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LEGAL METHOD—DECIDING THE RETROACTIVE EFFECT OF OVERRULING DECISIONS—*Lau v. Nelson*, 92 Wn. 2d 823, 601 P.2d 527 (1979).

Vivian Lau was killed while riding as a guest in a truck driven by Eugene Magnochi and owned by Ray Nelson. Lelan Lau, administrator of the estate, brought a wrongful death action against Magnochi and Nelson. The accident occurred before the effective date of the Washington legislature's repeal of the host-guest statute.[1] Before trial, which occurred after the repealer's effective date, plaintiff Lau sought an order declaring that the repeal applied retroactively to his case. The trial court denied the request, ruling that the repeal did not apply retroactively to claims arising before its effective date, and that therefore Lau was still required to prove gross negligence at trial.[2]

On discretionary review of that order, the Washington Supreme Court held in *Lau v. Nelson (Lau I)*[3] that the repeal was indeed intended by the legislature to apply retroactively to Lau's claim, but affirmed the trial court's subsidiary ruling that the effect of the repeal was merely to reinstate Washington's common law host-guest rule, which required proof of gross negligence just as the statute had.[4] Lau had assumed that the repeal replaced the gross negligence rule with the majority common law rule of ordinary negligence. Consequently, he did not argue that Washington's old common law gross negligence rule should be overruled. For that reason the court refused to consider abandoning the rule, despite intimating it would have been ready to do so.[5] It then remanded to the trial court with directions to apply the gross negligence standard.[6] The jury returned a

1. 1974 Wash. Laws, 1st Ex. Sess., ch. 3, § 1. The repealed statute required an invited guest or licensee injured in a motor vehicle accident to prove gross negligence, intoxication, or intent in order to recover from the owner or operator of the vehicle. 1961 Wash. Laws, ch. 12, at 250 (formerly codified in WASH. REV. CODE § 46.08.080).

2. Lau v. Nelson, No. 786930 (King County Super. Ct., Nov. 2, 1976).

3. 89 Wn. 2d 772, 575 P.2d 719 (1978) [hereinafter cited as *Lau I*]. The general rule is that repealing acts apply retroactively. Hertz v. Woodman, 218 U.S. 205 (1910); Robinson v. McHugh, 158 Wash. 157, 291 P. 330 (1930).

4. 89 Wn. 2d at 776, 575 P.2d at 721–22. The leading Washington cases on the common law host-guest rule are Heiman v. Kloizner, 139 Wash. 655, 247 P. 1034 (1926) and Saxe v. Terry, 140 Wash. 503, 250 P. 27 (1926).

5. It may well be that the requirement of proof of gross negligence is too harsh and should be modified. However . . . petitioners have not attempted to establish the invalidity of the premises upon which the [Washington] common-law rule was based or to show that the present rule is unjust. Until the question is fully argued before us, and facts are presented demonstrating the rule's inefficacy, we decline to abandon [the gross negligence standard].

89 Wn. 2d at 776, 575 P.2d at 721–22 (citations omitted).

6. *Id.*

verdict for defendants, and judgment was entered on October 6, 1978.[7] Lau appealed on October 29, 1978.

On December 21, 1978, the Washington Supreme Court decided in *Robberts v. Johnson*[8] to overrule the common law gross negligence rule applied in *Lau I* and earlier cases, and to adopt the ordinary negligence rule, followed by a majority of states.[9] Remanding to trial on an ordinary negligence standard, the court gave plaintiff Robberts the retroactive benefit of the new rule,[10] but remained silent on any further retroactive effect of the decision.

The principal issue in Lau's second appeal, argued after the filing of the *Robberts* decision, was whether and to what extent the *Robberts* overruling decision should be given further retroactive effect. In *Lau v. Nelson (Lau II)*[11] the Washington Supreme Court rejected Lau's request to apply the new rule to his case, refusing to order a new trial on the ordinary negligence standard. Three judges dissented, terming the denial of retroactivity "an unconscionable and unexplainable injustice."[12]

The *Lau II* court's analysis emphasized the effect retroactivity would have on the administration of justice. In focusing on that single factor, the court gave no more than passing mention to other factors[13] customarily examined in retroactivity cases. Moveover, the decision leaves uncertain whether the retroactivity question should turn on the nature of the new rule or on the peculiarities of the subsequent case before the court. Finally, the confusing sequence of decisions in *Lau I, Robberts,* and *Lau II* demonstrates the disadvantages of tentative, step-by-step overruling. Future overruling courts will perhaps take heed of *Lau II* and recognize that the determination of the retroactive effect of an overruling decision is closely linked to the overruling decision itself. Such a recognition provides a reason for overruling and deciding the effect of the overruling decision at the same time. After critically examining the *Lau II* opinion this casenote argues the advantages of such a practice.

7. Lau v. Nelson, No. 786930 (King County Super. Ct., Oct. 6, 1978).

8. 91 Wn. 2d 182, 588 P.2d 201 (1978).

9. *See* note 51 and accompanying text *infra*. The majority common law host-guest rule allows injured guests to recover from the owner or operator on a showing of ordinary negligence.

10. 91 Wn. 2d at 188, 588 P.2d at 204.

11. 92 Wn. 2d 823, 601 P.2d 527 (1979) [hereinafter cited as *Lau II*].

12. *Id.* at 831, 601 P.2d at 531 (dissenting opinion per Dolliver, J., joined by Utter, C.J., and Brachtenbach, J.) *See* note 52 *infra*.

13. *See* notes 24–54 and accompanying text *infra*.

