RETROSPECTIVE LEGISLATION AND ITS EFFECT ON EXISTING RIGHTS

DAVIES v. PUBLIC TRUSTEE, [1957] N.Z.L.R. 1021.

It is common ground with lawyers and students of jurisprudence, and in accordance with unquestionable authority, that, except as regards a matter of procedure, no statute will be construed by the Courts as operating retrospectively unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. This reluctance on the part of the Courts can be readily appreciated when it is remembered that retrospective legislation may severely affect or even completely extinguish rights or immunities previously enjoyed by members of the community. It is the function of the law to provide certainty in the legal relations into which people may enter, and it is considered with reason that retrospective statutes are apt to defeat this purpose, creating confusion and working injustice at the same time. The desire to prevent this state of affairs, reinforced by the presumption that the legislature does not intend what is unjust, has led the Courts to lean against giving certain statutes, and especially criminal enactments, a retrospective operation. As a result, the rules of construction adopted by the Courts have emphasized the preservation of existing rights. This was authoritatively asserted by Wright J. in In re Athlumney (1898), 2 Q.B. 547 (at 551-2):

> Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

Two points must at this stage be noted. The first is that, except as regards matters of procedure, no statute will be given retrospective operation unless there is "clear indication"(1) to that effect in the statute concerned. The second

point is this: Since the emphasis is on the protection of existing rights, the Court is concerned to enquire whether there are in fact rights capable of being affected if certain legislation is given a retrospective operation. This will require an investigation into the nature of the alleged rights, and the effect of the statute upon them.

Both aspects of the matter have recently been considered by the Court of Appeal in Davies v. Public Trustee, [1957] N.Z.L.R. 1021, an appeal from a decision of Henry J. reported as Davies v. Public Trustee, [1956] N.Z.L.R. 824. The facts of the case were as follows: a motorist, by his alleged negligence, caused his vehicle to collide with an electric power pole. The motorist was killed in the accident, and the Public Trustee, the appellant in the Court of Appeal, was executor of his will. The respondent Davies, a passenger in the car, sustained personal injuries in the accident. Davies commenced proceedings in the Supreme Court to recover damages for the injuries he had suffered.

At common law no action for damages could be brought against the estate of a deceased tortfeasor; the rule was expressed in the Latin maxim: Actio personalis moritur cum persona (see Phillips v. Homfray (1883), 24 Ch.D. 439). Section 3 of the Law Reform Act 1936, however, provides that the cause of action shall survive. Subsection (3) of the same section enables proceedings to be brought against the estate of a deceased tortfeasor, provided that the cause of action arises not earlier than two years before his death and proceedings are taken in respect thereof not later than twelve months after the personal representative takes out representation. In the present case, however, for reasons not apparent from the report, the plaintiff did not avail himself of this opportunity within the 12-month period of limitation, which expired on October 7, 1955.

Under these circumstances the plaintiff sought to avail himself of the provisions of subs. (3A) of s. 3 of the Law Reform Act 1936 (a new subsection inserted by the Law Reform Amendment Act 1955). This subsection provides:

> (3A) Notwithstanding anything in subsection three of this section, application may be made to the Court,

after notice to the personal representative, for leave to bring the proceedings at any time before the expiration of six years after the date when the cause of action arose, whether or not notice has been given to the personal representative under subsection three of this section; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the failure to give the notice or the delay in bringing the proceedings, as the case may be, was occasioned by mistake or by any other reasonable cause or that the personal representative was not materially prejudiced in his defence or otherwise by the failure or delay. No distribution of any part of the estate of the deceased made before the date of the giving of the notice of the intended application shall be disturbed by reason of the application or of an order made thereon.

In the Davies case the cause of action arose well within the six year period stipulated in the subsection, and in that respect the plaintiff was in order in making the application. The difficulty was, however, that this amending subsection did not come into force until October 26, 1955, which was some 19 days after the previously operating limitation period of twelve months had run. It therefore became a condition precedent to the actual granting of the leave for the Court to declare itself satisfied that it possessed jurisdiction to grant such leave.

Henry J. in the Supreme Court held that the Court had the required jurisdiction. His judgment consists of two main parts, one being an interpretation of the nature of the amendment and a decision on its retrospective operation, the other part concerning itself with the question of vested rights and the rule that these are not to be interfered with. Regarding the first matter, his Honour said (at 826):

> The amendment is in its nature a provision conferring jurisdiction on the Court to grant leave to bring an action which would not otherwise be maintainable. It is not a mere procedural section or an extension of a pre-existing period of limitation. The jurisdiction

> is to grant leave to bring proceedings in respect of a cause of action at any time before the expiration of six years after the date when the cause of action arose. Clearly, in the present instance, the cause of action is one within those words.

