

1977

# Thelma Madsen and Diana Lynn Madsen v. State of Utah et al : Brief of Plaintiff-Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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THELMA MADSEN, and DIANA  
LYNN MADSEN, an infant,  
by Thelma Madsen, her  
parent and natural guardian,

Plaintiffs-Appellants : Case No. ~~233142~~ 15215

vs. :

STATE OF UTAH, UTAH STATE :  
BOARD OF CORRECTIONS,  
SAMUEL H. SMITH, LEON HATCH, :  
TAGE SPONBECK and DOE I  
through DOE V.

Defendants-Respondents.

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BRIEF OF PLAINTIFF-APPELLANTS

APPEAL FROM THE JUDGMENT OF DISMISSAL BY THE  
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,  
STATE OF UTAH, HONORABLE DEAN E. CONDOR, JUDGE.

---

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THELMA MADSEN, and DIANA :  
LYNN MADSEN, an infant, by  
Thelma Madsen, her parent  
and natural guardian, :

Plaintiff-Appellants, :

vs. :

Case No. 233142 15215

STATE OF UTAH, UTAH STATE :  
BOARD OF CORRECTIONS, SAMUEL  
H. SMITH, LEON HATCH, TAGE  
SPONBECK and DOE I THROUGH :  
DOE V, :

Defendants-Respondents. :

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BRIEF OF PLAINTIFF-APPELLANTS

NATURE OF THE CASE

This is an action by the wife and infant child of Thomas Madsen for his wrongful death. The Plaintiffs-Appellants claim that the Defendants-Respondents were negligent in their actions toward Thomas Madsen, thereby causing his death.

DISPOSITION IN THE LOWER COURT

The trial court granted Defendants' motion to dismiss on the grounds that Plaintiffs' claim was barred by the Utah Governmental Immunity Act.

RELIEF SOUGHT ON APPEAL

The Appellants seek to have the order dismissing Plaintiffs' complaint reversed and the case remanded to the

to the lower court for trial.

#### STATEMENT OF THE FACTS

On March 1, 1974 Thomas B. Madsen was an inmate, incarcerated at the Utah State Prison at the point of the mountain. During some months prior to that date, Mr. Madsen had been repeatedly approached by prison officials and encouraged to undergo plastic surgery for a facial lift at the prison hospital. After numerous requests Mr. Madsen had consented to that operation which was performed on the morning of March 1, 1974. Prior to the operation Mr. Madsen was given a shot of morphine, and he received another morphine shot following the operation. For some time Mr. Madsen had suffered from a heart ailment which fact was known or reasonably could and should have been know to the prison officials.

After the operation, Mr. Madsen was placed in a hospital room to recover from the effects of the anesthesia and surgery. At approximately 6:00 or 6:30 p.m. of that day Mr. Madsen was discovered by another inmate by the name of Ron Bergeron to be having trouble breathing. Mr. Bergeron then went to the prison hospital medical technician and advised him that Mr. Madsen was having difficulty breathing and suggested that Mr. Madsen may need to go by way of ambulance to the University of Utah Medical Center for medical treatment. The medical technician, whose name is at this time unknown to appellants, responded that there was nothing wrong with Mr. Madsen that in fact, Mr. Madsen was a hypochondriac.

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Approximately one hour later, another inmate working at the prison hospital at that time by the name of Thomas Brough observed Mr. Madsen to be having difficulty breathing to a critical extent. Mr. Brough then notified the prison medical technician, apparently, the same individual, that Mr. Madsen appeared to be in great difficulty and perhaps was dying. Approximately five minutes later between 7:30 and 8:00 p.m. the medical technician examined Mr. Madsen and then summoned an ambulance and notified the prison doctor. The technician also attempted to give Mr. Madsen oxygen. However, the oxygen tanks apparently were not functioning and would not fit through the door to where Mr. Madsen was. Approximately forty five minutes later the ambulance arrived and transported Mr. Madsen to the University of Utah Medical Center where he was pronounced dead on arrival.

An autopsy was later performed on the body of Thomas Madsen and the findings were basically that Thomas Madsen had suffered a heart attack while at the prison hospital facility and that the heart attack was the direct cause of death.

## ARGUMENT

### POINT I.

THE UTAH GOVERNMENTAL IMMUNITY ACT IS UNCONSTITUTIONAL AS A VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF UTAH, THEREFORE, THE COURT ERRED IN APPLYING IT IN THE PRESENT CASE.

A. UTAH CODE ANNOTATED § 63-30-10(10) IS UNCONSTITUTIONAL AS A DENIAL OF EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, §24 OF THE CONSTITUTION OF THE STATE OF UTAH.

In order for a legislatively-enacted statute to meet the Constitutional test for validity, it is required that it apply to all persons within the class with which it seeks to deal equally, both upon the face of the statute itself and in application. Yick Wo v. Hopkins, 118 U. S. 356 (1886).

Article I, Section 24 of the Constitution of the State of Utah also incorporates such premise:

"All laws of a general nature shall have uniform operation."

It is Appellants' contention that Section 63-30-10(10) Utah Code Annotated, fails to meet those specified Constitutional requirements. Section 63-30-10(10) denies an action against the State by one who has suffered an injury as a result of an "incarceration". As a matter of application and operation in the present case, one injured in a prison hospital will be denied his claim, although, if he had been injured in any other government operated hospital in the State, he would have

been allowed access to the courts to prosecute his claim. Such is true though the functions and the risks inherent in the operation of both of the hospitals are the same. The result is a denial of equal protection of the law and a non-uniform operation of this law.

