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## Retroactive Application of Statutes: Protection of Reliance Interests

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## RETROACTIVE APPLICATION OF STATUTES: PROTECTION OF RELIANCE INTERESTS

Courts commonly use the term "retroactive" in two senses. On the one hand, it refers broadly to the fact that all new laws to some extent apply to a state of affairs created by past events.<sup>1</sup> The term, on the other hand, embodies a time-honored historical antipathy to laws that disrupt settled expectations.<sup>2</sup> The common law upholds the principle that the citizenry should be able to make everyday decisions with reasonable certainty of the legal consequences of their actions.<sup>3</sup> This principle is based on fundamental notions of fairness and justice.<sup>4</sup> It is well established, however, that the legislature may enact a statute to have retroactive effect.<sup>5</sup> Consistent with the com-

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1. *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 943 (Me. 1982).

2. *Id.* See also Smead, *Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936) (traces the development of this rule from Greek and Roman codes to American jurisprudence).

3. See Smead, *supra* note 2, at 776-77.

4. The historical hostility to retroactive application of statutes is thoroughly documented. Roman law upheld the principle that laws should be given future effect unless the law states that it should apply to previous or pending actions. *Id.* at 775. The rule became part of English common law through the legal works of Bracton, of which Lord Coke was an avid student. Lord Coke applied the principle in interpretation of statutes, establishing the rule as an irrefutable legal maxim, a violation of which worked a fundamental injustice. *Id.* at 777. Blackstone linked this concept of justice to a theory of the nature of law which included the characterization of laws as operative only in futuro. *Id.* In effect, the principle evolved into a rule of construction applied by the courts to cases in which Parliament had not addressed the point. *Id.* at 778.

5. See, e.g., *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056, 1060 n.5 (Me. 1986). This principle embodies a historical presumption in favor of legislative sovereignty. See Smead, *supra* note 2, at 778. The English tradition recognized that Parliament may draft a statute to have retroactive application. *Id.* Early American decisions limited this presumption of sovereignty by announcing that a retroactive law which impaired vested rights was unconstitutional. See *id.* at 780-83. The doctrine of vested rights sought to protect property and contract interests. See *id.* at 781-82. A vested right is a legal title to the present or future enjoyment of property. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 511 (7th ed. 1903). In terms of contract, a right to enforce a legal demand vests provided that the right is unconditional. 2 N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 41.06 (rev. 4th ed. 1936). The rule against the impairment of vested rights was linked to notions of natural law. "[T]he principle we are considering is now to be regarded as sacred. It is not pretended that we have any express constitutional provision on the subject; nor have we any numerous other rights dear alike to freedom and to justice." *Dash v. Van Kleeck*, 7 Johns. 477, 505 (N.Y. Sup. Ct. 1811). Most commentators agree that the linkage to natural law, although not widely accepted, provided the basis for the inclusion of a rule against retroactive statutes into the due process clauses of state and federal constitutions. See Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693-94 (1960); Smead, *supra* note 2, at 791; Smith, *Retro-*

mon law antipathy, courts traditionally interpret statutes to apply prospectively absent clear indication of legislative intent to the contrary.<sup>6</sup>

The Law Court has recently utilized two different methods for interpreting statutes with retroactive implications. General legislative intent analysis involves consultation of a wide variety of statutory materials in order to ascertain legislative intent as to retroactive application.<sup>7</sup> Definitional analysis, on the other hand, classifies a statute as either substantive or procedural. A statute deemed to affect substantive rights requires prospective application in the absence of clear legislative intent to the contrary.<sup>8</sup> A recent opinion of the Maine Supreme Judicial Court, sitting as the Law Court, provides an occasion for assessing the adequacy of these two methods.

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*active Laws and Vested Rights*, 5 TEX. L. REV. 231, 234-37 (1927).

An early Maine decision applied this doctrine and held that a statute which altered the common law of desecration so that an adverse possessor of land could make out a superior claim against the holder under record title impaired vested property rights in violation of article I, sections 1 and 21 of the state constitution. See *Proprietors of the Kennebec Purchase v. Laboree*, 2 Me. 275 (1823). Article I, section 1 provides in relevant part: "All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of . . . acquiring, possessing, and protecting property . . ." ME. CONST. art. I, § 1. Section 21 provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." *Id.* § 21. The Maine Constitution does not explicitly prohibit retroactive laws, yet the court, drawing on principles of natural law, declared, "Principles of free government, common honesty and justice do not sanction retroactive legislation." *Id.* at 292.

In a recent Maine decision, the concept of vested rights, however, was neither the basis for a constitutional challenge to a retroactive law nor a factor in the court's reasoning. In *Norton v. C.P. Blouin, Inc.*, the court held that a provision that gave special compensation for asbestos-caused disease when applied to cases involving the occurrence of incapacity before the statute's effective date did not impair contractual rights between employer and employee and thus did not violate the state constitution. *Norton v. C.P. Blouin, Inc.*, 511 A.2d at 1061.

On the federal level, the Supreme Court in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), rejected a federal due process challenge to the application of a statute which created employer liability for employees who contracted black lung disease. The Court held that retroactive legislation was permissible provided that a rational basis existed for the provisions. *Id.* at 17-19. The Court noted that legislation that readjusts rights and liabilities is not unconstitutional. *Id.* The *Norton* court quoted this language with approval, but explicitly reserved judgment on the question of whether Maine's due process provision "limits retroactive legislation to any greater degree than does its federal counterpart." *Norton v. C.P. Blouin, Inc.*, 511 A.2d at 1061 n.7.

6. Historically, the presumptive rule of construction requiring that a statute must apply prospectively absent specific legislative intent to the contrary constituted a recognition that the sole authority to make a law retroactive vested in the legislature and arose out of concerns for effectuating the policy of separation of powers. See *supra* note 5.

7. See *infra* text accompanying notes 28-31.

8. See *infra* text accompanying notes 32-40.

In *Bernier v. Raymark Industries*,<sup>9</sup> the Law Court resolved a question certified<sup>10</sup> by the District Court for the District of Maine as to whether the strict products liability statute applied where the harm-causing event occurred prior to the effective date of the statute.<sup>11</sup> The statute provides in part that a seller of "goods or products in a defective condition unreasonably dangerous to the user" is "subject to liability for physical harm thereby caused" despite "all possible care in the preparation and sale of his products."<sup>12</sup> The effective date provision of the Act further provides, "This Act shall not be construed to affect any cause of action arising prior to the effective date of this Act."<sup>13</sup> Plaintiffs, the estates of two deceased Bath Iron Works (BIW) employees, alleged strict products liability for wrongful death based upon the defendant asbestos manufacturer's failure to provide labels on its asbestos products warning users of the health hazards posed by inhalation of asbestos dust.<sup>14</sup>

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9. 516 A.2d 534 (Me. 1986).

10. Certification of questions was made pursuant to ME. REV. STAT. ANN. tit. 4, § 57 (1979 & Supp. 1986-1987) and M.R. Civ. P. 76B. The wrongful death actions were brought pursuant to ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1981 & Supp. 1986-1987).

11. ME. REV. STAT. ANN. tit. 14, § 221 (1980). The first two certified questions will not be discussed in this Note. The first question inquired whether state-of-the-art evidence is admissible under the strict liability statute when the product defect alleged is failure to warn. *Bernier v. Raymark Indus.*, 516 A.2d at 535. The Law Court concluded that such evidence was admissible. The second question queried whether damages allowed by the wrongful death statute are recoverable under an action brought pursuant to the strict liability statute. *Id.* The court answered in the affirmative. *Id.* at 535-36.

12. The strict products liability statute provides in its entirety:

One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

ME. REV. STAT. ANN. tit. 14, § 221 (1980).

13. P.L. 1973, ch. 466, § 2.

14. *Bernier v. Raymark Indus.*, 516 A.2d at 536. Plaintiffs' actions were consolidated for trial with six other cases. The trial was divided into four phases: liability, compensatory damages, apportionment, and punitive damages. Brief of Defendant-Appellant and the Intervenor-Appellants at 5, *Bernier v. Raymark Indus.*, 516 A.2d 534 (Me. 1986) (No. FED-86-117). On a motion for a directed verdict at the close of the liability phase of the trial, the defendant argued that the statute was inapplicable based on the effective date language. The trial court denied the motion. The jury in response to special interrogatories found for the plaintiffs. The defendant filed a motion for judgment notwithstanding the verdict and for a new trial, making the impermissible retroactive application argument. The certification followed these motions.

