Consequences of an overrule

Where a court decision determining the legal meaning of an enactment is overruled, what is the effect on those who relied on it? I refer to people who, between the two decisions, regulated their affairs by what the earlier court held the law was. Are they now to be confounded? If so, does that conform to what we understand by the rule of law? Suppose, which may happen, that a further court plumps for a third legal meaning of the enactment. What then?

The problem posed schematically

We can illustrate the problem schematically. Suppose an enactment comes into force in year E, and it is agreed by the profession that its legal meaning is W. Then in year E+5 the enactment comes before its first court, court A, which holds that the legal meaning is not W but X. In year E+10 the enactment comes before court B, which does not follow the ruling of court A but decides that the legal meaning is Y. What then is the legal meaning? If court B is superior to court A, its decision blots out meaning X and substitutes meaning Y. But suppose the two courts are of equal jurisdiction? What then is the legal meaning of the enactment? Suppose further that in year E+15 the enactment comes before court C, higher than A and B, and court C decides on meaning Z. One can say that thereafter meaning Z prevails, but what was the legal meaning of the enactment (i) between years E and E+5, (ii) between years E+5 and E+10, and (iii) between years E+10 and E+15?

These are not academic questions. In year E+2 a lawyer's client may have properly been advised that the legal meaning was W, and acted accordingly. In year E+7 a client may have properly been advised that the legal meaning was X, and acted accordingly. In year E+12 a client may have properly been advised that the legal meaning was Y, and acted accordingly. How do these clients stand after court C has pronounced its decision? Surprisingly the law is in disarray over these questions, and no short answer is possible.

Where there is a judicial decision on a point, and it has not been overruled, it is assumed that the law must thereafter be taken to be as indicated by that decision. That is not always sound. The profession may have expressed doubts about the decision's correctness. It may have been decided *per incuriam*, or without full argument. The profession may expect it to be overruled if the point comes before a higher court. This is why, allowing for the possibility of judicial disagreement, it can be said that the legal meaning of an enactment is what it is most likely the House of Lords, as the final court of appeal, would say it is. Even here it must be remembered that the House of Lords now claims power to depart from its previous decisions, thus destroying the old sensible doctrine of precedent or *stare decisis.* In any case the "most likely" test is pregnant with uncertainty. Lawyers may disagree on what is most likely.

As an illustration of the overrule problem we may take the *Brockhill Prison Case,* described below. This, in our schematic terms, can be expressed as follows. A public official who in year E+9 acted in accordance with court A's decision that the legal meaning of the enactment in question was X then found himself confounded when in year E+11 the superior court B departed from this ruling and decided instead that the legal meaning was Y.

The Brockhill Prison case

In ***R. v. Governor of H.M. Prison Brockhill, ex p. Evans (No. 2)***[1] the House of Lords considered a claim for damages for false imprisonment brought by a convicted prisoner against the governor of Brockhill Prison. Under a line of judicial of authority as to the legal meaning of the Criminal Justice Act 1967 s. 67(1), known as the ***Gaffney*** approach, the release date of the prisoner had been calculated by the governor as 18 November 1996. However the ***Gaffney*** approach was in effect overruled by ***R. v. Secretary of State for the Home Department, ex p. Naughton***[2]. On the normal declaratory principle of judicial precedent ***Naughton*** operated retrospectively (see below), so the respondent should with hindsight have been released two months earlier, on 17 September 1996. Was she therefore entitled to damages from the governor, even though at the relevant time he had correctly applied the law as laid down by the ***Gaffney*** approach? It was held that false imprisonment is a tort of strict liability, and the governor as representing the state was not absolved by the fact that he acted correctly. So she got her damages.

Lord Slynn said[3] that the governor could not be criticised, even though the court in ***Naughton*** doubted the soundness of the earlier decisions on which the ***Gaffney*** approach was based. Lord Steyn, applying the basic rule of statutory interpretation,[4] said the relevant principles of law pulled in opposite directions and he would therefore carry out a balancing exercise.[5] He said it was "a matter of judgment how the weight of the competing principles in the present case should be assessed".

