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REPORT

of

REVISOR OF STATUTES

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CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

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Submitted to the Legislature of the State of Minnesota

NOVEMBER 1976

STATE OF MINNESOTA

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November 15, 1976

The Honorable Alec G. Olson
President of the Senate

and

The Honorable Martin O. Sabo
Speaker of the House of Representatives

State Capitol
St. Paul, MN 55155

The Revisor of Statutes transmits herewith her Report to the Legislature as required by Minnesota Statutes, Section 482.09 (9), concerning statutory changes recommended or discussed or statutory deficiencies noted in opinions of the Supreme Court of Minnesota between September 30, 1974 and September 30, 1976.

Respectfully submitted,

Esther M. Tomljanovich

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Revisor of Statutes

REPORT OF THE REVISOR OF STATUTES

TO THE

LEGISLATURE OF THE STATE OF MINNESOTA

CONCERNING CERTAIN OPINIONS OF THE SUPREME COURT

The Revisor of Statutes respectfully reports to the Legislature of the State of Minnesota, in accordance with Minnesota Statutes, Section 482.09 (9), which provides that the Revisor of Statutes shall:

> "Report to the legislature by November 15 of each even numbered year any statutory changes recommended or discussed or statutory deficiencies noted in any opinion of the supreme court of Minnesota filed during the two-year period immediately preceding September 30 of the year preceding the year in which the session is held, together with such comment as may be necessary to outline clearly the legislative problem reported."

The opinions of the Supreme Court of Minnesota concerning statutory changes recommended or discussed, or statutory deficiencies noted during the period beginning September 30, 1974, and ending September 30, 1976, together with a statement of the cases and the comment of the court, are set forth on the following pages, in the order of the sections discussed.

TABLE OF CASES

REVERSED TABLE OF CASES

BARFKNECHT v. TOWN BOARD OF HOLLYWOOD TOWNSHIP,
232 N.W.2d 420, July 18, 1975

Section 160.05, Subdivision 1 provides that when land is used for a public highway for six years it is dedicated to the public for that use to a width of four rods (66 feet). The supreme court found the four rod provision to be an unconstitutional deprivation of property without due process. A property owner has notice of the public claim only on land actually used.

Thus the public can acquire by public use only the land actually used. Subdivision 1 should be amended to remove the four rod provision and language substituted to express what can be taken without constitutional violation.

WALLACE v. HANSON SILO COMPANY, 235 N.W.2d 363,
September 26, 1975

The worker's compensation law encourages the employment of handicapped persons by providing a special fund to bear part of the compensation cost when an employee suffers an injury that is greater "because of a pre-existing physical impairment." In this case the court observed that section 176.131, subdivisions 1 and 3 made no explicit reference to nonoccupational injuries. It expressed concern that the proportion of disability caused by a nonoccupational injury might not be compensable from the special fund. It recommended the matter to the legislature's attention. 235 N.W.2d 364.

However, section 176.131, subdivision 8 defines "physical impairment" to include conditions that are "congenital, or due to injury, disease or surgery." The subdivision includes a list of conditions, many of which could not have an occupational origin. Section 176.131, particularly subdivision 8, could hardly be construed to exclude "nonoccupational injuries." Nevertheless, further language could be added to subdivisions 1 or 8 or both to make the point unmistakably explicit. "Whether or not occupational in origin" would accomplish the effect desired.

ROBBINSDALE EDUCATION ASSOCIATION v. ROBBINSDALE FEDERATION OF TEACHERS LOCAL 872, 239 N.W.2d 437, January 23, 1976

The supreme court upheld the "fair share" provision of the Public Employment Labor Relations Act of 1971. That provision requires employees who do not belong to the exclusive representative to pay a fair share of the representative's costs in the function of representation. The court suggested that more careful provision be made for notice and review of the "fair share" and that the director of mediation services would be an appropriate officer to consider challenges to the "fair share" fee. 239 N.W.2d 445. These changes were accomplished by Laws 1976, Chapter 102.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. CITY OF MINNEAPOLIS, 225 N.W.2d 254, January 10, 1975

INTERNATIONAL UNION OF OPERATING ENGINEERS v. CITY OF MINNEAPOLIS, 233 N.W.2d 748, September 19, 1975

In these cases the supreme court was interpreting the Public Employment Labor Relations Act of 1971. Section 179.66, subdivision 5, was addressed to the problem of conflicts between contract provisions made pursuant to the Act and rules adopted under other statutory authority. An amendment in 1973 made the subdivision incoherent. Laws 1973, Chapter 635, Section 16.