I. THE *LAU II* ANALYSIS

In *Lau II* the court stated that five factors guide the determination of the retroactive effect of an overruling decision: "(1) Justifiable reliance on the earlier law; (2) The nature and purpose of the overruling decision; (3) *Res judicata;* (4) Vested rights, if any, which may have accrued by reason of the earlier law; and (5) The effect retroactive application may have on the administration of justice in the courts."[14]

After analyzing those factors, a court will generally apply the overruling decision in one of four ways: (1) purely prospectively, giving the new rule effect in future cases only; (2) partially retroactively, giving the new rule effect on the parties to the overruling decision and on future cases only; (3) generally retroactively, giving the new rule effect on all cases not barred by statutes of limitations or jurisdictional rules for timely appeal; and (4) retroactively as in (3) above, but not allowing the rule to govern cases terminated by judgment or verdict before the filing of the overruling decision.[15]

The *Lau II* court approved the reasoning of the Kansas Supreme Court in *Vaughn v. Murray,*[16] which emphasized the interests of litigants and trial courts in giving finality to error-free judgments under existing law.[17] The *Lau II* majority acknowledged that negligent behavior does not normally proceed from reliance on a law that imposes liability only on grossly negligent behavior. Even so, it rejected Lau's contention that retroactive application of the overruling decision to the allegedly negligent behavior of the defendants would not frustrate reliance or engender unfair surprise.[18] The court asserted that there is another kind of reliance deserving of notice. In the majority's view, a second trial, required by a retroactive change in the law, frustrates reliance on the old law by rendering nugatory the preparation of litigants and judge in the first trial.[19] The administration of justice suffers as a result.

Observing that Lau's ability to prove even ordinary negligence was "problematic," the court spoke of the unfairness of subjecting defendants to further litigation when they had already defended at a trial and through two appeals.[20]

14. 91 Wn. 2d at 826–27, 601 P.2d at 529 (quoting Vaughn v. Murray, 214 Kan. 456, 464, 521 P.2d 262, 269 (1974)). *See* note 47 *infra.*

15. *Lau II,* 92 Wn. 2d at 827, 601 P.2d at 529–30. *See also* Annot., 10 A.L.R.3d 1371, 1397 (1966).

16. 214 Kan. 456, 521 P.2d 262 (1974).

17. *Lau II,* 92 Wn. 2d at 827–28, 601 P.2d at 530.

18. *Id.* at 828, 601 P.2d at 530.

19. *Id.*

20. *Id.*

For the majority these concerns outweighed the desirability of giving Lau the benefit of the new law.[21] The court accordingly held that the *Robberts* decision applied only to those cases that had not gone to judgment on the date *Robberts* was decided, and to those cases reversed and remanded for some error other than the standard of fault to be proven.[22] Lau was excluded by that holding.[23]

II. PROBLEMS WITH THE *LAU II* APPROACH

A. Reliance on Tort Rules

Since the earliest attacks on the Blackstonian declarative theory of the judicial function,[24] which required all overruling decisions to be applied retroactively, the primary mischief of the retroactive effect of overruling decisions has been its perceived tendency to frustrate reasonable reliance on precedent.[25] This emphasis on reliance led to the invention of prospec-

21. "[I]nterests involved in the administration of justice outweigh the interests of plaintiffs in enjoying the new rights accorded in [*Robberts*]." *Id.*

22. *Id.*

23. Lau's case had gone to judgment before *Robberts* was decided, and his contention that the trial judge erred by excluding certain opinion testimony was rejected by the court, largely because counsel failed to furnish the supreme court with relevant portions of the record. *Id.* at 829, 601 P.2d at 530. The proceedings at trial were thus error-free under the old law.

24. Blackstone considered the role of the judge to be "to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." W. BLACKSTONE, COMMENTARIES *69. Judges were to discover law, rather than to make law, except on rare occasions when overruling was necessary: "[I]f 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;* that is, that it is not the established custom of the realm, as has been erroneously determined." *Id.* *70 (emphasis in original). Because the new law is the best available evidence of established customary law, it should govern past as well as future events.

John Austin described Blackstone's declarative theory as the "childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges." 2 J. AUSTIN, LECTURES ON JURISPRUDENCE 655 (emphasis in original).

25. Austin observed that the tendency of retroactive overruling to frustrate reliance on prior decisions caused judges to hesistate to overrule at all. J. AUSTIN, *supra* note 24, at 668.

Mr. Justice Cardozo, one of the foremost early proponents of prospective overruling, doubted that laymen relied on precedents as often as was commonly supposed. His concern, like Austin's, was that judges too often were reluctant to change outmoded rules because of assumed reliance. Address by Chief Judge Cardozo, New York State Bar Association (Jan. 22, 1932) *reprinted in* 55 N.Y.S.B.A. REP. 263, 294–96 (1932).

tive overruling.[26] Although courts now consider other factors relevant to retroactivity analysis, reliance remains the central problem.[27]

Tort rules, unlike rules of property or contracts, are not normally susceptible to reliance analysis. Whereas the draftsman of a will or contract creates legal relations by reference to and reliance on existing rules,[28] the tortfeasor generally encounters the law only after the occurrence of the legally significant event.[29] This special character of tort law has led modern authorities to discourage hesitation in overruling outdated and unjust precedents, because the traditional retroactive operation of overruling decisions normally will not, in tort, frustrate reliance interests.[30] Thus only in special circumstances has prospective overruling been regarded as a useful device in tort law.[31]

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26. Prospective overruling is the practice by which an appellate court decides the case before it according to the existing rule of law, while announcing in its opinion that future cases will be governed by a different rule. For an historical treatment of the development of the technique, *see* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960).

