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The Michigan Supreme Court - An Analysis of Recent Decisions

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COMMENTS

THE MICHIGAN SUPREME COURT—AN ANALYSIS OF RECENT DECISIONS—"This is the Supreme Court of Michigan speaking, the possessor of all the historic powers of law and equity, the keeper of the conscience of our sovereign people, a constitutional court of plenary powers, not a legislative court of enfeebled and circumscribed jurisdiction."[1] These words of Justice Talbot Smith seem to epitomize the attitude of the present majority toward the role of the Michigan Supreme Court as a court of last resort. It is the purpose of this comment to attempt to determine and evaluate just what the court's role has been. Attention will be directed to selected areas of non-statutory and statutory law, with specific emphasis placed upon the areas of contributory negligence and workmen's compensation.

I. *Introduction*

The eight-man Michigan Supreme Court currently consists of Chief Justice Dethmers and Associate Justices Carr, Kelly, Smith, Black, Edwards, Voelker and Kavanagh. Justices Smith, Black, Edwards and Voelker were named to the court between 1954 and 1957 and at that time joined together in several four-four decisions, which automatically affirm the trial court.[2] In 1958 this deadlock was broken when Justice Kavanagh became a member of the court and joined forces with the four newer justices. The effect of these personnel changes becomes apparent by studying the history of two recent automobile accident cases.[3] In both cases the trial judge gave judgment for defendant n.o.v. because plaintiff had been guilty of contributory negligence. In 1957 both judgments were affirmed four-four. In 1958 both judgments were reversed on rehearing, five-three. Justice Kelly, dissenting in one of the cases, pointed out that there had been no change in the facts or the law, only in personnel. Justice Voelker, however,

1 Consumers Power Co. v. Muskegon County, 346 Mich. 243 at 265, 78 N.W. (2d) 223 (1956).

2 See, e.g., notes 3 and 4 infra.

3 Weller v. Mancha, 351 Mich. 50, 87 N.W. (2d) 134 (1957); rehearing, 353 Mich. 189, 91 N.W. (2d) 352 (1958); Steger v. Blanchard, 350 Mich. 579, 86 N.W. (2d) 796 (1957); rehearing, 353 Mich. 140, 90 N.W. (2d) 891 (1958).

found "one other change," a change "in how a majority of this Court views the law."[4]

II. *Non-Statutory Law—Torts*

A. *Generally.* If there is a single theme which might be found running through the cases decided in this area it is this: the present majority has indicated a strong tendency to remove obstacles to recovery. It has taken a broad approach toward restitution,[5] cast doubt upon a municipality's immunity from suit,[6] adopted a rule akin to res ipsa loquitur,[7] indicated liberality toward the problem of psychic injuries,[8] and favored a strict attitude toward imputed negligence.[9] All this has been done to some extent in derogation of previous Michigan case law. Perhaps most significant has been the court's approach to the duty problem in the law of torts. Justice Smith has gone beyond existing authority in at least two areas. In a dissenting opinion in 1956 he stated that there is a duty on the part of a creditor not to write his debtor's employer in order to coerce payment.[10] In 1958 he wrote a majority opinion stating broadly that a landowner owes a duty of care to a trespassing child.[11]

A recent opinion of Justice Voelker also illustrates this point.[12] The action was for breach of warranty in the sale of

4 Steger v. Blanchard, 353 Mich. 140 at 141-142, 90 N.W. (2d) 891 (1958). For another 4-4 opinion in 1957, see Wall v. Lunn Laminates, 350 Mich. 626, 86 N.W. (2d) 804 (1957). No rehearing was applied for here apparently because Justices Smith, Black, Edwards and Voelker agreed with the trial judge.

5 Consumers Power Co. v. Muskegon County, 346 Mich. 243, 78 N.W. (2d) 223 (1956); Janiszewski v. Behrmann, 345 Mich. 8, 75 N.W. (2d) 77 (1956), dissenting opinions of Justice Smith.

6 Richards v. Birmingham School District, 348 Mich. 490, 83 N.W. (2d) 643 (1957), dissenting opinion of Justice Edwards joined by Justice Smith. Justice Black concurred specially and refrained from discussing the issue.

