

1987

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

Utah Supreme Court

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#### Recommended Citation

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**SUPREME COURT  
BRIEF**

IN THE SUPREME COURT

STATE OF UTAH

**CKET NO.** 870364

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MORRIS BRINKERHOFF, et al	:	
Individuals and heirs of the	:	
Estate of Decedent	:	
JACQUELYN BRINKERHOFF,	:	SUPPLEMENTAL
	:	APPELLANT'S BRIEF
Plaintiffs/Appellants,	:	
vs.	:	
WALTER K. CHRISTENSEN,	:	
CONRAD CHRISTENSEN,	:	
ALEXANDER J. AERTS and	:	Case No. 870364
ALLEN FORSYTH,	:	
Defendants/Respondents.	:	

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**SUPPLEMENTAL BRIEF OF PLANITIFFS/APPELLANTS**

---

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IN THE SUPREME COURT

STATE OF UTAH

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MORRIS BRINKERHOFF, et al.,	:	
Individuals and heirs of the	:	
Estate of Decedent	:	SUPPLEMENTAL
JACQUELYN BRINKERHOFF,	:	APPELLANT'S BRIEF
	:	
Plaintiffs/Appellants,	:	
	:	
vs.	:	
	:	
WALTER K. CHRISTENSEN,	:	
CONRAD CHRISTENSEN,	:	
ALEXANDER J. AERTS and	:	Case No. 870364
ALLEN FORSYTH,	:	
	:	
Defendants/Respondents.	:	

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## ADDITIONAL STATEMENTS OF ISSUES PRESENTED ON APPEAL

Whether the governmental immunity granted under the Utah Dram Shop Act codified at U.C.A. 31-11-2 being contrary to the provisions of Article XVI, Section 5, Constitution of Utah [Injuries Resulting in Death-Damages] is unconstitutional in cases of injury causing death?

Whether the governmental immunity granted under the Utah Dram Shop Act codified at U.C.A. 31-11-2 applies when the State has liability insurance?

Whether the limit of Judgment against a governmental entity or employee granted under U.C.A. 63-30=34(1) being contrary to Article XVI, Section 5, Constitution of Utah [Injuries Resulting in Death-Damages] is unconstitutional in case of injury causing death?

## UTAH CONSTITUTIONAL PROVISIONS TO BE REVIEWED

Article I, Section 24 [Uniform Operations of Law]. All laws of a general nature shall have uniform operation.

Article I, Section 26 [Provisions Mandatory and Prohibitory]. The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Article XVI, Section 5 [Injuries Resulting in Death-Damages]. The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation except in cases where compensation for injuries resulting in death is provided for by law.

## STATUTES TO BE REVIEWED

U.C.A. 31-11-2 [Immunity of State, State Agencies and Employees,

and Political Subdivisions]. No provision of this act shall create any civil liability on the part of the State, its agencies, employees, or political subdivisions, arising out of their activities in regulating, controlling, authorizing, or otherwise being involved in, the sale or other distribution of intoxicating liquor.

U.C.A. 63-30-34(1) [Limit of Judgment Against Governmental Entity or Employee]. Except as provided in Subsection (3), if a judgment for damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds \$250,000 for one person in any one occurrence or \$500,000 for two or more persons in any one occurrence, the Court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the injury is characterized as governmental.

#### STATEMENT OF CASE

Same as stated starting on page 2 of Appellants' Brief.

#### SUMMARY OF ARGUMENTS

U.C.A. Section 32-11-2 of the Dram Shop Act is contrary to the provisions of Article XVI, Section 5, Constitution of Utah and is unconstitutional in cases of injury causing death.

U.C.A. Section 32-11-1 of the Dram Shop Act granting governmental immunity is waived when the State has liability insurance.

U.C.A. Section 63-30-34(1) limiting judgments against a governmental entity or employee is contrary to the provisions of Article XVI, Section 5, Constitution of Utah and is unconstitutional in cases of injury causing death.

## ARGUMENT I

U.C.A. 31-11-2 is contrary to the provisions of Article XVI, Section 5, Constitution of Utah.

The Constitution of Utah is the supreme law of Utah and the obligation to guard and enforce every right secured by that Constitution rests on the Courts. "Where the text of the Constitution is clear and distinct, no restriction on its plain and obvious impart should be admitted unless the inference is irresistible." Martin v. Hunter Lessee, 14 U.S. 304 (Va. 1816).

