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Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

KATHY LYNN HIGGINS, individually and as guardian ad litem for SHAUNDRA HIGGINS, her daughter, Plaintiff-Appellant, -vs- SALT LAKE COUNTY, by and through SALT LAKE COUNTY MENTAL HEALTH, DR. WILLIAM KUENTZEL, SHERYL STEADMAN, THE UNIVERSITY OF UTAH and THE UNIVERSITY OF UTAH MEDICAL CENTER, Defendants-Appellees.	Case No. 90255 PRIORITY 16

BRIEF OF SALT LAKE COUNTY APPELLEES

FILED
FEB 5 1991
Clerk, Supreme Court, Utah

On Appeal from the Judgments of the Third District Court
In and For Salt Lake County
Honorable James Sawaya, Judge

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Plaintiff-Appellant,	)	Case No. 90255
-vs-	)	
SALT LAKE COUNTY, by and through SALT LAKE COUNTY MENTAL HEALTH, DR. WILLIAM KUENTZEL, SHERYL STEADMAN, THE UNIVERSITY OF UTAH and THE UNIVERSITY OF UTAH MEDICAL CENTER,	)	PRIORITY 16
Defendants-Appellees.	)	

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PARTIES

The parties to this litigation are:

APPELLANT: Kathy Lynn Higgins, individually and as guardian ad litem for her daughter Shaundra Higgins;

APPELLEES: Salt Lake County, by and through Salt Lake County Mental Health, Dr. William Kuentzel and Sheryl Steadman; The University of Utah and the University Medical Center;

OTHER DEFENDANTS: This action was originally commenced against the Appellees, Caroline Trujillo and the State of Utah, by and through the Department of Corrections and by and through the Department of Social Services. This is an appeal from summary judgment entered pursuant to Rules 54(b) and 56 of the Utah Rules of Civil Procedure, in favor of the Appellees. Caroline Trujillo remains as a party in the trial court. Appellant settled with the State of Utah and the case against it was dismissed.

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF JURISDICTION	vi
STATEMENT OF ISSUES	vi
DETERMINATIVE STATUTES	vi
STATEMENT OF CASE	1
STATEMENT OF FACTS	2
The Utah Mental Health System in 1984	2
Salt Lake County's Community Mental Health Services in 1984	5
Carolyn Trujillo and Her Mental Illness	7
Carolyn Trujillo's Criminal History	8
Carolyn Trujillo's First 1981 Criminal Charge	9
Carolyn Trujillo's Second 1981 Criminal Charge	10
Trujillo's Treatment at ARTU in 1984	12
Nurse Steadman and Dr. Kuentzel	16
Schizophrenia	20
The Assault on Shaundra Higgins	20
SUMMARY OF ARGUMENT	23
No Special Relationship	23

No Public Duty 24

No Duty from Court Sentences 24

Kathy Higgins Failed to File Notice of Claim 24

Kathy Higgins Has No Claim 24

§63-30-10, U.C.A. Bars this Action 25

No Denial of Constitutional Rights 25

ARGUMENT 25

POINT I - Summary Judgment was Properly Granted to the Salt Lake County Appellees 26

A. There were no Disputed Material Facts Precluding Summary Judgment 27

B. Salt Lake County Appellees Owed No Duty to Appellants 28

1. There was no Duty Created by Reason of Any Special Relationship . . . 28

2. There was no Duty Owed to the Public . . 33

3. Carolyn Trujillo's 1981 Sentences Imposed No Duty Upon the Salt Lake County Appellees 38

POINT II - Appellant Kathy Lynn Higgins' Claim is Barred Because She Failed to File a Notice of Claim 38

POINT III - Section 63-30-10 Bars this Action . . . 39

POINT IV - Appellant Kathy Higgins Has No Cause of Action 41

POINT V - The Lower Court's Judgment for Appellees Did Not Violate the Utah and United States Constitutions 41

CONCLUSION 46

TABLE OF AUTHORITIES

PAGE(S)

Beach v. University of Utah, 726 P.wd 413 (Utah 1986) . . 27

Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984)
910 F.2d 686 (10th Cir. 1990) 3

Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985) 41, 42, 43

Bowers v. Devito, 686 F.2d 616 (7th Cir. 1982) 45

Bradford v. Metropolitan County, 522 S.2d 96 (Fla. 1988) . 27

Brady v. Hooper, 751 F.2d 329 (10th Cir. 1984) 29

Celotex Corp. v. Catrett, 477 U.S. 317, 327 43

Christenson v. Hayward, 694 P.2d 612 (Utah 1984) 34

Clark v. State, 472 NYS.2d 170 (1980) 34

Colyar v. Third District Court, 469 F.Supp 424
(D.Utah 1979) 2

Condemarin v. The University Hospital,
775 P.2d 348 (Utah 1989) 42, 43 44

Connell v. Tooele City, 572 P.2d 697 (1977) 40

Cooke v. Berlin, 735 P.2d 830 (Ariz.App. 1987) 29

Currie v. U.S., 836 F.2d 209 (4th Cir. 1987) 27

Dimas v. County of Quay, N.M., 730 F.Supp. 373,
380 (D.N.M.1990) 45

Doe v. Arguelles, 716 P.2d 279 (Utah 1983) 31, 37

Edwards v. Iron County, 531 P.2d 476 (Utah 1975) 39

Ferree v. State of Utah, 784 P.2d 149 (Utah 1989) 27

Greenberg v. Barbour, 322 F.Supp. 745 (E.D.PA. 1971) . . . 35

Hasenai v. U.S., 541 F.Supp. 999 (D.Md. 1983) 29

Hinkelman v. Borgess Medical Center, 43 N.W.2d 547
(Michigan 1987) 23

Hokansen v. U.S., 868 F.2d 372 (1989) 23, 27, 30

Jablonski v. Pauls, U.S. 712 F.2d 391 (9th Cir. 1983) . . 34

Johnson v. Rogers, 763 P.2d 771, 785 (Utah 1988) 41

Lipari v. Sears, 497 F.Supp. 185 (D.Nev. 1980) 37

Little v. Division of Family Services,
667 P.2d 49 (Utah 1983) 31, 37

Martinez v. California, 444 U.S. 277 (1980) 45

McIntosh v. Milano, 403 A.2d 500 (N.J. 1973) 35

Naidu v. Laird, 539 A.2d 1064 (Del. 1988) 36

Obray v. Malmberg, 484 P.2d (Utah 1971) 34

Owens v. Garfield, 784 P.2d 1187 (Utah 1989) 27, 32, 37

Payton v. United States, 679 F.2d 475 (5th Cir. 1982) . . 37

Perreira v. State, 768 P.2d 1198 (Colo. 1989) 28, 29, 36

Petersen v. State, 671 P.2d 230 (Wash. 1983) 36

Semler v. Psychiatric Institute of Washington, D.C.,
538 F.2d 121, 127 (4th Cir. 1976) 37

Tarasoff v. Regents of the University of California,
551 P.2d 334 (CA. 1976) 37

Thompson v. County of Alameda, 614 P.2d 728
(10th Cir. 1984) 29

Varoz v. Sevey, 506 P.2d 435 (Utah 1973) 39

Yeates v. Vernal Family Health Center
617 P.2d 352 (Utah 1980) 24, 39

OTHER AUTHORITIES

PAGE(S)

Restatement (Second) of Torts 315 28

United States Constitution, Amendment XIV, §1 43

Utah Rules of Civil Procedure 56(c) 43

Utah Constitution, Article I, §11 43

STATEMENT OF JURISDICTION

Jurisdiction is vested in the Utah Supreme Court under Article VIII, Section 3 of the Constitution of Utah and Rules 4(a), 54(b) and 56 of the Utah Rules of Civil Procedure.

STATEMENT OF ISSUES

1. Whether the lower court erred in determining as a matter of law that appellees owed no duty to appellants?

2. Whether appellants' claims are barred by the Utah Governmental Immunity Act, §63-30-1 et. seq. U.C.A. and e.g. §63-30-10 U.C.A.?

3. Whether appellant Kathy Higgins' claim is barred by her failure to file a notice of claim upon Appellee Salt Lake County pursuant to §63-30-11, U.C.A. and §63-30-13, U.C.A.?

4. Whether Kathy Higgins can state a claim for negligent infliction of emotional distress?

All of the above are issues of law and this Court resolves all such legal issues without deference to the lower court's rulings on appeal from summary judgment. Ferre v. State of Utah, 784 P.2d 149 (Ut. 1989).

DETERMINATIVE STATUTES

The following provisions of Utah Code Annotated are determinative of the issues in this appeal and these statutes are reproduced in the addendum:

§26-17-1.2; §26-17-5; §26-17-7; §63-30-1 et seq.; §63-30-10; §63-30-10(2); §63-30-11; §63-30-13; §64-7-7; §64-7-28(4); §64-7-32; §64-7-34; §64-7-34(2); §64-7-36; §64-7-36(3); §64-7-36(8); §64-7-36(10); §76-2-301; §77-18-1; §78-3a-55

STATEMENT OF CASE

On April 10, 1984, Carolyn Trujillo, a chronically mentally ill person, stabbed Shaundra Higgins, a 10-year old girl who lived in Trujillo's neighborhood. Prior to the stabbing, Carolyn Trujillo had been a voluntary patient at several of Salt Lake County's mental health facilities, as well as, an involuntary patient at the Utah State Hospital.

Shaundra Higgins sued Salt Lake County Appellees and others for the physical and mental injuries she sustained as a result of being stabbed. Kathy Higgins, Shaundra's mother, though not present during the stabbing, sued for her emotional distress claimed to have been caused by the stabbing.

In November, 1986, Third District Court Judge Russon granted Summary Judgment, in separate orders, to the Defendant Utah State Hospital and the State of Utah's Department of Corrections because he found that these defendants had no responsibility for Carolyn Trujillo at the time of the stabbing. The Court also found that the Department of Corrections' (Adult Probation and Parole) termination of Carolyn Trujillo's probation was a discretionary function. (R. 791-797; 810-15). The Higginses appealed from these adverse judgments and later compromised their claims with the aforementioned defendants.

In August, 1989, after extensive and prolonged discovery, Salt Lake County Appellees moved for summary judgment on the basis that they owed no duty to the Higginses; that no special relationship existed between Salt Lake County Appellees and Carolyn Trujillo; that Salt Lake County Appellees' acts or omissions were not the proximate cause of injury to the Higginses; that Kathy Higgins' claim was barred by her failure to file a notice of claim (§63-30-11 and §63-30-13 U.C.A.) and that §63-30-10 U.C.A. barred Appellants' lawsuit. (R. 1143-1213) Third District Judge Sawaya ruled that the Salt Lake County Appellees owed not duty to Appellants and granted judgment in favor of the Salt Lake County Appellees on April 23, 1990. (R. 2345, 2349-2351). This is Appellants' appeal from that Judgment.

STATEMENT OF FACTS

THE UTAH MENTAL HEALTH SYSTEM IN 1984.

1. In Colyar v. Third District Court, 469 F.Supp 424 (D. Utah 1979) the United District Court for the Central Division of Utah, invalidated that part of Utah's civil commitment statute which allowed the commitment of non-dangerous mentally ill persons who lacked insight concerning their need for treatment or who lacked the capacity to provide themselves with the basic necessities of life.

2. Mentally ill persons in Utah have a constitutional right to refuse medication absent a court order or an emergency

and this right was clearly established in 1980. Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984); 910 F.2d 686 (10th Cir. 1990).

3. During 1984 and before, a comprehensive community mental health system administered by the State Division of Mental Health under the policy direction of the State Board of Mental Health was provided for throughout the State of Utah. [§26-17-1.2 U.C.A. (1977)].

4. Salt Lake County, pursuant to §26-17-7, et seq., U.C.A., established three community mental health centers: Granite (GMH), Copper Mountain (CMMH) and Salt Lake (SLCMH). These centers were later consolidated to form Salt Lake County Mental Health. (R. 2373, Depo. Whittaker, p. 16).

5. Mental health services in the State of Utah, through Community Mental Health Centers, were available regardless of ability to pay. (§26-17-5 U.C.A.).

6. During 1984, civil commitment/hospitalization in the State of Utah was to the State Division of Mental Health (§64-7-7 U.C.A.; R. 2371, Depo. Steadman, p. 76).

7. Involuntary commitment/hospitalization in the State of Utah in 1984 was governed by §64-7-32 and §64-7-36 U.C.A.

8. Temporary Involuntary Emergency Hospitalization in 1984 was accomplished by an application of a responsible person with personal knowledge of the proposed patient accompanied by certification of a physician or a designated examiner. (§64-7-34 U.C.A.).

9. Carolyn Trujillo's mother, stepfather or aunt could have filed an application for Temporary Involuntary Emergency Hospitalization in February, 1984, pursuant to the aforementioned statute along with the certificate of a physician or designated examiner.

10. Temporary Involuntary Emergency Hospitalization in 1984 also could be accomplished without certification of a physician or designated examiner by application of a mental health officer or a peace officer [§64-7-34(2) U.C.A.].

11. Designated Examiners were licensed physicians (preferably psychiatrists, or other licensed mental health professional who were designated to Utah State Division of Mental Health to sign applications for every hospital and to examine and diagnose proposed patients. (§64-7-28(4) U.C.A.).

12. In 1984, a person in the State of Utah could not be civilly committed/involuntarily hospitalized unless District Court found by clear and convincing evidence that the proposed patient had a mental illness which posed immediate danger or physical injury to the proposed patient or others, and he lacked the ability to engage in a rational decision-making process regarding the acceptance of care and that there was no appropriate less restrictive alternative to a court order of hospitalization and the hospital or mental health facility could provide adequate and appropriate care [§64-7-36(10) U.C.A.].

13. In 1984, involuntary hospitalizations were not

ordered if persons consented to voluntary care. [§64-7-35(3) and (8) U.C.A].

14. In 1984, directors of mental facilities had the discretion whether to admit a voluntary and mentally ill person to their facilities (§63-7-29, U.C.A.).

15. In 1984, mental health personnel had no legal right to prevent a voluntary patient from leaving a treatment facility unless mental personnel believed the release would be unsafe for the patient or others and in which a patient could be held for up to 48-hours (§64-7-31, U.C.A.).

SALT LAKE COUNTY'S COMMUNITY MENTAL HEALTH SERVICES IN 1984.

16. Once a person became a client of County Mental Health, he or she was assigned to the out-patient unit which serviced the geographic area where the client lived. Each out-patient unit had its own psychiatrist and staff of trained psychiatric nurses, social workers and mental health specialists. Each client has assigned a "primary therapist" who had overall responsibility for the client's ongoing care and treatment. The primary therapist met with the client on a regular basis, supervised the client's medication program, and provided other forms of therapy as needed. (R. 2375, Depo. Whittaker, pp. 45, 175-278; R. 2371, Depo, Steadman, p. 28)

17. In 1984, certain specialty mental health services and facilities were available in Salt Lake County to handle emergencies which might arise when the out-patient units were closed in the evenings and on weekends, or when close

supervision was needed. One of these special facilities was the Adult Residential Treatment Unit ("ARTU") located at 46 South 700 East. ARTU was a group home residence to which County Mental Health out-patient therapists could refer clients who were in need of a more structured treatment environment. Clients lived on the premises while participating in medication management, behavior modification and group programs supervised by the on-site staff. (R. 2375, Depo. Whittaker, pp. 10-12).

18. In 1984, ARTU was also the base for County Mental Health's 24-hour "crisis line" service. Anyone could call this service whenever he perceived he or others were "in crisis" and needed help. (R. _____, Depo. Fisher, pp. 8; 11-12; 19-20; 28-29).

19. In 1984, County Mental Health had expanded its available services through contracts with other health care providers and specifically contracted for bed space was contracted with University Hospital and Pioneer Valley Hospital for County Mental Health clients who needed in-patient treatment. In 1984, 20 beds were available at the University and 17 at Pioneer Valley Hospital. (R. 2380, Depo. Ericksen, p. 74).

20. ARTU typically treated people like Trujillo, who are chronically mentally ill and who had problems with daily living. County Mental Health clients were commonly referred to ARTU in lieu of hospitalization, in part because it had to abide by the legal requirement that all mental health patients

be treated in the least restrictive environment possible to preserve their civil liberties. (R. 2373, Depo. Whittaker, pp. 84-85; R. 2371, Depo. Steadman, p. 79; R. 2376, Depo. Ely, p. 89).

CAROLYN TRUJILLO AND HER MENTAL ILLNESS

21. Trujillo first had contact with one of Salt Lake County's mental health employees in late 1975, at age 17, while she was involuntarily committed and hospitalized in the in-patient unit at University Hospital. [R. 2371, Depo. Steadman, pp. 37,39.]

22. Trujillo had been diagnosed repeatedly since 1975 as suffering from paranoid schizophrenia, a chronic mental illness for which there is no cure and little effective treatment. Individual psychotherapy is usually ineffective and the illness is generally treated with medication therapy. [R. 2371, Depo. Steadman, pp. 163, 174; R. 2376, Depo. Ely, M.D. pp. 132-34].

23. Since 1975, Trujillo has been involuntarily committed and held in the in-patient unit of the University Hospital four times, most recently in February, 1979, and twice in the Utah State Hospital in Provo. (R. 2179, 2180 and 2199)

24. During Trujillo's hospitalization in the University hospital in late 1975, she was assigned to County Mental Health's Downtown Unit because of her geographical location/residence and defendant Cheryl Steadman, R.N., became her primary therapist after Trujillo's release from hospitalization. (R. 2371, Depo. Steadman, p. 39).

CAROLYN TRUJILLO'S CRIMINAL HISTORY.

25. Adult Probation and Parole Investigator Jack Bowers, provided the following information about Carolyn Trujillo's juvenile record in a postsentence report to the District Court in April, 1985: (R. 1233, Exhibit 1 p. 3)

DATE	OFFENSE	DISPOSITION
12-29-70	Ungovernable	Non-Judicial Closure
02-09-72	Attempted Suicide	Non-Judicial Closure
10-16-72	Ungovernable	Non-Judicial Closure
02-23-73	Ungovernable	Non-Judicial Closure
04-04-73	Ungovernable	Non-Judicial Closure
06-21-73	Ungovernable	Non-Judicial Closure
06-22-73	Theft, Class B	No Action Taken

26. Persons in Utah are not criminally responsible before age 14 (§76-2-30, U.C.A.) and their juvenile records are not open to public inspection (§78-3a-55, U.C.A.)

27. The aforementioned Adult Probation and Parole provided the District Court with the following information about Carolyn Trujillo's adult record: (R. 1233, Exhibit 1 p.3)

AGENCY	DATE	OFFENSE	DISPOSITION
SLCPD	09/08/76	Loitering for the purpose of prostitution	Case dismissed; insufficient evidence
SLCPD	03/17/78	Trespassing; Assault and Battery	Declined to Prosecute
U of U PD	03/22/78	Felony Theft	Fined $20; or 4 days in jail
SLCPD	12/27/79	Retail Theft	9 days jail suspended $45 fine

SLCPD	05/27/81	False Information	Declined to Prosecute
OGDEN PD	07/16/81	Assault	Probation; Evaluation
SLCPD	09/15/81	Aggravated Assault	Probation; Continued treatment; Restitution
SLCPD	04/10/84	Attempted Criminal Homicide	Utah State Hospital; 0 to 5 USP

CAROLYN TRUJILLO'S FIRST 1981 CRIMINAL CHARGE.

28. A woman named Janet Jones told Ogden City Police that when she attempted to walk past Carolyn Trujillo on July 16, 1981, that Carolyn struck at her and the small child she was carrying with her sweatshirt, causing a small scratch on the child's head. (R. 1143, Attachment 1).

29. As a result of the aforementioned incident, Carolyn was charged with assault and disorderly conduct, and Ogden City moved to merge the assault charge with the disorderly conduct charge. On July 17, 1981, Carolyn pleaded guilty to disorderly conduct. (R. 1143, Attachment 2).

30. On February 22, 1982, the Circuit Court sentenced Carolyn to sixty days in jail, but the sentence was suspended and she was placed on probation for one year to the Department of Corrections ' Adult Probation and Parole upon the conditions that she take her medication and participate in a program with Jean Marlor. (R. 1143, Attachment 2; §77-18-1 U.C.A.).

31. On January 20, 1983, Karen Cole Shepherd, a District Agent for Adult Probation and Parole, recommended that Carolyn

Trujillo's probation be terminated because she had reported regularly, had been taking her medications and had been attending her treatment sessions. (R. 1143, Attachment 3).

32. On January 28, 1983, Carolyn's probation was terminated by the Third Circuit Court in Ogden based upon the motion of Adult Probation and Parole. (R. 1143, Attachment 4); (R. 791-797).

CAROLYN TRUJILLO'S SECOND 1981 CRIMINAL CHARGE.

33. On September 15, 1981, Carolyn Trujillo stabbed a woman in the buttocks with a pocket knife while the woman was crossing the street. (R. 1233, Exhibit 1 Addendum))

34. On September 18, 1981, Carolyn was charged in the Fifth Circuit Court in Salt Lake County with aggravated assault, third degree felony, for the stabbing and on October 9, 1981, she was committed to the Utah State Hospital for a thirty-day evaluation to determine her competency to stand trial, and was found incompetent to stand trial until December 1, 1981. (See R. 1143, Attachment 5).

35. In a letter dated November 10, 1981, Utah State Hospital Psychiatrist Austin and Utah State Hospital Psychologist Howell informed the Third District Court that they found minimal evidence of schizophrenic mental illness in Carolyn Trujillo and that she demonstrated signs of organic brain dysfunction compatible with mixed illicit drug abuse and that her personality structure was dominated by anti-social and passive aggressive features. They also advised the Court that

she was incompetent to stand trial at that time. (R. 1143, Attachment 5).

36. On December 4, 1981, Carolyn appeared in Fifth Circuit Court pleaded no contest to the reduced charge of simple assault, a Class B misdemeanor, and was placed on probation for one year under the supervision of the Utah State Department of Corrections' Adult Probation and Parole. As one of the conditions of probation, Carolyn was ordered to enter a residential mental health program. (R. 1143, Attachment 6 and §77-18-1 U.C.A.); (R. 791-797).

37. On January 20, 1983, Karen Cole-Shepherd, a District Agent for Adult Probation and Parole, requested termination of Carolyn Trujillo's probation even though "The defendant has had minimal involvement with her counseling at Salt Lake Mental Health. She, however, continues to take her medication and the staff of Salt Lake Mental Health feel they cannot expect a great deal more from Carolyn. They will continue to monitor her medication and urge her to attend therapy. It is the opinion of this agency that the defendant will not benefit from further supervision. She has reported regularly and no further violations of the law have been reported." (R. 1143, Attachment 7); (R. 791-797)

38. On January 25, 1983, Carolyn's probation was terminated by the Fifth Circuit Court in Salt Lake City at the request of Adult Probation and Parole. (See R. 1143 Attachment 7); (R. 791-797)

TRUJILLO'S TREATMENT AT ARTU IN 1984.

39. On February 25, 1984, Trujillo was taken by her parents to the University Hospital and then to ARTU. Larry Romero, an ARTU mental health specialist, interviewed Carolyn, her parents and aunt. On the basis of that interview, Romero wrote the following note:

> This 25 year old female was admitted through UMC ER after being brought in by her parents. Client reports that two days ago she began feeling self destructive after feeling like not living.... Family reports that client is to get a hospital bed when one opens up however she does not appear to be appropriate for hospitalization. It appears that this family needs a time out. It also appears that she is appropriate for residential treatment stay. Plan: Evaluate while here thru Monday. Make plan w/Cheryl Steadman, crisis people and residential staffing. (Emphasis added)

Mr. Romero's note was countersigned by Lynn Whittaker, the Residential Coordinator for ARTU, who agreed with the assessment and plan. [R. 2373, Whittaker depo., pp. 4, 288].

40. ARTU notified Cheryl Steadman on February 28, 1984 of Trujillo's admission for a crisis stay. (R. 2371, Depo. Steadman, p. 135).

41. In 1984, Larry Romero had a two-year associate degree in social science, had been working for Salt Lake County since September, 1976 and had held various positions with mental health, including the crisis specialist position he held during 1983 and 1984 at ARTU. (R. _____, Depo. Romero, pages 3-26).

42. Romero was a mental health officer of the State of Utah and thereby qualified to sign an involuntary commitment applications. Romero's criteria for signing a petition for involuntary hospitalization were whether the person was displaying verbal or non-verbal behavior of dangerousness to self or others. (R. _____, Depo. Romero, pp. 57-58).

43. After Romero met with Carolyn Trujillo, her mother, step-father and aunt at ARTU on February 25, 1984, he felt Carolyn acted appropriately that she was not psychotic and that she was taking her medications. (R. _____, Depo. Romero, pp. 80, 83 and 87).

44. Carolyn Trujillo agreed to go to the evening-weekend program for therapy on Tuesday and Thursday in the evenings. (R. _____, Depo. Romero, Vol. II p. 48).

45. Mr. Romero did not think that Carolyn was in need of hospitalization on February 25, 1984, because she was not a danger to herself or others. (R _____, Depo. Romero, pp. 77 and 88, and Vol. II, p. 64).

46. Mr. Romero did not have any reason to believe during February, 1984 and thereafter that Carolyn was a danger to the community, nor did he have any reason to petition for the civil commitment for Carolyn Trujillo. (R. _____, Depo. Romero, Vol. II pp. 68-69).

47. ARTU typically treated people like Trujillo, who were chronically mentally ill and who had problems with daily living. Persons were commonly referred to ARTU in lieu of

hospitalization, in part because mentally ill persons had a statutory right to be treated in the least restrictive environment possible. [R. 2373, Depo. Whittaker, p. 84-85; R. 2371, Depo. Steadman, p. 79; R. 2376, Depo. Ely, p. 89].

48. Joy Ely is a licensed psychiatrist who worked part time at ARTU during 1983 and 1984 and who had been employed by Salt Lake County since 1969. Dr. Ely was a designated examiner. (R. 2376, Depo. Dr. Ely, p. 23, 31 and 4 and 7; §64-7-28(4) U.C.A.).

49. Dr. Ely interviewed Carolyn Trujillo on Monday morning, February 27, 1984, at ARTU and found that Carolyn did not exhibit overly psychotic features in the sense of delusions or hallucinations. (R. 2376, Depo. Ely, p. 67).

50. Dr. Ely had no reason to believe that Carolyn was in need of involuntary hospitalization/civil commitment on February 27 or on March 1, 1984, nor does she recall that she had any reason to believe that Carolyn was dangerous to others on those dates. (R. 2376, Depo. Dr. Ely, p. 124, 129-130 and 132).

51. Dr. Ely met with Trujillo for one-half hour on February 27, 1984 and she found Trujillo to be calm, non-delusional, and her behavior appeared to be under control. Trujillo told Dr. Ely that she felt much better, did not need hospitalization and wanted to go home. [R. 2376, Depo. Ely, pp. 64, 67-69].

52. Dr. Ely felt competent to evaluate Trujillo based on

the information available to her. She had had prior experience dealing with schizophrenia and confirmed that diagnosis of Trujillo. In Dr. Ely's opinion, Trujillo did not need hospitalization in February and March, 1984 and Trujillo was not dangerous to herself or others. [R. 2376, Depo. Ely, pp. 58, 115-116; 124-125; 130-132 and 122-126].

53. The last time Romero saw Carolyn prior to the stabbing was on March 16, 1984. (R _____, Depo. Romero, Vol, II, page 74).

54. Mr. Romero believes that Carolyn knew the difference between right and wrong, when she stabbed Shaundra Higgins on April 10, 1984, and although he did not see Carolyn after the March 16, 1984, he believes that if she were taking medication, that the stabbing was a criminal act and that if she were off the medication, it was a voluntary act that she made on her own while she was stable. (R _____, Depo. Romero, Vol. II, p. 73-74).

