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Conflict of Laws—Statute of Limitations; Criminal Law—Insanity—M'Naghten Rule Applied; Criminal Law—Presence of Defendant at Trial; Civil Procedure—Motion for Involuntary Dismissal—Rule 41(b); Torts—Municipal Liability for Operation of Fire Department;

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ALASKA CASE LAW—1962

Conflict of Laws—Statute of limitations. The plaintiff was the passenger in defendant's car on a "share-the-expense" trip from Seattle, Washington to Haines, Alaska. While in British Columbia, the defendant's wife caused an accident in which the plaintiff was injured. The plaintiff sued in Alaska, basing the claim on a British Columbia statute which creates an agency relationship between car owners and members of their families who drive.[1] The British Columbia statute also provides that "no action shall be brought against a person for the recovery of damages occasioned by a motor-vehicle after the expiration of twelve months from the time when the damages were sustained."[2] Over twenty-three months elapsed before commencement of the plaintiff's action. *Held,* the Canadian statute of limitations was not applicable, even though the plaintiff's cause of action and the statute of limitations were created by the same act.[3] *Lillegraven v. Tengs.*[4]

The reason for the holding is that procedural matters are governed by the law of the forum,[5] while tort liability is governed by the law of the place of injury.[6] The defendant argued that this case was an exception to the general rule because if a right of action is created by the same law that restricts the time within which the action must be brought, the restriction acts as a limitation on that right. The fact that the two provisions are part of the same act was held not to make the restriction a limitation on the right created. The British Columbia Motor-Vehicle Act contains one-hundred and ninety-six sections deal-

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[1] "In an action for the recovery of loss or damage sustained by any person by reason of a motor-vehicle on any highway, every person driving or operating the motor-vehicle who is living with and as a member of the family of the owner of the motor-vehicle, and every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment; but nothing in this section shall relieve any person deemed to be the agent or servant of the owner and to be driving or operating the motor-vehicle in the course of his employment from the liability for such loss or damage." Motor-Vehicle Act, Province of British Columbia, ch. 39, § 72(1) (1957).

Alaska has no statute making the owner of an automobile liable for the negligence of a person operating the owner's car with his consent. However, the federal court, before statehood, adopted the family purpose doctrine. Burns v. Main, 87 F. Supp. 705 (D. Alaska 1950). See generally MECHEM, AGENCY §§ 472, 475 (4th ed. 1952).

[2] Motor-Vehicle Act, Province of British Columbia, ch. 39, § 80(1) (1957).

[3] Motor-Vehicle Act, Province of British Columbia, ch. 39 (1957).

[4] 375 P.2d 139 (Alaska 1962).

[5] RESTATEMENT, CONFLICT OF LAWS § 585 (1934). The period for bringing a tort action in Alaska is two years. Section 55-2-7 ALASKA COMP. LAWS ANN. 1949.

[6] RESTATEMENT, CONFLICT OF LAWS § 387 (1934).

ing with almost every phase of vehicle regulation, and the statute of limitation applies to actions arising out of this act.

The right of action depended upon the British Columbia legislative body. It is very improbable that the policy of that body would be to create a right that would exist for a longer period outside the jurisdiction than in the jurisdiction. In actions for wrongful death, courts have held that the statute of limitations is a restriction on the right.[7] The reasons given in such cases might have led to the adoption of a similar rule in the *Lillegraven* situation. However, courts have not generally extended this reasoning to other statutory causes of action unless no alternative interpretation of the statute could fairly be made.[8]

MICHAEL D. GARVEY

Criminal Law—Insanity—M'Naghten Rule Applied. A defendant admittedly killed his wife and attempted to commit suicide. His only defense was insanity. The court instructed the jury that he was responsible for the crime unless his mind was so diseased and deranged that he was incapable of knowing the nature and quality of his act *and* was unable to distinguish right from wrong. The Alaska Supreme Court upheld this charge in *Chase v. State.*[1]

After considering arguments on both sides, the court rejected the "disease-product" test of *Durham v. United States,*[2] and adopted a stricter view of the *M'Naghten rule.*[3] The *M'Naghten* case stated that one is legally insane if he is either (1) incapable of understanding the nature or quality of his act, *or* (2) unable to distinguish between right and wrong. Alaska holds that one is legally insane only when he does not understand the nature of his act *and* cannot distinguish right from wrong.