7 Higdon v. Carlebach, 348 Mich. 363, 83 N.W. (2d) 296 (1957).

8 Courtney v. Apple, 345 Mich. 223, 76 N.W. (2d) 80 (1956). Cf. Lahar v. Barnes, 353 Mich. 408, 91 N.W. (2d) 261 (1958).

9 Sherman v. Korff, 353 Mich. 387, 91 N.W. (2d) 485 (1958).

10 "But when one of our people buys a refrigerator on time, he does not thereupon hang the vestments of his privacy in his creditor's closet, to stand naked and exposed to whatever measures the creditor chooses to employ to collect the debt." Hawley v. Professional Credit Bureau, 345 Mich. 500 at 516, 76 N.W. (2d) 835 (1956).

11 ". . . [T]he fact that the child is a trespasser does not now relieve the owner of the duty to use reasonable care. . . ." Lyshak v. Detroit, 351 Mich. 230 at 248, 88 N.W. (2d) 596 (1958). This could be considered dictum because the defendant conducted a dangerous activity (golfing) after the plaintiff had been discovered. This is the ground upon which Chief Justice Dethmers concurred, joined by Justices Carr and Kelly. Justice Edwards concurred solely on the basis of the quoted language.

12 Spence v. Three Rivers Supply, 353 Mich. 120, 90 N.W. (2d) 873 (1958).

chattels. The plaintiff's independent contractor had purchased building blocks from defendant. The trial court denied relief because there was no privity of contract between plaintiff and defendant. This was reversed on appeal, five-three. Justice Kelly, writing for the dissent, followed the traditional analysis: (1) the action is for breach of warranty; (2) there was no privity; (3) therefore the plaintiff must lose.[13] Justice Voelker's majority opinion is less easy to summarize. He began by referring to the implied warranty of "merchantability"[14] although the facts, the statute[15] cited, and later language indicate that the implied warranty of fitness for purpose was intended. He next expressed an inability to understand why privity should be an element of an action on a warranty yet not of a negligence action.[16] He then discussed the exception to the privity requirement but found no reason why it should be limited to dangerous articles or food causing personal injury.[17] Throughout his opinion the requirement of privity was criticized. Against this must be balanced Justice Voelker's reading of the complaint as stating a cause of action in negligence.[18]

B. *Contributory Negligence.* This aspect of the law of negligence occupies a unique position in the common law of any jurisdiction. Almost completely judge-made law it is readily susceptible to judicial change. Because of its almost daily application and its intimate relation to the problems of ordinary people it is sensitive to social, political and economic influences. Because of the accidental nature of the situations to which it is applied there is but slim possibility of reliance on the doctrine by the people it affects. It is not surprising that this area of the law should occasion more frequent expression of judicial notions of public policy than others.

If the doctrine of contributory negligence itself was not such a device,[19] the particular formulations of contributory negligence which grew up thereunder as a matter of law were conveniently

[13] Id. at 135 et seq.
[14] Id. at 122.
[15] Mich. Comp. Laws (1948) §440.15(2).
[16] Spence v. Three Rivers Supply, 353 Mich. 120 at 129, 90 N.W. (2d) 873 (1958).
[17] Id. at 130.
[18] Ibid. But cf. id. at 135.
[19] See Malone, "The Formative Era of Contributory Negligence," 41 ILL. L. REV. 151 at 158 (1946).

adaptable to judicial control of plaintiff-minded juries.[20] Characteristic of these formulations was the Michigan rule relative to pedestrians crossing a street:

> "Under present-day traffic conditions a pedestrian, before crossing a street or highway, must (1) make proper observation as to approaching traffic, (2) observe approaching traffic and form a judgment as to its distance away and its speed, (3) continue his observation while crossing the street or highway, and (4) exercise that degree of care and caution which an ordinarily careful and prudent person would exercise under like circumstances."[21]