While Appellants concede that those incarcerated in a state prison have more limited rights than those who are not, one right must remain inviolate, even to prisoners, in the absence of a court-ordered execution--the right to life. That right is fundamental and guaranteed to all, whether incarcerated or not. In regards to application of the equal protection clause of the United States Constitution, the U. S. Supreme Court has adopted a rigorous policy of "strict scrutiny" in cases dealing with the restriction of a "fundamental right". Kramer v. Union Free School District, 282 Fed. Supp. 70 (E.D. N. Y. 1969). Such scrutiny must then be applied to the present case.

This Court has also established standards by which a legislative act should be judged when it applies unequally to persons in the same circumstances:

...to be unconstitutional the discrimination must be unreasonable or arbitrary. A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded from its operation, provided the differentiation bears a reasonable relation to the purposes to be accomplished by the act. State v. Mason, 94 Utah 501, 70 P. 2d, 923 (1938).

The classification must bear a reasonable relation to the purposes to be accomplished by the act. The object or purpose of the act is the touchstone for determining whether the act is constitutional or unconstitutional. State v. Mason, at 507. The same test is employed by the United States Supreme Court in determining a violation of the Equal Protection Clause of the Fourteenth Amendment when a suspect classification is not involved. "A Century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires that the State's system be shown to bear some rational relationship to legitimate state purposes." San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 56 (1973).

The Supreme Court of Kansas recently applied these tests to the Kansas Governmental Immunity Act Brown v. Wichita State University, 217 Kan. 279, 540 P. 2d. 66 (1975).

"As the guardian of the principles embodied in the Constitutions, it is within our inherent power, and our duty, to determine the constitutionality of the legislation in question." Brown at 80.

The Kansas Court then went on to strike down the classification created by the State's legislators because the object of the statute-convenience-was not a rational basis for the classification and even if it was, it could not outweigh an individual's constitutional rights. In this regard, it said:

No doubt the absolute monarchs of the past, and the dictators of today, refused and still refuse to be charged with wrong, but that is no reason why our representative and democratic forms of government should be so classified. We think the rule was adopted in this country as a convenience to a sovereign people.

We do not subscribe to the belief that convenience is a pervasive legislative objective sufficient to totally deprive the appellants access to the courts. Convenience is completely unacceptable as a standard by which to balance the rights of the state. Convenience should not outweigh an individual's right to be compensated for actual damages sustained and injuries suffered. To hold convenience is a permissible legislative objective, sufficient to insulate the government from negligence, is to engage in incredulous reasoning, void of logic, which undermines the very principles upon which this nation was founded. Brown at 82,82.  
(Citations omitted)

In Kansas one injured by governmental entity was classified solely by the type of governmental entity involved. Their right to redress and remedies available, if any, were dependent solely upon this classification. Similar inequities are involved in the present case.

Legislative history and judicial opinion provide ample evidence that the purpose behind the statutory section in question here was to prevent prisoners from continually harassing official personnel with lawsuits and to prevent actions against the State for injuries inflicted by one inmate upon another. Senate Journal of 1965, pp. 136-37; Sheffield v. Turner, 21 Utah 2nd 314, 445 P. 2nd 367 (1968).

In application, the section in question allows a cause of action according to which class the prisoner falls in. If he is a prisoner who receives treatment within the prison hospital, then a cause of action for any injuries sustained as a result of that treatment is denied. If he is a prisoner who has received injuries as a result of treatment at another

hospital facility, his cause of action is preserved. Under close analyzation of the purposes of Section 63-30-10(10), it is Appellants' contention that there is no reasonable relation between such purposes and the classification which is imposed by the application of the Act. As such, the statute in question, Section 63-30-10(10), Utah Code Annotated, is in violation of the Constitution of the United States and the Constitution of the State of Utah and is, therefore, unconstitutional. Being unconstitutional, the lower Court erred in applying it to the present case.

B. PUBLIC POLICY DEMANDS THAT AN ENTITY BE RESPONSIBLE FOR ITS NEGLIGENT ACTS. THE UTAH GOVERNMENTAL IMMUNITY ACT IS CONTRARY TO SUCH POLICY AND SHOULD BE TOTALLY ABROGATED.

The Utah Governmental Immunity Act had its genesis in the English Common Law Doctrine of Sovereign Immunity. Many courts have stated that sovereign immunity was founded on the proposition that the "king could do no wrong." In reality, however, it was not that the king could do no wrong, he was just privileged to do wrong and not be held accountable for it in his own courts. In Driggs v. Utah State Teacher Retirement Board, 105 Utah 417, 142 P. 2d 657 (1943) the Utah Supreme Court, in an opinion by then District Judge Crockett criticized this foundation of sovereign immunity:

The idea that the King could do no wrong was merely a fictional concept without any righteous basis in law or logic. It arose out of the desire of the king and those holding favored positions under him to impose their will upon those



who were less privileged. This antiquated idea has certainly never had any place in American jurisprudence.

The more rational approach to the notion of sovereign immunity was indicated by Blackstone, 1 Bl. Comm. 241, 242: "The law ascribed to the king the attribute of sovereignty. He is a sovereign and independent within his own dominions, and he owes no kind of subjection to any other kind of potentate upon earth. Hence, it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him; for all jurisdiction implies superiority of power.

It was thought an anomaly that the king should have jurisdiction over himself, and that he could be asked to make himself do something. In our government of three separate branches, this paradox does not exist. There is no reason why the judiciary in its proper function as an independent branch of the government should not be asked to adjudicate the rights of individuals against the other branches of the government, or even as against the judiciary itself. Driggs at 658.

