

1988

Marjorie Allisen v. American Legion Post No. 134 : Brief of Appellant

Utah Supreme Court

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DOCKET NO. 880031
IN THE SUPREME COURT OF THE STATE OF UTAH

MARJORIE ALLISEN, :

Plaintiff/Respondent, : Supreme Court
Case No. 880031
vs. : (District Court
Case No. 38319)

AMERICAN LEGION POST NO. 134, :

Defendant/Appellant. :

BRIEF OF THE APPELLANT

INTERLOCUTORY APPEAL FILED FROM

THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARJORIE ALLISEN, : BRIEF OF THE APPELLANT

Plaintiff/Respondent, :

vs. :

AMERICAN LEGION POST NO. 134, : Supreme Court
Case No. 880031
(District Court
Defendant/Appellant. : Case No. 38319)

Comes now Defendant/Appellant by and through its
counsel, Barry Gomberg of David Bert Havas and Associates, and
respectfully submits the following Brief of the Appellant
pursuant to Rule 24 of the Utah Supreme Court.

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1. PARTIES

- | | | |
|----|---|--|
| A. | MARJORIE ALLISEN | Plaintiff
Respondent
Referred to herein as "Allisen" |
| B. | AMERICAN LEGION POST
#134 | Defendant/Third-Party Plaintiff
Appellant
Referred to herein as "the Legion" |
| C. | STATE OF UTAH DEPART-
MENT OF TRANSPORTATION | Third-Party Defendant
Respondent
Referred to herein as "UDOT" |
| D. | UTAH POWER & LIGHT
COMPANY | Third-Party Defendant
Respondent
Referred to herein as "UP&L" |
| E. | CLEARFIELD CITY | Third-Party Defendant
Referred to herein as "Clearfield" |

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4. JURISDICTIONAL STATEMENT

Authority for Jurisdiction: This appeal was granted by Order of this Court on March 1, 1988, pursuant to Rule 5 of the Utah Supreme Court.

5. STATEMENT OF ISSUES

The issues of law presented here are:

a. Does the version of the Utah Dram Shop Act in effect at the time of the accident apply to those who only provide "light" beer as defined by the Alcoholic Beverage Control Act?

b. Does the Utah Dram Shop Act in effect at the time of the accident require that the provider of alcohol breach a duty of ordinary care in order to be found liable, or does the statute create strict liability?

c. If the American Legion is found to have contributed to the cause of the accident by providing alcohol to Wesley Harju, does any comparative negligence on Plaintiff's part reduce her right to recover from Defendant?

d. If the American Legion is found to have contributed to the cause of the accident by providing alcohol to Wesley Harju, does any negligence on the part of Wesley Harju reduce the amount of damages for which American Legion may be held liable?

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e. If the American Legion is found to have contributed to the cause of the accident by providing alcohol to Wesley Harju, does any contributory negligence on the part of the State of Utah Department of Transportation, Clearfield City, or the Utah Power & Light Company reduce the amount of damages for which American Legion may be held liable?

f. If the American Legion is found to have contributed to the cause of the accident by providing alcohol to Wesley Harju, is the American Legion entitled to contribution from any other entity which may have contributed to the accident through its own negligence?

6. STATUTORY AUTHORITY

The statutes, rules or cases in support of Appellant's position are as follows:

STATUTES:

Utah Code Ann. Section 16-6-13.1(8)(d)
Utah Code Ann. Section 32-1-3 (1953 as amended)
Utah Code Ann. Section 32-1-36.5(1)(1)
Utah Code Ann. Section 32-7-14
Utah Code Ann. Section 32-7-24(b) and (c)
Utah Code Ann. Section 32-11-1 et seq. (the Utah Dram Shop Act in effect as of January 30, 1985)
Utah Code Ann. Section 32A-1-22 (1985)
Utah Code Ann. Section 32A-14-1 et seq. (the Utah Dram Shop Act enacted during 1985 session and amended in 1986)
Utah Code Ann. Section 63-30-8 (1953, as amended)
Utah Code Ann. Section 68-3-11
Utah Code Ann. Section 78-27-38 (1953 as amended)
Utah Code Ann. Section 78-27-39 (1953 as amended)
Utah Code Ann. Section 78-27-40(3) (1953 as amended)

A copy of these statutes are attached as Appendix A.

7. STATEMENT OF THE CASE

This is an interlocutory appeal of rulings made by the Second Judicial District Court of Davis County in a civil damages ("dram shop") case. The rulings being appealed include a denial of the Motion of American Legion Post No. 124 (hereafter "the Legion") to Dismiss or in the Alternative for Summary Judgment, and the granting of Third-Party Defendants' Motion for Summary Judgment.

Oral argument was held October 27, 1987, on Third-Party Defendants' Motion; a written Order based on the bench ruling was signed by the Honorable Douglas L. Cornaby, District Court Judge presiding, on January 6, 1988. This order confirmed an earlier ruling entered June 24, 1986. The interlocutory appeal was filed January 25, 1988.

Wesley Harju (hereafter "Harju") consumed approximately six beers within a several hour period on January 30, 1985, at the Legion. Afterward, as he was driving from the parking lot of the Legion, Harju's vehicle struck a pedestrian, Marjorie Allisen (hereafter "Allisen"), the Plaintiff in this action, at the intersection of State Route 126 and 800 North in Clearfield. Allisen was injured as a result of the accident. Allisen brought this action against the Legion under Utah Code Ann. Section 32-11-1 (1), the Utah Dram Shop Act. The Post filed the notices

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required by the Utah Governmental Immunity Act for claims against three governmental entities, Clearfield City (hereafter "Clearfield"), Davis County and the State of Utah Department of Transportation (hereafter "UDOT"). The Legion brought a Third-party Complaint against those entities (except Davis County) along with Utah Power & Light Company (hereafter "UP&L") and Mountain States Telephone & Telegraph for contribution. The Legion's Third-Party Complaint was based upon a claim that the reason Harju ran into Allisen was because of negligent design and maintenance of the intersection and negligent placement and maintenance of a utility pole at said intersection. The Legion stipulated to dismissing Mountain Bell after UP&L admitted ownership and placement of the utility pole.

8. SUMMARY OF ARGUMENTS

POINT NO. I: The version of the Utah Dram Shop Act in effect at the time of the accident did not apply to those who provided "light" beer as defined by the Utah Liquor Control Act, Utah Code Ann., Title 32. The Liquor Control Act contains extensive definitions of terms used in that title. Included are definitions of "liquor" and "light beer". These definitions are mutually exclusive. The Utah Dram shop Act in effect at the time of the accident applies to "liquor" and not to "light beer". The Legion only served Harju (the driver) "light beer". Thus, the

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Legion was not included in the coverage of the Utah Dram Shop Act, and this entire action should be dismissed.

POINT NO. II: The legislative history of the Utah Dram Shop makes it evident that the version of that act in effect as of January 30, 1985 did not create dram shop liability for giving selling or otherwise providing beer. Legislative actions taken after the accident show that the Legislature itself was certain that the version of the Utah Dram Shop Act in effect in 1985 did not cover "light beer". In fact, in 1986 the Legislature amended the Utah Dram Shop Act to include in its coverage some providers of beer.

POINT NO. III: If the Legion is found liable under the Utah Dram Shop Act, it is entitled to contribution from other tortfeasors who contributed to the accident. The Legislature has evidenced support for a variety of social policies which must be balanced by the courts in any given situation. It cannot be said that the Legislature evidenced, in its adoption of the Utah Dram Shop Act, an intent to ignore the general rules regarding contribution. Without an explicit showing of such intent, there is a presumption that the normal rules regarding contribution apply.

POINT NO. IV: The Legion is entitled to contribution despite the fact that the Utah Legislature abolished contribution

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after the cause of action arose. When the Legislature modified the rules regarding contribution it did so in conjunction with changes in joint and several liability. It would be grossly unfair to deprive a party of the right to contribution from co-tortfeasors without protecting that party from exposure to liability which exceeds its pro rata portion of fault.

POINT NO. V: The Legion, UDOT and UP&L are "joint tortfeasors" within the meaning of the Utah Comparative Negligence Act. There can be joint tort-feasors in a dram shop action. Nothing in the overall statutory scheme precludes such. Analogies to Workers' Compensation are inappropriate.

POINT NO. VI: The standard of care imposed by the Utah Dram Shop Act owed by one who serves alcohol in violation of its terms needs to be clarified. There has been some confusion as to the standard of care required by the Utah Dram Shop Act. It would be extremely helpful for this Court to address those questions if a trial in this matter will be necessary.

9. ARGUMENT

POINT NO. I

THE VERSION OF THE UTAH DRAM SHOP ACT IN EFFECT AT THE TIME OF THE ACCIDENT DID NOT APPLY TO THOSE WHO PROVIDED LIGHT BEER AS DEFINED BY THE UTAH LIQUOR CONTROL ACT, UTAH CODE ANN., TITLE 32.

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The definitions of "light beer" and "liquor" under the Utah Liquor Control Act (which is Title 32 of Utah Code Ann. in which the Utah Dram shop Act is located) preclude assessing liability under its terms for one who only provides "light beer." "Light beer" was defined by the Utah Legislature at the time of the accident by Utah Code Ann. Section 32-1-3 as having not more than 3.2 per centum of alcohol by weight. The definition of "liquor" operable at that time, as defined in the same code section explicitly excludes "light beer."

Before Utah Code Ann. Section 32-11-1(1) was repealed in 1985 it stated that:

Any person who gives, sells, or otherwise provides intoxicating liquor to another contrary to Subsection 16-6-13.1(8)(d), subsection 32-1-36.5(1)(1), section 32-7-14 or subsection 32-7-24(b) or (c), and thereby 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.

Since the Utah Liquor Control Act specifically excludes "light beer" from the definition of "liquor" the Dram Shop Act in effect at the time of the accident did not include providers for beer.

It must be concluded that the Legislature has chosen its words carefully. Words and phrases are to be construed as they are defined by statute. Utah Code Ann. Section 68-3-11. "The rule is well established that the General Assembly's own

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construction of its language, as provided by definitions, controls in the application of a statute. [citations omitted]. This definition will be given great weight against any claim that application of the statutory definition defeats the general purpose of the statute." Ohio Civil Rights Commission v. Parklawn Manor, Inc., 41 Ohio St. 2d 47, 50; 322 N.E. 2d 642 (1975).

Moreover, the specific statutory provisions included in the relevant version of the Dram Shop Act also preclude application to the Legion:

1. Subsection 16-6-13.1(8)(d) applies only to establishments with state liquor stores on their premises. That subsection also only applies to liquor and wine (items which can only be sold publicly in Utah in State Liquor Stores). The Legion has no state liquor store. Further, the Legion never provided Harju with either liquor or wine.

2. Subsection 32-1-36.5(1)(1) only applies to providing liquor or wine to minors. The Legion never provided either liquor or wine to Harju, and Harju was not a minor at the time of the accident. (The Driver's Report of Traffic Accident lists Mr. Harju's birth date as March 11, 1931.)

3. Section 32-7-14 only applies to those who provide alcoholic beverages to persons under the influence of liquor. The evidence is uncontroverted that Harju had no other alcoholic

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beverage the day of the accident other than beer. He was, therefore, not under the influence of liquor.

4. Finally, subsections 32-7-24(b) and (c) apply only to providing liquor to persons apparently under the influence of liquor. Again, Harju was not under the influence of liquor and the Legion provided him none.

It is apparent that none of the four statutory subsections included in the Dram Shop Act in effect at the time of the accident may be said to have been violated by the Legion. Therefore, the Legion may not be held to have violated the Act as a whole.

Allisen can only maintain this action against the Legion if the plain meanings and definitions set out by the Legislature are tortured beyond reason. Although Allisen may be able to point out a logical weakness in the overall structure of the Dram Shop Act in effect at the time of the accident, the remedy for such weakness is for the Legislature to amend the statute. That is exactly what was done two year ago, as will be discussed in the next section. Meanwhile, to apply those changes retroactively deprives the Legion of any notice that their conduct could result in liability and thus violates fundamental concepts of procedural fairness.

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POINT NO. II

THE LEGISLATIVE HISTORY OF THE UTAH
DRAM SHOP ACT MAKES IT EVIDENT THAT
THE VERSION OF THAT ACT IN EFFECT
AS OF JANUARY 30, 1985 DID NOT
CREATE DRAM SHOP LIABILITY FOR
GIVING, SELLING OR OTHERWISE
PROVIDING BEER.

If there could have been any doubt as to the Dram Shop Act's coverage in January 1985, that doubt was dispelled by the Utah State Legislature's subsequent actions with regard to that Act. In 1985 the Utah Legislature repealed the old Title 32 and replaced it with Title 32A which became effective in July, 1985. The Utah Dram Shop Act became Chapter 14 of the new Alcoholic Beverage Control Act (Title 32A). Dram shop liability was not expanded beyond its previous dimensions under the newer Act.

There had been widespread criticism of the pre-1986 Dram Shop Act's exclusion of beer from its coverage. Clearfield, in its Memorandum in Support of Motion for Summary Judgment in the lower court, included an Affidavit of Jerry D. Fenn. A copy of that affidavit is attached hereto as Appendix B. In 1985 Fenn chaired the Citizens' Council on Alcoholic Beverage Control (hereafter the "Council"). The Council was a statutorily-created, bi-partisan group formed to consider, investigate and inquire into all matters related to the liquor laws of Utah. See Utah Code Ann. Section 32A-1-22 (1985).

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Fenn's Affidavit describes the genesis of the Report and Recommendation of the Citizen's Council on Alcoholic Beverage Control to the Utah Legislature. That report is included in Fenn's Affidavit. Prepared in the summer of 1985, the Report recommended expanding the coverage of the Utah Dram Shop Act to include coverage for those who provide beer. The Report states at pages 8 and 9:

The dram shop statute (the "Statute") presently creates liability only for those giving, selling or otherwise providing "liquor." The Statute does not encompass beer. By limiting the statute to "liquor", only a small percentage of those who furnish alcoholic beverages are subjected to liability. Intoxication stemming from the consumption of beer is clearly a significant issue facing society. The incidents of beer-induced intoxication are not minimal. The Council is of the opinion that those who sell, give or otherwise provide beer to others should not escape the consequences for their actions in circumstances where those who furnish liquor would be liable. The Citizens' Council recommends an amendment to the Statute to encompass all "alcoholic beverages."

Apparently, because of a vigorous lobbying effort by the Utah Grocers' Association, among others, the exclusion for beer was not totally abolished. Instead, the Act, as amended in 1986, provides liability only for any person who directly "gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage ..." Note that providers of "liquor" are still held liable regardless of where the liquor is consumed. The broader coverage for those who

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provide "alcoholic beverages" (which includes beer) is reserved for those providers who allow consumption on their premises. This exception excludes grocers and others who sell only beer, and who do not allow it to be consumed on their premises.

The changes adopted by the Utah Legislature in 1986 clearly show that the Legislature believed that the Dram Shop Act in effect in 1985 did cover those who provided only "light beer". Their amendment of the statute, in the context of the debate taking place at the time, shows that it was felt that the term "alcoholic beverages" needed to be used to bring beer under its purview. The pre-1986 versions of the Dram Shop Act covered only "liquor." Again, it must be presumed that the Legislature says what it means and means what it says. Its deliberate effort to amend the Dram Shop Act to include beer can only be interpreted to mean that the legislature did not believe beer was covered prior to that time.