27. "[R]eliance upon the earlier decision, . . . is the fundamental justification for a prospective overruling . . . ." Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 644 (1967). To illustrate the potential harm of a retroactive change in the law, suppose a jurisdiction has both legal precedents and a law review article by a well-known scholar that indicate that the Rule in Shelley's Case is followed in the jurisdiction. *T*'s attorneys draft a will by which *T* gives Blackacre to *W* for life, remainder to *W*'s heirs. After *T* dies, *W*, upon advice of counsel, conveys Blackacre to a third party. Additionally, *W*'s attorneys compute, and *W* pays, inheritance tax on Blackacre in fee simple. The actions of *W* and counsel present no problems because under the Rule in Shelley's Case, *W* holds the fee. Subsequently, and without warning, the highest court in the jurisdiction holds that the Rule no longer applies. Suddenly *W* has breached his duty not to convey and has overpaid his taxes. This manifestly unfair and unsettling frustration of reliance on precedent could have been avoided if the overruling court had limited the retroactive effect of its decision. *See* Rubenser v. Felice, 58 Wn. 2d 862, 365 P.2d 320 (1961); Note, 37 WASH. L. REV. 183 (1962).

28. *See* Cascade Security Bank v. Butler, 88 Wn. 2d 777, 567 P.2d 631 (1977) (executory real estate contract); State *ex rel.* Finance Comm. v. Martin, 62 Wn. 2d 645, 384 P.2d 833 (1963) (state bond obligations); Rubenser v. Felice, 58 Wn. 2d 862, 365 P.2d 320 (1961) (will).

29. *See* Haney v. Lexington, Ky., 386 S.W.2d 738 (1964). The principal exception is the case where, at the legally significant event, the defendant is uninsured in reliance on a rule of limited liability. *See* note 31 *infra*. Generally, however, "it cannot realistically be said that a person behaving negligently does so in reliance upon a rule of law which protects him in that negligence . . . ." *Lau II*, 92 Wn. 2d at 828, 601 P.2d at 530.

30. *See, e.g.*, W. SEAVEY, COGITATIONS ON TORTS 65–69 (1954); Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 300 (1963); Comment, *The Prospective Decision—A Useful "Tool of the Trade,"* 38 WASH. L. REV. 584, 594 (1963).

31. The special circumstance is usually the defendant's failure to insure or to investigate accidents in reliance on a subsequently overruled tort immunity. *See* Parker v. Port Huron Hospital, 361 Mich. 1, 105 N.W.2d 1, 14 (1960); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89, *cert. denied*, 362 U.S. 968 (1959). For refutation of the slightly different argument that liability insurers are injured by retroactive overruling because premium rates were set in reliance on the overruled precedent, *see* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 492–93 (1962); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 579–81 (1961).

It is only where the overruling decision affects primary duty rather than the ultimate question of remedy that reliance should be of concern in tort.[32] Because the *Robberts* decision affected the ultimate remedy available to plaintiff guests rather than the primary duty of owners and operators, its retroactive application would not frustrate any reliance interests of defendants Nelson and Magnochi. In the host-guest situation, the driver of an automobile is already under a duty to drive with reasonable care. For breach of that duty the driver may have to answer in damages. It saddles the negligent driver with no unfair surprise to inform him after the fact that passengers in his car now have a more available remedy insofar as they need to prove a lesser degree of fault.

B. The Purpose of the Overruling Decision

Although the traditional retroactivity analysis emphasized reliance alone,[33] more recent opinions have also examined the purpose of the overruling decision.[34] If the purpose of the new rule is promoted by applying it to cases that arose before the overruling decision, the balance is tipped toward retroactive application.[35] If the purpose is unaffected by

32. On the distinction between primary and remedial rights and duties, *see* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 574–77, 640, 643 (tentative ed. 1958). Basically, a primary duty imposes obligations on persons. A remedial rule determines how obligations are to be enforced. As Hart and Sacks suggest, car manufacturers were under a longstanding duty to inspect their wheels with reasonable care. The case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), established that remote purchasers as well as dealers could enforce that duty. The rule of the case was thus remedial rather than primary.

33. *See, e.g.*, Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932); Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635 (1892); Hill v. Atlantic & N.C.R. Co., 143 N.C. 539, 55 S.E. 854, 868 (1906). *See also* the model statute proposed in 1931 to deal with the problem of overruling decisions in Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B.A. J. 180, 182 (1931).

34. *See, e.g.*, Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Desist v. United States, 394 U.S. 244, 251 (1968); Linkletter v. Walker, 381 U.S. 618 (1965); State v. Barton, 93 Wn. 2d 615, 619, 611 P.2d 789, 791 (1980) (Utter, C. J., concurring); Taskett v. KING Broadcasting Co., 86 Wn. 2d 439, 546 P.2d 81 (1976). In *Taskett*, the court went so far as to say that "while reliance was once considered to be the controlling criteria [*sic*], recent decisions demonstrate that it has been replaced by the *purpose* and *effect* of the civil rule." *Id.* at 449, 546 P.2d at 87 (emphasis in original). *But see* Cascade Security Bank v. Butler, 88 Wn. 2d 777 (1977) (reliance).

35. *In re* S/S Helena, 529 F.2d 744 (5th Cir. 1976); Taskett v. KING Broadcasting Co., 86 Wn. 2d 439, 449, 546 P.2d 81, 87 (1976). In *Taskett*, the court overruled prior cases to adopt the rule of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) that private individuals need not prove "actual malice" to recover defamation damages. In deciding whether to apply its decision retroactively, the *Taskett* court stated:

> The purpose of adopting a negligence criteria [*sic*] is to reassert our legitimate state interest in providing a realistic remedy for private individuals actually injured by a defamatory falsehood. . . . Only through retroactive application can the rule enunciated in this opinion fully effectuate the purpose intended by *Gertz* and this court.