Sovereign immunity was imported to America by the Massachusetts Supreme Court in Mower v. Inhabitants of Leicester, 9 Mass. 247 (1912). That court held that even though the town was incorporated, had a treasury out of which a judgment could be satisfied and had a means of taxation which could replenish the town's treasury; the town was immune from suit for its tortious wrongs, wrongfully citing the old English case, Russel v. Men of Devon, 100 Eng. Rep. 362, 2 T.R. 673 (1788) for support. The Russel case involved a suit against all the inhabitants of a country for damages occurring to Russel's wagon by reason of a bridge being out of repair. The Court disallowed

the action primarily on the grounds that there was no fund out of which any judgment could be paid and "it is better that an individual should sustain an injury than that the public should suffer an inconvenience". Russel at 363.

Commenting on this case the Minnesota Supreme Court said:

There is no mention of "the king can do no wrong", but on the contrary it is suggested that the Plaintiff sue the county itself rather than the individual inhabitants. Every reason assigned by the Court is born out of expediency. The wrong to Plaintiff is submerged in the convenience of the public. No moral, ethical, or rational reason for the decision is advanced by the Court except the practical problem of assessing damages against individual defendants..." It was on this shaky foundation that the law of governmental tort immunity was erected in Minnesota and elsewhere. Spanel v. Mounds View School District No. 621, 264 Minn. 279, 118 N.W. 2d 795, 197 (1962).

Some courts, including the Utah Supreme Court, have justified governmental immunity on these same grounds; see Hurst v. Highway Department, 16 Utah 2d 153, 397 P.2d 71 (1964). However, the statistical data simply does not support this fear that governmental functions would be curtailed by allowing citizens to sue their government. Even as early as 1959, it was apparent that this was not a rational basis for governmental immunity.

Figures actually compiled showing the claims experience in typical cities show that the spectre of the crippling judgment, as a deterrent to abrogation of procedural or substantive immunities, so far as not materialized in any great degree. The force of the "crippling judgment" may be vitiated by self insurance or commercial insurance. . . . So far as known, municipal insolvency proceedings in the federal courts have not occurred because of tort judgments.

David, "Tort Liability of Local Government:  
Alternatives to Immunity from Suit or Liability,"  
6 U.C.L.A. L. Rev. 1 (1959).

These original purposes of sovereign immunity; to protect the feudal lord from suit in his own court, to protect local government from the numerous feared suits, and to protect the state from feared insolvency, are contrary to one of the most fundamental principles of civilized society: that if a person or his property is wrongfully injured he should be able to seek reasonable compensation and relief from the wrongdoer. It is because the doctrine of sovereign immunity is contrary to this fundamental principle that the governmental proprietary distinction developed. This principle is designed to mitigate the harsh effects of sovereign immunity and allow relief in certain cases. However, the difficulty is in applying the distinction. Usually, the results are inconsistent and illogical, often arbitrary and harsh, as exception after exception developed to the rule that government could not be sued in governmental matters. Utah is no exception to this trend; history is replete with the Utah Court making fine distinctions which do not promote justice or the purpose of governmental immunity.

The Utah Supreme Court first recognized the doctrine in Gillmore v. Salt Lake City, 32 Utah 180, 89P. 714 (1907). That case involved an action for trespass to Plaintiff's property while police officers were searching the Jordan River for a dead body. In ruling against the Plaintiff the Court said, "It seems manifest that the city in any event was

engaged in the discharge of a public duty as agent of the sovereign state, its creator, . . . the City, in the absence of a special statute, cannot be held responsible for the acts of police officers, and certainly not strangers."

A year later the court recognized an exception to Gillmore. The Court held that a city, maintaining a water works system supplying water to its residents, acts in a proprietary capacity and is liable for any acts committed while supplying the water to the same extent as any private owner would be. Brown v. Salt Lake City, 33 Utah 222, 93 P.570 (1908).

From Brown and Gillmor to the present time, the Court has struggled with governmental immunity and its exceptions. The Court has held there is immunity in cases concerning: flood waters from a state constructed reservoir and canal<sup>1</sup>, operation of a fire truck on city streets,<sup>2</sup> injuries resulting from burns received from a school incinerator<sup>3</sup>, injuries from burns received in a community recreation area<sup>4</sup>, operation of a municipal golf course<sup>5</sup>, an airport waiting room<sup>6</sup>, sewer<sup>7</sup>, operation of a state owned gravel

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<sup>1</sup>Wilkinson v. State, 42 Utah 483, 134 P.626 (1913).

<sup>2</sup>Rollow v. Ogden City, 66 Utah 475, 243 P.791 (1926).

<sup>3</sup>Bingham v. Board of Education of Ogden, 118 Utah 582, 223 P.2d 432 (1950).

<sup>4</sup>Ramirez v. Ogden City, 3 Utah 2d 102, 279 P.2d 463, (1955).

<sup>5</sup>Jopes v. Salt Lake County, 9 Utah 2d 297, 343 p.2d 728 (1959).

<sup>6</sup>Wade v. Salt Lake City, 10 Utah 2d 374, 353 P.2d 914 (1960).

<sup>7</sup>Cobiar v. Roy City, 12 Utah 2d 375, 366 P.2d 986

pit<sup>8</sup>, and maintenance of a sewage disposal system<sup>9</sup>.

During the same period that Court held there is no immunity in cases concerning: injuries resulting from the maintenance of public streets<sup>10</sup>; the maintenance of a public nuisance<sup>11</sup>, the maintenance of an attractive nuisance<sup>12</sup>, operation of bath houses and swimming pools<sup>13</sup>, municipal water works<sup>14</sup>, and flooding from a municipal reservoir<sup>15</sup>.