Similar formulae arose in a variety of other situations especially in the auto accident field.[22] Thus a doctrine, conceived as a means of allowing judges freedom to decide cases in accordance with the flexible standard of due care, imposed upon its creators the shackles of precedent.[23] When a case fitted any pre-determined pigeonhole the decision would not only be out of the control of the jury, it would be out of the control of the judges as well. The original members of the present majority swiftly recorded their dissatisfaction with this condition of Michigan law.[24] When the crusading minority became a deciding majority, a new doctrine arose: the issue of contributory negligence is now to be left for the jury in all cases in which reasonable men might differ; rarely is a case to be taken from the jury.[25] In making this change the majority relied on the following:

> (1) A passage from a decision by Judge Cooley[26] emphasizing the province of the jury in determining questions of fact upon which reasonable minds might differ.[27] Thus the majority has been able to point out that although it has changed the law, it has done so only in the light of pre-existing principles.[28]

20 See Turk, "Comparative Negligence on the March," 28 CHI-KENT L. REV. 189 (1950); Malone, "Contributory Negligence and the Landowner Cases," 29 MINN. L. REV. 61 at 66 (1945).

21 Malone v. Vining, 313 Mich. 315 at 321, 21 N.W. (2d) 144 (1946).

22 See JAMIESON AND BROWN, MICHIGAN AUTOMOBILE LAW, 2d ed. (1951).

23 See McKinney v. Yelavich, 352 Mich. 687 at 691, 90 N.W. (2d) 883 (1958); 1954 WIS. L. REV. 95 at 139 et seq.

24 Sun Oil Co. v. Seamon, 349 Mich. 387, 84 N.W. (2d) 840 (1957).

25 Van Gilder v. C. & E. Trucking Corp., 352 Mich. 672, 90 N.W. (2d) 828 (1958).

26 Detroit & M.R. Co. v. Van Steinburg, 17 Mich. 99 at 123 (1868).

27 Gilson v. Bronkhorst, 353 Mich. 148, 90 N.W. (2d) 701 (1958); Cole v. Barber, 353 Mich. 427, 91 N.W. (2d) 848 (1958).

28 Shaw v. Bashore, 353 Mich. 31, 90 N.W. (2d) 688 (1958).

(2) The traditional rule that on appeal of a directed verdict for defendant or a judgment for defendant n.o.v., the evidence will be viewed in the light most favorable to the plaintiff.[29] By emphasizing this the majority has substantially weakened the contervailing notion that undisputed physical facts overcome the rule.[30]

(3) The assertion that the plaintiff's actions must not be viewed as isolated conduct but rather in the framework of the total situation, including the defendant's negligence;[31] due care by plaintiff does not include the duty to foresee or anticipate the negligent or illegal acts of the defendant.[32]

(4) A belief that substantial changes in traffic conditions invalidate the earlier approach.[33]

Closely related to the retreat from the doctrine of contributory negligence as a matter of law is the unanimously adopted court rule shifting the burden of proof on the issue of contributory negligence from the plaintiff to the defendant.[34] This shift creates a doubtful future for the presumption of due care accorded a deceased party to an accident[35] as it relates to a plaintiff's decedent.[36]

At one time this shifting of the Michigan position appeared destined to become a radical departure from traditional notions, but the more recent decisions indicate that the outcome will be much more moderate than the heralds had portended. Such results should not, however, overshadow the fact that Michigan law on this subject has substantially changed. The effect of a jury determination of the ultimate issue of contributory negligence with the burden of proof on the defendant should undoubtedly produce more plaintiffs' victories.

29 Hoffman v. Burkhead, 353 Mich. 47, 90 N.W. (2d) 498 (1958).

30 Shaw v. Bashore, 353 Mich. 31, 90 N.W. (2d) 688 (1958). But see Van Gilder v. C. & E. Trucking Corp., 352 Mich. 672 at 684, 90 N.W. (2d) 828 (1958).

31 Compare Ware v. Nelson, 351 Mich. 390, 88 N.W. (2d) 524 (1958), with Jones v. Michigan Racing Assn., 346 Mich. 648, 78 N.W. (2d) 566 (1956).

32 Samyn v. Bublitz, 352 Mich. 613, 90 N.W. (2d) 711 (1958); Vandervelt v. Mather, 353 Mich. 1, 90 N.W. (2d) 894 (1958). But see Landon v. Shepherd, 353 Mich. 500 at 507, 91 N.W. (2d) 844 (1958).