Taskett v. KING Broadcasting Co., 86 Wn. 2d 439, 449, 546 P.2d 81, 87 (1976).

retroactive application,[36] other factors, such as reliance or the administration of justice, will assume greater importance. If the purpose is thwarted or frustrated by retroactive application, prospective application is likely.[37]

The rationale for abandoning the gross negligence rule was identified by the *Robberts* court as a recognition "that the rule was mistakenly conceived, that it is out of harmony with general principles of law pertaining to tort liability, that the legislature has manifested a disinterest in its continuation, and that it serves no judicially acceptable purpose."[38]

The *Robberts* court did not merely believe that the gross negligence rule no longer served a once-legitimate purpose, but that it was bad from its inception. *Robberts* allows injured guests the benefit of a burden of proof to which they should always have been entitled; the common law and statutory rules of gross negligence were held to be mistaken.[39] Because it always would have been more just to apply the ordinary negligence standard, the purpose of the *Robberts* decision would be furthered by applying it to injured guests, regardless of whether their causes of action arose or were decided before *Robberts*.[40]

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36. Desist v. United States, 394 U.S. 244, 251 (1968); Linkletter v. Walker, 381 U.S. 618 (1965). At issue in *Linkletter* was the effect of Mapp v. Ohio, 367 U.S. 643 (1961), which held that the fourth amendment's searches and seizures clause applied to the states through the fourteenth amendment.

> *Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved.

Linkletter v. Walker, 381 U.S. at 636–37. *See also* State v. Barton, 93 Wn. 2d 615, 618–21, 611 P.2d 789, 791–92 (1980) (Utter, C.J., concurring).

37. In Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Supreme Court determined that Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1968), which held that state law, rather than admiralty law, would govern actions arising under the Outer Continental Shelf Lands Act, would not be applied retroactively to impose the Louisiana statute of limitations on a tort plaintiff.

> To hold that respondent's lawsuit is retroactively time barred would be anomalous indeed. A primary purpose underlying the absorption of state law as federal law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. *Rodrigue v. Aetna Casualty & Surety Co.* . . . Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit . . . would surely be inimical to the beneficent purpose of Congress.

Chevron Oil Co. v. Huson, 404 U.S. at 107–08 (citation omitted).

38. Robberts v. Johnson, 91 Wn. 2d 182, 187–88, 588 P.2d 201, 204 (1978).

39. The repeal of the statutory rule was retroactive. *See* note 3 and accompanying text *supra*. That the judicial "repeal" of the common law rule should also have been retroactive is, of course, the position of this casenote.

40. *See In re* S/S Helena, 529 F.2d 744 (5th Cir. 1976) (maritime law) (retroactive application of United States v. Reliable Transfer Co., 421 U.S. 397 (1975)). "The Court's purpose in rejecting the divided damages rule and adopting a rule of comparative negligence for allocating

Under the reliance test and the purpose of the rule test, then, Lau should have been entitled to the retroactive benefit of the *Robberts* decision. The *Lau II* court decided otherwise in the belief that denying retroactive relief to Lau would foster the administration of justice.[41]

C. *Effects on the Administration of Justice*

Administrative concerns have not colored the treatment of the retroactivity problem until relatively recently.[42] In a response to today's crowded dockets, concern that judge-made law will have burdensome effects on the administration of justice is undeniably legitimate. Even so, the administration of justice rationale has rarely been invoked to limit retroactivity.[43] Much more common arguments against retroactive application are showing actual reliance on the old rule and showing that the purpose of the new rule would not be served by retroactivity.[44] The ad-

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liability . . .'was the achievement of a "just and equitable" allocation of damages.' . . . Retrospective operation of the *Reliable Transfer* rule would promote that goal." *Id.* at 754.

Of course even general retroactivity, where appropriate, is limited to apply a rule only to cases not barred by statutes of limitations and jurisdictional rules for timely appeal. *See* note 15 and accompanying text *supra*. Full exploration of the proper outer bounds of general retroactivity is beyond the scope of this casenote.

41. *See* note 21 *supra*. Preferring administrative efficiency to the retroactive granting of new rights to injured plaintiffs does not appear to be the usual posture of the Washington Supreme Court. *See, e.g.*, Taskett v. KING Broadcasting Co., 86 Wn. 2d 439, 546 P.2d 81 (1976).

> [A]bsent unique circumstances, we have consistently applied our decisions retroactively whenever the intended purpose was to provide a remedy for an individual who has been tortiously injured and now seeks redress before the court. *See, e.g., Memel v. Reimer*, 85 Wn. 2d 685, 538 P.2d 517 (1975); *Freehe v. Freehe*, 81 Wn. 2d 183, 500 P.2d 771 (1972); *cf. Godfrey v. State*, 84 Wn. 2d 959, 530 P.2d 630 (1975); *Blaak v. Davidson*, 84 Wn. 2d 882, 529 P.2d 1048 (1975).

Id. at 449, 546 P.2d at 87.

42. Among the earliest expressions of administrative concerns are Griffin v. Illinois, 351 U.S. 12, 25 (1956) (Frankfurter, J., concurring) and United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2d Cir. 1964), *aff'd*, 381 U.S. 654 (1965). *See also* then-Chief Circuit Judge Vinson's cryptic comments in Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied*, 314 U.S. 678 (1941).