This brief look at the history of governmental immunity shows the arbitrariness involved in its application. The decisions do not seem to further the purpose of the doctrine; they tend only to show its lack of rationality. There seems to be no reasonable relationship between the particular classification and the supposed purpose of sovereign immunity. What discernable difference can there be between the operation of municipal golf course and a municipally operated swimming pool? Yet, the Court has held that immunity exists for the golf course<sup>16</sup>, but not for the swimming pool operation<sup>17</sup>. Clearly the distinction operates

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<sup>8</sup>Hurst v. Highway Department, 16 Utah 2d 153, 397 P.2d 71 (1964).

<sup>9</sup>Johnson v. Salt Lake County Cottonwood Sanitation District, 20 Utah 2d 389, 438 P.2d 706 (1968).

<sup>10</sup>Rollow v. Ogden City, Note 2.

<sup>11</sup>Rollow, Note 2.

<sup>12</sup>Brown v. Salt Lake City, 33 Utah 222, 93 P. 570 (1908).

<sup>13</sup>Burton v. Salt Lake City, 69 Utah 186, 253 P.444 (1926).

<sup>14</sup>Brown, Note 12.

<sup>15</sup>Nestman v. South Davis County Water Improvement District, 16 Utah 2d 198, 398 P.2d 203 (1965).

<sup>16</sup>Jopes, Note 5, supra.

<sup>17</sup>Burton, Note 13, supra.

unequally as to people in similar circumstances.

In 1965, the Utah Legislature adopted the Governmental Immunity Act. The act had two main purposes. In some areas it maintained the arbitrary governmental proprietary distinction based on the groundless fear that government still needed to be protected. In other areas its express purpose was to restrict or even waive immunity altogether. Utah chose to act legislatively against this anachronistic doctrine while other states have been in the process of judicially changing this harsh rule of the 18th Century. Almost a majority of states have now abolished or severely restricted the doctrine of governmental immunity. See, e.g., Brown v. Wichita State University, supra. Nieting v. Blondell, 235 N.W.3d 597 (Minn. 1975); Long v. City of Weirton, 214 S.E. 2d 832 (W.Va. 1975); Ayala v. Philadelphia Board of Public Education, 453 Pa. 584, 305 A.2d 877 (1973); Spencer v. General Hospital of District of Columbia, 138 U.S App. D.C. 48, 425 F.2d 479 (1969); Campbell v. State, 284 N.E.2d 733 (Ind. 1972); Flournoy v. School Dist. No. 1, 174 Colo. 110, 482, P.2d 966 (1971); Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970); Willis v. Department of Conservation and Econ. Dev., 55 N.J. 534, A.2d 34 (1970); Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970); General Laws of Rhode Island §9-31-1; Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Beach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Sherbutte v. Marine

City, 374 Mich. 48, 130 N.W.2d 920 (1964); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963); Muskopf v. Corning Hospital District, 55 Cal.2d 211, 11 Cal. Rrtr. 80, 359 P.2d 457 (1961); Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959); Hargrove v. Town of Cocoa Beach, 96 S.2d 130 (Fla. 1957); Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975); Wolfe v. Town of Bradford, 22 Conn. Sup. 239, 167 A.2d 924 (1961); Hamilton v. City of Shreveport, 247 La. 784, 174 So.2d 529 (1965); Tennessee Department of Mental Health v. Hughes, 531 S.W.2d 299 (Tenn. 1975); State Highway Department v. Pinder, 531 S.W. 2d 857 (Texas 1975); Evangelical United Brethren Church of Adna v. State, 407 P.2d 440 (Wash. 1965); Iowa Code Annotated, Section 25A-1 et seq.; Noll v. City of Bozeman, 534 P.2d 880 (Mont. 1975); Oregon Revised Statutes, Section 30.265-285; New York Consolidated Statutes, Section 10b-6(b); Rodriguez v. State, 52 Haw. 156, 472 P.2d 509 (1970), Hawaii Revised Statutes, Section 662-2, 15(1).

Court opinions and legal writings demonstrate that there are no reasonable justifications for the continuation of this doctrine which imposes such severe hardship and economic loss on the citizens of this State.

Utah's neighboring states have abolished the doctrine of sovereign immunity. The Supreme Court of Arizona has said,

"We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled." Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107, 109 (1963).

The Idaho Supreme Court in severely restricting sovereign immunity in that state has said, "It is unquestionable that there is an established trend discrediting the doctrine of sovereign immunity." Smith v. State, 93 Idaho 795, 473 P.2d 937, 943 (1970).

Justice Traynor, in a landmark California decision, had this to say concerning the governmental immunity:

After a re-evaluation of the governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust. . . The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative and judicial. . . and the exceptions operate so illogically as to cause serious inequality. Some who are injured by governmental agencies can recover, others cannot: one injured while attending a community theater in a public park may recover. . . but one injured in a children's playground may not. . . for torts committed in the course of a governmental function" there is no liability, unless the tort be classified as a nuisance. Muskopf v. Corning Hospital District, 359 P.2d 457 (1961). (citations omitted).

In a very strongly worded opinion, the New Mexico Supreme Court responded to its first opportunity to discard



the anachronistic doctrine.

"Several times in the recent past this court has cast aspersions upon sovereign immunity. . . but unfortunately, in those cases, the issue was not squarely before us as it is today. Thus, we take this opportunity to rid the State of this legal anachronism. Common law sovereign immunity may no longer be interposed as a defense by the State, or any of its political subdivisions, in tort actions. . . It can no longer be justified by existing circumstances and has long been devoid of any valid justification.