33 Krause v. Ryan, 344 Mich. 428 at 439, 74 N.W. (2d) 20 (1955) (dissent); Bartlett v. Melzo, 351 Mich. 177 at 181, 88 N.W. (2d) 518 (1958); McKinney v. Yelavich, 352 Mich. 687 at 690 et seq., 90 N.W. (2d) 883 (1958).

34 Mich. Court Rule 23, §3a, adopted April 14, 1958, effective June 1, 1958. Reported 352 Mich. p. xiii (1958).

35 Shaw v. Bashore, 353 Mich. 31, 90 N.W. (2d) 688 (1958); Steger v. Blanchard, 353 Mich. 140, 90 N.W. (2d) 891 (1958).

36 GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 50 (1936).

III. *Statutory Law*

A. *Generally.* Neither the present majority nor the minority has developed a sophisticated technique for interpreting statutes, although the majority is perhaps more likely to appeal to broad sociological considerations[37] or a presumption that the legislature intended a "just" result.[38] Both groups have placed heavy reliance upon decisions from other states without establishing any connection between those decisions and the intent of the Michigan legislature.[39] On occasion the present majority has devoted considerable space to a review of the legal history surrounding the statute in question, with largely inconclusive results.[40] At other times it has adopted a literal approach[41] and ignored highly persuasive legislative history.[42]

One area in which some definitive pattern of the court's approach to problems of statutory interpretation has developed concerns cases involving statutes which have been previously interpreted or amended. Four situations need to be considered. (1) The legislature enacts a statute, the court interprets it and the legislature leaves the statute untouched. In this situation it has been stated that the legislature did not by silence adopt the court's interpretation. The question concerns only the propriety of the initial interpretation.[43] (2) The legislature enacts a statute, the court interprets it and subsequently the statute is re-enacted without change. In this situation it has been stated that the legis-

[37] See Pazan v. Unemployment Compensation Commission, 343 Mich. 587 at 592, 73 N.W. (2d) 327 (1955) (dissent); Powell v. Employment Security Commission, 345 Mich. 455, 75 N.W. (2d) 874 (1956). But see In re Smith's Estate, 343 Mich. 291, 72 N.W. (2d) 287 (1955).

[38] See Van Dorpel v. Haven-Busch Co., 350 Mich. 135, 85 N.W. (2d) 97 (1957). The present minority has used the same reasoning. MacDonald v. Quimby, 350 Mich. 21, 85 N.W. (2d) 157 (1957).

[39] See, e.g., Butterfield Theaters v. Revenue Dept., 353 Mich. 345, 91 N.W. (2d) 269 (1958).

[40] Moore v. Palmer, 350 Mich. 363, 86 N.W. (2d) 585 (1957), followed in Kiefer v. Gosso, 353 Mich. 19, 90 N.W. (2d) 844 (1958).

[41] E.g., Kroes v. Harryman, 352 Mich. 642, 90 N.W. (2d) 444 (1958).

[42] See dissenting opinion of Justice Carr in Dyer v. Sears, Roebuck & Co., 350 Mich. 92 at 100-102, 85 N.W. (2d) 152 (1957).

[43] Van Dorpel v. Haven-Busch Co., 350 Mich. 135, 85 N.W. (2d) 97 (1957). Justice Voelker pointed out that the court which had originally decided the question was working with new legislation and lacked the experience which time had given the present court. Yet Justice Black was joined by Justice Voelker when he stated that a decision of the same earlier court was entitled to greater weight than intervening opinions overruling it because the earlier court was closer to the legislation. Dyer v. Sears, Roebuck & Co., 350 Mich. 92 at 95, 85 N.W. (2d) 152 (1957).

lature has adopted the judicial interpretation. It is presumed that the legislature knew of the interpretation and would have amended the statute had it disapproved.[44] (3) The legislature enacts a statute, the court interprets it and the legislature subsequently amends the statute. In this situation it is presumed that the legislature intended some change in the prior interpretation.[45] (4) The legislature enacts a statute, the court does not interpret it and the legislature subsequently amends the statute. In this situation the court feels free to interpret the original statute to have the same effect as the amended statute. Here the preceding rule does not apply, there being no interpretation to be affected by the change; the legislature might have intended merely to clarify the law.[46]

