weber that the defendant failed to purchase insurance because of reliance on prior law. Third, there was no claim that prior law was a determining factor in setting insurance rates. In any event, the effect of tort doctrines on rating practices is highly questionable.74 Finally, the defendant in Weber could have established reliance if he had depended on the imputed negligence doctrine in preparing his defense,75 but no such argument was made.76 Because there was no reasonable ba-

74. See Keeton, supra note 23, at 492-93; Morris, supra note 38, at 580-81; Peck, supra note 18, at 300-01.
75. See Traynor, supra note 3, at 546.
76. It is well recognized that principles of liability and defenses are in a constant state of flux and are subject to change at any time by a court. See, e.g., New York Cent. R.R. v. White, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); Mathison v. Minneapolis St. Ry., 126 Minn. 286, 291, 148 N.W. 71, 73 (1914) ("no person has any property right or vested interest in a rule of law"); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 75, 246 N.E.2d 725, 731, 298 N.Y.S.2d 955, 963 (1969) ("there is always a certain amount of un-
sis for reliance in Weber, prospective overruling was not justified. Therefore, the Weber court should have retroactively overruled the imputed negligence doctrine. Unfortunately, the Weber court’s failure to apply Minnesota precedent and the principles underlying retroactive and prospective overruling resulted in the denial of recovery to two plaintiffs solely because their causes of action arose prior to the date of the otherwise applicable decision.

77. Although it could be argued that the court was taking judicial notice of the fact of reliance, a judicially noticed fact must not be subject to reasonable dispute and, therefore, the fact must be generally known or capable of accurate and ready determination. See Minn. R. Evid. 201(b) (even though rules were not effective until 1971, the principles of judicial notice existed in the common law). Because it is generally accepted that reliance has no place in tort law, see note 28 supra and accompanying text, it is clear that any reliance by the defendant in Weber on the previous rule of law was subject to substantial doubt. Therefore, judicial notice of the fact of reliance would be unfounded. As a result, prospective overruling was not justified.

78. In Pierson v. Edstrom, 286 Minn. 164, 174 N.W.2d 712 (1970), the plaintiff's wife pulled up next to plaintiff's car while it was stopped on the shoulder of a freeway. The defendant subsequently collided with both cars. Since the accident occurred prior to Weber, the defendant sought to bar the recovery of the husband by imputing the contributory negligence of the wife to the husband. Id. at 171, 174 N.W.2d at 716. The Pierson court held that Weber was limited to the master-servant context and therefore was not controlling. This gave the Pierson court an opportunity to correct the error in Weber. Unfortunately, the apparent misapplication of retroactivity principles was perpetuated. The Pierson court held that the abolition of imputed contributory negligence between joint venturers was to be applied to the case before the court and held the decision would be given prospective application only to automobile negligence cases. Id. There was no discussion of any of the relevant policy considerations in support of the holding.

The ruling in Weber appeared once again in B.F. Griebenow, Inc. v. Anderson, 287 Minn. 174, 177 N.W.2d 395 (1970). The plaintiff corporation brought an action against defendant for property damage resulting from a collision between an automobile owned by plaintiff and operated by plaintiff's agent and defendant. The incident occurred prior to the decision in Weber. The Griebenow court construed the language of Weber to mean that the former rule of imputed contributory negligence applied to causes of action arising after the date of the decision and not to actions coming to trial after the decision but arising prior to that date. Id. at 176, 177 N.W.2d 396-97. Additionally, the Griebenow court stated that “[o]ur decisions before and after Weber demonstrate that in the prospective overruling of prior substantive rules of tort law we have uniformly intended the new rule to apply to causes of action arising from and after the date of the decision.” Id. at 176-77, 177 N.W.2d at 397. The only exception cited was the situation presented in Eicher v. Jones, 285 Minn. 409, 173 N.W.2d 427 (1970). See note 43 supra. The Griebenow court not only failed to consider Fussner or Hoven in its statement, but also did not recognize the exceptional nature of immunity cases. In support of its decision, the Griebenow court relied on Weber, Peterson v. City of Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969), Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969), Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968), and Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966). These cases do not support the proposition asserted by the Griebenow court. Silesky and Balts are immunity cases that have generally been given special treatment. Peterson held that the comparative negligence statute could be applied retroactively.
Similarly, the rule denying a wife's cause of action for loss of consortium should have been retroactively overruled in *Thill*. The *Thill* court stated that prospective overruling was dictated by *Spanel* and *Balts*.79 There are several reasons indicating that reliance on *Spanel* and *Balts* to justify prospective overruling was not warranted. Foremost is the fact that *Spanel* and *Balts* were immunity cases that are generally recognized as an exception to the rule of retroactive overruling.80 Because *Thill* was not an immunity case, *Spanel* and *Balts* were not the most relevant authority to support prospective overruling. Furthermore, neither *Spanel* nor *Balts* contain language that could be construed to apply to all substantive tort rulings.81 Finally, reliance on *Spanel* to support the proposition that the decision in *Thill* should be applied prospectively was not well founded because the *Spanel* court refused to apply the doctrine to the case before it and deferred application until after the next legislative session.82

