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THE NATURAL CATASTROPHES HANDBOOK

AN OVERVIEW AND JURISDICTIONAL SURVEY OF SUBROGATION ISSUES IN THE DISASTER CONTEXT

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November 2003

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I. INTRODUCTION

This is a guideline to legal recovery against third parties in the natural disaster context. Section II discusses the various types of disasters and their particular liability scenarios. Section III provides an overview of the main legal theories applicable in the storm context. Section IV provides a list of disaster resources. Section V provides a survey of case law across the country on the main legal issues of the duty of an adjoining landowner, the Act of God defense, and governmental liability for drainage and road conditions.

II. PARTICULAR FORMS OF CATASTROPHIC LOSS

This section provides a general description of each of the more common, significant natural disasters, with some specific planning considerations for each type of storm. These planning considerations apply primarily to businesses, building landlords, and building tenants, though some apply to any property owner including homeowners. A third party's failure to follow some or all the considerations can, in some circumstances, form the basis of a cause of action against that party.

Hurricanes

Hurricanes are severe tropical storms with winds that rotate counter clockwise and reach sustained levels of at least 64 knots (74 miles per hour). They develop over warm tropical oceans and can produce torrential rains and flooding. They can also spawn tornadoes. The winds can reach 160 miles per hour and extend inland for hundreds of miles causing tremendous property damage along the seaboard states. The hurricane season lasts from June through November. Satellite systems and hurricane hunters provide ready information on the development of hurricanes over the ocean. The National Hurricane Center in Miami will issue hurricane watches and warnings soon as soon as a hurricane appears to be a threat. A hurricane watch will typically provide advance warning one to two days before the hit. Lightning strikes are common in the course of a hurricane, often resulting in fires. If the structure was improperly equipped with lightning strike protection or fire protection, an action may lie against the architects, contractors, or others that failed to provide, or install, such equipment. When feasible, an aerial photograph of the structure and its surrounding structures should be taken.

Liability Scenarios

Most liability scenarios involve claims that the wind conditions were *below* the level of a hurricane and that the property in question failed to conform with code requirements, usually in the range of 70 to 90 miles per hour. In such cases, liability is usually straightforward as long as the claim is supported by experts who can opine on the standard of care in construction and in the degree of force applied to that construction. In cases where the damage could have been mitigated even in the face of a *bona fide* hurricane, other possible theories may also be available. For example, consider the property owner who fails to close its garage door, resulting in the roof blowing off – a condition that could have been prevented if the garage door had been left closed. If neighboring landowners incur damage from the debris of that home, a possible claim may lie. Other theories may include lack of post-disaster governmental response, *e.g.*, failure to install new stop signs or traffic signals in an adequate time. It is important to analyze the degree of damages to surrounding structures to assess how well they held up to similar conditions.

Things to Consider

- Whether the facility was inspected for integrity by a structural engineer, especially awnings and roofing systems.
- Code compliance during original construction or major renovations.
- Whether the windows were protected, preferably with permanent storm shutters or with 5/8' marine plywood.
- Whether warning and evacuation procedures were established and followed.
- Whether shutdown procedures were established and followed.
- Whether backup systems were in place and operational, including:
  - Portable pumps to remove flood water
  - Alternate power sources such as generators or gasoline-powered pumps
  - Battery-powered emergency lighting
- Whether plans to protect or move records or computer data were established and followed.

Tornadoes

Tornadoes are storms with violent whirling winds that extend from thunderstorm clouds down toward the ground. The winds can reach 300 miles per hour, uprooting trees, buildings, and other objects and turning them into devastating projectiles in the process. They can create paths of damage over a mile wide and fifty miles long. They form with little advance warning. Every state is susceptible to potential tornadoes, but they occur most often in the Midwest, Southeast and Southwest. Auditoriums, cafeterias, and gymnasiums that are covered with a flat, wide-span roof are not considered safe shelter areas. The Fujita Tornado Damage Scale measures the intensity of a tornado. Developed in 1971 by T. Theodore Fujita, the Fujita scale categorizes the storm on a scale of F0 (winds less than 73 mph) to F5 (winds of 261-318 mph). An F1 tornado (73-112 mph) will cause moderate damage, such as peeling the surface off a roof, overturning mobile homes, and blowing cars off the road. An F2 tornado (113-157 mph) causes considerable damage, such as tearing roofs off frame houses, uprooting trees, lifting cars off the ground, and demolishing mobile homes. An F3 tornado (158-206 mph) causes severe damage, such as tearing away walls and roof of well-built homes, overturning trains, uprooting forest trees, and throwing cars. An F4 tornado (207-260 mph) causes devastating damage, such as leveling houses, blowing away buildings, and turning cars into missiles. An F5 results in incredible damage, turning nearly everything in its path into missiles. Precise wind speeds are difficult to verify without a thorough analysis of the damage left in the tornado's path. Use of weather experts in conjunction with structural engineers is often critical.

Liability Scenarios

As with hurricanes, most liability scenarios involve claims that the wind conditions were *below* the level of a tornado and that the property in question failed to conform with code requirements for a certain level of wind. In cases of a *bona fide* tornado, similar theories of liability to the hurricane scenario may also be available, though they are more difficult to establish given the rapid movement and unpredictability of a tornado. In most tornado cases, it will be possible to uncover a path of the tornado. If the damaged structure is outside that path, it is possible to make the case that the structure was only subjected to partial impact.

Things to Consider

- Whether "spotters" were designated to look out for approaching storms.
- Whether protective areas were established underground or in:
    Small interior rooms on the lowest floor and without windows
    Hallways on the lowest floor away from doors and windows
    Rooms constructed with reinforced concrete, brick or block with no windows and a heavy concrete floor or roof system overhead
- Whether tornado drills were established and followed.