43. A thorough annotation on the subject cites only five cases in addition to the cases cited in the preceding note for concern about the administration of justice. Annot., 10 A.L.R.3d 1371, 1391 (1966 & Supp. 1978). The denial of retroactivity solely for administrative reasons has been criticized. *See* Linkletter v. Walker, 381 U.S. 618, 651–53 (1965) (Black, J., dissenting); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 950–51 (1962).

Chief Justice Utter recently discussed the effect that retroactive application of an interpretation of Washington's speedy trial rule, CrR 3.3, would have on the administration of justice, but he concluded the effect would be essentially neutral. He also discussed the factors of reliance on the old rule and the purpose of the new rule. State v. Barton, 93 Wn. 2d 615, 619–20, 611 P.2d 789, 791–92 (1980) (Utter, C.J., concurring).

44. *See, e.g.*, United States v. Peltier, 422 U.S. 531, 534–35 (1975) (no discussion of administration of justice in lengthy opinion holding that Almeida-Sanchez v. United States, 413 U.S. 266 (1973) would not apply retroactively).

ministration of justice argument has rarely succeeded, except where retroactive application would have led to the reopening of an unmanageable number of cases.[45]

To the *Lau II* court, however, "the administration of justice" meant something other than merely avoiding litigation. Protection of the interests of defendants Magnochi and Nelson was also involved. An expensive and time-consuming new trial, in which Lau's chances of proving even ordinary negligence were "problematic," would frustrate defendants' reliance on the gross negligence rule in preparing for the first trial: "[W]hen a negligence case goes to trial, the parties and the court have a reasonable expectation that the law as it exists at that time will apply to the proceedings, and they should be justified in governing their actions accordingly."[46]

The court's emphasis on the reliance of parties as litigants is questionable.[47] Usually the reliance interest protected by limiting the retroactive effect of an overruling decision is a person's reliance on the old rule in the conduct of daily affairs, and not in subsequent litigation.[48] Even if reliance in preparation for trial were an interest that courts should protect by limiting retroactivity, only reasonable reliance would merit that protection. Where the abandonment of a rule is forewarned, by intimating dicta or persuasive dissents, by abandonment in other jurisdictions, by notable law review commentary, or by a change in the prevailing winds of public

45. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 637–38 (1965); *In re* Bonds, 26 Wn. App. 526, 613 P.2d 1196 (1980) (retroactive application of *In re* Sinka, 92 Wn. 2d 555, 599 P.2d 1275 (1979) would require parole board "to reopen the files of every inmate serving a fixed minimum term in the state's penal institutions . . . ." *In re* Bonds, 26 Wn. App. at 530.)

In *Lau II*, there is no intimation that the court feared that a generally retroactive application of *Robberts v. Johnson* would stimulate a flood of host-guest litigation.

46. *Lau II*, 92 Wn. 2d at 828, 601 P.2d at 530.

47. The court's discussion of the reliance of litigants is drawn largely from Vaughn v. Murray, 214 Kan. 456, 521 P.2d 262 (1974), in which the Kansas court limited the retroactive effect of a prior decision holding the state's host-guest statute unconstitutional. The *Vaughn* court's emphasis on the "trauma and expense to litigants in every trial . . . doubled by requiring a second trial," *id.*, 521 P.2d at 271, appears to be unique in the retroactivity cases, except for the Washington court's adoption of the same emphasis in *Lau II*. The *Lau II* court's focus on the burdens of a new trial added the further novel twist of viewing a second trial as a frustration of a species of reliance. *See* text accompanying note 46 *supra*.

48. *See, e.g.*, Cascade Security Bank v. Butler, 88 Wn. 2d 777, 786, 568 P.2d 631, 635 (1977). *But see* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) (discussed in note 37 *supra*) and Narramore v. Colquitt, 15 Ill. App. 3d 954, 305 N.E.2d 662 (1973) (plaintiff filed suit in a disadvantageous forum in reliance on a subsequently overruled conflicts of law decision). In both *Chevron Oil* and *Narramore*, litigants' reliance was necessarily an issue simply because statutes of limitations and choice-of-law rules, respectively, concern litigation *per se*, where the legally significant event for purposes of reliance is filing suit. By contrast, in the host-guest situation, the legally significant event in terms of reliance is the auto accident. The amenability of remedial tort rules to reliance is discussed at notes 28–32 and accompanying text *supra*.

opinion, continued reliance on the challenged rule becomes less reasonable, and thus less deserving of protection when the rule is changed.[49] The demise of the minority host-guest rule was forewarned in such a way. The gross negligence standard has for several years been the subject of hostile commentary.[50] Legislatures and courts in several states abrogated the rule in the sixties and seventies, while in the same period not one state adopted the rule.[51]

49. *See* Roberts v. Russell, 392 U.S. 293, 295 (1968); Stovall v. Denno, 388 U.S. 293, 300 (1967); Bradbury v. Aetna Cas. & Sur. Co., 91 Wn. 2d 504, 511, 589 P.2d 785 (1979); Geise v. Lee, 10 Wn. App. 728, 733, 735, 519 P.2d 1005, 1008–10 (1974), *rev'd*, 84 Wn. 2d 866, 529 P.2d 1054 (1975). *See also* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 492–93, 508–09 (1962); State v. Barton, 93 Wn. 2d 615, 619–20, 611 P.2d 789, 791–92 (1980) (Utter, C.J., concurring).