Irrespective of the apparent misapplication of *Spanel* and *Balts*, the

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79. See notes 66-68 supra and accompanying text.
80. See notes 34-39 supra and accompanying text.
81. Subject to any statutory limitations or regulations, the *Spanel* court overruled the doctrine of sovereign 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 decision. The court explicitly did not abolish sovereign immunity as to the state itself. 264 Minn. at 281, 292-93, 118 N.W.2d at 796, 803.

The *Balts* court abolished parent-child tort immunity in tort actions brought by a parent against a child. The court explicitly did not abrogate tort immunity in actions by a child against a parent or between husband and wife. 273 Minn. at 433-34, 142 N.W.2d at 75.

82. See *Spanel* v. Mounds View School Dist. No. 621, 264 Minn. at 281, 292-93, 118 N.W.2d at 796, 803-04.

The Iowa Supreme Court had an opportunity to address the propriety of prospective overruling as applied in *Thill* in the case of *Berghammer* v. *Smith*, 185 N.W.2d 226 (Iowa 1971). In *Berghammer*, the plaintiff, a Minnesota resident, was injured when plaintiff's truck collided with defendant's truck in Iowa. In the subsequent lawsuit, the plaintiff's wife sued for loss of consortium. The *Berghammer* court held that Minnesota law governed the wife's action and therefore, the holding in *Thill* was to govern. Because the cause of action in *Berghammer* arose prior to the date of the decision in *Thill*, *Thill* required the application of pre-*Thill* law and a rejection of the plaintiff's wife's claim. The *Berghammer* court, however, refused to apply pre-*Thill* law and held that the parties in *Berghammer* would be judged under post-*Thill* law. *Id.* at 232. The *Berghammer* court stated that because Iowa had recognized a wife's cause of action for loss of consortium since 1965, four years before the decision in *Thill*, the defendants could not raise any reliance argument that the Minnesota court apparently felt existed in *Thill*. In addition, the *Berghammer* court stated that applying pre-*Thill* law would give life to a principle that the Minnesota and Iowa courts have repudiated. *Id.* at 228-33.
Thill court was not justified in giving prospective operation to its decision. The principle error in the Thill opinion is that the reliance principle generally has no application in tort cases because tort law does not affect conduct.\textsuperscript{83} Moreover, no assertion of reliance was made in Thill. As was the case with the Weber court’s decision, the Thill court’s apparent misapplication of precedent and the failure to use the policies underlying prospective and retroactive overruling resulted in two plaintiffs being denied recovery solely because of prospective overruling.\textsuperscript{84}

There are four major reasons that prospective overruling was not merited in Springrose. First, the general rule in non-immunity tort cases is that of retroactive overruling.\textsuperscript{85} Second, it is well accepted that substantive tort law has little or no effect on conduct.\textsuperscript{86} Third, there clearly could be no reliance by defendants or insurance companies upon such an esoteric concept as assumption of the risk in its secondary sense. Fourth, insurance premiums are only slightly, if at all, affected by a change in tort law.\textsuperscript{87} Therefore, there was no basis for recognizing an exception to the retroactivity rule in Springrose. As a result of the decision in Springrose, over a score of cases as late as 1980 were tried under a principle of law that was rejected in 1971.\textsuperscript{88} Four of these plaintiffs were denied recovery solely because their causes of action arose before the Springrose

\textsuperscript{83} See note 32 supra and accompanying text; cf. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 12.4, at 756 (1956) (arguing that the existence of potential tort liability does affect the conduct of large groups and enterprises who may often be exposed to tort law suits).