The text of Article XVI, Section 5, Constitution of Utah is clear and distinct. It states, "The right of action to recover for injuries resulting in death, shall never be abrogated..." (emphasis provided). Never is defined by Webster as "at not time" and "in no case."

The Dram Shop Act allows the children and spouse of Jacquelyn Brinkerhoff to bring suit against the intoxicated person (Alexander Aerts) and the person (Allen Forsyth) who provided the intoxicating liquor for injuries causing the death of Jacquelyn Brinkerhoff resulting from the intoxication. However, the immunity granted by U.C.A. 31-11-2 abrogates that right because Allen Forsyth is an employee of the National Guard. The abrogation is contrary to Article XVI, Section 5, Utah Constitution and therefore unconstitutional.

This argument is further strengthened by two other provisions of the Utah Constitutional. Article I, Section 26 [Provisions Mandatory and Prohibitory] states: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." There are no express words declaring Article XVI, Section 5 to be anything other than what it states. The Court cannot

add any new provision to the Constitution by construction. See In re State Tonnage Tax Cases, 79 U.S. 204 (Alabama 1870). The Constitution of a State is mandatory on the Legislature. See Graves vs. Slaughter, 40 U.S. 449 (La. 1841). Nor should the Court construe Article XVI, Section 5 so as to defeat its evident purpose, but rather to give it effective operation. Constitutional principles cannot be allowed to yield simply because of disagreement with them. The Utah Constitution grants the spouse and children of Jacquelyn Brinkerhoff a right to sue Allen Forsyth. That right is secured by the Utah Constitution and there can be no rule making or legislation which would abrogate it. See Miranda vs. State of Arizona, 384 U.S. 436 (Arizona 1966).

Article XVI, Section 5 is general in nature and not specific in type or category of injury causing death. Article I, Section 24 [Uniform Operation of Law]. All laws of a general nature shall have uniform operation. The governmental immunity granted by the Dram Shop Act cannot be an exception carved from Article XVI, Section 5, Constitution of Utah granting right of action to recover for injuries resulting in death.

#### ARGUMENT II

##### GOVERNMENTAL IMMUNITY GRANTED UNDER THE DRAM SHOP ACT CODIFIED AT U.C.A. 31-11-2 IS WAIVED BY HAVING LIABILITY INSURANCE

Sovereign immunity is an eroding doctrine with many exceptions and no longer defended for total government immunity. Most States have abolished governmental immunity either judicially or by statute. According to the Restatement of Torts, Section 895B (1977) places Utah among the most conservative of the States.

The historic roots of sovereign immunity was to protect the government entity from unexpected and unplanned for expenses. The availability of insurance protection with statutory provisions for ceilings on liability allows the governmental entity to accurately budget for potential tort liability.

Our State Legislature recognizing the erosion of governmental immunity and the need for sound financial planning enacted U.C.A Section 63-30-28 et. seq. allowing governmental entities to self insure and/or purchase commercial insurance. The State of Utah is self insured up to a certain point and has purchased excess commercial insurance against any risk for which the State could become liable.

During the course of this action against Allen Forsyth, the State of Utah through the Attorney General's Office defended Allen Forsyth for whom the State has a duty to indemnify as an employee. The State reaching its self-insured limit or for whatever reason kicked this case over to its commercial insurance carrier to defend. The commercial insurance carrier retained the law firm of Kipp & Christian to defend Allen Forsyth. A clear admission the State has waived governmental immunity granted to it under the Dram Shop Act codified at U.C.A. 31-11-2.

Now we have a commercial insurance carrier, collecting premiums from the State of Utah for excess liability insurance they are providing to protect the State against the tort claims of the children and spouse of Jacquelyn Brinkerhoff, arguing the State has governmental immunity and therefore, are not liable to indemnify the State.

There is good support for the proposition, where a State has liability insurance, the State is liable to the amounty of the insurance coverage. See Galvan vs. City of Albuquerque, 531 P.2d

1208 (New Mexico 1975) and Colorado Statute, C.R.S. Section 24-10-104.