> Subd. 5. Any provision of any contract required by section 179.70, which of itself or in its implementation would be in violation of or in conflict with any statute of the state of Minnesota or rule or regulation promulgated thereunder or provision of a municipal home rule charter or ordinance or resolution adopted pursuant thereto, or rule of any state board or agency governing licensure or registration of an employee, provided such rule, regulation, home rule charter, ordinance, or resolution is not in conflict with sections 179.61 to 179.66 and shall be returned to the arbitrator for an amendment to make the provision consistent with the statute, rule, regulation, charter, ordinance or resolution.

The court draws the matter to the attention of the legislature in both the opinions cited. 225 N.W.2d 258. 233 N.W.2d 753, note 2.

JOHNSRUD v. STATE, DEPARTMENT OF EMPLOYMENT SERVICES,
237 N.W.2d 362, December 5, 1975

Section 268.08, subdivision 1, clause (3) and related federal law provide that an unemployed worker shall not be denied unemployment compensation if he "is in training with the approval of the commissioner." Department regulation ES 30 provides as a condition for the commissioner's approval that work opportunities do not exist in the locality. The court upheld the regulation and the limitation it contains but referred the policy question to the legislature. 237 N.W.2d 365.

NORTH STAR RESEARCH INSTITUTE v. COUNTY OF HENNEPIN,
236 N.W.2d 754, October 17, 1975

North Star Research Institute provides applied research services. It is a nonprofit corporation. Most of its services are performed for corporations and when completed become their property. The research services are of value to the commerce of the region and the community as a whole because of the development of that commerce. North Star sought exemption from property taxation as an "institution of purely public charity." No exemption was allowed. Chief Justice Sheran recommended the matter to the legislature's attention for any action it deemed appropriate. 236 N.W.2d 762.

Justice Kelly wrote a concurring opinion emphasizing the point and urged that it have "a complete ventilation . . . at the legislative level." 236 N.W.2d 766.

BROM v. KALMES, 230 N.W.2d 69, May 23, 1975

Minnesota Statutes, Chapter 344, governs partition fences. Section 344.13 applies to certain new enclosures and provides that fence viewers be used to ascertain the value of the new fence. The value can be recovered by a civil action if necessary.

Section 344.03, subdivision 1, in its early forms applied to maintenance of existing fences. General Statutes 1866, Chapter 18, Section 2, Revised Statutes 1905, Section 2750. Since 1905 the process of amendment of section 344.03, subdivision 1, has extended its language to apply to newly built fences.

The supreme court in Brom v. Kalmes limited the application of section 344.13 to a very narrow class of cases. It applied section 344.03, instead, and expressed regret that fence viewers were not explicitly provided by section 344.03. Nevertheless, it approved their use as a procedural matter but invited the legislature's attention to "the procedural difficulty" and "potential inequities." 230 N.W.2d 73, note 5.

The fence viewer language of section 344.13 might be adapted to and incorporated in section 344.03, subdivision 1, so far as it applies to new fences. The whole of chapter 344 should be read carefully before a change is made. Although the chapter is brief, it was not very clear in its earlier forms and amendment and judicial construction have added confusion.

STATE v. HEMBD, 232 N.W.2d 872, August 15, 1975

The defendant was charged with false imprisonment. His defense was that the complaining witness was suicidal and that he restrained her for her own protection. To support his defense he tried to introduce medical records showing an earlier suicide attempt. The trial court refused to admit them into evidence on the basis of section 595.02, clause (4), which provides that medical information is privileged and may be disclosed only with the consent of the patient.