55. ARTU's Weekly Service Summaries reflect that Carolyn Trujillo was doing well immediately prior to April 10, 1984, when she stabbed Shaundra Higgins. (R. 1143, Attachment 9).

56. ARTU's records reflect that Carolyn Trujillo attended group, recreational and milieu therapy sessions during the period February 25, 1984 through March 29, 1984. (R. 1143, Attachment 9).

57. During Carolyn's stay at ARTU in 1984, ARTU staff regularly met and made regular assessments of all of ARTU's

patients' need for hospitalization. (R. 2376, Depo. Ely, p. 123).

NURSE STEADMAN AND DR. KUENTZEL

58. Nurse Steadman is one of only 20-25 nurses in the State of Utah who put in the 508 hours of group psychotherapy and supervision necessary to obtain a Nurse Specialist license. [R. 2371, Steadman depo., pp. 4-5, 166].

59. Nurse Steadman has had extensive experience in dealing with chronic mental illness and estimates since 1972 she has seen 5,000-6,000 patients suffering from schizophrenia, half of whom are, like Trujillo, the paranoid type. [R. 2371, Depo. Steadman, p. 10-12, 18, 21 167].

60. Based upon Nurse Steadman's contact with and role as Carolyn Trujillo's primary therapist she feels she is well acquainted with Carolyn and that her symptoms were "typical" for the diagnosis of paranoid schizophrenia and that her illness was "moderate" in degree. In Nurse Steadman's experience, paranoid schizophrenia of the "mild" variety is seldom seen. [R. 2371, Depo. Steadman, pp. 23, 25, 168-70].

61. According to Nurse Steadman, Trujillo had never had good insight into her mental illness, a problem typical of schizophrenics. Like many schizophrenics, Trujillo sometimes had hallucinations or heard voices which told her to harm herself. Carolyn Trujillo did not suffer from constantly overt psychiatric symptomatology, delusions, hallucinations or paranoid ideation. (R. 2371, Depo. Steadman p. 156, 168).

62. Throughout her voluntary association with Salt Lake County's mental health centers, Carolyn Trujillo was non-compliant with her medications and treatment much of the time, but was able to comply with medication and treatment for some period of months. If Carolyn appeared unstable at times, it may or may not have been due to the fact she wasn't taking her medications, since there were times when Carolyn was unstable when she was taking her medications. Periods of instability are not uncommon with persons like Carolyn who have a chronic mental illness. (R. 2371, Depo. Steadman, p. 81, 125.).

63. On March 10, 1982, Steadman received a phone call from someone at Adult Probation and Parole who informed her of the terms of Carolyn's probation. Even though it was not Steadman's obligation or role to call and advise the court or Adult Probation and Parole of Carolyn's non-compliance with probation terms, Steadman did inform Carolyn's probation officer about her non-compliance. (R. 2371, Depo. Steadman, p. 89-91).

64. Medication is not a cure; rather, it treats symptomatology and it treats symptomatology on different levels with each individual. Not every individual responds to medication in the same way. In some mentally ill persons, medication may alleviate all of their symptomatology, while in others it may alleviate only a tiny amount of the symptomatology. In Carolyn's case, the medications sometimes

worked and sometimes didn't work. (R. 2371, Depo. Steadman, p. 82).

65. In February 1984, Carolyn's mental health chart was transferred to ARTU and primary treatment was thereafter through ARTU with Steadman on the sideline. (R. 2371, Depo. Steadman, p. 146).

66. Nurse Steadman was "not surprised" at Trujillo's superficial suicide gesture in February 1984 and she did not consider the episode to be a dangerous act or an indication that Trujillo would try something more "lethal", but she agreed that an evaluation was in order and that the structured environment and programs at ARTU might be better for Trujillo at that time than out-patient care. [R. 2371, Depo Steadman, p. 137, 142, 172]

67. An increase in suicidal ideation may or may not be related to decompensation. Suicidal gestures usually relate to depression (R. 2371, Depo. Steadman, p. 149).

68. March 21, 1984, was the last time Steadman saw Carolyn prior to the stabbing. At that time she found Carolyn to be stable. (R. 1143, See Attachment 8).

69. On April 11, 1984, Steadman received a phone call from a jail person who told her that Carolyn was in jail for stabbing a ten-year-old girl the night before and she was surprised. (R. 2371, Depo. Steadman, p. 154).

70. During 1984, Carolyn was a voluntary patient of Salt Lake County Mental Health and as such, had the right to refuse

mental health treatment. Steadman did not petition for civil commitment for Carolyn in January, February or March of 1984 because Carolyn did not meet the commitment criteria. (R. 2371, Depo. Steadman, p. 177-182).

71. Dr. Kuentzel obtained his medical degree from the University of Iowa in 1973, thereafter completed a year of rotating internship, three years of psychiatric residency, and in April 1980, became board certified in psychiatry and neurology. (R. 2370, Depo. Dr. Kuentzel, pp. 4-10).

72. Mental health specialists, including Dr. Kuentzel, are unable to predict future violence based upon past history. (R. 2370, Depo. Kuentzel, p. 255).

73. Dr. Kuentzel's duties in 1984 were to provide psychiatric coverage in terms of medication evaluation which meant he interviewed patients, established working diagnoses and treatment plans and if psychopharmacology were involved, supervised the administration of the medication. (R. 2370, Depo. Kuentzel, p. 24).

74. Dr. Kuentzel was never Trujillo's therapist and never provided her with psychotherapy. (R. 2370, Depo. Kuentzel, p. 25).

75. According to Dr. Kuentzel, the 1984 mental health notes show that Carolyn looked the best she'd ever looked in many years and indicated she was getting better. (R. 2370, Depo. Kuentzel, pp. 256-257).

SCHIZOPHRENIA.

76. Schizophrenia is a chronic illness for which there is no cure. Schizophrenia is a difficult illness to treat because it does not respond terribly well to medication. That is, schizophrenics do not become completely normal and absolutely symptom free. While schizophrenics can improve some, there is no guarantee of any future conduct. The severity of schizophrenia may increase or decrease during the course of the illness. (R. 2370, Depo. Kuentzel, pp. 147; 263).

77. Schizophrenics, including Carolyn Trujillo, lack insight into their illness and their need for treatment and therefore are not medication compliant. (R. 2370, Depo. Kuentzel, pp. 153-154).

78. Lots of persons who do not suffer from schizophrenia commit assaults and hence schizophrenia does not predict or guarantee assaultive behavior. (R. 2370, Depo. Kuentzel, p. 253).

THE ASSAULT ON SHAUNDRA HIGGINS.

79. On April 10, 1984, Shaundra Higgins was sent by her mother to the neighborhood 7-11 store to buy some items for dinner. (R. 2372, Depo. Higgins, p. 27).

80. While Shaundra Higgins was in the process of returning home from the store through an alley running behind the Higgins' home, she was suddenly and without warning attacked and stabbed by Trujillo. (R. 1233, Exhibit 1)

81. The Higgins family had never met Trujillo and had no

idea who she was at the time of the assault. They were also unacquainted with any member of Trujillo's family. [R. 2372, Depo. Higgins pp. 22 and 23].

82. Plaintiff Kathy Higgins did not witness the assault on her daughter. Her first notice that something had happened was when she heard Shaundra's scream. [R. 2372, Depo. Higgins p. 31].

83. Mrs. Higgins ran to the backyard where she found her daughter. When she first saw Shaundra, she did not know what had happened, did not see Trujillo and did not feel she was in any danger at the time. (R. 2372, Depo. Higgins, p. 32).

84. Mrs. Higgins was never attacked or frightened by Trujillo. The damages she claims as a plaintiff in this action are for "stress, [and] anxiety." [R. 2372, Depo. Higgins p. 59, lines 2-9].

85. Counsel filed a Notice of Claim upon Salt Lake County for Shaundra Higgins. (R. 1143, Attachment 11).

86. Mrs. Higgins has never served a Notice of Claim upon Salt Lake County for her injuries (R. 1143, Attachment 11).

87. Carolyn Trujillo was arrested by the Salt Lake City Police Department on April 10, 1984 and told them that she had stabbed a young girl. (R. 1233, Exhibit 1).

88. Carolyn Trujillo gave the following (written) statement of her version of what happened to the presentence investigator on April 15, 1985:

> "I was in my room at my Mom's house I started to feel some pain in my stomach and head and then started to hear voices telling me to hurt someone and ran out of the house and ran down this or walked down this alley and seen this girl and stabbed her thats all."

89. Carolyn Trujillo states she had been taking her medication, serentil regularly and on April 10, 1984 when voices told her to hurt someone. (R. 1233, Exhibit 1; R. 1143, Attachment 10).

90. Carolyn Trujillo had not been using illicit drugs prior to or on April 10, 1984. (R. 1143, Attachment 10).

91. Carolyn Trujillo's stepfather, Richard Navarro, called ARTU on April 10, 1984 and stated that Carolyn had stabbed a 10-year old girl and had been taken into police custody. Mr. Navarro also stated that he had not seen any unusual behavior prior to the stabbing and that Carolyn had been taking her medication (R.2371, Depo. Steadman Exhibit #24).

92. State Hospital psychologist examined Carolyn Trujillo pursuant to court order on May 30, 1984, and thereafter advised the court that Carolyn Trujillo was mentally ill on April 10, 1984, but that her mental illness did not prevent her from forming the intent to intentionally and knowlingly stab/injure Shaundra Higgins. (R. 1143, Attachment 10).

93. Carolyn Trujillo was found guilty and mentally ill to attempted criminal homicide, manslaughter, a third degree

felony and sentenced to the Utah State Prison for 0-5 years. (R. 1233, Exhibit 1).

SUMMARY OF ARGUMENT

THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT

Appellants claim that there were disputed material facts which precluded summary judgment, however they failed to identify any such disputed material facts and their failure to do so demonstrates the absence of any disputed material facts.

NO SPECIAL RELATIONSHIP

An exception to the general rule that there is no duty to control the conduct of a third party arises when a "special relationship" exists between the parties. Special relationships arise when one assumes responsibility for the safety of another or prevents another from utilizing his normal opportunities for self-protection. Salt Lake County Appellees contend that no "special relationship" existed between Salt Lake County Appellees and Carolyn Trujillo because Carolyn was a voluntary patient. Further, Salt Lake County Appellees did not have the right to control Carolyn's actions and where no right to control exists, there is no duty.

In similar cases, the courts have refused to recognize a duty by health care professionals to warn, detain, commit or control patients whose participation is voluntary. Hokansen v. U.S., 868 F.2d 372 (10th Cir. 1989); Hinkelman v. Borgess Medical Center, 43 N.W.2d 547 (Michigan 1987).

NO PUBLIC DUTY

As community mental health care providers, Salt Lake County Appellees owed no duty to appellants. If Salt Lake County Appellees owed any duty to the public such a public duty does not create a duty owed to Appellants.

NO DUTY FROM COURT SENTENCES

Salt Lake County Appellees had no duty to treat and control Carolyn Trujillo at anytime especially not on April 10, 1984. Additionally, Salt Lake County Appellees had no legal right or control over Carolyn Trujillo by reason of Carolyn's two court sentences and probations. Appellants' claim in this regard is absolutely ridiculous and frivolous.

KATHY HIGGINS FAILED TO FILE NOTICE OF CLAIM

Appellant Kathy Lynn Higgins' claim for infliction of emotional distress is barred because she failed to file a Notice of Claim required by §63-30-11, U.C.A. of the Utah Governmental Immunity Act. Failure to file a timely Notice of Claim forever bars the prosecution of the claim. (U.C.A. §63-30-13). Thus, Appellant Kathy Lynn Higgins' claim must be dismissed. Yeates v. Vernal Family Health Center, 617 P.2d 352 (Utah 1980).

KATHY HIGGINS HAS NO CLAIM

Appellant Kathy Higgins seeks recovery for the emotional distress she has experienced by reason of injuries her daughter Shaundra received from Carolyn Trujillo's assault. Appellant Kathy Higgins did not witness the assault, nor did she ever

fear injury to herself. Hence, she was not in the "zone of danger" and has no cause of action.

§63-30-10, U.C.A. BARS THIS ACTION

§63-30-10, U.C.A. retains immunity for the Salt Lake County Appellees for their discretionary acts or omissions. The Salt Lake County Appellees alleged failure to commit or otherwise treat Carolyn Trujillo properly was discretionary and hence Salt Lake County Appellees are immune from suit.

§63-30-10, U.C.A. also retains immunity from suit for injuries which arise out of the assault, battery and infliction of mental anguish. Hence, Appellants' claims are barred.

NO DENIAL OF CONSTITUTIONAL RIGHTS

Appellants claim that the trial court's granting of summary judgment deprived them of various constitutional rights. this is without merit.

ARGUMENT

Appellants assert that they are not seeking to hold mental health providers strictly liable for all harmful acts committed by their mentally ill and dangerous patients. Rather, they claim that they are only seeking to hold mental health providers responsible for injuries caused by their breach of duties to control and properly treat their mentally ill and dangerous patients. These assertions are untrue. Appellants are seeking to hold mental health care providers liable to third parties for the criminal acts of nondangerous voluntary patients. Furthermore, Appellants seek to establish,

contrary to constitutional law, the existence of duties to civilly commit and medicate nondangerous patients who are not civilly commitable and to predicate these duties upon the opinions contained in the affidavits of paid mental health consultants, as well as, to establish duty in this case based solely upon foreseeability.

Appellants state that this Court has heretofore recognized that psychotherapists and other mental health care providers owe a duty to third parties to use reasonable care in diagnosing and treating patients who are in their control, who are known or should be known in accordance with the standards of the psychiatric profession, to be dangerous and to take precautions to control their dangerous patients. This Court has never so ruled and even if this Court were to so rule, such a duty would be inapplicable in this case because, contrary to Appellants' statements in their brief, Carolyn Trujillo did not voluntarily submit to the control of the appellees by seeking hospitalization in February, 1984, nor was Carolyn Trujillo in the control of Salt Lake County Appellees at the time she stabbed Shaundra Higgins, nor was she in the custody of Salt Lake County Appellees by reason of two court sentences.

POINT I.

SUMMARY JUDGMENT WAS PROPERLY GRANTED TO THE SALT LAKE COUNTY APPELLEES

As is more fully discussed below, the lower Court properly granted Summary Judgment to the Salt Lake County

Appellees because there were no disputed material facts precluding summary judgment and the lower Court correctly ruled that Appellees owed no duty to Appellants.

A. THERE WERE NO DISPUTED MATERIAL FACTS PRECLUDING SUMMARY JUDGMENT

Appellants claim that although duty is a legal question, it is also highly fact-dependent and can only be properly determined in the context of a full trial of the facts according to the majority of courts deciding third-party liability cases. This is a false assertion since numerous courts have decided duty in a Summary Judgment context as did the lower court in the present case . See, for example: Currie v. U.S., 836 F.2d 209 (4th Cir. 1987); Bradford v. Metropolitan County, 522 S.2d 96 (Fla. 1988); Ferree v. State of Utah, 784 P.2d 149 (Utah 1989); Beach v. University of Utah, 726 P.2d 413 (Utah 1986); Owens v. Garfield, 784 P.2d 1187 (Utah 1989); Hokansen v. U.S., 868 F.2d 372 (10th Cir. 1989).

Appellants also claim there were many disputes of material facts which precluded summary judgment; however no recitation of any such disputed facts is made and Appellants' failure to do so establishes that there were no such disputed material facts which precluded summary judgment. Should Appellants identify disputed material facts in their Reply Brief, this Court should disregard the same because allowing Appellants to delay identifing disputed facts until that time deprives Appellees of the opportunity to demonstrate the

absence of any such disputed material facts.

In essence, Appellants herein are claiming that duty should have been resolved as a fact issue by a jury which considered the testimony of Appellants' paid experts against the testimony of the Appellees. Appellants' argument is frivolous since duty was unarguably a legal issue to be decided by the trial court.

B. SALT LAKE COUNTY APPELLEES OWED NO DUTY TO APPELLANTS

Appellants contend that there are three possible bases giving rise to a duty to them: (1) the special relationship between Salt Lake County Appellees and Carolyn Trujillo; (2) Salt Lake County Appellees' status as community mental health care providers and (3) Salt Lake County Appellees' custodial relationship with Carolyn Trujillo while she was on probation. None of these bases support any duty.

(1) THERE WAS NO DUTY CREATED BY REASON OF ANY SPECIAL RELATIONSHIP

Appellants acknowledge in their brief that the general rule of law set forth in Restatement (Second) of Torts §315 is that there is no duty to control the conduct of a third person to prevent him from causing harm to another; however, they claim that most courts have recognized the special relationship exception to this rule of nonliability involving a voluntary mental health patients and mental health care providers. This is untrue as the Perreira v. State, 768 P.2d 1198 (Colo. 1989)

case cited, and discussed at great length, by Appellants holds otherwise. Id, 1209-1212.

According to the Perreira decision supra, courts have failed to impose any duty on mental health care providers for the actions of their voluntary patients for several reasons: the difficulty in forecasting whether a patient presents a serious danger of violence to others; the providers' limited opportunity to observe and determine the patient's violent propensities, lack of control over voluntary patients, as well as, the lack of specific threats against readily identifiable victims. [Thompson v. County of Alameda, 614 P.2d 728; Brady v. Hopper, 751 F.2d 329 (10th Cir. 1984)]. Also, courts which have focused on the control issue have found that the ability or right to control in a voluntary patient-mental health care provider relationship to be so lacking that there is no special relationship to give rise to a duty to protect third parties. [Hasenai v. U.S., 541 F.Supp. 999 (D.Md 1983)] (768 P.2d at 1209-1210).

Appellants contend that courts have only refused to find duty in voluntary patient cases where the voluntary patient is resistant to treatment and has little or no history of violence. Cited in support of this contention are Cooke v. Berlin, 735 P.2d 830 (Ariz. App. 1987); Brady v. Hooper, 751 F.2d 329 (10th Cir. 1984); and Hasenai v. U.S., 541 F.Supp. 99 (D.Md. 1983). Assuming, arguendo, that this is an accurate representation of said holdings, and that this Court were

inclined to adopt such an approach to duty, it could not hold in this case that there was a duty owed to appellants since the undisputed facts show that Carolyn Trujillo was always treatment resistant and had little history of violence prior to her assault on Shaundra Higgins.

Appellants' assertion that most of the jurisdictions that have considered whether there is a duty to control voluntary patients have held there is a duty to control voluntary patients is inaccurate. The 10th Circuit Court in Hokansen v. U.S., 868 F.2d 372 (1989) found otherwise:

> In any event, where voluntary patients are concerned most jurisdictions have declined to impose upon mental hospitals a common law duty of the type urged by the plaintiffs here. See, e.g., Hinkelman v. Borgess Medical Center, 157 Mich.App. 314, 403 N.W.2d 547 (1987) (Duty to control vested by involuntary commitment. No such duty for voluntary patients); Case, 523 F.Supp. at 319) (No liability for United States under FTCA in Ohio for actions of voluntary outpatient); Hasenei v. United States, 541 F.Supp. 999 (D.Maryland 1982) (United States not liable for release of voluntary outpatient by Veteran's Administration psychiatrist under section 315 duty to control); see also Anthony v. United States, 616 F.Supp. 156 (S.D. Iowa 1985) (no duty to confine voluntary alcoholism patient without a commitment order); but see Bradley Center, 296 S.E.2d at 693. Even were we to consider the special relationship theory properly raised, we can see nothing in Kansas law or precedent to suggest that the Kansas Supreme Court would go so far under §315 analysis as to impose an affirmative duty to detain or seek an involuntary commitment in a case similar to this. Id. p. 378-379

Appellants suggest that several of this Court's past decisions are consistent with "this analysis" (Appellants'

Brief p.38). It is unclear what approach to duty is claimed to have been previously adopted by this Court--duty to warn when a specific threat is made to an identifiable victim or a duty to establish control over a patient with violent propensities who seeks hospitalization. Salt Lake County Appellees contend that neither approach was adopted by this Court in Doe v. Arguelles, 716 P.2d 279 (Utah 1983) nor in Little v. Division of Family Services, 667 P.2d 49 (Utah 1983).

In Doe, plaintiff sued the State of Utah and others on behalf of her minor ward who had been raped, sodomized and stabbed by Arguelles, who was on conditional release from the youth detention center (YDC). This Court found that YDC statutorily retained legal custody and control over Arguelles when he was on conditional release and hence had a duty to oversee Arguelles while on conditional release. No statute made the Salt Lake County Appellees the legal custodians of Carolyn Trujillo at any time.

Little involved an action against the Utah Division of Family Services (DFS) for the wrongful death of plaintiff's infant while in foster care DFS had petitioned for and received an order allowing it to take the infant and place it in foster care. This court recognized that DFS had the right and the duty to protect the infant based upon the fact that DFS statutorily had legal custody and control of the infant. In the present case there is no statutory basis for finding that the Salt Lake County Appellees had legal custody and control

over Carolyn Trujillo at any time.

This Court's decision in Owens v. Garfield, 784 P.2d 1187 (Utah 1989) does not support the finding of a special relationship and any duty to Appellants because absent in this case was the legal right to control Carolyn Trujillo at or before the stabbing in April, 1984. Also, there is no evidence in this case that the Appellants relied upon the Salt Lake County Appellees to adequately treat Carolyn Trujillo and to prevent injury to them.

Appellants claim that the uncontestable evidence in this case establishes that the Salt Lake County Appellees had the ability to control Carolyn Trujillo in April 1984, by virtue of two court-ordered sentences and that in April, 1984 Salt Lake County Appellees had agreed to and assumed a duty to treat Carolyn Trujillo and to make full and accurate reports to probation authorities. No evidence supports these assertions. In fact, in April 1984, Carolyn Trujillo was not in the care of the Salt Lake County Appellees by virtue of Court ordered sentences nor was Carolyn Trujillo on probation since her probation had been terminated in January, 1983 by both state courts. Even if Trujillo had been on probation in April, 1984, she would have been "in the custody" of Adult Probation and Parole, which was part of the Department of Corrections, pursuant to §77-18-1, U.C.A. Also Salt Lake County Appellees were never under any duty at any time to report Carolyn Trujillo's progress in mental health treatment to Adult

Probation and Parole or to the state courts by reason of her court-ordered probations.

Secondly, even if Carolyn Trujillo had voluntarily sought and requested care hospitalization at a Salt Lake County mental health treatment facility in February 1984, this did not place her in the legal custody of the Salt Lake County Appellees.

Thirdly, while Carolyn Trujillo may have been entitled to mental health care pursuant to the Community Mental Health Act, the responsibility to supervise her treatment at any mental health facility was that of the Utah State Division of Mental Health, not that of the Salt Lake County Appellees pursuant to §64-7-7, U.C.A.

Appellants last argument that the Salt Lake County Appellees had the right to control Trujillo" during 1984 because of the voluntary admission and release or denial of release statutes (§64-7-29 and §64-7-31 U.C.A.) is ridiculous and no discussion warranted.

(2) THERE WAS NO DUTY OWED TO THE PUBLIC

Appellants contend that courts have universally recognized that health care providers owe a duty to the public to protect the public from their patients' infectious or contagious diseases. This duty is claimed to have been extended to impose upon mental care providers a duty to protect the public from harm caused by the criminal acts of their mentally ill persons who voluntarily seek community mental

health services. No Utah cases are cited in support of any such duty to the public. Furthermore, none of the cases cited by Appellants in their brief are factually similar to theie case. Also, not all of the cases cited by Appellants recognize that public duty creates a duty to individuals and even if cases from other states did so, Utah caselaw holds that duties owed to the public are not owed to individuals. Obray v. Malmberg, 484 P.2d (Utah 1971; Christenson v. Hayward, 694 P.2d 612 (Utah 1984).

In Clark v. State, 472 NYS.2d 170 (1980), the psychiatrist continued the patient as an outpatient even through he had received information from two of the patients' close friends about the patient's deteriorating condition. In the present case, no close friends of Carolyn Trujillo informed the Salt Lake County Appellees that her condition was deteriorating prior to her criminal assault on Shaundra Higgins.

The VA psychiatrists in the Jablonski v. Pauls, U.S. 712 F.2d 391 (9th Cir. 1983) case did not warn the deceased that their outpatient, who was deceased's boyfriend, was dangerous even through deceased had told them that she feared her boyfriend/outpatient and that her boyfriend/outpatient's behavior was unusual and the psychiatrists had the opportunity to so warn. Also, the psychiatrists believed that the patient was dangerous and that there was an emergency but that there was no basis for emergency hospitalization. The boyfriend/outpatient had had a history of crimes upon his wife,

had recently attacked the deceased's mother, and the Court found that there was potential harm which was directed at a readily identifiable person, the deceased, and the psychiatrists had a duty to warn her and their failure to do so was a proximate cause of deceased's death. In the present case, the victim Shaundra Higgins, had had no relationship with Carolyn Trujillo, had not expressed concerns to Salt Lake County Appellees about Carolyn Trujillo's behavior and neither Shaundra Higgins nor her mother was readily identifiable as a potential victim of Carolyn Trujillo nor did Carolyn Trujillo have a past history of violence toward young neighborhood girls prior to the April 10, 1984 stabbing.

The patient shot and killed decedent in McIntosh v. Milano, 403 A.2d 500 (N.J. 1973). The physician knew that his patient was obsessed with the decedent and had previously shot BB's at her car or her boyfriend's car, yet the physician failed to warn decedent, her parents or the appropriate authorities. No such evidence of past danger to Appellants nor perception of danger to Appellants was present and hence there is no basis for any duty to warn.

In Greenberg v. Barbour, 322 F.Supp 745 (E.D.Pa. 1971), the court denied summary judgment to a psychiatrist who had been informed of the dangers and homicidal state of a person who sought care at the state hospital and who failed to adequately convey the information to another doctor who in turn failed to consummate the person's admission. Salt Lake County

Appellees were not in possession of any such information about Carolyn Trujillo, nor did they fail to admit her to care.

In Perreira v. State, 768 P.2d 1198 (Colo. 1989), the defendants released an involuntarily committed patient who later shot and killed a policeman. The court did not determine that defendants owed a duty to the public; rather, they found a duty based upon the special relationship created by reason of involuntary commitment. Also present in that case was the fact that the patient was extremely delusional toward policemen and blamed them for his past problems. Hence, the deceased policeman was a readily identifiable victim. In the present case, there was no special relationship because Carolyn Trujillo was not an involuntarily committed patient and she had not had any delusions toward young neighborhood girls prior o her assault on Shaundra Higgins.

Naidu v. Laird, 539 A.2d 1064 (Del. 1988) imposed a duty to protect potential victims upon a state hospital psychiatrist who had released a patient from voluntary commitment more than five months before the patient, while psychotic, drove his car into that of plaintiff's deceased. This case is not factually similar to Appellants'.

The court in Petersen v. State, 671 P.2d 230 (Wash. 1983), found a duty to take reasonable precaution in a case where a psychiatrist released an involuntary patient with a history of drug induced schizophrenia even through the patient had used drugs and operated a vehicle while out on a pass, the

evening before his release and who, five days after his release, while under the influence of drugs, was involved in an accident which injured plaintiff. Carolyn Trujillo had not been engaged in assaultive behavior before her discharge from ARTU, nor did she engage in assaultive behavior within five days after her release from HRTU.

In Lipari v. Sears, 497 F.Supp. 185 (D.Nev. 1980) the court found a duty to detain a dangerous patient when the patient's leaving was against medical advice. In the present case, although Carolyn Trujillo was asked to stay at ARTU and declined to do so, no one believed her to be dangerous and hence no one had any legal basis to detain her by instituting an involuntary commitment proceeding.