The California Supreme Court fully discarded governmental immunity from tort liability in Muskopf vs. Corning Hospital District, 359 P.2d 457 (California 1961). This landmark case recounts the doctrines history, beginning with its English roots. According to Muskopf and contrary to English cases, public convenience does not outweigh individual compensation. Risks imposed by governmental negligence should not be borne by affected individuals; they should rather be spread throughout society, even at the cost of public inconvenience. The Court stated, "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.

Liability insurance protects the State of Utah from unexpected and unplanned fee expenses. Liability insurance cures the problem for which governmental immunity was enacted. Government of the people, by the people, for the people, should not place the government above the law, for its negligent acts.

Jacquelyn Brinkerhoff had a right not to have her life wrongfully extinguished. That right is secured by our Federal and State Constitution and there can be no rule making or legislation which would abrogate that right. Miranda, supra. U.C.A. 32-11-1 gives the children and spouse of Jacquelyn Brinkerhoff a cause of action against Allen Forsyth for providing the intoxicating liquor to Alexander Aerts who wrongfully took Jacquelyn Brinkerhoff's life by causing injury resulting in death within six (6) minutes after he left the Camp Williams NCO Club. Article XVI, Section 5, Utah Constitution provides that Cause of Action shall never be abrogated and Article 1, Section 24,

Utah Constitution provides that right to have uniform operation.

The Constitution is the supreme law of the land and U.C.A. Section 32-11-2 cannot abrogate the right of the children and spouse of Jacquelyn Brinkerhoff's cause of action against Allen Forsyth, which the State of Utah must indemnify, for redress for their loss. The Constitution is intended to preserve practical and substantial rights of its citizens, not to maintain theories. The theory of governmental immunity is unconstitutional in light of the Utah Constitution, in this case and fails with Utah's right to self insure and purchase excess commercial insurance against any risk for which Utah could become liable.

U.C.A. Section 32-11-2 is a law which is constitutional as applied in one manner, i.e., protecting the State and employees only as liquor wholesalers, and contravenes the Utah Constitution as applied in another, i.e., the selling of intoxicating liquor by Allen Forsyth to Alexander Aerts which caused injury resulting in death of Jacquelyn Brinkerhoff. See Watson vs. Buck, 61 S.Ct. 962, 13 U.S. 387 (Florida 1941).

### ARGUMENT III

U.C.A. Section 63-30-34(1) is contrary to the provisions of Article XVI, Section 5, Constitution of Utah.

U.C.A. Section 63-30-34(1) limits judgment for damages for personal injury against a government entity, or an employee whom a government entity has a duty to indemnify to \$250,000 for one person in any one occurrence or \$500,000 for two or more persons in any one occurrence.

Article XVI, Section 5, Constitution of Utah provides amounts shall not be subject to any statutory limitations except in cases

where compensation for injuries resulting in death is provided for by law.

There are no other statutory provisions which speak to limitations of judgments against a government entity for injuries resulting in death. U.C.A. Section 63-30-34(1) limits judgments for damages against a governmental entity for personal injuries only. Therefore, any statutory limitation based on U.C.A. Section 63-30-34(1) would be unconstitutional in cases where compensation for injuries resulting in death are involved.

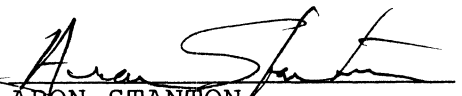
#### CONCLUSION

Article XVI, Section 5, Constitution of Utah secures for the children and spouse of Jacquelyn Brinkerhoff the right of action against Allen Forsyth, which the State of Utah has a duty to indemnify, to recover damages for injuries resulting in the death of Jacquelyn Brinkerhoff. The amounts recoverable are not subject to any statutory limitations for compensation because there are none which speak to compensation for injuries resulting in death other than Article XVI, Section 5, Constitution of Utah. This secured right is uniform in operation and is mandatory in law and is prohibitive against any contrary legislation.

The lower Court ruling should be reversed and remanded for a hearing to determine damages.

DATED this 24 day of February, 1989.

ARON STANTON, P.C.

By:   
ARON STANTON  
Attorney for Plaintiffs/  
Appellants

MAILING CERTIFICATE

I hereby certify on this 24<sup>th</sup> day of February, 1989, a true and correct copy of the foregoing SUPPLEMENTAL BRIEF OF PLAINTIFFS/ APPELLANTS was mailed, postage prepaid, first class, U.S. Mail to:

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