This interpretation assisted his Honour in finding that it was not necessary to give the amendment retrospective effect if it was to be used to deal with a case where the period of limitation had already run. In his Honour's opinion the construction that the Court had jurisdiction did no more than to give the amendment present, i.e. prospective effect, although in respect of actions which had originated in the past. His Honour furthermore thought that the legislature had used clear words to indicate its intention that all causes of action within the six year period mentioned should fall within the provisions of the section, notwithstanding the previous period of limitation. His Honour said (at 826):

> But it is claimed that the operation of subs. (3) [of the 1936 Act, providing the twelve-month limitation period] excludes the jurisdiction of the Court, since the period of limitation therein contained has already run. This is no answer because the amendment says in express terms that the jurisdiction is exercisable "notwithstanding anything in subsection three".

The second part of the judgment deals with the question of vested rights and the presumption against interference with such rights. His Honour refuted the claim made by counsel for the defendant that the operation of subs. (3) gave the defendant, before the amendment was passed, a "vested right", i.e. "one which in strict sense is a right and is vested", to hold the assets of the estate freed from all claims under the Law Reform Act 1936. The defendant, he said, "had no more than an existing right (using 'right' in its widest sense) to plead the limitation period as a defence to any proceedings". Rights of this nature were constantly interfered with by the legislature. His Honour quoted in support the words of Buckley L.J. in West v. Gwynne, [1911] 2 Ch. 1, 12:

> As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There

> is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights.

It is to be noted that no attempt was made by Henry J. to elaborate the distinction between a "vested right" and an "existing right" nor to contrast the "right" held by the defendant with that held by the plaintiff.

Mention should be made at this stage of Rodgers v. Public Trustee, [1956] N.Z.L.R. 914, in which the point in issue was the same as in Davies's case. Rodgers's case was heard before Barrowclough C.J. approximately five weeks after the decision in Davies's case, and the report in the latter case had not become available. The learned Chief Justice held that the Court did not possess the required jurisdiction:

> In this case, because of the expiry of twelve months from the date of taking out administration [in the deceased's] estate, the alleged cause of action, if it was a true cause of action, had ceased to be operative a month before the passing of [subs. (3A)]. On September 27, 1955, the statutorily given and limited right to bring an action against that estate had terminated. I can see in subs. (3A) no clear indication that rights such as that were to be revived or that the obligation of the estate to indemnify the plaintiff, if his injuries were caused by [the deceased's] neglect, was to be recreated. (ibid., 917.)

It is submitted, with great respect, that so far as the retrospective operation of the section is concerned, his Honour failed to give due effect to the words introducing subs. (3A): "Notwithstanding anything in subsection three of this section . . . ." It can be argued that in these words there is a "clear indication" that the subsection was intended to have retrospective effect. His Honour found it necessary to seek this clear indication because he had decided that the subsection was not procedural:

> . . . I am of opinion that subs. (3A) of s. 3 of the Law Reform Act 1936 is not a purely procedural enactment for the purposes of the doctrine now under

> consideration. Subsection (3A) affects the substantive law. It creates a new statutory right . . . . . It created a new and different right, or at all events, a new remedy without which the right to recover damages did not exist. . . . It was not an absolute right. It was conditional on obtaining the leave of the Court. . . . in my opinion subsection (3A) does affect the substantive law and does create a new right. Though, in one sense, it relates to a matter of procedure, it is not to be regarded as a merely procedural enactment to which a retrospective interpretation should more readily be given.

The learned Chief Justice thus reached a conclusion opposite to that of Henry J.; but, again, there is an absence of precision as to what is meant by "a right" in such statements as "It created a new and different right . . . ."

Faced with the conflicting decisions of Barrowclough C.J. and Henry J., the Court of Appeal in Davies v. Public Trustee, (supra) unanimously upheld the judgment of Henry J. in the Court below. It is noteworthy, however, that this unanimity in result was by no means paralleled by an equivalent agreement as to method. Finlay A.C.J., and Hutchison and McCarthy JJ. agreed in substance with the view taken by Henry J., i.e. in the words of Finlay A.C.J. (at 1022): ". . . subs. (3A) must be taken as a present authority authorizing an application to the Court, and conferring present jurisdiction upon the Court in respect of past circumstances". Hutchison J. (McCarthy J. concurring) added the gloss that it was important to remember that subs. (3A) did not directly affect the law as it stood before its enactment, but empowered the Court to do something. Hutchison J. continued (at 1025):

> What the Court may do is something that may affect rights that persons had before the Court dealt with the matter, but the amendment itself does not directly affect any such rights.

Here, again, there is no attempt to refer with precision to the "rights" which, it was thought, were not affected.

There are two passages in the judgment of Hutchison J. (at 1028 and 1030) which suggest that he would have been prepared to hold that there was to be found in subs. (3A) enough clear indication that the subsection was intended to have

retrospective operation.