The Tarasoff v. Regents of University of California, 551 P.2d 334 (1976) case is factually dissimilar from the present case because, although it involved a voluntary treatment relationship, the patient had made threats to kill an unnamed girl who was readily identifiable to the psychiatrist. In this case, Carolyn Trujillo had not made any threats of bodily injury to anyone and hence there was no danger to anyone much less to readily identifiable victims.

Appellants state that this Court has cited with approval cases which impose a duty of care to the public. This is a blatant misrepresentation. Little, Owens, and Doe, supra, do not cite Payton, Peterson or Semler, supra, in recognition of a public duty; rather, this Court cited the Payton, Peterson and

Semler cases in discussion and recognition of the difference between discretionary acts for which there is immunity from lawsuit and ministerial acts for which there is no immunity.

(3) CAROLYN TRUJILLO'S 1981 SENTENCES IMPOSED NO DUTY UPON THE SALT LAKE COUNTY APPELLEES

Appellants contend that because of the Salt Lake County Appellees' role in the Utah criminal justice system in 1981 and their voluntary "acceptance" of Carolyn Trujillo as a patient in accordance with the court sentences, their failure to provide Carolyn Trujillo with mental health treatment or failure to see that Carolyn Trujillo met the conditions of her probations to receive mental health treatment, that the Salt Lake County Appellees breach of said duties resulted in injury to Appellants. These contentions are fallicious because the Salt Lake County Appellees were not involved in the criminal proceedings against Carolyn Trujillo in 1981 and had no duty to treat Carolyn Trujillo nor to insure that Carolyn complied with the terms of her two probations.

POINT II.

APPELLANT KATHY LYNN HIGGINS' CLAIM IS BARRED BECAUSE SHE FAILED TO FILE A NOTICE OF CLAIM

Section 63-30-11, U.C.A, of the Utah Governmental Immunity Act requires any person who has a claim for injury against a governmental entity (county) or its employees to file, prior to commencing a lawsuit, a Notice of Claim in accordance with the requirements of §63-30-13, U.C.A. The

Notice of Claim must be file within a year after the claim arises, and the failure to file a timely Notice of Claim forever bars the prosecution of the claim. (§63-30-13 U.C.A.)

In the case before this Court, Appellant Kathy Lynn Higgins claims damages for infliction of emotional distress. Although Appellant Kathy Lynn Higgins caused a Notice of Claim to be filed on behalf of her minor child, Shaundra, she failed to file a Notice of Claim on her own behalf against Salt Lake County or to include her own claim in the Notice filed on behalf of her daughter. Hence, Appellant Kathy Lynn Higgins' lawsuit against Defendant Salt Lake County is barred and her claim/lawsuit must be dismissed. Yeates v. Vernal Family Health Center, 617 P.2d 352 (Utah 1980), Varoz v. Sevey, 506 P.2d 435 (Utah 1973) and Edwards v. Iron County, 531 P.2d 476 (Utah 1975).

POINT III

SECTION 63-30-10 BARS THIS ACTION

Appellants' action against the Salt Lake County Appellees is barred by the provisions of §63-30-10, U.C.A. which prohibits all lawsuits for injuries arising out of the exercise of a discretionary function, as well as, out of assault and battery, or the infliction of mental anguish.

The claimed omission of Salt Lake County Appellees to commit Carolyn Trujillo was a discretionary act for which they are immune from lawsuit under §63-30-10, U.C.A.

In Connell v. Tooele City, 572 P.2d 697 (1977), plaintiff brought an action claiming negligence on the part of the clerk and her deputy, as well as, Tooele City. Plaintiff alleged in his Complaint that he was issued a citation for speeding which was entered on the docket books of Tooele City Court in two different places and given two separate case numbers. He was subsequently found guilty of the offense and fined and paid the fine. A conviction was entered under both case numbers on the docket books, but payment of the fine was entered only in one case. A bench warrant was issued in the second case and plaintiff was arrested but later released when he produced a receipt for payment of the fine. Plaintiff was again arrested when a clerk failed to enter payment of the fine on the second docket and to recall the bench warrant. Defendant Tooele City moved to dismiss the Complaint against it on the grounds that it was immune from suit under the provisions of §63-30-10(2), U.C.A. for injuries arising out of false arrest. This Court, affirmed the lower court's decision that Tooele City was immune from lawsuit and found that the legislature intended to retain the immunity of the governmental entity in a case. Although the plaintiff's had alleged negligence of the clerk in keeping her books, all the injuries claimed by plaintiff arose out of plaintiff's arrest, one of the excepted torts set forth in §63-30-10(2), U.C.A.

In the present case, Appellants' injuries arose out of an assault by, and the infliction of mental distress by Carolyn

Trujillo. Hence Appellants' claims are barred by §63-30-10, U.C.A.

POINT IV

APPELLANT KATHY HIGGINS HAS NO CAUSE OF ACTION

Appellant Kathy Higgins' claim is for negligent infliction of emotional distress. Since she was not present at the time Carolyn Trujillo stabbed Shaundra, she was not within the "zone of danger" and did not fear for her own safety and hence has no cause of action. Johnson v. Rogers, 763 P.2d 771, 785 (Utah 1988)

POINT V

THE LOWER COURT'S JUDGMENT FOR APPELLEES DID NOT VIOLATE THE UTAH AND UNITED STATES CONSTITUTIONS

Appellants raise Article I, Section 11, of the Utah Constitution in support of the proposition that they have been unconstitutionally denied a remedy by the trial court's summary judgment in this case. Citing this court's analysis of the Utah Open Court Provision in Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985), Appellants contend that they were denied judicial process and "remedies designed to protect basic individual rights without sufficient justification." Id. Berry dealt with legislative abrogation of a cause of action by enactment of a statute of repose which did not occur in this case. Also, it is clear in Berry that the Utah Open Court Provision does not guarantee a cause of action to every

potential litigant and that causes of action and remedies may be denied with "sufficient justification". Additionally, "[t]he term "rights" when used with reference to Section 11, is used loosely...What Section 11 is primarily concerned with is not particular, identifiable causes of action as such, but with the availability of legal remedies..." Id. at 676 n.4

The trial court's grant of summary judgment to the Salt Lake County Appellees was not an abrogation of Appellants' rights similar to the legislative enactment in the Berry case because there was "sufficient justification" to excuse liability in this lawsuit. Specifically, there should be liability limitations for mental health care providers who are only remotely able to predict the often dangerous behavior of their voluntary patients. Furthermore, this limitation on liability "reasonably and substantially advances" the purpose of avoiding a chilling effect upon the practice of mental health disciplines. Id. at 683.

Condemarin v. The University Hospital, 775 P.2d 348 (Utah 1989), was a Section 11 case analyzing a legislative expansion of governmental immunity and it is distinguishable from the case at hand which simply recognized, reaffirmed and applied the existing law in Utah on third party liability. Hence, the trial court's ruling that there was no duty owed to Appellants did not broadly affect the "availability of legal remedies" to Appellees. Berry, supra. Nor did the trial court's recognition of the prevailing Utah law on third party liability

abrogate Appellants' remedy by expanding or contracting of the rights of either party.

Appellants' rights were not unconstitutionally affected by the trial court's action in granting summary judgment to the Salt Lake County Appellees. The Berry court observed: "[o]bviously, Section 11 rights also are subject to reasonable rules of procedure for the ajudication [of] rights." Berry, at 677, n.5. Summary judgment has long been a rule justified by "the just, speedy and inexpensive determination of every action" Celotex Corp. v. Catrett, 477 U.S. 317, 327 and generally proper only when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Utah Rules of Civil Procedure 56(C).

Appellants claim that recovery for personal injury is a substantive right guaranteed by Due Process under the Utah Constitutions' Open Courts Provision and the United States Constitution and allege "there is no meaningful alternative allowed to seek redress for injury" and the ruling favors psychotherapists/mental health care providers' economic interest in avoiding liability over the Appellants' interest in recovering damages." (Appellants' Brief p. 50).

The meaning of Due Process in the context of the Open Courts Provision has been addressed by this Court. In Condemarin v. The University Hospital, 775 P.2d 348 (Utah 1989) this Court observed: "[A]rticle I, Section 11...we determined that the clear implication of this language is "that an

individual may not be arbitrarily deprived of effective remedies designed to protect basic individual rights." [emphasis added]. This language makes it clear that rights assured under Section 11 are protected if arbitrarily deprived, and implies that Appellants are not always guaranteed a remedy under Due Process.

The Condemarin court approved an analysis used to weight the competing interests of individual remedies and public policies for limiting them:

> "The analytic process presented in Berry under Article 1, Section 11 of the Utah Constitution was referred to as a "balancing analysis"...
>
> A legislative determination to interfere with, limit or abrogate the availability of remedies for injuries to person, property, or reputation requires an important state interest and a rational means of implementation [intermediate scrutiny]."

Condemarin at 358. This intermediate level of scrutiny for Due Process claims balances remedies against limitations. The result is that not every cause of action is recognized: i.e., not every remedy is guaranteed.

Additionally, Salt Lake County Appellees contend that ruling that there was no duty owed to Appellees did not defeat a substantive right so fundamental that there was a denial of Due Process under the United States Constitution:

> we cannot accept the contention that this statute deprived [the] victim of her life without the due process of law because it condoned a parole decision that led directly to her death. The statute neither authorized nor

> immunized the deliberate killing of any human being. It is not the equivalent of a death penalty statute which expressly authorizes state agents to take a person's life. This statute merely provides a defense to potential state tort-law liability.

Martinez v. California, 444 U.S. 277 (1980). See also Bowers v. Devito, 686 F.2d 616 (7th Cir. 1982):

> "there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the 14th Amendment or, we support, any other provision of the Constitution."

Cited in Dimas v. County of Quay, N.M., 730 F.Supp. 373, 380 (D.N.M. 1990).

In summary, there was no arbitrary deprivation of Appellants' due process rights or remedies as a result of the trial court's ruling on duty inasmuch as public policy mandates reasonable limitations on liability in this area. Second, the right to be free from personal injury does not necessarily attach to governmental entities nor inure to Appellants in such a way that denial of a remedy on their cause of action amounts to a denial of Due Process.

Appellants also contend that the ruling below results in the disparate treatment of victims and arbitrary immunization of mental health care providers from liability. Salt Lake County Appellees respond that there is a reasonable relationship between the goals of the nonliability and the

means used to achieve it, to give the rule of law constitutional legitimacy under both the Utah Constitution and the United States Constitution:

> The determination of reasonableness must take into account the extent to which the constitutional right--in this case the right to sue for a full recovery under Article I, Section 11--is diminished and the extent to which the burden imposed actually furthers the legislative goals, as well as the importance of those goals.

Condermarin at 373 (Stewart).

CONCLUSION

Based upon the foregoing, this Court should affirm the trial court's judgment for the Salt Lake County Appellees.

DATED this 4th day of February, 1991.

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SALT LAKE COUNTY ATTORNEY

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MAILING CERTIFICATE

I hereby certify that on this 5th day of February, 1991, I mailed four copies of the foregoing to:

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Addenda

26-17-1.2 **Division of mental health—Creation—Duties and responsibilities.**—There is created the division of mental health, which shall be within the department of social services under the administration and general supervision of the executive director of social services, and under the policy direction of the board of mental health. The division of mental health shall be the mental health authority for the State of Utah and shall have the following duties and responsibilities:

(1) To review and coordinate mental health functions within the division and with related activities of other state agencies.

(2) To assist and consult with local mental health authorities and with local mental health advisory councils in the establishment of community mental health programs, which may include prevention, rehabilitation, case-finding, diagnosis and treatment of the mentally ill, and consultation and education for groups and individuals regarding mental health.

(3) To collect and disseminate information pertaining to mental health.

(4) To develop, administer, and supervise a comprehensive state program for care of the mentally disabled, both within state and local hospitals and on an out-patient basis.

(5) To have general direction over the Utah State Hospital at Provo.

(6) To perform such other acts as are necessary to promote mental health in the state.

26-17-5. **Distribution of funds for mental health programs.**—(1) The division of mental health shall provide an equitable distribution of funds appropriated or otherwise available for mental health programs among those counties and cities eligible to perform these services for the division of mental health and which are seeking contracts to provide mental health service. The division shall recommend an appropriation for comprehensive community mental health based on a per capita figure for the population residing within the jurisdictions of local mental health authorities. The per capita rate shall be based on state general fund monies appropriated by the legislature and federal grants designated by the division of mental health with the approval of the legislature.

26-17-7. **Mental health services authorized—Felony to attempt to change individual's belief about God.**—Community mental health services are authorized to be provided by cities and counties in accordance with the provisions of this act. Such services shall include one or more of the following: outpatient mental health clinics, rehabilitation services for persons suffering from mental disorders, consultant and educational services, and other activities necessary to protect and promote mental health. It shall be a felony to give psychiatric treatment, nonvocational mental health counseling, case-finding testing, psychoanalysis, drugs, shock treatment, lobotomy, or surgery to any individual for the purpose of changing his concept of, belief about, or faith in God.

64-7-7. **Supervision and treatment of mentally ill persons.**—The division of mental health shall have the responsibility for supervision and treatment of mentally ill persons in the state, who have been admitted to its care under the provisions of this act, whether residing in the hospital or elsewhere.

(4) "Designated examiner" means a licensed physician, preferably a psychiatrist, designated by the division of mental health as specially qualified by training or experience in the diagnosis of mental or related illness or another licensed mental

64-7-32 **Involuntary hospitalization procedures.**—No person shall be involuntarily hospitalized by reason of mental illness except under the following provisions

(1) Emergency procedures for temporary hospitalization upon medical or designated examiner certification as provided in subsection (1) of section 64-7-34

(2) Emergency procedures for temporary hospitalization without endorsement of medical or designated examiner, certification as provided in subsection (2) of section 64-7-34

(3) Hospitalization on court order as provided in section 64-7-36

64-7-34 **Temporary admission to mental health facility—Requirements and procedures—Costs.**—(1) Any individual may temporarily be admitted to a mental health facility upon

(a) Written application by a responsible person who has reason to know, stating a belief that the individual is likely to cause serious injury to self or others if not immediately restrained, and the personal knowledge of the individual's condition or circumstances which lead to such belief, and

(b) A certification by a licensed physician or designated examiner stating that the physician or designated examiner has examined the individual within a three-day period immediately preceding said certification and is of the opinion that the individual is mentally ill and, because of the individual's mental illness, is likely to injure self or others if not immediately restrained

Such an application and certificate shall authorize any mental health or peace officer to take the individual into custody and transport the individual to a mental health facility

(2) If a duly authorized mental health officer or peace officer observes a person involved in conduct which leads the officer to have probable cause to believe that such person is mentally ill, as defined by this act, and that, because of such apparent mental illness and conduct, there is a substantial likelihood of serious harm to that person or to others pending proceedings for examination and certification as provided in this act, the officer may take the person into protective custody A peace officer may transport a patient pursuant to this provision either on the basis of his own observation or on the basis of the observation of a mental health officer reported to him by the mental health officer Immediately thereafter the officer shall transport the person to a mental health facility and there make application for the person s admission therein The aplication shall be upon a prescribed form and shall include the following

(a) A statement by the officer that the officer believes on the basis of personal observation or on the basis of the observation of a mental health officer reported to him by the mental health officer that the person is, as a result of a mental illness, a substantial and immediate danger to self or others.

(b) The specific nature of the danger.

(c) A summary of the observations upon which the statement of danger is based.

(d) A statement of facts which called the person to the attention of the officer.

(3) Any person admitted under this section may be held for a maximum of 24 hours excluding Saturdays, Sundays and legal holidays. At the expiration of that time period, the person shall be released unless application for involuntary hospitalization has been commenced pursuant to section 64-7-36. If such application has been made, an order of detention may be entered pursuant to subsection (3) of section 64-7-36. If no order of detention is issued, the patient shall be released, except when the patient has made voluntary application for admission.

(4) Cost of all diagnosis and treatment under this section shall be paid by the county in which such person is found, unless the county participates in the state social services medical program as outlined in section 55-15a-3, in which event the state shall pay, or unless the person is financially able to pay the same in which event that person shall pay.

64-7-36. **Involuntary hospitalization— Examination of patient— Hearing— Power of court— Findings— Costs.**— (1) Proceedings for the involuntary hospitalization of an individual may be commenced by the filing of a written application with the district court of the county in which the proposed patient resides or is found, by a responsible person who has reason to know of the condition or circumstances of the proposed patient which lead to the belief that the individual is mentally ill and should be involuntarily hospitalized. Any such application shall be accompanied by:

(a) A certificate of a licensed physician or a designated examiner stating that within a seven-day period immediately preceding the certification the physician or designated examiner has examined the individual and is of the opinion that the individual is mentally ill and should be involuntarily hospitalized; or

(b) A written statement by the applicant that the individual has been requested to but has refused to submit to an examination of mental condition by a licensed physician or designated examiner. Said application shall be sworn to under oath and shall state the facts upon which the application is based.

(2) Prior to issuing a judicial order, the court may require the applicant to consult a mental health facility or may direct a mental health professional from a mental health facility to interview the applicant and the proposed patient to determine the existing facts and report them to the court.

(3) If the court finds from the application, any other statements under oath, or any reports from a mental health professional that there is a reasonable basis to believe that the proposed patient's mental condition and immediate danger to self, others or property requires involuntary hospitalization pending examination and hearing, or if the proposed patient has refused to submit to an interview with a mental health professional as directed by the court or to go to a treatment facility voluntarily, the court may issue an order directed to a mental health officer or peace officer to immediately take the proposed patient to any mental health facility, or a temporary emergency facility as provided in section 64-7-38(2), there to be detained for the purpose of examination. Within 24 hours of the issuance of the order for examination, the clinical director of a mental health facility or a designee shall report to the court orally or in writing whether the patient is, in the opinion of the examiners, mentally ill, whether the patient has agreed to become a voluntary patient pursuant to section 64-7-29, and whether treatment programs are available and acceptable without court proceedings. Based on such information, the court may without taking any further action terminate the proceedings and dismiss the application. In any event, if the examiner reports orally, the examiner shall immediately send the report in writing to the clerk of the court.

(4) Notice of the commencement of proceedings for involuntary hospitalization, setting forth the allegations of the application and any reported facts, together with a copy of any official order of detention, shall be provided by the court to a proposed patient prior to, or upon, admission to a mental health facility or, with respect to any individual presently in a mental health facility whose status is being changed from voluntary to involuntary, upon the filing of an application for that purpose with the court. A copy of such order of detention must be maintained at the place of detention.

(5) Notice of the commencement of such proceedings shall be provided by the court as soon as practicable to the applicant, any legal guardian, any immediate adult family members, the legal counsel for the parties involved, and any other persons the proposed patient or the court shall designate, and shall advise such persons that a hearing thereon may be held within the time provided by law, unless the patient has refused to permit release of such information in which case the extent of notice shall be determined by the court.

(6) Proceedings for the involuntary hospitalization of an individual under the age of eighteen years who is under the continuing jurisdiction of the juvenile court may be commenced by the filing of a written application with the juvenile court in accordance with the provisions of this section and said court shall have jurisdiction to proceed in such case in the same manner and with the same authority as the district court.

(7) If there are no appropriate mental health resources within the district, the court may in its discretion transfer the case or patient's custody to any other district court within the state of Utah provided that said transfer will not be adverse to the interest of the proposed patient.

(8) Within twenty-four hours, excluding Saturdays, Sundays, and legal holidays, of the issuance of a judicial order or after admission at a mental health facility of a proposed patient under court order for detention or examination, the court shall appint two designated examiners to examine the proposed patient. If requested by the proposed patient's counsel, the court shall appoint as one of the examiners a reasonalby available qualified person designated by counsel. The examinations, to be conducted separately, shall be held at the home of the proposed patient, a hospital or other medical facility, or at any other suitable place not likely to have a harmful effect on the patient's health.

A time shall be set for a hearing to be held within ten court days of the appointment of the designated examiners unless said examiners or the clinical director of the mental health facility shall inform the court prior to said hearing date that the patient is not mentally ill, that the patient has agreed to become a voluntary patient pursuant to section 54-7-29 or that treatment programs are available and acceptable without court proceedings in which event the court may without taking any further action terminate the proceedings and dismiss the application.

(9) Prior to the hearing, an opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither the patient nor others provide counsel, the court shall appoint counsel and allow sufficient time to consult with the patient prior to the hearing. In the case of an indigent patient, the payment of reasonable attorney's fees for counsel as determined by the court shall be made by the county in which the patient resides or was found. The proposed patient, the applicant, and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses, and the court may in its discretion receive the testimony of any other person. The court may allow a waiver of the patient's right to appear only for good cause shown, which cause shall be made a matter of court record. The court is authorized to exclude all persons not necessary for the conduct of the proceedings and may, upon motion of counsel, require the testimony of each examiner to be given out of the presence of any other examiners. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered subject to the rules of evidence.

The mental health facility or the physician in charge of the patient's care shall provide to the court at the time of the hearing the following information: the detention order, the admission notes, the diagnosis, any doctors' orders, the progress notes, the nursing notes and the medication records pertaining to the current hospitalization. Said information shall also be supplied to the patient's counsel at the time of the hearing and at any time prior thereto upon request.

(10) The court shall order hospitalization if, upon completion of the hearing and consideration of the record, the court finds by clear and convincing evidence that:

(a) The proposed patient has a mental illness; and

(b) Because of the patient's illness the proposed patient poses an immediate danger of physical injury to others or self, which may include the inability to provide the basic necessities of life, such as food, clothing, and shelter, if allowed to remain at liberty; and

(c) The patient lacks the ability to engage in a rational decision-making process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the possible costs and benefits of treatment; and

(d) There is no appropriate less restrictive alternative to a court order of hospitalization; and

(e) The hospital or mental health facility in which the individual is to be hospitalized pursuant to this act can provide the individual with treatment that is adequate and appropriate to the individual's conditions and needs. In the absence of the required findings of the court after the hearing, the court shall forthwith dismiss the proceedings.

11) (a) The order of hospitalization shall designate the period for which the individual shall be treated When the individual is not under an order of hospitalization at the time of the hearing, this period shall not exceed six months without benefit of a review hearing Upon such a review hearing, to be commenced prior to the expiration of the previous order, an order for hospitalization may be for an indeterminate period, if the court finds by clear and convincing evidence that the required conditions in section 64-7-36(10) will last for an indeterminate period

(b) The court shall maintain a current list of all patients under its order of hospitalization, which list shall be reviewed to determine those patients who have been under an order of hsopitalization for the designated period At least two weeks prior to the expiration of the designated period of any order of hospitalization still in effect, the court that entered the original order shall so inform the clinical director of the mental health facility reasponsible for the care of such patient The director shall immediately reexamine the reasons upon which the order of hospitalization was based If the director and staff determine that the conditions justifying such hospitalization no longer exist, the director shall discharge the patient from involuntary treatment and make an immediate report thereof to the court and to the division of mental health Otnerwise, the court shall immediately appoint two designated examiners and proceed under subsections (8) through (10) of this section

(c) The clinical director of mental health facility or a designee responsible for the care of a patient under an order of hospitalization for an indeterminate period shall at six-month intervals re-examine the reasons upon which the order of indeterminate hospitalization was based If the clinical director or the designee determine that the conditions justifying such hospitalization no longer exist, the director shall discharge the patient from involuntary treatment and make an immediate report thereof to the court and the division of mental health If the clinical director or designee has determined that the conditions justifying such hospitalization continue to exist, the director shall send a written report of such

findings to the court and to the division of mental health The patient and the patient's counsel of record shall be notified in writing that the involuntary treatment will be continued, the reasons for such, and that the patient has the right to a review hearing by making a request to the court Upon receiving the request, the court shall immediately appoint two designated examiners and proceed under subsection (8) through (10) of this section

(12) In the event that the designated examiners are unable because of refusal of a proposed patient to submit to an examination, to complete such examinatin upon the first attempt to conduct the same, the court shall fix a reasonable compensation to be paid to such designated examiners for services in the cause

(13) Any person hospitalized under this act or a person's legally designated representative who is aggrieved by the findings, conclusions and order of the court shall have the right to a rehearing upon a petition filed with the court within thirty days of the entry of the court order In the event the petition alleges error or mistake in the findings the court shall appoint three impartial designated examiners previously unrelated to the case who shall conduct an additional examination of the patient The rehearing shall in all other respects be conducted in the manner otherwise permitted

(14) Costs of all proceedings under this section shall be paid by the county in which the proposed patient resides or is found

CHAPTER 30
GOVERNMENTAL IMMUNITY ACT

Section	
63-30-1.	Short title.
63-30-2.	Definitions.
63-30-3.	Immunity of governmental entities from suit.
63-30-4.	Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.
63-30-5.	Waiver of immunity as to contractual obligations.
63-30-6.	Waiver of immunity as to actions involving property.
63-30-7.	Waiver of immunity for injury from negligent operation of motor vehicles — Exception.
63-30-8.	Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.
63-30-9.	Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.
63-30-10.	Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights.
63-30-10.5.	Waiver of immunity for taking private property without compensation.
63-30-11.	Claim for injury — Notice — Contents — Service — Legal disability.
63-30-12.	Claim against state or its employee — Time for filing notice.
63-30-13.	Claim against political subdivision or its employee — Time for filing notice.
63-30-14.	Claim for injury — Approval or denial by governmental entity or insurance carrier within ninety days.
63-30-15.	Denial of claim for injury — Authority and time for filing action against governmental entity.
63-30-16.	Jurisdiction of district courts over actions — Application of Rules of Civil Procedure.
63-30-17.	Venue of actions.
63-30-18.	Compromise and settlement of actions.
63-30-19.	Undertaking required of plaintiff in action.
63-30-20.	Judgment against governmental entity bars action against employee.
63-30-21.	Repealed.
63-30-22.	Exemplary or punitive damages prohibited — Governmental entity exempt from execution, attachment or garnishment.
63-30-23.	Payment of claim or judgment against state — Presentment for payment.
63-30-24.	Payment of claim or judgment against political subdivision — Procedure by governing body.
63-30-25.	Payment of claim or judgment against political subdivision — Installment payments.
63-30-26.	Reserve funds for payment of claims or purchase of insurance created by political subdivisions.
63-30-27.	Tax levy by political subdivisions for payment of claims, judgments, or insurance premiums.
63-30-28.	Liability insurance — Purchase of insurance or self-insurance by governmental entity authorized — Establishment of trust accounts for self-insurance.
63-30-29.	Repealed.
63-30-29.5.	Liability insurance — Government vehicles operated by employees outside scope of employment.
63-30-30.	Repealed.
63-30-31.	Liability insurance — Construction of policy not in compliance with act.
63-30-32.	Liability insurance — Methods for purchase or renewal.
63-30-33.	Liability insurance — Insurance for employees authorized — No right to indemnification or contribution from governmental agency.
63-30-34.	Limit of judgment against governmental entity or employee.
63-30-35	Comprehensive liability plan — Providing coverage — Expenses of attorney general, general

Section
counsel for state judiciary, and general counsel for the Legislature in representing the state, its branches, members, or employees.
63-30-36. Defending government employee — Request — Cooperation — Payment of judgment.
63-30-37. Recovery of judgment paid and defense costs by government employee.
63-30-38. Indemnification of governmental entity by employee not required.

63-30-1. Short title.

This act shall be known and may be cited as the "Utah Governmental Immunity Act."

History: L. 1965, ch. 139, § 1.

Meaning of "this act." — The term "this act," as used in this section, means Laws 1965, ch. 139, §§ 1 to 37, codified as §§ 63-30-1 to 63-30-34.

Cross-References. — Comparative negligence, §§ 78-27-37, 78-27-38.

Insect infestation emergency control activities, immunity, § 4-35-8.

Limitation of actions on claims against cities, § 78-12-30.