POINT NO. III

IF THE LEGION IS FOUND LIABLE UNDER
THE UTAH DRAM SHOP ACT, IT IS
ENTITLED TO CONTRIBUTION FROM OTHER
TORTFEASORS WHO CONTRIBUTED TO THE
ACCIDENT.

Clearfield and the other third-party defendants, UDOT and UP&L, argued below that the legislative intent underlying the Utah Dram Shop Act militates against allowing contribution from a third-party defendant. It is correct that the Act requires

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suppliers of intoxicants to assume liability for damages caused to third parties by the consumers of those intoxicants. The Dram Shop Act, however, does not exist in a vacuum. Other legislative pronouncements also apply.

A substantial cause of the accident injuring Allisen was the negligent design and maintenance of the intersection where the accident occurred. The Utah State Legislature chose to waive governmental immunity specifically for defective, unsafe, or dangerous conditions of any highway, road, street, crosswalk or sidewalk. Utah Code Ann. Section 63-30-8 (1953, as amended)

To excuse UDOT and Clearfield for the abominable conditions at that intersection simply because they were brought into this action by the Legion instead of Allisen would directly thwart the Legislature's intent in passing the Utah Governmental Immunity Act. Since the only circumstances under which third-party defendants could be found liable would be if it was determined that their negligence caused the accident, and since those entities would only be assessed for that portion of a verdict which their negligence caused, and since any and all contribution would go to Allisen, the intended beneficiary of the legislature's protection, the third party defendants should not have been dismissed from the lawsuit.

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POINT NO. IV

THE LEGION IS ENTITLED TO CONTRIBU-
TION DESPITE THE FACT THAT THE UTAH
LEGISLATURE ABOLISHED CONTRIBUTION
AFTER THE CAUSE OF ACTION AROSE.

Clearfield, UDOT, and UP&L also argued in the trial court that since the Utah Legislature did away with the right to contribution pursuant to Utah comparative negligence statutes adopted in 1986, Utah Code Ann. Sections 78-27-38-40, they cannot now be liable for contribution. This contention is based upon the mistaken notion that since the right to contribution "vests" at the time when the tortfeasor has paid more than its pro rata share of liability, and since the right to contribution was abolished prior to the time when the Legion actually had to write out a check to Allisen, that Clearfield, UDOT and UP&L escape all liability.

A tortfeasor may not be able to receive contribution from a co-tortfeasor until it actually pays more than its pro rata portion of damages, but the common liability upon which the co-tortfeasor's obligation rests is created at the time of the tortious conduct. In Employers Mutual Casualty Co. v. Chicago, St. P. M. & O. Ry. Co., 235 Minn. 304, 309; 50 N.W.2d 689, 693; cited approvingly in Farmers Insurance Exchange v. Village of Hewitt, 143 N.W.2d 230, 234 (Minn 1966) the court said:

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... 'Common Liability' exists immediately after the acts of the tortfeasors which give rise to a cause of action against them. [Citations omitted.] But, in addition to the requirement of common liability, the right to contribution rests on a payment by one which thereby relieves the other from liability.

Thus, there is a distinction between the common liability which underlies the right to contribution and the right to immediate payment to fulfill one's obligation to contribute. Clearfield obfuscated that distinction in an effort to avoid the conclusion that Clearfield's (and the other third-parties') common liability existed at the point in time when the condition of the intersection caused the accident. The fact that the Legislature abolished contribution before the Legion actually had to pay Allisen is irrelevant.

Clearfield's argument below is inconsistent with its (and the Legion's) position regarding the applicability of the Dram Shop Act to providers of beer. Regarding contribution, Clearfield argues that the modification of the Comparative Negligence Act ought to be applied to a cause of action which arose prior to that modification. In contrast, however, Clearfield has correctly argued that later changes to the Dram Shop Act demonstrate that the earlier version was in effect at the time of the accident. Consistent logic dictates that both statutory modifications be prospectively applied. Thus, any

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change in the Comparative Negligence Act should not affect the Legion's right to contribution in this case.

Clearfield's reliance below on Unigard Insurance Co. v. City of LaVerkin, 689 P.2d 1344 (Utah 1984) is misplaced. In that case the Utah Supreme Court was faced with the prospect of having to dismiss a claim for contribution against a governmental agency which allowed a dangerous road condition to develop because the city claimed that over a year had elapsed since the accident, and, therefore, the Sovereign Immunity Act barred the claim. The court refused to dismiss the claim for contribution based upon the Utah State Legislature's basic policy underlying the Comparative Negligence Act, "which was designed to spread the loss for injuries among all who are responsible." Id. at 1346. Spreading the loss for Allisen's injuries to all who are responsible for them requires reversing third-party defendants' dismissal.

If the third-party defendants' dismissal is not reversed, a most unjust situation could be created. Because the Legion was sued before contribution was modified, conceivably, the Legion could be held jointly and severally liable for the entirety of Allisen's damages (less the approximately \$52,000 already paid by Harju's insurance carrier). This could occur despite the fact the Legion may have only been slightly responsible for those injuries. Such a result would flip on its head

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the Legislature's purpose in doing away with contribution, coupled with reducing exposure to liability to that proportion representing its fault.

POINT NO. V

THE LEGION, UDOT AND UP&L ARE
"JOINT TORTFEASORS" WITHIN THE
MEANING OF THE UTAH COMPARATIVE
NEGLIGENCE ACT.

Clearfield, UDOT and UP&L based their Motion for Summary Judgment on the argument that they ought not be held liable for contribution because they were not "joint tortfeasors" with the Legion, and, therefore, could not be liable under Utah Code Ann. Section 78-27-39 (1953, as amended). The statutory definition of "joint tort-feasor" found in Section 78-27-40(3) states: "As used in this section, 'joint tort-feasor' means one of two or more persons, jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." Under this definition and the facts as taken for purposes of this appeal, third-party defendants are certainly "joint tort-feasors" with the Legion.

Prosser has described the confusion and uncertainty which surround the terms "joint tort" and "joint tort-feasors". W. Prosser, The Law of Torts, Section 46 (1984). There described are the various meanings given to those terms. An example of

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such diversity is apparent in the recent Utah Supreme Court decision of Krukiewicz v. Draper, 725 P.2d 1349 (Utah 1986). The Court was faced with the question of whether an employer, vicariously liable for an automobile accident involving his employee, was to be considered a joint tort-feasor for purposes of contribution. Despite the employer's contention that since he was only derivatively liable under the doctrine of respondeat superior, the Court held that the employer was a joint tort-feasor. In doing so the Court relied upon the definition contained in Section 78-27-40(3) at issue here. The Court cited approvingly the case of Blackshear v. Clark, 391 A.2d 747, 748 (Del. 1978):

The basis of liability is not relevant, nor is the relationship among those liable for the tort. In short, it makes no difference whether the [master's] liability is based upon the doctrine of respondeat superior or any other legal concept. The point is that both it and the [servant] are (at least) "severally" liable for the same injury to plaintiff . . . (emphasis in original).

Contrast that definition with the discussion of the basis for contribution under joint liability in Farmers Insurance Exchange v. Village of Hewitt, 143 N.W.2d at 233. That case was also a dram shop action. The would-be contributor defended by arguing that it could not be held liable for contribution since its possible liability was statutorily distinct from that of the

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seeker of contribution (similar to Clearfield's arguments here). The Court rejected that argument and required contribution saying, "Contribution rests on common liability, not on joint negligence or joint tort. Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds." Id. It is interesting that while the Minnesota Court distinguished "common liability" from "joint tort", the definition it gave for "common liability" is virtually identical to the Utah statutory definition of "joint tort-feasor". Utah Code Ann. Section 78-27-40(3).

Clearfield attempted to bolster its argument below by analogizing Dram Shop Act liability to Workers' Compensation liability. Citing Phillips v. Union Pacific Railroad Company v. Hammary Furniture, 614 P.2d 153 (Utah 1980), Clearfield reasoned that since an employer cannot be a joint tortfeasor with regard to one of its employees, that a third-party cannot be a joint tort-feasor with a Dram Shop under a civil damages statute. Phillips is inapposite for a variety of reasons. To summarize, however, these distinctions exist between Workers' Compensation and the Utah Dram Shop Act:

1. Workers' Compensation is an insurance statute; the Dram Shop Act defines a tort. As the Phillips Court held, "Our

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statute defines joint tort-feasor as one of two or more persons jointly or severally liable in tort for the same injury. The liability of the employer [under Worker's Compensation] is not tort liability at all, but only required that the injured employee be in the course and scope of the employment." (emphasis in original) Phillips at 154. Regardless of whether liability is based upon a negligence standard or strict liability (a question discussed in the next section) a Dram Shop operator must engage in some wrongful conduct in order for liability to result. That, of course, is not true for an employer to be found liable under Workers' Compensation. Dram Shop Act liability, then, is surely similar enough to negligence under the governmental Immunity Act to allow for joint liability between the two.

2. Workers' Compensation remedies generally provide specified number of weeks of an employee's salary in exchange for the loss of a particular appendage or organ. In contrast, Dram Shop liability results in traditional tort measures of damages.

3. Workers' Compensation sets the limits of an employer's liability, while the Dram shop Act in effect at the time of the accident did not. To allow contribution from an employer might permit an employee to exceed that liability ceiling. No such difficulty exists under the Dram Shop Act.

Dram Shop Act liability is more akin to the master-servant vicarious liability which allowed contribution under

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Krukiewicz than Workers' Compensation which precluded contribution under Phillips. The distinction between common law tort liability and liability under the Dram Shop Act which Clearfield, UDOT and UP&L urged in the court below is both nonexistent and irrelevant. Joint liability ought be allowed with a right of contribution between the Legion and Clearfield, UDOT and UP&L.

POINT NO. VI

THE STANDARD OF CARE IMPOSED BY THE
UTAH DRAM SHOP ACT OWED BY ONE WHO
SERVES ALCOHOL IN VIOLATION OF ITS
TERMS NEEDS TO BE CLARIFIED.

This final point will doubtless appear a strange one for the Legion to be raising at this point. Consideration of judicial economy requires it be raised now, since failing to do so might very well result in the necessity of another appeal after trial (if a trial is ordered at all given the arguments related to the inapplicability of the Dram Shop Act to the Legion).

The lower court held in its June 24, 1986, ruling that the Utah Dram Act is a negligence-based statute, meaning that the provider of the intoxicants must provide the alcohol in a negligent manner before liability attaches. Allisen cited authority from several jurisdictions in her Memorandum of Law in Support of Motion to Strike Defense for the proposition that Dram statutes impose strict liability without negligence.

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Williams v Klemesrud, 197 N.W.2d 614 (Iowa 1972); Feuerherm v. Ertelt, 286 N.W.2d 509 (N.D. 1979); Nelson v. Araiza, 372 N.E.2d 637 (Ill. 1977). This authority was also cited for the proposition that comparative negligence is inapplicable and irrelevant.

While the District Court's position that negligence must be shown favors the Legion, it would be opportune for this Court to review that standard at this time. If the thrust of this appeal fails, and the Utah Dram shop is held to apply to providers of beer in 1985, it would be of benefit to all to know with certainty what the standard of care owed should be under the Dram Shop Act. That way, if a trial is held the parties can present evidence appropriate to that level of care and avoid the possibility of another appeal later, as well as the possibility of yet another trial.

10. CONCLUSION

A single finding that the Dram Shop Act in effect at the time of the accident complained of herein does not apply to suppliers of "beer", and therefore the Legion in this case, would dispense of all issues. The plain meaning of the statute and its legislative history both strongly support that position. If, however, this Court is not persuaded to dismiss this action on that basis, then guidance is needed regarding issues of contribu-

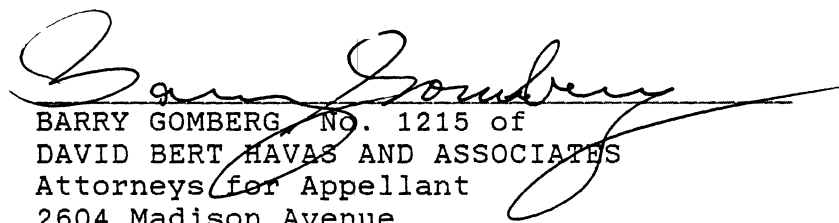
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tion, joint and several liability, apportioning of damages and finally, the standard of care required by the Utah Dram Shop Act, and whether comparative negligence applies.

RESPECTFULLY SUBMITTED this 26th day of April, 1988.


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ALLISEN v. AMERICAN LEGION POST
NO. 134, et al.
Appellant's Brief

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of the Appellant, to Robert Gordon and Paul H. Proctor, Attorneys For Utah Power and Light Company, 1407 West North Temple, Suite 340, Salt Lake City, UT 84140; to James R. Hasenyager of Marquardt, Hasenyager & Custen, Attorneys for Plaintiff, 2661 Washington Boulevard, Suite 202, Ogden, Utah 84401; to William F. Bannon Ass't Attorney General and Stephen J. Sorenson, Ass't Attorney General, Chief, Litigation Division, Attorneys for State of Utah Department of Transportation, 236 State Capitol, Salt Lake City, Utah 84114; to Robert H. Henderson, of Snow, Christensen & Martineau, Attorneys for Third Party Defendant Clearfield City, 10 Exchange Place, 11th Floor, Post Office Box 45000, Salt Lake City, UT 84145, postage prepaid this 26th day of April, 1988.



REBECCA LASILOO, Secretary

revoke club charter and fine club for certain violations of Liquor Control Act does not impliedly repeal this section giving the secretary of state similar powers where he finds a violation of the statutes under which the charter was granted, the two laws, in combination, do not constitute unconstitutional excessive fines and punishments. *Bowling Club v. Toronto*, 17 U. (2d) 5, 403 P. 2d 651.

Failure to participate in hearing.

Bowling club which failed to participate in revocation hearing waived right to claim secretary of state erred in basing his decision to revoke on unsworn testimony. *Bowling Club v. Toronto*, 17 U. (2d) 5, 403 P. 2d 651.

Municipal regulation.

By enacting statute providing for regulation by secretary of state of clubs on whose premises liquor is stored and consumed, legislature did not intend to preclude municipal corporation from licensing and regulating nonprofit social clubs, even though liquor is stored and consumed

on then respective premises, thereby subjecting them also to regulation by secretary of state. *Salt Lake City v. Towne House Athletic Club*, 18 U. (2d) 417, 424 P. 2d 442.

City ordinance regulating and licensing nonprofit clubs or associations, which established the same requirements for license as state did for charter and which provided for revocation of license in substantially the same terms as state law providing for revocation of charter, was unconstitutional as encroaching upon jurisdiction of secretary of state. *State v. Salt Lake City*, 21 U. (2d) 318, 445 P. 2d 691, distinguished at 25 U. (2d) 333, 481 P. 2d 669.

Collateral References.

Clubs § 3, *Intoxicating Liquors* § 15.
14 C.J.S. *Clubs* § 4, 48 C.J.S. *Intoxicating Liquors* §§ 38, 39.

Licensing of social clubs, 45 Am. Jur. 2d 577, *Intoxicating Liquors* § 130.

Status and rights of one renting room in club, 32 A. L. R. 1016.

DECISIONS UNDER FORMER LAW

Construction prior to amendment.