\textsuperscript{84} One year after Thill, plaintiff in Gray v. General Motors Corp., 434 F.2d 110 (8th Cir. 1970), was denied recovery for her loss of consortium arising out of an automobile accident \textit{inter alia} because the accident occurred prior to the decision in Thill. \textit{Id.} at 112.

In 1970, the spectre of Thill once again denied a wife recovery for her loss of consortium solely because the accident occurred prior to the decision in Thill. See Thoen v. Hatton, 287 Minn. 545, 177 N.W.2d 815, 816 (1970). \textit{But cf.} Ryter v. Brennan, 291 So. 2d 55 (Fla. Dist. Ct. App. 1974) (newly created cause of action for loss of consortium retroactively applied); Deems v. Western Md. Ry., 247 Md. 93, 231 A.2d 514 (1967) (because of action for loss of consortium applicable to all future and pending actions, except for claims by husbands or wives which, prior to date of filing of opinion, have been effectively barred by settlement, judgment, the statute of limitations, or otherwise); Shepherd v. Consumers Coop. Ass’n, 384 S.W.2d 635 (Mo. 1964) (wife’s action for loss of consortium involves matter of substantive law and therefore operates retroactively); Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 157 N.W.2d 595 (1968) (cause of action for loss of consortium retroactively applied).

\textsuperscript{85} See note 18 supra and accompanying text.

\textsuperscript{86} See notes 32, 83 supra and accompanying text.

\textsuperscript{87} See Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 157 N.W.2d 595, 596 (1968) ("The degree to which the premiums charged by insurance companies would have differed had a wife always been accorded the right to recover consortium damages is speculative and probably relatively insignificant."); Keeton, supra note 9, at 493; Morris, supra note 36, at 580-81; Peck, supra note 14, at 300-01; Traynor, supra note 3, at 546.

\textsuperscript{88} See note 72 supra.
The tragedy of cases like *Thill*, *Weber*, and *Springrose* is that deserving plaintiffs are denied recovery under a rule of law that has been declared to be erroneous. In addition, the administration of justice is hampered by the application of a dead rule of law to cases coming to trial years after the overruling decision. Considering the great activity in the area of tort reform, a plaintiff's chance of recovery easily could become tangled in a pre- and post-decision situation in which the outcome of the case would not be determined on the ground of justice but by the date the injury occurred. It is clear from *Thill*, *Weber*, and *Springrose* that the Minnesota court is blindly applying the prospective overruling doctrine without fully recognizing the consequences of its rulings.

V. CONCLUSION

On the basis of public policy and fairness, retroactive overruling is the most equitable approach in the area of tort law. The arguments supporting this view are clear and numerous. First, it is not necessary to use the prophylactic doctrine of prospective overruling in the tort area since reli-

89. See Goblirsch v. Western Land Roller Co., 310 Minn. 471, 477, 246 N.W.2d 687, 691 (1976) (recovery denied for loss of hand because plaintiff assumed risk in operating corn grinding machine); Bakke v. Rainbow Club, Inc., 306 Minn. 99, 104 n.3, 235 N.W.2d 375, 378 n.3 (1975) (combined trial for wrongful death and dramshop liability; decedent's assumption of risk barred wrongful death action); Schroeder v. Jesco, Inc., 296 Minn. 447, 449 n.1, 209 N.W.2d 414, 416 n.1 (1973) (electrician denied recovery for damage sustained while working on construction project on basis of assumption of the risk); Meyer v. Bushma, 295 Minn. 510, 510 n.2, 202 N.W.2d 871, 872 n.2 (1972) (per curiam) (recovery denied because plaintiff assumed the risk by walking on snow-covered icy ground on exterior premises of defendant's club).