In *Bradbury*, the Washington Supreme Court retroactively applied its overruling decision in Cammel v. State Farm Mut. Auto Ins. Co., 86 Wn. 2d 264, 543 P.2d 634 (1975). Focusing solely on the question of reliance, the majority stated that:

> While we do not consider ourselves bound by judicial trends in other states, the favorable trend toward "stacking" [providing multiple uninsured motorist coverage where multiple premiums are paid] may not be ignored completely when considering the question of Aetna's reasonable or justifiable reliance upon the belief that "stacking" would not be adopted in Washington. . . . [B]oth nationally and locally the issue of "stacking" was a "hot issue." . . . Clearly, the issue was known to be in a state of flux.

Bradbury v. Aetna Cas. & Sur. Co., 91 Wn. 2d at 511, 589 P.2d at 788.

In *Geise*, the Washington Court of Appeals decided not to overrule the "Massachusetts rule" limiting landlords' duty of care over ice-and snow-covered common areas. The court observed that the Washington courts had made no prior suggestions that the rule might be reconsidered and that there had been no thorough criticism of the rule in Washington. Geise v. Lee, 10 Wn. App. at 735, 519 P.2d at 1009–10, *rev'd*, 84 Wn. 2d 866, 529 P.2d 1054 (1975). The court stated that under such circumstances "at best the legal profession should be now alerted to the possibility the rule may have to be reconsidered when an appropriate opportunity arises to do so." *Id.* at 736, 519 P.2d at 1010. On further appeal, the Washington Supreme Court held that its earlier decision in McCutcheon v. United Homes Corp., 79 Wn. 2d 443, 488 P.2d 1093 (1971), implicitly overruled the "Massachusetts rule," and reversed. Geise v. Lee, 84 Wn. 2d 866, 529 P.2d 1054 (1975). The Washington Supreme Court did not disagree with the court of appeals' general solicitude for reliance interests, but merely determined that since the "Massachussetts rule" had already been overruled in *McCutcheon*, there remained no reliance interests in the rule to protect. Geise v. Lee, 84 Wn. 2d at 872, 529 P.2d at 1057–58.

50. *See, e.g.*, F. HARPER & F. JAMES, LAW OF TORTS, 961–62 (1956); W. PROSSER, LAW OF TORTS, 186–87, 382–85 (4th ed. 1971); Lasher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA L. REV. 1 (1968); Mundt, *The South Dakota Automobile Guest Statute*, 2 S.D. L. REV. 70 (1957); Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287 (1958); Vetri, *The Case for Repeal of the Oregon Guest Passenger Legislation*, 13 WILLAMETTE L.J. 53 (1976); Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659 (1974); Note, *The Future of the Automobile Guest Statute*, 45 TEMPLE L.Q. 432 (1972); Note, *Non-Driving Owners Denied the Protection of the Host-Guest Statute*, 47 WASH. L. REV. 172 (1971).

51. Vetri, *The Case for Repeal of the Oregon Guest Passenger Legislation*, 13 WILLAMETTE L.J. 53, 53–55 and nn. 4–7 (1976); Note, *Repeal of the Auto Guest Passenger Statute: Cause for Reexamination of Oregon's Family Immunity Rules*, 16 WILLAMETTE L.J. 125 (1979) (brings Vetri article up to date).

Only three years before *Robberts v. Johnson*, the Washington Supreme Court itself came within one vote of abrogating the host-guest statute on constitutional grounds. Brewer v. Copeland, 86 Wn.

Most significantly, the Washington legislature had recently repealed the host-guest statute.[52] Defense counsel in *Lau* could not reasonably have relied on the assumption that the common law gross negligence rule would govern the case at trial. The applicable standard of fault was the very issue that sent *Lau I* up on discretionary review the day before trial was scheduled to begin.[53] Until the *Lau I* court determined that the gross rather than ordinary negligence standard would apply, defense counsel had to be prepared for both contingencies.[54] Reliance on the continued vitality of the gross negligence rule would thus have been unreasonable.

D. The Import of the Lau II *Analysis*

So far in this section, the *Lau II* court's denial of retroactive application of *Robberts* to Lau has been criticized. Just as important as the result of the controversy between Lau and Nelson, however, is the opinion's lack of clarity regarding its intended precedential effect.

Lau II fails to provide clear guidance, because it cannot be determined from the language of the opinion whether the majority based its position on the procedural peculiarities of the *Lau* case itself, or the nature of the host-guest rule.[55] Although the holding seems intended to determine the rights of parties to all host-guest cases which arose before *Robberts,* the

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2d 58, 542 P.2d 445 (1975). Three of the four dissenting justices in *Brewer* expressly stated their belief that not only should the statute have fallen, but that they "would overrule the common-law doctrine extant in this state that a driver of an automobile is liable in damages to his invited guests only for acts of gross negligence." *Id.* at 88, 542 P.2d at 462 (Finley, J., dissenting).

52. *See* note 1 and accompanying text *supra*. The repeal also provides the basis of an argument not otherwise advanced by this casenote. The repeal represents the Legislature's judgment that the statutory gross negligence rule should not govern host-guest cases. The *Robberts* court found that judgment to be persuasive in deciding whether to overrule the common law gross negligence rule. 91 Wn. 2d at 187–88, 588 P.2d at 204. The *Lau I* court found that the legislative judgment embodied in the repeal was intended to apply retroactively. In *Lau II,* however, a similar decision by a *court* was held not to apply generally retroactively. If the Legislature's decision to repeal was persuasive evidence for the *Robberts* court, it seems that its decision to repeal *retroactively* should have been considered by the *Lau II* court. Yet the point was not raised in the majority opinion. *See* Justice Dolliver's dissent in *Lau II,* 92 Wn. 2d at 830–31, 601 P.2d at 531.