The supreme court reversed that ruling on the basis of the sixth amendment right to confront accusers and recent United States supreme court cases on the subject. The Minnesota court repeated its criticism of section 595.02, clause (4), and, at 232 N.W.2d 874, quoted its own earlier statement that it is "in urgent need of revision." State v. Staat, 291 Minn. 394, 403, 192 N.W.2d, 192, 199 (1971).

Justice Todd wrote a separate opinion. He argued that the difficulty with section 595.02, clause (4) has arisen from its construction by the Minnesota court and could be corrected by the court.

EVENRUD v. CITY OF MINNEAPOLIS, September 3, 1976

The plaintiffs were employed as part time park patrolmen. Section 626.846 requires that peace officers have certain training. When the statute was brought to the park board's attention it created a new classification of officers without power of arrest and assigned plaintiffs to it. After some delay the plaintiffs asserted various claims about the actions of the board. In disposing of the matter, the supreme court observed,

> "The real source of the difficulty in this case, as we perceive it, is the failure of Minn. St. 626.846 to clearly assign the responsibility, either with the employee or employer, to see that a police officer receives the required training. If it is the employee, obviously he has no further rights once his probationary period expires because he forfeits his position under the statute and can be fired at will. If, on the other hand, it is the duty of the employer to advise the employees of the statutory requirements for the job and to see that the employee receives the necessary training, then the failure of the employer to do so, it seems to us, should not result in either the loss of the employee's job or his tenure in that job. These are fundamental questions the legislature has left unanswered, and which, as evidenced by this case, have the potential for creating serious inequities and hardships in the application of an otherwise thoughtful and sound piece of legislation. We commend these questions to the legislature for consideration."

STATE v. HARRIS, July 23, 1976

After conviction of a traffic offense in municipal court, the defendant appealed for a new trial. He was again convicted and costs of $200 were assessed against him. The supreme court found the taxation of costs to be constitutional.

Justice Todd concurring stated, "At a minimum, the successful defendant should be allowed to tax costs against the state." He suggested remedial action by the legislature.

LEBENS v. HARBECK, 243 N.W.2d 128, May 21, 1976

In this election contest case notice of contest was served on a state holiday. The court held the notice invalid since section 645.44, subdivision 5, prohibits service of civil process on holidays. Election contest notices must be served like civil process, Minnesota Statutes, Section 209.02, Subdivision 4.

The court observed,

> "It is arguable that the statutory prohibition does not make much sense these days, especially on holidays such as Veterans Day which few employers observe. However, if any change in the rule is to come, it should come from the legislature." 243 N.W.2d 129

FERGUSON v. NORTHERN STATES POWER COMPANY, 239 N.W.2d 190, January 16, 1976

The plaintiff was injured by a high voltage electric power line in a residential area. The supreme court considered but declined to impose strict liability on the company. Strict liability would make the company liable for harm resulting from maintenance of a high voltage line regardless of its efforts to prevent harm. This rule is imposed for "abnormally dangerous activities." The court referred the matter to the legislature's attention.

> ". . . a convincing argument can be made for holding the utility strictly liable. Moreover, spreading the cost of serious injury over all consumers of electricity is equitably more appealing. However, the court is persuaded by the amicus briefs which detail the severe economic consequences which may be sustained by the many small electric utilities in the state by the abrupt imposition of such a rule. We therefore decline to decide this issue at this time; however, we do call this matter to the attention of the legislature which is better equipped to resolve economic problems of this nature." 239 N.W.2d 194

PETITION OF GIBLIN, 232 N.W.2d 214, July 18, 1975

In this child custody case, the father sought custody on the basis of an Illinois court's order and the mother sought to keep custody by resisting that order in the Minnesota court.

The Minnesota supreme court declined to enter the jungle of conflicting precedents. Instead, it ordered the district court to decide the dispute by applying the principles of the Uniform Child Custody Jurisdiction Act and recommended that the legislature adopt the act.