90. See note 1 supra.

91. One reason tort law continues to be prospectively overruled in Minnesota may be because there is no incentive for attorneys to bring the issue before the court. Because the court makes the decision to overrule prospectively in the overruling case rather than in a subsequent case in which application of the new rule would be contested by adversaries, and since the court typically applies the new rule of law in the overruling case, there is no incentive for attorneys advocating a change in the law to point out the inequities caused by prospective overruling in tort cases. Similarly, attorneys advocating the status quo have no reason to raise the retroactivity issue. Therefore, it is understandable that the Minnesota Supreme Court has not squarely addressed the controversy.

For example, in *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971), the court stated in one sentence that the decision was prospective. *Id.* at 26, 192 N.W.2d at 828. No other discussion of retroactive or prospective overruling appeared in the decision. Similarly, in *Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W.2d 865 (1969), the court declared that the old rule was prospectively overruled without any further discussion except a one sentence footnote citing two immunity cases as authority for prospective treatment. *Id.* at 514 n.10, 170 N.W.2d at 870 n.10. In *Weber v. Stokely-Van Camp, Inc.*, 274 Minn. 482, 144 N.W.2d 540 (1966), the court's entire discussion of prospective and retroactive overruling consisted of one sentence that was devoid of citations to any authority. *Id.* at 491, 144 N.W.2d at 545.
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ance on prior law is generally not a viable argument. Second, by applying the new law to the case before the court, the policy of providing incentive for challenging outmoded legal doctrines is served. Third, the fear that the new rule becomes pure dicta if it is not applied to the case before the court is eliminated. Finally, applying the new rule to cases still in the judicial process promotes the interests of fairness and judicial administration. By accepting review of cases that reach the court after a change in the law, the court avoids the cumbersome task of deciding cases under the old law after the rejection of that law. Because of the delays in legal process, discredited rules of law live on for many years under prospective overruling.

In this era of massive tort reform, the complications caused by prospective overruling might require courts to consult tables to determine which rule of law to apply in a given instance. Such an absurd result would not serve the ends of justice. Justice should not depend upon a fortuitous event such as the date an injury occurred. Unfortunately, prospective overruling in Minnesota tort reform cases still persists. Until

92. See notes 32, 83 supra and accompanying text.
93. See note 23 supra and accompanying text.
94. See note 24 supra and accompanying text.
96. See notes 21, 78, 84, 88-89 supra and accompanying text.
98. See Peterson v. Balach, 294 Minn. 161, 173, 199 N.W.2d 639, 647 (1972). In Peterson the court prospectively overruled the rule that a property entrant's status is controlling when determining the landowner's duty to that person. Id. The court held that an entrant's status as licensee or invitee is only one element among many to be considered in determining a landowner's liability under ordinary standards of negligence. Id. In justifying prospective overruling, the court stated, "[a]lthough the time has come when we must reexamine our previous decisions, the doctrine of stare decisis restrains us from overruling our previous holdings with retroactive effect. In the present case, we prospectiveiy eliminate previous restrictions to which we have adhered." Id. In a footnote the court stated, "in fairness to all litigants and trial courts a more equitable solution is to provide prospective application of the new rules effective from and after the date of this decision, except that they shall apply to the instant matter." Id. at 173 n.6, 199 N.W.2d at 647 n.6. The Peterson court failed to recognize the effect prospective overruling has on future litigation. Surely, it is not fair and equitable to future litigants to try their cases under a rule of law that had been rejected as unfair and inequitable. Furthermore, prospective overruling is not fair and equitable to trial courts who must constantly be aware of the date of the cause of action so they may apply all the rejected rules of law to a case that are required.

To date, four cases that have come to trial after Peterson were tried under the pre-Peterson rule of law merely because the causes of action arose prior to Peterson. Fortunately, in three of the cases the plaintiff's legal status did not interfere with the court's determination of duty and breach of duty. See Szyplinski v. Midwest Mobile Home Supply Co., 308 Minn. 152, 241 N.W.2d 739 (1974) (plaintiff, held to be licensee, recovered for
the effects of prospective overruling in tort reform cases are recognized and eliminated, confusion will continue to plague this area of the law.99