Mailing claims to state or political subdivisions, § 63-37-1 et seq.

Voluntary services for public entities, immunity from liability, §§ 63-30b-1 to 63-30b-4.

NOTES TO DECISIONS

Analysis

Application of act.
Equitable claims.
Governmental function of sanitary district.
School districts.

Application of act.

Governmental Immunity Act applies only to entities and does not include the entities' employees. Cornwall v. Larsen, 571 P.2d 925 (Utah 1977).

This act applies only to governmental entities and does not affect the personal liability of individuals for their own torts. Madsen v. State, 583 P.2d 92 (Utah 1978).

Judicial review of a decision of the Division of State Lands to cancel a lease was authorized by former § 65-1-9 and did not require compliance with the Governmental Immunity Act. Adkins v. Division of State Lands, 719 P.2d 524 (Utah 1986).

Equitable claims.

The Governmental Immunity Act did not abolish the common-law exception of equitable claims from governmental immunity; claims for overcharges on water and sewer service and for discrimination in failing to provide usual city services were equitable in nature, and governmental immunity and lack of notice were not available as defenses. El Rancho Enters., Inc., v. Murray City Corp., 565 P.2d 778 (Utah 1977).

Governmental immunity is not a defense to equitable claims. Bowles v. State ex rel. Department of Transp., 652 P.2d 1345 (Utah 1982).

Governmental function of sanitary district.

Operation of sewage facilities by sanitary district was governmental function and, prior to Governmental Immunity Act, district enjoyed immunity from suit for damages. Johnson v. Salt Lake County Cottonwood San. Dist., 20 Utah 2d 389, 438 P.2d 706 (1968).

School districts.

Nothing in this act transforms school districts into entities separate and distinct from the state; action against school board is action against the state for sovereign immunity purposes. Harris v. Tooele County School Dist., 471 F.2d 218 (10th Cir. 1973).

COLLATERAL REFERENCES

Utah Law Review. — The Utah Governmental Immunity Act: An Analysis, 1967 Utah L. Rev. 120.

Misapplication of Governmental Immunity — Epting v. Utah, 1976 Utah L. Rev. 186.

Recent Developments in Utah Law, 1980 Utah L. Rev. 649.

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

Recent Developments in Utah Law — Judicial Decisions — Torts, 1987 Utah L. Rev. 244.

Am. Jur. 2d. — 56 Am. Jur. 2d Municipal Corporations, Counties and Other Political Subdivisions § 680 et seq.; 57 Am. Jur. 2d Municipal, School, and State Tort Liability § 1 et seq.; 68 Am. Jur. 2d Schools §§ 16, 63, 66; 72 Am. Jur. 2d States, Territories, and Dependencies §§ 99 to 128.

C.J.S. — 20 C.J.S. Counties §§ 215 to 221, 297 to 338; 63 C.J.S. Municipal Corporations § 745 et seq.; 64 C.J.S. Municipal Corporations §§ 2173 to 2214; 78 C.J.S. Schools and School Districts §§ 100, 153, 238, 318 to 322; 79 C.J.S. Schools and School Districts §§ 423 to 444; 81A C.J.S. States §§ 196 to 202, 267 et seq.

A.L.R. — Contractors: right of contractor with federal, state, or local public body to latter's immunity from tort liability, 9 A.L.R.3d 382.

Schools: modern status of doctrine of sovereign immunity as applied to public schools and institutions of higher learning, 33 A.L.R.3d 703.

Schools: immunity of private schools and institutions of higher learning from liability in tort, 38 A.L.R.3d 480.

Sovereign immunity doctrine as precluding suit against sister state for tort committed within forum state, 81 A.L.R.3d 1239.

Official immunity of state national guard members, 52 A.L.R.4th 1095.

Liability to one struck by golf ball, 53 A.L.R.4th 282.

Liability of school authorities for hiring or retaining incompetent or otherwise unsuitable teacher, 60 A.L.R.4th 260.

Tort liability of United States under Claims Act for acts committed by aliens, 78 A.L.R. Fed. 683.

Calculations of attorneys' fees under Federal Tort Claims Act — 28 USCS § 2678, 86 A.L.R. Fed. 866.

Key Numbers. — Counties ⇐ 141 to 148, 197 to 228; Municipal Corporations ⇐ 723 et seq., 1001 to 1040; Schools and School Districts ⇐ 148(6), 88 to 89.19, 112 to 126, 147; States ⇐ 112, 169 et seq., 191.

63-30-2. Definitions.

As used in this chapter:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

(2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

(4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

History: L. 1965, ch. 139, § 2; 1973, ch. 103, § 2; 1978, ch. 27, § 1; 1981, ch. 116, § 1; 1983, ch. 129, § 2; 1987, ch. 75, § 2; 1987 (1st S.S.), ch. 4, § 1; 1988, ch. 2, § 338.

Amendment Notes. — The 1987 amendment alphabetized the definitions of this section and renumbered the subsections accordingly, added present Subsection (4), and made minor changes in phraseology and punctuation

The 1987 (1st S S) amendment, effective June 3, 1987, designated the former provisions of Subsection (2) as (2)(a) and added subsection (2)(b) ; and substituted "includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body" for "means any officer, employee, or servant of a governmental entity, whether or not compensated, including" and inserted "but does not include an independent contractor" in Subsection (2)(a)

The 1988 amendment, effective February 2, 1988, in Subsection (2)(a) substituted "53A-6-101" for "53-2-15 "

NOTES TO DECISIONS

ANALYSIS

"Governmental entity."
"Injury "

"Governmental entity."

Complaint of inmate of state prison for damages from injuries inflicted by fellow prisoner was properly dismissed as to state which is governmental entity within meaning of statute defining "governmental entity" and because statute waiving sovereign immunity from negligent acts of all governmental entities specifically excepts injuries arising out of incarceration of any person in any state prison from the operation of the statute, although warden of the state prison is not "governmental entity" within statute and consequently was not immune from suit for alleged negligence, complaint against him was properly dismissed under common-law rule that where one inmate has injured another, warden and other prison officers are protected by doctrine of sovereign immunity against claims of negligence so long as they are acting in good faith Sheffield v. Turner, 21 Utah 2d 314, 445 P 2d 367 (1968).

"Injury."

When state university constructed building, parking lot, and road which diverted surface water flow onto adjoining owner's land and basement, landowner was "injured" within meaning of Subsection (6). Sanford v University of Utah, 26 Utah 2d 285, 488 P 2d 741 (1971).

63-30-3. Immunity of governmental entities from suit.

Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental

entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

History: L. 1965, ch. 139, § 3; 1978, ch. 27, § 2; 1981, ch. 116, § 2; 1984, ch. 33, § 1; 1985, ch. 93, § 1.

Amendment Notes. — The 1985 amendment inserted "and other natural disasters" in the second paragraph.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Construction and application.
Equitable claims.
Escrowed fund disbursement.
Extent of immunity.
Failure or omission to act.
Financial institution supervision.
Golf courses.
Governmental function.
Health care facilities.
Hospitals.
Misrepresentation by city.
Personal liability.
Proprietary or governmental function.
Recreational opportunities provided by city.
Right to maintain action.
Sewer system.
Street repair and construction.
Subdivision plan approval.
Test for determining governmental immunity.
Water system.

Constitutionality.

It is within power of legislature to impose such conditions upon right to sue cities and towns, which are merely arms of state government, as in its judgment may seem wise and proper. Berger v. Salt Lake City, 56 Utah 403, 191 P. 233, 13 A.L.R. 5 (1920).

Construction and application.

This section indicates an intention that the act be strictly applied 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); Epting v. State, 546 P.2d 242 (Utah 1976).

Equitable claims.

Governmental immunity is not a defense to equitable claims. Bowles v. State ex rel. Department of Transp., 652 P.2d 1345 (Utah 1982).

Escrowed fund disbursement.

The supervision of disbursement of escrowed funds is not of such a unique nature that it could only be performed by a governmental entity and is not essential to the core of governmental activity; therefore, disbursement of escrowed funds does not constitute a governmental function for purposes of this section and is not subject to the notice requirement of § 63-30-11. Cox v. Utah Mtg. & Loan Corp., 716 P.2d 783 (Utah 1986).

Extent of immunity.

Classification of operation of governmental entity as "governmental function" does not signal unconditional immunity under this section since the grant of immunity is expressly subjected to operation of other sections of this act. Frank v. State, 613 P.2d 517 (Utah 1980).

Failure or omission to act.

This section provides immunity from suit for injuries resulting from both acts of commission and omission involving the exercise of a governmental function. Madsen v. Borthick, 658 P.2d 627 (Utah 1983).

Financial institution supervision.

State's supervision of financial institutions is of such a unique nature that it can only be performed by a governmental agency and constitutes the exercise of a governmental function. Madsen v. Borthick, 658 P.2d 627 (Utah 1983).

Golf courses.

Operation of a public golf course is not essential to governing and is therefore not a governmental operation with result that city is not immune from tort liability related to its operation of golf course. Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980).

Governmental function.

A lender's complaint against the State Tax Commission, claiming that the commission and its employees negligently failed to advise the lender that a duplicate vehicle title had been issued and improperly issued to the borrower the title certificate upon which the lender relied in making its loan, was barred by governmental immunity. The issuance of motor vehicle titles and recordkeeping responsibilities are governmental functions and have immunity under this section. Further, the statutory waiver of immunity for negligence does not apply, according to § 63-30-10(1)(c), when the alleged injury arises out of the issuance of a title certificate. Metropolitan Fin. Co. v. State, 714 P.2d 293 (Utah 1986).

The regulation of public safety needs and the evaluation, installation, maintenance and improvement of safety signals or devices at railroad crossings is a governmental function. Gleave v. Denver & R.G.W.R.R., 749 P.2d 660 (Utah Ct. App. 1988).

Health care facilities.

While 1978 amendment was not expressly made retroactive, the Supreme Court was disinclined, as a matter of judicial policy, to disregard the obvious manifestation of legislative intent reflected in the amendment; for that reason, the court held, in a case which arose prior to the amendment, that operation of a governmentally owned health care facility such as a university medical center was a "governmental function" as contemplated by the statute prior to amendment. Frank v. State, 613 P.2d 517 (Utah 1980).

County mental health facility was a "governmental health care facility" within the meaning of this section. Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

Hospitals.

The state's operation of a hospital at a prison facility for treatment of prisoners is a governmental function. Madsen v. State, 583 P.2d 92 (Utah 1978).

Misrepresentation by city.

City is immune to tort action for deceit and misrepresentation in its advertisement for construction bids which failed to disclose to bidders that a competitive advantage had been granted to one corporation. Rapp v. Salt Lake City, 527 P.2d 651 (Utah 1974).

Personal liability.

The Governmental Immunity Act has no application to individuals; however, under common-law principles, a governmental agent performing a discretionary function is immune from suit for injury arising therefrom, but an employee acting in a ministerial capacity is not so protected; psychologist working with university medical center on contractual basis and alleged to have been negligent in his treatment of suicidal patient was performing ministerial rather than discretionary acts, and thus was not afforded immunity from suit. Frank v. State, 613 P.2d 517 (Utah 1980).

Proprietary or governmental function.

Four factors to be considered in determining whether an activity is a proprietary or a governmental function are: (1) whether the activity is something that is done for the general public good; (2) whether it is generally regarded as a public responsibility; (3) whether there is any special pecuniary benefit to the city; and (4) whether it is in competition with free enterprise. Greenhalgh v. Payson City, 530 P.2d 799 (Utah 1975).

Recreational opportunities provided by city.

Governmental immunity was not a bar to a negligence action against a city for injuries sustained by a child when child's sled collided with a post on a city owned golf course that was open to the public for sledding in the winter. Johnson v. Salt Lake City Corp., 629 P.2d 432 (Utah 1981).

Right to maintain action.

The right to maintain an action against the state or its political subdivisions can result from a finding that the injury did not result from the exercise of a governmental function, or from a finding that even though the injury resulted from the exercise of a governmental function, the government's immunity has been expressly waived. Madsen v. Borthick, 658 P.2d 627 (Utah 1983).

Sewer system.

Governmental immunity was not a bar to an action by property owner against city for damage sustained when water backed into his home due to city's alleged negligence in maintaining the sewer system. Thomas v. Clearfield City, 642 P.2d 737 (Utah 1982).

An action for negligence against a sanitary district is not subject to the one-year limitations period for actions against the government, since operation of a sewer system is a nongovernmental function, and thus not protected by governmental immunity. Dalton v. Salt Lake Sub. San. Dist., 676 P.2d 399 (Utah 1984).

Street repair and construction.

Duty of city to repair or construct streets within its corporate limits is a governmental one, and in absence of statute no liability devolves on municipality for defective condition of its streets. Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d 800 (1941) (decided under former law).

Subdivision plan approval.

City was immune from a damage suit based on its refusal to approve a subdivision plan, since its actions were deemed to be a "governmental function." Seal v. Mapleton City, 598 P.2d 1346 (Utah 1979).

Test for determining governmental immunity.

Test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity: this new standard broadens governmental liability. However, the position is consistent with the plain legislative intent of this chapter to expand governmental liability.

Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980).

Test for determining governmental immunity is whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency, referring not to what government may do but to what government alone must do, or that it is essential to the core of governmental activity, referring to those activities not unique in themselves but essential to the performance of those activities that are uniquely governmental. Johnson v. Salt Lake City Corp., 629 P.2d 432 (Utah 1981).

Water system.

Where city operated water system as a commercial venture in a proprietary capacity, it was liable for injuries allegedly suffered by plaintiff when she stepped on loose water meter lid whether the meter was on plaintiff's property or in the street. Gordon v. Provo City, 15 Utah 2d 287, 391 P.2d 430 (1964).

COLLATERAL REFERENCES

Journal of Contemporary Law. — Defining Governmental Function Under the Utah Governmental Immunity Act, 9 J. Contemp. L. 193 (1983).

Journal of Energy Law and Policy. — Comment, The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control, 8 J. Energy L. & Pol'y 95 (1987).

A.L.R. — Liability of municipality for personal injury or death under mob violence or anti-lynching statutes, 26 A.L.R.3d 1142.

Liability of municipality for property damage under mob violence statutes, 26 A.L.R.3d 1198.

Modern status of rule excusing governmental unit from tort liability on theory that only general, not particular, duty was owed under circumstances, 38 A.L.R.4th 1194.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A.L.R.4th 948.

Failure to restrain drunk driver as ground of liability of state or local governmental unit or officer, 48 A.L.R.4th 287.

Governmental liability for failure to post highway deer crossing warning signs, 59 A.L.R.4th 1217.

State's liability for personal injuries from criminal attack in state park, 59 A.L.R.4th 1236.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody, 60 A.L.R.4th 942.

Tort liability of college or university for injury suffered by student as a result of own or fellow student's intoxication, 62 A.L.R.4th 81.

Medical malpractice: hospital's liability for injury allegedly caused by failure to have properly qualified staff, 62 A.L.R.4th 692.

Liability to one struck by golf club, 63 A.L.R.4th 221.

Tort liability of college, university, fraternity, or sorority for injury or death of member or prospective member by hazing or initiation activity, 68 A.L.R.4th 228.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured, 68 A.L.R.4th 266.

Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of assault and battery (28 USCS § 2680(h)), 88 A.L.R. Fed. 7.

63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.

(1) Nothing contained in this chapter, unless specifically provided, shall be construed as an admission or denial of liability or responsibility insofar as governmental entities or their employees are concerned. If immunity from suit is waived by this chapter, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

(2) Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law.

(3) The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such

employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through fraud or malice.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

History: L. 1965, ch. 139, § 4; 1978, ch. 27, § 3; 1983, ch. 129, § 3.

Cross-References. — Compromise and settlement, § 63-30-18.

Payment of medical and similar expenses not admissible to prove liability for injury, Utah Rules of Evidence, Rule 409.

NOTES TO DECISIONS

ANALYSIS

Governmental immunity.
—Governmental function.
Official sued in representative capacity.
Personal liability.
—Applicability of section.
—Remedy for wrongful act.
Suit in federal court.
Cited.

Governmental immunity.

—Governmental function.

While legislative delegation of certain powers and duties surely establishes that the exercise and performance thereof is a governmental function for purposes of a political subdivision's authority to operate, it does not automatically follow that the function qualifies as a "governmental function" for purposes of governmental immunity analysis. Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987).

In a homeowner's suit based on failure to construct a fence around a canal adjacent to the house, the city's procedure in review and approval of the relevant subdivision plans did not constitute a governmental function. Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987).

Official sued in representative capacity.

A governmental official or employee can only be sued in a representative capacity when the governmental entity is liable; commissioner of Department of Financial Institutions could not be sued in a representative capacity where the state was not liable. Madsen v. Borthick, 658 P.2d 627 (Utah 1983).

Personal liability.

This section precludes personal liability of a governmental employee for acts or omissions occurring during the performance of his duties, unless the employee acted or failed to act through gross negligence, fraud or malice. Madsen v. Borthick, 658 P.2d 627 (Utah 1983) (decided prior to 1983 amendment).

This section barred negligence claims against individual police officers, where plaintiff did not allege that the officers acted with fraud or malice in beating him after an alleged wrongful arrest. Maddocks v. Salt Lake City Corp., 740 P.2d 1337 (Utah 1987).

—Applicability of section.

Where parents contended that they were not subject to the 1978 amendment of this section because their cause of action accrued at the time they received and relied upon the negligent advice of the doctors in 1977 that they could safely have another child, it was held that the injury in a wrongful birth claim cannot precede the birth of the child, which was 10 months after the effective date of the 1978 amendment to this section. Since there was no allegation of gross negligence, fraud, or malice this section precluded the personal liability of the doctors. Payne ex rel. Payne v. Myers, 743 P.2d 186 (Utah 1987).

The 1983 amendment of this section deleting the provision making employees personally liable for gross negligence should be applied prospectively only. Madsen v. Borthick, 769 P.2d 245 (Utah 1988).

—Remedy for wrongful act.

The 1978 amendment to this section did not leave the parents without a remedy for their wrongful birth injury by granting immunity

for simple negligence to doctors employed by the state, since parents had a remedy against the state for injuries arising out of the negligent acts of state employees, but the parents failed to give notice of their claim to the state within one year as required by § 63-30-12. Payne ex rel. Payne v. Myers, 743 P.2d 186 (Utah 1987).

Suit in federal court.

Judgment for damages entered by federal district court against state of Utah cannot stand unless Utah has waived its rights under the Eleventh Amendment to the U.S. Constitution; nor does the appearance of the attorney general and the ensuing defense at trial serve to waive the Eleventh Amendment right of the state to be sued in its own court, which is a jurisdictional question and may be raised at any time. Richins v. Industrial Constr. Inc., 502 F.2d 1051 (10th Cir. 1974).

Cited in Lancaster v. Utah State Prison, 740 P.2d 261 (Utah 1987).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Torts, 1989 Utah L. Rev. 334.

A.L.R. — Probation officer's liability for negligent supervision of probationer, 44 A.L.R.4th 638.

63-30-5. Waiver of immunity as to contractual obligations.

Immunity from suit of all governmental entities is waived as to any contractual obligation. Actions arising out of contractual rights or obligations shall not be subject to the requirements of Section 63-30-11, 63-30-12, 63-30-13, 63-30-14, 63-30-15, or 63-30-19.

History: L. 1965, ch. 139, § 5; 1975, ch. 189, § 1; 1978, ch. 27, § 4; 1983, ch. 129, § 4; 1985, ch. 82, § 1.

Amendment Notes. — The 1985 amendment divided the section into two sentences, substituting "Actions" for "and actions" at the beginning of the second sentence; and inserted "63-30-14, 63-30-15" near the end of the section.

NOTES TO DECISIONS

Cited in Katsos v. Salt Lake City Corp., 634 F. Supp. 100 (D. Utah 1986).

63-30-6. Waiver of immunity as to actions involving property.

Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

History: L. 1965, ch. 139, § 6.

Cross-References. — Mortgage foreclosure actions, § 78-37-1 et seq.

Quiet title actions, § 78-40-1 et seq.

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 Section 41-6-14.

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

COLLATERAL REFERENCES

A.L.R. — Admiralty jurisdiction: maritime nature of tort — modern cases, 80 A.L.R. Fed. 105.

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.
Private developments.
Traffic signs.

Complaint, sufficiency of allegations.

Claim for injuries "sustained on or about January 15, 1902, while walking on the sidewalk along First West street between Seventh and Eighth South, * * * through the negligence of the city in suffering * * * a fence * * * to be on said sidewalk," not having misled the city, was sufficiently definite. Connor v. Salt Lake City, 28 Utah 248, 78 P. 479 (1904).

Where plaintiff sustained damages to his automobile on city streets, and presented a claim for "necessary repairs to automobile $133," he cannot claim and recover additional damages for $1,000 for its "depreciation in value and

general impairment," since such claim was not included in original claim, and could not be said to be proximate consequence of injuries therein included. Sweet v. Salt Lake City, 43 Utah 306, 134 P. 1167 (1913).

In suit for personal injuries sustained by falling on sidewalk of defendant city, plaintiff could not recover for permanent injuries in excess of amount claimed in notice to city on ground that injuries were more serious than at first supposed, where she alleged no excuse why she could not initially state all consequences of injuries described in complaint. Berger v. Salt Lake City, 56 Utah 403, 191 P. 233, 13 A.L.R. 5 (1920).

Construction.

A city is required to exercise reasonable care to keep its streets in safe condition and may be held liable for injuries proximately resulting from failure to do so and, in an action against city for injuries, the failure of a city to warn of or protect a row of dirt left in the street during the installation of a curb and gutter justified finding that city was negligent. Nyman v. Cedar City, 12 Utah 2d 45, 361 P.2d 1114 (1961).

Contributory negligence.

Ordinarily, a pedestrian with prior knowledge of a sidewalk defect and an unobstructed daylight view who steps into a visible defect is contributorily negligent as a matter of law. Eisner v. Salt Lake City, 120 Utah 675, 238 P.2d 416 (1951).

In order that a temporary forgetfulness may be excused, the cause diverting a pedestrian's attention from a known danger in a sidewalk must be unexpected and substantial. Otherwise, the forgetfulness itself may constitute contributory negligence. Eisner v. Salt Lake City, 120 Utah 675, 238 P.2d 416 (1951).

Dangerous objects.

It is primary duty of city to exercise reasonable care to maintain streets in reasonably safe condition, and to guard against injury to persons and property by removing or making reasonably safe any dangerous objects in streets. Morris v. Salt Lake City, 35 Utah 474, 101 P. 373 (1909).

Discretionary function.

Power of public service commission under § 54-4-14 to require public utility to construct and maintain appropriate safety devices at grade crossings is a discretionary function, and therefore § 63-30-10 excepts the commission from waiver of immunity for injuries caused by failure to require warnings at crossing. Velasquez v. Union Pac. R.R., 24 Utah 2d 217, 469 P.2d 5 (1970).

The design of a system of traffic-control semaphores did not involve "the basic policy making level" nor constitute a discretionary act for which § 63-30-10 would provide immunity to the state in a tort action alleging dangerously designed, constructed and maintained electric traffic-control semaphore caused an auto accident resulting in personal injury. Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980).

Ice and snow on sidewalk.

Cities and towns are not liable for failure to keep sidewalks free from natural accumulations of ice and snow, but may be held liable for injuries arising from such snow and ice upon streets or sidewalks which are placed there by their own acts. Berger v. Salt Lake City, 56 Utah 403, 191 P. 233, 13 A.L.R. 5 (1920) (decided under former law).

Manholes.

A city was liable for damages sustained when right rear wheel of automobile crashed through a defective manhole lid because the city was negligent in failing to maintain street in a reasonably safe condition for vehicular traffic by allowing a broken and cracked manhole lid to remain in the street. Wilson v. Salt Lake City, 13 Utah 2d 234, 371 P.2d 644 (1962).

Negligent construction.

Where university construction diverted flow of surface water, flooding basement and causing other damage to adjoining landowner, governmental immunity was waived and university was liable to landowner. Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (Utah 1971).

There was adequate evidence to support jury finding that highway project of the state, including the storm drain system, was unnecessarily defective or dangerous and had resulted in damage to plaintiffs' property by diversion of rainwater from channels which had previously carried it to points beyond the plaintiffs' properties. Andrus v. State, 541 P.2d 1117 (Utah 1975).

New duties not created.

This section did not create any new duties but merely waived immunity, and since county had no duty to correct conditions on private property that obstructed motor bike driver's view of county road, it could not be held liable for driver's injuries caused as result of obstruction. Stevens v. Salt Lake County, 25 Utah 2d 168, 478 P.2d 496 (1970).

Nondelegable duty.

A city is charged with a nondelegable duty to exercise due care in maintaining its streets and sidewalks in a reasonably safe condition and may incur tort liability for breach of this duty by virtue of this section. Murray v. Ogden City, 548 P.2d 896 (Utah 1976).

Private developments.

This section's waiver of immunity applies only with regard to property in the public use,

not to private developments, such as an irrigation canal owned by a private company. Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987).

Traffic signs.

The maintenance and repair of traffic signs is a governmental function for which immunity from suit has been expressly waived and which is not within the discretionary function exception. Richards v. Leavitt, 716 P.2d 276 (Utah 1985).

COLLATERAL REFERENCES

A.L.R. — Highways: governmental duty to provide curve warnings or markings, 57 A.L.R.4th 342.

Governmental tort liability as to highway median barriers, 58 A.L.R.4th 559.

Governmental tort liability for injury to roller skater allegedly caused by sidewalk or street defects, 58 A.L.R.4th 1197.

Legal aspects of speed bumps, 60 A.L.R.4th 1249.

Highway contractor's liability to highway user for highway surface defects, 62 A.L.R.4th 1067.

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 A.L.R.4th 204.

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.

Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions.

History: L. 1965, ch. 139, § 9.

NOTES TO DECISIONS

ANALYSIS

Latent defective condition.
Negligent construction.
Notice to city.
Nuisance action.
Other public improvement.
Private developments.
Cited.

Latent defective condition.

Defect in a county storm drain that was discoverable by a reasonable inspection was not a latent defect. Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978).

Negligent construction.

Where university construction diverted flow of surface water, flooding basement and causing other damage to adjoining landowner, governmental immunity was waived and university was liable to landowner. Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).

Notice to city.

Requirement that notice of claim be given to political subdivision within ninety days (now one year) in § 63-30-13 is applicable to this section. Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975) (decided under former law).

Nuisance action.

Intent of legislature was to include within the waiver of immunity an action for private nuisance in so far as the action is predicated on a dangerous or defective condition of a public improvement that unreasonably interferes with the use and enjoyment of the claimant's property. Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).

Other public improvement.

Damages to house and basement partially incurred from defective conditions of sewer drain and canal fell under purview of this section. Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975).

Private developments.

This section's waiver of immunity for injuries caused by defective conditions applies only with regard to conditions on property in the public use, not on private developments such as an irrigation canal owned by a private com-

pany. Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987).

Cited in Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987).

COLLATERAL REFERENCES

Journal of Energy Law and Policy. — Comment, The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control, 8 J. Energy L. & Pol'y 95 (1987).

A.L.R. — State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 A.L.R.4th 204.

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights [Effective until July 1, 1990].

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused; or

(b) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights; or

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization; or

(d) arises out of a failure to make an inspection or by reason of making an inadequate or negligent inspection of any property; or

(e) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause; or

(f) arises out of a misrepresentation by the employee whether or not it is negligent or intentional; or

(g) arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances; or

(h) arises out of or in connection with the collection of and assessment of taxes; or

(i) arises out of the activities of the Utah National Guard; or

(j) arises out of the incarceration of any person in any state prison, county, or city jail or other place of legal confinement; or

(k) arises from any natural condition on state lands or the result of any activity authorized by the Board of State Lands and Forestry;

(l) arises out of the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous waste; or

(iv) emergency evacuations; or

(m) arises out of research or implementation of cloud management or seeding for the clearing of fog.