Wildland Fires

Wildland fires are quasi-natural events. They can arise both from natural forces, as from lightning, and from human hands, accidental or otherwise. Most wildland fires are relatively harmless and, indeed, are prescribed by land managers – governmental and private -- in an effort to stimulate biotic processes and/or reduce the potential fuel load of dried wildlands should lightning or errant human hands strike. Whether a minor wildland fire will become catastrophic depends upon such factors as wind, temperature, humidity, slope, topography, and the surrounding fuel load. Strong winds can carry burning embers or sparks to other areas, causing spot fires, or can push the flames toward new fuel sources. Wind can also dry out the surrounding fuel sources. The convection currents of wildland fires can also create additional winds, thus fanning their own flames. Solar heating affects the spread of wildland fires by speeding up the time it takes for surrounding fuel loads to reach their ignition point. Humidity affects the spread in that the lower it gets, the less moisture there is to dampen the fuel load. Topography can affect the spread in several ways. The shape of the land determines how much sunlight or shade it gets and how much wind gets through. Rock formations can affect the amount of fuel that can grow. Certain natural or manmade barriers can stop or slow the spread, including highways, boulders, and bodies of water. Elevation and slope can contribute to how quickly the fire will reach the crest of the land form. Fires that start at the bottom of the slope will preheat the uphill fuels by the rising air, increasing the chances of ignition. Fires that start uphill can also roll downward when burning material drops by the force of gravity. In many cases, it can be useful to take an aerial photograph to show the path of the spread for later use at trial.

Liability Scenarios

The primary theories of liability in wildland fire cases will involve government liability for inadequate prevention and inadequate response. Other theories include failure of an adjoining landowner to act reasonably in order to prevent the spread, *e.g.*, failure to conform to the items set forth below.

Things to Consider

- Whether the owner was aware of the history of wildfires in the area.
- Whether the roof and exterior had been checked for non-combustible or fire resistant materials such as tile, slate, sheet iron, aluminum, brick, or stone.
- Whether the roof surfaces and gutters had been cleared of pine needs, leaves, branches, and other combustible materials.
- Whether a "fuel break" had been created around all structures by clearing away foliage or other combustibles (*e.g.*, picnic tables)

- Whether the flue opening of every stovepipe or chimney had been protected with a non-combustible screen with mesh (preferably with openings no larger than 1/2 inch in diameter).
- Whether the flue openings had been cleared of any foliage (roughly within ten feet).
- Whether the trees and bushes had been spaced away from the structure or surrounding vegetation.
- Whether tree branches less than 15 feet high had been pruned away.
- Whether gasoline and propane had been stored in approved containers away from occupied buildings.
- Whether the roads and driveways were widened to approximately 16 feet or more.
- Whether fire equipment and tools had been kept on hand, such as:
  - Extinguishers
  - Ladder long enough to reach the roof
  - Shovel
  - Rake
  - Water buckets.
- Whether garden hoses had been kept connected to the outlets and were readily accessible.

Floods and flash floods.

Of all the natural disasters, floods are perhaps the most common and widespread throughout the states. Most floods develop from spring rains, heavy thunderstorms, or winter snow thaws. They often develop slowly over a period of days. Flash floods, however, come without warning, descending upon communities in a crash of water in mere minutes, usually from intense storms or dam failure.

Liability Scenarios

These will often involve arguments that the contractor and/or landowner failed to construct or protect the property in accordance with the planning considerations outlined above.

Things to Consider

- Whether the owner or developer had asked the local emergency management office whether the facility was located in a flood plain.
- Whether the owner or developer inquired about the history of flooding in the area.
- Whether the owner or developer inquired of the elevation of the facility in relation to streams, rivers and dams.
- Whether a flood-proofing feasibility study had been conducted, looking into such things as:
  - Protecting windows, doors, and other openings with bricks, blocks, flood shields, or other water-resistant materials.
  - Equipping water and sewer lines with check valves.
  - Sealing or reinforcing walls to resist water seepage or pressure.
  - Protecting equipment or work areas with water-tight walls.
  - Building outdoor floodwalls or levees to protect the facility, without causing water diversion to neighboring property owners.
  - Elevating the facility on walls, columns or compacted fill.
  - Installing permanent watertight doors
  - Constructing movable floodwalls

Installing permanent pumps to remove flood waters
Stacking sandbags against building walls.
Constructing a double row of walls with boards and posts to create a "crib," then filling the crib with soil
Constructing a single wall by stacking small beams or planks on top of each other

- Whether backup systems had been established or followed, including:
  Portable pumps to remove flood water
  Alternate power sources such as generators or gasoline-powered pumps
  Battery-powered emergency lighting
- Whether the community had engaged in flood control projects.
- Whether community had developed an emergency plan and evacuation routes.
- Whether warning and evacuation procedures for the facility had been developed and followed.
- Whether there had been flood watches and warnings.
- Whether a plan had been developed and implemented for moving records and equipment to a higher location.

Severe Winter Storms.
Winter storms can bring heavy snow, heavy winds, hail, ice, and freezing rains. Each region is equipped to handle them differently depending on the historical frequency and severity the storms. When they hit, however, they can shut down even the most prepared of cities.

Liability Scenarios
Violation of applicable roofing and other building and construction codes or standards. Lack of adequate post-disaster response. In snow accumulation cases, it is extremely useful to take measurements of the depth of snow as soon a possible to calculate the load.

Things to consider

- Whether there had been storm warnings and watches.
- Code compliance during construction or major renovations.
- Whether a backup power source had been established for critical operations.

Earthquakes
Earthquakes are perhaps the most sudden and unpredictable of the natural disasters. Though they are mostly confined to the states west of the Rocky Mountains, the most violent earthquakes in history have occurred in the central United States. In addition to damaging buildings and utility services, they can trigger avalanches, landslides, flash floods, and tsunamis. They are often followed by aftershocks that can last for weeks.

Liability Scenarios
Similar to those described in the Hurricane section, above.

Things to consider

- Whether the facility's vulnerability to earthquakes had been assessed.
- Whether the owner or developer had asked local government agencies for seismic information for the area.

- Code compliance during construction or major renovations
- Whether strengthening measures had been developed and prioritized, such as:
    - Adding steel bracing to frames or suspended ceilings
    - Adding sheer walls to frames
    - Strengthening columns and building foundations
    - Replacing unreinforced brick filler walls
    - Installing safety glass where appropriate
    - Securing large utility and process piping
- Whether non-structural systems had been inspected, such as air conditioning, communications and pollution control systems.
- Whether the facility had been inspected for any item that could fall, spill, break or move during an earthquake and taking steps to reduce these hazards.
- Whether large and heavy objects had been moved to lower shelves or the floor.
- Whether heavy items had been secured, such as shelves, filing cabinets, tall furniture, desktop equipment, computers, printers, copiers and light fixtures.
- Whether copies of design drawings of the facility were kept available to be used in assessing the facility's safety after an earthquake.
- Whether plans had been developed and followed for handling and storing hazardous materials and storing incompatible chemicals separately.