Turner J. had no sympathy with the proposition that the construction contended for by the respondent did not involve giving to the subsection a retrospective effect:

> It is true that the leave to be granted is to be granted prospectively, and to this extent the literal effect of the section is a prospective and not a retrospective one. But it must at the same time be acknowledged as a matter of reality that, while the leave of the Court which is sought in the present application is to be granted prospectively, the effect of such (future) exercise of the Court's powers must be to allow the respondent to proceed upon a cause of action which, but for such leave, was already barred by a Statute of Limitation when the Act came into force. To this extent the operation of the section . . . must be admitted to be retrospective. (ibid., 1034.)

Although he took this approach, Turner J. was able to find that subs. (3A) had retrospective effect because he decided, as did Henry J., that the subsection was procedural. Their Honours relied on the decision of the English Court of Appeal in The Ydun, [1899] P. 236. This case concerned the Public Authorities Protection Act 1893 which stated that certain actions were not to lie or to be instituted unless commenced within six months of the act complained of. In The Ydun the plaintiffs' cause of action had accrued before the passing of the Act, and had it not been for the Act the plaintiffs would have had six years in which to sue. A.L. Smith J. said (at 245):

> . . . when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.

North J. pointed out that in The Ydun time was still running when the new statute came into force and that therefore the case was not a compelling authority in the case of causes of

action already barred. In the result, however, North J. was with Turner J. when he (North J.) said (at 1032): "I think that The Ydun and R. v. Chandra Dharma, [1905] 2 K.B. 335 are authorities for the view that generally speaking amendments to Statutes of Limitation are to be regarded as touching procedure."

As both Finlay A.C.J. and McCarthy J. were prepared to accept, as alternative grounds for their decisions, that subs. (3A) is procedural rather than substantive, four of the five judges who sat on the Court of Appeal were of this opinion. The fifth, Hutchison J., did not reach a finding on the point.

This procedural ground would appear to be the most satisfactory and clear-cut basis for the decision of the Court of Appeal in Davies v. Public Trustee. Nevertheless, an analysis of the exact legal relations of the parties concerned might have avoided the very confusing references to "rights" contained in a number of the judgments; and might incidentally have led to a more consistent approach by the members of the Court of Appeal.

It may be useful to attempt an examination of the legal relations involved in the Davies and Rodgers cases in the light of the analysis of the legal concept "right" elaborated by the American jurist W.N. Hohfeld.(2) Hohfeld believed that all legal problems could be stated in the following eight fundamental conceptions:

Jural opposites	(right	privilege	power	immunity
	(no right	duty	disability	liability
Jural correlatives	(right	privilege	power	immunity
	(duty	no right	liability	disability

Jural correlatives are present in two different persons: if X has a right, this necessarily means that somebody else is under a duty. If X has a power, by which is meant a power to change legal relationships, Y is under a liability to have his legal relationships changed. Jural opposites are present in one person, but to each other's exclusion: If X has a power he cannot at the same time be under a disability; if X enjoys an immunity he cannot, at the same time, be subject to a liability. By the use of these four concepts - right,

privilege, power and immunity - Hohfeld succeeds in avoiding the confusion resulting when the word "right" is used loosely to denote any one or all of the four concepts.

Hohfeld uses the word "power" to indicate a person's ability to change another person's legal relations. So when it is said that an agent has a right to transfer his principal's property, this means, in Hohfeld's terminology, that the principal has conferred upon the agent the power to alter not only the principal's legal relations, but also those of the persons with whom the agent may enter into contracts on behalf of the principal. Whenever a power exists, there is at least one person whose legal relations will be altered if the power is exercised.

The word "right" is frequently used to denote that one person is not subject to the power of another person to alter his legal relations. So it is said that one has a "right" not to be convicted without proper trial. This use of the word "right" attempts to convey the idea that in those circumstances one is exempt from power on the part of somebody else to alter one's legal relations. Hohfeld therefore calls this kind of right an immunity. Correlatively, the person who lacks the power to alter that first person's legal relations is said to be under a disability.

Reverting to the circumstances of the Davies and Rodgers cases, it must be remembered that Statutes of Limitation do not affect a cause of action to the point of extinction; they merely deprive it of enforceability by action once the period of limitation has expired. The cause of action is otherwise untouched, and the plaintiff is entitled to enforce his claim by any means, other than action or set-off, available to him. This means in relation to cases like those under discussion:

1. Prior to the passing of the Law Reform Act 1936 the cause of action died with the tortfeasor.

2. Since the passing of the 1936 Act, a cause of action against the personal representative of the alleged tortfeasor has survived, but there is a requirement that proceedings are to be taken within twelve months (of the

personal representative taking out representation).

3. After the expiry of the twelve month limitation period, the cause of action can no longer be enforced in the Courts, but the intended plaintiff still has his cause of action which remains dormant.