The defendant asserted that application of the strict liability statute to this case constituted an impermissible retroactive application of the statute because all harm-productive inhalations of asbestos dust from the defendant's products occurred before the statute's effective date of October 3, 1973.<sup>15</sup>

The question certified to the Law Court queried whether the strict liability statute applied "where all inhalation of the asbestos dust which caused the diseases and deaths complained of occurred before [the effective date of the statute], but where the diseases were diagnosed and the deaths occurred after [that date]."<sup>16</sup> Focusing on the term "cause of action" in the effective date provision, the court reasoned that a "judicially recognizable claim does not arise [under the strict liability statute] until there has been a *manifestation of physical injury* to a person sufficient to cause him actual loss, damage or suffering . . . ."<sup>17</sup> The court concluded that the case involved prospective application because manifestation of harm to the plaintiff occurred after the effective date. The Law Court, in other words, avoided the question of retroactivity by determining that manifestation of physical harm, rather than harm, causation, or breach of duty, constituted the operative event for purposes of the effective date language.

Plainly, this interpretation fails to recognize that at least two and perhaps three legally relevant events occurred prior to the statute's effective date. The inhalation of cancer-causing dust from defendant's product took place at least thirty years prior to 1973.<sup>18</sup> Defendant's failure to warn, on the basis of what it knew or reasonably should have known about the dangers of asbestos products, also occurred, if at all, long before the statute's effective date.<sup>19</sup> The onset of the asbestos-related diseases may also have occurred prior to October 1973.<sup>20</sup> Thus, although application of the statute realized the

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Bernier v. Raymark Indus., 516 A.2d at 536-37.

15. Bernier v. Raymark Indus., 516 A.2d at 536.

16. *Id.* at 535.

17. *Id.* at 543 (emphasis added).

18. *See id.* at 536.

19. *Id.*

20. *Id.* at 543. Relying on *Myrick v. James*, 444 A.2d 987 (Me. 1982), and statutes of limitation cases from other jurisdictions, the *Bernier* court defined injury as *manifestation of harm*. *See Bernier v. Raymark Indus.*, 516 A.2d at 541-42 & nn.6-7. The court stated, "The actionable harm is the manifestation of disease in the body . . . ." *Id.* at 542. The *Myrick* court wrote, "As a general proposition, however, in this jurisdiction, a cause of action in tort is deemed to accrue when the plaintiff sustains a judicially cognizable injury: the moment when a wrongful act produces an injury for which the plaintiff is entitled to seek judicial vindication." *Myrick v. James*, 444 A.2d at 994. The court recognized a limited exception in foreign-object surgical malpractice actions under the statute of limitation? *Id.* at 996. The *Myrick* court held that the date of actionable harm was not the date of actual injury to the body, i.e. when the surgeon negligently left the surgical sponge inside the patient, but when the patient

laudable goal of providing compensation for asbestos-induced injury, there is no doubt that such application substantially affects a state of affairs existing prior to the statute's effective date. The court's failure, or refusal, to recognize the retroactivity issue permitted it to sidestep the analyses generally undertaken to resolve the retroactive application issue.

This Note initially contends that the Law Court should have recognized that application of Maine's strict liability statute to the *Bernier* facts necessarily involved a question of retroactive application of the statute. At least two legally relevant events occurred prior to the statute's effective date. It simply does not make sense to state that because the cause of action language of the effective date provision focuses attention on the injury element of the tort, i.e. the element occurring last in time, that the case involves prospective application of the statute only. This Note, however, does not aim primarily to discuss the *Bernier* case as decided. Rather the Note seeks to use the *Bernier* facts as a basis for discussing and analyzing the two methods employed by the Law Court to determine whether the Legislature intended a statute to apply retroactively.

This Note urges that where the Legislature has expressed no clear imperative as to temporal application of a statute, and at least one reasonable construction of legislative intent bases liability or establishes rights upon pre-enactment events, the court should treat the statute as raising a problem of retroactive application.<sup>21</sup> This Note will apply both the general legislative intent and the more specialized definitional models to the *Bernier* situation. This approach will show that neither method yields completely satisfactory results. The Note will conclude with a recommendation that the Law Court revert to an earlier method used by the court which imposes even greater restraints on judicial subjectivity consistent with the common law hostility towards retroactive application of statutes.

The Law Court has defined a retroactive statute as one that "purports to determine the legal significance of acts or events that

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discovered or reasonably should have discovered the presence of the sponge. The *Bernier* court applied the discovery rule that *Myrick* adopted for statutes of limitation purposes to determine when the harm element of strict products liability occurs. *Bernier v. Raymark Indus.*, 516 A.2d at 542.

21. The cause of action language of the statute's effective date provision admits of at least two reasonable interpretations of legislative intent regarding temporal application: the effective date could mean either that a cause of action accrues upon the impact of the harm-causing agent or upon the manifestation of physical harm. The latter interpretation would substantially affect pre-enactment events by imposing strict liability for harm which manifests itself after the effective date but which could not have occurred but for the fact that the defendant inhaled asbestos dust at least thirty years prior to the statute's enactment. In contrast, an interpretation that a cause of action accrues upon impact of the deleterious substance on plaintiff's lungs would not substantially affect any pre-enactment event as this interpretation would avoid liability.

have occurred prior to the statute's effective date.'<sup>22</sup> Application of a retroactive statute establishes new principles by which to evaluate pre-enactment events.<sup>23</sup> All statutes to some extent affect the significance of past events if only because the altered status quo requires the community to abandon past reliances and accept new expectations. Even a prospectively applied statute may have legal impact on pre-enactment events, as in the case of a purely prospectively applied statute of limitation.<sup>24</sup> For purposes of creating a working definition, a retroactive statute may be distinguished from a prospective statute that affects past events by the quality and degree of effect it has on pre-enactment actions.<sup>25</sup> A new statute which substantially affects settled expectations and interests based on old law is deemed retroactive.<sup>26</sup>

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22. *Dobson v. Quinn Freight Lines*, 415 A.2d 814, 816 (Me. 1980) (quoting *State Comm'n on Human Relations v. Amecon Div. of Litton Sys.*, 278 Md. 120, 123, 360 A.2d 1, 3-4 (1976)).

23. *See id.*; *Proprietors of the Kennebec Purchase v. Laboree*, 2 Me. 275, 288 (1823).

24. A statute of limitation, for instance, which has been amended to shorten the limitation period after a cause of action arises but before an action is brought creates a duality in definition. The amended statute is retroactive if deemed to apply to causes of action which arose prior to enactment. The amended statute is also prospective if that period is deemed to run from the date of enactment. *See Dobson v. Quinn Freight Lines*, 415 A.2d at 816; *Coates v. Maine Employment Sec. Comm'n*, 406 A.2d 94, 96 (1979). *See generally* Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. Rev. 540, 544-50 (1956) (discussing definitional difficulties); Smead, *supra* note 2, at 782-83 (examining the English common law and early American definitions of retroactivity).

25. *See* Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 217-18 (1960). Slawson observes that the qualitative effects include the legal effect of the statute in terms of reaching back and altering the legal significance of past events, and the effects of such an application on pre-enactment reliance on the old law. *Id.*

26. *Id.* The defendant in *Bernier* in essence claimed that the strict products liability statute had an impermissible retroactive effect because the new statutorily created tort of strict liability applies to harm-causing events that occurred thirty years before enactment. Moreover, the imposition of liability unjustly disrupts the defendant's settled expectations regarding liability since business decisions involving substantial investments are jeopardized. Commentators have noted, however, that the objection to retroactive application does not withstand scrutiny in many instances. *See, e.g.*, Hochman, *supra* note 5, at 643. Lay people often do not know the rights and duties which attach to a particular course of conduct and may not attempt to research or inquire about a particular choice by consulting, for example, a lawyer or accountant. *See id.* Additionally, a statute designed to operate prospectively can also affect expectations. *Id.* Judicial decisions, moreover, whether retroactive or not, can defeat settled expectations. *Id.* at 693, 696. A retroactive statute may in fact vindicate expectations by remedying the effect of a particular judicial decision. *Id.* at 693.

Nonetheless, in the *Bernier* situation involving a manufacturer, these objections to retroactive application have more certain significance. It is more likely than not that a corporate entity would retain counsel for purposes of consultation in business decisions. At the time during which defendant manufactured and sold the harm-causing products, the general rule in most jurisdictions denied recovery on a theory of strict

The principle is well established that the legislature may draft a statute to have retroactive application. The courts, nonetheless, have traditionally viewed retroactive application of a statute with disfavor. The Law Court has generally adhered to this view.<sup>27</sup> Without indicating which it prefers, however, the court has recently applied two distinct methodologies to determine a statute's correct temporal application when the Legislature has failed to state clearly, if at all, whether to apply the statute retroactively.