Where secretary of state sent notice of hearing on revocation of charter to corporate officers instead of corporation itself it was a deviation from the notice requirement (prior to the 1955 amendment), but tested by the "fair play" theory of due process, the corporation had actual notice, appeared at the hearing, and was afforded opportunity to defend against the charges brought. *Entre Nous Club v. Toronto*, 4 U. (2d) 98, 287 P. 2d 670.

Although this section (prior to amendment) provided no means of giving the notice required it did not follow that the Rules of Civil Procedure governed the issuance of process, the Rules were for formal contests between adverse parties and clearly were inapplicable to a proceeding before an administrative body seeking to regulate activities burdened with a public interest. *Entre Nous Club v. Toronto*, 4 U. (2d) 98, 287 P. 2d 670.

16-6-13.1. Clubs storing or permitting consumption of liquor on premises—Bond—Filing of articles, bylaws and house rules—Federal malt liquor revenue stamp—Establishment of state liquor store—Restrictions.—(1) Every social club, recreational or athletic association, or kindred association, incorporated under the provisions of this chapter, which now maintains or intends to maintain premises upon which liquor is or will be stored or consumed must procure and file with the Utah liquor control commission and maintain thereafter a cash or corporate surety bond payable to the state of Utah, in the amount of \$7500. The bond shall be in any form approved by the attorney general and shall be conditioned upon the faithful compliance by the nonprofit corporation, its officers, agents, and employees with the provisions of this chapter and the Utah Liquor Control Act of 1969 as amended, and regulations of the commission adopted thereunder. No part of any cash bond so posted may be withdrawn either during the period the license is in effect, or while revocation proceedings are pending against the licensee, or for a period of six months thereafter. A bond

filed by a licensee under the provisions of this section shall be forfeited if the license of a licensee is finally revoked. Upon final revocation, the attorney general shall undertake necessary procedures to collect the bond and pay the proceeds to the state treasurer.

(2) Each club or association required by this chapter to file a \$7500 bond shall submit a copy of its articles, bylaws and house rules to the Utah liquor control commission, and each club or association shall abide by and conform to its articles, bylaws and house rules. A copy of the articles, bylaws and house rules and any amendments thereto shall be kept on file with the Utah liquor control commission at all times.

(3) All social clubs, recreational, athletic or kindred associations organized pursuant to this chapter which have procured and filed a \$7,500 bond as required by this section and which have on file with the Utah liquor control commission a copy of their articles, bylaws and house rules, and are abiding by them and the provisions of this chapter and the Utah Liquor Control Act of 1969 and regulations of the commission adopted thereunder, may hold a United States retail malt liquor revenue stamp and at the same time permit members to have, hold, store or possess liquor in or on premises described in such stamp.

(4) The so-called "locker system" for the storage and serving of intoxicating liquors shall be legal in this state only when operated by a nonprofit corporation in compliance with the terms and provisions of this chapter and the provisions of the Utah Liquor Control Act of 1969, and the regulations of the commission adopted thereunder.

(5) Under the Utah Liquor Control Act of 1969, the regulations adopted thereunder, and the provisions of this chapter, the Utah liquor control commission may establish a state store on premises of a social club, recreation, athletic or other kindred association.

(6) Any social club, recreational, athletic, or other kindred association seeking to have a state liquor store located on its premises, shall have a valid license issued by the Utah liquor control commission, file a written application with the commission in the form prescribed, accompanied by an application fee of \$25, the written consent of the local authority as defined in the Utah Liquor Control Act of 1969, satisfactory documentary proof that the applicant is currently licensed to and does operate a place where a variety of hot food is prepared and cooked and complete meals are served in connection with indoor dining accommodations, satisfactory proof that the applicant is in compliance with the provisions of this chapter and the Utah Liquor Control Act of 1969, and the regulations adopted thereunder, and that the proposed vendor can qualify for and obtain the bond specified in section 32-1-37 of the Utah Liquor Control Act of 1969. Every application shall contain a scaled floor plan of the social club, recreational, athletic, or other kindred association, including that part thereof in which applicant proposes that a state store be established and shall set forth any other information as the commission may direct. If a state store is so established, liquor or wine may not be stored or sold in any other place than as designated and approved by the commission.

(7) The Utah liquor control commission may refuse to locate a state liquor store in any social club, recreational, athletic, or other kindred association whose officer, director, managing agent or employee has been convicted of a felony or of violation of any ordinance, state or federal law concerning the sale, delivery or transportation of an alcoholic beverage, or who has forfeited bond to appear in court to answer charges of having committed a felony or having violated any such laws or ordinances, or has pleaded guilty to a charge of having committed a felony, or has violated any such law or ordinance, or who has been convicted of any crime involving moral turpitude.

(8) In those instances where a state liquor store is established on premises occupied by a social club, recreational, athletic, or other kindred association, the following restrictions shall apply:

(a) The state liquor store must remain locked at all times when it is not open for business.

(b) The state store shall not stock or sell any liquor except in original unbroken containers.

(c) No minor shall be employed by any vendor to sell or dispense any alcoholic beverage.

(d) No vendor, officer, director, managing agent or employee, nor any other person employed by or acting for or in behalf of any licensee, shall sell, deliver or furnish, or cause or permit to be sold, delivered or furnished any liquor or wine to:

(i) Any minor;

(ii) Any person actually, apparently or obviously drunk;

(iii) Any known habitual drunkard;

(iv) Any known interdicted person.

(e) Every lease, contract or other arrangement under which a state store is established in a social club, recreational, athletic or other kindred association shall be in writing and contain a provision to the effect that it is terminable at the option of the state, with or without cause, and without liability of any kind to the state.

(f) There shall be no advertising or other reference to the sale of liquor, except as provided in section 32-1-36.5 (n).

(g) No liquor or wine shall be sold or offered for sale at said stores during the following hours:

(i) On any day of a general or primary election until after the time when the polls are closed.

(ii) On Sunday and legal holidays after 12:00 midnight and prior to 12:00 noon.

(h) No provision in this act or the Utah Liquor Control Act of 1969, shall be construed to prevent a social club, recreational, athletic or other kindred association which is licensed to and does operate a place where a variety of hot food is prepared and cooked and complete meals are served in connection with indoor dining accommodations, or a restaurant, from purchasing, storing or using flavoring and cooking wines, liqueur

and cordials for flavoring and cooking purposes, but no such wines, liqueurs or cordials shall be sold as a beverage.

History: C. 1953, 16-6-13.1, enacted by L. 1955, ch. 25, § 2; L. 1969, ch. 37, § 4.

Compiler's Notes.

The 1969 amendment rewrote this section which provided for a \$5,000 bond filed with the secretary of state, dictated the form of the bond and enumerated items to be included in the club's constitution, by-laws and/or house rules; the amendment divided the section into numbered subsections, in subsec. (4) added "and the provisions of the Utah Liquor Control Act * * * adopted thereunder" and added subsecs. (5) to (8).

Constitutionality.

Although provision regarding the "locker system" for storing and serving liquor is amendatory of sections 32-1-8 and 32-7-3 of the Liquor Control Act there is no violation of the constitutional prohibition

against the passage of a bill containing more than one subject (Art. VI, § 23), since the amended sections relate directly to the general subject of the act. *Kent Club v. Toronto*, 6 U. (2d) 67, 305 P. 2d 870.

Act was not unconstitutionally discriminatory on ground that \$5,000 bond was so high that only financially affluent clubs could afford it. *Kent Club v. Toronto*, 6 U. (2d) 67, 305 P. 2d 870.

Forfeiture of bond.

Where nonprofit corporation pleaded guilty to violation of state liquor law, action of court in fining corporation \$1,000 did not affect corporation's liability under its bond given to the secretary of state and did not preclude forfeiture of bond posted in accordance with the statute. *Disabled American Veterans' Club v. Toronto*, 12 U. (2d) 213, 364 P. 2d 830.

DECISIONS UNDER FORMER LAW

Constitutionality.

Former requirements that club charter contain limitations on "number of members consistent" with the nature and purposes of the club, provide for "reasonable initiation fees and dues," have "reasonable regulations for the dropping of members for nonpayment of dues or for other

causes," and have "strict regulations" for the government of the club rooms or quarters consistent with the nature and purpose of the club were not unconstitutionally uncertain and ambiguous. *Kent Club v. Toronto*, 6 U. (2d) 67, 305 P. 2d 870.

16-6-13.2. Clubs storing or permitting consumption of liquor on premises—Existing clubs.—All existing social clubs, recreational or athletic associations or kindred associations, incorporated under the provisions of this chapter, may within sixty days immediately following the effective date of this act file an application with the commission which it must either grant or deny within six months from the date of filing. Any authorization issued by the secretary of state, permitting members to have, hold, store or possess liquor in or on club or association premises shall terminate on the date the commission grants or denies the application for a license filed hereunder. The authorization of any such club or association not filing an application within the sixty-day period, shall terminate at midnight on the sixtieth day following the effective date of this act.

History: C. 1953, 16-6-13.2, enacted by L. 1955, ch. 25, § 3; L. 1969, ch. 37, § 10.

Compiler's Notes.

The 1969 amendment substituted "may within sixty days * * * sixtieth day fol-

lowing the effective date of this act" for "shall have thirty days after the effective date of this act to comply with the terms thereof."

Chapter 37, Laws 1969, carried no effective date clause.

16-6-13.3. Repealing and separability clause.—All statutes or parts thereof inconsistent herewith are hereby repealed. If any section or pro-

tutional as against contentions that it created monopoly, constituted levy of tax not for public purpose, was private law, and that it was violation of due process of law clause. *Utah Manufacturers' Assn. v. Stewart*, 82 U. 198, 23 P. 2d 229.

Purpose of act.

The purpose of the former Prohibition Law was not only to prevent traffic in intoxicating liquors, but also to prevent transportation. *State v. Davis*, 55 U. 54, 184 P. 161.

32-1-2. Deemed exercise of police powers—Liberally construed.—This act shall be deemed an exercise of the police powers of the state for the protection of the public health, peace and morals; to prevent the recurrence of abuses associated with saloons; to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages; and all provisions of this act shall be liberally construed for the attainment of these purposes.

History: L. 1935, ch. 43, § 2; C. 1943, 46-0-44.

Effect of legislative declaration.

Mere declaration by legislature that an act is within exercise of police power is not binding on courts unless it is within the recognized scope of such power. That the prohibition or regulation of alcohol and other intoxicating liquors is an exercise of the police power of the state admits of no doubt. *Utah Manufacturers' Assn. v. Stewart*, 82 U. 198, 23 P. 2d 229.

Collateral References.

Intoxicating Liquors § 6.
48 C.J.S. *Intoxicating Liquors* § 33.
45 Am. Jur. 2d 501, *Intoxicating Liquors* § 23.

Law Review.

California v. La Rue (93 Sup. Ct. 390)—
The Supreme Court's New Overbreadth Doctrine, 1973 *Utah L. Rev.* 320.

32-1-3. Definitions.—As used in this act:

"Alcoholic beverage" means and includes "beer" and "liquor" as they are defined herein.

"Application" means a formal written request for the issuance of a permit or license.

"Beer" means any beverage containing not less than one-half of one per centum of alcohol by weight and obtained by the alcoholic fermentation of an infusion or decoction of any malted grain or similar products. "Heavy beer" means beer containing more than 3.2 per centum of alcohol by weight. "Light beer" means beer containing not more than 3.2 per centum of alcohol by weight. Beer may or may not contain hops or other vegetable products. "Beer" includes ale, stout and porter.

"Brewer" means any person engaged in manufacturing beer.

"Commission" means "Utah liquor control commission."

"Council" means citizens' council.

"Dentist" means a person holding a valid and unrevoked license to practice dentistry under the laws of the state of Utah.

"Druggist" or "pharmacist" means any person holding a valid and unrevoked license as a registered pharmacist under the laws of the state of Utah and who is actually in good faith engaged in the business of compounding and dispensing drugs or medicines.

"Drugstore" or "pharmacy" shall be as defined by the statutes of Utah.

"Interdicted person" means a person to whom the sale of liquor is prohibited by an order made under this act.

"Liquor" means and includes alcohol, or any alcoholic, spirituous, vinous, fermented, malt, or other liquid or combination of liquids, a part of which is spirituous, vinous, or fermented, and all other drinks or drinkable liquids, containing more than one-half of one per centum of alcohol by weight; and all mixtures, compounds or preparations, whether liquid or not, which contain more than one-half of one per centum of alcohol by weight, and which are capable of human consumption; except that the term "liquor" shall not include "light beer."

"Local authority" means (a) the board of county commissioners of the county in which the premises are located if the premises are located in an unincorporated area of the county or (b) the governing body of the city or town in which the premises are located if the premises are located in an incorporated city or town.

"Manufacture" means to distill, brew, rectify, blend, mix, compound, process, ferment, or otherwise make any alcoholic beverage as defined in this act.

"Minor" means any person under the age of twenty-one years.

"Package" shall mean any container, bottle, vessel, or other receptacle immediately containing liquor.

"Package agency" means an outlet authorized by the commission to sell original package liquor or wine for consumption off the premises.

"Person" includes any individual, firm, copartnership, corporation, association, or any group or combination, and the plural as well as the singular number, unless the intent to give a more limited meaning is disclosed by the context.

"Physician" means a person holding a valid and unrevoked license to practice medicine and surgery in the state of Utah.

"Premises" means any room, enclosure, building or structure where alcoholic beverages may be lawfully manufactured, stored, sold, or consumed as provided in this act.

"Prescription" means a writing in the form prescribed by the regulations, signed by a physician, and given by him to a patient for the obtaining of liquor pursuant to this act for use for medicinal purposes only.

"Public place" shall mean and include any place, building or conveyance, to which the public has, or is permitted to have access, and any highway, street, lane, park or place of public resort or amusement, and any other place which, under the provisions of this act, has been declared to be a public place.

"Regulations" means regulations made by the commission.

"Residence" means and includes any building, or part of a building, where a person resides, but shall not include any part of a building which is not actually and exclusively used as a private residence, nor any part of a hotel other than a private guest room, nor a club or any part thereof, nor any place from which there is access to a club or hotel except through a street or lane or other open and unobstructed means of access, nor any portion of a building used in part for business purposes unless such portion is separated from the part used for business purposes by a wall or walls

having no doors or other means of access opening into such part used for business purposes.

"Restaurant" means a place of business where a variety of hot food is prepared and cooked and complete meals are served to the general public in connection with indoor dining accommodations.

"Retailer" means any person engaged in the sale or distribution of alcoholic beverages to the consumer.

"Sell" or "to sell" when used in this act in any prohibition, shall be construed to include: to solicit or receive an order for; to keep or expose for sale; to deliver for value; to peddle; to possess with intent to sell; to traffic in; for any consideration, promised or obtained, directly or indirectly, or under any pretext or by any means whatsoever, to procure or allow to be procured for any other person; and "sale," when so used, shall include every act of selling as above defined.

"State store" shall mean an outlet for the sale of liquor located on premises owned or leased by the state of Utah.

"Wholesaler" means any person other than a manufacturer, engaged in the importation for sale, or in the sale of alcoholic beverages in wholesale or jobbing quantities to the commission or to retailers.

"Wine" includes any alcoholic beverage obtained by the fermentation of the natural sugar content of fruits, plants, honey or milk, whether or not other ingredients are added.

History: L. 1935, ch. 43, § 3; C. 1943, 46-0-45; L. 1969, ch. 83, § 2.