53. *Lau II,* 92 Wn. 2d at 824, 601 P. 2d at 529.

54. Even after the *Lau I* court remanded to trial on the gross negligence standard, defense counsel could not reasonably have been unmindful that Lau might again appeal.

55. The majority's statement of its holding is ambiguous on this point:

> We believe that, where retroactivity is at issue, interests involved in the administation of justice outweigh the interests of plaintiffs in enjoying the new rights accorded in *Robberts v. Johnson.* . . . Accordingly, the decision will be applicable to cases which had not gone to judgment when it was decided, and to all cases in which a new trial is granted for some other error in the trial.

92 Wn. 2d at 828, 601 P.2d at 530.

primary rationale on which the holding is based was explained only as it pertained specifically to the *Lau* case: the litigation had dragged on too long, Lau's showing of even ordinary negligence was slight, and the litigants had a reliance interest in the old rule.[56] The procedural setting of *Lau II* was indeed peculiar. In cases so unusual, however, an appellate court should make clear that it is deciding only the case before it and not state rules to govern future cases.

III. OVERRULING ALL AT ONCE: A RECOMMENDATION

The question whether to overrule and the question whether to overrule retroactively are closely linked issues that should be considered in the same case, so that the court can reach a decision of general import that simultaneously promotes the logic and justice of the new rule and the administration of justice.

If the *Robberts* court had announced whether its new rule would apply retroactively, Lau might still have been denied the benefit of the *Robberts* decision if the court decided against retroactive application. Such an approach, however, would have promoted efficiency in the administration of justice.[57] First, such an announcement would have eliminated the need for Lau to continue to prosecute his second appeal. Second, it would have

56. *Id.* Moreover, the precise limits of retroactivity set by the court seem tailored more to exclude Lau from the benefit of *Robberts* than to determine most justly the burden of proof for all outstanding host-guest actions arising before *Robberts* was decided. Only the court's rejection of Lau's evidentiary assignment of error kept Lau from a trial on the ordinary negligence rule.

Authorities have criticized formulations of retroactivity, like that in *Lau II*, that focus on the stage of proceedings reached by a case at the time the overruling case is decided. As former Chief Justice Schaefer of the Illinois Supreme Court observed, "Too many irrelevant considerations, including the common cold, bear upon the rate of progress of a case through the judicial system." Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 645 (1967). Justice Douglas consistently criticized the inequality inherent in the practice of affording new rights retroactively to defendants in the overruling case itself, but not to other defendants. See his dissents in Peltier v. United States, 422 U.S. 531 (1975); Daniel v. Louisiana, 420 U.S. 31 (1975); Adams v. Illinois, 405 U.S. 278 (1972); Mackey v. United States, 401 U.S. 667, 714 (1971) (incomprehensible that, "if justice rather than the fortuitous circumstances of the time of the trial is the standard, . . . all victims of the old constitutional rule should not be treated equally"); Williams v. United States, 401 U.S. 646 (1971); Fuller v. Alaska, 393 U.S. 80 (1968). *See also* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1602 (1975); Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 491 (1962).

57. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1621 (1975); Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 645 (1967); *contra*, Taskett v. KING Broadcasting Co., 86 Wn. 2d 439, 452, 546 P.2d 81, 89 (1976)(Stafford, C.J., dissenting in part); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 933–40 (1962).

Dean Beytagh proposes a similar technique for the United States Supreme Court; the retroactivity issue would be argued and decided in a separate proceeding soon after the Court announced the decision to overrule. Beytagh, *supra*, at 1619–21. His call for a two-step procedure reflects his belief

given trial courts guidance on which law to apply in trials of other host-guest suits that arose before *Robberts*.[58] Third, and most important, such an announcement would have required the court to focus on the impersonal, general policies behind the overruling decision rather than on the peculiarities of the first case where the retroactivity of the new rule is the issue. Such a focus would likely have led to a decision that *Robberts* would have general retroactive application, including within its limits Lau and other plaintiffs similarly situated.[59]

A routine practice of announcing in the overruling opinion the decision's retroactive effect is within the competence of the court, and can be adopted without sacrificing judicial flexibility. The recommendation here is not radical. Courts already frequently overrule in the proposed manner.[60] An adoption of the practice of overruling all at once would affirm the view that determining the retroactive effect of a new rule is an integral part of the overruling process.[61] The court that has heard sufficient argument to overrule a precedent is competent at that time to decide the issue of retroactivity.

A crucial element of the retroactivity decision is the purpose of the overruling decision.[62] By the time a court has decided to overrule, it is

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that the question whether to overrule and the question whether to limit retroactivity are presently too often confused. *Id.* at 1618–19. Because the author of this casenote believes that the retroactivity question is not "collateral" to the decision on the merits, but is an integral part of the overruling process, sharing similar inquiries with the decision to overrule itself, it is believed that problems with the traditional approach are solved if the two questions are decided together. *See* notes 62–66 and accompanying text *infra*. Additionally, Dean Beytagh's recommended creation of a discrete proceeding would partially undercut the savings of time and effort afforded to parties and courts by deciding the question of retroactivity in connection with the decision to overrule. One of his proffered rationales for the two-step procedure is that litigants are spared the burden of briefing and arguing the retroactivity question in those cases where the court decides not to overrule. Beytagh, *supra*, at 1621. Precisely because the two questions are so closely linked, however, the added effort in briefing and arguing should not be substantial.