Sinkholes

A sinkhole is a depression in the land. There are four basic types of sinkholes: solution sinkhole, cave collapse sinkhole, subsidence sinkhole, and buried sinkhole. Sinkholes occur when the land under the surface forms spaces or caverns that collapse under pressure of the land above it. They occur most often in Florida and Texas, but also affect Alabama, Missouri, Kentucky, Tennessee, and Pennsylvania. The substrata of land is usually limestone, carbonate rock, salt beds, or rocks that are susceptible to dissolving when groundwater circulates among them. As the groundwater erodes the rock or salt beds, spaces or caverns develop underground. The land above the caverns will usually stay intact for a period of time with no external sign of a problem underneath. However, if the space gets too big, the land above it can slowly subside and/or suddenly collapse. Sometimes the collapse is small and benign, as in an open field. Sometimes, however, the collapse covers a wide area, enveloping a roadway or swimming pool or an entire row of buildings. The process of underground limestone erosion generally begins with the presence of a conveying path by which the eroded materials will travel away from the limestone to create a cavity. Dissolved limestone is more inclined to travel along the sand than clay because of the cohesive properties of clay. Another contributing factor is if there are two different water tables near each other. A significant downward gradient between one water table to another water table increases the chances of downward migration of eroded materials. If the soil is comprised of stiff and intact clays, this reduces the possibility of downward migration. Predicting the location, timing, and likelihood of sinkhole activity is extremely difficult based on current technology and data. For example, when a structure begins developing cracks from ground subsidence, it is difficult to directly evaluate the underlying soil for the presence or potential for conveying channels to transmit soil particles. The ground subsidence could be the result of clayey or plastic soils or degrading organic materials, as opposed to sinkhole-related activity. Sinkhole indicators include an unusual loss of drilling fluid circulation in the soil and the presence of abnormally soft subsoil and rock conditions. To narrow down the cause, different experts use different

techniques and combinations of techniques, which may include: history of prior confirmed sinkhole activity in the vicinity, standard penetration test (SPT) borings to test the soil's contents and properties, penetrometer probe soundings, ground penetrating radar investigation, a floor slab survey to analyze sloping and depressions, installing crack monitors to measure relative crack movement, a capacitatively coupled resistivity test (CCR) to locate raveled soils.

Liability Scenarios

In many states, a statute of repose will often prevent a claim of liability against the original contractor or geologist if the property is older than the statutory period. For example, Florida has a 15-year statute of repose for improvements to real property. If the insured property was surveyed and constructed more than 15 years ago, there is very little chance of establishing liability against the contractor or geologist that constructed and/or surveyed the property in that state. For cases within the repose period, there appear to be no specific code requirements to either conduct a geological survey for potential sinkholes or construct a building in such a way as to protect against sinkhole collapse. However, it is a general requirement in the industry that the contractor hire a firm to conduct a soil sample for suitability for construction. If, in the course of that soil survey, the geologist uncovers evidence of two different water tables and/or a conveying channel creating a likelihood of a sinkhole, such information should be reported to the contractor. If the geologist fails to convey that information and/or if the contractor fails to take a reasonable precaution against the potential for sinkhole activity (*e.g.*, constructs a building negligently and/or conceals the structural problems from the buyers), there may be a viable theory of liability against such party. Accordingly, when analyzing a sinkhole case, the first question should be the age of building, dating back from the certificate of occupancy. If it is within the repose period, the next inquiry should be the identity of the general contractor who built the property and the identity of the geological company, if any, who conducted the soil survey. This will usually require a check of the county records. There may turn out to be nothing in the soil survey that would have put the surveyor and contractor on notice of a potential sinkhole, in which case there is little basis to institute a subrogation claim.

Conceivably, there may be other liability scenarios. For example, suppose a property owner/landlord becomes aware of a potential sinkhole by virtue of either a neighboring sinkhole or by virtue of a geological survey of a nearby property. Suppose further that the property owner fails to communicate this information to its tenants or to a subsequent purchaser. If a sinkhole occurs, the tenants or subsequent purchaser may have a basis to assert a claim of concealment. However, such claims can be difficult to prove, as the plaintiff will generally need to show that the owner had actual knowledge of a confirmed sinkhole and that the tenant/subsequent purchaser relied on the false statement.

Things to consider

- Whether the facility's vulnerability to sinkholes had been assessed.
- Whether the owner or developer had asked local government agencies for sinkhole activity in the area.
- Whether a geologist had inspected the soil.
- Whether boring data was available
- Whether strengthening measures were considered, such as:
    - Adding grout pipes that penetrate at least 150 feet below ground surface.

- Installing underpins, after the grouting program, to transfer the load of the structure through the organic material to the soils beneath them.
- Installing concrete slabs that have contraction joints spaced at intervals about equal to the slab width (slabs wider than about 10 to 12 feet should have a longitudinal joint down the center, if possible; contraction joints to concrete slabs should be approximately square; rectangular sections should not have length to width ratios of more than 1.5).

III. OVERVIEW OF THE SUBROGATION ISSUES

Most liability scenarios in the storm context involve claims in the peripheral areas of the storm, where the winds or floods were *within* the level of force the structure was expected to withstand. In such cases, liability is premised on the argument that the property in question failed to conform with building codes or industry practice. Liability may be relatively straightforward in such claims as long as the claim is supported by experts who can opine on the standard of care in construction and the degree of force applied to that construction. It will be important for those experts to analyze the degree of damages to surrounding structures to assess how well they held up to similar conditions.

In cases of hurricanes and tornadoes, it will be important to look for a path. If the damaged structure is outside that path, it is possible to make the case that the structure was only subjected to partial impact. When feasible, an aerial photograph of the structure and its surrounding structures should be taken. In cases involving direct-path damage from a true hurricane or other storm, other possible theories may also be available. For example, consider the property owner who fails to "batten down the hatches," *e.g.*, fails to protect the windows or close the garage door. Such failure can result in the roof blowing off from uplift – a condition that could have been prevented if these openings had been properly secured. If neighboring landowners incur damage from the debris of that home, a possible claim may lie for improperly securing the structure. Other theories may include lack of post-disaster governmental response, *e.g.*, pre-storm failure to maintain sewage systems or post-storm failure to install new stop signs or traffic signals within a reasonable time after the storm.

Regardless of whether the claim is a peripheral damage or direct damage case, some basic theories of liability can be used to make the case.

A. Liability of Adjoining Landowners for Debris Damage

A common subject of legal problems for disaster victims involves rights and responsibilities relating to fallen trees and other storm debris. Determining liability depends on an analysis of duty, breach of duty, and proximate cause.