(2) (a) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights as provided in Chapter 16, Title 78 which shall be the exclusive remedy for injuries to those protected rights.

(b) If Section 78-16-5 or Subsection 77-35-12(g) or any parts thereof are held invalid or unconstitutional, this Subsection (2) shall be void and governmental entities shall remain immune from suit for violations of fourth amendment rights.

Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights [Effective July 1, 1990].

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of:

(a) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

(b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights;

(c) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;

(d) a failure to make an inspection or by making an inadequate or negligent inspection of any property;

(e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(f) a misrepresentation by the employee whether or not it is negligent or intentional;

(g) or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;

(h) or in connection with the collection of and assessment of taxes;

(i) the activities of the Utah National Guard;

(j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;

(k) any natural condition on state lands or as the result of any activity authorized by the Board of State Lands and Forestry;

(l) the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous wastes; or

(iv) emergency evacuations; or

(m) research or implementation of cloud management or seeding for the clearing of fog.

(2) (a) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights under Chapter 16, Title 78, which is the exclusive remedy for injuries to those protected rights.

(b) If Section 78-16-5 or Rule 12(g), Utah Rules of Criminal Procedure, or any parts of either of them are held invalid or unconstitutional, this subsection is void and governmental entities remain immune from suit for violations of fourth amendment rights.

History: L. 1965, ch. 139, § 10; 1975, ch. 194, § 11; 1982, ch. 10, § 1; 1985, ch. 169, § 1; 1989, ch. 185, § 1; 1989, ch. 187, § 3; 1989, ch. 268, § 29.

Amended effective July 1, 1990. — Laws 1989, ch. 187, § 3 amends this section effective July 1, 1990. See fourth paragraph of amendment note below.

Amendment Notes. — The 1985 amendment, effective March 18, 1985, added Subsection (1)(l) and made minor changes in phraseology.

The 1989 amendment by ch. 185, effective April 24, 1989, added Subsection (1)(m) and designated the first and second sentences of Subsection (2) as Subsections (2)(a) and (b).

The 1989 amendment by ch. 268, effective July 1, 1989, substituted "Board of State Lands and Forestry" for "State Land Board" in Subsection (1)(k), subdivided Subsection (1)(l) and made related punctuation changes, and rewrote Subsection (1)(l)(iii), which had read, "handling hazardous materials."

The 1989 amendment by ch. 187, effective July 1, 1990, added "arises out of" to the introductory paragraph in Subsection (1) and deleted it from the beginning of each subsection of Subsection (1); substituted "Board of State Lands and Forestry" for "State Land Board" in Subsection (1)(k); substituted "Rule 12(g), Utah Rules of Criminal Procedure" for "Subsection 77-35-12(g)" in Subsection (2); and made minor stylistic changes.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Compiler's Notes. — Sections 78-16-5 and 77-35-12(g) (Criminal Procedure Rule 12(g)), cited in Subsection (2)(b), were held unconstitutional in State v. Mendoza, 748 P.2d 181 (Utah 1987). See case note under catchline "Constitutionality," below.

Cross-References. — Indemnification of public officers and employees, §§ 63-30-36 to 63-30-38.

NOTES TO DECISIONS

Analysis

Constitutionality.
Discretionary function.
Escaped prisoner.
False arrest.
Foster care of children.
Incarceration in state prison.
Individual agents' immunity.
Injunctions.
Legislative intent.
Misrepresentation in advertisement.
Release from Youth Detention Center.
Sale of recovered stolen property.
State hospital patient.
State prison inmate.
Trees negligently cut.
Vehicle title certificate.
Cited.

Constitutionality.

Because the good faith exception to the exclusionary rule announced in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), can never apply to investigatory stops and searches, and because Subsection 77-35-12(g) purports to create a "good faith" exception to such searches, the Fourth Amendment Enforcement Act (which added Subsection (2) to this section, amended §§ 67-15-5 and 77-35-12, and enacted §§ 77-23-12 and 78-16-1 to 78-16-11) violates the Fourth Amendment to the United States Constitution. State v. Mendoza, 748 P.2d 181 (Utah 1987).

Discretionary function.

Power of Public Service Commission under § 54-4-14 to require public utility to construct and maintain appropriate safety devices at grade crossings is a discretionary function, so this section excepts the commission from waiver of immunity for injuries caused by failure to require warnings at crossings. Velasquez v. Union Pac. R.R., 24 Utah 2d 217, 469 P.2d 5 (1970).

The decision of a road supervisor to use berms as the sole method for warning a traveler of a cut in an abandoned road was not a basic policy decision essential to the realization or accomplishment of some basic governmental policy, program, or objective, and therefore was not within the discretionary exception of this section. Carroll v. State Rd. Comm., 27 Utah 2d 384, 496 P.2d 888 (1972).

Although the decision to build a highway and the general location of the highway were discretionary functions of the state, preparation of plans and specifications and supervision of the manner in which the work was carried out were not "discretionary" within the mean-

ing of this section and did not exempt state from tort liability. Andrus v. State, 541 P.2d 1117 (Utah 1975).

Psychiatric care of an individual patient is a ministerial, rather than a discretionary, function. Frank v. State, 613 P.2d 517 (Utah 1980).

The design of a system of traffic-control semaphores did not involve "the basic policy making level" nor constitute a discretionary act for which this section would provide immunity to the state in a tort action alleging dangerously designed, constructed and maintained electric traffic-control semaphore caused an auto accident resulting in personal injury. Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980).

Failure of Department of Transportation to install different safety signals or devices at a particular railroad crossing was a purely discretionary function within the meaning of Subsection (1)(a). Gleave v. Denver & R.G.W.R.R., 749 P.2d 660 (Utah Ct. App. 1988).

Escaped prisoner.

State had not waived its immunity from suit for negligence in permitting escape of state prisoner who subsequently killed plaintiffs' mother; prisoner had escaped from a work release program in which he was placed at the discretion of prison authorities; therefore, state's negligence, if any, arose out of exercise of discretionary function and it was immune from suit under Subsection (1) (now (1)(a)) of this section; likewise, state was immune under Subsection (10) (now (1)(j)) because alleged negligence arose out of escapee's incarceration in a state prison. Epting v. State, 546 P.2d 242 (Utah 1976).

False arrest.

City was immune from suit claiming that plaintiff was arrested on a bench warrant due to city court clerk's failure to enter in the docket book that plaintiff had paid his fine. Connell v. Tooele City, 572 P.2d 697 (Utah 1977).

Foster care of children.

Failure of Division of Family Services to properly evaluate the foster home, its failure to supervise the child's placement and its failure to protect her from harm was a breach of conduct implemental in nature, and when found to be negligent entitled the parents, upon the death of their child after she was placed in foster care, to maintain a wrongful death action against the Division of Family Services, which had obtained custody and guardianship of the child and placed her in foster care. Little v. Utah State Div. of Family Servs., 667 P.2d 49 (Utah 1983).

Incarceration in state prison.

The exception of the waiver of governmental immunity for injuries arising out of the incarceration of a person in the state prison is not a denial of equal protection nor is it against public policy. Madsen v. State, 583 P.2d 92 (Utah 1978).

This section barred a wrongful death action against the state and board of corrections for death of a prisoner due to alleged negligent treatment of the prisoner after surgery in the prison hospital. Madsen v. State, 583 P.2d 92 (Utah 1978).

State is immune under Subsection (10) (now (1)(j)) of this section from claim of inmate for negligent deprivation of property, but individual employees of the state are not immune. Schmitt v. Billings, 600 P.2d 516 (Utah 1979).

This section barred an action by an inmate against the state prison for personal injuries he received in a fire at the prison where he was lawfully incarcerated. Lancaster v. Utah State Prison, 740 P.2d 261 (Utah 1987).

Individual agents' immunity.

Under Subsection (10) (now (1)(j)) of this section, individual defendants are not immune from liability for their own torts. Schmitt v. Billings, 600 P.2d 516 (Utah 1979).

Psychologist working with university medical center on contractual basis and alleged to have been negligent in his treatment of suicidal patient was acting in a ministerial rather than discretionary capacity and thus was not immune from suit. Frank v. State, 613 P.2d 517 (Utah 1980).

Injunctions.

The Utah State Tax Commission, as an agency of the state of Utah, has immunity from suits seeking to enjoin an investigation to determine whether a taxpayer has violated any provision of the state individual income tax law. Hamilton v. Mengel, 629 F. Supp. 1110 (D. Utah 1986).

Legislative intent.

Since the waiver of immunity in § 63-30-8 and § 63-30-9 encompasses a much broader field of tort liability than merely negligent conduct of employees within the scope of their employment, the Legislature could not have intended that this section, with its exceptions, should modify the preceding two sections even though it be conceded that the negligent conduct of an employee might be involved in an action for injuries caused by the creation or maintenance of a dangerous or defective condition. Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).

Misrepresentation in advertisement.

City is immune to tort action for deceit and misrepresentation in its advertisement for construction bids which failed to disclose to bidders that a competitive advantage had been granted to one corporation. Rapp v. Salt Lake City, 527 P.2d 651 (Utah 1974).

Release from Youth Detention Center.

In a guardian's suit on behalf of her ward who was raped, sodomized, and stabbed by a juvenile, summary judgment for the state and a Youth Detention Center superintendent was reversed and remanded for a trial to determine whether the ward's injuries resulted from the superintendent's negligence in monitoring prescribed treatment after making a discretionary decision to release the juvenile into the community. Mary Doe v. Arguelles, 716 P.2d 279 (Utah 1985).

Sale of recovered stolen property.

Where plaintiff's motorcycle was stolen, recovered, held for trial of alleged thief, then sold by State Tax Commission without notice to plaintiff (who never received notice letter), the motorcycle's sale did not involve such exercise of "basic policy evaluation" as to make it a discretionary decision under Subsection (1) (now (1)(a)) of this section, but rather the decision to sell was an operation function and not immune from attack; also, since defendant tax commission never claimed taxes were owing on the motorcycle and no taxes were deducted from the sale price, and since the motorcycle was being held as evidence in a criminal prosecution, the commission could not claim immunity on basis of the tax exception under Subsection (8) (now (1)(h)) of this section. Morrison v. Salt Lake City Corp., 600 P.2d 553 (Utah 1979).

State hospital patient.

State was immune from liability for wrongful death of patient who voluntarily entered state hospital since she was "incarcerated" or "confined" within the meaning of this section; "other place of legal confinement" includes the hospital. The fact that decedent was voluntary patient did not preclude conclusion that she was "incarcerated" since she had not sought release and had she done so, superintendent could obtain court order preventing her release. Emery v. State, 26 Utah 2d 1, 483 P.2d 1296 (1971).

State's immunity from suit was waived under this section in action alleging negligent treatment of suicidal patient by psychiatrist and psychologist at university medical center. Frank v. State, 613 P.2d 517 (Utah 1980).

State prison inmate.

Complaint of inmate of state prison for damages from injuries inflicted by fellow prisoner was properly dismissed as to state which is governmental entity within meaning of statute defining "governmental entity" and because statute waiving sovereign immunity from negligent acts of all governmental entities specifically excepts injuries arising out of the incarceration of any person in any state prison from the operation of the statute; although warden of state prison is not "governmental entity" within statute and consequently was not immune from suit for alleged negligence, complaint against him was properly dismissed under common-law rule that where one inmate has injured another, warden and other prison officers are protected by doctrine of sovereign immunity against claims of negligence so long as they are acting in good faith. Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367 (1968).

Trees negligently cut.

City and sidewalk contractor were liable for damage sustained by abutting homeowner when trees were blown down as result of unnecessary and negligent cutting of roots. Morris v. Salt Lake City, 35 Utah 474, 101 P. 373 (1909).

Vehicle title certificate.

A lender's complaint against the State Tax Commission, claiming that the commission and its employees negligently failed to advise the lender that a duplicate vehicle title had been issued and that it had improperly issued to the borrower the title certificate upon which the lender relied in making its loan, was barred by governmental immunity. The issuance of motor vehicle titles and recordkeeping responsibilities are governmental functions and have immunity under § 63-30-3. Further, the statutory waiver of immunity for negligence does not apply, under Subsection (1)(c) of this section, when the alleged injury arises out of the issuance of a title certificate. Metropolitan Fin. Co. v. State, 714 P.2d 293 (Utah 1986).

Cited in Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987); Maddocks v. Salt Lake City Corp., 740 P.2d 1337 (Utah 1987); Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987); Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Misapplication of Governmental Immunity — Epting v. Utah, 1976 Utah L. Rev. 186.

Journal of Energy Law and Policy. — Comment, The Only Way to Manage a Desert: Utah's Liability Immunity for Flood Control, 8 J. Energy L. & Pol'y 95 (1987).

A.L.R. — Liability of municipality for building inspector's negligent performance of duties, 41 A.L.R.3d 567.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A.L.R.3d 90.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 A.L.R.4th 948.

Failure to restrain drunk driver as ground of liability of state or local governmental unit or officer, 48 A.L.R.4th 287.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 A.L.R.4th 235.

Municipal liability for negligent fire inspection and subsequent enforcement, 69 A.L.R.4th 739.

Applicability of libel and slander exception to waiver of sovereign immunity under Federal Tort Claims Act (28 USCS § 2680(h)), 79 A.L.R. Fed. 826.

Applicability of 28 USCS §§ 2680(a) and 2680(h) to Federal Tort Claims Act liability arising out of government informant's conduct, 85 A.L.R. Fed. 848.

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) Immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Chapter 34, Title 78.

History: C. 1953, 63-30-10.5, enacted by L. 1987, ch. 75, § 3.

COLLATERAL REFERENCES

Utah Law Review. — Recent Development in Utah Law — Judicial Decisions — Civil Procedure, 1989 Utah L. Rev. 166.

63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

(3) (a) The notice of claim shall set forth:

(i) a brief statement of the facts;

(ii) the nature of the claim asserted; and

(iii) the damages incurred by the claimant so far as they are known.

(b) The notice of claim shall be signed by the person making the claim or that person's agent, attorney, parent, or legal guardian, and shall be directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

(4) (a) If the claimant is under the age of majority, mentally incompetent and without a legal guardian, or imprisoned at the time the claim arises,

the claimant may apply to the court to extend the time for service of notice of claim.

(b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

(ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

History: L. 1965, ch. 139, § 11; 1978, ch. 27, § 5; 1983, ch. 131, § 1; 1987, ch. 75, § 4.

Amendment Note. — The 1987 amendment, in Subsection (2), added "before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental" to the end of the subsection; added the subsection designations within Subsections (3) and (4); in Subsection (4)(a), added "at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim"; and made minor changes in phraseology and punctuation throughout the section.

NOTES TO DECISIONS

Analysis

Constitutionality.
Action based on exercise of governmental function.
Assignment of municipal debt.
Clear statement of claims required.
Conditions for right to recover.
Damages not specified.
Failure to file claim.
Notice.
Sufficiency of notice.
Waiver of objections by city.
Cited.

Constitutionality.

Functions of the notice of claim requirement in giving the affected governmental entity an opportunity to promptly investigate and remedy defects immediately, in avoiding unnecessary litigation, and in minimizing difficulties which might attend changes in administration provide sufficient justification for its imposition as to governmental but not other tort-feasors, and therefore this section does not constitute a denial of equal protection. Sears v. Southworth, 563 P.2d 192 (Utah 1977).

Action based on exercise of governmental function.

Action against state which was predicated on governmental supervision of financial institutions involved the exercise of a governmental function and was barred where there was no compliance with the notice of claim provisions of §§ 63-30-11 and 63-30-12. Madsen v. Borthick, 658 P.2d 627 (Utah 1983).

Assignment of municipal debt.

Assignment directing city to pay debt it owes assignor to assignee is not kind of claim required to be submitted to city in accordance with this statute. Cooper v. Holder, 21 Utah 2d 40, 440 P.2d 15 (1968) (decided under former law).

Clear statement of claims required.

The purpose of this section is to require every claimant to state clearly all of the elements of his claims to the board of commissioners or city council for allowance as a condition precedent to his right to sue the city and recover his damages in an ordinary action. Sweet v. Salt Lake City, 43 Utah 306, 134 P. 1167 (1913).

Conditions for right to recover.

Statutory right to recover can be availed of only when there has been a compliance with the conditions upon which right is conferred. One who seeks to enforce the right must by allegation and proof bring himself within the conditions prescribed thereby. Hamilton v. Salt Lake City, 99 Utah 362, 106 P.2d 1028 (1940).

Damages not specified.

A claim which stated the time, place and general nature of the injury and the sidewalk defect causing it fulfilled the purpose of former section even though the amount of damages was not stated; since the claim had to be filed within thirty days of the injury, the exact amount of damages was impossible to ascertain. Spencer v. Salt Lake City, 17 Utah 2d 362, 412 P.2d 449 (1966) (decided under former law).

Failure to file claim.

Where no claim was filed as required by this section, action to recover moneys expended to

construct bridge which city had agreed to construct was barred. Thomas E. Jeremy Estate v. Salt Lake City, 87 Utah 370, 49 P.2d 405 (1934).

Notice.

The supervision of disbursement of escrowed funds is not of such a unique nature that it could only be performed by a governmental entity and is not essential to the core of governmental activity; therefore, disbursement of escrowed funds does not constitute a governmental function for purposes of § 63-30-3 and is not subject to the notice requirement of this section. Cox v. Utah Mtg. & Loan Corp., 716 P.2d 783 (Utah 1986).

Service of notice is a precondition to suit. Madsen v. Borthick, 769 P.2d 245 (Utah 1988).

Sufficiency of notice.

Under this section, a notice in which damages were specified as "for general impairment" of an automobile was an insufficient description of the damages and one which could not be cured by amendment. Sweet v. Salt Lake City, 43 Utah 306, 134 P. 1167 (1913) (decided under former law).

Waiver of objections by city.

In action against city for injuries sustained as result of defective sidewalk, objection that plaintiff's claim was not verified and did not sufficiently describe extent of injury was waived by city, where it did not decline to consider claim, but acted upon it. Bowman v. Ogden City, 33 Utah 196, 93 P. 561 (1908) (decided under former law).

Failure to file claim barred action against town; and consideration of claim by town did not waive the filing requirement. Hurley v. Town of Bingham, 63 Utah 589, 228 P. 213 (1924).

City council had no discretion to waive verification of notice of street or sidewalk injury claims; evidence of waiver or estoppel by city employees respecting filing of notice was inadmissible where not alleged. Hamilton v. Salt Lake City, 99 Utah 362, 106 P.2d 1028 (1940) (decided under former law).

Cited in Schultz v. Conger, 755 P.2d 165 (Utah 1988).

COLLATERAL REFERENCES

A.L.R. — Amount of damages stated in notice of claim against municipality or county as limiting amount of recovery, 24 A.L.R.3d 965.

Incapacity caused by accident in suit as affecting notice of claim required as condition of holding state and local governmental unit liable for personal injury, 44 A.L.R.3d 1108.

Attorney's mistake or neglect as excuse for failing to file timely notice of tort claim against state or local governmental unit, 55 A.L.R.3d 930.

Waiting period: plaintiff's right to bring tort action against municipality prior to expiration of statutory waiting period, 73 A.L.R.3d 1019.

Class action: maintenance of class action against governmental entity as affected by requirement of notice of claim, 76 A.L.R.3d 1244.

Local government tort liability: minority as affecting notice of claim requirement, 58 A.L.R.4th 402.

Insufficiency of notice of claim against municipality as regards statement of place where accident occurred, 69 A.L.R.4th 484.

63-30-12. Claim against state or its employee — Time for filing notice.

A claim against the state, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

History: L. 1965, ch. 139, § 12; 1978, ch. 27, § 6; 1983, ch. 131, § 2; 1987, ch. 75, § 5.

Amendment Notes. — The 1987 amendment near the end of the section substituted "Section 63-30-11" for "Subsection 63-30-11(4)" and added "regardless of whether or not the function giving rise to the claim is characterized as governmental" and made minor changes in phraseology.

Cross-References. — Actions arising out of contractual rights or obligations not subject to this section, § 63-30-5.

Health Care Malpractice Act, § 78-14-1 et seq.

Mailing claims to state or political subdivisions, § 63-37-1 et seq.

NOTES TO DECISIONS

Claims for death.
Compliance with section.
Federal claim.
Notice.
Quiet title actions.
Remedy for wrongful act.

Claims for death.

In cases involving claims for death, the statutory period would commence to run on the date of death of the person injured, inasmuch as that is the date upon which the damage accrues to the personal representative or third party entitled to recover for such wrongful death. Nelson v. Logan City, 103 Utah 356, 135 P.2d 259 (1943) (decided under former law).

Compliance with section.

Complaint alleging that tax commission and its agent acted maliciously and arbitrarily in attempting to enforce payment of excise taxes and in compelling plaintiff to supply a surety in greater amount than was reasonable to ensure payment of the tax, requesting damages both compensatory and punitive was fatally defective in that it did not allege compliance with this section; tax commission and its agent were immune from suit for damages where the acts complained of were performed in good faith and within the statutory authority granted to them. Roosendaal Constr. & Mining Corp. v. Holman, 28 Utah 2d 396, 503 P.2d 446 (1972).

Plaintiffs complied with this section where, within a year after the cause of action arose, they filed notice of claim with the attorney general and the agency concerned on the same day they filed the original complaint with the court, and amended complaint alleging compliance with the Governmental Immunity Act was filed, as a matter of right, within one year after denial of the claim or after the end of the 90-day period in which the claim is deemed to have been denied. Johnson v. Utah State Retirement Office, 621 P.2d 1234 (Utah 1980).

Action against state which was predicated on governmental supervision of financial institutions involved the exercise of a governmental function and was barred where there was no compliance with the notice of claim provisions of §§ 63-30-11 and 63-30-12. Madsen v. Borthick, 658 P.2d 627 (Utah 1983).

Federal claim.

A federal claim under 42 U.S.C.§ 1983 may not be barred by failure to meet state statutory requirements, such as the "notice of claim" requirement in this section. Edwards v. Hare, 682 F. Supp. 1528 (D. Utah 1988).

Notice.

Service of notice is a precondition to suit. Madsen v. Borthick, 97 769 P.2d 245 (Utah 1988). (But see note under catchline "Federal claim" above.)

Quiet title actions.

Notice of a claim for quiet title complies with this section if it is given not more than one year after plaintiff's right to possession has been disturbed or encroached upon by the state. Ash v. State, 572 P.2d 1374 (Utah 1977).

Remedy for wrongful act.

The 1978 amendment to § 63-30-4 did not leave the parents without a remedy for their wrongful birth injury by granting immunity for simple negligence to doctors employed by the state, since parents had a remedy against the state for injuries arising out of the negligent acts of state employees, but the parents failed to give notice of their claim to the state within one year as required by this section. Payne ex rel. Payne v. Myers, 743 P.2d 186 (Utah 1987).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Torts, 1989 Utah L. Rev. 334.

Am. Jur. 2d. — 72 Am. Jur. 2d States, Territories, and Dependencies §§ 124, 126.

C.J.S. — 81A C.J.S. States §§ 269, 271, 272, 310.

A.L.R. — See A.L.R. Annotations set forth under § 63-30-11.

Key Numbers. — States ⚷ 174, 177, 197.

63-30-13. Claim against political subdivision or its employee — Time for filing notice.

A claim against a political subdivision, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

History: L. 1965, ch. 139, § 13; 1978, ch. 27, § 7; 1983, ch. 131, § 3; 1987, ch. 75, § 6.

Amendment Notes. — The 1987 amendment near the end of the section substituted "Section 63-30-11" for "Subsection 63-30-11(4)" and added "regardless of whether or not the function giving rise to the claim is characterized as governmental."

Cross-References. — Actions arising out of contractual rights or obligations not subject to this section, § 63-30-5.

Mailing claims to state or political subdivisions, § 63-37-1 et seq.

NOTES TO DECISIONS

Administrative proceedings.
Claims barred.
Claims by minors.
Claims for death.
Contract action.
Estoppel.
Full compliance required.
Necessity for presentation of claim.
Notice.
Cited.

Administrative proceedings.

Tenured teacher seeking reinstatement following decision to terminate his services had no claim for breach of contract until after adverse result at administrative hearing provided for by the school termination provisions (now § 53A-8-101 et seq.); therefore, where he filed his notice of claim within the statutory period after termination of the hearing, he complied with the requirements of this section. Pratt v. Board of Educ., 564 P.2d 294 (Utah 1977) (decided under former law).

Claims barred.

Neither actual knowledge by county officials of circumstances which resulted in death of four-year-old child's mother in an automobile accident nor minority of the child dispensed with necessity of filing timely claim in action against county in which it was alleged that death was due to inadequate warning signs and an improperly constructed guardrail; timely claim against county was necessary even though county highway department employee allegedly advised child's attorney, incorrectly, that highway in question was maintained by state, resulting in initial filing of claim against state. Varoz v. Sevey, 29 Utah 2d 158, 506 P.2d 435 (1973).

Trial court properly dismissed complaint against county where notice of the claim was not filed with the county commission during the year following plaintiff's discovery of her injuries. Yates v. Vernal Family Health Center, 617 P.2d 352 (Utah 1980).

Claims by minors.

Failure of a minor to give notice within the time provided in this section does not bar the minor's claim as the time for notice is tolled during minority by § 78-12-36. Scott v. School Bd., 568 P.2d 746 (Utah 1977).

Claims for death.

In cases involving claims for death, the statutory period would commence to run on the date of death of the person injured, inasmuch as that is the date upon which the damage accrues to the personal representative or third party entitled to recover for such wrongful death. Nelson v. Logan City, 103 Utah 356, 135 P.2d 259 (1943) (decided under former law).

Contract action.

An action on a contractual obligation is a claim permitted under this chapter, and notice of such claim must be filed in accordance with this section. Baugh v. Logan City, 27 Utah 2d 291, 495 P.2d 814 (1972).

Estoppel.

County was not estopped from pleading the filing deadline of the statutory period as a bar to the claim of a boy who had been injured at school while playing with dangling wires, even though the principal of the school erroneously

informed the mother that public service company was responsible for the wires, and she did not discover until after the filing deadline that the county tree-trimming employees were in fact responsible. Scarborough v. Granite School Dist., 531 P.2d 480 (Utah 1975) (decided under former law).

Full compliance required.

Before suit against a political subdivision can be allowed, plaintiff must have fully complied with the statutory requirements; and thus, prior to filing suit, a claim must be filed which (1) is in writing, (2) states the facts and the nature of the claim, (3) is signed by the claimant, (4) is directed and delivered to someone authorized to receive it, and (5) has been filed within the prescribed time. Scarborough v. Granite School Dist., 531 P.2d 480 (Utah 1975).

Necessity for presentation of claim.

Plaintiff had no cause of action for damages to his crops caused by seepage of water from defendant city's canal where no claim was presented therefor to city within a year. Dahl v. Salt Lake City, 45 Utah 544, 147 P. 622 (1915 (decided under former law).

Presentation of claim within time fixed by law is a condition precedent to bringing action against municipality. Brown v. Salt Lake City, 33 Utah 222, 93 P. 570, 14 L.R.A. (n.s.) 619, 126 Am. St. R. 828, 14 Ann. Cas. 1004 (1908); Hurley v. Town of Bingham, 63 Utah 589, 228 P. 213 (1924) (decided under former law).

Notice.

The fact that employees of the county in fact knew of the plaintiff's injuries at the time they occurred does not dispense with the necessity of filing a timely claim. Edwards v. Iron County ex rel. Valley View Medical Center, 531 P.2d 476 (Utah 1975).

Notice provision in this section is applicable to § 63-30-9. Parrish v. Layton City Corp., 542 P.2d 1086 (Utah 1975) (decided under former law).