58. *See* Cascade Security Bank v. Butler, 88 Wn. 2d 777, 785, 567 P.2d 631, 635 (1977). In *Cascade*, the court justified its announcement of the further effect of its overruling decision in the overruling opinion by stating that: "We usually determine the general or unlimited retroactive effect of our overruling decisions only when the question arises in subsequent cases. . . . However, in order to eliminate uncertainty, confusion, and conflicting lower court decisions, we must clarify the retroactive effect of our decision." *Id.* (citation omitted).

59. *See* notes 33–41 and accompanying text *supra*.

60. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968); Kaatz v. Alaska, 540 P.2d 1037 (1975); State v. Ariz. Hwy. Comm., 93 Ariz. 384, 381 P.2d 107 (1963); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Myers v. Genesee County Auditor, 375 Mich. 1, 133 N.W.2d 190 (1965); Cascade Security Bank v. Butler, 88 Wn. 2d 777, 567 P.2d 631 (1977).

61. It cannot meaningfully be argued that a prior decision is "overruled" until the extent of its continuing vitality is expressly determined. In that sense, the "overruling" process may presently continue through several decisions. In the proposed technique, "overruling" takes place all at once, because the remaining life of the prior rule is delineated in one opinion.

62. *See* notes 33–41 and accompanying text *supra*.

familiar with the policies promoted by the new rule and the effect the new rule will have on conduct, because those are considerations put into issue by the parties to the overruling case.[63] The court then can decide whether the purpose of the new rule is furthered, unaffected, or frustrated by retroactive application.

Another crucial element of the retroactivity decision is reliance. Because the ultimate interest of the parties to the overruling case is whether any new rule will apply retroactively to themselves, the issue of reliance and unfair surprise will be put before the court.[64] If the court decides to overrule, it will be aware of any tendency of the retroactive operation of the new rule to frustrate reasonable reliance on the old rule.

Appellate courts are also accustomed to considering the effect of new law on the administration of justice. By the same token, an overruling court will be familiar with the history of the old rule, and know whether the retroactive change in the law will reopen an unmanageable number of troublesome suits, or whether a retroactive availability of new rights will encourage the commencement of a large number of new suits.[65] In short, an immediate decision on retroactivity would be informed by interested advocacy and the experience of the appellate court.[66]

Additionally, announcing the decision on retroactivity in the overruling opinion does not deprive the court of future flexibility. Like any other expression of an appellate court—in holding as well as in dictum—an announcement of the effect of an overruling decision does not purport to bind courts in future, distinguishable cases.[67] For example, once the

63. The parties are also likely to put forward interested argument on whether retroactive application will promote the purpose of the new rule because of their ultimate interest in any new rule's applicability to them.

64. Additionally, *amici curiae*, who are typically present in overruling cases, usually have a continuing interest in the new rule, and will likely offer argument on all the elements of the retroactivity problem.

65. *Contra*, Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 936 (1962).

66. Because by using the suggested technique the court announces a rule which will be applied in cases not yet before the court, the announcement is arguably dictum. On the other hand, that prospective overruling is clearly the use of dictum, *see* note 26 *supra*, has not stopped state and federal courts from adopting it as a routine practice. Although there is language in Stovall v. Denno, 388 U.S. 293, 301 (1967), to the effect that prospective overruling in the federal courts runs afoul of article III's requirement of a case or controversy, subsequent decisions employing purely prospective overruling leave little doubt that the *Stovall* language need not be seriously heeded. *See, e.g.*, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969). There is thus no reason that the proposal here should fall prey to the charge that it advocates impermissible judicial legislation.

67. "Even the staunchest advocates of the doctrine of stare decisis concede that, as to future decisions, a holding itself is but a *prophecy*." Note, *Prospective Operation of Decisions Holding Statutes Unconstitutional or Overruling Prior Decisions*, 60 HARV. L. REV. 437, 440 (1947)(emphasis in original).

overruling court announced that its new rule will have general retroactive effect, a subsequent party may still be exempted from the new rule upon a showing that he reasonably and detrimentally relied on the old rule. The court can make such an exception without compromising the force of its earlier announcement of retroactivity. Moreover, like any other judicial expression, the retroactivity decision is subject to change. If a court decides that its retroactivity decision was ill-advised or is unworkable, it is as free to change its mind as it is about any unjust rule.[68] The advantage of overruling all at once is not that the rights of future parties are concluded *en masse,* but that lower courts and parties contemplating litigation may more accurately gauge the appellate court's inclinations.[69] Judicial flexibility need not be sacrificed in order to secure that advantage.

IV. CONCLUSION

In limiting the retroactive application of the overruling decision in *Roberts,* the *Lau II* court focused almost entirely on administative concerns, and paid little attention to other factors familiar in the retroactivity analysis. Additionally, the analysis and decision in *Lau II* seem tailored to circumstances peculiar to the *Lau* case, rather than to the nature of the overruling decision in *Robberts.* It is suggested that the decision to overrule and the determination of how far to overrule should occur all at once. The court that carefully considers the overruling decision is able to make an informed decision on the further retroactive effect of the new rule. Such an approach should cause the resolution of the retroactivity issue to reflect the general nature and purpose of the overruling decision, and would promote efficiency and predictability in the administration of justice.

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68. *See* Olson v. Augsburger, 18 Wis. 2d 197, 118 N.W.2d 194 (1962).

69. "One of the primary functions of a court of last resort is to write its opinions in such a way that they can reasonably be relied on by attorneys and their clients in determining a future course of action." Bradbury v. Aetna Cas. & Sur. Co., 91 Wn. 2d 504, 514, 589 P.2d 785, 789 (1979)(Dolliver, J., dissenting).