

1987

Morris Brinkerhoff, et al. and the Estate of  
Jacquelyn Brinkerhoff v. Walter K. Christensen,  
Conrad Christensen, Alexander J. Aerts, and Allen  
Forsyth : Petition for Rehearing

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Aron Stanton; Aron Stanton, P.C.; Attorneys for Appellant.

Carman E. Kipp, Robert H. Rees; Kipp and Christian; Attorneys for Respondent.

---

#### Recommended Citation

Petition for Rehearing, *Brinkerhoff v. Christensen*, No. 870364.00 (Utah Supreme Court, 1987).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/1728](https://digitalcommons.law.byu.edu/byu_sc1/1728)

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU  
45.9  
.S9  
DOCKET NO.

BRIEF.

**870364**

IN THE SUPREME COURT  
STATE OF UTAH

---

MORRIS BRINKERHOFF, et al.,	:	
individuals and heirs of the	:	
Estate of Decedent	:	
JACQUELYN BRINKERHOFF,	:	PETITION FOR REHEARING
Plaintiffs/Appellants,	:	
vs.	:	
WALTER K. CHRISTENSEN, CONRAD	:	
CHRISTENSEN, ALEXANDER J. AERTS,	:	
and ALLEN FORSYTH,	:	Case No. 870364
Defendants/Respondents.	:	Priority 15

---

PETITION OF PLAINTIFF/APPELLANTS

---

Aron Stanton #3077  
ARON STANTON, P.C.  
2035 East 3300 South, Suite 314  
Salt Lake City, Utah

Attorney for Plaintiffs/Appellants

Carmen E. Kipp  
Robert H. Rees  
KIPP & CHRISTIAN  
City Centre I, #330  
175 East 400 South  
Salt Lake City, Utah 84111

Attorneys for Defendants/Respondents

**FILED**  
JAN 30 1990

---

Clerk, Supreme Court, Utah

IN THE SUPREME COURT

STATE OF UTAH

---

MORRIS BRINKERHOFF, et al.,	:	
individuals and heirs of the	:	
Estate of Decedent	:	
JACQUELYN BRINKERHOFF,	:	
	:	PETITION FOR REHEARING
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
WALTER K. CHRISTENSEN, CONRAD	:	
CHRISTENSEN, ALEXANDER J. AERTS,	:	
and ALLEN FORSYTH,	:	Case No. 870364
	:	
Defendants/Respondents.	:	Priority 15

---

PETITION OF PLAINTIFF/APPELLANTS

---

Aron Stanton #3077  
ARON STANTON, P.C.  
2035 East 3300 South, Suite 314  
Salt Lake City, Utah

Attorney for Plaintiffs/Appellants

Carmen E. Kipp  
Robert H. Rees  
KIPP & CHRISTIAN  
City Centre I, #330  
175 East 400 South  
Salt Lake City, Utah 84111

Attorneys for Defendants/Respondents

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES . . . . .	ii
PETITION FOR RE-HEARING . . . . .	1
ANNEX "A"	
ANNEX "B"	

## TABLE OF AUTHORITIES

	<u>Page</u>
Article XVI, §5 [Injury Resulting in Death-Damages] Utah Constitution . . . . .	2-3-5
Article I, §26 [Provisions Mandatory and Prohibitory] Utah Constitution . . . . .	2-3-5
Article I, §24 [Uniform Operation of Law] Utah Constitution.	2-3-5
Dram Shop Act . . . . .	1-2-3-5
U.C.A. 31-11-2 . . . . .	2
U.C.A. 63-30-3 . . . . .	3-4-6
U.C.A. 63-30-10 . . . . .	6
U.C.A. 63-30-10(1)(i) . . . . .	3-5
U.C.A. 63-30-28 etc. . . . .	5
U.C.A. 63-30-34(i) . . . . .	3
Rule 24(j), Rules of the Supreme Court . . . . .	1-2
<u>Standiford v. Salt Lake City Corporation</u> , 609 P.2d 1230 (Utah 1980) . . . . .	3-4-5

### PETITION FOR REHEARING

COMES NOW the Appellants, by Attorney Aron Stanton, and Petitions the Court, in good faith and not for delay, for a re-hearing in this entitled matter.