One method that the court has recently applied to determine retroactive application is simply its general method of interpreting legislative intent. This method entails an examination of all relevant statutory and legislative materials. The court ranks these materials in hierarchal fashion for purposes of consultation. The search for legislative intent begins with the plain language of the statute.<sup>28</sup> In the event that the statutory text does not disclose legislative intent, the court consults relevant extrinsic resources such as the statutory history, the circumstances of enactment, contemporaneous, related statutes and the legal meaning of statutory terms. The problem with applying the court's general, all-purpose method of statutory construction to retroactivity problems is that it creates too great an opportunity for the court to read its own policy preferences into the statute where the Legislature has expressed its intent at all ambiguously.<sup>29</sup> Although the court's role in formulating decisional policy consistent with a statute's perceived underlying policies is recognized as a legitimate and necessary aspect of statutory interpretation,<sup>30</sup> the issue of retroactive application calls for special con-

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liability absent privity between manufacturer and purchaser. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 97 (Owen 5th ed. 1984). A negligence action, moreover, required privity between buyer and maker in order to recover. See *id.* § 96. See also *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 935-38 (Me. 1982) (discussing Maine law concerning absence of privity as a defense in a negligence action). Accordingly, the defendant prepared and sold the products in reliance on and with notice of a certain level of liability. One might reasonably expect that the manufacturer's insurance, other costs, and sales prices reflected to some extent probable liability. Thus, the products liability statute retroactively applied violates the notion that one can make decisions involving substantial assets with reasonable assurance of the legal consequences.

27. *Adams v. Buffalo Forge Co.*, 443 A.2d at 943. "Courts must examine the state of affairs which has been determined by past events to consider the character of previously established rights, expectations and prospects which will be displaced." *Id.* The Law Court has recognized these concerns in the context of retroactive application of judicial decisions. See *infra* notes 106-109 and accompanying text.

28. See, e.g., *Adams v. Buffalo Forge Co.*, 443 A.2d at 942.

29. See *Reggep v. Lunder Shoe Prods. Co.*, 241 A.2d 802, 804-805 (Me. 1968).

30. The Law Court has stated, "'Absent a legislative definition, the terms must be given a meaning consistent with the overall statutory context, and be construed in the light of the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation.'" *Town of Arundel v. Swain*, 374 A.2d 317, 321 (Me. 1977) (quoting *Finks v. Maine State Highway*



straints on judicial policy-making.<sup>31</sup>

The court has also employed a "definitional" methodology.<sup>32</sup>

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Comm'n, 328 A.2d 791, 798 (Me. 1974)). The Law Court's legislative intent analysis comports with Professor Dickerson's model of statutory interpretation. Dickerson first posits that a court bears a responsibility to adjudicate the particular controversy at bar. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 13-14 (1975). Dickerson explains that statutory interpretation involves two interrelated roles. The first is "to read the statute in its proper context to ascertain whether and how its meaning relates to the controversy at hand." *Id.* at 18. Second, "where the meaning of the statute as so ascertained does not resolve the controversy, [the court must] apply, adjust, or create an appropriate judicial rule to resolve it." *Id.* This approach recognizes the courts' cognitive function in ascertaining legislative meaning and their creative function in judicial lawmaking. *Id.* This analysis preserves "[l]egislative supremacy in the creation of law [which] cannot be maintained unless cognition precedes creation." *Id.* at 20. The cognitive process requires an analysis of the statutory language. Where the meaning of the statute remains unclear, extrinsic materials may be consulted as part of the statutory context.

Dickerson summarizes the considerations involved in ascertainment of meaning in statutory language as follows:

A full-bodied theory of interpretation should recognize (1) that the common usage that makes clear language clear is not limited to individual words taken in isolation, (2) that by usage, combinations of words often carry meanings independent of the meanings of their constituent parts, (3) that usage extends also to observed patterns of syntax and to shared tacit legislative assumptions, (4) that the same word, expression, syntactical pattern, or tacit assumption may have multiple common usages, (5) that each such usage relates to a particular speech community, and (6) that patterns of context are to a limited extent reflected in the dictionary meanings of words.

*Id.* at 66. Finally, Dickerson proposes the following: "The court is justified in initiating its own solution only if a legally adequate answer cannot be found, through the normal processes of cognition, within the statute and its proper context." *Id.* at 18.

31. Consistent with traditional hostility toward retroactive application of a statute, the Law Court has historically demonstrated restraint in construing legislative intent in this area. *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973), involved a statute which contained effective date language similar to the products liability statute. In *McNally*, the statute eliminated lack of privity as a defense in tort actions. The effective date language provided that the statute "shall not be construed to affect any transaction occurring prior to the effective date." ME. REV. STAT. ANN. tit. 14, § 161 (1980). The court stated in dictum, "Had the Legislature indicated . . . neutrality, this Court would be here free, as it would find compelling policy justifications" to apply a statute retroactively. *McNally v. Nicholson Mfg. Co.*, 313 A.2d at 926. The *McNally* court recognized that the Legislature did not indicate the requisite neutrality because the language contained the negative restriction. *Id.* at 925-26. The court observed that the Legislature could have indicated such neutrality by simply omitting any reference to temporal application or by an explicit statement indicating legislative neutrality on the issue. *Id.* This analysis illustrates the cautious use of the judicial creative function with respect to retroactive application of a statute. Generally, only after an exhaustive and deferential search of the statutory language and other materials has the court formulated its own response to the issue of temporal application.

32. In *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986), the Law Court reaffirmed the definitional methodology principles. The case, however, also illustrates the lack of a predictable analytical framework. While reaffirming the definitional analysis

Under this methodology the court first determines whether the statute is substantive or procedural.<sup>33</sup> A statute effects a substantive change "if it determines the legal significance of operative events occurring prior to its effective date by impairing rights or creating liabilities."<sup>34</sup> A statute concerns procedural matters if it "does not have the effect of changing the legal significance of prior events or acts."<sup>35</sup> For example, the Law Court has included statutes of limitation in the procedural category, reasoning that a statute of limitation is a law of process which does not extinguish the underlying right, but affects only the remedy.<sup>36</sup>

The court presumes that the Legislature intended a substantive statute to apply prospectively only unless legislative intent to the contrary is clearly expressed or necessarily implied by the language of the statute.<sup>37</sup> The application of a substantive statute "remains prospective if it governs operative events that occurred after its effective date, even though the entire state of affairs includes events pre-dating the statute's enactment."<sup>38</sup> In contrast, retroactive appli-

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in a footnote, the court determined that an intent analysis was dispositive for resolution of the retroactive application issue in that case. *Id.* at 1060 n.5, 1061.

33. *Id.* at 1060 n.5.

34. *Id.* Application of a statutory amendment, for example, which prolonged a claimant's disqualification from unemployment benefits significantly altered the legal consequences of the claimant's conduct in leaving her job. Under previous law, the claimant would have been able to obtain the benefits. *Coates v. Maine Employment Sec. Comm'n*, 406 A.2d 94, 96 (Me. 1979). The court, moreover, has characterized a workers' compensation amendment enacting special provisions in asbestos disease cases as affecting substantive changes by increasing employer liability over pre-enactment levels. *Norton v. C.P. Blouin, Inc.*, 511 A.2d at 1061 n.6.

35. *Dobson v. Quinn Freight Lines*, 415 A.2d 814, 816 (Me. 1980). This case also stated that a procedural statute is one which "does not revive an extinguished right or deprive anyone of vested rights." *Id.* The *Norton* court noted that this statement admitted of some confusion because "the test set forth for identifying an unconstitutional retroactive application has mirrored [this] standard." *Norton v. C.P. Blouin, Inc.*, 511 A.2d at 1060 n.5. *See also supra* note 5. The *Norton* court did not offer any explanation for this confusion.

36. *Miller v. Fallon*, 134 Me. 145, 147-48, 183 A. 416, 417 (1936). The court concluded that enactment of a statute of limitation did not violate any constitutional provision because the provision did not impair vested rights. *Id.* The Law Court has unequivocally stated, "There is no vested right in any particular remedy." *Berry v. Clary*, 77 Me. 482, 486, 1 A. 360, 361 (1885). A remedial statute applied to matters pending at the time of enactment constitutes a prospective application even though the events giving rise to the action occurred previous to enactment. *See Norton v. C.P. Blouin, Inc.*, 511 A.2d at 1060 n.5. *See also supra* note 5.