1. Duty

The common law rule absolves the landowner of any duty to find or remedy naturally occurring conditions; the rule is designed to avoid burdening rural landowners with inspection of large

unpopulated woodlands. *See generally* Keeton, *Prosser and Keeton on the Law of Torts*, § 57 (5th ed. 1984). However, in most jurisdictions, a property owner owes a duty of care to maintain man-made structures, cultivated trees, and other pieces of human-cultivated landscaping, and naturally occurring objects which he/she knows are in an unreasonably dangerous condition. The duty generally extends to lawful visitors, drivers on neighboring public roads, and adjoining property owners, so long as the landowner had actual or constructive knowledge of the dangerous condition. In addition, courts in an increasing number of jurisdictions will impose the added duty of *inspecting* the property for potential defects or hazards. Some have abolished the common law exception for naturally occurring hazards regardless of whether the setting was rural or urban. *See, e.g.*, Sprecher v. Adamson Cos., 30 Ca.3d 358, 636 P.2d 1121 (1981) (tree); Dudley v. Meadowbrook, Inc., 166 A.2d 743 (D.C. Mun. Ct. App. 1960) (tree); *see also* Annotation, "Tree Limb Falls onto Adjoining Private Property: Personal Injury and Property Damage Liability", 54 A.L.R. 4th 530, 541 (1987); Annotation, "Failure to Exercise Due Care to Prevent Fall of Tree", 27 AM. JUR. *Proof of Facts* 639, § 6, at 657-59; Westlaw headnote Negligence 34.

2. Breach

The property owner is required to take reasonable precautions against damage to neighboring property caused by a storm or other natural disaster. The extent of precautions necessary depends upon the likelihood and probably severity of the disaster and the efficacy and cost of precautions.

3. Proximate Cause

Assuming that the property owner has been negligent in some manner, the property owner may escape liability of the damage would have occurred even in the absence of the property owner's negligence. However, if the property owner's negligence concurred in causing the disaster, then the property owner can be held liable. If the disaster is so unexpected as to be deemed unforeseeable, then the disaster is a superceding cause, relieving the property owner of liability.

B. Trespass and Nuisance

Even where actual negligence cannot be proven, a claim for trespass or nuisance may lie. A trespass is generally defined as an unauthorized entry onto property which results in interference with the property owner's possessory interest therein. The owner must prove an invasion of the land that interfered with the right of exclusive possession of the land as a direct result of some act committed by the defendant. Any physical entry upon the land constitutes such an invasion, whether the entry is "walking upon it, flooding it with water, casting objects upon it, or otherwise." W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 13, at 70 (5th ed. 1984). Similarly, nuisance is any act that unreasonably interferes with the quiet use and enjoyment of the land of another. Unlike trespass, however, a nuisance can occur without actual physical entry upon the land. Sounds, smells, and other detractors can suffice.

In the natural disaster context, trespass or nuisance claims can provide a basis for third-party liability even when "the act" of that third party was not technically "negligent." In Akers v.

Mathieson Alkali Works, 151 Va. 1, 144 S.E. 492 (1928), for example, the plaintiff sued under theories of continuing trespass and nuisance for leakage of chemical "muck" from the defendant's storage basin. Defendant argued that the right of recovery was predicated upon a finding of negligence by defendant. The Virginia Supreme Court rejected that argument, stating:

> The law requires that every person so use his own property as not to injure the property of another …. When defendant permitted the muck to escape from its land and injure land of the plaintiff, without his fault, defendant was liable for the damages sustained by the plaintiff. The loss in such cases must be borne by plaintiff or defendant and it seems just that it fall upon the defendant by whose conduct it was made possible.

C. The Act of God Defense

The general rule in most states is that an Act of God is no defense if the damages occurred in concurrence with another act. The principle has been stated succinctly as follows: "He whose negligence joins with the act of God in producing injury is liable therefor." 1 AM. JUR. 2d, Act of God, § 11.

D. Governmental Liability

Every disaster will involve some aspect of governmental activity. Disasters affect the roadways, sewage systems, storm drains, power lines, firefighting activities, and so forth. However, each state has peculiar rules on whether and to what extent a governmental entity may be liable in tort for such damages. Historically, the common law doctrine has accorded sovereign immunity to most governmental entities under the belief that governments would be immobilized if they had to defend all of their actions. Today, most American governmental entities have limited or abrogated sovereign immunity by either legislative or judicial action. However, even where sovereign immunity has been abrogated, government entities are still immune from liability for their "discretionary or governmental acts," *e.g.*, the decision to plan roads or build buildings or install sewage systems. The immunity is often waived for the government's "proprietary or ministerial acts," *e.g.*, actions performed in the course of *maintaining* roads, buildings, sewage systems and so forth. The degree of governmental immunity is often established by statute framework or by judicial doctrine, such the public duty doctrine and the special duty doctrine. Under the public duty doctrine, government officials or agencies are deemed to have no specific duty to the public and are thus not liable for such actions as allowing a criminal to escape during a chase. However, an exception to the public duty doctrine arises if a special relationship developed between the government actor and the victim sufficient to create a special or particular duty to the victim. *See, e.g.*, Gazette v City of Pontiac, 41 F.3d 1061, 1994 F.E.D.App. 405P. (1994, CA.6 Mich.); Warren v District of Columbia, 444 A.2d 1 (1981, Dist. Col. App.); Davidson v City of Westminster, 32 Cal.3d 197, 185 Cal.Rptr. 252, 649 P.2d 894 (1982); Biloon's Electrical Service, Inc. v Wilmington, 401 A.2d 636, affd on other grounds (Del. Sup.) 417 A.2d 371 (1979, Del. Super.); Florence v Goldberg, 44 N.Y.2d 189, 404 N.Y.S.2d 583, 375 N.E.2d 763 (1978); Chapman v Philadelphia, 290 Pa. Super. 281, 434 A.2d 753 (1981).

Presenting a claim against a government will often require compliance with specific notice requirements. For example, the procedures for filing a tort claim against the federal government are set out in 28 U.S.C. § 2401 of the Federal Tort Claims Act, which requires that the claim be submitted in writing to the appropriate federal agency within two years after the claim accrues. If the federal agency sends a written denial letter, the claimant must initiate suit within six months.

Claims against governmental entities often have damage limits, typically of around $100,000. The Oregon Revised Statute 30.270(a) has a limit as low as $50,000 per occurrence for property damage.