Cited in Richards v. Leavitt, 716 P.2d 276 (Utah 1985); Schultz v. Conger, 755 P.2d 165 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 680 et seq.

C.J.S. — 20 C.J.S. Counties §§ 297, 298, 323; 64 C.J.S. Municipal Corporations §§ 2173, 2174, 2199; 79 C.J.S. Schools and School Districts §§ 423, 433.

A.L.R. — See A.L.R. Annotations set forth under § 63-30-11.

Key Numbers. — Counties ⇐ 200, 203, 213; Municipal Corporations ⇐ 1001, 1005, 1008, 1021; Schools and School Districts ⇐ 112, 115.

63-30-14. Claim for injury — Approval or denial by governmental entity or insurance carrier within ninety days.

Within ninety days of the filing of a claim the governmental entity or its insurance carrier shall act thereon and notify the claimant in writing of its approval or denial. A claim shall be deemed to have been denied if at the end of the ninety-day period the governmental entity or its insurance carrier has failed to approve or deny the claim.

History: L. 1965, ch. 139, § 14.

63-30-15. Denial of claim for injury — Authority and time for filing action against governmental entity.

(1) If the claim is denied, a claimant may institute an action in the district court against the governmental entity or an employee of the entity.

(2) The claimant shall begin the action within one year after denial of the claim or within one year after the denial period specified in this chapter has

expired, regardless of whether or not the function giving rise to the claim is characterized as governmental.

History: L. 1965, ch. 139, § 15; 1983, ch. 129, § 6; 1985, ch. 82, § 2; 1987, ch. 75, § 7.

Amendment Notes. — The 1985 amendment substituted "or an employee of the entity" for "in those circumstances in which immunity from suit has been waived in this chapter" at the end of the first sentence.

The 1987 amendment added the designations to the previously undesignated section; in Subsection (2), added at the end "regardless of whether or not the function giving rise to the claim is characterized as governmental"; and made minor changes in phraseology.

NOTES TO DECISIONS

Amended complaint.
Estoppel.
Extension of time for filing suit.
Waiver for contractual obligations.

Amended complaint.

Plaintiffs complied with this section where, within a year after the cause of action arose, they filed notice of claim with the attorney general and the agency concerned on the same day they filed the original complaint with the court, and amended complaint alleging compliance with the Governmental Immunity Act was filed, as a matter of right, within one year after denial of the claim or after the end of the 90-day period in which the claim is deemed to have been denied. Johnson v. Utah State Retirement Office, 621 P.2d 1234 (Utah 1980).

Estoppel.

Whether city was estopped to assert statute of limitations in suit for injuries sustained by child in cave-in at city-owned clay bank adjacent to municipally maintained park was a question of fact; entry of no cause of action judgment was precluded where evidence presented dispute as to whether plaintiffs' attorney had been "lulled" into not filing suit by assurances there would be a settlement within insurance policy limits. Whitaker v. Salt Lake City Corp., 522 P.2d 1252 (Utah 1974).

Governmental entity was not estopped from asserting the statute of limitations on the basis that an adjustor of its insurance carrier "lulled" plaintiff into delay where plaintiff was at all times represented by an attorney. Cornwall v. Larsen, 571 P.2d 925 (Utah 1977).

Extension of time for filing suit.

Where plaintiff sustained injuries from alleged fall from negligently maintained bleachers on school grounds and evidence indicated that delay in filing claim was caused by misrepresentations of school's insurance agent, trial court erred in dismissing complaint with prejudice on grounds that statute of limitations barred such claim. Rice v. Granite School Dist., 23 Utah 2d 22, 456 P.2d 159 (1969), distinguished, Scarborough v. Granite School Dist., 531 P.2d 480 (Utah 1975).

Waiver for contractual obligations.

Where a sanitary district sewer line became clogged, resulting in damages to houses owned by a private citizen, a subsequent action against the sewer district was not subject to the one-year limitations period for actions against the government insofar as it was based on breach of contract. Dalton v. Salt Lake Sub. San. Dist., 676 P.2d 399 (Utah 1984).

63-30-16. Jurisdiction of district courts over actions — Application of Rules of Civil Procedure.

The district courts shall have exclusive original jurisdiction over any action brought under this chapter, and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this chapter.

History: L. 1965, ch. 139, § 16; 1983, ch. 129, § 7.

NOTES TO DECISIONS

ANALYSIS

District court jurisdiction.
Sovereign immunity in federal courts.

District court jurisdiction.
The district court had exclusive, original jurisdiction of an action by the former chairman and director of the state liquor control commission for attorneys' fees incurred in the successful defense of twelve indictments issued against him for alleged acts or omissions committed in his official capacity since this section is not in conflict with Utah Const., Art. VII, Sec. 13. Hulbert v. State, 607 P.2d 1217 (Utah 1980).

Sovereign immunity in federal courts.
This act lacks the "clear intent" necessary under Eleventh Amendment to U.S. Constitution to waive state's immunity from suit in federal court. Harris v. Tooele County School Dist., 471 F.2d 218 (10th Cir. 1973).

63-30-17. Venue of actions.

Actions against the state may be brought in the county in which the claim arose or in Salt Lake County. Actions against a county may be brought in the county in which the claim arose, or in the defendant county, or, upon leave granted by a district court judge of the defendant county, in any county contiguous to the defendant county. Leave may be granted ex parte. Actions against all other political subdivisions including cities and towns, shall be brought in the county in which the political subdivision is located or in the county in which the claim arose.

History: L. 1965, ch. 139, § 17; 1983, ch. 129, § 8.

NOTES TO DECISIONS

Federal court actions.
This section indicates Utah does not intend to waive sovereign immunity under Eleventh Amendment to U.S. Constitution. Harris v. Tooele County School Dist., 471 F.2d 218 (10th Cir. 1973).

63-30-18. Compromise and settlement of actions.

A political subdivision, after conferring with its legal officer or other legal counsel if it has no such officer, may compromise and settle any action as to the damages or other relief sought.

The risk manager in the Department of Administrative Services may compromise and settle any claim for damages filed against the state up to and including $10,000 for which the Risk Management Fund may be liable, and may, with the concurrence of the attorney general or his representative and the executive director of the Department of Administrative Services, compromise and settle a claim for damages in excess of $10,000 for which the Risk Management Fund may be liable.

History: L. 1965, ch. 139, § 18; 1981, ch. 250, § 6; 1983, ch. 303, § 2; 1983, ch. 320, § 54.

Cross-References. — Governmental Immunity Act provisions not construed as admission or denial of liability, § 63-30-4.

Payment of medical and similar expenses not admissible to prove liability for injury, Utah Rules of Evidence, Rule 409.

Rescission of release or settlement by injured person, §§ 78-27-32 to 78-27-36.

Risk manager in Department of Administrative Services, § 63-1-45 et seq.

63-30-19. Undertaking required of plaintiff in action.

At the time of filing the action the plaintiff shall file an undertaking in a sum fixed by the court, but in no case less than the sum of $300, conditioned upon payment by the plaintiff of taxable costs incurred by the governmental entity in the action if the plaintiff fails to prosecute the action or fails to recover judgment.

History: L. 1965, ch. 139, § 19.

Cross-References. — Actions arising out of contractual rights or obligations not subject to this section, § 63-30-5.

63-30-20. Judgment against governmental entity bars action against employee.

Judgment against a governmental entity in an action brought under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim.

History: L. 1965, ch. 139, § 20.

Meaning of "this act." — See the note under the same catchline following § 63-30-1.

Cross-References. — Indemnification of public officers and employees, §§ 63-30-36 to 63-30-38.

NOTES TO DECISIONS

Judgment against governmental entity required.

There must first be a judgment against the governmental entity before this section bars a claim against an employee; claim against an employee was not barred where claim against the entity was dismissed for failure to file it within the prescribed time limits. Cornwall v. Larsen, 571 P.2d 925 (Utah 1977).

COLLATERAL REFERENCES

A.L.R. — Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A.L.R.3d 90.

63-30-21. Repealed.

Repeals. — Section 63-30-21, as enacted by Laws 1965, ch. 139, § 21 prohibiting claims under the act by the United States or any state, territory, nation or governmental entity, was repealed by Laws 1978, ch. 27, § 12.

63-30-22. Exemplary or punitive damages prohibited — Governmental entity exempt from execution, attachment or garnishment.

No judgment shall be rendered against the governmental entity for exemplary or punitive damages; nor shall execution, attachment or garnishment issue against the governmental entity.

History: L. 1965, ch. 139, § 22.

Cross-References. — Archives and Records Service and Information Practices Act, exemplary damages under, § 63-2-88.

Health Care Malpractice Act, relation to this chapter, § 78-14-10.

Salaries of public officers subject to garnishment, § 78-27-15.

Tax levy for payment of punitive damages awarded against elected official or employee, § 63-30-27.

63-30-23. Payment of claim or judgment against state — Presentment for payment.

Any claim approved by the state as defined by Subsection 63-30-2(1) or any final judgment obtained against the state shall be presented to the state risk manager, or to the office, agency, institution or other instrumentality involved for payment, if payment by said instrumentality is otherwise permitted by law. If such payment is not authorized by law then said judgment or claim shall be presented to the board of examiners and the board shall proceed as provided in Section 63-6-10.

History: L. 1965, ch. 139, § 23; 1983, ch. 129, § 9; 1987, ch. 75, § 8.

Amendment Notes. — The 1987 amendment substituted "Subsection 63-30-2(1)" for "Subsection 63-30-2(5)."

63-30-24. Payment of claim or judgment against political subdivision — Procedure by governing body.

Any claim approved by a political subdivision or any final judgment obtained against a political subdivision shall be submitted to the governing body thereof to be paid forthwith from the general funds of said political subdivision unless said funds are appropriated to some other use or restricted by law or contract for other purposes.

History: L. 1965, ch. 139, § 24.

63-30-25. Payment of claim or judgment against political subdivision — Installment payments.

If the subdivision is unable to pay the claim or award during the current fiscal year it may pay the claim or award in not more than ten ensuing annual installments of equal size or in such other installments as are agreeable to the claimant.

History: L. 1965, ch. 139, § 25.

63-30-26. Reserve funds for payment of claims or purchase of insurance created by political subdivisions.

Any political subdivision may create and maintain a reserve fund or may jointly with one or more other political subdivisions make contributions to a joint reserve fund, for the purpose of making payment of claims against the co-operating subdivisions when they become payable pursuant to this chapter,

or for the purpose of purchasing liability insurance to protect the co-operating subdivisions from any or all risks created by this chapter.

History: L. 1965, ch. 139, § 26; 1983, ch. 129, § 10.

63-30-27. Tax levy by political subdivisions for payment of claims, judgments, or insurance premiums.

(1) Notwithstanding any provision of law to the contrary, all political subdivisions may levy an annual property tax sufficient to pay the following:

(a) any claim;

(b) any settlement;

(c) any judgment, including any judgment against an elected official or employee of any political subdivision, including peace officers, based upon a claim for punitive damages but the authority of a political subdivision for the payment of any judgment for punitive damages is limited in any individual case to $10,000;

(d) the costs to defend against any claim, settlement, or judgment; or

(e) the establishment and maintenance of a reserve fund for the payment of claims, settlements, or judgments as may be reasonably anticipated.

(2) It is legislative intent that the payments authorized for punitive damage judgments or to pay the premium for such insurance as authorized is money spent for a public purpose within the meaning of this section and Article XIII, Sec. 5, Utah Constitution, even though as a result of the levy the maximum levy as otherwise restricted by law is exceeded. No levy under this section may exceed .0001 per dollar of taxable value of taxable property. The revenues derived from this levy may not be used for any other purpose than those stipulated in this section.

History: L. 1965, ch. 139, § 27; 1973, ch. 165, § 1; 1978, ch. 27, § 8; 1985, ch. 165, § 81; 1988, ch. 3, § 234.

Amendment Notes. — The 1985 amendment substituted ".0001" for "one-half mill" near the end of the section.

The 1988 amendment, effective February 9, 1988, rewrote the section, as amended by Laws 1985, ch. 165, § 81, to the extent that a detailed comparison is impracticable.

Retrospective Operation. — Laws 1988, ch. 3, § 269 provides that the act has retrospective operation to January 1, 1988.

Cross-References. — No judgment for punitive damages to be rendered against governmental entity, § 63-30-22.

63-30-28. Liability insurance — Purchase of insurance or self-insurance by governmental entity authorized — Establishment of trust accounts for self-insurance.

Any governmental entity within the state may purchase commercial insurance, self-insure, or self-insure and purchase excess commercial insurance in excess of the statutory limits of this chapter against any risk created or recognized by this chapter or any action for which a governmental entity or its employee may be held liable.

In addition to any other reasonable means of self-insurance, a governmental entity may self-insure with respect to specified classes of claims by establish-

ing a trust account under the management of an independent private trustee having authority with respect to claims of that character to expend both principal and earnings of the trust account solely to pay the costs of investigation, discovery, and other pretrial and litigation expenses including attorneys' fees, and to pay all sums for which the governmental entity may be adjudged liable or for which a compromise settlement may be agreed upon. The monies and interest earned on said trust fund shall be subject to investment pursuant to Chapter 7, Title 51, the State Money Management Act of 1974, and shall be subject to audit by the state auditor. Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees and to protect and safeguard the assets of the trust, to provide for claims investigation and adjustment services, to employ expert witnesses and consultants, and to provide such other services and functions necessary and proper to carry out the purposes of the trust.

History: L. 1965, ch. 139, § 28; 1978, ch. 27, § 9; 1979, ch. 94, § 1; 1983, ch. 130, § 1; 1985, ch. 21, § 32.

Amendment Notes. — The 1985 amendment substituted "Chapter 7, Title 51, the State Money Management Act of 1974" for "the State Money Management Act, 51-7-1 to 51-7-2" in the second sentence of the second paragraph.

Cross-References. — Department of Alcoholic Beverage Control to maintain liability insurance on its motor vehicles, § 32A-1-18.

Professional liability insurance for health care providers, § 78-14-9.

Settlement of claim under liability insurance policy not admission of liability, Utah Rules of Evidence, Rule 409.

Waiver of policy provisions or defenses, what does not constitute, § 31A-21-312.

NOTES TO DECISIONS

Right to hire legal counsel.

This section provides University of Utah Hospital with authority to hire independent legal counsel; this section does not violate attorney general's authority under Art. VII, Sec. 16 of the state constitution and provides an exception to the general authority of the attorney general to perform legal services for any agency of state government. Hansen v. Utah State Retirement Bd., 652 P.2d 1332 (Utah 1977).

COLLATERAL REFERENCES

Utah Law Review. — Utah Legislative Survey — 1979, 1980 Utah L. Rev. 155.

A.L.R. — Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties, 71 A.L.R.3d 6.

63-30-29. Repealed.

Repeals. — Section 63-30-29, as amended by Laws 1978, ch. 27, § 10 relating to provisions of liability insurance policies, was repealed by Laws 1983, ch. 130, § 5.

63-30-29.5. Liability insurance — Government vehicles operated by employees outside scope of employment.

A governmental entity that owns vehicles driven by employees of the governmental entity with the express or implied consent of the entity, but which, at the time liability is incurred as a result of an automobile accident, is not being driven and used within the course and scope of the driver's employment is considered to provide the driver with the insurance coverage required by Chapter 12a, Title 41. However, the liability coverages considered provided are the minimum limits under Section 31A-22-304.

History: C. 1953, 63-30-29.5, enacted by L. 1983, ch. 128, § 1; 1985, ch. 242, § 53.

63-30-30. Repealed.

Repeals. — Section 63-30-30, as enacted by Laws 1965, ch. 139, § 30, requiring that any liability policy purchased under act include provision whereby insurer agreed not to assert defense of sovereign immunity and to pay all sums for which it would otherwise be liable under policy, was repealed by Laws 1978, ch. 27, § 12.

63-30-31. Liability insurance — Construction of policy not in compliance with act.

Any insurance policy, rider or endorsement hereafter issued and purchased to insure against any risk which may arise as a result of the application of this chapter, which contains any condition or provision not in compliance with the requirements of the chapter, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider or endorsement been in full compliance with this chapter, provided the policy is otherwise valid.

History: L. 1965, ch. 139, § 31; 1983, ch. 129, § 11.

63-30-32. Liability insurance — Methods for purchase or renewal.

No contract or policy of insurance may be purchased or renewed under this chapter except upon public bid to be let to the lowest and best bidder; except that the purchase or renewal of insurance by the state shall be conducted in accordance with the provisions of Sections 63-56-1 through 63-56-73.

History: L. 1965, ch. 139, § 32; 1981, ch. 250, § 7; 1983, ch. 129, § 12.

63-30-33. Liability insurance — Insurance for employees authorized — No right to indemnification or contribution from governmental agency.

(1) (a) A governmental entity may insure any or all of its employees against liability, in whole or in part, for injury or damage resulting from an act or omission occurring during the performance of an employee's duties, within the scope of employment, or under color of authority, regardless of whether or not that entity is immune from suit for that act or omission.

(b) Any expenditure for that insurance is for a public purpose.

(c) Under any contract or policy of insurance executed under authority of this section, the insurer has no right to indemnification or contribution from the governmental entity or its employee with respect to any loss or liability covered by the contract or policy.

(2) Any surety covering a governmental entity or its employee under any faithful performance surety bond has no right to indemnification or contribution from the governmental entity or its employee with respect to any loss covered by that bond based on any act or omission for which the governmental entity would be obligated to defend or indemnify under the provisions of Section 63-30-36.

History: L. 1965, ch. 139, § 33; 1979, ch. 94, § 2; 1983, ch. 130, § 2; 1989, ch. 220, § 1.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, subdivided and designated as Subsection (1) the existing provisions, making minor stylistic changes, and added Subsection (2).

Cross-References. — Indemnification of public officers and employees, §§ 63-30-36 to 63-30-38.

COLLATERAL REFERENCES

A.L.R. — Validity and construction of statute authorizing or requiring governmental unit to procure liability insurance covering public officers or employees for liability arising out of performance of public duties, 71 A.L.R.3d 6.

Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A.L.R.3d 90.

63-30-34. Limit of judgment against governmental entity or employee.

(1) Except as provided in Subsection (3), if a judgment for damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $250,000 for one person in any one occurrence, or $500,000 for two or more persons in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the injury is characterized as governmental.

(2) Except as provided in Subsection (3), if a judgment for property damage against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds $100,000 in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the damage is characterized as governmental.

(3) The damage limits established in this section do not apply to damages awarded as compensation when a governmental entity has taken or damaged private property without just compensation.

History: C. 1953, 63-30-34, enacted by L. 1983, ch. 130, § 3; 1987, ch. 75, § 9.

Repeals and Reenactments. — Laws 1983, ch. 130, § 3 repealed former § 63-30-34, as amended by Laws 1979, ch. 94, § 3, relating to excess judgments, and enacted present § 63-30-34.

Amendment Notes. — The 1987 amendment added to the end of Subsections (1) and (2) "regardless of whether or not the function giving rise to the injury is characterized as governmental," rewrote Subsection (3), and made minor changes in phraseology.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Cited.

Constitutionality.

The recovery limits provisions are unconstitutional as applied to University Hospital in Salt Lake City, a teaching hospital associated with the University of Utah School of Medicine and essentially supported by non-state funds. Condemarin v. University Hosp., 107 Utah Adv. Rep. 5 (1989).

Cited in Payne ex rel. Payne v. Myers, 743 P.2d 186 (Utah 1987).

63-30-35. Comprehensive liability plan — Providing coverage — Expenses of attorney general, general counsel for state judiciary, and general counsel for the Legislature in representing the state, its branches, members, or employees.

(1) After consultation with appropriate state agencies, the risk manager in the Department of Administrative Services shall provide a comprehensive liability plan, with limits not lower than those set forth in Section 63-30-34, which will protect the state and its indemnified employees from claims and liability. Deductibles and maximum limits of coverage shall be determined by the risk manager in consultation with the executive director of the Department of Administrative Services.

(2) The risk manager may expend funds from the Risk Management Fund established in Section 63-1-47, to procure and provide coverage to all state agencies and their indemnified employees, except those specifically exempted by law, and shall apportion the cost of such coverage in accordance with Section 63-1-47. Unless specifically authorized by statute to do so, including Subsection 63-1-47(8), no agency other than the risk manager may procure or provide liability insurance for the state.

(3) (a) The Office of the Attorney General has primary responsibility to provide legal representation to the judicial, executive, and legislative branches of state government in cases where Risk Management Fund coverage applies.

(b) When the attorney general has primary responsibility to provide legal representation to the judicial or legislative branches, the attorney general shall consult with the general counsel for the state judiciary and with the general counsel for the Legislature, to solicit their assistance in defending their respective branch, and in determining strategy and making decisions concerning the disposition of those claims. The decision for

settlement of monetary claims in those cases, however, lies with the attorney general and the state risk manager.

(4) (a) If the Judicial Council, after consultation with the general counsel for the state judiciary, determines that the Office of the Attorney General cannot adequately defend the state judiciary, its members, or employees because of a conflict of interest, separation of powers concerns, or other political or legal differences, the Judicial Council may direct its general counsel to separately represent and defend it.

(b) If the general counsel for the state judiciary undertakes independent legal representation of the state judiciary, its members, or employees, the general counsel shall notify the state risk manager and the attorney general in writing, prior to undertaking that representation.

(c) If the state judiciary elects to be represented by its own counsel under this section, the decision for settlement of claims against the state judiciary, its members, or employees, where Risk Management Fund coverage applies, lies with the general counsel for the state judiciary and the state risk manager.

(5) (a) If the Legislative Management Committee, after consultation with general counsel for the Legislature, determines that the Office of the Attorney General cannot adequately defend the legislative branch, its members, or employees because of a conflict of interest, separation of powers concerns, or other political or legal differences, the Legislative Management Committee may direct its general counsel to separately represent and defend it.

(b) If the general counsel for the Legislature undertakes independent legal representation of the Legislature, its members, or employees, the general counsel shall notify the state risk manager and the attorney general in writing, prior to undertaking that representation.

(c) If the legislative branch elects to be represented by its own counsel under this section, the decision for settlement of claims against the legislative branch, its members, or employees, where Risk Management Fund coverage applies, lies with the general counsel for the Legislature and the state risk manager.

(6) Notwithstanding the provisions of Section 67-5-3 or any other provision of this code, the attorney general, the general counsel for the state judiciary, and the general counsel for the Legislature may bill the Department of Administrative Services for all costs and legal fees expended by their respective offices, including attorneys' and secretarial salaries, in representing the state or any indemnified employee against any claim for which the Risk Management Fund may be liable and in advising state agencies and employees regarding such claims. The risk manager shall draw funds from the Risk Management Fund for this purpose.

History: C. 1953, 63-30-5, enacted by L. 1981, ch. 250, § 8; 1983, ch. 130, § 4; 1987, ch. 92, § 115; 1988, ch. 221, § 1.

Amendment Notes. — The 1987 amendment, in the last sentence of Subsection (1), substituted "executive director of the Department of Administrative Services" for "director of Administrative Services" and substituted "Subsection 63-1-47(8)" for "Subsection 63-1-47(9)" in the last sentence in Subsection (2)

The 1988 amendment, effective April 25, 1988, added Subsections (3) to (5), redesignated former Subsection (3) as Subsection (6) and in the first sentence of Subsection (6) substituted "attorney general, the general counsel for the state judiciary, and the general counsel for the Legislature may bill the Department of Administrative Services for all costs and legal

fees expended by their respective offices" for "state attorney general may bill the Department of Administrative Services for all costs and legal fees expended by the attorney general."

Applicability. — Laws 1983, ch. 130, § 6 made the act applicable only to claims that arise on or after the effective date of the act, July 1, 1983.

63-30-36. Defending government employee — Request — Cooperation — Payment of judgment.

(1) Except as provided in Subsections (2) and (3), a governmental entity shall defend any action brought against its employee arising from an act or omission occurring:

(a) during the performance of the employee's duties;

(b) within the scope of the employee's employment; or

(c) under color of authority.

(2) (a) Before a governmental entity may defend its employee against a claim, the employee shall make a written request to the governmental entity to defend him:

(i) within ten days after service of process upon him; or

(ii) within a longer period that would not prejudice the governmental entity in maintaining a defense on his behalf; or

(iii) within a period that would not conflict with notice requirements imposed on the entity in connection with insurance carried by the entity relating to the risk involved.

(b) If the employee fails to make a request, or fails to reasonably cooperate in the defense, the governmental entity need not defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim.

(3) The governmental entity may decline to defend an action against an employee if it determines:

(a) that the act or omission in question did not occur:

(i) during the performance of the employee's duties; or

(ii) within the scope of his employment; or

(iii) under color of authority; or

(b) that the injury or damage resulted from the fraud or malice of the employee; or

(c) that the injury or damage on which the claim was based resulted from:

(i) the employee driving a vehicle, or being in actual physical control of a vehicle:

(A) with a blood alcohol content equal to or greater by weight than the established legal limit; or

(B) while under the influence of alcohol or any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(C) while under the combined influence of alcohol and any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(ii) the employee being physically or mentally impaired so as to be unable to reasonably perform his job function because of the use of alcohol, because of the nonprescribed use of a controlled substance as defined in Section 58-37-4, or because of the combined influence of

alcohol and a nonprescribed controlled substance as defined by Section 58-37-4.

(4) (a) Within ten days of receiving a written request to defend an employee, the governmental entity shall inform the employee whether or not it shall provide a defense, and, if it refuses to provide a defense, the basis for its refusal.

(b) A refusal by the entity to provide a defense shall not be admissible for any purpose in the action in which the employee is a defendant.

(5) If a governmental entity conducts the defense of an employee, the governmental entity shall pay any judgment based upon the claim, or any compromise or settlement of the claim, except as provided in Subsection (6).

(6) A governmental entity may conduct the defense of an employee under an agreement with the employee that the governmental entity reserves the right not to pay a judgment, if the conditions set forth in Subsection (3) are established.

(7) (a) Nothing in this section or Section 63-30-37 affects the obligation of a governmental entity to provide insurance coverage according to the requirements of Subsection 41-12a-301(3) and Section 63-30-29.5.

(b) A governmental entity may refuse to defend an action against its employee under the conditions set forth in Subsection (3), but shall still provide coverage up to the amount specified in Sections 31A-22-304 and 63-30-29.5.

History: C. 1953, 63-30-36, enacted by L. 1983, ch. 131, § 4; 1987, ch. 30, § 1.

Amendment Notes. — The 1987 amendment, effective July 1, 1987, added Subsection (1), redesignated former Subsection (1) as present Subsection (2), adding the internal designations and making minor word changes, added Subsections (3) and (4), redesignated former Subsection (2) as present Subsection (5), inserting "the claim" following "based upon" and substituting "Subsection (6)" for "Subsection (3)," redesignated former Subsection (3) as present Subsection (6), rewriting that subsection which formerly read "A governmental entity may conduct the defense of an employee under an agreement with the employee that the government entity reserves the right not to pay the judgment, compromise, or settlement unless it is established that the claim arose out of an act or omission occurring during the performance of his duties, within the scope of his employment, or under color of authority," and added Subsection (7).

Cross-References. — Judgment against government bar to action against employee, § 63-30-20.

Liability insurance for employees, purchase by government, § 63-30-33.

Negligent act or omission of employee, waiver of governmental immunity for injury from, § 63-30-10.

NOTES TO DECISIONS

Analysis

Liability of insurer.
Cited.

Liability of insurer.

School district and its insurer and not the teacher and his insurer were liable to defend and respond to action by a student against the teacher for an alleged tort committed by the teacher within the scope of his duties. Gulf Ins. Co. v. Horace Mann Ins. Co., 567 P.2d 158 (Utah 1977) (decided under former Title 63, Chapter 48).