The court split two-to-one on this issue. Judge Arend's dissent pointed out that using the conjunctive "and" results in a stricter test

[7] *E.g.,* "By a statute of X, the next of kin of a person whose death is caused by the negligent act of another may recover damages provided an action is brought within one year from the time of the death. By a statute of Y, the next of kin of a person whose death is caused by the negligent act of another may recover damages provided an action is brought within two years from the time of death. A is killed in State X by the negligence of B. Sixteen months later C, A's next of kin, brings an action in State Y against B for negligently causing A's death. The action cannot be maintained." RESTATEMENT, CONFLICT OF LAWS § 605, example (1934).

[8] 3 BEALE, CONFLICT OF LAWS §§ 604, 605 (1935).

[1] 369 P.2d 997 (1962).

[2] 214 F.2d 862, 45 A.L.R.2d 1430 (D.C. Cir. 1954). The heart of this test is a causal connection between the mental defect and the act committed. In other words, the question is whether or not the crime was a "product" of the mental condition.

[3] M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

than *M'Naghten,* which used the disjunctive "or." The authorities are divided on this point,[4] but the majority of the court in this case believed the public would be better protected by the stricter rule.

The court also refused to include the "irresistible impulse" test as a supplement to *M'Naghten.* It concluded that there is such a strong presumption of sanity that one who asserts the contrary "should be required to establish his insanity by a preponderane of the evidence."[5]

In short, Alaska has basically followed the majority views; *i.e.,* accepting *M'Naghten,* rejecting *Durham* and "irresistible impulse," and placing the burden of proving insanity on the defendant.[6] Alaska's application of the *M'Naghten* rule is more strict than in many jurisdictions, but is not without precedential support.[7]

WAYNE BOOTH JR.

Criminal Law—Presence of Defendant at Trial. Rule 38 of the Alaska Rules of Criminal Procedure provides that the defendant shall be present at every stage of the trial.[1] This includes a hearing, during trial, to determine whether defendant's wife shall be detained as a material witness, even though such a hearing might have been held before trial. The Alaska Supreme Court so held in *Brown v. State.*[2]

The charge was assault with a dangerous weapon.[3] Various attempts were made to locate the defendant's wife who had been present at the alleged assault. During the trial, the defense moved for a continuance in order to have more time to find the wife. The motion was granted, and the defendant returned to jail. Later that day the court reconvened to consider whether the wife, who was then present, would be detained as a witness. Defense counsel was present but the accused was not. The wife invoked her privilege as a spouse[4] and refused to testify.

The defendant maintained that he could have calmed his wife so

[4] See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954).
[5] 369 P.2d at 1003.
[6] See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE, 129-173 (1954).
[7] In the recent case of *State v. White,* 160 Wash. Dec. 554, 374 P.2d 942 (1962), the supreme court of Washington reached conclusions very similar to those of Alaska. For a more complete discussion of these issues and the situation in other jurisdictions, see Note, 38 WASH. L. REV. 305 (1963), *supra.*

[1] "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules." Rule 38, ALASKA R. CRIM. P.
[2] 372 P.2d 785 (Alaska 1962).
[3] The charge also included simple assault and possession of a concealable weapon by a person previously convicted of assault with a deadly weapon.
[4] § 66-13-58 ALASKA COMP. LAWS ANN. (1949) provides that neither husband nor wife shall be compelled to testify against one another in criminal actions.

that she would have testified in his behalf. He was therefore prejudiced by his absence. The Alaska court sustained this contention, set aside the conviction, and granted a new trial. The decision was based largely on federal authorities,[5] since the pertinent part of Rule 43 of the Federal Rules of Criminal Procedure is nearly identical with Alaska's Rule 38.