We recognize that this is a far-reaching decision which, at first blush, does violence to the doctrine of stare decisis. However, we do not feel that stare decisis should be used to perpetuate the harsh and unjust results which blind adherence to sovereign immunity rules mandated." Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975). (Emphasis added.)

The Court also rejected the rational of Russell v. Men of Devon, supra, as "an anachronism in the law of today." Id. at 1156.

On the basis of the aforementioned authority, Appellants conclude that the ancient doctrine of sovereign immunity has lost its underpinnings by the social and governmental change which have occurred. In today's world, we cannot discount the extent of governmental intervention and actions which affect the conduct of human affairs. This view was expressed with great clarity by Justice Cardozo in the following words:

"A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the court when the mores have so changed that perpetuation of the rule would do violence to the social conscience." Cardozo, The Growth of the Law, pp. 136-37 (1924).

Tort liability is grounded in the concept that an individual, or any entity, should be responsible for injuries occasioned by his/her/its negligent acts. While valid purposes may have once existed for the creation of the doctrine of governmental immunity, the reasons for the adoption of the doctrine have long since disappeared. Appellants agree with the view suggested by Justice Cordozo, that when the reason for a judicially-created rule disappears, the Court is not only empowered to abrogate the rule, but has a duty to do so. Appellants urge the Court to follow the trend established by Utah's neighboring states and return the state of the law in Utah to that which is promulgated by the public policy surrounding the very concept of liability in tort.

## POINT II

APPELLANTS' CAUSE OF ACTION DID NOT ARISE OUT OF INCARCERATION WITHIN THE MEANING OF UTAH CODE ANNOTATED, 63-30-10(10)

Section 63-30-10, Utah Code Annotated provides that immunity from suit for all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment. If this provisions were to go no further, there could be no serious contention that governmental immunity has not been waived with respect to the case at bar. However, Section 63-30-10 goes on to provide a series of exceptions to the waiver of immunity, and it specifically provides for an

exception from the waiver if the injury arises out of the incarceration of any person in any State prison or other place of "legal confinement." It is conceded by Appellants that Appellants' decedent was legally confined in a State Prison at the time of his death. The issue then becomes whether or not the injury to Appellants' decedent, which ultimately caused his death, did in fact "arise out of his incarceration."

Respondents contend that any injury arising from any function associated with operation of a prison must be construed as arising from the incarceration. Appellants assert, however, that if the broad interpretation insisted upon by the defendant is given the statute, there could never be any waiver of immunity on the part of the State for any injury which was connected in any way with a prisoner or prison. Surely the legislature intended to waive immunity in some instances and did not intend that this subsection be interpreted so broadly so as to eliminate that very waiver. Such construction would seem to limit a cause of action against the prison to a visitor who was injured by the accidental discharge of a guard's weapon, simply because he was visiting a person who was "incarcerated" within the meaning of the statute.

Judicial construction of Section 63-30-10(10) Utah Code Annotated is limited at best. In 1968, the Utah Supreme Court decided the case of Sheffield v. Turner, supra, in which the Plaintiff Sheffield, who had been an inmate at the Utah State

Prison, sued the State of Utah and the prison warden for damages resulting from an altercation between the Plaintiff and another prisoner in which the Plaintiff was stabbed in his eye. In that case, the District Court granted the Defendants' Motion to Dismiss based on Section 63-30-10(10) holding that plaintiff's injury arose out of his incarceration at a state prison. On appeal, the Plaintiff contested the dismissal only as to the prison warden, but the Utah Supreme Court commented on the dismissal as to the State of Utah as follows:

"Inasmuch as the statute just referred to (63-30-10(10) plainly retains sovereign immunity to the State for any injury arising out of incarceration in the prison, the trial court correctly dismissed the complaint as to it."

The Sheffield case, however, is not as helpful as it may seem because it is clearly distinguishable from the facts of the case at bar. In Sheffield, the plaintiff was, as mentioned, injured by a fellow prisoner. In this case, Appellants' decedant, Thomas Madsen, was not injured by a fellow prisoner nor was his injury caused by any other activity closely associated with the operation of a prison, but his injury was caused by the negligent operation of a hospital facility and by the negligent hospital personnel.

Another Utah case dealing with Section 63-30-10(10) Utah Code Annotated is that of Emery v. State, 26 U.2d 1, 483 P.2d 1296, (1971). In the Emery case, the issue decided by the Utah Supreme Court was whether or not a State Hospital

of what constitutes an injury arising out of incarceration was not raised, therefore, the Emery case is not helpful to us on that issue.

It is an accepted principal of law in Utah that where a particular statutory phrase has been used in the past by the State Legislature and has been construed in the past by the Courts, it is to be assumed that the legislature is aware of the judicial construction of that phrase and that when that language is used by future legislatures it is used advisedly. See Greenhalgh v. Payson City, 533 P.2d 799 at 801, (1975). With that principal in mind, Plaintiffs direct the Court's attention to Section 35-1-45, Utah Code Annotated providing that workman's compensation is available to employees who are killed or injured by accidents "arising out of" or in the course of their employment. Under the workman's compensation statute, the phrase "arising out of" has been construed in a number of cases to require a close causal connection between the employee's employment and the injury he suffers. The case of Bountiful Brick Company v. Giles, 276 U.S. 154, 72 L.Ed. 507, 48 S.Ct. 221, 66 ALR 1402, (1928), affirming 68 U. 600, 251 P. 555, is particularly illustrative. In that case the Supreme Court of the United States held that the phrase arising out of as contained in the Utah statute meant that liability would be imposed if there were a close causal connection between the injury and the employment in which the employee was then engaged and which substantially contributed

to the injury. It appears well established in Utah that before a causal connection can be established under the phrase arising out of, it must be shown that the injury resulted from a risk to which the injured person was subjected by his employment. See Andreason et al v. Industrial Commission et al, 98 Utah 551, 100 P.2d 202, (1940).