> "In deciding the matter before us, we do not utilize our prior decisions on the subject. And, in effect, we do not decide the questions of jurisdiction put squarely before us. What we do is to hold that the principles and the appropriate provisions of the Uniform Child Custody Jurisdiction Act should be applied to this case. To the extent that our precedents differ or are inconsistent with the Uniform Act, for the purposes of this case we direct the trial court to disregard them in arriving at an ultimate decision.
>
> "We regard the Uniform Child Custody Jurisdiction Act as an authoritative statement of the rules currently to be preferred in dealing with the problems encountered in the instant case. Several states have adopted in whole or in part this uniform act, and we commend it to the legislature for adoption with such modification as its policy decisions may dictate."
> 232 N.W.2d 221, 222

IN RE WELFARE OF I.Q.S., June 4, 1976

In this case the supreme court again considered the intractable problem of dangerous juvenile offenders.

For various reasons, including lack of money and lack of success in other states, the department of corrections has not established a program for treatment of dangerous youthful offenders in a separate secure facility. As a result, members of this relatively small class of offenders are confined with young adults and any opportunity for rehabilitation is lost.

The court again urged that the legislature direct attention to the problem. It mentioned 1975 Senate File 904, as a measure directed at the problem.

> "We emphatically invite the legislature to continually reevaluate existing facilities and programs in light of these recurring and unresolved concerns.
>
> ". . . we invite the legislature's continuing attention to the court's findings regarding the availability and feasibility of correctional programs for its classification of 'hard-core' youths in need of secure treatment facilities."

In a concurring opinion, Justice MacLaughlin outlined the matters of agreement and disagreement between Commissioner Schoen and Judge Arthur, the Hennepin county juvenile court judge. He also urged the legislature to study the matter.

NIETING v. BLONDELL, 235 N.W.2d 597, October 31, 1975

In this case the supreme court abolished the state's common law immunity from tort liability. Effect of the decision was delayed until August 1, 1976 so the legislature could take appropriate action. 253 N.W.2d 603. It did so in Laws 1976, Chapter 331, Section 33.

NORTHWESTERN NATIONAL BANK OF MINNEAPOLIS v. SIMONS, 242 N.W.2d 78, June 4, 1976

The supreme court was called on to construe a trust instrument executed in 1921 to determine whether an illegitimate grandchild was a beneficiary. The court by a diligent search found ambiguity in the instrument and held in favor of the illegitimate. In the course of its reasoning it remarked, "Legislation defining the terms 'issue' and 'children' for the purpose of testamentary dispositions is certainly appropriate."

Four dissenting judges found no ambiguity in the language of the trust instrument and, presumably, no need for more legislation.

SCHUMANN v. McGINN, 240 N.W.2d 525, March 19, 1976

The plaintiff, a fifteen year old boy, was shot and severely injured by the defendant, a city police officer, while the plaintiff ran from a stolen automobile. The court was presented with the question of whether an officer may use "deadly force" to accomplish the arrest of a felony suspect who is not an apparent danger to the public.

Acting Justice Chanak wrote an opinion for himself and four of his colleagues holding that deadly force may be used when necessary in a felony arrest without regard to "the seriousness of the felony or the dangerous propensities of the felon." 240 N.W.2d 534. That view is the traditional one. It has been harshly criticized and strongly defended. The opponents urge that deadly force be limited to arrests of persons who are thought to be dangerous to the public. Evidence of the danger may be the conduct of the suspect at the time of arrest or the nature of the crime of which he is suspected. A few states have adopted various forms of the "modern rule" proposed by opponents of the "traditional rule." Most have rejected it. The controversy has been intense for more than 40 years. Justice Chanak repeatedly states that it is a legislative question. 240 N.W.2d 536, 537.

Chief Justice Sheran wrote a short opinion that also referred the matter to the legislature.

Justice Otis very strongly urged that the use of deadly force in the circumstances was a tort as a matter of law.

Justice Rogosheske, with the concurrence of Justice Otis and two others, would have adopted the American Law Institute's formulation of the modern rule. He points out that the legislature has left most of the law of tort to the courts for development. 240 N.W.2d 541.

The several opinions are a good introduction to both the law and the emotions involved in the controversy.