37. *Norton v. C.P. Blouin, Inc.*, 511 A.2d at 1060 n.5. In the event that the court determines that the Legislature intended a substantive statute to apply retroactively, or applies a procedural statute retroactively, such applications must withstand constitutional scrutiny. *Id.*

38. *Id.* (citing *Director of Bureau of Labor Standards v. Fort Halifax Packing Co.*, 510 A.2d 1054, 1063 (Me. 1986) (operative events in the application of severance pay statute are not previous periods of employment but rather the relocation or termination of the business which event occurred after enactment constituting a prospective

cation occurs when a substantive statute is applied to an operative, i.e. legally relevant, event arising prior to its effective date. On the other hand, a purely procedural statute applied to matters pending at the time of its enactment constitutes a prospective application even though the events giving rise to the proceedings occurred prior to the statute's effective date.<sup>39</sup> The problems with this method are the difficulty in distinguishing between a substantive and procedural statute and the possible frustration of legislative intent.<sup>40</sup>

While the court has utilized both methods in the past, it has applied only the general legislative intent method in resolving temporal application questions under the strict products liability statute. The court's use of the method reveals its deficiencies. In *Burke v. Hamilton Beach Division*,<sup>41</sup> the court observed that the strict liability statute's effective date language contained a restriction. The language provided that the statute "shall not be construed"<sup>42</sup> to affect a pre-enactment cause of action.<sup>43</sup> The court indicated that this language clearly expressed the "Legislature's basic and consistent thrust to apply changes in products liability law only *in futuro*."<sup>44</sup> In *Adams v. Buffalo Forge Co.*,<sup>45</sup> however, the Law Court characterized the *Burke* statement as dictum and determined that the negative manner in which the Legislature drafted the effective date language

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application) and *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 943-44 (Me. 1982) (sale of product not operative event under the strict products liability statute but rather the date of injury, which event occurred after the effective date of the statute, constituting a prospective application)).

39. *Id.* (citing *Merrill v. Eastland Woolen Mills*, 430 A.2d 557, 560-61 (Me. 1981) (application of workers' compensation statutory amendment to pre-enactment claim settlement agreement between employer and employee affected only the forum where the validity of the argument would later be challenged and therefore did not affect the substantive rights of the parties affected) and *Dobson v. Quinn Freight Lines*, 415 A.2d 814, 816 (Me. 1980) (amendment extending statute of limitation does not change the legal consequences of acts and events occurring prior to the effective date but affects only the procedure for enforcement of those claims)). An amendment to a statute of limitation, however, which shortens the limitation period is deemed to change the legal significance of prior acts, and thus may not be retroactively applied absent clear legislative intent. *Miller v. Fallon*, 134 Me. 145, 148, 183 A. 416, 417 (1936). See *Dobson v. Quinn Freight Lines*, 415 A.2d at 816 (discussing difference between statutes that shorten and lengthen the limitation period).

40. See *infra* notes 86-96 and accompanying text.

41. 424 A.2d 145 (Me. 1984).

42. P.L. 1973, ch. 466, § 2.

43. *Burke v. Hamilton Beach Div.*, 424 A.2d at 148 n.6.

44. *Id.* at 148 n.6. The court, in *Adams v. Buffalo Forge Co.*, deemed this language dictum because the plaintiff had not alleged a cause of action in strict liability and therefore the applicability of the statute was not before the court. See *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 940 n.7 (Me. 1982). Nevertheless, the *Burke* court noted the explicit restriction in the effective date language and also found it significant that similar language appeared in two other statutory enactments providing consumer protections. *Burke v. Hamilton Beach Div.*, 424 A.2d at 148 n.6.

45. 443 A.2d 932 (Me. 1982).

created ambiguity.<sup>46</sup> The court found that the language "provides only a description of those actions to which [the statute] does not apply" and "does not provide a statement as to what actions [the statute] does apply."<sup>47</sup> The *Adams* court then examined the legislative history and circumstances of enactment in order to determine whether the Legislature had intended the term "cause of action" to include a pre-enactment sale of a product.<sup>48</sup>

In *Adams*, the court examined whether the pre-enactment sale of the harm-causing product constituted the operative event for purposes of determining the statute's temporal application where the actual harm occurred after the statute's effective date.<sup>49</sup> The *Adams* court held that physical injury, rather than the sale of the product, is the operative event.<sup>50</sup> Thus, the *Adams* court deemed the statute to have prospective application because the injury occurred subsequent to the statute's effective date.<sup>51</sup> The *Adams* court recognized, however, that the statute admitted of more than one possible interpretation regarding temporal application. The court observed that

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46. *Id.* at 944 n.14.

47. *Id.* at 942.

48. *Id.* at 942-43. The *Adams* court noted that the Legislature adopted the *Restatement (Second) of Torts* provision governing products liability. *Id.* at 940. The court, moreover, examined the drafts of the statute as they were first proposed for enactment and noted that initially the statute was suggested as an addition to article 2 of Maine's Commercial Code. *Id.* at 941.

The *Adams* court examined a series of statutory amendments which were generated by the Legislature's desire to make a definite distinction between warranty and tort claims. *Id.* at 941 n.12. In 1973, the Legislature recognized that under section 2-318 of Maine's Commercial Code a lack of privity was no defense in an action against a manufacturer to recover for breach of warranty or for negligence. *Id.* At the same time, the Legislature recognized that section 161 of title 14 of the Maine Revised Statutes Annotated, ME. REV. STAT. ANN. tit. 14, § 161 (1980), provided that lack of privity was no defense in an action brought for breach of warranty or for negligence. *Adams v. Buffalo Forge Co.*, 443 A.2d at 941 n.12. The Legislature, therefore, deleted from article 2 all reference to negligence actions, and deleted from section 161 all reference to breach of warranty. *Id.* In effect, the Legislature eliminated the paradox of placing a provision precluding lack of privity as a defense to a tort action in article 2 of the Code, and placing a provision precluding lack of privity as a defense to a contract action in the title governing tort actions. *Id.* As a result of these statutory changes, the provisions that eliminate lack of privity as a defense to a negligence action are now located in title 14, where the Legislature chose to enact the strict products liability statute. *Id.*

The *Adams* court also noted that various changes to title 14 made clear that absence of privity was no defense to tort actions. *Id.* at 941 n.12. The court, in addition, acknowledged that the statute was enacted in an atmosphere favoring consumer rights. The court observed that changes in Maine's Commercial Code and Unfair Trade Practices Act enhanced consumer protection. *Id.* at 943. Finally, the court noted that remarks made by the statute's sponsor during legislative debate indicate the statute's purpose to enhance consumer protection. *Id.*

49. *Adams v. Buffalo Forge Co.*, 443 A.2d at 942.

50. *Id.* at 944.

51. *Id.* at 944.

"by allowing these plaintiffs to pursue their strict liability claim, [the statute] will affect a state of affairs created to some extent by events which occurred prior to the injury, and, indeed, prior to the effective date of the Act."<sup>52</sup> The court declared, "Courts must examine the state of affairs which has been determined by past events to consider the character of previously established rights, expectations and prospects which will be displaced" and, "at the same time, consider the manner in which the Legislature intended the enactment to apply."<sup>53</sup>

While the court reached conflicting conclusions in *Burke* and *Adams* in regard to the temporal application of the statute, the *Bernier* court failed even to recognize the issue as one of retroactivity.<sup>54</sup> Al-

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52. *Id.* at 943.

53. *Id.*

54. Rather, the *Bernier* court proceeded to analyze the issue by first examining the *Adams* decision. Justice Scolnik, writing for the majority, noted that in *Adams* the court analyzed legislative intent in order to determine whether the strict products liability statute applied retroactively where the product was sold before the effective date, but the actual injury occurred after that date. *Bernier v. Raymark Indus.*, 516 A.2d 534, 541 (Me. 1986) (citing *Adams v. Buffalo Forge Co.*, 443 A.2d at 941-44). The defendant in *Adams* contended that the statute did not apply where the sale occurred before the effective date. *Id.* (citing *Adams v. Buffalo Forge Co.*, 443 A.2d at 939-40). The *Bernier* court observed that in *Adams* the court found that the Legislature intended a cause of action to sound in tort, not contract, and therefore, that actual liability would arise only when physical harm is caused to a person. *Id.* Citing *Adams*, the *Bernier* court then pronounced that a cause of action under the strict products liability statute arises "when a person has a judicially recognizable claim against a defendant." *Id.* (citing *Adams v. Buffalo Forge Co.*, 443 A.2d at 943). The court noted that this statement in *Adams* in turn relied upon *Williams v. Ford Motor Co.*, 342 A.2d 712 (Me. 1975). In *Williams*, the court examined when a negligence action for injuries caused by a defective axle occurred under the applicable statute of limitation where the time of accrual had not been defined by the Legislature. *Id.* at 718. The *Bernier* court followed *Williams* and stated that "[i]n the absence of any explicit legislative direction, the process of defining this term is a judicial function." *Bernier v. Raymark Indus.*, 516 A.2d at 541 n.6. The court concluded, therefore, that it was appropriate for the judiciary to determine by analogy when a cause of action accrued under the strict products liability statute. *Id.*