In the lower court, the respondents relied heavily upon Justice Crockett's language in Epting v. State, 546 P.2d 242 (1976), for the alleged premise that where a prisoner is still under control of prison authorities incidents thereto "arise out of the incarceration." Respondents' reliance would seem to be mis-placed in that Justice Crockett was speaking as to whether inmate Hart's conduct arose out of the incarceration. The language of the statute requires that the injury result from the incarceration. There is no requirement of a causal link between the conduct of the agent committing the negligent act and the incarceration, but between the injury and the incarceration. The Utah Courts have always applied the close causal connection definition of this phrase rather strictly requiring more to be shown than simply that the injury occurred "in the course of" the employment. See M & K Corporation v. Industrial Commission, 112 U. 488, 189 P.2d 132, (1948).

According to the principal of law above enunciated, this Court must assume that the Utah Legislature knew the construction which has been applied to the phrase arising

out of and used it advisedly when it was included in Section 63-30-10(10) Utah Code Annotated. As applied to the facts of this case, the phrase arising out of the incarceration of a person would refer to an injury which is in some way caused by one's incarceration or an injury resulting from a risk to which a person is exposed by reason of incarceration. There is no such close causal connection between the fact of incarceration and negligent actions of medical personnel. To say that incarceration exposes one to the risk which caused the death of Plaintiffs' decedent in this case is to say that substandard medical attention and treatment are knowingly and intentionally provided by the State of Utah to prisoners in the State Prison and that such is to be expected and accepted as a consequence of incarceration.

The cause of the injury in this case is not closely connected with incarceration, but could have taken place in any medical facility given the same type of negligent acts complained of in Appellants' Complaint. Even if a causal connection is found, it cannot be seriously argued that the decedent's incarceration contributed substantially to his injury.

### POINT III

THE INJURY TO APPELLANTS' DECEDENT IS NOT WITHIN THE CONTEMPLATION OF EXCEPTION 10 TO SECTION 63-30-10 AND THE COURT ERRED IN SO APPLYING THE STATUTE.

An examination of the legislative history of Utah Code Annotated, §63-30-10(10), (the section preserving immunity if the injury arises out of the incarceration of any person) shows that the Legislature of the State of Utah, in enacting the Governmental Immunity Act, never intended that subsection (10) apply to a situation like the present one.

The Utah Governmental Immunity Act was introduced in the Utah Legislature in 1965 as Senate Bill No. 4. The bill was sponsored by Charles Welch, Jr. and M. Jenkins (Senate Journal 1965 hereinafter referred to as "S.J."). The appellants request the Court to take judicial notice of the Senate Journal for 1965. (U.C.A. 78-25-1). Senate Bill No. 4 was introduced and read to the Senate on the 1st day of the session, January 11, 1965, and was referred to the Rules Committee for further consideration. (S.J. p.32). On the second day of the session, it was printed and referred to the Judiciary Committee. (S.J. p.38) The bill then went through various readings and committees until it was placed on the calendar for second reading of the bill on the 10th day of the session, January 20, 1965. (S.J. p. 136-137). On that day, the Senate added several amendments to the original bill. One of those amendments was subsection (10) concerning the incarceration of persons in state prisons, etc. Following is the summary of those proceedings as printed in the Senate



On motion of Senator Welch S.B. No. 4 having retained its position on the Second Reading Calendar, was now before the Senate.

On Motion of Senator Welch S.B. No. 4 was amended as follows:

Page 3, Add subsection (10) to Section 10, reading, "arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement, or."  
(emphasis added)

An examination of actual recordings of the conversations that took place on the floor of the Senate during the adoption of the amendments to S.B. 4 provide the listener with an insight into the actual discussion of the Senate when adopting that amendment.

The discussion relating to the adoption of subsection (10) began by Senator Welch reading the proposed subsection (10). Senator Welch read the section very slowly because the Senators had not been provided with copies of the amendment previously. After reading the proposed amendment very slowly, Senator Welch then quickly read the entire amendment again. Then he explained the purpose of the amendment. A transcription of the discussion is as follows:

SENATOR WELCH:

"You can write it at the bottom of the page if you want, and these are the words (read very slowly) 'arises out of the incarceration of any person in any state prison, county or city jail or other place of legal confinement, or.' Now let me repeat that please. You will see that it follows pretty well the language that is already

on your printed amendments except just at the beginning there are two or three extra words in there, Mr. President." (Words in parenthesis are editorial comments).

UNIDENTIFIED VOICE:

"Would you repeat that paragraph Senator Welch?"

SENATOR WELCH:

"I will, and if you will follow the language in the printed ones you will see that I have just added, we have just added two or three words here to make it kind of follow the same language we have had in respect to the other subsection. (Whereupon Mr. Welch repeated the proposed subsection (10)).

Now I can explain this very briefly, there was the concern of some of our officials who have to do with the state prison and other institutions, unless we had this limitation in there they might be besieged with suits and that sort of thing of persons who claim that they were mistreated and that sort of thing." (emphasis added).

UNIDENTIFIED VOICE:

"Mr. President, I understand then on our page 2 amendment that we drop the balance of that, "shall have a cause of action under the statute", is that correct?"

SENATOR WELCH:

"Yes."

PRESIDENT OF THE SENATE:

"What he is doing is substituting the language that he just dictated for the language that you have on the amendment sheet." (Recording of Senate Proceedings, Day 10, Jan. 20th, 1965, Part III, Side 1, located in Lieutenant Governor's Office.)