The Court, in rendering its decision, handed down an opinion that is narrow, limited, prejudicial to justice and does not fairly address the issues and arguments raised in the Brief and the letter submitted to the Court addressing pertinent and significant authority, as allowed, pursuant to Rule 24(j), Rules of the Supreme Court.

Further, it is apparent, by the reading of the Court's opinion, the Court did not make itself knowledgeable of the facts, pleadings and papers on file, nor consider the issues raised and the arguments of the Appellants. The Court was quick to uphold the governmental immunity of the Dram Shop Act without exercising its powers of fashioning consistent and rational limits to governmental immunity based upon the issues, arguments and authorities presented.

The following points of law or fact which the Court overlooked or failed to address are stated with particularity as follows:

1. The Court's opinion states the Appellants did not challenge the constitutionality of the Dram Shop Act. The Appellants challenged the constitutionality of the Dram Shop Act. Rule 24(j), Rules of the Utah Supreme Court allow pertinent and significant authority that comes to the attention of a party after that party's Brief has been filed, or after oral argument, but before

a decision by properly advising the Clerk of the Court by letter of an original and five copies. (Emphasis added)

On April 16, 1989, Attorney for Appellants, submitted to the Clerk of the Court, in compliance with Rule 24(j), a letter pointing out the pertinent and significant authorities that, by their own wording, challenges the constitutionality of the Dram Shop Act and raises the following issues: (A copy of the letter is attached and incorporated herein by reference.)

NOTE: Rule 24(j) only allows the pointing out of the pertinent and significant authorities. Does not allow for argument. Therefore, it appears it falls to the Court to apply those pertinent and significant authorities to the case under appeal. In this case, it is pretty straight forward and the issues raised are obvious.

A. Whether the governmental immunity, claimed by Allen Forsyth, granted under the Utah Dram Shop Act, codified at U.C.A. 32-11-2 being contrary to the provisions of Article XVI, §5 [Injury Resulting in Death-Damages]; Article I, §26 [Provisions Mandatory and Prohibitory]; and Article I, §24 [Uniform Operation of Law] Utah Constitution is constitutional in this case of injury causing Jacquelyn Brinkerhoff's death?

B. Whether governmental immunity, claimed by Allen Forsyth, granted under the Utah Dram Shop Act codified at U.C.A. 32-11-2 being contrary to the provisions of Article XVI, §5 [Injuries Resulting in Death-Damages]; Article I, §26 [Provisions Mandatory and Prohibitory]; and Article I, §24 [Uniform Operation of Law] Utah Constitution is constitutional in this case of injury causing Jacquelyn Brinkerhoff's death when the State of Utah self-insures

and carries liability insurance?

C. Whether the limit of Judgement against a governmental entity or employee codified at U.C.A. 63-30-34(i) being contrary to the provisions of Article XVI, §5 [Injuries Resulting in Death-Damages] Utah Constitution is constitutional in this case of injury causing Jacquelyn Brinkerhoff's death?

D. Whether the governmental immunity, claimed by Allen Forsyth, granted to National Guard Employees codified at U.C.A. 63-30-10(1)(i) for injuries arising out of the activities of the Utah National Guard being contrary to the provisions of Article XVI, §5 [Injuries Resulting in Death-Damages; Article I, §26 Provisions Mandatory and Prohibitory]; and Article I, §24 [Uniform Operation of Law] is constitutional in this case of injury causing Jacquelyn Brinkerhoff's death?

E. The Appellants provided the Court with an informal opinion, numbered 85-92, dated January 8, 1986, (two years after the death of Jacquelyn Brinkerhoff), expressing the Attorney General's position on the Dram Shop Act and governmental immunity. The opinion is contrary to the position the State argued to the Court in this case. It is the opinion of the Attorney General the NCO Club and its employees can be held liable under Utah's Dram Shop Act. An adjunct issue is whether the State has dealt fairly with the Appellants?

Further, it is the Attorney General's opinion the NCO Club and its employees do not meet the test laid down in Standiford v. Salt Lake City Corporation, 609 P.2d 1230 (Utah 1980). Hence, it is not a governmental function as required in U.C.A. 63-30-3 and



Thus is not entitled to immunity status. A copy of the informal opinion is attached and incorporated herein by reference.