B. *Workmen's Compensation.* The Workmen's Compensation Act[47] has not only been the most frequently interpreted Michigan statute in recent years, but it has also received the most comprehensive "treatment."[48] As in the area of contributory negligence, the present majority of the court views its decisions not as changes but as a return to earlier correct interpretations of the act.[49]

1. *Employment.* "Arising out of and in the course of employment" has long been treated as a dual standard by Michigan courts.[50] "Arising out of" has been construed to mean that the employment must be the proximate cause of the injury.[51] "In the course of employment" has been interpreted to relate to the time, place and circumstances of the injury.[52]

In changing the Michigan position from perhaps the most

44 Jeruzal v. Wayne County Drain Commissioner, 350 Mich. 527, 87 N.W. (2d) 122 (1957).

45 See MacDonald v. Quimby, 350 Mich. 21, 85 N.W. (2d) 157 (1957).

46 Detroit Edison v. Janosz, 350 Mich. 606, 87 N.W. (2d) 126 (1957).

47 Mich. Comp. Laws (1948), chapters 411 to 417, §411.1 et seq., as modified by chapter 408, §408.1 et seq.

48 This "treatment" has not been exclusively judicial. The act had been amended 196 times up to 1957. Sheppard v. Michigan Nat. Bank, 348 Mich. 577 at 631, 83 N.W. (2d) 614 (1957).

49 See Barron v. Detroit, 348 Mich. 213 at 216, 82 N.W. (2d) 463 (1957).

50 Buvia v. Oscar Daniels Co., 203 Mich. 73, 168 N.W. 1009, 7 A.L.R. 1301 (1919); Thier v. Widdifield, 210 Mich. 355, 178 N.W. 16 (1920); Sichterman v. Kent Storage Co., 217 Mich. 364, 186 N.W. 498, 20 A.L.R. 309 (1922); Appleford v. Kimmel, 297 Mich. 8, 296 N.W. 861 (1941).

51 See note 47 supra and Graham v. Sommerville Constr. Co., 336 Mich. 359, 58 N.W. (2d) 101 (1953).

52 See notes 47 and 48 supra and Mann v. Board of Education of Detroit, 266 Mich. 271, 253 N.W. 294 (1934).

conservative[53] to a position of leadership in the movement toward greater liberality, the present majority has not effected much change in the formal interpretations given the phrases "arising out of" and "in the course of" as used in the act. The majority continues to require a causal relation between the employment and injury[54] although the element of proximate cause seems somewhat diluted.[55] Instead of changing the applicable tests, the majority has achieved liberality by broadening interpretation of the word "employment." It has replaced the earlier "what he was hired to do" or "control" test[56] with a rather complete catalog of activities at work.[57]

An incidental effect of this sweeping definition of employment is a rather hazy merging of the dual standard. This merger is of little significance in the ordinary case because once the "arising out of" test is satisfied, satisfaction of the "in the course of" test is nearly automatic. There are two instances, however, when the distinction between the two tests could be of controlling importance. One involves the statutory presumption that an employee is in the course of his employment when arriving at and leaving his employer's premises.[58] The other involves the legislative pre-emption of an employee's common law actions against his employer for injuries occurring "in the course of . . . his employment."[59] In both instances "arising out of" was omitted by the legislature.

2. *Accident.* The second interpretative difficulty involves the term "personal injury." In 1914 the court determined that to be compensable under Part II[60] of the act an injury must be accidental, and denied compensation for an occupational disease.[61] In 1937 the legislature enacted Part VII[62] providing compensa-

53 See Pound, "Comments on Recent Important Workmen's Compensation Cases," 15 NACCA L.J. 45 at 54 (1955).

54 Crilly v. Ballou, 353 Mich. 303 at 327, 91 N.W. (2d) 493 (1958); Stewart v. Chrysler Corp., 350 Mich. 596, 87 N.W. (2d) 117 (1957).