The court analyzed the substantive elements of tort law in order to determine the accrual point. Noting that "[t]here is generally no cause of action in tort until a plaintiff has suffered an identifiable, compensable injury," *id.* at 542, the court concluded that manifestation of disease rather than inhalation constituted actionable harm. *Id.* at 543. The court found particularly compelling the context of asbestos-related diseases which are characterized by long latency periods absent any indication of injury. *Id.* at 542. In this respect, the court relied on extra-jurisdictional statute of limitation cases which hold that strict liability causes of action accrue upon plaintiff's discovery of the injury. *Id.*

The *Bernier* analysis is fundamentally flawed because the court misread the *Adams* decision. The court did not recognize that *Adams* held only that physical injury rather than the sale of the product constituted the statute's operative event. See *Adams v. Buffalo Forge Co.*, 443 A.2d at 944. The *Bernier* court instead relied on the statement in *Adams* that a cause of action arises when a plaintiff has a judicially recognizable claim, in order to warrant the adoption of a discovery rule for purposes

though the *Bernier* court did not recognize the retroactivity issue, application of the definitional methodology and the legislative intent analysis to the *Bernier* facts reveals their shortcomings. Moreover an examination of the *Bernier* facts demonstrates the strengths of the analysis proposed by this Note.<sup>55</sup>

*Bernier* involved claims for wrongful death brought by the estates of two former BIW employees who developed a form of lung cancer caused by inhalation of asbestos fibers after exposure to asbestos during their employment at BIW. Both workers inhaled asbestos dust prior to the effective date of the strict liability statute. Both were diagnosed and died of asbestos-induced lung disease after the effective date.<sup>56</sup> The court concluded that inhalation alone is an insufficient physical injury to give rise to a judicially cognizable claim under the strict products liability statute.<sup>57</sup> The court construed the term "cause of action" in the effective date provision to refer to manifestation of the disease.<sup>58</sup>

General legislative intent analysis does not resolve the question of whether the strict liability statute imposes liability under the factual circumstances of *Bernier*. The strict liability statute itself is silent on the issue of whether inhalation or manifestation of the injury constitutes the operative event for purposes of imposing liability. On the one hand, one could infer from the silence that the Legislature intended an unrestricted temporal application of the statute. On the

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of determining the accrual point. See *Bernier v. Raymark Indus.*, 516 A.2d at 541-42. The proposition, however, upon which the *Bernier* court relied was removed from its proper context, and in any event, constitutes dictum. The sentence immediately following the proposition states, "Our legislative review leaves little doubt that the Legislature intended the rules generally applicable to actions which sound in tort to apply to actions brought pursuant to [this statute]." *Adams v. Buffalo Forge Co.*, 443 A.2d at 943. The *Adams* court next asserted that the court must apply the statute "in the manner our Legislature intended it to be applied." *Id.* Clearly, the proposition that a cause of action accrues when a person has a judicially recognizable claim in this context signifies only that the court "recognizes" the claim by means of a legislative intent analysis.

In fact, the paragraph in which the proposition appears concludes with the statement, "We determine, therefore, that the Legislature intended that under the circumstances here alleged these plaintiffs could avail themselves of the provisions of [the statute]." *Id.* Even if the *Bernier* court had relied on the actual *Adams* holding, such reliance also would have been misplaced. *Adams*, indeed, did not address the issue posed by the *Bernier* facts regarding whether actual injury or manifestation of that injury constituted the operative event for purposes of imposing strict liability pursuant to the statute. *Bernier v. Raymark Indus.*, 516 A.2d at 542.

55. See *infra* text accompanying notes 101-109.

56. *Bernier v. Raymark Indus.*, 516 A.2d at 536.

57. *Id.* at 543.

58. *Id.* The court could not determine from the record when manifestation occurred. Plaintiffs-appellees contended without supporting facts, that prior to the effective date neither manifestation nor diagnosis of the diseases had occurred. Brief of Plaintiffs-Appellees at 32, *Bernier v. Raymark Indus.*, 516 A.2d 534 (Me. 1986) (No. FED-86-117).

other hand, the silence might imply that the Legislature never meant the statute to create liability in cases where the product actually caused the injury at a time long before the statute's enactment.<sup>59</sup>

The effective date provision, which provides that the statute shall not be construed to affect any cause of action arising prior to the effective date, is likewise ambiguous. The *Adams* court, for example, determined that the effective date provision created an "inherent difficulty" in interpretation.<sup>60</sup> Chief Justice McKusick, writing in dissent in *Bernier*, in contrast, reasoned that the negative language of the effective date provision, in conjunction with the absence of express or implied direction regarding retroactive application, compelled the conclusion that the statute did not apply "where both the sale and the harm-causing impact . . . occurred prior to [the effective date]."<sup>61</sup> Thus, reference to the effective date language fails to re-

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59. This conclusion derives from application of the "*casus omissus*" rule of construction. That is, if an idea has not been expressly set forth, the court may not supply it. See R. DICKERSON, *supra* note 30, at 236.

60. *Adams v. Buffalo Forge Co.*, 443 A.2d at 942. Typically, when the Legislature drafts exclusions or inclusions in the affirmative the policy choices involved are more clearly expressed. As the dissenting opinion in *Bernier* points out, the effective date language does not state to what actions the provision does apply. *Bernier v. Raymark Indus.*, 516 A.2d at 545 (McKusick, C.J., concurring in part and dissenting in part). The *Adams* court resolved the ambiguity by seeking out legislative intent. The court determined that the Legislature intended the accrual of a cause of action to be governed by tort principles. *Adams v. Buffalo Forge Co.*, 443 A.2d at 944.

61. *Bernier v. Raymark Indus.*, 516 A.2d at 544 (McKusick, C.J., concurring in part and dissenting in part) (emphasis in original). The dissent first posited that the "task in analyzing the scanty expressions of intent is to select an interpretation that is . . . 'the most plausible alternative on the basis of the text and proper context . . .'" *Id.* at 544 (citing R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 221 (1975)). The dissent observed that the effective date language stated only that the statute "shall not be construed to effect any cause of action arising prior to the effective date." *Id.* at n.1 (citing P.L. 1973, ch. 466, § 2). Chief Justice McKusick pointed out that the language "did not say conversely that all causes of action arising after October 3, 1973 would be 'affected' or controlled by the new Act. Least of all did section 2 say that any and all causes of action that this court might later find became 'judicially recognizable' after October 3, 1973, were to be controlled [by the statute]." *Id.* at 547. This reasoning is consistent with the Law Court's treatment of similar effective date language in *McNally*. In *McNally*, the Law Court concluded that a negative restriction in the effective date language indicated that the statute should not apply retroactively. *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913, 925-26 (Me. 1973). See *supra* note 31. The *McNally* court reasoned that use of the word "not" in the effective date did not constitute legislative neutrality and did not permit the court to apply the statute retroactively. *Id.* at 926.

The *Bernier* dissent, in effect, construed the statute in a manner perceived as consistent with "the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation." *Town of Arundel v. Swain*, 374 A.2d 317, 321 (Me. 1977) (quoting *Finks v. Maine State Highway Comm'n*, 328 A.2d 791, 798 (Me. 1974)). See *supra* note 30 and accompanying text. The dissent contended that "fair-minded legislators were not likely to have imposed

solve the statutory ambiguity.

The legislative history of the strict liability statute, like the statutory language, is silent on the issue of whether inhalation or the subsequent manifestation is the time at which liability accrues. Remarks of the statute's proponent indicate that the Legislature sought to enable consumers to recover for damages caused by manufacturers of unreasonably dangerous and defective products.<sup>62</sup> The legislative record also reveals that the Legislature was concerned primarily with the typical consumer problem: a buyer who locally purchases a product which had been manufactured, warehoused, and shipped by different, foreign corporations and is barred from suing the foreign corporations due to lack of privity.<sup>63</sup> The statements explicitly provide that the Legislature intended the statute to overcome the privity obstacle to recovery.<sup>64</sup> One may fairly conclude from the legislative discussions that the Legislature intended the statute to apply only to the typical consumer product liability case where the harm-producing impact and the injury resulting therefrom occur simultaneously.<sup>65</sup> On the other hand, one may also interpret the legislative history as a broad policy statement generally endorsing protection of all consumers, including those who suffer harm

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strict liability upon the manufacturer cumulatively to the existing common law liability for negligence." *Bernier v. Raymark Indus.*, 516 A.2d at 546. The dissent reasoned that in *Bernier*, where the defect alleged was the failure to warn of the product's dangers, the defendant's "opportunity to warn the user or to recall or redesign the product expired as soon as the user was last exposed to it—long before 1973." *Id.*

62. 3 Legis. Rec. 3897 (1973) (statement of Sen. Richardson).