Cited in Schaefer v. Wilcock, 676 F. Supp. 1092 (D. Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions §§ 208, 804; 57 Am. Jur. 2d Municipal, School, and State Tort Liability § 34; 63A Am. Jur. 2d Public Officers and Employees § 319.

C.J.S. — 20 C.J.S. Counties §§ 139, 220; 42 C.J.S. Indemnity § 10; 62 C.J.S. Municipal Corporations § 545; 67 C.J.S. Officers §§ 251 to 254; 78 C.J.S. Schools and School Districts §§ 129, 153, 238, 320; 81A C.J.S. States § 126.

A.L.R. — Validity and construction of statute authorizing or requiring governmental unit to indemnify public officer or employee for liability arising out of performance of public duties, 71 A.L.R.3d 90.

Key Numbers. — Counties ⇐ 88, 146; Indemnity ⇐ 6; Municipal Corporations ⇐ 170, 176, 742, 747; Officers ⇐ 119; Schools and School Districts ⇐ 62, 89, 115, 147; States ⇐ 78, 79, 112.

63-30-37. Recovery of judgment paid and defense costs by government employee.

(1) Subject to Subsection (2), if an employee pays a judgment entered against him, or any portion of it, which the governmental entity is required to pay under Section 63-30-36, the employee may recover from the governmental entity the amount of the payment and the reasonable costs incurred in his defense.

(2) If a governmental entity does not conduct the defense of an employee against a claim, or conducts the defense under an agreement as provided in Subsection 63-30-36(6), the employee may recover from the governmental entity under Subsection (1) if:

(a) the employee establishes that the act or omission upon which the judgment is based occurred during the performance of his duties, within the scope of his employment, or under color of authority, and that he conducted the defense in good faith; and

(b) the governmental entity does not establish that the injury or damage resulted from:

(i) the fraud or malice of the employee;

(ii) the employee driving a vehicle, or being in actual physical control of a vehicle:

(A) with a blood alcohol content equal to or greater by weight than the established legal limit;

(B) while under the influence of alcohol or any drug to a degree that rendered the person incapable of safely driving the vehicle;

(C) while under the combined influence of alcohol and any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(iii) the employee being physically or mentally impaired so as to be unable to reasonably perform his job function because of the use of alcohol, because of the nonprescribed use of a controlled substance as defined in Section 58-37-4, or because of the combined use of alcohol and a nonprescribed controlled substance as defined in Section 58-37-4.

History: C. 1953, 63-30-37, enacted by L. 1983, ch. 131, § 5; 1987, ch. 30, § 2.

Amendment Notes. — The 1987 amendment, effective July 1, 1987, substituted "the employee may recover from the governmental entity the amount of the payment and the reasonable costs incurred in his defense" for "the employee is entitled to recover the amount of

such payment and the reasonable costs incurred in his defense from the governmental entity" in Subsection (1) and, in Subsection (2), substituted "or conducts the defense under an agreement as provided in Subsection 63-30-36(6)" for "or does conduct the defense under an agreement as provided in Subsection 63-30-36(3)" in the introductory paragraph and added the provisions in Subsections (b)(ii) and (b)(iii)

63-30-38. Indemnification of governmental entity by employee not required.

If a governmental entity pays all or part of a judgment based on or a compromise or settlement of a claim against the governmental entity or an employee, the employee may not be required to indemnify the governmental entity for the payment

History: C. 1953, 63-30-38, enacted by L. 1983, ch. 131, § 6.

NOTES TO DECISIONS

Liability shifted.

This section shifts liability from the employee and his insurer to the public entity and its insurer Gulf Ins Co v Horace Mann Ins Co, 567 P2d 158 (Utah 1977) (decided under former § 63-48-5)

CHAPTER 30a

REIMBURSEMENT OF LEGAL FEES AND COSTS TO OFFICERS AND EMPLOYEES

Section	
63-30a-1	Definitions
63-30a-2	Indictment or information against officer or employee — Reimbursement of attorneys' fees and court costs incurred in defense
63-30a-3	Payment of reimbursement of attorneys' fees and court costs

63-30a-1. Definitions.

As used in this act

(1) "Officer or employee" means any individual who at the time of an event giving rise to a claim under this act is or was elected or appointed to or employed by a public entity, whether or not compensated, but does not include an independent contractor

(2) "Public entity" means the state or any political subdivision of it or any office, department, division, board, agency, commission, council, authority, institution, hospital, school, college, university, or other instrumentality of the state or any such political subdivision

History: L. 1977, ch. 245, § 1.

Meaning of "this act." — The term "this act," as used in this section, means Laws 1977, ch 245, §§ 1 to 3 which are codified as §§ 63-30a-1 and 63-30a-2

History: C. 1953, 63-29a-101, enacted by L. 1987, ch. 164, § 1; 1988, ch. 149, § 1; 1990, ch. 56, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, in the first sentence in Subsection (5), deleted "or" before "other" and added the phrase at the end beginning "or the building official."

63-29a-103. Liquefied Petroleum Gas Board — Creation — Composition — Appointment — Terms of office — Meetings — Compensation.

Sunset Act. — Section 63-55-263 provides that the Liquefied Petroleum Gas Board is repealed July 1, 1997.

CHAPTER 30
GOVERNMENTAL IMMUNITY ACT

Section	
63-30-7.	Waiver of immunity for injury from negligent operation of motor vehicles — Exception.
63-30-10.	Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions.
63-30-18.	Compromise and settlement of actions.
63-30-35.	Expenses of attorney general, general counsel for state judiciary, and general counsel for the Legislature in representing the state, its branches, members, or employees.

63-30-1. Short title.

COLLATERAL REFERENCES

A.L.R. — Construction and application of Federal Tort Claims Act provision excepting from coverage claims arising out of interference with contract rights (28 USCS § 2680(h)), 92 A.L.R. Fed. 186.

63-30-3. Immunity of governmental entities from suit.

NOTES TO DECISIONS

ANALYSIS

Construction and application.
Creek drainage system.
Prisoners.
Schools and school districts.

Construction and application.

The 1984 amendment to this section could not be applied retroactively to bar a valid cause of action that had already arisen when the amendment went into effect. Irvine v. Salt Lake County, 785 P.2d 411 (Utah 1989); Rocky Mt. Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989).

Creek drainage system.

Construction, operation, and maintenance of a creek drainage system was a governmental function. Rocky Mt. Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989).

Prisoners.

Bailiff's action against state for gunshot wound inflicted by a prisoner was properly dismissed, because either: (1) the prisoner had totally escaped the control of the officers escorting him and was thus acting on his own so the officers were not responsible for him, or (2) he was still under the control of the officers, in which case the officers would be immune from suit under the statute. Kirk v. State, 784 P.2d 1255 (Utah Ct. App. 1989).

Schools and school districts.

School, in pumping water out of its base-

ment, was not engaged as a governmental entity in the "management of flood waters" so as to be immune from suit. Branam v. Provo School Dist., 780 P.2d 810 (Utah 1989).

School district was not shielded from possible liability for damages arising from its negligence in the resurfacing of a school parking lot, which resulted in surface water runoff on an adjoining landowner's property. Williams v. Carbon County Bd. of Educ., 780 P.2d 816 (Utah 1989).

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

(1) (a) 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.

(b) This subsection does not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of Section 41-6-14.

(2) (a) All governmental entities employing peace officers retain and do not waive immunity from liability for civil damages for personal injury or death or for damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he is being or has been pursued by a peace officer employed by the governmental entity in a motor vehicle.

(b) Enactment of this subsection does not state nor imply that this immunity was ever previously waived or this liability specifically or implicitly recognized.

History: L. 1965, ch. 139, § 7; 1983, ch. 129, § 5; 1990, ch. 204, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, designated the former section as Subsection (1); added Subsection (2); and made related stylistic changes.

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.

NOTES TO DECISIONS

Cited in Rocky Mt. Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989).

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions.

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of:

(1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

(2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights;

the issuance, denial, suspension, or revocation of or by the failure or al to issue, deny, suspend, or revoke any permit, license, certificate, oval, order, or similar authorization;

) a failure to make an inspection or by making an inadequate or igent inspection of any property;

) the institution or prosecution of any judicial or administrative proing, even if malicious or without probable cause;

) a misrepresentation by the employee whether or not it is negligent ntentional;

) or results from riots, unlawful assemblies, public demonstrations,) violence, and civil disturbances;

8) or in connection with the collection of and assessment of taxes;

9) the activities of the Utah National Guard;

10) the incarceration of any person in any state prison, county or city , or other place of legal confinement;

11) any natural condition on state lands or as the result of any activity thorized by the Board of State Lands and Forestry;

12) research or implementation of cloud management or seeding for e clearing of fog; or

(13) the activities of:

(a) providing emergency medical assistance;

(b) fighting fire;

(c) regulating, mitigating, or handling hazardous materials or hazardous wastes;

(d) emergency evacuations; or

(e) intervening during dam emergencies.

ory: L. 1965, ch. 139, § 10; 1975, ch. 11; 1982, ch. 10, § 1; 1985, ch. 169, § 1; ch. 185, § 1; 1989, ch. 187, § 3; 1989, 3, § 29; 1990, ch. 15, §§ 1, 2; 1990, ch. § 1, 2.

endment Notes. — The 1990 amendby ch. 15, effective July 1, 1990, deleted bsection designation (1) from the beginf the section, redesignated former Subns (1)(a) to (1)(l) as Subsections (1) to (13) ade related changes, and deleted former Subsection (2), waiving immunity from suit for violation of Fourth Amendment rights and making the provisions of Chapter 16 of Title 78 the exclusive remedy for injuries caused by such violations.

The 1990 amendment by ch. 319, effective July 1, 1990, added Subsection (13)(e) and made a related stylistic change.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

NOTES TO DECISIONS

ANALYSIS

etionary function.
ped prisoner.
ses.

retionary function.

leged negligent conduct of a county emee in operating a backhoe pursuant to a ilar program of dredging stream channels lear away silt, gravel deposits, debris, and er matter which obstructed the flow of er did not fall within the discretionary ction exception of Subsection (1). Irvine v. t Lake County, 785 P.2d 411 (Utah 1989).

Decisions regarding the design, capacity, and construction of a flood control system were discretionary functions. Rocky Mt. Thrift Stores, Inc. v. Salt Lake City Corp., 784 P.2d 459 (Utah 1989).

Escaped prisoner.

Bailiff's action against state for gunshot wound inflicted by a prisoner was properly dismissed, because either: (1) the prisoner had totally escaped the control of the officers escorting him and was thus acting on his own so the officers were not responsible for him, or (2) he was still under the control of the officers, in which case the officers would be immune from

suit under the statute. Kirk v. State, 784 P.2d 1255 (Utah Ct. App. 1989).

Licenses.

Governmental immunity provisions barred a negligence action against the Department of Financial Institutions alleging that the department's failure to regulate supervised lenders had resulted in investors' losses, where the claims asserted were for injuries arising out of licensing decisions allegedly made in a negligent fashion. Gillman v. Department of Fin. Insts., 782 P.2d 506 (Utah 1989); Hilton v. Borthick, 121 Utah Adv. Rep. 11 (1989).

63-30-12. Claim against state or its employee — Time for filing notice.

NOTES TO DECISIONS

Cited in Forsman v. Forsman, 779 P.2d 218 (Utah 1989).

63-30-18. Compromise and settlement of actions.

(1) A political subdivision, after conferring with its legal officer or other legal counsel if it does not have a legal officer, may compromise and settle any action as to the damages or other relief sought.

(2) The risk manager in the Department of Administrative Services may:

(a) compromise and settle any claim of $25,000 or less in damages filed against the state for which the Risk Management Fund may be liable; and

(b) with the concurrence of the attorney general or his representative and the executive director of the Department of Administrative Services, compromise and settle any claim of more than $25,000 in damages for which the Risk Management Fund may be liable.

History: L. 1965, ch. 139, § 18; 1981, ch. 250, § 6; 1983, ch. 303, § 2; 1983, ch. 320, § 54; 1990, ch. 97, § 9.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, inserted the subsection designations; substituted "of $25,000 or less in damages filed against the state" for "for damages filed against the state up to and including $10,000" in present Subsection (2)(a); substituted "any claim of more than $25,000 in damages" for "a claim for damages in excess of $10,000" in present Subsection (2)(b); and made stylistic changes.

63-30-35. Expenses of attorney general, general counsel for state judiciary, and general counsel for the Legislature in representing the state, its branches, members, or employees.

(1) (a) After consultation with appropriate state agencies, the state risk manager shall provide a comprehensive liability plan, with limits not lower than those set forth in Section 63-30-34, that will protect the state and its indemnified employees from claims and liability.

(b) The risk manager shall establish deductibles and maximum limits of coverage in consultation with the executive director of the Department of Administrative Services.

(2) (a) The Office of the Attorney General has primary responsibility to provide legal representation to the judicial, executive, and legislative

nches of state government in cases where Risk Management Fund erage applies.

) When the attorney general has primary responsibility to provide al representation to the judicial or legislative branches, the attorney eral shall consult with the general counsel for the state judiciary and h the general counsel for the Legislature, to solicit their assistance in ending their respective branch, and in determining strategy and mak- decisions concerning the disposition of those claims. The decision for tlement of monetary claims in those cases, however, lies with the at- ney general and the state risk manager.

) If the Judicial Council, after consultation with the general counsel the state judiciary, determines that the Office of the Attorney General not adequately defend the state judiciary, its members, or employees cause of a conflict of interest, separation of powers concerns, or other itical or legal differences, the Judicial Council may direct its general nsel to separately represent and defend it.

b) If the general counsel for the state judiciary undertakes indepen- nt legal representation of the state judiciary, its members, or em- yees, the general counsel shall notify the state risk manager and the torney general in writing before undertaking that representation.

(c) If the state judiciary elects to be represented by its own counsel der this section, the decision for settlement of claims against the state diciary, its members, or employees, where Risk Management Fund cov- age applies, lies with the general counsel for the state judiciary and the ate risk manager.

a) If the Legislative Management Committee, after consultation with eneral counsel for the Legislature, determines that the Office of the ttorney General cannot adequately defend the legislative branch, its embers, or employees because of a conflict of interest, separation of owers concerns, or other political or legal differences, the Legislative Management Committee may direct its general counsel to separately rep- esent and defend it.

(b) If the general counsel for the Legislature undertakes independent egal representation of the Legislature, its members, or employees, the eneral counsel shall notify the state risk manager and the attorney eneral in writing before undertaking that representation.

(c) If the legislative branch elects to be represented by its own counsel nder this section, the decision for settlement of claims against the legis- ative branch, its members, or employees, where Risk Management Fund overage applies, lies with the general counsel for the Legislature and the tate risk manager.

(a) Notwithstanding the provisions of Section 67-5-3 or any other provi- sion of this code, the attorney general, the general counsel for the state udiciary, and the general counsel for the Legislature may bill the De- partment of Administrative Services for all costs and legal fees expended by their respective offices, including attorneys' and secretarial salaries, in representing the state or any indemnified employee against any claim for which the Risk Management Fund may be liable and in advising state agencies and employees regarding any of those claims.

(b) The risk manager shall draw funds from the Risk Management Fund for this purpose.

History: C. 1953, 63-30-5, enacted by L. 1981, ch. 250, § 8; 1983, ch. 130, § 4; 1987, ch. 92, § 115; 1988, ch. 221, § 1; 1990, ch. 97, § 9.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, designated the first and second sentences in Subsection (1) as Subsections (1)(a) and (1)(b); deleted former Subsection (2), relating to the provision of liability insurance for state agencies and employees; designated former Subsections (3) to (6) as Subsections (2) to (5); and made stylistic changes.

CHAPTER 31

BUSINESS AND ECONOMIC DEVELOPMENT

Sunset Act. — Section 63-55-263 provides that this chapter is repealed July 1, 1992.

CHAPTER 33

COMMUNITY AND ECONOMIC DEVELOPMENT

Part 1

Department of Community and Economic Development

Section
63-33-1. Department of Community and Economic Development — Creation — Divisions within department.

Part 3

Shared Foreign Sales Corporations

63-33-13. Creation of shared foreign sales corporations.
63-33-14. Shared foreign sales corporations management fees.

Part 4

Child Care Advisory Committee

63-33-15. Definitions.
63-33-16. Creation of office.
63-33-17. Functions and duties of office.
63-33-18. Duties of director.
63-33-19. Creation of committee.

PART

DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

63-33-1. Department of Community and Economic Development — Creation — Divisions within department.

There is created within state government the Department of Community and Economic Development which is responsible for community and economic development within the state and for the administration and coordination of all state or federal grant programs which are, or become, available for community and economic development or for any of the programs over which the department has administrative supervision. The Department of Community and Economic Development is also responsible for the administrative supervi-

64-7-31. Release of voluntary patient.

A voluntary patient who requests release or whose release is requested, in writing, by the patient's legal guardian, parent, spouse, or adult next of kin shall be released forthwith except that:

(1) If the patient were admitted on the patient's own application and the request for release is made by a person other than the patient, release may be conditioned upon the agreement of the patient thereto, and

(2) If the patient, by reason of age, was admitted on the application of another person, any release prior to becoming sixteen years of age may be conditioned upon the consent of the patient's parent or guardian, and

(3) If the clinical director of the mental health facility or a designee is of the opinion that release of a patient would be unsafe for the patient or others, release of the patient may be postponed for up to 48 hours excluding weekends and holidays provided that the clinical director or a designee must cause to be instituted involuntary hospitalization proceedings with the district court within the specified time period unless cause no longer exists for instituting such proceedings. Written notice of such denial with the reasons for such denial must be given to the patient without undue delay. No judicial proceedings shall be commenced with respect to a voluntary patient unless release of the patient has been requested by the patient or, if under the age of sixteen, by the patient's parent or guardian.

History: C. 1943, 85-7-58, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1971, ch. 172, § 6 [a]; 1975, ch. 198, § 19; 1979, ch. 97, § 13.

Cross-References. — Limitation of application as to criminally insane, § 64-7-54.

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d Incompetent Persons §§ 44 to 48.

C.J.S. — 7 C.J.S. Asylums and Institutional Care Facilities § 11; 41 C.J.S. Hospitals § 7; 44 C.J.S. Insane Persons § 72.

A.L.R. — Immunity of public officer from liability for injuries caused by negligently released individual, 5 A.L.R.4th 773.

Governmental tort liability for injuries caused by negligently released individual, 6 A.L.R.4th 1155.

Key Numbers. — Asylums ⇐ 5; Hospitals ⇐ 5; Mental Health ⇐ 59.

64-7-32. Involuntary hospitalization — General procedures.

No person shall be involuntarily hospitalized by reason of mental illness except under the following provisions:

(1) emergency procedures for temporary hospitalization upon medical or designated examiner certification as provided in Subsection (1) of § 64-7-34.

(2) emergency procedures for temporary hospitalization without endorsement of medical or designated examiner, certification as provided in Subsection (2) of § 64-7-34.

(3) hospitalization on court order as provided in § 64-7-36.

into all the hospital departments of labor and expenses, and a careful examination of the buildings, property and general condition of the hospital, at least once in every three months. The division shall estimate and determine as nearly as may be the actual expense per annum of keeping and taking care of a patient in the hospital and such amount or portion thereof shall be assessed to and paid by the applicant, patient, spouse, parents, child or children who are of sufficient financial ability to do so, or by the guardian of the patient who has funds of the patient that may be used for such purpose.

History: R.S. 1898, § 2159; L. 1903, ch. 115, § 1; C.L. 1907, § 2159; C.L. 1917, § 5389; R.S. 1933, 85-7-6; L. 1941, ch. 71, § 1; C. 1943, 85-7-6; L. 1945, ch. 121, § 1; 1947, ch. 123, § 1; 1951, ch. 113, § 2; 1967, ch. 174, § 117.

Cross-References. — Liability of estate for care and treatment, § 64-7-18.

Limitation of application as to criminally insane, § 64-7-54.

Order in which relatives liable for support, § 17-14-2.

State Building Board, § 63-1-33 et seq.

NOTES TO DECISIONS

Criminally insane.

This section is inapplicable to one declared insane prior to determination of guilt in criminal prosecution and committed to state hospital; therefore, guardian cannot be compelled to pay cost of care and treatment. Ollerton v. Diamenti, 521 P.2d 899 (Utah 1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d Incompetent Persons §§ 55 to 61.

C.J.S. — 7 C.J.S. Asylums and Institutional Care Facilities §§ 3, 4; 41 C.J.S. Hospitals § 4; 44 C.J.S. Insane Persons §§ 73 to 76.

A.L.R. — Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum, 20 A.L.R.3d 363.

Civil liability for physical measures undertaken in connection with treatment of mentally disordered patient, 8 A.L.R.4th 464.

Key Numbers. — Asylums ⇐ 2; Hospitals ⇐ 2; Mental Health ⇐ 71 to 86.

64-7-7. Supervision and treatment of mentally ill persons by division.

The Division of Mental Health shall have the responsibility for supervision and treatment of mentally ill persons in the state, who have been admitted to its care under the provisions of this act, whether residing in the hospital or elsewhere.

History: R.S. 1898, § 2610; L. 1903, ch. 115, § 1; C.L. 1907, § 2160; C.L. 1917, § 5390; R.S. 1933, 85-7-7; L. 1941, ch. 71, § 1; C. 1943, 85-7-7; L. 1951, ch. 113, § 2; 1963, ch. 159, § 1; 1967, ch. 174, § 118; 1975, ch. 198, § 4.

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1963, ch. 159, § 1, which appears as §§ 64-7-7, 64-7-33, and 64-7-48.

Cross-References. — Limitation of application as to criminally insane, § 64-7-54.

History: R.S. 1898, § 2197; L. 1903, ch. 115, § 1; C.L. 1907, § 2197; C.L. 1917, § 5427; R.S. 1933 & C. 1943, 85-7-49; L. 1975, ch. 198, § 14.

Cross-References. — Escape of patient committed for causing fire, duty to report, § 63-29-25.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

64-7-24.5. Escape of criminals.

Any person committed to the Utah State Hospital under the provisions of Title 77, Chapters [Chapter] 48 or 49, or under the provisions of § 77-24-15, who escapes or leaves without proper legal authority shall be deemed guilty of a class A misdemeanor.

History: L. 1973, ch. 175, § 1; 1979, ch. 97, § 10.

Compiler's Notes. — Section 77-24-15 and Chapters 48 and 49 of Title 77, referred to in this section, were repealed by Laws 1980, ch. 15, § 1. For present provisions relating to commitment on findings of incompetency in criminal proceedings, see Chapters 15 and 16 of Title 77.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

64-7-25. Repealed.

Repeals. — Section 64-7-25 (R.S. 1898, § 2198; L. 1903, ch. 115, § 1; C.L. 1907, § 2198; C.L. 1917, § 5428; R.S. 1933 & C. 1943, 85-7-50; L. 1951, ch. 113, § 2), relating to penalties for bringing a mentally ill person into the state with intent to make such person a charge upon the state, was repealed by Laws 1975, ch. 198, § 35.

64-7-26. Violation of chapter — Penalty.

Any person who willfully and knowingly violates any of the provisions of this chapter, except where another penalty is provided by law, shall be guilty of a class C misdemeanor.

History: R.S. 1898, § 2199; L. 1903, ch. 115, § 1; C.L. 1907, § 2199; C.L. 1917, § 5429; R.S. 1933 & C. 1943, 85-7-51; L. 1975, ch. 198, § 15.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

64-7-27. Repealed.

Repeals. — Section 64-7-27 (L. 1935, ch. 95, § 2; 1941, ch. 71, § 1; C. 1943, 85-7-54; L. 1945, ch. 121, § 1; 1951, ch. 113, § 2; 1967, ch. 174, § 129), relating to boarding out of indigent patients who were quiet and not dangerous with suitable families, was repealed by Laws 1975, ch. 198, § 35.

64-7-28. Words and phrases defined.

As used in this chapter:

(1) "Mental illness" means a psychiatric disorder as defined by the current Diagnostic and Statistical Manual of Mental Disorders which substantially impairs a person's mental, emotional, behavioral, or related functioning.

(2) "Patient" means an individual under observation, care, or treatment in a mental health facility.

(3) "Licensed physician" means an individual licensed under the laws of this state to practice medicine or a medical officer of the government of the United States while in this state in the performance of official duties.

(4) "Designated examiner" means a licensed physician, preferably a psychiatrist, designated by the Division of Mental Health as specially qualified by training or experience in the diagnosis of mental or related illness or another licensed mental health professional designated by the Division of Mental Health as specially qualified by training and at least five years' continual experience in the treatment of mental or related illness. At least one designated examiner in any case shall be a licensed physician. No person who is the applicant, or who signs the certification, under § 64-7-36 may be a designated examiner in the same case.

(5) "Comprehensive community mental health center" means a community mental health center providing essential services to residents of a designated geographic area and complying with the state standards for comprehensive community mental health centers.

(6) "Mental health facility" means the Utah State Hospital, a comprehensive community mental health center, or a hospital inpatient unit which has been accredited for care and treatment of involuntary patients by the Board of Mental Health.

(7) "Mental health officer" means an individual designated by the Division of Mental Health to interact with and transport persons to any mental health facility.

(8) "Hospitalization" means admission to inpatient treatment in a mental health facility followed by partial or outpatient treatment in a variety of settings as required by the patient's needs.

(9) "Institution" means a hospital, jail, prison, or health facility licensed under the provisions of § 26-21-9.

(10) "Chief executive officer" means the individual who has the ultimate responsibility for the operation of the mental health facility. All medical functions shall be designated to a physician who is the clinical director or a designee.

(11) "Designee" means a physician who has responsibility for medical functions including admission and discharge.

History: C. 1943, 85-7-55, enacted by L. 1951, ch. 113, § 3; L. 1971, ch. 172, § 4; 1975, ch. 198, § 16; 1979, ch. 97, § 11; 1985, ch. 49, § 7.

Amendment Notes. — The 1985 amendment substituted "chapter" for "act" in the introductory language and "health facility licensed" for "agency duly registered" and "§ 21-26-9" for "section 58-15-2" in Subsection (9).

Cross-References. — Limitation of application as to criminally insane, § 64-7-54.

NOTES TO DECISIONS

Designated examiner.

—Re-examination.

The doctor who signs the original application for commitment as provided in § 64-7-36 is disqualified to act as a designated examiner on a re-examination pursuant to § 64-7-45. In re Wahlquist (1978) 585 P.2d 437.

History: C. 1943, 85-7-58, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1971, ch. 172, § 6 [b]; 1975, ch. 198, § 20; 1979, ch. 97, § 14.

Cross-References. — Inquiry into defendant's sanity, Chapter 15 of Title 77.

Limitation of application as to criminally insane, § 64-7-54.

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur 2d Incompetent Persons §§ 8 to 25, 39 to 42.

C.J.S. — 44 C.J.S. Insane Persons §§ 14 to 34.

Key Numbers. — Mental Health ⇐ 37 to 46.

64-7-33. Repealed.

Repeals. — Section 64-7-33 (C. 1943, 85-7-59, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1963, ch. 159, § 1; 1967, ch. 174, § 130; 1971, ch. 172, § 7), relating to admission to the Utah State Hospital on certification by examiners, was repealed by Laws 1975, ch. 198, § 35

64-7-34. Temporary admission to mental health facility — Requirements and procedures — Costs.

(1) Any individual may temporarily be admitted to a mental health facility upon:

(a) written application by a responsible person who has reason to know, stating a belief that the individual is likely to cause serious injury to self or others if not immediately restrained, and the personal knowledge of the individual's condition or circumstances which lead to such belief, and

(b) a certification by a licensed physician or designated examiner stating that the physician or designated examiner has examined the individual within a three-day period immediately preceding said certification and is of the opinion that the individual is mentally ill and, because of the individual's mental illness, is likely to injure self or others if not immediately restrained.