Compiler's Notes.

The 1969 amendment inserted "Council," "Local authority," "Minor," "Package agency," "Premises," "Restaurant," and "State store" in the list of definitions; and deleted "or gratuitously" after "value" in the definition of "Sell" or "to sell."

"Light beer" defined.

That light beer as defined in this sec-

tion, even if nonintoxicating, is a proper subject for the exercise of the state's police power is undoubted. *Riggins v. District Court of Salt Lake County*, 89 U. 183, 51 P. 2d 645.

Collateral References.

Intoxicating Liquors ⇨ 122.
48 C.J.S. Intoxicating Liquors § 201.
45 Am. Jur. 2d 488, Intoxicating Liquors § 4.

32-1-4. Nonpartisan.—It is hereby declared to be the policy of the state that the administration of this act shall be nonpartisan.

History: L. 1935, ch. 43, § 4; C. 1943, 46-0-46.

Collateral References.

Intoxicating Liquors ⇨ 111.

48 C.J.S. Intoxicating Liquors § 192.
45 Am. Jur. 2d 488, Intoxicating Liquors § 3.

32-1-5. Liquor control commission—Members—Terms—Compensation—Vacancies—Oath and bond—Quorum.—(a) Upon approval of this act the term of office of the present liquor control commission shall expire. Thereafter the liquor control commission shall be comprised of three commissioners to be appointed by the governor with the consent of the senate. Immediately upon approval of this act the governor shall appoint one commissioner to hold office for a period of two years, one to hold office for a period of four years, and one to hold office for a period of six years.

liability or loss on account of damage to or destruction of property of any or every description, including liability of the commission for the resultant loss of use of such property, resulting from accident due to the ownership, maintenance or use of any such motor vehicle. The commission shall be liable to respond in damages in all such cases if a private corporation under the same circumstances would be liable.

(b) The written consent of the governor as required by section 32-1-28 shall not be required to proceed against the commission under this section. The provisions set forth in chapter 30 of Title 63 shall apply in all actions so commenced; however, immunity from suit against the council or the commission, or against any official, officer, examiner or member of the council or commission, is in all respects retained except as provided in section 32-1-26 of this act, and for damages sustained as a result of the ownership, maintenance or use of motor vehicles as set forth in subsection (a) of this section.

History: L. 1935, ch. 43, § 37; C. 1943, section designation "(a)"; and added 46-0-79; L. 1969, ch. 83, § 11. subsec. (b).

Compiler's Notes.

The 1969 amendment inserted the sub-

Collateral References.

Intoxicating Liquors ⇨ 111.
48 C.J.S. Intoxicating Liquors § 192.

32-1-36. State stores.—Unless otherwise prohibited, stores to be known as state liquor stores may be established by the commission at such places in the state as considered advisable for the sale of liquor in accordance with the provisions of this act and the regulations made thereunder.

History: L. 1935, ch. 43, § 38; C. 1943, 46-0-80.

Legal authority to sell "hard" liquor.

By the Liquor Control Act the exclusive right to sell intoxicating beverages, other than light beer, is in the state. *Riggins v. District Court of Salt Lake County*, 89 U. 183, 51 P. 2d 645.

distribution of intoxicating liquors. Article XII, § 20 of the Constitution does not apply to the state. *Riggins v. District Court of Salt Lake County*, 89 U. 183, 51 P. 2d 645.

Collateral References.

Intoxicating Liquors ⇨ 128.
48 C.J.S. Intoxicating Liquors § 211.
45 Am. Jur. 2d 644, Intoxicating Liquors § 228.

Validity.

There is nothing in our state Constitution which prohibits the state legislature from enacting a law putting the state into the liquor business; or to prevent it from engaging in the sale and

Constitutionality of statutes providing for sale of intoxicating liquor by a state or state agencies, 121 A. L. R. 300.

32-1-36.5. State store on premises occupied by restaurant—Restrictions.—In those instances where a state liquor store is established on premises occupied by a restaurant, the following restrictions shall apply:

- (a) The consent of the local authority shall first be obtained.
- (b) The stock of alcoholic beverages shall be so stored as not to be visible to patrons of the restaurant.
- (c) Liquor or wine shall not be purchased for or served to any guest or patron of any restaurant by the vendor or by a person employed by or in any manner for or in his behalf. Purchases must be made by the

guest or patron at the site of the store approved by the commission and not elsewhere.

(d) No liquor or wine shall be sold or offered for sale at said stores during the following hours:

(1) On any day of a general or primary election until after the time when the polls are closed.

(2) On Sunday and legal holidays after 12:00 o'clock midnight, and prior to 12:00 o'clock noon.

(3) On any other day after 12:00 o'clock midnight and prior to 4:00 o'clock p.m.

(e) The state liquor store must remain locked at all times when it is not open for business.

(f) The state store shall not stock or sell any liquor except in original unbroken containers, the contents of which do not exceed two (2) fluid ounces, and wine in original unbroken containers, the contents of which do not exceed one (1) pint.

(g) Any liquor or wine so purchased shall not be removed from the restaurant premises.

(h) In any restaurant licensed to sell draft beer the dispensing facilities shall not be visible to guests or patrons in the dining area of the restaurant and such beer shall not be sold or served or consumed at a bar or similar structure.

(i) All original unbroken containers sold at any such state store are to be opened only at the customer's table.

(j) Liquor or wine may not be sold or purchased except in connection with an order for food to be prepared, sold and served at such restaurant.

(k) No minor shall be employed by any retailer or vendor to sell or dispense alcoholic beverages.

(l) No vendor, retailer, proprietor, partner, officer, agent or employee of any restaurant, nor any other person, shall sell, deliver or furnish, or cause or permit to be sold, delivered or furnished, any liquor or wine to:

- (1) Any minor;
- (2) Any person actually, apparently or obviously drunk;
- (3) Any known habitual drunkard;
- (4) Any known interdicted person.

(m) Every lease, contract or other arrangement under which a state store is established in a restaurant shall be in writing and shall contain a provision to the effect that it is terminable at the option of the state, with or without cause and without liability of any kind to the state.

(n) There shall be no advertising or other reference to the sale of liquor or wine, except that a statement of availability, the content and form of which has been approved by the commission, may be attached to or carried on the menu.

History: C. 1953, 32-1-36.5, enacted by L. 1969, ch. 83, § 28.

Effect of county ordinance.

County commission has no authority to dictate to district court its jurisdiction

by county ordinance stating that planning board's denial of petition to operate state liquor store is appealable to district courts within thirty days. *Burgner v. Cannon*, 26 U. (2d) 56, 484 P. 2d 1184.

History: L. 1935, ch. 43, § 125; C. 1943, 46-0-167; L. 1969, ch. 83, § 20.

Compiler's Notes.

The 1969 amendment inserted "or airline" near the beginning of the section;

and inserted "if otherwise required by law" near the end of the section.

Collateral References.

Intoxicating Liquors \Rightarrow 111.
48 C.J.S. Intoxicating Liquors § 192.
45 Am. Jur. 2d 503, Intoxicating Liquors § 24.

32-7-13. Drinking and drunkenness in public places.—No person shall drink liquor in a public building, park or stadium or be in an intoxicated condition in a public place.

History: L. 1935, ch. 43, § 126; 1937, ch. 49, § 1; C. 1943, 46-0-168.

Compiler's Notes.

The 1937 amendment inserted "drink liquor in a public building, park or stadium or."

Operation of motor vehicle while intoxicated.

Following an automobile collision, defendant was sitting on curb holding a handkerchief to his head which was bleeding; there was a strong odor of alcohol on his breath; he appeared to be intoxicated and in fact stated that he was drunk. A bottle containing whiskey was found on the floor of his automobile. He was taken to a nearby hospital where his wounds were attended and he was placed under arrest for operating a motor vehicle while intoxicated in violation of 41-6-44. Under such circumstances arrest of

defendant was justified though offense for which he was arrested was not committed in the presence of the arresting officer. The defendant, being intoxicated in a public place in violation of this section, and upon death of his passengers, was charged with automobile homicide under 76-30-7.4. State v. Bryan, 16 U. (2d) 47, 395 P. 2d 539.

Collateral References.

Drunkards \Rightarrow 10.
28 C.J.S. Drunkards § 14.
45 Am. Jur. 2d 512, Intoxicating Liquors § 36.

Location of offense as "public" with in requirement of enactments against drunkenness, 8 A. L. R. 3d 930.

Modern status of the rules as to voluntary intoxication as defense to criminal charge, 8 A. L. R. 3d 1236.

DECISIONS UNDER FORMER LAW

Drunkenness and intoxication.

Under Prohibition Law of 1917, drunkenness and intoxication by use of intoxicating liquors was criminal, and a mis-

demeanor, wherever and whenever occurring at any place in the state. Kolb v. Peterson, 50 U. 450, 168 P. 97.

32-7-14. Sale of liquor to drunken person.—No person shall sell or supply any alcoholic beverages or permit alcoholic beverages to be sold or supplied to any person under or apparently under the influence of liquor.

History: L. 1935, ch. 43, § 127; C. 1943, 46-0-169.

45 Am. Jur. 2d 669, Intoxicating Liquors § 265.

Collateral References.

Intoxicating Liquors \Rightarrow 161.
48 C.J.S. Intoxicating Liquors § 258.

Criminal responsibility of one authorized generally to sell intoxicating liquors for particular illegal sale thereof by employee or agent, 139 A. L. R. 306.

32-7-15. Selling or supplying alcoholic beverages to minor prohibited—Exception.—(1) No person shall sell or supply alcoholic beverages to any person under the age of 21 years.

(2) This section does not apply to the supplying of liquor to a person under the age of 21 years for medicinal purposes by the parent or guardian

32-7-23. Possession of false or fictitious permit.—Except as provided by this act and the regulations, no person shall within this state have or keep in his possession a false or fictitious permit purporting to authorize the purchase of liquor or a permit of which he is not the holder.

History: L. 1935, ch. 43, § 136; C. 1943, 46-0-178.

32-7-24. Permitting drunkenness.—No person shall:

(a) permit drunkenness to take place in any house or on any premises of which he is the owner, tenant or occupant; or

(b) permit or suffer any person apparently under the influence of liquor to consume any liquor in any house or on any premises of which the first-named person is owner, tenant or occupant; or

(c) give any liquor to any person apparently under the influence of liquor.

History: L. 1935, ch. 43, § 137; C. 1943, 46-0-179.

45 Am. Jur. 2d 669, Intoxicating Liquors § 265.

Collateral References.

Intoxicating Liquors 161.

48 C.J.S. Intoxicating Liquors § 258.

Revocation or suspension of liquor license because of drinking or drunkenness on part of licensee or business associates, 36 A. L. R. 3d 1301.

32-7-25. Having liquor without permit.—Except as authorized by this act, no person, not holding a permit under this act entitling him so to do, shall have any liquor in his possession within this state.

History: L. 1935, ch. 43, § 138; C. 1943, 46-0-180.

48 C.J.S. Intoxicating Liquors § 192.
45 Am. Jur. 2d 645, Intoxicating Liquors § 230.

Collateral References.

Intoxicating Liquors 111.

32-7-26. Advertising prohibited.—The advertising of alcoholic beverages by the commission and any window display thereof in its stores are hereby expressly prohibited, except that the commission may provide for appropriate signs on window or front of building denoting the fact that it is a state liquor store or package agency, and may provide for printed price lists.

History: L. 1935, ch. 43, § 139; C. 1943, 46-0-181.

erages. Horman v. Liquor Control Comm., 21 U. (2d) 294, 445 P. 2d 4.

"Alcoholic beverages" defined.

Light beer is included within phrase "alcoholic beverages." Bird & Jex Co. v. Funk, 96 U. 450, 85 P. 2d 831.

Collateral References.

Intoxicating Liquors 111.

48 C.J.S. Intoxicating Liquors § 192.

45 Am. Jur. 2d 649, Intoxicating Liquors § 236.

Light beer advertising.

Commission regulation providing that light beer might be advertised is valid in view of 32-7-27 notwithstanding contention that 32-7-26 is general prohibition against advertising all alcoholic beverages.

Validity, construction, and effect of statutes, ordinances or regulations prohibiting or regulating advertising of intoxicating liquors, 19 A. L. R. 2d 1114.

32-7-27. Advertising prohibition applicable to manufacturers, licensees and package agencies.—The prohibition against advertising alcoholic beverages

32-9-12. Penalty for violation of act. Unless otherwise provided herein, every person who violates this act is guilty of a class B misdemeanor.

History: C. 1953, 32-9-11, enacted by L. 1979, ch. 112, § 2.

Compiler's Notes.

Although it was enacted as '32-9-11, the compiler has redesignated this section as 32-9-12 since Laws 1977, ch. 137, § 1 had already enacted a 32-9-11.

CHAPTER 11

DRAM SHOP ACT

Section

32-11-1. Liability for injuries resulting from illegal sale or other distribution of intoxicating liquors — Injured person's cause of action against intoxicated person or person who provided liquor — Survival of action

32-11-2. Immunity of state, state agencies and employees, and political subdivisions

32-11-1. Liability for injuries resulting from illegal sale or other distribution of intoxicating liquors — Injured person's cause of action against intoxicated person or person who provided liquor — Survival of action. (1) Any person who gives, sells, or otherwise provides intoxicating liquor to another contrary to subsection 16-6-13.1 (8)(d), subsection 32-1-36.5 (1)(l), section 32-7-14 or subsection 32-7-24 (b) or (c), and thereby 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.

(2) A person who suffers an injury referred to in subsection (1) of this section, shall have a cause of action against the intoxicated person and the person who provided the intoxicating liquor in violation of subsection (1) above, or either of them.

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

History: L. 1981, ch. 152, § 1.

Title of Act.

An act relating to intoxicating liquors; providing liability for injuries resulting from illegal sale or other distribution of intoxicating liquors; providing that claims and liabilities survive the death of a person; and pro-

viding immunity for the state, its agencies, employees, and political subdivisions. Laws 1981, ch. 152.

Law Reviews.

A New Perspective — Has Utah Entered the Twentieth Century in Tort Law?, 1981 Utah L. Rev. 495.

32-11-2. 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.

History: L. 1981, ch. 152, § 2.

Alcoholic Beverages

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commission in the performance of its official duties. The writ of mandamus lies from the Supreme Court to the commission in all proper cases.

(5) A petition pending in the Supreme Court shall not of itself stay or suspend the operation of any order of the commission, although the Supreme Court in its discretion may enter an order staying or suspending in whole or in part the operation of the commission's order during pendency. The Supreme Court shall give three days' notice of an order staying or suspending the commission's order, and after hearing, make a written finding that great or irreparable damage would otherwise result to the petitioner, specifying the nature of the damage. The finding shall be based upon evidence submitted to the court and identified by reference. 1985

32A-1-21. Citizens' council created - Members - Vacancies - Quorum - Per diem allowance and expenses - Meetings - Clerical staff - Attorney general.

A Citizens' Council on Alcoholic Beverage Control is created which consists of seven persons who are citizens of the United States and the state of Utah. The governor shall appoint three members, two of whom hold office for a period of four years and one of whom holds office for a period of two years. The speaker of the House of Representatives and the president of the Senate shall each appoint two members, one to a two year term and one to a four-year term. Vacancies occurring for any reason are filled for the unexpired term, or for four years if due to expiration of a term, by the person then occupying the office responsible for the appointment. Four members of the council constitute a quorum for the transaction of business. The members appointed select one of their number as chairman to serve at the pleasure of the council.