4. After the coming into force of subs. (3A) of the Law Reform Act 1936, the party seeking to enforce his cause of action can make an application to the Court which may, if it thinks fit, re-endow him with the ability to enforce his claim, even if the period of limitation of twelve months has expired. The Court cannot do this if the plaintiff has not already a cause of action capable of being restored to enforceability. The point in issue in the Davies and Rodgers cases was the subsidiary one whether the Court had authority to grant leave to the plaintiff to enforce a cause of action which, although still extant, had lost its enforceability in the Courts before the coming into force of subs. (3A).

When we apply the Hohfeld classification to these propositions, the following results emerge:

1. Prior to the passing of the Law Reform Act a person in the position of the plaintiff would, on the death of the tortfeasor, lose any right, in the strict sense, which he might have.

2. After the passing of the 1936 Act, the plaintiff's right survives the death of the tortfeasor, i.e. the plaintiff has a right, in the strict sense, against the personal representative, in whom there is a correlative duty. The plaintiff has also the power to assert his right by action, i.e. to alter the legal relations of the personal representative, and the latter is under a corresponding liability.

3. On the expiry of the twelve month limitation period the plaintiff loses his power to take action, and the personal representative acquires immunity, i.e. the latter loses his liability to have legal proceedings taken against him. It is submitted, however, that the plaintiff's right, in the strict sense, and the personal representative's

corresponding duty remain in existence, because

(i) subs. (3) provides that all causes of action are to survive, and

(ii) a Statute of Limitation takes away the remedy only and not the cause of action.

4. The effect of subs. (3A) is to give the Court authority at any time within six years from the date on which the cause of action arises, and even if the 12 month period provided by subs. (3) has expired, to re-endow the plaintiff with the power to take legal proceedings to enforce his still existing right, in the strict sense. It follows that the question for determination in the Davies and Rogers cases was whether, having regard to the fact that in those cases the 12 month period provided by subs. (3) had expired before the coming into force of subs. (3A), the exercise by the Court of its authority under subs. (3A) would have retrospective effect, and if so, whether such an exercise of authority was intended by the legislature.

If the above analysis is accepted, there can be little doubt that the exercise of the Court's authority would in the circumstances operate retrospectively to the date of the coming into force of subs. (3A), i.e. the plaintiff's power to take legal proceedings, which had been lost before that date, would be re-established. It would seem to follow that the passage quoted above from the judgment of Turner J. (at 1034) deserves support.

If it is accepted that subs. (3A) has retrospective effect, we are faced with a decision as to whether "vested rights" are affected. Again on the basis of the above analysis, the effect of the exercise of the Court's discretion under subs. (3A) would be to endow the plaintiff with a power he had lost to take proceedings in respect of a right he had not lost; and to deprive the defendant of an immunity which he had had, i.e. to re-impose upon him the liability that an existing duty would be enforced. It follows that no right, in the strict sense, of the plaintiff or defendant is affected.

It is submitted that the Hohfeld classification provides a method by which "vested rights" and "existing rights" can

be distinguished. "Vested rights" would correspond with Hohfeld's right, in the strict sense, while "existing rights" in the broad sense could be regarded as embracing "right", "privilege", "power" and "immunity" as those words are used by Hohfeld. On the basis of this distinction it can be said that subs. (3A) does not have the effect of authorising the Court to interfere with vested rights, and North J. was making this point when he said (at 1032):

> It is, however, in my respectful opinion, another matter altogether to say that a defendant has a vested right in the defences that were open to him when the cause of action arose.

The authorities referred to in this note suggest that if vested rights are not affected any presumption against the retrospective operation of a statute disappears. These decisions appear to have assimilated vested rights with questions of substance, and to have relegated all other "rights" to the status of matters of procedure. Thus North J., having rejected the argument that a vested right was involved in the Davies case, thereupon concluded that the issue was one of procedure; and a similar approach was adopted by Turner J. The assumption appears to have been that vested rights and their correlative duties on the one hand, and questions of procedure on the other, exhaust the legal situations that can arise in respect of the retrospective operation of a statute. Does this involve a conclusion that legislation that retrospectively affects a privilege, power, or immunity will normally be effective because an issue of procedure is involved? This is a point on which a more detailed exploration of Hohfeld's classification than has been possible in this note could prove profitable.(3)

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(1) Barrowclough C.J. in Rodgers v. Public Trustee, [1956] N.Z.L.R. 914, 917; see infra p. 217.
(2) Hohfeld, Fundamental Legal Conceptions (1923); and see Dias and Hughes, Jurisprudence (1957), 257 ff.
(3) This note was in type before the attention of the editor was drawn to Maxwell v. Murphy (1957), 96 C.L.R. 261 in which a majority of the High Court of Australia came to a different conclusion on a point similar to that in the Davies case.