63. Senator Richardson stated:

In today's society it is not at all unusual for us to buy a product which was warehoused in Massachusetts a week ago, manufactured and shipped from California two months ago. The multi-state corporation enterprise is something that we in Maine have not kept track with. We very seldom, very seldom in Maine, do business locally with someone with whom we are familiar, so that if there is something wrong with the product we can go to the local man and say, "Well, this product didn't meet up to expectations." This bill, I think, will make possible a greater fluidity in the law, and will avoid some of the technical distinctions that now permit people to sell dangerously defective consumer goods by placing them in the chain of commerce and having the unsuspecting consumer injured through absolutely no fault of his own.

*Id.*

64. *Id.*

65. One could conclude from the absence of reference to asbestos-related disease that the Legislature never contemplated the statute to reach the *Bernier* situation. The legislative remarks indicate, therefore, that the Legislature envisioned only typical products liability cases in which the harm producing impact and the resultant harm occur virtually simultaneously. A hand mixer, for example, malfunctions and injures the operator when he inserts the beaters. "Harm" means, in this instance, nothing more than the injury which occurs simultaneously with the product malfunction.



in the same manner as the *Bernier* plaintiffs.<sup>66</sup> The statutory history, therefore, is amenable to two or more conflicting interpretations regarding the statute's temporal applicability.

An examination, moreover, of contemporary, related legislation does not resolve the ambiguity.<sup>67</sup> The difficulty with this aspect of the intent analysis arises in the determination of which statute or statutes, if any, legitimately constitute contemporary, related legislation. Consultation of such legislation is only legitimate where the court can determine that the Legislature intended a term to have the same meaning in related statutory contexts.

For example, when faced with a question of retroactive application in *Burke*, the Law Court construed the term "cause of action" in the strict liability statute in light of effective date language found in other enactments. The court initially found that the enactments were both contemporary and related in that all the statutes effectuated changes in products liability law within a ten-year period.<sup>68</sup> The "related" enactments included two statutes removing vertical and horizontal privity requirements in breach of warranty suits, and a statute removing privity requirements in negligence actions.<sup>69</sup> While the strict products liability effective date provision used the term "cause of action" and the "related" enactments utilized the term "transaction," the court concluded, "Even though those different terms may have contrasting meanings in other contexts, the variation in language in itself does not alter the legislature's basic and consistent thrust to apply changes in products liability only *in futuro*."<sup>70</sup>

The *Burke* court's analysis, however, is not ironclad. First, one could contend that the statutes are not related. The statutes con-

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66. The legislative statements, by the absence of itemized situations to which the statute was intended to apply and by the lack of specific exclusions of any particular situation, imply a broad, all-inclusive application of the statute. There is no distinction under this interpretation between simultaneous injury and delayed injury. Moreover, one could infer from the broad statement that the general principles of tort law apply. This inference is buttressed by the fact that the statute was adopted from the *Restatement (Second) of Torts*. See *supra* note 48. A cause of action does not arise according to principles of tort law until the victim has suffered actual loss or damage. *Bernier v. Raymark Indus.*, 516 A.2d 534, 542 (Me. 1986). In this sense physical harm as used in the statute signifies harm which is discoverable by the victim. See *id.*

67. The Law Court has employed the rule of statutory construction which provides that, in the event of statutory ambiguity, a court may consult contemporary related legislation. See *State v. Edward C.*, 531 A.2d 672, 673 (Me. 1987) (citing *Mundy v. Simmons*, 424 A.2d 135, 137 (Me. 1980)).

68. See *Burke v. Hamilton Beach Div.*, 424 A.2d 145, 147 (Me. 1981).

69. *Id.* at 148 & n.6.

70. *Id.* at 148 n.6 (citation omitted). This conclusion was later deemed dictum because the plaintiffs in *Burke* did not allege a cause of action in strict liability and thus the strict products liability statute's applicability was not at issue. *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 940 n.7 (Me. 1982).

cerning privity requirements sound in contract whereas the strict liability statute creates a new tort action. Given this fundamental distinction, one could infer that the Legislature did not intend the effective date language in these different contexts to share the same meaning with respect to retroactive application. The fact that the Legislature used different terms in the effective date provision supports this conclusion. Second, the terms do not share similar meanings. "Transaction" has been construed to refer to the time of sale and delivery.<sup>71</sup> "Cause of action," however, typically refers to a legally cognizable claim. In light of these differences it is unlikely that the Legislature intended the terms to mean the same in these distinct statutory contexts. Resort to contemporary, related legislation thus may raise more issues of interpretation and does not resolve the ambiguity evident thus far in the intent analysis.

The court also refers to legislation that, although not contemporary, is related. For example, in both *Bernier* and *Adams* the court relied on cases construing the term "cause of action" under statutes of limitation for guidance in interpreting the same term under the strict products liability statute.<sup>72</sup> The function and underlying policies of statutes of limitation, however, differ from those of the strict products liability statute. The former prescribe time limits on the assertion of rights<sup>73</sup> and are justified by administrative policy concerns.<sup>74</sup> The latter functions to create a new claim<sup>75</sup> and is justified by policy concerns regarding compensation for injury caused by defective, unreasonably dangerous products.<sup>76</sup>

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71. *Burke v. Hamilton Beach Div.*, 424 A.2d at 149.

72. See *Bernier v. Raymark Indus.*, 516 A.2d at 541 n.6; *Adams v. Buffalo Forge Co.*, 443 A.2d at 943.

73. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950). A statute of limitation "deprives one party of the opportunity, after a time, of invoking the public power in support of an otherwise valid claim." *Id.*

74. The Law Court recognizes that these types of statutes represent competing interests. *Myrick v. James*, 444 A.2d 987, 994 (Me. 1982). On the one hand, plaintiffs must have an opportunity to pursue legitimate claims in the courts. *Id.* On the other hand, defendants "are entitled to eventual repose and to protection from being required to meet claims which could have been addressed more effectively if asserted more promptly." *Id.* The Law Court has quoted approvingly the United States Supreme Court's views on the subject: "Statutes of limitation find their justification in necessity and convenience . . . They represent expedients rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims . . . They are by definition arbitrary . . . They represent a public policy about the privilege to litigate." *Id.* at 994-95 (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1944)).

75. See *Adams v. Buffalo Forge Co.*, 443 A.2d at 941 (noting that strict liability arises by virtue of judicial development of the common law or by legislative adoption).

76. In *Adams* the Law Court explained that "manufacturers, sellers and suppliers have a duty not to place defective, unreasonably dangerous products into the stream of commerce and that those who do so should be held responsible for injuries which

In the context of statutes of limitation, the interpretation of "cause of action" to mean accrual from the time of the manifestation of injury balances competing policy objectives by allowing the plaintiff to recover for latent harm which even a diligent party could not be expected to discover.<sup>77</sup> Absent a discovery rule, under which a cause of action accrues at the time of manifestation of injury, by the time a plaintiff becomes cognizant of a latent injury the applicable statute of limitation might bar any possible claim.<sup>78</sup> Thus, a discovery rule in statutes of limitation mitigates the harsh effect such a statute could have without the rule. The defendant, however, is not substantially affected by the discovery rule in statutes of limitation cases because the rule merely extends the time during which the defendant might be held liable on grounds known to him when he acted. It does not create any new liabilities. In contrast, while the same fairness concerns for the plaintiffs apply under the strict liability statute, the defendant cannot be held to have constructive knowledge of the newly created tort. The statute creates an additional form of liability, rather than merely extending the period of time during which parties may act upon existing legal rights.<sup>79</sup> These differences in function and policy arguably compel the conclusion that the term "cause of action" in the strict liability effective date language was not intended to have the same meaning as in the statutes of limitation context.

Notwithstanding the differences in function and policy, however, the term "cause of action" in statutes of limitation arguably does constitute sound guidance in determining the meaning of the same term in the strict liability statute. Although the strict liability statute creates a new ground of liability, the term "cause of action" ap-

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thereafter occur as a result." *Adams v. Buffalo Forge Co.*, 443 A.2d at 941 (footnote omitted).

77. See, e.g., *Anthony v. Koppers Co.*, 284 Pa. Super. 81, 89, 425 A.2d 428, 432 (1980). See also *supra* notes 73-74 and accompanying text.