(a) Each council member receives a per diem allowance as set by the Division of Finance for each day or partial day in which the member is engaged in performing council business, together with all actual and necessary expenses incurred in carrying out official duties.

(b) The council holds meetings at times and places as may be called by the chairman or any two members. Meetings may be open to the public. Necessary facilities to accommodate the needs of the members are provided by the lieutenant governor.

(c) The council may hire clerical staff as it considers necessary for the efficient transaction of its business. The attorney general shall render legal assistance as requested by the council.

(d) No more than four of the members shall be of the same political party. 1985

32A-1-22. Citizens' council - Powers and duties.

The council is independently empowered and its principal duty is to consider, investigate, and inquire into any or all matters within the scope of or directly related to this title and matters concerned directly or indirectly with the administration and enforcement of laws related to the sale, purchase, and consumption of alcoholic beverages. It shall not interfere in the direction or management of the state alcoholic products operation. The council shall prepare an annual report to the governor and the Legislature setting forth, in detail, its activities of the previous year. The council may make recommendations concerning the same to the governor, the Legislature, and the commission, setting forth, in detail, its activities of the previous year. The council may make recommendations con-

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cerning the same to the governor, the Legislature, the commission, the director, the department, the commissioner of public safety or to any other person, commission, or agency as it considers advisable. The commission is required to meet with the council at least semiannually and more frequently if requested by the commission or the council. The Bureau of Narcotics and Alcoholic Beverage Law Enforcement of the Department of Public Safety shall cooperate with the council in all matters concerning this title. 1985

32A-1-23. Citizens' council - Power to obtain information.

The council is authorized to secure directly from the commission, its members, the director, and department employees information concerning the alcoholic product operations of the state; and the commission, its members, the director, and department employees are authorized and directed to furnish information directly to the council upon request. 1985

32A-1-24. Citizens' council - Hearings - Reports.

(1) The council may conduct private and public hearings and compel the appearance of witnesses by subpoena. The council is not required to make its findings public, but shall report fully to the governor and the legislative council of the Utah State Legislature.

(2) Any council member who is not satisfied with council reports or recommendations may file additional reports and recommendations to the governor and the legislative council of the Utah State Legislature. 1985

32A-1-25. Citizens' council - May request grand jury.

When the council believes the public interest demands it, the council by majority vote may request any district judge to summon a grand jury for the purpose of inquiring into actual or suspected public offenses against this title and concerned directly or indirectly with the administration and enforcement of laws related to the sale, purchase, and consumption of alcoholic beverages. 1985

Chapter 2. State Stores

32A-2-1. Commission's power to establish state stores - Limitations.

32A-2-2. State store - Commission and department duties before establishing.

32A-2-3. Operational restrictions.

32A-2-4. Delivery of liquor to state stores.

32A-2-1. Commission's power to establish state stores - Limitations.

(1) The commission may establish state operated liquor stores known as "state stores" in numbers and at places, owned or leased by the department, as it considers proper for the sale of liquor, by employees of the state, in accordance with this title and the rules made under this title. Employees of state stores are considered employees of the department and shall meet all qualification requirements for employment outlined in Section 32A-1-11.

(2) The power of the commission to establish state stores is plenary, except as otherwise provided by this title, and is not subject to review.

(3) The total number of state stores shall not at any time aggregate more than that number determined by dividing the population of the state by 48,000. Population is determined by the most recent

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32A-2-2. State store duties before establish

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erance is occupied or used in violation of this title or commission rules as described in this section, or allows the same to be so occupied or used, the same is subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of the nuisance and the lien may be enforced by action in any court having jurisdiction.

(3) Any action to abate any nuisance defined in this title is brought in the name of the Department of Alcoholic Beverage Control in any court having jurisdiction. It is tried as an action in equity. No bond is required to initiate proceedings.

(4) The court may issue a temporary writ of injunction, if it appears that the nuisance exists, restraining the defendant from conducting or permitting the continuance of the nuisance until the conclusion of the trial. The court may also issue an order restraining the defendant and all other persons from removing or interfering with the alcoholic products, packages, equipment, or other property kept or used in violation of this title or commission rules.

(5) In any action to abate or enjoin any nuisance, it is not necessary for the court to find the property involved was being unlawfully used at the time of the hearing, but on finding that the material allegations of the petition or complaint are true, the court shall order that no alcoholic product shall be possessed, kept, used, offered for sale, sold, given, furnished, supplied, received, purchased, stored, warehoused, manufactured, adulterated, shipped, carried, transported, or distributed in the room, house, building, structure, place, aircraft, vehicle, vessel, or other conveyance or in any part of these. Upon judgment of the court ordering abatement of the nuisance, the court may order that the premises or conveyance in question shall not be occupied or used for any purpose for one year. The court may permit the premises or conveyance to be occupied or used if its owner, lessee, tenant, or occupant gives bond in an appropriate amount with sufficient surety, approved by the court, payable to the state of Utah, and on the conditions that alcoholic products will not be present therein or thereon, and that payment of all fines, costs, and damages that may be assessed for any violation of this title or commission rules upon the property will be made.

(6) If a tenant of any premises uses the same or any part thereof in maintaining a common nuisance as defined in this section, or knowingly permits use by another, the lease is rendered void, and the right to possession reverts to the owner or lessor who is entitled to the remedy provided by law for forcible retention of the premises.

(7) Any person who knowingly permits any building or premises owned or leased by the person, or under the person's control, or any part of any building or premises, to be used in maintaining a common nuisance as defined in this title, or who, after being notified in writing by a prosecuting officer or any citizen of the unlawful use, and who fails to take all proper measures, either to abate the nuisance or to remove the person or persons from the premises, is guilty of assisting in the maintaining of the nuisance.

1983

32A-13-7. Right of appeal in state.

In all cases arising under this title the commission or the state has the right of appeal as to questions of law.

1983

32A-13-8. Duties of officials and officers to enforce this act.

(1) It is the duty of the governor, the commissio-

ners, the director and all officials, inspectors, and employees of the department, all prosecuting officials of the state and its political subdivisions and of counties, cities, and towns, all officers, sheriffs, deputy sheriffs, constables, marshals, law enforcement officials, state officials, and all clerks of the courts to enforce this title in their respective capacities. Failure to do so is a class B misdemeanor.

(2) Immediately upon conviction of any person for violation of this title or commission rule or violation of any city or town ordinance relating to alcoholic products, it is the duty of the clerk of the court to notify the Department of Alcoholic Beverage Control of the conviction in written forms supplied by the department.

32A-13-9. Authority of inspectors, peace officers to inspect.

(1) For purposes of enforcing this title and commission rules, all members of the commission, citizens' council, authorized representatives of the commission or department or any law enforcement or peace officer shall be accorded access, ingress, and egress to and from all premises or conveyances used in the manufacture, storage, transportation, service, or sale of any alcoholic product. They also have the authority to open any package containing, or supposed to contain, any article manufactured, sold, or exposed for sale, or held in possession with intent to sell in violation of this title or commission rules, and may inspect its contents, and may take samples of the contents for analysis.

(2) All dealers, clerks, bookkeepers, express agents, railroad and airline officials, common and other carriers, and their employees shall assist, when so requested by any authorized person specified in Subsection (1), in tracing, finding, or discovering the presence of any article prohibited by this title or commission rules to the extent assistance would not infringe upon the person's federal and state constitutional rights.

1983

Chapter 14. Dram Shop Liability

32A-14-1. Liability for injuries resulting from illegal sale or other distribution of alcoholic beverages - Injured person's cause of action against intoxicated person or persons who provided alcoholic beverage - Survival of action.

32A-14-2. Immunity of state, state agencies and employees, and political subdivisions.

32A-14-1. Liability for injuries resulting from illegal sale or other distribution of alcoholic beverages - Injured person's cause of action against intoxicated person or persons who provided alcoholic beverage - Survival of action.

(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.

(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.

1983

32A-14-2. Immunity of state, state agencies and employees, and political subdivisions.

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 otherwise being involved in the sale or other distribution of alcoholic beverages. 1985

Chapter 15. Bureau of Narcotics and Alcoholic Beverage Law Enforcement**32A-15-1. Creation of Bureau of Narcotics and Alcoholic Beverage Law Enforcement.****32A-15-2. Responsibility and jurisdiction.****32A-15-3. Appointment of director.****32A-15-4. Powers and duties of director.****32A-15-5. Supplies and equipment.****32A-15-6. Director and officers to have powers of peace officers.****32A-15-7. Bureau to cooperate with other agencies.****32A-15-8. Other agencies to cooperate with bureau.****32A-15-1. Creation of Bureau of Narcotics and Alcoholic Beverage Law Enforcement.**

There is created within the Department of Public Safety a bureau known as the Bureau of Narcotics and Alcoholic Beverage Law Enforcement. 1985

32A-15-2. Responsibility and jurisdiction.

The bureau shall:

(1) have specific responsibility for the enforcement of all laws of the state pertaining to alcoholic beverages and products;

(2) have general law enforcement jurisdiction throughout the state;

(3) have concurrent law enforcement jurisdiction with all local law enforcement agencies and their officers. The bureau does not relieve local law enforcement agencies or officers of the responsibility of enforcing laws relating to alcoholic beverages and products or any other laws;

(4) sponsor or supervise programs or projects related to prevention, detection, and control of violations of the Alcoholic Beverage Control Act and Utah Controlled Substance Act;

(5) respond to the call of the governor for emergency or other purposes as the governor may require. 1985

32A-15-3. Appointment of director.

(1) The Commissioner of Public Safety shall appoint a director who serves at the pleasure of the commissioner, and who supervises and directs the activities of the bureau.

(2) The director shall be a full time officer of the state, who in addition to possessing administrative ability, is experienced in law enforcement and has a background of training related to narcotics and alcoholic beverages and products.

(3) The salary of the director is fixed by the Legislature in accordance with Section 67-8-3. The director shall also be paid all necessary expenses incurred while engaged in the performance of official duties. 1985

32A-15-4. Powers and duties of director.

The director, with the consent of the Commissioner of Public Safety, shall:

(1) Appoint enforcement agents, investigative agents, clerks, and other employees as authorized from eligible lists supplied by the state merit system. Not fewer than 21 enforcement and investigative

agents shall be appointed. This provision shall not prohibit the director from employing or paying for the assistance of persons on a temporary basis who may otherwise be ineligible for state employment for purposes of assisting in crime prevention or detection;

(2) Delegate responsibilities among employees as necessary for the purpose of policing and enforcing the laws of this state with respect to alcoholic beverages, products, dangerous drugs, and narcotics;

(3) Establish ranks, grades, and positions in the bureau and designate the authority and responsibility in each rank, grade, and position;

(4) Establish standards and qualifications and fix prerequisites of training, education, and experience for each rank, grade, and position, and fix salaries for each rank, grade, and position in accordance with salary standards adopted by the Division of Finance;

(5) Appoint, under Subsection (1), personnel to each rank, grade, and position as necessary for the efficient operation and administration of the bureau and devise and administer examinations designed to test applicants for the positions. Any persons hired shall meet prescribed standards and prerequisites;

(6) Formulate any necessary rules governing the bureau;

(7) Discharge, demote, temporarily suspend, or take other disciplinary action against any employee in accordance with the State Personnel Management Act, Chapter 19, Title 67;

(8) Prescribe any uniforms worn and equipment used by the employees;

(9) Establish with the approval of the Division of Finance, the terms and conditions under which any expense allowance is paid to any employee;

(10) Conduct in conjunction with the state boards of education and higher education in state schools, colleges, and universities, an educational program concerning alcoholic products, and work in conjunction with civic organizations, churches, local units of government, and other organizations in the prevention of alcoholic product and drug violations;

(11) Coordinate law enforcement programs throughout the state and accumulate and disseminate information related to the prevention, detection, and control of violations of this title as it relates to storage or consumption of alcoholic beverages on premises maintained by social clubs, recreational athletic, and kindred associations;

(12) Prepare and present evidence in connection with prosecution of persons charged with criminal offenses, and assist local law enforcement agencies in controlling law violations;

(13) Cooperate with any law enforcement agency for the purpose of coordinating and correlating records concerning prevention, detection, and control of violations of the law;

(14) Make inspections and investigations required by the Alcoholic Beverage Control Commission and Department;

(15) Consult and cooperate with the Citizens Council on Alcoholic Beverage Control;

(16) Perform other acts as may be necessary appropriate concerning control of the use of alcoholic beverages and products and drugs;

(17) Make reports to the Legislature, governor, the Commissioner of Public Safety, Alcoholic Beverage Control Commission and Department, and the Citizens' Council as may be required or requested;

(18) Make recommendations to the Legislature

so requested by any authorized person specified in Subsection (1), in tracing, finding, or discovering the presence of any article prohibited by this title or commission rules to the extent assistance would not infringe upon the person's federal and state constitutional rights.

History: C. 1953, 32A-13-9, enacted by L. 1985, ch. 175, § 1.

CHAPTER 14

DRAMSHOP LIABILITY

Section	Section
32A-14-1. Liability for injuries resulting from illegal sale or other distribution of alcoholic beverages — Injured person's cause of action against intoxicated	person or persons who provided alcoholic beverage — Survival of action.
	32A-14-2. Immunity of state, state agencies and employees, and political subdivisions.

32A-14-1. Liability for injuries resulting from illegal sale or other distribution of alcoholic beverages — Injured person's cause of action against intoxicated person or persons who provided alcoholic beverage — Survival of action.

(1) Any person who directly gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage, to a person:

- (a) who is under the age of 21 years or
- (b) who is apparently under the influence of intoxicating alcoholic beverages or products or drugs or
- (c) whom the person furnishing the alcoholic beverage knew or should have known from the circumstances was under the influence of intoxicating alcoholic beverages or products or drugs or
- (d) who is a known interdicted person,

and by those actions causes the intoxication of that person, is liable for injuries in person, property, or means of support to any third person, or to the spouse, child, or parent of that third person, resulting from the intoxication. An employer is liable for the actions of its employees in violation of this chapter.

(2) A person who suffers an injury under Subsection (1) has a cause of action against the person who provided the liquor or other alcoholic beverage in violation of Subsection (1).

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

(4) The total amount of damages that may be awarded to any person pursuant to a cause of action under this chapter which arises after the effective date of this subsection is limited to \$100,000 and the aggregate amount which may be awarded to all persons injured as a result of one occurrence is limited to \$300,000.

(5) An action based upon a cause of action under this chapter which arises after the effective date of this subsection shall be commenced within two years after the date of the injury.

(6) Nothing in this chapter precludes any cause of action or additional recovery against the person causing the injury.

History: C. 1953, 32A-14-1, enacted by L. 1985, ch. 175, § 1; 1986, ch. 177, § 3.

Amendment Notes. — The 1986 amendment, effective March 17, 1986, added the language in Subsection (1) following "or otherwise provides liquor," Subsections (1)(a) through (1)(d), the last sentence in Subsection (1), and Subsections (4) through (6); inserted "directly" in Subsection (1) near the

beginning; in Subsection (2), inserted "or other alcoholic beverage"; and made minor stylistic changes.

Compiler's Notes. — The phrase "effective date of this subsection," referred to in Subsections (4) and (5), appears in Laws 1986, ch. 177, § 3, which became effective March 17, 1986.