55 See Redfern v. Sparks-Withington Co., 353 Mich. 286, 91 N.W. (2d) 516 (1958).

56 Salmon v. Bagley Laundry Co., 344 Mich. 471, 74 N.W. (2d) 1 (1955); Tegels v. Kaiser-Frazer Corp., 329 Mich. 84, 44 N.W. (2d) 880 (1950).

57 Salmon v. Bagley Laundry Co., 344 Mich. 471 at 475 (dissent). See also Wheeler v. Dept. of Conservation, 350 Mich. 590, 87 N.W. (2d) 69 (1957).

58 Mich. Comp. Laws (Supp. 1956) §412.1. But see Dyer v. Sears, Roebuck & Co., 350 Mich. 92, 85 N.W. (2d) 152 (1957).

59 Mich. Comp. Laws (1948) §411.1.

60 Mich. Comp. Laws (1948) §412.1 et seq.

61 Adams v. Acme White Lead & Color Works, 182 Mich. 157, 148 N.W. 485 (1914).

62 Mich. Public Act No. 61 (1937).

tion for occupational injuries and diseases. The word "accident" did not appear in the basic compensating provisions but did appear in other sections and in the title. In 1943 and again in 1952 the legislature amended the act and omitted the terms "accident" and "accidental" in fifty-two places altogether.[63] The question presented by this legislative activity was whether or to what extent the accident requirement had been eliminated from the act. Early cases considering this question display considerable diversity of opinion.[64] Contrary to judicial statements that this problem has been finally settled,[65] the cases evidence a greater difference of opinion than ever before. Justice Carr requires accidental cause throughout the act. Justice Edwards would not require accident of any sort in Part II but has given no opinion as to Part VII. Chief Justice Dethmers would not require any accident as to "single-event injuries," those not the result of aggravation of pre-existing physical defects. Justice Kelly would require only an accidental result in non-aggravation cases under Part II. Justices Smith and Black require only accidental result, but require it in both parts. This is gleaned from two decisions comprised of twelve opinions signed seventeen times by only seven justices.[66] Of the present court, Justices Voelker and Kavanagh did not participate.

3. *Aggression and Horseplay.* One employee maliciously or sportively attacks another. In the ensuing activity one or the other of them is hurt. Can the injured one recover compensation? The old rules were fairly clear. In the case of malicious aggression: (a) the aggressor could not recover because the act specifically bars compensation for injuries occasioned by the injured employee's intentional and willful misconduct;[67] (b) the victim to recover need only show that the assault was incident to his employment.[68]

63 Mich. Public Act No. 245 (1943).

64 E.g., Hagopian v. Highland Park, 313 Mich. 608, 22 N.W. (2d) 116 (1946); Anderson v. General Motors Corp., 313 Mich. 630, 22 N.W. (2d) 108 (1946); Kasarewski v. Hupp Motor Car Corp., 315 Mich. 225, 23 N.W. (2d) 689 (1946); Brazauskis v. Muskegon County Board of Road Commissioners, 345 Mich. 480, 76 N.W. (2d) 851 (1956).

65 See Coombe v. Penegor, 348 Mich. 635 at 657, 83 N.W. (2d) 603 (1957).

66 Sheppard v. Michigan Nat. Bank, 348 Mich. 577, 83 N.W. (2d) 614 (1957), a 1-2-2-1-2-1 decision; and Coombe v. Penegor, 348 Mich. 635, 83 N.W. (2d) 603 (1957), a 1-1-2-1-2-1 decision. See also Redfern v. Sparks-Withington Co., 353 Mich. 286, 91 N.W. (2d) 516 (1958).

67 Mich. Comp. Laws (1948) §412.2; Horvath v. La Fond, 305 Mich. 69, 8 N.W. (2d) 915 (1943).

68 Marshall v. Baker-Vawter Co., 206 Mich. 466, 173 N.W. 191 (1919); Schultz v.

In the case of horseplay the injured employee usually could not recover, whether or not he participated, because the injury did not arise out of and in the course of the employment.[69]