The proposed amendments were voted upon and passed by the Senate. The bill was then sent to the House where it was voted upon.

on the 32nd day of session. S.B. No. 4, as amended by the Senate, failed to pass the House on that day. The following day, S.B. No. 4 passed the House after being amended. The amendments, however, did not involve subsection (10) of section 10. The bill then returned to the Senate where it passed the Senate and was eventually signed into law by the Governor. The only discussion of the language in question was a statement that the provision was added for the benefit of prison officials and others who were afraid they would be sued by "persons who claim they were mistreated."

Judicial interpretation has resulted in a similar construction. In Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367 (1968), the Court said:

"There can be no question but that the maintenance of a state prison and the keeping of prisoners therein is a necessary auxiliary of government and therefore, a governmental function, nor that consequently the performance of the duties incident thereto would normally be protected by the traditional rule of sovereign immunity. In this connection it is appropriate to point out that this does not constitute a carte blanche protection for anything that may be done or permitted in a prison.

On the other side of this proposition is the imperative need for those in a supervisory capacity to have reasonable freedom to discharge the burdensome responsibilities of keeping in confinement and maintaining discipline of a large number of men who have been convicted of serious crime. If such officials are too vulnerable to lawsuits for anything untoward which may happen to inmates a number of evils follow. . ."  
(Emphasis added).

As can be seen from the Court's analysis, the basis purposes of immunity from injuries arising out of incarceration are 1) to prevent prisoners from continually harrassing official personnel with lawsuits; 2) to prevent actions against the state for injuries inflicted by one inmate upon another.

The injury to Thomas Madsen cannot, by any reasonable construction, be found to lie within either of these areas. Death resulting from improper treatment and care is in no respect similar to a suit against the prison because the inmate's cell is too cold. Nor is the injury one which has been inflicted by a fellow prisoner. The injury to the deceased in this instance was inflicted by the act or omission of those whose assignment it was to look after him.

Since the injury to Thomas Madsen is not one which falls within legislative contemplation or judicial construction of the purposes behind exception 10 to Section 63-30-10, Appellants contend that the exception is inapplicable in the present case and the State is barred from denying the statutory waiver of immunity.

#### POINT IV

PRE-OPERATIVE AND POST-OPERATIVE TREATMENT OF THE DECEASED WAS AN OPERATIONAL FUNCTION WHICH IS NOT WITHIN THE COVERAGE OF UTAH CODE ANNOTATED, Section 63-30-10(1).

Section 63-30-10(1) provides that:

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee

committed within the scope of his employment except if the injury:

(1) arises out of the exercise or performance or the failure to exercise or perform a discretionary function. . ."

Absent the exception, the government has waived its immunity from suit in actions such as the one at bar. The issue then becomes whether the actions of the prison officials and employees prior to, during, and after the operation upon Thomas Madsen were of such a nature as to be categorized as discretionary, and therefore, impose no liability upon the State. Respondents urge, citing Dalehite v. U.S., 346 U.S. 15, 73 S.Ct. 956 (1953), that the negligent acts of the prison employees and officials were pursuant to the basic plan which established the prison hospital, and as such were protected by the holding of that case.

The Dalehite opinion, however, recognizes the existence of a distinction between discretionary and operational activities as they pertain to the action taken by governmental employees. If we were to assume the position urged by respondents, we would be hard put to find an activity which could be classified as operational in nature. Any action taken is somewhat objective in origin and requires some degree of discretion. This court held in the case of Carroll v. State Road Commission, 27 U.2d 384, 496 P.2d 888 (1972) as follows:

". . . every action of a government employee, except a conditioned reflex action, involved the use of some degree of discretion. . . The Court observed that acts done in accordance with operational level decisions do not come within the discretionary function exception. The Court stated that the conclusion may be drawn that operational level acts are those which confirm routine, everyday matters, not requiring evaluation of broad policy factors.

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". . . Consequently, the circuit court did not error in holding that the state's negligence in this case did not come within the discretionary function exception." Carroll v. State Road Commission ib. at page 388, 399.

While appellants can see that the decision to construct a prison hospital, and possibly even the decision to allow Thomas Madsen to undergo the operation may be discretionary actions, the treatment involved with the operation was operational. Certainly, in any medical facility, a standard rule of good medical care must exist, and such can always be measured objectively. While the decision as to the quantity and/or type of two acceptable anesthetics may be a subjective choice, the decision to give a morphine injection to a patient known to be suffering from a heart condition is a knowing negligent act by any objective standard.

To argue that the injury to Thomas Madsen arose out of a discretionary act is to say that it is a matter of discretion in the prison administration whether or not to provide decent and adequate medical care to the prisoners incarcerated therein. Specifically, it is to say that it is

discretionary in the individual doctor or technician whether or not to provide adequate medical care for individual patient. Obviously, this is not what was intended by the legislature in an acting section 63-30-10(1) Utah Code Annotated. Clearly, a responsibility of a technician or an orderly to make rounds and see that the patient's needs constitute an operational function. Also, the maintenance of an oxygen unit to keep it in good working condition is certainly an operational function. Without a doubt, the duty of an employee of a medical facility to check on a patient who has had surgery that day after being informed by someone else that that patient is having difficulty breathing must be an operational function. Therefore, the injury to appellant's decedent Thomas Madsen did not arise out of the exercise or performance or the failure to exercise or perform a discretionary function and this action is therefore, not barred by that provision.

#### POINT V

OPERATION OF A HOSPITAL FACILITY AT THE STATE PRISON IS A PROPRIETARY FUNCTION WHICH IS NOT WITHIN THE COVERAGE OF THE UTAH GOVERNMENTAL IMMUNITY ACT.