78. *Id.*

79. See *Bernier v. Raymark Indus.*, 516 A.2d 534, 547 (Me. 1986) (McKusick, C.J., concurring in part and dissenting in part). Indeed, statutes of limitation arguably do not constitute contemporary related legislation. In *State v. Edward C.*, 531 A.2d 672 (Me. 1987), the Law Court defined contemporary related statutes. *Edward C.* required the court to determine whether the Legislature intended to place an age requirement in Maine's gross sexual misconduct statute. ME. REV. STAT. ANN. tit. 17-A, § 253(1)(B) (1983). The court examined related statutes governing sexual abuse of minors and sexual contact with minors under fourteen. *State v. Edward C.*, 531 A.2d at 673. The court noted that those statutes required the perpetrator to be of a specific age. *Id.* The court concluded that the statute at bar which omitted any reference to age, read in the context of the related statutes, indicated no legislative intent to place an age requirement in the definition of the offense. *Id.* In contrast, statutes of limitation do not have any connection to the subject matter of the strict products liability statutes. See *Adams v. Buffalo Forge Co.*, 443 A.2d at 941 n.12; *Burke v. Hamilton Beach Div.*, 424 A.2d at 147-48 & nn.1-6 (Me. 1981) (tracing the statutory changes in products liability law).

pears in the effective date provision, which is set forth separately from the statute itself. Insofar as this language merely sets forth the time at which the newly created rights and corresponding liabilities will be recognized, it may function similarly to a statute of limitation. That is, both the effective date provision and statutes of limitation express timing considerations notwithstanding that the strict liability statute in addition creates a new claim.

One final method by which the Law Court has resolved statutory ambiguity involves attribution of legal meaning: where a statutory term has a legal meaning the court presumes that the Legislature attached that meaning to the term.<sup>80</sup> In *Bernier* the court construed "cause of action" to refer to manifestation of injury and found support for this interpretation in statute of limitation cases.<sup>81</sup> The court did not, however, construe "cause of action" in the statute of limitation context as referring to manifestation of disease until nine years after enactment of the strict liability statute.<sup>82</sup> The court, therefore, could not have presumed that the Legislature intended the term to have this meaning.

Accordingly, the general legislative intent analysis fails to disclose with requisite clarity whether the Legislature intended the strict liability statute to afford a remedy in the situation like the one in *Bernier*, where manifestation of injury occurred after the effective date, but breach, causation, and perhaps even onset of the disease itself occurred before the date. Since two and perhaps three operative events occurred prior to the effective date, the question necessarily involves an issue of retroactive application.<sup>83</sup> The general legislative intent analysis, therefore, is inadequate to safeguard pre-enactment reliance interests traditionally recognized by the common law as worthy of special protection. The method poses too great an opportunity for the court to read its own policy preferences into the statute in contravention of the traditional antipathy to retroactive laws.<sup>84</sup>

The definitional method fares no better in resolving retroactive issues, but for different reasons.<sup>85</sup> Commentators have widely criticized the procedural-substantive distinction which forms the basis of this analysis.<sup>86</sup> The distinction between substance and procedure is indeed problematic.<sup>87</sup> For example, a statute of limitation,<sup>88</sup> which

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80. *Sweeney v. Dahl*, 140 Me. 133, 138, 34 A.2d 673, 675 (Me. 1934).

81. *Bernier v. Raymark Indus.*, 516 A.2d at 542 n.7.

82. *See Myrick v. James*, 444 A.2d 987 (Me. 1982).

83. *See supra* notes 18-20 and accompanying text.

84. *See supra* note 4.

85. For a brief discussion of the definitional method, *see supra* notes 32-40 and accompanying text.

86. *See Developments In the Law—Statutes of Limitations, supra* note 73, at 1186-88; Greenblatt, *supra* note 24, at 548-50.

87. *Cf. Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945) (Frankfurter, J.) (criticism of distinction between substance and procedure in context of federal rules).

88. *See supra* notes 24 & 36 and accompanying text.

the Law Court has defined as a procedural statute, effectively bars a potential claimant's ability to maintain a cause of action. Once a cause of action is barred by a statute of limitation, however, a claimant can no longer realize the value of the right so that, for all practical purposes, the right is extinguished. Clearly, the statute effects a substantive change as to that particular plaintiff's claim in that the right of action which existed to recover for an alleged wrongdoing is forever barred.

Recent Law Court decisions also demonstrate the lack of clarity between substantive and procedural classifications. In *Dobson v. Quinn Freight Lines*,<sup>89</sup> the court classified an amendment to the workers' compensation statute of limitation as a procedural statute. The amendment extended the time available to file a petition for a workers' compensation claim. The court reasoned that the amendment "[did] not have the effect of changing the legal significance of prior events or acts."<sup>90</sup> The decision, however, did permit the employee to bring his claim where under prior law the claim was time-barred.<sup>91</sup> Application of the amendment thus caused the employer's liability to exceed limits established under prior law.<sup>92</sup> In contrast, the court in *Norton v. C.P. Blouin, Inc.*, rejected the commissioner's characterization of another workers' compensation amendment as procedural.<sup>93</sup> This amendment provided for compensation for asbestos-related diseases.<sup>94</sup> The court reasoned that "at a minimum, [the section at issue in the case] increases [the employer's] liability over what it would have been under prior law. [The] provision precludes any reduction in [the employee's] compensation for incapacity attributable to smoking and emphysema."<sup>95</sup> Thus, the court characterized the amendment as substantive even though it did not alter the basis on which the employer would be held liable, but merely the extent of his liability.

Also, both commentators and courts have recognized that an anal-

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89. 415 A.2d 814 (Me. 1980).

90. *Id.* at 816.

91. *See id.* at 815.

92. *See id.*

93. *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056, 1061 n.7 (Me. 1986). *See also* *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557 (Me. 1981) (statutory amendment that enabled employer to challenge a lump-sum agreement previously entered into as settlement of worker's compensation claim deemed procedural and thus not violative of substantive contract rights); *Otisfield v. Scribner*, 129 Me. 311, 151 A. 670 (1932) (statute enacted to make collections by Town Assessor who was disqualified at the time of collections valid; statute not a curative act to validate irregularities in legal proceedings, but an act which, if applied retroactively, impermissibly divests property owner of substantive property rights).

94. *Norton v. C.P. Blouin, Inc.*, 511 A.2d at 1058-59.

95. *Id.* at 1061 n.6.

ysis based on preliminary categorization of statutes as either substantive or procedural disregards other elements of statutory interpretation.<sup>96</sup> The presumption against retroactivity reflects the belief that reliance interests deserve protection, but does not explain why a particular preexisting state of affairs should or should not be insulated from legislative intention.<sup>97</sup> In practical effect, the definitional methodology may prohibit the retroactive application of a statute where the legislative intent was not explicitly set forth in the statute but was expressed, for example, in the statutory history. This result is undesirable because the analysis may frustrate the effectuation of legislative intent.<sup>98</sup> The Law Court in *Adams v. Buffalo Forge Co.*, recognized the conclusory nature of this analysis.<sup>99</sup> The *Adams* court stated, "Responsible attention to the significance to be attached to past events cannot be compressed into some simple formula to serve legislation of all kinds."<sup>100</sup>

The distinction between substantive and procedural, moreover, is problematic even in cases where the statute would appear to be readily capable of categorization, because the rules of presumption

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96. See R. DICKERSON, *supra* note 30, at 227-36. See also *Adams v. Buffalo Forge Co.*, 443 A.2d at 942 (quoting *Whipple v. Howser*, 291 Or. 475, 488, 632 P.2d 782, 790 (1981) (Linde, J., concurring)).

97. DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U.L. REV. 253, 272-73 (1983); Greenblatt, *supra* note 24, at 540, 561-62.

98. The analysis, in fact, can be perceived as a judicial limitation on the extent to which a legislative body may disturb a pre-enactment status quo. The historical basis for this proposition concerns constitutional issues. The rule of construction against retroactive laws had two functions. The first, inherited from English common law, aided a court in discerning legislative intent. The second aspect, however, was a uniquely American development. The rule acted to limit the extent to which a legislature could disturb vested rights. "In effect, judicial definitions of 'rights' trigger the appropriate standard of review to be used in determining the constitutional validity of retroactive legislation." DeMars, *supra* note 97, at 259. See also *supra* note 5.

99. *Adams v. Buffalo Forge Co.*, 443 A.2d 932 (Me. 1982).

100. *Id.* at 942 (citing *Whipple v. Howser*, 291 Or. 475, 488-89, 632 P.2d 782, 790 (1981) (Linde, J., concurring)). The *Whipple* concurrence relied on by the *Adams* court further explicated the reasons for rejecting the conclusory classifications:

Too many different past events and too many potential legal consequences are relevant for different kinds of laws. . . . The variety and sequence of relevant past events will be different in property law, in inheritance law, in commercial transactions, in taxation or public regulation, and in tort law, and so will the policy choices as to changing or preserving the preenactment legal effects of these past events.