The present majority has indicated dissatisfaction with these rules. In the case of malicious aggression it has stated that the distinction between the aggressor and the victim is difficult, if not completely unrealistic to make, and has indicated that very limited judicial review will be given administrative findings that the injured employee was the victim rather than the aggressor.[70] In deciding a case in which the malicious aggressor question was clearly not before them, four members of the majority indicated that they would require something closely akin to premeditation to bar the aggressor's recovery.[71] The non-aggressor apparently still must show that the injury was incident to his employment, but this requirement is probably merely an application of the expanded concept of "employment."[72] In the case of horseplay, the fact of horseplay will no longer bar the non-participant.[73] The participant also will be allowed recovery where he can show that the injury arose out of and in the course of employment; again this would seem to be an application of "employment" in its expanded connotation.[74]

4. *Conclusion.* The majority has definitely indicated the general approach it will take in interpreting the workmen's compensation act. Previous cases had vacillated between two conflicting maxims of statutory interpretation: statutes in derogation of the common law are to be strictly construed;[75] remedial statutes are to be broadly construed.[76] Today there should be little doubt but that the latter controls.[77]

Yet even assuming that by liberalizing interpretation of

Chevrolet Motor Co., 256 Mich. 393, 239 N.W. 894 (1932); Slusher v. Pontiac Fire Dept., 284 Mich. 657, 280 N.W. 78 (1938).

69 Tarpper v. Weston-Mott Co., 200 Mich. 275, 166 N.W. 857 (1918); Derhammer v. Detroit News, 229 Mich. 658, 202 N.W. 958 (1925); Jones v. Campbell, Wyant & Cannon Foundry Co., 284 Mich. 358, 279 N.W. 860 (1938).

70 Stewart v. Chrysler Corp., 350 Mich. 596 at 600, 87 N.W. (2d) 117 (1957).

71 Crilly v. Ballou, 353 Mich. 303, 91 N.W. (2d) 493 (1958).

72 Note 70 supra.

73 Hollingsworth v. Auto Specialties, 352 Mich. 255 at 265, 89 N.W. (2d) 431 (1958).

74 Ibid.

75 E.g., Smith v. Wilson Foundry & Machine Co., 296 Mich. 484, 296 N.W. 654 (1941).

76 E.g., Simpson v. Lee & Cady, 294 Mich. 460, 293 N.W. 718 (1940).

77 ". . . [W]e reject . . . [the derogation maxim] without qualification." Sheppard v. Michigan Nat. Bank, 348 Mich. 577 at 589, 83 N.W. (2d) 614 (1957).

the act the majority has furthered its overall policy, the manner in which this has been accomplished leaves something to be desired. Although the opinions clearly apprise counsel of the majority attitude, they appear to do little to clarify the law. In place of a "3-2-2 monster" decision,[78] the court now provides "settled" 1-2-2-1-2-1 decisions.[79] This is more than unsettling to the lawyer, as it would seem to frustrate one of the basic purposes of the act—prompt settlement of workmen's claims at a minimum of litigation and expense.[80]

IV. *Conclusion*

Any analysis of the efforts and direction of a court of law must consider the approach of that court to the application of the doctrine of stare decisis in formulating its decisions. The American doctrine of stare decisis is not a rule requiring strict adherence to precedent, a rule which is broken when a prior decision is overruled.[81] Rather it is a broad principle flexibly adjusting two needs, the need for stability and the need for progress in the law. There is no problem of stare decisis if a court feels the prior decision to be correct. If a court feels the prior decision to have been wrong it must then consider application of the doctrine of stare decisis by balancing the good and bad which will result from overruling or following precedent, a question of social policy. Generally a court will be more likely to resolve the issue in favor of following precedent where the area of law is such that reliance has previously been placed upon the existing rule. Typically this would be true as to the "vested interests" concepts which exist in property and contract law and to criminal law. On the other hand, where action has been taken largely without reference to the existing law, a court may

[78] Justice Black so described Beltnick v. Mt. Pleasant State Home & Training School, 346 Mich. 494, 78 N.W. (2d) 302 (1956), in Sheppard v. Michigan Nat. Bank, 348 Mich. 577 at 579, 83 N.W. (2d) 614 (1957).

[79] See note 66 supra.

[80] See Hill, "Progress in the Field of Workmen's Compensation," 13 DET. B. Q. 8 (1945); LARSON, WORKMEN'S COMPENSATION §2.20 (1952); Crilly v. Ballou, 353 Mich. 303 at 309, 91 N.W. (2d) 493 (1958).