COLLATERAL REFERENCES

Utah Law Review. — A New Perspective — Has Utah Entered the Twentieth Century in Tort Law?, 1981 Utah L. Rev. 495.

Am. Jur. 2d. — 45 Am. Jur. 2d Intoxicating Liquors § 292.

C.J.S. — 48 C.J.S. Intoxicating Liquors § 34; 48A C.J.S. Intoxicating Liquors §§ 428-463.

A.L.R. — Civil damage or dramshop act: what constitutes injury to means of support within civil damage or dramshop act, 4 A.L.R.3d 1332.

Liability, under dramshop acts, of one who sells or furnishes liquor otherwise than in operation of regularly established liquor business, 8 A.L.R.3d 1412.

Who is, as "owner" of premises on which intoxicating liquor is sold, liable under civil damage or dramshop act, 18 A.L.R.3d 1323.

Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another, 32 A.L.R.3d 589.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another, 97 A.L.R.3d 528.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 A.L.R.3d 694.

Liability of persons furnishing intoxicating liquor for injury to or death of consumer, outside coverage of civil damage acts, 98 A.L.R.3d 1230.

Choice of law as to liability of liquor seller for injuries caused by intoxicated person, 2 A.L.R.4th 952.

Tavernkeeper's liability to patron for third person's assault, 43 A.L.R.4th 281.

Key Numbers. — Intoxicating Liquors ⇐ 282, 283.

32A-14-2. Immunity of state, state agencies and employees, and political subdivisions.

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 otherwise being involved in the sale or other distribution of alcoholic beverages.

History: C. 1953, 32A-14-2, enacted by L. 1985, ch. 175, § 1.

COLLATERAL REFERENCES

A.L.R. — Liability of state or municipality in tort action for damages arising out of sale of intoxicating liquor by state or municipally operated liquor store or establishment, 95 A.L.R.3d 1243

CHAPTER 15

BUREAU OF NARCOTICS AND ALCOHOLIC BEVERAGE LAW ENFORCEMENT

Section	Section
32A-15-1. Creation of Bureau of Narcotics and Alcoholic Beverage Law Enforcement.	32A-15-5. Supplies and equipment.
32A-15-2. Responsibility and jurisdiction.	32A-15-6. Director and officers to have powers of peace officers.
32A-15-3. Appointment of director.	32A-15-7. Bureau to cooperate with other agencies.
32A-15-4. Powers and duties of director.	32A-15-8. Other agencies to cooperate with bureau.

32A-15-1. Creation of Bureau of Narcotics and Alcoholic Beverage Law Enforcement.

There is created within the Department of Public Safety a bureau known as the Bureau of Narcotics and Alcoholic Beverage Law Enforcement.

History: C. 1953, 32A-15-1, enacted by L. 1985, ch. 175, § 1.

Cross-References. — Department of public safety, § 41-13-1 et seq.

indicates by any form of written expression the intention of the injured person not to be bound by the settlement agreement, liability release, or disavowed statement.

History: L. 1973, ch. 208, § 4.

78-27-36. Right of rescission or disavowal of release, settlement, or statement by injured person in addition to other provisions.—The rights provided by this act are intended to be in addition to, and not in lieu of, any rights of rescission, rules of evidence, or provisions otherwise existing in the law.

History: L. 1973, ch. 208, § 5.

78-27-37. Comparative negligence—Diminishment of damages—"Contributory negligence" includes "assumption of the risk."—Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. As used in this act, "contributory negligence" includes "assumption of the risk."

History: L. 1973, ch. 209, § 1.

releases on other joint tort-feasors.—L. 1973, ch. 209.

Title of Act.

An act relating to actions for the recovery of damages in actions based on negligence or gross negligence; removing contributory negligence as a bar to any recovery under certain circumstances; providing for the diminishing of any recovery in proportion to the negligence of the person seeking recovery; providing for separate judgments as to damages and proportionate negligence; providing for contribution among joint tort-feasors; providing for the release of one or more joint tort-feasors without releasing them all; and providing for the effect of such

Cross-Reference.

Product Liability Act, manufacturer or seller not liable if alteration or modification of product after sale is substantial contributing cause of injury, 78-15-5.

Law Reviews.

Comment, McGinn v. Utah Power & Light Co.—Jury Blindfolding in Comparative Negligence Cases, 1975 Utah L. Rev. 569.

Note, A Primer on Damages under the Utah Wrongful Death and Survival Statutes, 1974 Utah L. Rev. 519.

78-27-38. Separate special verdicts on damages and percentage of negligence—Reduction of damages.—The court may, and when requested by any party shall, direct the jury to find separate special verdicts determining (1) the total amount of damages suffered and (2) the percentage of negligence attributable to each party; and the court shall then reduce the amount of the damages in proportion to the amount of negligence attributable to the person seeking recovery.

History: L. 1973, ch. 209, § 2.

78-27-39. Contribution among joint tort-feasors—Discharge of common liability by joint tort-feasor required.—(1) The right of contribution shall exist among joint tort-feasors, but a joint tort-feasor shall not be entitled

COLLATERAL REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d Sundays and Holiday § 70 et seq. on Sunday or holiday, validity of, 63 A.L.R.3d 423.
C.J.S. — 40 C.J.S. Holidays §§ 4 to 6. **Key Numbers.** — Holidays ⇌ 4 to 6.
A.L.R. — Service of summons or complaint

68-3-9. Seal, how affixed.

When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. In all other cases the word "seal" may include a scroll printed or written.

History: R.S. 1898 & C.L. 1907, § 2495; Great seal of the State of Utah, Utah Const.,
C.L. 1917, § 5845; R.S. 1933 & C. 1943, Art. VII, Sec. 20; § 67-1a-8.
88-2-9. Municipal seals, § 10-1-202.
Cross-References. — Custody of seals by Seals of courts, §§ 78-7-14, 78-7-15.
archivist, § 63-2 to 62.5.

COLLATERAL REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d Seals § 3.
C.J.S. — 79 C.J.S. Seals § 3.
Key Numbers. — Seals ⇌ 3.

68-3-10. Joint authority is authority to majority.

Words giving a joint authority to three or more public officers, or other persons, are to be construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

History: R.S. 1898 & C.L. 1907, § 2496; **Cross-References.** — Personal representa-
C.L. 1917, § 5846; R.S. 1933 & C. 1943, tives, majority concurrence required unless
88-2-10. will provides otherwise, § 75-3-716.

NOTES TO DECISIONS

Board of education. ties of a board of education. Tooele Bldg. Ass'n
Joint authority is not "otherwise expressed" v. Tooele High School Dist. No. 1, 43 Utah 362,
in any statute prescribing the powers and du- 134 P. 894 (1913).

68-3-11. Rules of construction as to words and phrases.

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

History: R.S. 1898 & C.L. 1907, § 2497; **Cross-References.** — Duty of court to con-
C.L. 1917, § 5847; R.S. 1933 & C. 1943, strue statutes, § 78-21-3.
88-2-11.

NOTES TO DECISIONS

Construction and application.

The waiver of immunity from suit "for the recovery of any property real or personal or for the possession thereof" does not include an action for damages for impairment of access to property caused by construction of highway

underpass; this act should be strictly construed to preserve sovereign immunity and to waive it only as clearly expressed therein. *Holt v. Utah State Rd. Comm.*, 30 Utah 2d 4, 511 P.2d 1286 (1973).

63-30-7. Waiver of immunity for injury from negligent operation of motor vehicles — Exception.

Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment during the performance of his duties, within the scope of employment, or under color of authority; provided, however, that this section shall not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of § 41-6-14.

History: L. 1965, ch. 139, § 7; 1983, ch. 129, § 5.

Amendment Notes. — The 1983 amendment substituted "during the performance of his duties, within the scope of employment, or under color of authority" for "while in the scope of his employment"; and deleted "Utah

Code Annotated 1953, as amended by Chapter 86, Laws of Utah, 1961" at the end of the section.

Cross-References. — Safety Responsibility Act, provisions of motor vehicle liability policy, § 41-12-21.

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

History: L. 1965, ch. 139, § 8.

NOTES TO DECISIONS

ANALYSIS

Complaint, sufficiency of allegations.

Construction.

Contributory negligence.

Dangerous objects.

Discretionary function.

Ice and snow on sidewalk.

Manholes.

Negligent construction.

New duties not created.

Nondelegable duty.

to a money judgment for contribution until he has, by payment, discharged the common liability or more than his prorata share thereof.

History: L. 1973, ch. 209, § 3.

Applicability.

Because this section creates a new cause of action in a tort-feasor who has paid more than his prorata share of a common liability, it is not merely remedial and does not apply where the underlying tort was committed before its effective date, even though liability was not adjudged until after that date. *Brunyer v. Salt Lake County*, 551 P. 2d 521.

Compiler's Notes.

Section 3 of Laws 1973, ch. 209 contained no subsec. (2).

Cross-References.

Enforcement of contribution and reimbursement, Rules of Civil Procedure, Rule 69(h).

Joint obligations, 15-4-1 et seq.

78-27-40. Settlement by joint tort-feasor—Determination of relative degrees of fault of joint tort-feasors—"Joint tort-feasor" defined.—(1) A joint tort-feasor who enters into a settlement with the injured person shall not be entitled to recover contribution from another joint tort-feasor whose liability to the injured person is not extinguished by that settlement.

(2) When there is a disproportion of fault among joint tort-feasors to an extent that it would render inequitable an equal distribution by contribution among them of their common liability, the relative degrees of fault of the joint tort-feasors shall be considered in determining their prorata shares, solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law.

(3) As used in this section, "joint tort-feasor" means one of two or more persons, jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

History: L. 1973, ch. 209, § 4.

78-27-41. Individual liability of joint tort-feasors, right of indemnity under law, and contractual right to contribution or indemnity not affected.—Nothing in this act shall affect:

(1) The common-law liability of the several joint tort-feasors to have judgment recovered, and payment made, from them individually by the injured person for the whole injury. However, the recovery of a judgment by the injured person against one joint tort-feasor does not discharge the other joint tort-feasors.

(2) Any right of indemnity which may exist under present law.

(3) Any right to contribution or indemnity arising from contract or agreement.

History: L. 1973, ch. 209, § 5.

78-27-42. Release of joint tort-feasor—Reduction of injured person's claim.—A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors, unless the release so provides, but reduces the claim against the other tort-feasors by the greater of: (1) The amount of the consideration paid for that re-

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IN THE SECOND JUDICIAL DISTRICT COURT FOR DAVIS COUNTY
STATE OF UTAH

MARJORIE ALLISEN,

Plaintiff,

vs.

AMERICAN LEGION POST NO.
134,

Defendant.

AFFIDAVIT OF JERRY D. FENN

AMERICAN LEGION POST NO.
134,

Civil No. 38319

Third-Party Plaintiff,

vs.

STATE OF UTAH DEPARTMENT OF
TRANSPORTATION, et al.,

Third-Party Defendants.

STATE OF UTAH)
 : SS.
County of Salt Lake)

JERRY D. FENN, being first duly sworn, deposes and says:

1. In 1985 I was the Chairman of the Citizens' Council on Alcoholic Beverage Control, a seven member, bi-partisan council created by statutes of the State of Utah and independently empowered to consider, investigate and inquire into all matters related to the liquor laws of the state. See §32A-1-32 Utah Code Ann. (1985).

2. The scope of the Citizens' Council's responsibilities encompasses serving in an advisory capacity to the Utah Legislature regarding possible amendments to the liquor laws. In the summer of 1985, the Business, Labor & Economic Development Interim Committee of the Legislature referred several proposed liquor law amendments to the Citizens' Council.

3. On November 20, 1985, the Citizens' Council submitted its report and recommendation to this committee of the Utah Legislature. A true and accurate copy of the Report and Recommendation is attached hereto as Exhibit "A".

4. The Report and Recommendation proposed certain amendments to the then existing Utah Dram Shop Act. Because the Dram Shop Act that then existed created liability only for those giving, selling or otherwise providing "Liquor", one of the proposed amendments, found at pages 8 and 9 of the Report, was to expand the scope of the statute to encompass "beer".

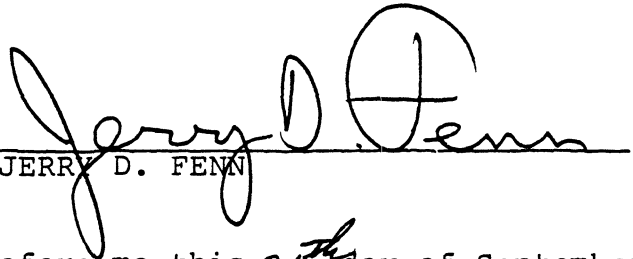
5. After the Report and Recommendation was submitted to the Legislature, I was asked by the Chairperson of the Interim Committee to draft the proposed revisions to the Utah Dram Shop

Act. Among other things, the proposed amendments as originally drafted would have expanded the scope of the Dram Shop Act to any person who directly gives, sells, or otherwise provides "alcoholic beverages," which would have included both liquor and beer. The proposed amendment incorporated the revisions recommended by the Citizens' Council.

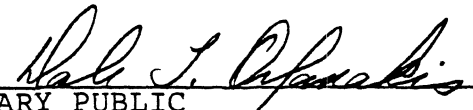
6. The amendments as originally drafted did not pass. This was due in part I believe to lobbying efforts on the part of the Utah Grocers' Association and others who vigorously opposed any expansion of statutory liability to those who sold alcoholic beverages for off-premise consumption. The Act as passed provides only for liability for any person who directly "gives, sells, or otherwise provides liquor, or at a location allowing consumption on the premises, any alcoholic beverage . . ." The reason for this amendment was to exclude from the scope of the dram shop statute liability grocery stores, convenience stores and other establishments which sell beer but do not allow consumption on premises. In other words, despite the Report and Recommendation of the Citizens' Council to the Utah Legislature to expand the scope of the Dram Shop Statute to include all alcoholic beverages, both liquor and beer, the Legislature specifically rejected the recommendation to the extent that the Utah Dram Shop Act, in its present form, does not apply to the sale of beer at locations that do not allow consumption on the premises.

Further affiant sayeth not.

DATED this 24th day of September, 1987.


JERRY D. FENN

SUBSCRIBED AND SWORN to before me this 24th day of September,
1987.


NOTARY PUBLIC
Residing at Salt Lake County, Utah

My Commission Expires:

10/29/88

EXHIBIT "A"

REPORT AND RECOMMENDATION
OF
THE CITIZENS' COUNCIL ON ALCOHOLIC BEVERAGE CONTROL
TO THE
UTAH LEGISLATURE

SUBMITTED
NOVEMBER 20, 1985

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REPORT AND RECOMMENDATION OF
THE CITIZENS' COUNCIL ON ALCOHOLIC BEVERAGE CONTROL
TO THE UTAH LEGISLATURE

I. INTRODUCTION

The Citizens' Council on Alcoholic Beverage Control (the "Citizens' Council"), a seven member, bi-partisan council created by statutes of the State of Utah, is independently empowered to consider, investigate and inquire into all matters related to the liquor laws of the state. See §32A-1-22 Utah Code Ann. (1985). The scope of the Citizens' Council's responsibilities encompasses serving in an advisory capacity to the Legislature regarding possible amendments to the state's liquor laws.