Evans shows that no general answer can be given to the question what is the effect on previous transactions when a ruling on the law changes: it depends on the nature of the law in question. It should also be borne in mind, whenever it becomes necessary for anyone, whether a practitioner advising a client, a court disposing of a case, or a person such as the prison governor in ***Evans***, to decide what the legal meaning of an enactment is, that it is requisite, where there is real doubt on the point, to apply all relevant interpretative criteria.[6] The existing court decision will only be one of these, and the overall weight of argument may fall the other way. The interpreter does not discharge his or her duty if this investigative process is not undertaken when necessary, especially where a serious issue, perhaps affecting the liberty of the subject, depends on it. Even where no doubt has been felt as to the correctness of the earlier decision, it may still be overruled. On normal principles the later decision will then operate retrospectively.[7]

The case of the governor of Brockhill Prison needs to be distinguished from the byelaw case of ***Percy v. Hall***[8] where it was held that the acts of police enforcing a byelaw would not be rendered unlawful by a later court ruling that the byelaw was void.[9] The difficult case where, without fault, a person relied on meaning X before a later court substituted meaning Y should be decided according to principles of legal policy.[10] As Schiemann LJ said in ***Percy v. Hall***[11]: "The policy questions which the law must address in this type of case are whether any and if so what remedy should be given to whom against whom in cases where persons have acted in

[1] [2000] 4 All ER 15.
[2] [1997] 1 All ER 426
[3] P. 18.
[4] See Bennion, ***Statutory Interpretation*** (3rd edn 1997, supplement 1999) s. 193. This codification of the principles of statutory interpretation is below referred to as "Code".
[5] P. 20.
[6] For "real doubt" see Code pp. 15-16.
[7] See e.g. ***Miliangos v. George Frank (Textiles) Ltd*** [1976] AC 443; ***R. v. Preddy*** [1996] AC 815. See also ***Evans***, passim.
[8] [1996] 4 All ER 523. See Code pp. 195-196.
[9] See also ***Boddington v. British Transport Police*** [1998] 2 All ER 203.
[10] For this see Code s. 263.
[11] At 545.

reliance on what appears to be valid legislation".[12] One obvious principle of legal policy that should be applied is that law should be just and court decisions should further the ends of justice.[13]

Another aspect of legal policy is the principle that generally speaking law should not operate retrospectively.[14] Because procedural changes are assumed to be beneficial and not punitive, this principle does not apply to them.[15] Put more broadly, the principle applies only where retrospectivity would inflict hardship or would be otherwise unfair. Treating the decision abrogating the *Gaffney* approach as retrospective in the case of the claimant in *Evans* may on balance be thought to have conferred a benefit, since in a case where the law was in doubt a prisoner was held to have been confined for a longer time than would have otherwise been the case.[16] The position may be more difficult in a private law case where benefit to one side involves detriment to the other. It is also obvious that litigants will claim the benefit of this principle only where it is to their advantage to do so.

Prospective overruling

In *Evans* the House of Lords debated the question whether the declaratory-retrospective principle always hitherto applied by the common law to decisions overruling earlier cases should be relaxed. Lord Slynn said[17]: "I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants. The European Court of Justice, though cautiously and infrequently, has restricted the effect of its ruling to the particular claimants in the case before it and to those who had begun proceedings before the date of its judgment. Those who had not sought to challenge the legality of acts done years before could only rely on the ruling prospectively. Such a course avoided unscrambling transactions perhaps long since over and doing injustice to defendants."[18]

Lord Slynn was here referring to the so-called *Barber* principle This is named after *Barber v Guardian Royal Exchange Assurance Group*[19], in which the Court of Justice of the European Communities (CJEC) unexpectedly held that certain occupational pensions constituted "pay" within the meaning of the equal pay provisions of art. 119 of the EC Treaty (now art. 141).[20] The principle is largely based on the legal policy principle requiring legal certainty.[21] The declaratory nature of the CJEC's jurisdiction means that under normal principles, that is apart from the *Barber* principle, a long-held view as to the meaning and effect of a particular Community law could by virtue of a CJEC decision be overthrown retrospectively. In such cases, but only where the difficulty is extreme, the CJEC has asserted the power to modify the