The court also found that defendant did not waive his right to be present because of the failure of his counsel to object to his absence. The decision, therefore, seems to follow well-settled principles laid down as long ago as the decision in *Lewis v. United States*.[6]

The court did not fully consider the state's argument that such a hearing could have been held before trial and was not, therefore, a "stage of the trial." The court replied only that the hearing in this case was in fact held during trial. This apparently leaves open the question of a defendant's presence at a similar pre-trial hearing; but the court's characterization of the importance of this right suggests a similar result in pre-trial matters.[7]

WAYNE BOOTH, JR.

Civil Procedure—Motion for Involuntary Dismissal—Rule 41 (b). Two 1962 Alaskan cases[1] held that where the plaintiff had presented a prima facie case based on unimpeached evidence the trial judge should not have granted a motion for involuntary dismissal under rule 41(b) of the Alaska Rules of Civil Procedure.[2] These two hold-

[5] See *e.g.*, note 6 *infra*.

[6] 146 U.S. 370 (1892). This appears to be the early landmark decision on a defendant's right to be present at the trial. The Alaska court also cited Diaz v. United States, 223 U.S. 442 (1912). Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960), was relied on for the proposition that involuntary absence from a trial does not constitute a waiver of the right to be present.

[7] *But cf.* United States v. Lynch 132 F.2d 111 (3rd Cir. 1942), *cert. denied*, 318 U.S. 777 (1943).

[1] Rogge v. Weaver, 368 P.2d 810 (1962); Trusty v. Jones, 369 P.2d 420 (1962).

[2] "(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). A dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party does not operate as an adjudication upon the merits. Any other dismissal not provided for in this rule and a dismissal under this subdivision operates as an adjudication upon the merits, unless the court in its order for dismissal otherwise specifies." ALASKA R. CIV. P. 41(b).

ings mark a significant deviation from prior application of the like rule in federal courts.[3]

The first case, *Rogge v. Weaver*,[4] involved a negligence action resulting from a collision of two trucks. The trial took place eight years after the accident. Only two witnesses were presented on behalf of the plaintiff. Both testified to what they had observed after arriving upon the scene of the accident on the day following its occurrence. After the plaintiff had rested, the defendant, without proceeding further, moved for judgment. The trial court, sitting without a jury, granted the motion, treating it as a motion for involuntary dismissal pursuant to Rule 41(b). Although plaintiff had presented a prima facie case, the trial judge held that plaintiff had not sustained his burden of proof. This decision was reversed on appeal, Judge Arend dissenting on the ground that Rule 41(b) does permit a trial court in a non-jury case to dismiss a plaintiff's action before the defendant has rested, even though the plaintiff has shown a prima facie case.

In *Trusty v. Jones*,[5] plaintiff established a prima facie case for claim and delivery. At the conclusion of plaintiff's evidence, the trial court granted judgment for defendants on the ground that plaintiff's evidence had proved he had abandoned the tractor in controversy. The Alaska Supreme Court held that under the "*Rogge* rule" it was error to dismiss after the plaintiff had presented a prima facie case. Mr. Justice Arend again dissented.

The application of Rule 41 (b) according to the "*Rogge* doctrine" is:

> Where plaintiff's proof has failed in some aspect the motion should, of course, be granted. Where plaintiff's proof is overwhelming, application of the rule is made easy and the motion should be denied. But where plaintiff has presented a prima facie case based on unimpeached evidence we are of the opinion that the trial judge should not grant the motion even though he is the trier-of-facts and may not himself feel at that point in the trial that the plaintiff has sustained his burden of proof. We believe in the latter situation the trial judge should follow the alternative offered by the rule wherein it is provided that he '... may decline to render, any judgment until the close of all the evidence,' and deny the motion. If after denial of the motion, the defendant declines to present any evidence, the judge must, of course, then exercise his own judgment in applying the law to the facts presented and rule on the motion and decide the case.[6]

[3] The language of the two rules is identical. See text at note 11, *infra*.
[4] 368 P.2d 810 (Alaska 1962).
[5] 369 P.2d 420 (Alaska 1962).
[6] Rogge v. Weaver, 368 P.2d 810, 813 (Alaska 1962).