E. Maritime Law

Coastal storms will often involve at least some damage to marinas, docks, and other structures along the coastline, often implicating federal maritime law. Admiralty jurisdiction will be triggered if the loss arises out of the storage and maintenance of boats in a marina on navigable waters. *See* Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990).

The elements of a negligence claim under maritime law essentially mirror the common law elements: duty, breach, proximate cause, and damages. Burklow & Associates v. Belcher, 719 So. 2d 31 (Fla. 1st DCA 1998)(citing Rodi Yachts, Inc. v. National Marine, Inc., 984 F.2d 880 (7th Cir. 1993); Complaint of Paducah Towing Co., Inc., 692 F.2d 412 (6th Cir. 1982); United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); The Charles H. Sells, 89 F.2d 631 (2d Cir. 1937); and Restatement (Second) of Torts §§ 283, 289-93 (1965)). In addition, the standard of conduct required of a reasonable person may be established by a legislative enactment. Burklow, 719 So. 2d at 35 (citing Restatement (Second) of Torts §§ 285-86 (1965)). Determining the duty element, however, requires a balancing between (1) the likelihood of the disaster causing injury to others, (2) the potential extent of the injury, and (3) the expense and effort of adequate precautions to avoid the occurrence. *See* Kossick v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961); Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 2 L.Ed. 368 (1959); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955); Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921).

In states with statutory guidelines governing the conduct of marina and boat owners, the question can arise as to whether the state law is pre-empted by federal maritime law. Under the "maritime-but-local" doctrine, federal law will generally govern unless (1) the matter is one which has great local significance and (2) the state law to be applied does not threaten the uniformity of federal maritime law. Burklow, 719 So. 2d at 35.

For example, in Burklow & Associates v. Belcher, 719 So. 2d 31 (Fla. 1st DCA 1998), sixteen boat owners sought the protection of Florida Statute §327.59 when they were sued by a marina owner for damages allegedly caused by the boat owners' failure to move vessels from marina before a hurricane had moved ashore. The statute barred marina owners from forcing boat owners to remove their boats from a marina and thus protected boat owners from liability for failure to remove the boats. In upholding the state statute *vis a vis* maritime law, the court found

that protection of lives during the threat of a hurricane was "a matter of paramount local concern" and that the statute did not threaten the uniformity of federal maritime law. *Id*. at 36.[i] Accordingly, to the extent that the marina owner had knowledge of the issuance of a hurricane watch or warning, any claim for damages based on a theory that the boat owners failed to evacuate their boats was barred by the state statute. *Id.* at 36. *See generally* United States v. State Road Department of Florida, 189 F.2d 591 (5th Cir. 1951); The Havana, 89 F.2d 23 (2d Cir. 1937); United States v. Bruce Dry Dock Co., 65 F.2d 938 (5th Cir. 1933); Ladner v. Bender Welding and Machine Co., Inc., 336 F.Supp. 1264 (S.D. Miss. 1971); Twery v. Houseboat Jilly's Yen, 267 F.Supp 722 (S.D. Fla. 1967).

The court was careful to note, however, "that boat owners have a duty to take all other reasonable precautions to protect the marina from harm in the face of the hurricane threat, including the duty to properly moor the boat, the duty to remove loose objects from the deck, and the duty to properly tie down anything that cannot be removed from the deck and may cause damage." Burklow, 719 So. 2d at 37 n. 5.

IV. RESOURCES

This section provides the following information sources:

A. Publications

The Federal Emergency Management Agency (FEMA) provides numerous publications on their website, www.fema.gov. Hardcopies can also be obtained by writing to: FEMA, Publications, P.O. Box 70274, Washington, DC 20024. Useful publications include:

- Disaster Mitigation Guide for Business and Industry (FEMA 190) --Technical planning information for building owners and industrial facilities on how to reduce the impact of natural disasters and man-made emergencies.
- Principal Threats Facing Communities and Local Emergency Management Coordinators (FEMA 191) -- Statistics and analyses of natural disasters and man-made threats in the U.S.
- Floodproofing Non-Residential Structures (FEMA 102) -- Technical information for building owners, designers and contractors on floodproofing techniques (200 pages).
- Non-Residential Flood-proofing -- Requirements and Certification for Buildings Located in Flood Hazard Areas in Accordance with the National Flood Insurance Program (FIA-TB-3).
- Building Performance: Hurricane Andrew in Florida (FIA 22) -- Technical guidance for enhancing the performance of buildings in hurricanes.
- Building Performance: Hurricane Iniki in Hawaii (FIA 23) -- Technical guidance for reducing hurricane and flood damage.
- Answers to Questions About Substantially Damaged Buildings (FEMA 213) -- Information about regulations and policies of the National Flood Insurance Program regarding substantially damaged buildings (25 pages).
- Design Guidelines for Flood Damage Reduction (FEMA 15) -- A study on land use, watershed management, design and construction practices in flood- prone areas.
- Comprehensive Earthquake Preparedness Planning Guidelines: Corporate FEMA 71) -- Earthquake planning guidance for corporate safety officers and managers.

Publications from other sources include:

-Mullins, G.W. 1999. *Wildfire–Feel the Heat Study Guide*. Bethesda, MD: Discovery Pictures, Inc.
- National Wildfire Coordinating Group. 1994. "Introduction to Wildland Fire" Behavior S-190, Student Workbook NFES 1860. Boise, ID: National Interagency Fire Center.
- Pyne, S.J., P.L. Andrews, and R.D. Laven. 1996. *Introduction to Wildland Fire*, 2nd Edition. New York: John Wiley & Sons, Inc.

B. Websites

National Oceanic and Atmospheric Administration website: www.noaanews.noaa.gov
National Weather Service: www.nws.noaa.gov
Rainfall data: http://www.srh.noaa.gov (gives rainfall and other data for a particular area, and narrows it down to specific cities.)
Mapping of precipitation: http://www.srh.noaa.gov/lub/wx/precip_freq/precip_index.htm (provides maps which classify rainfall events by time interval -- 30 minute, 1 hour, 2 hour, 3 hour, 6 hour, 12 hour, 24 hour -- and according to severity -- 1 year, 2 year, 5 year, 10 year, 25 year, 50 year and 100 year).
National Climatic Data Center: www.ncdc.noaa.gov
The Weather Channel: www.weather.com
Accuweather.Com: www.accuweather.com
The Weather Network: www.theweathernetwork.com
Weather Underground: www.wunderground.com
Intellicast Weather: www.intellicast.com
Online Meteorology Guide: http://ww2010.atmos.uiuc.edu
World Climate: www.worldclimate.com
Automated Weather Service: www.aws.com
The Weather Center/WeatherWatch.Com: www.weatherwatch.com
WeatherNet: http://cirrus.sprl.umich.edu/wxnet
WeatherConcepts: www.weatherconcepts.com
National Interagency Fire Center: www.nifc.com
Center for Analysis and Prediction of Storms, Univ. Oklahoma: www.caps.ou..edu

C. Experts

Cozen O'Connor maintains a database of forensic experts, including engineers, contractors, meteorologists, and numerous others. Recommendations for experts are available from Cozen O'Connor upon request.