*Whipple v. Howser*, 291 Or. at 489, 632 P.2d at 790. The *Whipple* majority, however, did not reject outright the utility of presumptive rules of construction. *Id.* at 480, 487, 632 P.2d at 784, 789. The *Whipple* court stated that rules of construction are not conclusive but only a guide to proper interpretation of a statute. *Id.* at 481, 632 P.2d at 786. The *Whipple* court held that where the language of a statute is clear as to legislative intent, "it is both unnecessary and improper to resort to such 'rules.'" *Id.* at 487, 632 P.2d at 789. Likewise, the *Adams* court did not need to employ the definitional methodology because the examination of the statutory materials unambiguously revealed legislative intent.

themselves create interpretative ambiguity. In *Bernier*, for example, the strict products liability statute falls soundly within the substantive category. The provision creates strict liability where it did not exist previously, imposing a new, absolute duty to abstain from the production and distribution of any dangerous and defective products.<sup>101</sup> One could contend, however, that the effective date language in the provision operates as an internal statute of limitation. One may conclude that the statute does not produce purely substantive changes. The counterargument, of course, is that the effective date information is best characterized as effectuating solely substantive changes because it appears in a separate provision and thus has no independent significance.

The legislative intent analysis and the definitional methodology present inadequacies when applied to resolve the issue of temporal application. The intent analysis, in cases like *Bernier* where the statutory materials are ambiguous as to legislative intention, reveals equally availing but conflicting inferences of such intention. The conflict can only be resolved by making a subjective choice. Although subjectivity in statutory construction is recognized as a necessary and desirable part of the judicial function, in cases involving issues of temporal application the Law Court has sought to protect pre-enactment reliance interests. The definitional methodology, moreover, is deficient because the distinction between substantive and procedural statutes admits of no bright line. Such an analysis, in addition, may have the adverse effect of disregarding legislative intention.

In order to mitigate these analytic deficiencies, this Note urges that the Law Court employ a hybrid analysis which finds support in earlier Maine decisions. This analysis embodies the traditional presumption against retroactivity found in the definitional method but rejects the method's preliminary categorization of statutes as substantive or procedural. The method resembles the general legislative intent analysis in that it involves a searching examination of the statutory materials in order to determine whether the Legislature intended the statute to apply retroactively or prospectively. It differs from the latter in that if the legislative material does not clearly and strongly state any intention as to retroactive application, the

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101. See *supra* note 3 and accompanying text. With the exception of statutes of limitation, the Law Court has ruled with virtual uniformity that statutes which increase liability produce substantive change. *C.f., e.g.,* *Terry v. St. Regis Paper Co.*, 459 A.2d 1106 (Me. 1983) (amendment deemed substantive because it placed a ceiling on workers' compensation benefits and could not be retroactively applied to claimant's pre-enactment injury absent clear legislative intent); *Coates v. Maine Employment Sec. Comm'n*, 406 A.2d 94 (Me. 1979) (amendment which created new disqualification provision for unemployment benefits deemed substantive and could not be retroactively applied because it would deprive claimant of benefits which had accrued under prior law).

court should apply the rule of construction which presumes that all statutes operate prospectively.

The Law Court has employed this analysis in the past. In *Coates v. Maine Employment Security Commission*,<sup>102</sup> the court examined an amendment to Maine's unemployment benefits statute which prolonged a claimant's disqualification from such benefits. The court found nothing in the statute's text to indicate retroactive application.<sup>103</sup> The court then reviewed all other material relevant to employment security law and concluded that the material did not indicate intent to apply the statute retroactively.<sup>104</sup> Thus, the court applied the rule of construction favoring prospective application absent "strong, clear and imperative" indication to the contrary.<sup>105</sup>

The suggested methodology, moreover, effects a return to the traditional common law hostility to retroactive laws, a "principle . . . identified with the concepts of justice and fairness."<sup>106</sup> The Law Court has recognized these types of reliance interests at stake in considering the propriety of applying judicial decisions retroactively.

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102. 406 A.2d 94 (Me. 1979). In *Terry v. St. Regis Paper Co.*, 459 A.2d 1106 (Me. 1983), the Law Court applied this analysis and ruled that an amendment which placed a ceiling on workers' compensation benefits did not apply to a pre-enactment injury. *Id.* at 1109-10. The court noted that the language and relevant statutory material did not indicate legislative intent to apply the provision retroactively. *Id.* at 1109. The *Terry* court gave the presumption full effect with the result that the claimant received the pre-amendment benefit rates. *Id.* at 1109-10. See also *Miller v. Fallon*, 134 Me. 145, 148, 183 A. 416, 417 (1936) (amendment to statute of limitation which reduced time in which malpractice plaintiff could press claims allowed only prospective operation where statutory materials exhibited no legislative intention to apply retroactively); *In re Pope*, 103 Me. 382, 385, 69 A. 616, 617 (1908) (amendment which allowed surety on probate bond to be discharged on petition of principal from any further liability did not apply to bond in force before amendment because even though language was broad enough to apply to bonds in force at time of passage and future bonds, nothing in the language clearly intended retroactive application and thus the rule of prospective operation applied). Other jurisdictions also have applied this analysis. See *Whipple v. Howser*, 291 Or. 475, 481-87, 632 P.2d 782, 785-89 (1981); *State ex rel. Briggs & Stratton Corp. v. Noll*, 100 Wis. 2d 650, 654-55, 302 N.W.2d 487, 490-91 (1981).

103. *Coates v. Maine Employment Sec. Comm'n*, 406 A.2d at 97.

104. *Id.*

105. *Terry v. St. Regis Paper Co.*, 459 A.2d at 1109 (quoting *Barrett v. Herbert Eng'g, Inc.*, 371 A.2d 633, 635 n.1 (Me. 1977)).

106. DeMars, *supra* note 97, at 259. As previously discussed, statutes that are applied prospectively affect in some degree a state of affairs preexisting the statute's enactment, as do judicial decisions both prospectively and retroactively applied. See *supra* notes 22-26 and accompanying text. These observations notwithstanding, it may be fairly assumed that people expect the opportunity to act with knowledge of their obligations under the laws. The Oregon Supreme Court expressed this notion aptly: "Every day it is necessary in the conduct of the affairs of individuals and of businesses to make a closely calculated estimate of the responsibility or lack thereof resulting from an accident or from other unforeseen and unplanned circumstances and to act in reliance on such estimate." *Joseph v. Lowery*, 261 Or. 545, 551, 495 P.2d 273, 276 (1972).



In *Myrick v. James*,<sup>107</sup> the Law Court adopted a discovery rule making manifestation of injury rather than injury itself the operative event for the statute of limitation governing medical malpractice actions.<sup>108</sup> The court, however, declined to apply the rule retroactively. The court observed that "one may legitimately think it likely that there has been substantial public reliance upon the former rule and little ability of litigants to foresee the change in the law accomplished by this opinion."<sup>109</sup> The court sought to protect these notice and reliance interests. The *Myrick* analogy is particularly compelling because the case involved the adoption of a discovery rule similar to the manifestation doctrine adopted in *Bernier*. The *Myrick* court exercised extreme caution in resolving a retroactive issue which involved a judicial decision. One may fairly assume that equal caution should be extended to issues involving the retroactive application of a statute.

Finally, the suggested framework of analysis will foster greater reliability and predictability in addressing and resolving the retroactivity issue. As the decisional law now stands, both the intent and definitional analyses co-exist without any indication as to which method is more appropriate. This uncertainty demands a reevaluation of the decisional methodology.

This Note urges a two part analysis. First, where the Legislature has expressed no clear imperative as to temporal application of a statute, and at least one reasonable construction of legislative intent bases liability or establishes rights upon pre-enactment events, the court should treat the problem of interpretation as one involving retroactivity. Second, having recognized the issue of retroactive application, the court should, as it has done in the past, examine the statutory materials for indication of legislative intention regarding temporal application. In the event that the materials do not contain a clear, strong, and imperative declaration of legislative intent, the court should employ its traditional rule of construction that presumes the statute applies prospectively.

This analysis mandates a bright line standard for the ascertainment of legislative intention and provides much needed objectivity, predictability, and certainty in interpretation. The analysis, moreover, serves to protect reliance interests and promotes fairness in application of laws by removing the decisional policy-making typical to judicial interpretative functions from the narrow field of statutory retroactive application issues.

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107. 444 A.2d 987 (Me. 1982).

108. *Id.* at 996.

109. *Id.* at 1002. See also *MacDonald v. MacDonald*, 412 A.2d 71, 74 (Me. 1980); *Black v. Solmitz*, 409 A.2d 634, 640 (Me. 1979); *Poulin v. Colby College*, 402 A.2d 846, 851 (Me. 1979).