injuries sustained when coupling on neighbors’ flag pole broke); Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 203 N.W.2d 841 (1973) (plaintiff, held to be business invitee, recovered for injuries resulting from tripping on a photo booth doorway riser). Unfortunately, in one case the use of the plaintiff’s legal status as a controlling factor may have resulted in the plaintiff being denied recovery. See Stapleman v. St. Joseph The Worker, 295 Minn. 406, 205 N.W.2d 677 (1973) (per curiam). In Stapleman the plaintiff tripped over a coatrack at a senior citizen’s party on premises furnished by defendant without charge. Both the trial court and the supreme court held that the duty owed to the plaintiff should be assessed under the law of a licensee. The supreme court, however, reversing the lower court, held that there was no evidence of any breach of duty owed to the licensee. Id. at 410, 205 N.W.2d at 680. If the Peterson court had retroactively instead of prospectively overruled the rule that a property entrant’s status is controlling, the fact that the plaintiff was a licensee in Stapleman would have been only a factor in determining the duty owed to the plaintiff. As a result, the decision in Stapleman may have been different.

99. For example, the so-called products liability crisis has been prompted in part by uncertainty in judicial decisions extending the law of products liability. The crisis has been caused by a complex of factors, however, only one of which is uncertainty in the law. See INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT I-1, -20 to -31 (1976).

Several significant Minnesota Supreme Court personal injury decisions did not specify whether the decision was to be applied prospectively or retroactively. See Perkins v. Public Serv. Comm’n, No. 47876 (Minn. Nov. 9, 1979) (extrahazardous crossing doctrine abandoned); Busch v. Busch Constr., Inc., 262 N.W.2d 377 (Minn. 1977) (strictly liable manufacturer can get contribution from a negligent co-tortfeasor under Minnesota comparative negligence statute); Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977) (manufacturer obtained indemnity from installer who failed to discover defect in manufacturer’s product); Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (1977) (third party manufacturer obtained limited contribution from negligent employer under Minnesota workers’ compensation statute). The general rule dictates retroactive overruling absent an express judicial declaration to the contrary. See Canton v. United States, 265 F. Supp. 1018, 1021 (D. Minn. 1967); Fitzgerald v. Meissner & Hicks, Inc., 38 Wis. 2d 571, 576, 157 N.W.2d 595, 596-98 (1968) (party seeking prospective treatment must establish a compelling judicial reason); Rogers, supra note 3, at 42, 59. In addition, Perkins, Busch, Tolbert, and Lambertson are tort cases that do not involve an immunity. For an analysis of Busch, Tolbert, and Lambertson, see Note, Contribution and Indemnity—An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts, 5 WM. MITCHELL L. REV. 109, 145-58 (1979). Therefore, the rules announced in those cases should be applied retroactively. See notes 29-39 supra and accompanying text (Minnesota has prospectively overruled personal injury decisions since 1966).

A recent Minnesota Supreme Court case dramatically illustrates the confusion that prospective overruling creates. In Wegscheider v. Plastics, Inc., No. 49512 (Minn. Feb. 15, 1980) the plaintiff was injured when he fell from defendant’s tanker trailer. Based on the fact that the accident had taken place prior to the Minnesota court’s ruling in Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971), the trial court granted the defendant’s request for a jury instruction on assumption of the risk. The jury found the plaintiff to be 10% negligent and the defendant to be 90% negligent. However, the jury also found that the plaintiff had assumed the risk of injury. Therefore, the trial court found that, based on pre-Springrose law, the plaintiff’s recovery was barred. On appeal the supreme court reversed the trial court holding that the evidence was insufficient to warrant an instruction
on assumption of the risk. Thus, nine years after assumption of the risk was abrogated, the Minnesota court was required by its prospective overruling to deal with a doctrine that had long been declared unjust. Fortunately, the plaintiff was not denied recovery on the basis of pre-Springrose law.

Wegscheider also furnishes another example of the confusion generated by prospective overruling. The court stated that the rule of Busch v. Busch Constr. Co., 262 N.W.2d 377 (1977), holding that contributory negligence does not include the failure to discover a defect, was properly applied to the Wegscheider facts. Busch was decided in 1977. Springrose was decided in 1971. Thus, the Wegscheider court applied pre-Springrose and post-Busch law to the same case. The potential for confusion is obvious.