V. SURVEY OF CASE LAW IN THE 50 STATES

Note: The below case law excerpts are quoted directly from West's Headnotes, except for discussions of the law in Alabama, the District of Columbia, Florida, Georgia (first half of the municipal liability section), North Carolina, and Virginia which were written by the author of this Handbook. The notice provisions and monetary liability limits of each state are not discussed, except for those of Alabama, Florida, North Carolina, and Virginia.

Alabama

1. Landowner's Duty to Inspect/Prepare

Alabama subscribes to an "ordinary care" standard. Adjoining landowners have a duty to exercise ordinary care not to cause or permit condition to exist that will result in injury to others who are rightfully using or occupying adjacent property. Bradford v. Universal Const. Co., Inc., 644 So.2d 864 (Ala. 1994). The court defines "ordinary care" as requiring the landowner do no affirmative act that will create an unsafe condition in the public way fronting his or her property. Id.

2. Act of God Defense

Alabama law describes an "Act of God" as an accident produced by physical causes which are irresistible, or which occurs only when there exists the intervention of such an extraordinary, violent and destructive agent, that by its very nature raises a presumption that no human means could resist its effect. Bradford v. Universal Const. Co., Inc., 644 So.2d 864 (Ala. 1994). For the Act of God defense to apply, defendant must show that the injury was due directly and exclusively to that Act of God, *i.e.*, to natural causes without human intervention, and which could not have been prevented by exercise of reasonable care and foresight. Id. An act which may be prevented by exercise of ordinary care is not an "act of God" which would immunize tort-feasor from liability. Id. *See also* General Motors Corp. v. Edwards, 482 So.2d 1176 (Ala. 1985); Bradford v. Stanley, 355 So.2d 328 (Ala. 1978) ("Act of God" only applies to events so extraordinary in nature that history of climatic variations and other conditions in particular locality affords no reasonable warning of them.).

3. Governmental Liability

a. 6-Months to Submit Notice of Claim

Under Alabama Code § 11-47023, all tort claims against a municipality shall be presented to the city clerk within six months of the loss. The statute reads:

> 11-47-23. Limitation periods for presentation of claims against municipalities.
>
> All claims against the municipality (except bonds and interest coupons and claims for damages) shall be presented to the clerk for payment within two years from the accrual of said claim or shall be barred. Claims for damages growing out of torts shall be presented within six months from the accrual thereof or shall be barred.

The notice must be sworn and must set forth very specifically the date and time of day of the incident, the location of the incident, the manner of injury, and the amount of the damages. Alabama Code §11-47-192. This statute reads:

> 11-47-192. Filing of statement as to manner of injury, damages claimed, etc.
>
> No recovery shall be had against any city or town on a claim for personal injury received, unless a sworn statement be filed with the clerk by the party injured or his personal representative in case of his death stating substantially the manner in which the injury was received, the day and time and the place where the accident occurred and the damages claimed.

However, cases have held that this provision is only applicable to personal injury claims, not to mere property damage claims. Coffee County Commission v. Smith, 480 So. 2d 1194 (Ala. 1985), City of Huntsville v. Goodenrath, 13 Ala. App. 579, 68 So. 676 (1915).

Plaintiff can file a lawsuit without providing the statutory notice, so long as the suit is commenced within six months of the loss. Browning v. City of Gadsden, 359 So. 2d 361 (Ala. 1978). Recovery is limited to the damages set forth. Perrine v. Southern Bitulithic Co., 190 Ala. 96, 66 So. 705 (Ala. 1914).

b. Municipality Has Duty to Exercise Due Care in Construction and Maintenance

In Lee v. City of Anniston, 722 So. 2d 755 (Ala. 1998), the Alabama Supreme Court held that a municipality has a duty to exercise due care in construction and maintenance of its drainage systems, analogous to the duty involved in construction and maintenance of streets. The test for determining whether county or municipality has duty to maintain roadway is whether it has right to control, or to participate in control, of roadway. §§Code 1975, 11-50-50 to 11-50-56. The court stated:

> Pursuant to §§ Ala.Code 1975, 11-50-50 to -56, "municipalities are authorized to construct and maintain drainage systems." City of Mobile v. Jackson, 474 So.2d 644, 649 (Ala.1985). Although "a municipality is not required to exercise this authority, once it does so, a duty of care arises and a municipality may be liable for damages caused by its negligence." Id. The action of a municipality in constructing a drainage system is, therefore, attended by a duty to exercise due care to "avoid injury to persons and property." Sisco v. City of Huntsville, 220 Ala. 59, 60, 124 So. 95, 95 (1929). "While related to the government function of preserving the public health, such improvement and the maintenance thereof involves continuous management." Id. (emphasis added). See Whitworth v. Utilities Bd. of the Town of Blountsville, 382 So.2d 557, 560 (Ala.1980); Brown v. City of Fairhope, 265 Ala. 596, 600, 93 So.2d 419, 422 (1957)."

Id. at 757-58. See also Hale v. City of Tuscaloosa, 449 So.2d 1243, 1247 (Ala.1984) (City is required by § 11-47-190 to maintain its roadways and streets in a safe manner and has a duty to warn of a dangerous condition on or near a roadway: "[A] railroad crossing may be a hazardous defect at or near the street, and if the City has actual or constructive notice of such a defect, it has the duty to remedy that defect.").

c. $100,000 Cap on Damages for Property Damages

Alabama Code § 11-93-2 states as follows:

> § 11-93-2. Maximum amount of damages recoverable against governmental entities; settlement or compromise of claims not to exceed maximum amounts.
>
> The recovery of damages under any judgment against a governmental entity shall be limited to $100,000.00 for bodily injury or death for one person in any single occurrence. Recovery of damages under any judgment or judgments against a governmental entity shall be limited to $300,000.00 in the aggregate where more than two persons have claims or judgments on account of bodily injury or death arising out of any single occurrence. Recovery of damages under any judgment against a governmental entity shall be limited to $100,000.00 for damage or loss of property arising out of any single occurrence. No governmental entity shall settle or compromise any claim for bodily injury, death or property damage in excess of the amounts hereinabove set forth.