[12] For the *Evans* type of case one would substitute "have acted in reliance on what appears to be a valid court ruling".
[13] See Code pp. 614-616.
[14] See Code p. 623.
[15] See Code pp. 237-240, 623.
[16] This conforms to the principle of legal policy that persons should not be penalised under a doubtful law: see Code Part XVII.
[17] P. 19.
[18] See *Amministrazione delle Finanze v. Srl Meridionale Industria Salumi* (Joined cases 66, 127 and 128/79) [1980] ECR 1237 at 1260-1261 (para 10); *Coloroll Pension Trustees Ltd v. Russell* (Case C-200/91) [1995] All ER (EC) 23.
[19] Case C-262/88 [1990] ECR I-1889.
[20] The first case in which the principle which later became known as the *Barber* principle was applied was *Gabrielle Defrenne v Sabena* (No 2) (Case 43/75) [1976] ECR 455.
[21] See [1990] ECR I-1889 at 1956 (para 44). For the principle of legal certainty see Code s 403.

usual declaratory effect of its judgment by denying it retrospective effect or modifying that effect.[22]

In another case the CJEC was prepared to limit the temporal effect of one of its judgments on account of the catastrophic financial repercussions which the French overseas territories would face if charges later held not to be due became repayable. The test applied, as in *Barber*, was whether the parties or member states in question were reasonably entitled to consider that their conduct was in accordance with Community law.[23]

The *Barber* principle, so far as it applies to art. 119 (now art. 141), was codified by a protocol to the Treaty of Rome (added by the Maastricht Treaty) which came into force on 1 November 1993. This states: "For the purposes of Article 119 of this Treaty, benefits under occupational security schemes shall not be considered as remuneration if and so far as they are attributable to periods of employment prior to 17 May 1990 [the date of the *Barber* decision], except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law.'[24]

Lord Slynn's colleagues in *Evans* did not share his view on prospective overruling. Lord Hobhouse said[25]: "It is a denial of the constitutional role of the courts for courts to say that the party challenging the ***status quo*** is right, that the previous decision is overruled, but that the decision will not affect the parties and only apply subsequently".

Nevertheless Lord Slynn's opinion in *Evans* may be thought to have merit, particularly since there is now a growing feeling among the higher judiciary that they should proceed as if the constitution gave them power to ***make*** law rather than merely declare it. When they act in that way judges don the mantle of legislators, so it can be said that, as with true parliamentary legislation, their pronouncements should be held to take effect only from the moment of utterance.

Judicial legislation

While some senior judges do now claim to be possessed of a power to change legal rules, whether of common law or as laid down by statutory interpretation, other senior judges disagree and would disclaim this alleged power. We remember that Viscount Simonds savagely criticised Denning for his wish to engage in judicial legislation, which in a famous

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[22] For example the CJEC held that, except where a claim had been made before that date, the direct effect of Art 119 of the EC Treaty could be relied on in order to claim equal treatment in the matter of occupational pensions only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, the effective date of the decision in *Barber*: *Neath v Hugh Steeper Ltd* (Case C-152/91) [1994] 1 All ER 929; *Coloroll Pension Trustees Ltd v Russell* (Case C-200/91) [1995] All ER (EC) 23 at 79 (para 48).

[23] *Administration des douanes et droits indirects v Legros* (Case C-163/90) [1992] ECR I-4625 (para 34). Cf *Worringham v Lloyds Bank Ltd* (Case 69/80) [1981] 1 WLR 950 at 971 (para 33) where the court, after weighing and balancing the factors concerned, decided that the number of the cases which would be affected was not sufficient to require it to limit the temporal effect of its judgment. For other examples of cases where the temporal effect of a judgment of the CJEC was limited in this way see *Belbouab v Bundesknappschaft* (Case 10/78) [1978] ECR 1915 (nationality requirement affecting mineworker's pension); *Pinna v Caisse d'allocations familiales de la Savoie* (Case 41/84) [1986] ECR 1 (family allowances under provision held invalid); *Vincent Blaizot v University of Liège* (Case 24/86) [1988] ECR 379 (registration fees wrongly exacted from non-nationals).

[24] See *Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune* (Case C-7/93) [1995] All ER (EC) 97 at 104 (para 13) and 130 (para 61).

[25] P. 39.

phrase Simonds described as "a naked usurpation of the legislative function".[26] Many judges of today would still agree with Simonds.

This disagreement at the highest levels of the judiciary presents problems for the analyst. A recent instance is the decision of the House of Lords in *Kleinwort Benson Ltd. v Lincoln City Council*.[27] It arose out of the wish of some local authorities to evade the full rigour of the Government's capping system by entering into contracts for interest rate swaps. Under these the parties gambled on interest rates by reference to a notional capital sum. One party agreed to pay to the other interest over a specified period at a fixed rate. The other agreed to pay, in relation to the same period and capital sum, interest at a floating rate geared to the money market's fluctuating rate. In essence this was a gamble on how the money market would perform over the given period. At the time they were entered into, the general view of the legal profession was that such contracts by local authorities were valid. However in a 1991 decision[28] the House of Lords held them to be ultra vires and void. The bankers Kleinwort Benson then sought to recover payments they had made to some local authorities in the mistaken belief that swaps contracts were valid.