NOTE: The State of Utah was not sued, but, undertook the defense of Allen Forsyth, a National Guard employee, as required as a self-insurer and holder of liability insurance. Later, when the State maximum dollar amount had been paid out, the case was turned over to the law firm of Kipp & Christian, who represents the commercial carrier of liability insurance on the State of Utah that kicks in when the State has paid out its maximum dollar amount of self-insurance.

2. The Court did not address the test for governmental immunity and its applicability to the Camp Williams NCO Club and Allen Forsyth as laid down in Standiford v. Salt Lake City Corporation, 605 P.2d 1230 (Utah 1980), to wit:

Tests for determining governmental immunity is whether activity under consideration is of such unique nature that it can only be performed by governmental agency or that it is essential to the care of governmental activity.

Turning now to the fact of the Court overlooking or failing to address points of law and facts and their application to U.C.A. 63-30-3, as amended by the 1978 legislature.

It has been stated in scholarly analysis that the legislature designed the statutory scheme to allow the Court flexibility and adaptability in fashioning consistent and rational limits to governmental immunity. To that end, the legislature intended the Courts to have the powers to restrict the scopes of governmental immunity.

Article XVI, §5, Utah Constitution grants the Appellants the right of action to recover damages for injuries resulting in death. That right is never to be abrogated. The Dram Shop Act abrogates that right.

Article I, §26, Utah Constitution makes the provisions mandatory upon the law. Therefore, a right of action by the Appellants, to recover damages for injuries resulting in death, cannot be waived by the governmental immunity of the Dram Shop Act.

U.C.A. 63-30-28 etc. authorizes public entities to secure liability insurance covering the entity and its employees. This authorization is relevant whether a governmental immunity should be subjected to tort claims by the Appellants. Most jurisdictions waive immunity up to the face amount of the policy.

The test laid down in Standiford v. Salt Lake City Corporation did away with governmental functions and proprietary functions and looks to the activity to determine if it is essential to the core of governmental activity. Can Allen Forsyth, as a part time bartender for the Camp Williams NCO Club, hide behind the governmental immunity of the Dram Shop Act or immunity provided to National Guard employees under U.C.A. 63-30-10(1)(i)?

The Court's narrow and limited opinion which clearly does not address the issues and arguments raised in Appellants' Brief and letter to the Clerk of the Court pointing out pertinent and significant authorities as allowed by Rule 24(j) Rules of the Supreme Court has caused an injustice to the Appellants.

It is appropriate the Court grant Appellants' Petition for a rehearing and consider all the above stated points of law and fact

so the Court can, consistent with justice, fashion rational limits to governmental immunity under the Dram Shop Act; U.C.A. 63-30-3 and U.C.A. 63-30-10.

Respectfully submitted.

DATED this 5<sup>th</sup> day of January, 1990.

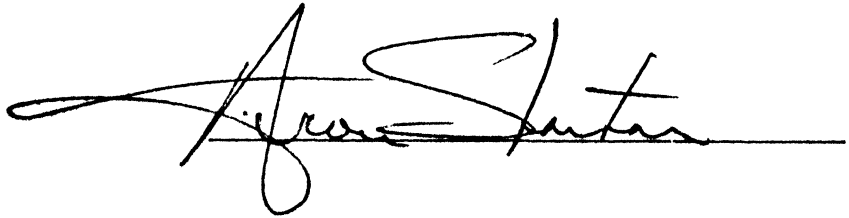
ARON STANTON, P.C.

By:   
ARON STANTON

MAILING CERTIFICATE

Mailed, postage prepaid, this 24th day of January, 1990,  
four true and correct copies of the foregoing Petition for Rehearing  
of the Appellants, to the following:

Robert H. Rees  
KIPP & CHRISTIAN  
City Centre I, #330  
175 East 400 South  
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Robert H. Rees", written over a horizontal line.

Aron Stanton P.C.  
Attorney At Law



April 26, 1989.