However, plaintiff can recover interest in an amount exceeding the $100,000 limit. Elmore County Com'n v. Ragona, 561 So.2d 1092 (Ala.1990) (Nothing in the language of this section indicates that the Legislature intended to prohibit a judgment creditor of a county from recovering interest on his judgment, even when such a recovery, together with the recovery of damages for bodily injury or death, would exceed $100,000.).

d. Sewage and Drainage Systems

In Lott v. City of Daphne, 539 So.2d 241 (Ala. 1989), the court held that a municipality is not *required* to construct and maintain a drainage system, but once it undertakes such such construction, a duty arises to exercise a duty of care in the construction and maintenance of that system. *See also* Locke v. City of Mobile, 2002 WL 31630708 (Ala. 2002) (citing also to Alabama Code § 11-50-50 et seq. (1975)); Lee v. City of Anniston, 722 So.2d 755 (Ala. 1998) (duty to exercise due care to avoid injury to persons and property once construction of sewage system is undertaken); Garrett v. City of Vestavia Hills, 739 So.2d 46 (Ala.Civ.App. 1998) (same); Long v. Jefferson County, 623 So.2d 1130 (Ala. 1993) (cities and counties liable negligent operation and maintenance of sewers and drains under their control); Hendrix v. Creel, 297 So.2d 364, (Ala.,1974); City of Birmingham v. Cox, 159 So. 818 (Ala. 1935) (no absolute duty of a municipality to provide barriers at open ditch, sewer, or drain, unless place is alongside street and endangers travel in usual mode).

In Kennedy v. City of Montgomery, 423 So.2d 187 (Ala. 1982), the court provided a limited form of immunity to a city for damage caused by water drainage onto a property owner's land. The plaintiff owned property downstream from water controlled by the city. The court noted that there is a common-law right of lower property owner not to be injured by interference of an upper property owner with the natural drainage of the water onto the lower property. However, the court held that this rule did not apply to a lower landowner in an action against the city for alleged negligence in maintaining drainage system.

If the municipality neither owns the sewage line nor contracted to work on the sewage line, the municipality is not liable for damage to the sewage line that it did not cause. Thompson v. City of Bayou La Batre, 399 So.2d 292 (Ala. 1981). In Thomspon, a contractor's laborer was buried alive while working in a ditch on an excavation site near a sewage line to a main trunk line. Although the municipality had a *right* to inspect the connection between a property owner's sewage line to the main trunk line, the court held that this did not create a duty of the municipality to the contractor's laborer because the municipality neither owned the property nor contracted for the work.

Alaska

1. Landowner's Duty to Inspect/Prepare

2. Act of God Defense

Widmyer v. Southeast Skyways, Inc., 584 P.2d 1 (Alaska 1978): In order for an "act of God" to preclude liability in negligence, two elements must be present: the occurrence alleged to be "an act of God" must be such that it was incapable of being avoided by reasonable care or foreseen by reasonable prudence and the result of injury must have come about without the intervention of any human agency.

3. Governmental Liability

Arizona

1. Landowner's Duty to Inspect/Prepare

2. Act of God Defense

3. Governmental Liability

Campbell Estates, Inc. v. Bates, 517 P.2d 515 (Ariz.App. 1973): That city required and approved ditch did not relieve defendants of liability on account of water cast on plaintiffs' property where defendants were not forced to build ditch and city only required it as condition precedent to rezoning and development.

Arkansas

1. Landowner's Duty to Inspect/Prepare

Driggers v. Locke, 913 S.W.2d 269 (Ark. 1996): Under Restatement (Second) of Torts, possessor of land in urban area is subject to liability to persons using public highway for physical harm resulting from his failure to exercise reasonable care to prevent unreasonable risk of harm arising from condition of trees on land near highway; danger contemplated is that not resulting from presence of trees but from their condition, or probability that they may break and fall on highway. Restatement (Second) of Torts § 363(2).

Hartsock v. Forsgren, Inc., 365 S.W.2d 117 (Ark. 1963): Corporation which allowed tar to overflow into playground area could be charged with duty of anticipating likelihood that child might get pitch on his feet but was not charged with foreseeing the chance that the child would be burned because gasoline used in cleaning his feet was ignited.

Strange v. Bodcaw Lumber Co., 96 S.W. 152 (Ark. 1906): Where one damming water causes it to back up beside a highway, so as to be dangerous to travelers thereon, it is his duty to do whatever is reasonably necessary to protect the public from the danger, and this though he was given permission by the county judge to back the water; and, if guard rails are so reasonably necessary, it is no excuse for his not erecting them that he has no authority to erect them on the highway, at least where he has not asked and been refused permission.

2. Act of God Defense

Tinsley v. Cross Development Co., 642 S.W.2d 286 (Ark. 1982): If act of God concurs with another's negligence to cause damages, negligent person is not excused from liability.

Dye v. Burdick, 553 S.W.2d 833 (Ark. 1977): Where act of God is cause of injury, but act or omission of defendant so mingles with it as to also be an efficient and cooperating cause, defendant is liable.

3. Governmental Liability

Jones v. Sewer Imp. Dist. No. 3 of City of Rogers, 177 S.W. 888 (Ark. 1915): It is the duty of a municipal corporation, to so maintain its sewer system, and the outlets thereof, so that they shall not be a nuisance to property owners.

California

1. Landowner's Duty

Alpert v. Villa Romano Homeowners Assn., 96 Cal.Rptr.2d 364 (Cal.App. 2. Dist. 2000): Landowner or possessor of land has a duty to take reasonable measures to protect persons from dangerous conditions on adjoining land when landowner exercises possession or control over that adjacent land. West's Ann.Cal.Civ.Code § 1714(a).

Barnes v. Black, 84 Cal.Rptr.2d 634 (Cal.App. 4. Dist. 1999): A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner; rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off-site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site. The Rowland factors for determining scope of landowner's duty of care to maintain the property so as to avoid exposing others to unreasonable risk of injury apply regardless of whether the risk of harm is situated on-site or off- site.

Lompoc Unified School Dist. v. Superior Court, 26 Cal.Rptr.2d 122 (Cal.App.2.Dist. 1993): Duty of occupier of real property to exercise ordinary care in use and management of his or her land ordinarily does not extend to persons outside land, e.g., on adjacent land or highway. West's Ann.Cal.Civ.Code § 1714(a).