In *Trusty*, the court stated the reason for the change to be that,

> the Rogge rule is more likely to achieve justice and reduce the number of appeals resulting from the application of Rule 41 (b) than an interpretation permitting the judge to dismiss in close cases before he has heard both sides of the issues and has obtained a complete picture of the controversy.[7]

If the "*Rogge* rule" is viewed as a developing trend,[8] then the history of Rule 41(b) appears to be following a circular path. Before the 1946 amendment to the rule,[9] some courts held that the sole question presented to the trial judge by such a motion was whether the plaintiff's evidence and all the inferences drawn from the evidence, considered most favorably to the plaintiff, made out a prima facie case for relief.[10] If it did, then the motion was to be denied. However, in *United States v. United States Gypsum Co.*,[11] the court stated that the prima facie case rule governing the actions of judges in jury trials upon a motion for a directed verdict, by Rule 50(a), rests upon the division of functions between the judge and the jury. A judge sitting before a jury has no fact-finding function except to decide whether there is a case for the jury. But in an action tried without a jury, the judge decides issues both of fact and law. It is not reasonable to require a judge to determine, on a motion to dismiss under Rule 41(b), whether there is a prima facie case sufficient for the consideration of a trier of facts when he is himself the trier of facts. Since the Rules of Civil Procedure are to be contrued to secure a just, speedy and inexpensive determination of every action, a court should dispose of the case at its first opportunity. This argument prevailed and as a consequence the rule was amended in accordance with it. At present, upon such a motion it is the duty of the court to weigh the evidence and, if it finds the evidence is insufficient, to render judgment on the merits for the defendant. It is also required to make findings of fact pursuant to Rule 52(a).[12]

[7] 369 P.2d 420, 422 (Alaska 1962).

[8] 2B BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 919 (Supp. 1962). The author cites *Rogge v. Weaver*, note 1 *supra*, as supporting the view advocated by Steffen, *The Prima Facie Case in Non-Jury Trials*, 27 U. CHI. L. REV. 94 (1959). Professor Steffen argues that where the plaintiff has made out a prima facie case, the court should hear all the evidence from both parties. By having the whole controversy before it, the court is then able to arrive at a better decision. Professor Steffen's article was cited in footnote 6 of the *Rogge* case.

[9] The third sentence to Rule 41(b) was added by the 1946 amendment; it reads: "In an action tried by the court without a jury the court as trier of facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

[10] Schad v. Twentieth Century-Fox Film Corp., 136 F.2d 991, 993 (1942).

[11] 67 F. Supp. 397 (D.D.C. 1946).

[12] 2B BARRON AND HOLTZOFF, *op. cit. supra* note 8, at § 919 (1961).

However, the Alaska court requires the judge to determine whether plaintiff has made out a prima facie case. The effect of this is a reversion to the minority rule in the cases prior to the 1946 amendment and a nullification of the third sentence of Rule 41(b).

MICHAEL GARVEY

Torts—Municipal Liability For Operation Of Fire Department. In one of Alaska's most important decisions, the city of Fairbanks was held liable for the negligent operation of its fire department. *City of Fairbanks v. Schaible*[1] not only resolved conflicts in prior territorial decisions, but also called attention to a long-overlooked statute which dates back to 1866 and the General Laws of Oregon. In addition, the fact that its rule is applied prospectively creates some interesting probems.