Utah Supreme Court  
Mr. Geoffrey J. Butler  
Clerk of the Court  
332 State Capitol Building  
Salt Lake City, Utah 84114

Re: Brinkerhoff, et al, v. Christensen, et al  
Case No. 870364

Dear Mr. Butler:

Pursuant to Rule 24(j) Citation of Supplemental Authorities, of the Rules of the Utah Supreme Court, I advise you of pertinent and significant authority that has come to my attention since the filing of Appellant's Brief.


These authorities refer to Appellant's Brief as follows:

1. Page four (4), last paragraph from bottom of page.
2. Page six (6), beginning with second line from the bottom of the page.
3. Page eight (8) Argument III.

The significant and pertinent authorities are:

1. Article I, §24 [Uniform Operators of Law].
2. Article I, §26 [Provisions Mandatory and Prohibitory].
3. Article XVI, §5 [Injuries Resulting in Death-Damages].
4. Informal Opinion No. 85-92, Dated January 8, 1986 expressing the Attorney General's position on the Dram Shop Act and governmental immunity. (Copy attached.)

Very truly yours,

  
Aron Stanton, P.C.  
Attorney at Law

AS/vh  
Enc.



85-92

THE ATTORNEY GENERAL  
STATE OF UTAH

DAVID L. WILKINSON  
ATTORNEY GENERAL

TINKER  
ATTORNEY GENERAL  
JENSEN  
Deputy  
B. MATHESON  
Assistant Attorney General

WILLIAM T. EVANS, CHIEF  
Human Resources Division  
DONALD S. COLEMAN, CHIEF  
Physical Resources Division  
STEPHEN G. SCHWENDIMAN, CHIEF  
Tax & Business Regulation Division  
EARL F. DORIUS, CHIEF  
Governmental Affairs Division  
PAUL M. WARNER, CHIEF

January 8, 1986

John L. Matthews  
Major General  
The Adjutant General  
Utah National Guard  
P.O. Box 800  
Salt Lake City, Utah 84108-0900

Re: Informal Opinion No. 85-92  
Operation of the Utah Air National Guard, Non-  
Commissioned Officers Club, in regards to ANG  
Regulation 215-2

Dear Adjutant General:

Recently you requested an opinion from our office which  
in essence asked the following basic questions:

1. If the ANG NCO club meets the requirements of Title  
12A of the Utah Code for operation as a private liquor club, does  
the Adjutant General, Utah National Guard and/or the State of  
Utah incur any liability for negligent operation of the activity,  
including suit under U.C.A. 32A-14-1, the so-called Dramshop law?

2. If the answer to the foregoing is in the  
affirmative, what would be the effect of the immunity for  
National Guard activities from suit granted by U.C.A.  
53-30-10(1)?

3. Do the provisions of ANG Regulation 215-2 relating  
to licensing provisions and compliance with State law affect the  
1983 opinions of Paul Cotro-Manes, Leland Ford and Earl Dorius?

John L. Matthews  
Major General  
The Adjutant General  
January 8, 1986  
Page 2

Informal Opinion No. 85-92

The answers to these questions are, respectively:

1. No. See discussion.
2. See discussion below.
3. Yes. See discussion.

In preparing this response to your opinion request I have reviewed a number of documents which include: Brigadier General Paul N. Cotro-Manes' June 1983 opinion, Assistant Attorney General Leland Ford's June 1983 opinion, Assistant Attorney General Earl Dorius' September 1983 opinion, ANG Regulation 215-2, LTC Vernon's Memorandum to Rod Taylor dated 29 October 1985, responses from the NCO Club dated 4 November 1985 and 15 November 1985, a letter from Major General USAF, John B. Conaway to Adjutant Generals of all states dated 29 November 1984, a letter from Major Larr V. Lunt, Utah ANG to Brig. General Ronald E. Chytraus, and a letter from LTC Craig S. Cook JA, Utah ANG Judge Advocate dated 3 December 1985. Additionally, I have independently researched and reviewed the applicable law.

Prior to addressing specific questions presented, it is of interest to note that for a period of twenty-five years the NCO Club has operated without a State liquor license. In the past few years as a result of a law suit and enactment of Regulation 215-2, the ANG NCO Club has come under increasing scrutiny. In response, opinions have been requested and given regarding operation of the UT-ANG NCO Club in consideration of Utah licensing laws and ANGR 215-2.