During the summer of 1985, the Business, Labor and Economic Development Interim Committee of the Legislature referred several proposed amendments to the Alcoholic Beverage Control Act (the "Act") to the Citizens' Council for comment. The Citizens' Council held three public hearings in September and October, 1985 to obtain comment about these and other proposed amendments.

Although the Citizens' Council heard comments from numerous people, it should be pointed out that most of those who addressed the Council were representatives of the travel and tourism or hospitality industries. Very few citizens who were not directly involved with alcoholic beverages appeared before the Council. The comments which the Citizens' Council heard from special interest groups may not in fact be representative of the sentiments of a majority of the citizens of the state. The Citizens' Council believes that more public comment should be elicited in an effort to more clearly ascertain public opinion with regard to two of the proposed amendments.

Ambivalence about alcohol characterized the attitude of many who testified before the Citizens' Council. On the one hand, the Citizens' Council heard almost unanimous condemnation of the abuse of alcohol. On the other hand, the Council heard a substantial number of comments that Utah's liquor laws are too tough and need to be more accommodating to tourists and those who wish to drink. The Council hearings produced an interesting dichotomy: condemnation of the evils of alcohol while at the same time a chorus of voices crying out for liberalization of the law.

The statutory policy of the state with respect to alcoholic beverages is to neither promote nor encourage their sale or consumption but to "regulate the sale of alcoholic beverages in a manner and at prices which reasonably satisfy the public demand and protect the public interest, including the rights of citizens who do not wish to be involved with alcoholic products." §32A-1-4(3) Utah Code Ann. (1985). Of course, this is no easy task. It represents a difficult balancing of differing interests.

In formulating recommendations on proposed amendments, the Citizens' Council has attempted to balance the public demand for alcoholic beverages with protecting the public interest. The Council has subscribed to a philosophical approach that any proposed change in the Act that leads to increased abuse of alcohol should be defeated. Alcohol is the number one drug of abuse in our society. Highway accidents, death, sickness, social disruption, and economic loss result from excess alcohol consumption. In reaching a recommendation on any proposed amendment, the Citizens' Council has examined whether the amendment may lead to an increase in the consumption of alcohol. If it appears that alcohol consumption will not increase as a result of the amendment, the Council has inquired whether the current statutory provision adequately meets public demand for alcoholic

beverages while protecting the public interest or whether substantial reasons for amending the Act exist.

The Citizens' Council submits the following report and recommendation on the proposed amendments and enactments it has considered.

II. RECOMMENDATIONS

A. THE CITIZENS' COUNCIL OPPOSES THE ELIMINATION OF STATE CONTROL OVER THE NUMBER OF LIQUOR OUTLETS

With the repeal of Prohibition (the 18th Amendment) in 1933, Utah was one of 18 states to adopt the "state control" concept of dispensing liquor. This system vests control of the sale of liquor with the state government rather than private enterprise. Utah has the lowest per-capita consumption of alcohol of any state. Of course, this is partly attributable to the large non-drinking population. However, average annual consumption of alcohol in the 18 control states is approximately 1.63 gallons per capita whereas average annual consumption in the 32 other states is 2.10 gallons. An argument can be made that state control over the price and availability of alcoholic beverages appears to make a difference in consumption of alcohol. The Citizens' Council is of the opinion that it is contrary to the public interest to see Utah's low rate of alcohol consumption increase.

The Citizens' Council believes the state, rather than local authorities, is the appropriate entity to regulate the number of outlets where liquor may be purchased. Elimination of the statutory quotas in favor of local control could lead to an unfettered proliferation in the number of outlets. It is possible that some municipalities would completely abandon all restraints on the number of liquor outlets. On the other hand, it is also possible that some municipalities may totally prohibit outlets within their

jurisdiction. The Citizens' Council is persuaded that elimination of the statutory quotas in favor of local control would be contrary to the public interest because of the possible large increase in availability of alcoholic beverages and increased alcohol consumption and abuse which could follow.

In addition, the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Commission have demonstrated expertise in performing the difficult balancing task required in regulating liquor availability through controlling the number of outlets. It is the consensus of the Citizens' Council that such expertise not be wasted nor the regulatory purview of the Department and the Commission diminished.

Finally, the 1985 Act, which became effective on July 1, 1985, provided for an increased rate of growth in the number of liquor outlets. The statutory quotas were revised to allow for a slightly greater rate of growth for package agencies and restaurant liquor outlets and the statutory ceiling on private club outlets was abolished. The new quotas, along with improved regulatory control which may result in revocation of unqualified and non-complying outlets' licenses, could ameliorate somewhat the scarcity of licenses. In the future, the Legislature may deem it advisable to examine the liquor license allocation system further. However, the Citizens' Council is of the opinion that total elimination of the quotas in favor of local regulation of the number of outlets is neither wise nor warranted.

B. THE CITIZENS' COUNCIL OPPOSES AN INCREASE IN THE HOURS WHEN LIQUOR MAY BE SOLD IN RESTAURANTS

Liquor can be sold in restaurants under the Act from 4:00 p.m. until midnight. The Utah Restaurant Association has proposed that the hours of permissible liquor sales in restaurants be extended to 10:00 a.m. to 1:00 a.m. These proposed hours match the liquor sales hours in private clubs.

In determining whether to recommend an extension of the hours of restaurant liquor sales, the Citizens' Council considered whether public demand for increased hours exists or whether the demands of the liquor-consuming populace are currently being met at the lunch hour. The Council then analyzed whether an increase in liquor sales hours would have beneficial or deleterious impacts on the public interest.

It appears that the demands of those who desire to consume liquor at the lunch hour are being met by existing law. The Citizens' Council has not observed a groundswell of public support for the proposal to extend hours of liquor sales in restaurants. While the restaurant industry understandably believes the ability to sell liquor at lunch time may attract more customers to their establishments, the Council does not think the demonstrated demand for liquor during lunch in restaurants is significant enough to justify the extension of hours, particularly given the negative impacts discussed below.

The Citizens' Council is persuaded that the advantages which a restaurant may gain by being allowed to serve liquor at the lunch hour would be offset by the unfavorable aspects to the general public by such a change. Increasing the hours of liquor sales in restaurants would increase the availability of liquor in public places. Where the needs of those who wish to consume liquor at lunch are apparently being met by private clubs, the public interest, on balance, appears to weigh in favor of not increasing availability. A substantial segment of the population may not wish to be exposed to liquor sales at the lunch hour. Moreover, the increase in availability of liquor early in the day may lead to more alcohol abuse and loss to society. The incidents of on-the-job intoxication may increase, bringing the specter of diminished productivity and economic loss.

Although the extent of possible negative impacts cannot be accurately predicted, the risk of increased alcohol abuse cannot be totally discounted. Therefore, given the lack of strong public demand for the extension of liquor sales hours, coupled with the potential for abuse occasioned by increased availability of liquor, the Citizens' Council recommends the Legislature not amend the law to increase the hours of liquor sales in restaurants from the current 4:00 p.m. to midnight.

C. FURTHER CONSIDERATION OF A PROPOSAL ALLOWING THE SERVER TO BRING LIQUOR IN UNOPENED BOTTLES TO THE RESTAURANT PATRON'S TABLE

Current law provides that a restaurant patron must make his or her liquor purchases at an approved location in the restaurant and then bring the mini-bottle back to the table. The Utah Restaurant Association and others in the hospitality industry have proposed the Act be amended to allow the server to bring the unopened mini-bottle directly to the patron's table.

The Citizens' Council has concluded that further analysis of this proposed amendment is warranted. This proposal should be analyzed in conjunction with an in-depth consideration of education and training of restaurant servers. In addition, the Council believes further public hearings would be helpful in understanding and explaining the ramifications of this proposed amendment and in ascertaining public opinion. Opponents of this amendment argue that allowing the server to bring liquor to the table may result in the restaurant encouraging and promoting liquor sales and that allowing untrained servers to bring the liquor to the table may result in the loss of control over service of liquor to minors and intoxicated persons. Opponents of this amendment also argue that restaurant employees who

may not wish to handle liquor will be required by their employer to serve liquor. Furthermore, a question has been raised whether the current system deters a customer who has consumed his or her first mini-bottle from buying a second or third mini-bottle.

On the other hand, proponents of the amendment have argued that the change will promote tourism, further accommodate patrons and alleviate the perception of many that Utah's liquor laws are an anomaly. Proponents also argue that control over dispensing liquor will actually increase as the point of distribution is shifted to the patron's table since this facilitates the server's perusal of possible consumers of liquor.

The Citizens' Council has also been apprised that adoption of this proposal may impact on liquor advertising laws. The ramifications of this amendment on liquor advertising laws should be analyzed. The issue of "brownbagging" of liquor in restaurants may also be considered in conjunction with this proposal.

Finally, even though this provision of the state's liquor law is different from other states, the Citizens' Council is not convinced, at this point, that this is necessarily negative. Although the Council heard testimony from representatives of the tourism and hospitality industries claiming the majority of citizens find the current law an embarrassment and unnecessarily inconvenient to tourists, the Citizens' Council is of the opinion that further analysis is necessary to determine if the purported public sentiment to amend the law in fact exists. The existing procedures of liquor purchases in restaurants may in fact be a workable system supported by a majority of the citizens of the state. However, it must be pointed out that in the three public hearings held by the Council, it did not hear substantial opposition to this proposed change. At this point the Council is not sure

whether that is because significant public opposition does not exist or because the issue has not adequately been brought to the public's attention. The Citizens' Council believes a greater effort must be made to elicit public comment and ascertain public opinion regarding this proposed amendment and the advantages and disadvantages of the amendment weighed further during the next year so that a recommendation on this issue can be made prior to the 1987 legislative general session.

D. PROPOSED AMENDMENTS TO THE DRAM SHOP STATUTE

Dram shop statutes and common law liability for dram shops are relatively recent developments in the area of tort law. Prior to the temperance movement of the early nineteenth century, a tavern owner generally could not be liable for any damages caused by a drunk to a third party. However, this principle has given way to common law liability in 22 states and statutory dram shop liability in 23 states, including Utah. Chapter 14 of the Act, captioned Dram Shop Liability provides in part:

- (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 intoxication.
- (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.

§32A-14-1 Utah Code. Ann (1985).

The dram shop statute (the "Statute") presently creates liability only for those giving, selling or otherwise providing "liquor." The Statute does not

encompass beer. By limiting the Statute to "liquor", only a small percentage of those who furnish alcoholic beverages are subjected to liability.

Intoxication stemming from the consumption of beer is clearly a significant issue facing society. The incidents of beer-induced intoxication are not minimal. The Council is of the opinion that those who sell, give or otherwise provide beer to others should not escape the consequences for their actions in circumstances where those who furnish liquor would be liable. The Citizens' Council recommends an amendment to the Statute to encompass all "alcoholic beverages." (6 voted in favor of this amendment with Mr. Thurman opposed).

The Statute should be further amended to clearly delineate liability triggering acts. The Statute currently imposes liability on those who furnish liquor "contrary to this title." This rather nebulous phrase should be deleted and the particular liability triggering acts inserted. Specifically, at least three acts should be inserted in the Statute as acts which trigger liability: Selling, giving or otherwise providing alcoholic beverages, unless otherwise permitted by law, to (1) minors, §32A-12-8; (2) any person apparently under the influence of intoxicating alcoholic beverages or products or drugs, §32A-12-9; and (3) any known interdicted person, §32A-12-10 Utah Code Ann. (1985).

The Act presently makes it a criminal offense for a person to sell or otherwise furnish any alcoholic beverage to a person "actually or apparently under the influence of intoxicating alcoholic beverages or products or drugs." §32A-12-9 Utah Code Ann. (1985). The Citizens' Council believes the Legislature should consider deleting the words "actually or" from the statute. It has been argued that the current provision imposes a very harsh standard for which there is no defense and that instead, a person should be liable

under the Dram Shop Statute or under the criminal provisions of the Act only if the person furnishes alcoholic beverages to an individual who is "apparently intoxicated." For example, a private club proprietor will now be subject to dram shop or criminal liability if he sells an individual liquor who has a blood-alcohol concentration of .08 or higher, even though the individual has no outward appearance of intoxication and the person selling the beverage has no reason to suspect the individual is intoxicated.

The Citizens' Council also recommends the Legislature consider imposing a ceiling on the amount of damages that can be recovered under the Statute. Presently there is no dollar limit on damages recoverable under the Statute. The Council heard testimony that many establishments are foregoing insurance coverage for dram shop liability because of extremely expensive insurance premiums. Insurance companies are reluctant to write dram shop insurance due to the unlimited potential liability and the risk of numerous judgments. At least four states currently place limits on the amount that can be recovered against the person furnishing the alcoholic beverage, ranging from \$30,000 in Illinois to \$500,000 in North Carolina. The Citizens' Council recommends a limitation on the amount of damages that may be awarded to any person be incorporated into the Statute with an aggregate that may be awarded to all persons as a result of a single occurrence. Further input may be needed from the insurance industry and others to determine the dollar amount of the limitation. However, the Citizens' Council is persuaded that a limitation of \$100,000 that may be awarded to any person with an aggregate of \$300,000 that may be awarded as a result of a single occurrence is an appropriate ceiling. The Council heard testimony that such a limitation could have a measurable impact on increasing the availability of dram shop insurance to an establishment. The

Citizens' Council believes it is in the public interest that commercial vendors of alcoholic beverages have dram shop insurance coverage to provide a source of payment for injuries to third persons caused by an intoxicated person. A limitation on the amount of damages that can be recovered in any specific instance may reduce somewhat the reluctance of insurance carriers to provide such insurance and could have the tendency to prevent premiums for such insurance from continuing to increase at the present rapid rates. If a limitation on the amount of damages results in more establishments obtaining dram shop insurance, the disadvantages of limiting an individual's recovery are offset by the increased likelihood that a fund will be available from which the victim can recover. Given the current open-ended liability, some victims may obtain judgments but may not be able to recover their damages from the establishment if the establishment is without insurance. Furthermore, it should be remembered that dram shop liability is secondary liability. The victim is not limited by statute in the amount of damages he or she can recover from the primary tortfeasor.

In addition, the Council believes that a specific statute of limitations should be provided in the Statute. The Council recommends an amendment to the Statute to require that any action under the Statute be brought within one year of the date of the occurrence. Often a potentially liable establishment may not be apprised of the cause of action until long after the injury occurs. The general statute of limitations applicable to personal injury cases imposes a hardship on the establishment that served the alcoholic beverage since, if a long time has elapsed after the person causing the injury was allegedly furnished alcohol, evidentiary problems are compounded in finding someone who can testify whether the establishment

served the person alcoholic beverages and, if so, whether the person appeared to be intoxicated.

The Legislature should consider amending the law to require mandatory education and training of all establishment employees who are directly involved in selling or otherwise furnishing alcoholic beverages. The Citizens' Council recommends the Legislature consider establishing an Alcohol Training and Education Advisory Committee consisting of persons representing the Department of Alcoholic Beverage Control, the Citizens' Council, the Attorney General, the Department of Public Safety, the Division of Alcoholism and Drugs, and other appropriate governmental entities as well as representatives of alcoholic beverage retailers. The Advisory Committee would assist in the formation and implementation of a training and education curriculum. An Alcohol Training and Education Seminar should be required for all individuals who sell or furnish alcoholic beverages to the public in the scope of their employment. The following subjects should be included in the curriculum and instruction: (1) Alcohol as a drug and its effect on the body and behavior, especially driving ability; (2) Recognizing the problem drinker; (3) State alcoholic beverage laws including operational restrictions; (4) The dram shop law; (5) Drunk driving laws; (6) Dealing with the problem customer, including ways to cut off service, ways to deal with the belligerent customer and alternative means of transportation to get the customer safely home; and (7) Temporary detention of the criminal violator of liquor laws until law enforcement officers arrive.