The plaintiff's wife died of asphyxiation in a Fairbanks apartment house fire. In this wrongful death action, both the city and the apartment owner were joined as defendants. The trial court entered judgment against both. The Alaska Supreme Court reversed as to the owner but affirmed the judgment against Fairbanks.

The opinion discussed the owner's and the city's appeals separately. The owner's portion dealt with the element of *causation* in tort liability, and the general duties of a landlord toward his tenant. The court relied heavily on treatises, and case discussion was held to a minimum.[2]

The more significant aspects of the opinion arose in the city's appeal. The court held that the city did not enjoy municipal immunity and was therefore liable for the negligence of its fire department. Recognizing its departure from the rule of most other jurisdictions,[3] the court based its decision on a long-overlooked statute.[4]

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[1] City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska 1962).

[2] This part of the opinion, for example, contained seven references to PROSSER, TORTS (1955), and RESTATEMENT, TORTS (1934), and only three cases were cited. This is not unusual practice in Alaska. Since the supreme court has operated only since 1959, there is often a scarcity of Alaska decisions on any given issue. In addition, the Alaska court does not feel itself bound by territorial district court decisions. It is therefore not surprising to find frequent reliance on treatise material.

Prosser is unquestionably the most popular single author in the torts field. The Restatement series has been accorded wide approval in torts, and other fields as well; and, the seven citations to A.L.R. in this opinion alone suggest its influence.

[3] "[I]t appears to be the rule without exception that a fire department maintained by a municipal corporation belongs to the public or governmental branch of the municipality, and that the municipality is not liable for injuries to persons or property resulting from negligence connected with the department's operation or maintenance." 375 P.2d at 206. This statement is no longer entirely correct. At least one court has said, "It cannot be said as a matter of law that a city is not responsible for the negligence of its fire department. . . ." *Brazinski v. City of Cohoes*, 17 App. Div. 2d 675, 230 N.Y.S.2d 244, 246 (1962). In addition, the way may be cleared for similar

To construe this statute, the court looked to its historical background. The old General Laws of Oregon permitted municipal corporations to be sued in either contract or tort actions.[5] In 1884, Congress incorporated by reference the laws of Oregon in providing for Alaska's territorial government.[6] In 1900, various Alaska codes were enacted in detail, but were largely copied from the Oregon laws. The section upon which the present decision rests "was almost identical with the like provision in the Oregon statute."[7] This provision was in force at the time of the decedent's death,[8] and has since been re-enacted by the Alaska legislature.[9]

The court referred to early Oregon decisions which construed the law to allow tort actions against municipalities in either governmental or proprietary functions.[10] Relying on these interpretations, the Alaska court decided that Alaskan municipalities do not enjoy governmental immunity.[11]

The present decision clears up the rather confused state of prior Alaska cases. By way of dictum, one previous district court decision recognized both the statute and the early Oregon cases, and stated that a city might be liable even while engaged in a governmental, as distinguished from a proprietary, function.[12] The present case follows this view. In *City of Fairbanks v. Gilbertson*,[13] the statute was ignored, and it was held that the city did enjoy immunity in the exercise of a governmental function, *i.e.*, the operation of its fire department. That case is now specifically repudiated. In *Tapscott v. Page*,[14] a govern-

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results in several jurisdictions which have recently abolished the doctrine of municipal immunity. See note 20 *infra*.

[4] "ACTIONS AGAINST PUBLIC CORPORATIONS. An action may be maintained against any of the public corporations in the Territory mentioned in the last preceding section in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such public corporation." § 56-2-2 ALASKA COMP. LAWS ANN. (1949).

[5] Deady, General Laws of Oregon, § 347, at 235 (1866), cited in the principal case, 375 P.2d at 207.

[6] Act of May 17 § 7, 23 Stat. 24 (1884), cited in the principal case, 375 P.2d at 207.

[7] 375 P.2d at 207.

[8] Section 56-2-2 ALASKA COMP. LAWS ANN. (1949).