Former opinions base their conclusions on the grounds of concurrent jurisdiction, legitimate function of the armed services, and the supremacy clause. They surmise there is concurrent jurisdiction, that Utah through its lease has ceded concurrent jurisdiction to the United States, per U.C.A. 63-8-1, and that Congress expressly authorized the sale and consumption of liquor on premises primarily used by the armed forces as part of disciplining the militia. Pursuant to AR 210-65, former opinions found state laws and regulations subservient to federal laws and regulations.

In finding the sale and consumption of liquor on the ANG Base to be a federal activity, they cite the case of McCullough v. Maryland, (1819) 17 U.S. (4 Wheat) 316, 4 L.Ed 579, which enunciated the doctrine of federal supremacy/federal immunity from state control or regulation with respect to federal

John L. Matthews  
Major General  
The Adjutant General  
January 8, 1986  
Page 3

Informal Opinion No. 85-92

lands and activities. In addition to citing McCullough, they say "while it is the policy of the regulation to cooperate with duly constituted regulatory officials of the state (ANGR 210-65, Par. 17) still, this is a mere policy and is not an admission of any legal obligation to submit to state control." (Id. para. 1-7b.)

Concurrent jurisdiction in fact does exist, and thus it is important to note as mentioned in earlier opinions that at no time has the United States concurred in accepting exclusive jurisdiction as required in 40 U.S.C. § 255 (1982). Unless, and until, the United States does concur, it shall be conclusively presumed that no such jurisdiction has been accepted." Id. § 255. In that the United States has not indicated acceptance, concurrent jurisdiction remains giving both state and federal governments the right to enforce their laws.

In U.C.A. 63-8-1 (1985), Utah reserves the right to execute its process both criminal and civil within such territory, while ceding jurisdiction to the United States. Clearly both Utah and the United States have jurisdiction.

The question then is, if the sale and consumption of liquor on the ANG NCO base is a federal activity and if the jurisdictional basis has not changed, what effect upon the supremacy clause does ANGR 215-2 have? Our opinion is that through ANGR 215-2 the supremacy clause is waived and as of December 1, 1984 all ANG NCO Clubs must comply with the state licensing laws wherein they are located. As emphasized in Major General John B. Conaway's letter dated 29 November 1984, paragraph 3, waivers to the provisions of ANGR 215-2 cannot be considered, unless specifically allowed therein. It must be stated that nowhere in ANGR 215-2 is waiver mentioned regarding compliance with states' licensing laws.

It is our opinion that upon passage of ANG 215-2, federal supremacy and immunity were waived in regards to ANG NCO Clubs. Hereinafter, any ANG NCO Club serving liquor will not be protected under the supremacy clause from liability resulting from the sale of liquor, further, it must comply with "all applicable federal, state and local laws" in their liquor and beer sales operations. Id. 2(d). The intent to comply with state laws is further emphasized by ANGR 215-2 1(f) which states:

Dining social club organization - a private, not-for-profit membership corporate entity . . . is not entitled to the sovereign immunities or privileges given to NAFIs.



John L. Maulews  
Major General  
The Adjutant General  
January 8, 1986  
Page 4

Informal Opinion No. 85-92

(Nonappropriated fund instrumentality). It has no legal connection or affiliation with any federal organization outside of the ANG installation. It is subject to and must comply with all applicable state and local laws of the jurisdiction in which the ANG installation is located. (Emphasis added.)

On the premise that federal supremacy, insofar as ANG NCO Clubs has been waived by ANGR 215-2, and state law is now applicable we will address the questions presented for our opinion.

1. If the ANG NCO Club meets the requirements of title 32A of the Utah Code for operation as a private liquor club, does the Adjutant General, Utah National Guard and/or State of Utah incur any liability for negligent operation of the activity, including suit under U.C.A. 32A-14-1, the so-called Dramshop Law?