At first instance Langley J, following well-established law, held that their statement of claim disclosed no cause of action. The Appellate Committee of the House of Lords, by a majority of three to two, reversed Langley J. They purported to overturn, as if by parliamentary legislation, the long-standing rule of the common law that payments made under a mistake of law are irrecoverable (the mistake of law rule). One of the majority, Lord Goff, boldly described what they were doing as the "abrogation" of this rule.[29] He described his thought processes quite openly. He was considering whether the mistake of law rule "should remain part of English law".[30] What was in issue at the heart of the case was, he said, "the continued existence of a long-standing rule of law, which has been maintained in existence for nearly two centuries in what has been seen to be the public interest". It was, he went on, for the House to consider whether this rule should be maintained, "or alternatively should be abrogated altogether or reformulated".[31] The boldness of this move is accentuated by the fact that a past Lord Chancellor had asked the Law Commission to examine the mistake of law rule with a view to its reform by legislation. In response the Law Commission produced a report and draft bill, which still awaits consideration by Parliament.[32] What Lord Goff had to say about this was-

> "I am very conscious that the Law Commission has recommended legislation. But the principal reasons given for this were that it might be some time before the matter came before the House, and that one of the dissentients in [*Woolwich Building Society v IRC (No 2)* [1993] AC 70] (Lord Keith of Kinkel) had expressed the opinion [at 154] that the mistake of law rule was too deeply embedded to be uprooted judicially. Of these two reasons, the former has not proved to be justified, and the latter does not trouble your Lordships *because a more robust view of judicial development of the law is, I understand, taken by all members of the Appellate Committee hearing the present appeals*."[33]

[26] *Magor and St Mellons RDC v Newport Corporation* [1952] AC 189 at 190.
[27] [1998] 4 All ER 513.
[28] *Hazell v Hammersmith and Fulham London Borough Council* [1991] 2 AC 1.
[29] At p. 525.
[30] P. 525.
[31] P. 526.
[32] See *Restitution: mistakes of law and ultra vires public authority receipts and payments* (Law Com. No. 227) (1994).
[33] P. 532 (emphasis added). The decision was followed in *Nurdin & Peacock plc v D B Ramsden & Co. Ltd. (No 2)* [1999] 1 All ER 941.

Another recent example of judicial legislation by the House of Lords is *Director of Public Prosecutions v Jones and Another*.[34] This concerned a demonstration consisting of around 21 persons congregating on the highway near Stonehenge. The House of Lords, again by a majority of three to two, here purported to revolutionise the common law of highways. It was clearly established, by long authority, that the right of the public is limited to passing and repassing along the highway, together with uses incidental to that. In *Jones* Lord Irvine of Lairg LC decided this was too constricted for modern conditions: 'to limit lawful use of the highway to that which is literally "incidental or ancillary" to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities'.[35] The Oxford English Dictionary[36] defines "warranted" as "allowed by law or authority; approved, justified, sanctioned". That is an apt description of the rule overturned by this decision, so the Lord Chancellor was saying what was the exact opposite of the true position.

Recently there have been a number of such cases, embracing both common law (including equity) and statutory interpretation. As a final example I cite an equity case. Under the established rules of equity manifest disadvantage is a necessary ingredient in a case of presumed undue influence. However it was recently stated judicially that the House of Lords has "signalled that it might not continue to be a necessary ingredient indefinitely".[37] This is judicial legislation (or the threat of it) of the most inconvenient kind. How is the legal adviser to be able to advise a client when it has been announced that the existing law is liable to be changed by the judiciary at an unspecified and unknowable time? Is this judicial expansionism really consonant with the constitution, or with the true functions of a common law judiciary?

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2001.031 PL Autumn 2001 450.

[34] [1999] 2 All ER 257.
[35] Pp. 263-264.
[36] Second edition, 1992.
[37] Said to have been stated in *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, *per* Nourse LJ in *Barclays Bank plc v Coleman and Another* [2000] *The Times* 5 January.
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