[81] The British doctrine is much more strict and consequently requires an extremely careful determination of the *ratio decidendi* of a decision. 17 MOD. L. REV. 462 (1954); 71 L. Q. REV. 196 (1955).

be less disposed to follow precedent.[82] This would be the case in areas of torts and workmen's compensation in which the Michigan Supreme Court has recently been so active.

There seem to be two basic points in issue between the present majority and minority of the Michigan Supreme Court. One concerns the soundness of particular rules. The other involves application of stare decisis where a change in the rules may be desirable. Unfortunately there has been little or no clarification in the opinions as to which of the two possible disputes a particular case involves. It is notable, however, that the minority most frequently relies upon Michigan precedents whereas the majority searches more widely for its authority, citing not only cases from other jurisdictions but also relying heavily upon treatises and the Restatements.[83] From this it might be inferred that the minority relies on the inertia of stare decisis while the majority asserts the wrongness of the particular rule in question. It is regrettable that both groups cannot come to grips with both issues.

The method of analysis employed in decisions by the present court often touches polar extremes. At times it is very careful to avoid generalizations.[84] In other instances opinions are directed at a broad but non-decisive issue.[85] Opinions of this type are frequently written by dissenting justices and might be explained as a matter of judicial advocacy.[86] Nevertheless, considering the frequency with which such dissents have become law, a more thorough exposition of the problems involved would seem to be warranted. The decisions are frequently very long and padded

82 Von Moschzisker, "Stare Decisis in Courts of Last Resort," 37 HARV. L. REV. 409 (1924). But see Sprecher, "The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied," 31 A.B.A.J. 501 (1945); Douglas, "Stare Decisis," 49 COL. L. REV. 735 (1949).

83 See, e.g., Bisceglia v. Cunningham Drugstores, 350 Mich. 159, 85 N.W. (2d) 91 (1957); Denton v. Utley, 350 Mich. 332, 86 N.W. (2d) 537 (1957).

84 People v. Stoeckl, 347 Mich. 1, 78 N.W. (2d) 640 (1956); People v. McFadden, 347 Mich. 357, 79 N.W. (2d) 869 (1956).

85 See, e.g., Justice Smith's dissent in People v. Robinson, 344 Mich. 353, 74 N.W. (2d) 41 (1955).

86 Edwards, "Dissenting Opinions of Mr. Justice Smith," 34 UNIV. DET. L.J. 81 at 85-86 (1956); Moorhead, "Concurring and Dissenting Opinions," 38 A.B.A.J. 821 (1952); Stephens, "Function of Concurring and Dissenting Opinions in Courts of Last Resort," 5 UNIV. FLA. L. REV. 394 (1952); Carter, "Dissenting Opinions," 4 HASTINGS L.J. 118 (1953); Musmanno, "Dissenting Opinions," 6 KANS. L. REV. 407 (1958); Musmanno v. Eldredge, 382 Pa. 167, 114 A. (2d) 511 (1955).

with quotations at length from the record, other cases and texts.[87] Often they are criss-crossed by dissenting and concurring opinions.[88] It is of course comforting to the lawyer to know that the court has threshed out the matter and consulted numerous sources, but opinions of this type are too frequently of little value to one interested in determining the precise rule of the case. One might even get the impression from the nature of the opinions that the present majority may be writing for posterity.

Credit must be given to the readiness of the present majority to take a fresh look at the law and attempt to shape the law in a given case so that justice will be done. Certainly this should be the prime goal of any court, and the Michigan Supreme Court has, in furthering its conceptions of the judicial process, done much to achieve this objective.

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87 Sun Oil Co. v. Seamon, 349 Mich. 387, 84 N.W. (2d) 840 (1957). "It seems to me that a lawyer or a judge should be able to reach the conclusion that five and five are ten without expounding the whole science of mathematics." Smith, "Judicial Opinions," 34 MICH. ST. B. J. 21 at 23 (November 1955). See also King, "The Number and Length of Judicial Opinions," 33 J. AM. JUD. SOC. 108 (1949).

88 See note 66 supra.