[9] Alaska Sess. Laws 1962, Chap. 101, § 5.13.

[10] Sheridan v. City of Salem, 14 Or. 328, 12 Pac. 925 (1886); McCalla v. Multnomah County, 3 Or. 424 (1869). *Accord*, Krause v. Town of Juneau, 2 Alaska 633 (1905) (not mentioned in the present opinion).

[11] It is interesting to notice at this point that in 1887, three years after Congress first adopted Oregon laws for Alaska, Oregon amended its law to allow only actions on contracts against municipalities. See Grant County v. Lake County, 17 Or. 453, 21 Pac. 447, 449 (1889). The court did not mention this development in the *Schaible* opinion.

[12] Lucas v. City of Juneau, 168 F. Supp. 195 (D. Alaska 1958).

[13] 16 Alaska 590 (D. Alaska 1957), *aff'd*, 262 F.2d 734 (9th Cir. 1959).

[14] 17 Alaska 507 (D. Alaska 1958).

mental-proprietary distinction was recognized in holding a school district not liable for the negligence of its bus driver. That opinion recognized the statute but gave it only procedural importance, rather than substantive force.

In short, the *Schaible* opinion clearly abolishes a governmental-proprietary distinction and plainly strikes down municipal immunity. However, the decision leaves some questions as to what standards will be applied by the court to impose liability in the future.

The fire department in this case not only failed to use good sense in its rescue operation, but affirmatively excluded bystanders who most likely could have saved the deceased. In other words, the fire department actually worsened the victim's position after undertaking the rescue.

These facts presented a very strong case on which to premise the city's liability. It is therefore possible that the Alaska court will be reluctant to impose liability except where negligence is clearly and persuasively shown.[15] Whether or not the court will require an affirmative "worsening of the victim's position" is still uncertain.

One further aspect of the case remains to be mentioned. The court held Fairbanks liable in this instance. However, since prior territorial decisions recognized municipal immunity, the court stated that the rule of the *Schaible* case would apply only to actions based on occurrences after the date of the opinion. In other words, as to Fairbanks, the rule of this case applies retroactively.[16] As to all others it applies prospectively.

This disposition of the case may provoke academic debate, but it seems a reasonable approach from a practical standpoint. Since earlier decisions recognized immunity, parties injured prior to this decision have not been placed in any worse position. The prospective application may afford municipalities an opportunity to insure themselves, if previously they have not done so. It may also serve to prevent the revival of numerous claims which had been abandoned because of the immunity doctrine.

In any event, as of August 10, 1962, Alaskan municipalities may be

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[15] This conclusion finds additional support in the statement by the court that it is not just second-guessing the fire department. The opinion points out, "This is not merely a case where the court in retrospect and using hindsight has determined that the City might have done things differently in its overall method of fighting the fire." 375 P.2d at 210.

[16] It should be remembered that the *Gilbertson* case, note 13 *supra*, specifically held that Fairbanks was immune from liability for the negligence of its fire department.

held liable for the negligent performance of governmental functions. *Fairbanks v. Gilbertson*[17] has been repudiated, and Alaska has taken a positive stand against municipal immunity.

The case definitely places Alaska in the minority on this issue.[18] However, municipal immunity has a long history of criticism,[19] and a few jurisdictions have very recently abolished it in some areas.[20] Hopefully, Alaska's blow to this antiquated doctrine will contribute to similar results in other jurisdictions.

WAYNE BOOTH, JR.

[17] 16 Alaska 590 (D. Alaska 1957), *aff'd*, 262 F.2d 734 (9th Cir. 1959).
[18] See Annot., 60 A.L.R.2d 1198 (1958).
[19] *Ibid.*
[20] Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 359 P.2d 457 (1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957), 60 A.L.R.2d 1193 (1958); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962); Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962). See Brinker v. City of Greenburg, 409 Pa. 110, 185 A.2d 593 (1962).