The Retail Grocers Association informed the Citizens' Council of two amendments they intend to propose: (1) an amendment to provide that a merchant may temporarily take an individual into custody and detain the person if he or she attempts to make an unlawful purchase of an alcoholic

beverage and (2) an amendment making it a crime for a person actually intoxicated or an interdicted person to purchase an alcoholic beverage. The Citizens' Council endorses these amendments which will be introduced in the 1986 general legislative session. The Retail Grocers Association also proposes that individuals under the legal age to purchase alcoholic beverages be issued drivers' licenses which clearly indicate the individual is under age 21. It was suggested that the drivers' licenses of those under the age of 21 should differ in appearance from licenses of those over age 21, e.g., perhaps by color or by profile photograph rather than a front view photograph. The Citizens' Council believes that contrasting drivers' licenses for those over and under the legal age to purchase alcoholic beverages will assist retailers of alcoholic beverages in avoiding sales to those under the age of 21.

Finally, the Citizens' Council is of the opinion that the State of Utah should not be immune from liability for the sale of alcoholic beverages out of a state liquor store to a minor, to an apparently intoxicated person or to a known interdicted person. If the Legislature adopts the clarifying and limiting amendments to identify the wrongful acts that trigger liability, to impose a limitation on the amount of damages that can be recovered and to establish a one year statute of limitations, the Council is of the opinion that, with these additional safeguards, the state should not be immune from liability under the Statute. However, the Act should clearly indicate that immunity is waived only for sales by the state out of state liquor stores. The state should not be liable for sales by a package agency or sales by any other licensee or permittee.

E. FURTHER STUDY OF A PROPOSAL TO ALLOW THE USE OF A METERED LIQUOR DISPENSING DEVICE IN PRIVATE CLUBS

The Licensed Club Association has proposed that the use of mini-bottles in private clubs be eliminated in favor of a metered liquor dispensing device. Whereas the mini-bottle contains 1.7 ounces of liquor, the metered device would be calibrated to dispense one ounce of liquor. The proposal to use a metered device has facial appeal. However, before the Citizens' Council can make a definitive recommendation with regard to the metered device, several questions must be answered:

First, will the use of a metered device actually cut consumption of liquor significantly? Opponents have argued that consumers of alcohol may increase the number of drinks they order to offset, in part, the reduction in liquor in a given drink, thus leading to an increase in the profits made by private clubs. On the other hand, certainly the amount of liquor in a given drink would be reduced. However, it is not clear to the Citizens' Council that this would lead to a significant reduction in the consumption of liquor if the argument has merit that the number of drinks ordered on average would increase. The question of whether private club patrons drink a given number of drinks or drink to consume a desired amount of alcohol has not been definitively answered in the Council's hearings. The issue of reduced consumption has not been studied in depth nor any statistical evidence offered to support a conclusion of a significant reduction in liquor consumption. It should be pointed out that a persuasive common sense argument has been made that people who drink socially in a private club usually consume a finite number of drinks per hour and that this behavior will not be significantly altered if a metered device is used.

The Citizens' Council believes its recommendation should take into

account actual data on the impact of the metered device on consumption rather than be based on the conjecture of private club representatives and others that liquor consumption will significantly decrease. However, data concerning the impact of a metered device on liquor consumption is not readily available. Only Utah and several counties in North Carolina currently use the mini-bottle system and apparently no states or counties have recently changed from a mini-bottle to a metered device system from which data can be obtained. The Licensed Club Association proposes that data could be provided if the Legislature were to authorize a controlled study of the metered device in several private clubs on a short-term basis.

Second, will the state lose any control over the dispensing of liquor? Will the use of a metered device facilitate permissiveness in the dispensing of liquor or lead to abuses such as watered drinks, etc. The Council believes that further study is necessary of the types of liquor dispensing devices available and the controls that can be placed on them.

Third, will the use of a metered device lead to increased revenues and profits for private clubs? The non-profit factor has long been a sacrosanct theory of the State's liquor laws even though weakened in application. We believe the Legislature may look unfavorably upon any change in the law that will result in increased revenues to private clubs directly or indirectly from the sale of liquor.

Finally, will the use of a metered device in private clubs lead to a clamor by restaurants that they also should be allowed to use the metered device, thus fueling the liquor-by-the-drink debate? It can be argued that the use of a metered device is a move towards liquor-by-the-drink. However, it should be pointed out that liquor-by-the-drink already exists in private clubs. In a private club, the bartender mixes the drink and a server

brings the drink to the table. The use of this device will not change the procedures of private club liquor distribution in any significant way. Opponents claim the real risk of this amendment is that the switch to a metered device in private clubs may lead to a clamor by restaurant proprietors that they should be allowed to use a metered device as well. Of course if a metered device was used in restaurants, for all practical purposes, the state would have liquor-by-the-drink, a concept rejected by the voters, since it would be infeasible to use a metered device and not have the bartender mix the drinks. The probable outcry for the use of a metered device in restaurants then is the most significant risk opponents foresee in allowing the metered device in private clubs.

The Citizens' Council feels that these issues should be examined further during the next year. The metered device proposal, if adopted, would represent a major change in the State's liquor laws. Before such a change is recommended, all of the ramifications of such a proposal should be examined and fully articulated. Although this issue has surfaced several times over the years, it has been considered in only three hearings over a period of two months by the reorganized Citizens' Council. The Council is of the opinion that further public hearings and data on the use of the metered device and its impact on consumption and increased revenues would be helpful in further illuminating the issues and providing data on which a decision can be based. Over the next year, the Citizens' Council intends to consider more fully the advantages and disadvantages of the metered device and intends to submit a report and recommendation on the metered device to the Legislature after its analysis has been completed.

F. THE CITIZENS' COUNCIL SUPPORTS A LAW THAT WOULD PROVIDE FOR A ONE YEAR DRIVER'S LICENSE DENIAL FOR MINORS CONVICTED OF ANY CRIME INVOLVING THE POSSESSION, USE OR ABUSE OF ALCOHOL OR CONTROLLED SUBSTANCES

It is self-evident that alcohol use by minors is a significant societal problem. The Citizens' Council believes it is in the public interest to impose stringent sanctions on minors who are convicted of offenses involving the possession, use or abuse of alcohol or controlled substances. One of the most eagerly awaited and sought after privileges of teenagers is the privilege to drive. Utah grants this privilege to teenagers at the age of 16. The risk of loss of this privilege constitutes a deterrent to the use of alcohol by teens. Under Utah law, a person must be 21 to purchase, possess or consume alcoholic beverages. This law represents a recognition that society should not encourage, and in fact, should prohibit the consumption of alcohol by minors. A law which would deny driving privileges to minors convicted of alcohol offenses is further recognition of society's desire to discourage teenage drinking. Furthermore, revocation of driving privileges to minors who drink advances public safety, as those who have a propensity to drink and then possibly drive are removed from the highways.

The Citizens' Council recommends the enactment of a law providing that whenever a person 17 years of age or younger, is convicted of any offense or determined by a juvenile court to have committed any offense involving the possession, use or abuse of alcohol or controlled substances, the court in which the person is convicted shall prepare and send to the Office of Driver License Services, an order of denial of driving privileges for the person so convicted. The Act should also contain a provision that the court issuing such denial may, upon petition, review the order and may withdraw

it. However, the court should not be able to withdraw the order for a period of 90 days following issuance, if it is the first such order issued with respect to the person, or for one year if it is the second or subsequent such order issued. The Act should provide that upon receipt of the first order denying driving privileges, the Office of Driver License Services shall impose a suspension of driving privileges for one year, or until the person so suspended reaches 17, whichever is longer. Upon receipt of a second order denying driving privileges, the Office of Driver License Services shall suspend driving privileges for one year or until the person reaches 18 years of age, whichever is longer. This proposal is modeled after Oregon's Driver's License Denial law. [See H.B. No. 44, Suspension of Juvenile Driving Privileges, filed by Representative Kim R. Burningham on October 16, 1985 which is very similar to the Oregon law.]

In Oregon, where such a law has been in effect since 1983, there has been a significant reduction in juveniles arrested for various alcohol-related offenses. The following data has been provided by the Oregon Traffic Safety Commission:

<u>Juveniles Arrested</u>	<u>% Change 1982-1984</u>
DUI	-17% (DUI arrests +2% overall)
Open Container	-45%
All Liquor Law Violations	-12%
All Drug Law Violations	-22%

Of course, factors other than the driver's license denial law may explain, in part, the significant reductions in alcohol-related juvenile arrests but the stiff driver's license sanctions have most certainly contributed.

G. THE CITIZENS' COUNCIL FAVORS CLEAR LABELING OF ALCOHOLIC BEVERAGES WHICH REASONABLY APPRISES THE PUBLIC THAT THE BEVERAGE CONTAINS ALCOHOL

The Citizens' Council recently became aware that beverages containing alcohol, i.e. "malt beverage coolers", which bore no indication that they contained alcohol were being sold in the state. The labels on these beverages merely stated "a malt beverage." In some grocery and convenience stores these beverages were found in the soda pop coolers. When the Department of Alcoholic Beverage Control discovered these beverages were being sold in the state, it asked the distributors of these malt beverages to place a label on all such beverages indicating the beverage was an "alcoholic beverage". The distributors voluntarily complied with the Department's request to label the beverages.

While commending distributors of malt beverage coolers who have voluntarily labeled such beverages as alcoholic, the consensus of the Citizens' Council is that state law should require such labeling. The Citizens' Council is of the opinion that all beverages falling within the definition of alcoholic beverages as defined in §32A-1-5(1), (4) and (17) Utah Code Ann. (1985) should clearly indicate they are alcoholic beverages. However, since liquor and beer are already sufficiently identified, the Citizens' Council is particularly concerned that beer coolers and other malted beverages bear an indication that they contain alcohol. Perhaps the Beer Wholesaling License Chapter can be amended to provide as an operational restriction that: "No [beer wholesaling] licensee shall sell or distribute any alcoholic beverage that is not clearly labeled in such a manner as is reasonably calculated to put the public on notice that the beverage is an alcoholic beverage. The beverage shall bear the label 'alcoholic beverage' or it shall

bear a label containing the words 'beer' or 'malt liquor' which in common usage apprises the general public that the beverage contains alcohol." See §32A-10-6 Utah Code Ann. (1985).

It should be noted that the Citizens' Council is not recommending that labeling of alcohol content be required. Federal statutes provide that malt beverage labeling and advertising shall not contain any statement concerning the alcohol content of the product unless required by state law. See Sections 5(e) and 5(f) of the Federal Alcohol Administration Act, 27 U.S.C. §§ 205(e) and (f). Although the state can require labeling of alcohol content, the Citizens' Council heard testimony to the effect that labeling of alcohol content on malt beverage should be avoided, since the effects of differentiating the products by alcohol content may have a deleterious impact on the public interest if some consumers choose to consume the beverage with the higher alcohol content.

H. THE CITIZENS' COUNCIL OPPOSES AN AMENDMENT TO PROHIBIT POLITICAL NOMINATING CONVENTIONS FROM BEING GRANTED A SINGLE EVENT PERMIT

A proposal to amend the Single Event Permit Chapter of the Act to prohibit political parties from being granted a single event permit was also referred to the Citizens' Council. However, no one addressed the Council either in favor or in opposition to this proposed amendment.

The Citizens' Council is not in favor of this proposed amendment. The consensus of the Council is that the Single Event Permit Chapter contains adequate safeguards and restrictions on the issuance of the single event permit. The Alcoholic Beverage Control Commission has plenary power to grant or deny single event permits. §32A-7-1(4) Utah Code Ann. (1985). The Commission must consider the times, dates, location and purpose of the

event, and shall determine where the liquor may be stored, sold and consumed at the event. §§ 32A-7-3(2)(c) and 32A-7-6(2)(e),(f), and (g) Utah Code Ann. (1985). The Commission may consider other factors or circumstances it considers necessary to determine whether the permit should be granted. Rather than amending the Act to deal with specific organizations and events which, although meeting the facial requirements, should not be eligible for a permit, the Legislature should allow the Commission to utilize its comprehensive criteria and to exercise its discretion in determining whether a single event permit should be granted.

Furthermore, it was felt that responsible organizers of political nominating conventions would, in the exercise of common sense, self-police their own conventions and would limit the times that liquor was dispensed to when actual voting was not occurring, based on the realization that the voting process and alcohol consumption don't mix.

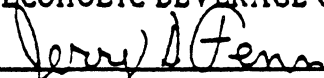
III. CONCLUSION


The Citizens' Council recognizes that these recommendations will not please everyone. In the realm of alcoholic beverage regulation, controversy has repeatedly and consistently reared its head. Whatever recommendations are made, there are always those who say they go too far and those who say they don't go far enough. Our approach has been cautious. We have avoided a rush to judgment on issues which we believe deserve more consideration and which merit further public hearings in order to more fully elicit and ascertain public opinion. Furthermore, the 1985 Alcoholic Beverage Control Act has only been in effect since July 1985. The Citizens' Council recognizes that the Legislature may determine that major substantive changes in the Act should be examined only after there has been an opportunity to evaluate the performance and gauge the strengths and deficiencies in the 1985 Act.

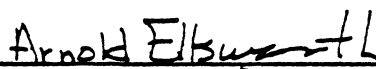
Issues will continue to resurface. Further amendments to the law will most certainly be made over time. The Citizens' Council's task is ongoing and it will attempt to provide a forum for the fair consideration of all issues that may arise involving alcoholic beverages and laws related to their sale, purchase and consumption.

Submitted this 20th day of November, 1985.

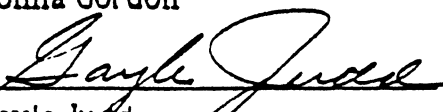
THE CITIZENS' COUNCIL ON
ALCOHOLIC BEVERAGE CONTROL

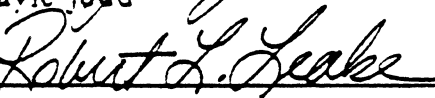

Jerry D. Fenn, Chairman

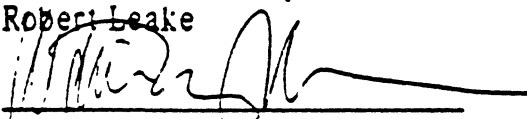

Kenneth E. Kefauver, Vice-Chairman


Arnold Ellsworth ^{By JDF} per Telephone approval 11-19-85


Donna Gordon


Gayle Judd


Robert Leake


William Thomas Thurman

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

DONNA CAMPBELL, being duly sworn, states that she is employed in the office of Snow, Christensen & Martineau, attorneys for Clearfield City and that she served a copy of Affidavit of Jerry D. Fenn upon the following parties:

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by placing a true copy thereof in an envelope and mailing the same postage prepaid on the 5th day of October, 1987.

Donna Campbell
SECRETARY

SUBSCRIBED and sworn to before me this 5th day of October 1987.

Charles A. Shute
NOTARY PUBLIC