With ANGR 215-2 resulting in the waiver of the supremacy clause the NCO Club must comply with the Utah liquor licensing laws Title 32A. If the ANG base is under jurisdiction of the Utah Alcohol Beverage Control Commission pursuant to U.C.A. 32A-5-2, and is a non-profit corporation as required by ANGR 215-2 section 1(f), a state liquor license would be required. Whether the ANG NCO Club could meet the requirements for a state liquor license is a separate question and is not addressed in this opinion. If the licensing requirement has been met, the question then becomes, what liability, if any, attaches to the Adjutant General, Utah National Guard and/or State of Utah?

Whether or not U.C.A. 32A-14-1, Utah's Dramshop Act impose the liability upon the Adjutant General, Utah National Guard and/or State of Utah must be addressed by looking at the statute, which states:

(1) Any person who gives, sells, or otherwise provides liquor to another contrary to this title and by those actions causes the intoxication of the other person, is liable for injuries in person, property, or means of support to any third person, or the spouse, child, or parent of that third person, resulting from the intoxication.

John L. Matthews  
Major General  
The Adjutant General  
January 8, 1986  
Page 5

Informal Opinion No. 85-92

(2) A person who suffers an injury under subsection (1) has a cause of action against the intoxicated person and the person who provided the liquor in violation of subsection (1), or either of them.

(3) If a person having rights or liabilities under this section dies, the rights or liabilities provided by this section survive to or against that person's estate. (Emphasis added.)

Title 32A contains several operational restrictions relating to the unlawful sale or furnishing of liquor including: furnishing liquor to any minor, to any interdicted person or person actually, apparently, or obviously drunk. U.C.A. 32A-12-8 through 11 (Supp. 1985). Clearly, the ANG NCO Club must comply with these provisions. Accordingly, if a person while at a NCO Club becomes intoxicated and in turn injures another, the Dramshop Act would be applicable.

The Dramshop Act, however, is limited in its application by the definition provided in U.C.A. 32A-1-5(22) which states:

Person means any individual, partnership, firm corporation, association, business trust, or other form of business enterprise, including a receiver or trustee, and the plural as well as the singular number, unless the intent to give a more limited meaning is disclosed by the context.

As stated by Craig S. Cook, LTC, JA, UT-ANG in his letter dated December 3, 1985, "obviously, any bartender at the NCO Club would clearly fit under this definition. Conceivably, the NCO Club itself as a private entity would also be liable for any negligence." I also agree with LTC Cook that U.C.A. 32A-14-2 would more than likely immunize the Adjutant General and the Utah National Guard and/or State of Utah from suit. U.C.A. 32A-14-2 states:

No provision of this title creates any civil liability on the part of the state, its agencies, employees, the commission, the department, or any state political subdivisions arising out of their activities in regulating, controlling, authorizing or

John L. Matthews  
Major General  
The Adjutant General  
January 8, 1986  
Page 6

Informal Opinion No. 85-92

otherwise being involved in the sale or other  
distribution of alcoholic beverages,  
(Emphasis added.)

Any state liability would be based upon its licensing the ANG NCO Club. This theory fails in that licensing is clearly a governmental function and immunity would attach. Any liability on the Adjutant General's part would be based on his approval of the NCO license, which is required by ANGR 215-2 para. 3(b). Both the state and Adjutant General are excluded from any liability under U.C.A. 32A-14-2. Since neither are responsible for the club's daily operation, they should not incur liability simply by carrying out their governmental duties. On the other hand, employees of the club and the club as a legal entity can be held liable under Utah's Dramshop Liability Act.<sup>1</sup>

2. If the answer to the foregoing is in the affirmative, what would be the effect of the immunity for National Guard activities from suit granted by U.C.A. 63-30-10(i)?

If the Adjutant General, Utah National Guard and/or State of Utah could be held liable on some basis, U.C.A. § 63-30-10(i) would be of little help. It states:

(1) Immunity from suit of all  
governmental entities is waived for injury  
proximately caused by a negligent act or

---

<sup>1</sup> It has come to our attention that the "Citizens Council on Alcoholic Beverage Control", which acts in an advisory capacity to the Legislature, is presently in the process of constructing a proposed amendment to the Dram Shop Act. The proposed amendment will be presented in the 1986 Annual General Session. Although presently not yet in final form it will encompass concepts enunciated in the "Citizen's Council November 1985 Report to the Utah Legislature." In view of this opinion, of interest is the proposal to eliminate the State of Utah's immunity from liability as granted under U.C.A. 32A-14-2. Immunity would be eliminated for the sale of alcoholic beverages out of a state liquor store to a minor, a person apparently intoxicated, or to a known interdicted person. If the proposed amendment becomes law no longer will the state, et. al., have complete immunity under U.C.A. 32A-14-2, and the door would be open for a logical extension of liability.