Such an application and certificate shall authorize any mental health or peace officer to take the individual into custody and transport the individual to a mental health facility.

(2) If a duly authorized mental health officer or peace officer observes a person involved in conduct which leads the officer to have probable cause to believe that such person is mentally ill, as defined by this act, and that, because of such apparent mental illness and conduct, there is a substantial likelihood of serious harm to that person or to others pending proceedings for examination and certification as provided in this act, the officer may take the person into protective custody. A peace officer may transport a patient pursuant to this provision either on the basis of his own observation or on the basis of the observation of a mental health officer, reported to him by the mental health officer. Immediately thereafter, the officer shall transport the person to a mental health facility and there make application for the person's admission therein. The application shall be upon a prescribed form and shall include the following:

(a) a statement by the officer that the officer believes on the basis of personal observation or on the basis of the observation of a mental health officer reported to him by the mental health officer that the person is, as a

result of a mental illness, a substantial and immediate danger to self or others.

(b) the specific nature of the danger.

(c) a summary of the observations upon which the statement of danger is based.

(d) a statement of facts which called the person to the attention of the officer.

(3) Any person admitted under this section may be held for a maximum of 24 hours excluding Saturdays, Sundays and legal holidays. At the expiration of that time period, the person shall be released unless application for involuntary hospitalization has been commenced pursuant to § 64-7-36. If such application has been made, an order of detention may be entered pursuant to Subsection (3) of § 64-7-36. If no order of detention is issued, the patient shall be released, except when the patient has made voluntary application for admission.

(4) Cost of all diagnosis and treatment under this section shall be paid by the county in which such person is found, unless the county participates in the state social services medical program as outlined in § 55-15a-3, in which event the state shall pay, or unless the person is financially able to pay the same in which event that person shall pay.

History: C. 1943, 85-7-60, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1963, ch. 159, § 1; 1971, ch. 172, § 8; 1975, ch. 198, § 21; 1979, ch. 97, § 15; 1981, ch. 261, § 1.

Amendment Notes. — The 1981 amendment deleted "upon endorsement for such purpose by a judge of the district court or a member of the board of county commissioners of the county in which the individual is present" after "certificate" in the second paragraph of Subsection (1); inserted "officer" after "mental health" in the first sentence of Subsection (2); inserted the second sentence of Subsection (2); and inserted "or on the basis of the observation of a mental health officer reported to him by the mental health officer" in Subsection (2)(a).

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1975, ch. 198, §§ 1 to 34, which appear as various sections throughout Titles 26 and 64. See Table of Session Laws in Parallel Tables volume.

Compiler's Notes. — Section 55-15a-3, cited in Subsection (4), is repealed. See § 26-18-10.

Cross-References. Limitation of application as to criminally insane, § 64-7-54.

COLLATERAL REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d Incompetent Persons §§ 8 to 25, 39 to 42.

C.J.S. — 44 C.J.S. Insane Persons §§ 14 to 34.

Key Numbers. — Mental Health ⇐ 37 to 46.

64-7-35. Mental health commissioner — Appointment — Qualifications — Duties.

The court is authorized to appoint a mental health commissioner to assist in the conduct of hospitalization proceedings who shall be an attorney licensed to practice law in this state and knowledgeable about mental health. In any case in which the court refers an application to the commissioner, the commissioner shall promptly cause the proposed patient to be examined and, on the basis thereof, shall either recommend dismissal of the application or hold a hearing as provided in this chapter and make findings of fact and recommen-

dations to the court regarding the order for involuntary hospitalization of the proposed patient.

History: C. 1953, 64-7-35, enacted by L. 1979, ch. 97, § 16.

Compiler's Notes. — Laws 1975, ch. 198, § 35 repealed former § 64-7-35 (C. 1943, 85-7-61, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1971, ch. 172, § 9), relating to protective custody pending examination and certification.

Cross-References. — Admission to practice law, § 78-51-10.

64-7-36. Involuntary hospitalization on court order — Examination of patient — Hearing — Power of court — Findings — Costs.

(1) Proceedings for the involuntary hospitalization of an individual may be commenced by the filing of a written application with the district court of the county in which the proposed patient resides or is found, by a responsible person who has reason to know of the condition or circumstances of the proposed patient which lead to the belief that the individual is mentally ill and should be involuntarily hospitalized. Any such application shall be accompanied by:

(a) a certificate of a licensed physician or a designated examiner stating that within a seven-day period immediately preceding the certification the physician or designated examiner has examined the individual and is of the opinion that the individual is mentally ill and should be involuntarily hospitalized; or

(b) a written statement by the applicant that the individual has been requested to but has refused to submit to an examination of mental condition by a licensed physician or designated examiner. Said application shall be sworn to under oath and shall state the facts upon which the application is based.

(2) Prior to issuing a judicial order, the court may require the applicant to consult a mental health facility or may direct a mental health professional from a mental health facility to interview the applicant and the proposed patient to determine the existing facts and report them to the court.

(3) If the court finds from the application, any other statements under oath, or any reports from a mental health professional that there is a reasonable basis to believe that the proposed patient's mental condition and immediate danger to self, others or property requires involuntary hospitalization pending examination and hearing, or if the proposed patient has refused to submit to an interview with a mental health professional as directed by the court, or to go to a treatment facility voluntarily, the court may issue an order directed to a mental health officer or peace officer to immediately take the proposed patient to any mental health facility, or a temporary emergency facility as provided in Section [Subsection] 64-7-38(2), there to be detained for the purpose of examination. Within 24 hours of the issuance of the order for examination, the clinical director of a mental health facility or a designee shall report to the court orally or in writing whether the patient is, in the opinion of the examiners, mentally ill, whether the patient has agreed to become a voluntary patient pursuant to § 64-7-29, and whether treatment programs are available and acceptable without court proceedings. Based on such information, the court may without taking any further action terminate the proceed-

ings and dismiss the application. In any event, if the examiner reports orally, the examiner shall immediately send the report in writing to the clerk of the court.

(4) Notice of the commencement of proceedings for involuntary hospitalization, setting forth the allegations of the application and any reported facts, together with a copy of any official order of detention, shall be provided by the court to a proposed patient prior to, or upon, admission to a mental health facility or, with respect to any individual presently in a mental health facility whose status is being changed from voluntary to involuntary, upon the filing of an application for that purpose with the court. A copy of such order of detention must be maintained at the place of detention.

(5) Notice of the commencement of such proceedings shall be provided by the court as soon as practicable to the applicant, any legal guardian, any immediate adult family members, the legal counsel for the parties involved, and any other persons the proposed patient or the court shall designate, and shall advise such persons that a hearing thereon may be held within the time provided by law, unless the patient has refused to permit release of such information in which case the extent of notice shall be determined by the court.

(6) Proceedings for the involuntary hospitalization of an individual under the age of eighteen years who is under the continuing jurisdiction of the juvenile court may be commenced by the filing of a written application with the juvenile court in accordance with the provisions of this section and said court shall have jurisdiction to proceed in such case in the same manner and with the same authority as the district court.

(7) If there are no appropriate mental health resources within the district, the court may in its discretion transfer the case or patient's custody to any other district court within the state of Utah provided that said transfer will not be adverse to the interest of the proposed patient.

(8) Within twenty-four hours, excluding Saturdays, Sundays, and legal holidays, of the issuance of a judicial order or after admission at a mental health facility of a proposed patient under court order for detention or examination, the court shall appoint two designated examiners to examine the proposed patient. If requested by the proposed patient's counsel, the court shall appoint as one of the examiners a reasonably available qualified person designated by counsel. The examinations, to be conducted separately, shall be held at the home of the proposed patient, a hospital or other medical facility, or at any other suitable place not likely to have a harmful effect on the patient's health.

A time shall be set for a hearing to be held within ten court days of the appointment of the designated examiners unless said examiners or the clinical director of the mental health facility shall inform the court prior to said hearing date that the patient is not mentally ill, that the patient has agreed to become a voluntary patient pursuant to § 64-7-29, or that treatment programs are available and acceptable without court proceedings in which event the court may without taking any further action terminate the proceedings and dismiss the application.

(9) Prior to the hearing, an opportunity to be represented by counsel shall be afforded to every proposed patient, and if neither the patient nor others provide counsel, the court shall appoint counsel and allow sufficient time to consult with the patient prior to the hearing. In the case of an indigent patient, the payment of reasonable attorney's fees for counsel as determined by

the court shall be made by the county in which the patient resides or was found. The proposed patient, the applicant, and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses, and the court may in its discretion receive the testimony of any other person. The court may allow a waiver of the patient's right to appear only for good cause shown, which cause shall be made a matter of court record. The court is authorized to exclude all persons not necessary for the conduct of the proceedings and may, upon motion of counsel, require the testimony of each examiner to be given out of the presence of any other examiners. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall receive all relevant and material evidence which may be offered subject to the rules of evidence.

The mental health facility or the physician in charge of the patient's care shall provide to the court at the time of the hearing the following information: the detention order, the admission notes, the diagnosis, any doctors' orders, the progress notes, the nursing notes and the medication records pertaining to the current hospitalization. Said information shall also be supplied to the patient's counsel at the time of the hearing and at any time prior thereto upon request.

(10) The court shall order hospitalization if, upon completion of the hearing and consideration of the record, the court finds by clear and convincing evidence that:

(a) The proposed patient has a mental illness; and

(b) Because of the patient's illness the proposed patient poses an immediate danger of physical injury to others or self, which may include the inability to provide the basic necessities of life, such as food, clothing, and shelter, if allowed to remain at liberty; and

(c) The patient lacks the ability to engage in a rational decision-making process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the possible costs and benefits of treatment; and

(d) There is no appropriate less restrictive alternative to a court order of hospitalization; and

(e) The hospital or mental health facility in which the individual is to be hospitalized pursuant to this act can provide the individual with treatment that is adequate and appropriate to the individual's conditions and needs. In the absence of the required findings of the court after the hearing, the court shall forthwith dismiss the proceedings.

(11) (a) The order of hospitalization shall designate the period for which the individual shall be treated. When the individual is not under an order of hospitalization at the time of the hearing, this period shall not exceed six months without benefit of a review hearing. Upon such a review hearing, to be commenced prior to the expiration of the previous order, an order for hospitalization may be for an indeterminate period, if the court finds by clear and convincing evidence that the required conditions in Section [Subsection] 64-7-36(10) will last for an indeterminate period.

(b) The court shall maintain a current list of all patients under its order of hospitalization, which list shall be reviewed to determine those patients who have been under an order of hospitalization for the desig-

nated period. At least two weeks prior to the expiration of the designated period of any order of hospitalization still in effect, the court that entered the original order shall so inform the clinical director of the mental health facility responsible for the care of such patient. The director shall immediately reexamine the reasons upon which the order of hospitalization was based. If the director and staff determine that the conditions justifying such hospitalization no longer exist, the director shall discharge the patient from involuntary treatment and make an immediate report thereof to the court and to the Division of Mental Health. Otherwise, the court shall immediately appoint two designated examiners and proceed under Subsections (8) through (10) of this section.

(c) The clinical director of a mental health facility or a designee responsible for the care of a patient under an order of hospitalization for an indeterminate period shall at six-month intervals reexamine the reasons upon which the order of indeterminate hospitalization was based. If the clinical director or the designee determine that the conditions justifying such hospitalization no longer exist, the director shall discharge the patient from involuntary treatment and make an immediate report thereof to the court and the Division of Mental Health. If the clinical director or designee has determined that the conditions justifying such hospitalization continue to exist, the director shall send a written report of such findings to the court and to the Division of Mental Health. The patient and the patient's counsel of record shall be notified in writing that the involuntary treatment will be continued, the reasons for such, and that the patient has the right to a review hearing by making a request to the court. Upon receiving the request, the court shall immediately appoint two designated examiners and proceed under Subsections (8) through (10) of this section.

(12) In the event that the designated examiners are unable, because of refusal of a proposed patient to submit to an examination, to complete such examination upon the first attempt to conduct the same, the court shall fix a reasonable compensation to be paid to such designated examiners for services in the cause.

(13) Any person hospitalized under this act or a person's legally designated representative who is aggrieved by the findings, conclusions and order of the court, shall have the right to a rehearing upon a petition filed with the court within thirty days of the entry of the court order. In the event the petition alleges error or mistake in the findings, the court shall appoint three impartial designated examiners previously unrelated to the case who shall conduct an additional examination of the patient. The rehearing shall in all other respects be conducted in the manner otherwise permitted.

(14) Costs of all proceedings under this section shall be paid by the county in which the proposed patient resides or is found.

History: C. 1943, 85-7-62, enacted by L. 1951, ch. 113, § 3; L. 1953, ch. 124, § 2; 1963, ch. 60, § 1; 1967, ch. 174, § 131; 1971, ch. 172, § 10; 1975, ch. 198, § 22; 1979, ch. 97, § 17; 1981, ch. 261, § 2.

Amendment Notes. — The 1981 amendment substituted "issuing a judicial order" in Subsection (2) for "filing the application", inserted "or to go to a treatment facility voluntarily" and "or a temporary emergency facility as provided in section 64-7-38(2)" in the first sentence of Subsection (3), added the last three

PART 3

DEFENSES TO CRIMINAL RESPONSIBILITY

76-2-301. Person under fourteen years old not criminally responsible.

A person is not criminally responsible for conduct performed before he reaches the age of fourteen years. This section shall in no way limit the jurisdiction of or proceedings before the juvenile courts of this state.

History: C. 1953, 76-2-301, enacted by L. 1973, ch. 196, § 76-2-301.

COLLATERAL REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d Criminal Law § 38.

C.J.S. — 43 C.J.S. Infants § 31, 32.

A.L.R. — Burden of proof of defendant's age, in prosecution where attainment of particular age is statutory requisite of guilt, 49 A.L.R.3d 526.

Key Numbers. — Criminal Law ⇐ 65.

76-2-302. Compulsion.

(1) A person is not guilty of an offense when he engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would not have resisted.

(2) The defense of compulsion provided by this section shall be unavailable to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

(3) A married woman is not entitled, by reason of the presence of her husband, to any presumption of compulsion or to any defense of compulsion except as in Subsection (1) provided.

History: C. 1953, 76-2-302, enacted by L. 1973, ch. 196, § 76-2-302.

NOTES TO DECISIONS

ANALYSIS

Deviation from compelled behavior.
Escape.
—Instructions.
Standard.

Deviation from compelled behavior.

Where wife was asked by imprisoned husband to break into jail and get the keys and unlock the doors, but instead gave him hacksaw blades, she was not incapable of commission of crime because she departed from his coercion and committed a crime of her own choosing. Farrell v. Turner, 26 Utah 2d 351, 482 P.2d 117 (1971).

Escape.

In prosecution for escape from state prison, trial court did not err in refusing to submit to

in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 A L.R.4th 11.

Key Numbers. — Criminal Law ⇐ 857(1).

77-17-12. Defendant on bail appearing for trial may be committed.

When a defendant who has given bail appears for trial, the court may, at any time after his appearance for trial, order him to be committed to the custody of the proper officer to await the judgment or further order of the court.

History: C. 1953, 77-17-12, enacted by L. 1980, ch. 15, § 2.

COLLATERAL REFERENCES

Key Numbers. — Bail ⇐ 80.

CHAPTER 18
THE JUDGMENT

Section	
77-18-1.	Suspension of sentence — Probation — Supervision — Presentence investigation — Standards — Confidentiality — Terms and conditions — Restitution — Termination, revocation, modification, or extension — Hearings.
77-18-2.	Expungement and sealing of records.
77-18-3.	Disposition of fines.
77-18-4	Sentence — Term — Construction.
77-18-5.	Reports by courts and prosecuting attorneys to Board of Pardons.
77-18-5.5.	Judgment of death — Defendant to select method — Time of selection.
77-18-6.	Judgment to pay fine or restitution constitutes a lien.
77-18-7.	Costs imposed on defendant — Restrictions.
77-18-8.	Fine not paid — Commitment.

77-18-1. Suspension of sentence — Probation — Supervision — Presentence investigation — Standards — Confidentiality — Terms and conditions — Restitution — Termination, revocation, modification, or extension — Hearings.

(1) (a) On a plea of guilty or no contest or conviction of any crime or offense, the court may suspend the imposition or execution of sentence and place the defendant on probation. The court may place the defendant:

(i) on probation under the supervision of the Department of Corrections except in cases of class C misdemeanors or infractions;

(ii) on probation with an agency of local government or with a private organization; or

(iii) on bench probation under the jurisdiction of the sentencing court.

(b) The legal custody of all probationers under the supervision of the department is with the Department of Corrections. The legal custody of all probationers under the jurisdiction of the sentencing court is vested as ordered by the court. The court has continuing jurisdiction over all probationers.

(2) (a) The Department of Corrections shall establish supervision and presentence investigation standards for all individuals referred to the department. These standards shall be based on the type of offense, the demand for services, the availability of agency resources, the public safety, and other criteria established by the Department of Corrections to determine what level of services shall be provided.

(b) Proposed supervision and investigation standards shall be submitted to the Judicial Council and Board of Pardons on an annual basis for review and comment prior to adoption by the Department of Corrections.

(c) The Judicial Council and department shall establish procedures to implement the supervision and investigation standards.

(d) The Judicial Council and the department shall annually consider modifications to the standards based upon criteria in Subsection (2)(a) and other criteria as they consider appropriate.

(e) The Judicial Council and the department shall annually prepare an impact report and submit it to the appropriate legislative appropriations committee.

(3) Notwithstanding other provisions of law, the Department of Corrections is not required to supervise the probation of persons convicted of class B or C misdemeanors or infractions, or to conduct presentence investigation reports on class C misdemeanors or infractions. However, the department may supervise the probation of class B misdemeanants in accordance with department standards.

(4) (a) Prior to the imposition of any sentence, the court may, with the concurrence of the defendant, continue the date for the imposition of sentence for a reasonable period of time for the purpose of obtaining a presentence investigation report from the Department of Corrections or information from other sources about the defendant. The presentence investigation report shall include a specific statement of pecuniary damages, accompanied by a recommendation from the Department of Corrections regarding the payment of restitution by the defendant. The contents of the report are confidential and not available except for purposes of sentencing as provided by rule of the Judicial Council and for use by the Department of Corrections.

(b) At the time of sentence, the court shall hear any testimony or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence. This testimony or information shall be presented in open court on record and in the presence of the defendant.

(5) While on probation, and as a condition of probation, the defendant may be required to perform any or all of the following:

(a) pay, in one or several sums, any fine imposed at the time of being placed on probation;

(b) pay amounts required under Chapter 32a, Title 77, Defense Costs;

(c) provide for the support of others for whose support he is legally liable;

(d) participate in available treatment programs;

(e) serve a period of time in the county jail not to exceed one year;
(f) serve a term of home confinement;
(g) participate in community service restitution programs;
(h) pay for the costs of investigation, probation, and treatment services;
(i) make restitution or reparation to the victim or victims in accordance with Subsections 76-3-201(3) and (4); and
(j) comply with other terms and conditions the court considers appropriate.

(6) The Department of Corrections is responsible, upon order of the court, for the collection of fines and restitution during the probation period in cases for which the court orders supervised probation by the department. The prosecutor shall provide notice of the restitution order to the clerk of the court. The clerk shall place the order on the civil docket and shall provide notice of the order to the parties. The order is considered a legal judgment enforceable under the Utah Rules of Civil Procedure.

(7) (a) Probation may be terminated at any time at the discretion of the court or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions. If the defendant, upon expiration or termination of the probation period, has outstanding fines or restitution owing, the court may retain jurisdiction of the case and continue the defendant on bench probation or place the defendant on bench probation for the limited purpose of enforcing the payment of fines and restitution. Upon motion of the prosecutor or victim, or upon its own motion, the court may require the defendant to show cause why his failure to pay should not be treated as contempt of court or why the suspended jail or prison term should not be imposed.

(b) The Department of Corrections shall notify the sentencing court and prosecuting attorney in writing in advance in all cases when termination of supervised probation will occur by law. The notification shall include a probation progress report and complete report of details on outstanding fines and restitution orders.

(8) (a) Any time served by a probationer outside of confinement after having been charged with a probation violation and prior to a hearing to revoke probation does not constitute service of time toward the total probation term unless the probationer is exonerated at a hearing to revoke the probation. Any time served in confinement awaiting a hearing or decision concerning revocation of probation does not constitute service of time toward the total probation term unless the probationer is exonerated at the hearing.

(b) The running of the probation period is tolled upon the filing of a violation report with the court alleging a violation of the terms and conditions of probation or upon the issuance of an order to show cause or warrant by the court.

(9) (a) Probation may not be modified or extended except upon waiver of a hearing by the probationer or upon a hearing and a finding in court that the probationer has violated the conditions of probation. Probation may not be revoked except upon a hearing in court and a finding that the conditions of probation have been violated.

(b) Upon the filing of an affidavit alleging with particularity facts asserted to constitute violation of the conditions of probation, the court that

authorized probation shall determine if the affidavit establishes probable cause to believe that revocation, modification, or extension of probation is justified. If the court determines there is probable cause, it shall cause to be served on the defendant a warrant for his arrest or a copy of the affidavit and an order to show cause why his probation should not be revoked, modified, or extended.

(c) The order to show cause shall specify a time and place for the hearing, and shall be served upon the defendant at least five days prior to the hearing. The defendant shall show good cause for a continuance. The order to show cause shall inform the defendant of a right to be represented by counsel at the hearing and to have counsel appointed for him if he is indigent. The order shall also inform the defendant of a right to present evidence.

(d) At the hearing, the defendant shall admit or deny the allegations of the affidavit. If the defendant denies the allegations of the affidavit, the prosecuting attorney shall present evidence on the allegations. The persons who have given adverse information on which the allegations are based shall be presented as witnesses subject to questioning by the defendant unless the court for good cause otherwise orders. The defendant may call witnesses, appear and speak in his own behalf, and present evidence.

(e) After the hearing the court shall make findings of fact. Upon a finding that the defendant violated the conditions of probation, the court may order the probation revoked, modified, continued, or that the entire probation term commence anew. If probation is revoked, the defendant shall be sentenced or the sentence previously imposed shall be executed.

(10) Restitution imposed under this chapter is considered a debt for "willful and malicious injury" for purposes of exceptions listed to discharge in bankruptcy as provided in Title 11, Section 523, U.S.C.A. 1985.

History: C. 1953, 77-18-1, enacted by L. 1980, ch. 15, § 2; 1981, ch. 59, § 2; 1982, ch. 9, § 1; 1983, ch. 47, § 1; 1983, ch. 68, § 1; 1983, ch. 85, § 2; 1984, ch. 20, § 1; 1985, ch. 212, § 17; 1985, ch. 229, § 1; 1987, ch. 114, § 1; 1989, ch. 226, § 1.

Amendment Notes. — The 1987 amendment rewrote this section, as last amended by Laws 1985, ch. 229, § 1, to the extent that a detailed analysis is impracticable.

The 1989 amendment, effective April 24, 1989, rewrote Subsections (1), (7)(a), and (8)(b); inserted "the public safety" in the second sentence of Subsection (2)(a); inserted "on an annual basis" in Subsection (2)(b); added Subsections (2)(c) through (2)(e) and (5)(j), making related changes in Subsection (5); added the "(a)" and "(b)" designations in Subsection (4); inserted "upon order of the court" in the first sentence of Subsection (6) and substituted "enforceable under the Utah Rules of Civil Procedure" for "under which the victim may seek civil remedy" in the last sentence of that subsection; deleted "45 days" following "in writing" in the first sentence of Subsection (7)(b); deleted Subsection (7)(c), concerning extension of probation; deleted the former first sentence of Subsection (8)(a), concerning the applicability of time served without violation while on probation; deleted Subsection (8)(c), which provided: "Nothing in this section precludes the court from discharging a probationer at any time, at the discretion of the court"; deleted "Except as provided in Subsection (7)(c) of this chapter" from the beginning of Subsection (9)(a); in Subsection (9)(b), inserted "a warrant for his arrest or" in the second sentence; and made stylistic changes throughout the section.

Severability Clause. — Section 3 of Laws 1983, Chapter 85 provided: "If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act shall be given effect without the invalid provision or application."

Cross-References. — Indecent public display, incarceration without suspension of sentence, § 76-10-1228.

Payment of costs of defense as condition of probation or suspension, § 77-32a-6.

Presentence investigation reports, Rules 4-607, 6-301, Rules of Judicial Administration.

Rules of Evidence inapplicable to sentencing and probation proceedings, Rules of Evidence, Rule 1101.

History: L. 1965, ch. 165, § 53, formerly C. 1953, 55-10-115 redes. as 78-3a-54; L. 1977, ch. 79, § 8; 1979, ch. 135, § 1; 1983, ch. 83, § 12; 1986, ch. 104, § 1; 1987, ch. 182, § 5.

Amendment Notes. — The 1983 amendment, in the second paragraph, inserted "or forfeiture" in the first sentence, substituted "Funds" for "Fines" in the third sentence and substituted "not encumbered by work orders fulfilled or in process" for "but not disbursed" in the third sentence

The 1986 amendment redesignated the first two paragraphs as Subsection (1), the first two sentences of the third paragraph as Subsection (2), the rest of the third paragraph as Subsection (3) and the last paragraph as Subsection (4), in the second paragraph of Subsection (1) substituted "25%" for "20%" and "provides for for "supervises public service" in the first sentence, in the second sentence inserted "and any private contributions to the rehabilitative employment program" following "provision" and substituted "are" for "shall be" and substituted "and private contributions are nonlapsing and may be transferred for use among counties within the district in which they are donated or collected The Board of Juvenile Court Judges shall establish policies for the use of the funds" for "not encumbered by work orders fulfilled or in process before the last day of the county fiscal year shall be paid to the county treasurer of the county in which they were collected " in the third sentence, in Subsections (2) and (3) made minor word changes, and substituted "youth corrections facilities" for "the state industrial school" in Subsection (4)

The 1987 amendment, effective July 1, 1987, in Subsection (1) inserted the designations and in Subsection (1)(a) substituted "state treasurer for deposit in the General Fund" for "county treasurer of the county in which they are collected," in Subsection (1)(c) in the second sentence deleted "and may be transferred for use amoung counties within the district in which they are donated or collected" from the end of the first sentence and made minor changes in phraseology, punctuation and style throughout this section

78-3a-55. Court records — Inspection — Fingerprints or photographs prohibited, exception.

The court and the probation department shall keep such records as may be required by the board and the presiding judge. Court records shall be open to inspection by the parents or guardian, other parties in the case, the attorneys, and agencies to which custody of a child has been transferred; and with the consent of the judge, court records may be inspected by the child, by persons having a legitimate interest in the proceedings, and by persons conducting pertinent research studies Probation officers' records and reports of social and clinical studies shall not be open to inspection, except by consent of the court given pursuant to rules adopted by the board.

Without the consent of the judge, no fingerprints or photographs shall be taken of any child taken into custody, unless the case is transferred for criminal proceedings.

History: L. 1965, ch. 165, § 54, formerly C. 1953, 55-10-116 redes. as 78-3a-55; L. 1983, ch. 83, § 13.

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Fingerprinting.

Where the procedure of § 78-3a 25 is not followed, there is no transfer of the case for criminal proceedings and the fingerprints of the child cannot be taken without the consent of the judge H A G v Fillis, 577 P 2d 964 (Utah 1978)

Judge's consent to fingerprint a child requires affirmative action by an individual juvenile judge, Rule 39 of the Utah State Juvenile Court Rules of Practice and Procedure which authorizes a blanket consent, unindividualized by juvenile judge, does not satisfy the consent requirement H A G v Fillis, 577 P.2d 964 (Utah 1978)

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