Surely there is no question that operation of a prison facility by the State Government is a governmental function. Operation of a hospital facility, however, is another matter. In the case of Greenhalgh v. Payson City, 533 P.2d 799, (1975), the Utah Supreme Court held that operation of a hospital facility by a municipality is a proprietary

function and is not within the coverage of the Utah Governmental Immunity Act. In the Greenhalgh case, the Court outlined four important factors to consider in deciding whether an activity is proprietary or governmental. Those factors are: 1) Whether the activity is something which is done for the general public good. 2) Whether there is any special pecuniary benefit to the municipality and, 4) Whether it is of such a nature as to be in competition with free enterprise. One noticable difference between the Greenhalgh case and this case is that a municipal hospital accepts patients in return for payment while the State provides medical services for its prisoners. However, that is not entirely true since a public hospital also accepts a large number of welfare patients and medicare patients whose medical services are also provided by the government.

The important issue on this point is whether or not maintenance of a hospital facility at which surgery may be performed, etc. on the State Prison premises is to be regarded as a public responsibility. Apart from a routine pill dispensary and first aid clinic, there is absolutely no necessity or responsibility on the part of the State to operate a hospital facility at the State Prison. Even with the present hospital facilities, prisoners are frequently sent to the University Medical Center and other privately and independently maintained hospitals for various medical services. Had Appellants' decedent been permitted to have his surgery performed



at one of those hospitals, there would not be a question of governmental immunity with regard to a claim of negligence connected therewith. Therefore, since the State of Utah has chosen to maintain a complete hospital facility on the Prison premises for its own convenience, maintenance of that facility must be regarded as a proprietary function just as if a similar facility were maintained and opened to the public. Another consideration was raised in the Greenhalgh case, as well as in the case of Sessions v Thomas D. Dee Memorial Hospital, 94 U. 460, 78 P.2d 645, (1938), which is the paramount public policy of encouraging a high standard of care in a medical or hospital facility. That principle should be applied here in that if immunity is to be granted for any and all acts of negligence which may occur in the hospital facility on the part of doctors, nurses or technicians, there is no way to encourage those who operate the facility to exercise due care. It is therefore, a matter of public policy not to extend the principle of governmental immunity to the hospital facility.

#### POINT VI

THE COURT ERRED IN GRANTING THE MOTION TO DISMISS AS TO DEFENDANTS SAMUEL H. SMITH, LEON HATCH, TAGE SPONBECK AND DOE I THROUGH DOE V.

The lower Court found that the individual Defendants, as well as the State and the Board of Corrections, were protected by the Section 63-30-10(10), Utah Code Annotated, 1953.

Therefore, the motion to dismiss as to the individual Defendants was also granted.

That motion, however, should only be granted where there is no viable premise upon which the Plaintiff could recover. Utah Rules of Civil Procedure #12(b). In the case at bar, the requisite premise or theory still exists. In Sheffield v. Turner, Supra. In another case dealing with the meaning of "arising out of the incarceration", the Court held:

" . . . (T)he warden and other prison officers are protected by the doctrine of sovereign immunity against claims of negligence so long as they are acting in good faith and within the scope of their duties, and that they could not be held liable unless they were guilty of some conduct which transcended the bounds of good faith performance of their duty by a wilful or malicious wrongful act which they know or should know would result in injury." (Emphasis added).

Appellant's pleadings in the lower court contained allegations sufficient to create a triable issue of fact as to whether the actions of the individual defendants, while possessed with knowledge regarding the seriousness of deceased Thomas Madsen's physical condition both prior to and following the operation, were such as would constitute a wilful or malicious wrongful act which they knew or should have known would result in serious complications and probable injury. If that issue were found in appellant's favor, then the jury would have been forced to find for the Appellants and against the individual respondents.

Therefore, the granting of the dismissal as to the individual Defendants without adjudication upon the merits of such claim constitutes reversible error.

A finding that the State is immune to suit in a case such as this does not automatically require a dismissal as to the individual Defendants. Utah Code Annotated, Section 63-30-20 bars any action against the employee whose act or omission gave rise to the claim if judgment is rendered against the State upon such claim. That language offers no connotation that if the State is held not to be liable, that the claim against the employee is also dismissed.

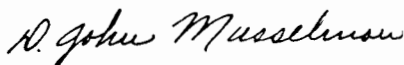
#### CONCLUSION

In conclusion, appellants submit that the trial court erred in granting respondents' motion to dismiss on the basis of governmental immunity. Appellants' contend that Section 63-30-10(10), Utah Code Annotated is unconstitutional in that it denies equal protection of the law. Appellants also contend that the death of Thomas Madsen was not an injury "arising out of the incarceration" of the prisoner, Thomas Madsen, rendering Section 63-30-10(10) inapplicable to this case. Appellants further contend that even if the statute is found to be applicable, that such injury is not of the type which the legislature of the State of Utah contemplated as falling within the auspices of the statute when it was enacted. Finally, appellants assert that the negligent acts of the respondents were of an operational, rather than a

discretionary nature, and are, therefore, not controlled by Section 63-30-10(1), Utah Code Annotated. Even if the Court finds that Appellants' claim against the State is barred by the Governmental Immunity Act, the case should be remanded to consider the liability which may still extend to the individual respondents.

Appellants respectfully urge that the judgment of dismissal by Third District Court be reversed and that this case be remanded to the trial court for disposition on the merits of the case.

Respectfully submitted,

A handwritten signature in cursive script that reads "D. John Musselman".

D. JOHN MUSSELMAN,  
Attorney for Appellants