John L. Matthews  
Major General  
The Adjutant General  
January 8, 1986  
Page 7

Informal Opinion No. 85-92

omission of an employee committed within the  
scope of employment, except if the injury:

(i) Arises out of the activities of the  
Utah National Guard.

On its face it appears that the very activity which  
could give rise to liability would also give rise to immunity.  
However, the Governmental Immunity Act retains immunity only for  
injuries occurring in the exercise of a governmental function.  
U.C.A. 63-30-3. The proprietary - governmental analysis was  
reanalyzed by the Utah Supreme Court in Standiford v. Salt Lake  
City Corp., 609 P.2d 1230 (Utah 1980). The court rejected the  
proprietary-governmental analysis and replaced it with a more  
workable test. "The new test for determining governmental  
immunity is whether activity under consideration is of such  
unique nature that it can only be performed by a governmental  
agency or that it is essential to the core of governmental  
activity. Clearly this new standard broadens governmental  
liability and is consistent with the plain legislative intent in  
U.C.A. 63-30-1 et seq., to expand governmental liability." Id.  
at 1237.

Under the new test it is obvious that U.C.A.  
63-30-10(i) would not include the activities of the ANG NCO Club  
in terms of the sale or distribution of alcohol. These  
activities are not of such a unique nature that they can only be  
performed by a governmental agency, nor are they ones essential  
to the core of governmental activity. It is therefore my opinion  
that U.C.A. 63-30-10(i) would not serve as a shield from  
liability to an ANG NCO Club in the sale or distribution of  
alcohol.

3. Do the provisions of ANGR 215-2 relating to  
licensing, provisions and compliance with state law  
affect the 1983 opinions of Paul Cotro-Manes, Leland  
Ford and Earl Dorius?

As discussed at the first part of this opinion, upon  
enactment of ANGR 215-2, the supremacy argument is no longer  
controlling. Earlier opinions were written prior to the  
promulgation of ANGR 215-2. Hence, this opinion limits the  
earlier opinions to the extent Air Force NCO clubs are concerned.  
Now any ANG NCO base serving liquor must comply with the state's  
licensing laws in which it is located. Although the State of  
Utah attempted to cede jurisdiction to the United States, in not  
accepting, the United States retained concurrent rather than  
exclusive jurisdiction enabling the application of both federal

John L. Matthews  
Major General  
The Adjutant General  
January 8, 1986  
Page 8

Informal Opinion No. 85-92

and state laws. To operate the club the ANG must now obtain all appropriate state licenses.

In conclusion it is our view that past opinions are greatly effected in that federal supremacy no longer protects the NCO Club from liability due to the enactment of ANGR 215-2. State law must be complied with in regards to the licensing of private clubs serving liquor. Under the present wording of U.C.A. 32A-14-2, the Adjutant General, Utah National Guard and/or State of Utah are excluded from liability provided the NCO Club is properly organized as a private non-profit corporation. On the other hand, the club and its employees can be held liable under 32A-14-1. Finally, the ANG NCO Club does not benefit from U.C.A. 63-30-10(1) in that the sale or distribution of liquor cannot be viewed as an activity so unique in nature that it can only be performed by the government, nor is it essential to the core of governmental activity. Hence, it is not a governmental function as required in U.C.A. 63-30-3 and thus is not entitled to immunity status.

Very truly yours,



PAUL M. WARNER  
Assistant Attorney General  
Chief, Litigation Division

PMW/bl

NOTE: In conformity with the Attorney General's internal policy on opinions, this (letter) opinion does not deal with issues of such broad public import that it would justify detailed scrutiny by the Attorney General himself or official publication in the manner of a formal opinion. Nevertheless, it is authoritative for the purposes of the agency requesting it and with respect to the specific questions presented, represents the position of the Attorney General as expressed through its designated staff member.