Lucas v. George T. R. Murai Farms, Inc., 19 Cal.Rptr.2d 436 (Cal.App.4.Dist. 1993): Security company's acts of protecting migrant farm workers in labor camp and banning alcohol and prostitutes at camp did not show control of the camp and, therefore, did not impose on employer and landowner duty to workers who were injured by fire in camp which was on property adjacent to that of employer and landowner. Landowner and employer of migrant farm workers owed no duty to workers who were injured by fire in camp on property adjacent to that of employer and landowner, even though foremen apparently did not prevent workers from taking scrap materials from ranch and even though landowner allowed workers to use its water and restrooms; landowner and employer tried to prohibit workers from using building materials from ranch scrap heaps, workers knew danger of using candle in the temporary structure, danger was not latent and concealed, and foreseeability of the type of harm was questionable.

Martinez v. Pacific Bell, 275 Cal.Rptr. 878 (Cal.App.1.Dist. 1990): Requirement that property owner use or maintain its property in such way as to avoid undue risk of harm to others on nearby parcels cannot be extended to impose duty on owner of property to prevent intentional torts by policing nearby areas, which it has no legal right or realistic opportunity to control, in such a way as to lessen such risks; such extension would be wholly inconsistent with principles underlying premises liability.

A. Teichert & Son, Inc. v. Superior Court, 225 Cal.Rptr. 10 (Cal.App.3.Dist. 1986): Owner or possessor of land may be liable for injuries incurred by persons off the premises as result of natural or artificial conditions on the land and activities on the land which give rise to a hazardous condition off the premises may also result in a duty being imposed on the landowner to remedy the hazard. Owner of asphalt plant located adjacent to state highway had no duty to post signs or other warning devices cautioning passersby, including bicyclist who was killed by dump truck entering plant, of frequent heavy truck traffic into and out of the plant; owner was statutorily barred from erecting warning signs on the highway and was also prevented from placing such signs on its own premises in view of traffic passing on the highway. West's Ann.Cal.Vehicle Code §§ 21100, 21102, 21352, 21353, 21400, 21465, 21468.

Davert v. Larson, 209 Cal.Rptr. 445 (Cal.App.3.Dist. 1985): Landowner or possessor owes a duty of care to persons who come on his property as well as to persons off the property for injuries due to landowner's lack of due care in management. West's Ann.Cal.Civ.Code § 1714(a).

Nava v. McMillan, 176 Cal.Rptr. 473 (Cal.App.2.Dist. 1981): Duty of land owner or possessor of land to exercise ordinary care in the management of his property usually does not extend to persons outside the land, on adjacent property, or on a sidewalk or highway, except where the physical harm caused to persons outside the land is a result of dangerous activities conducted on the land, in which event a defendant is held strictly liable for the harm done.

Sprecher v. Adamson Cos., 30 Ca.3d 358, 636 P.2d 1121 (1981): Landowner liable for fall of decaying tree regardless of whether the setting is rural or urban.

Harris v. De La Chapelle, 127 Cal.Rptr. 695 (Cal.App.2.Dist. 1976): Landowner is liable for conditions occurring where he fails to exercise reasonable care to prevent an unreasonable risk of harm to users of highways from trees on his property.

Coates v. Chinn, 332 P.2d 289 (Cal. 1958): A possessor of land is subject to liability for bodily harm caused to others outside the land by a structure or other artificial condition thereon, which possessor realizes or should realize as involving an unreasonable risk of such harm, if possessor has created the condition or, when he took possession, knew or should have known of the condition which was created before he took possession.

Marsh v. City of Sacramento, 274 P.2d 434 (Cal.App.3.Dist. 1954): Public right of passage carries with it obligation upon occupiers of abutting land to use reasonable care to see that passage is safe and although occupiers are not required to maintain and repair highway itself, they will be liable for any unreasonable risk to those who are on it and their obligation extends to any conditions, such as excavation next to street, which are dangerous to those who use street.

Werkman v. Howard Zink Corp., 218 P.2d 43 (Cal.App.2.Dist. 1950): The duty of owner installing overhead garage door opening from building into alley is measured by standard of foreseeability of injury to eyes of reasonably prudent man having regard for accompanying circumstances.

Potter v. Empress Theatre Co., 204 P.2d 120 (Cal.App.3.Dist. 1949): Possessor of land is liable for bodily harm to others outside the land caused by structure or other artificial condition thereon which possessor realizes, or should realize, involves unreasonable risk of harm, if condition is created by possessor or by third person without possessor's consent or acquiescence but reasonable care is not taken to make the condition safer after possessor knows or should know of it.

Castro v. Sutter Creek Union High School Dist., 77 P.2d 509 (Cal.App.3.Dist. 1938): The owners of a parkway must exercise due care to have parkway kept in reasonably safe condition, and member of general public is not guilty of contributory negligence as matter of law in passing over parkway. St.1923, p. 675, § 2 (repealed. See Govt.Code, § 53051).

Knott v. McGilvray, 56 P. 789 (Cal. 1899): A person engaged with tools and materials directly over a thoroughfare where people are rightfully traveling must exercise the greatest care to prevent injury to travelers.

2. Act of God Defense

Mancuso v. Southern Cal. Edison Co., 283 Cal.Rptr. 300 (Cal.App.2.Dist. 1991): Defense to liability for damages that event was "act of God" may be asserted if an unanticipated natural occurrence is sole cause of injury or damage; natural event must be so unusual in its proportions that it could not be anticipated by defendant, and fact that event is unforseeable is not enough.

American Motorcyle Assn. V. Superior Court, 578 P.2d 899 (Cal. 1978): Under common-law principles, negligent tort-feasor is generally liable for all damage of which his negligence is a proximate cause and tort-feasor may not escape this responsibility simply because another act, either "innocent" occurrence such as "Act of God" or other negligent conduct, may also have been cause of injury; in order to recover damages sustained as a result of indivisible injury, plaintiff is not required to prove that tort-feasor's conduct was sole proximate cause of injury, but only that such negligence was a proximate cause. West's Ann.Civ.Code § 1714.

3. Governmental Liability

Locklin v. City of Lafayette, 867 P.2d 724 (Cal. 1994): Governmental entity must exert control over and assume responsibility for maintenance of watercourse if it is to be liable for damage caused by streamflow on theory that watercourse has become public work.

Tri-Chem, Inc. v. Los Angeles County Flood Control Dist., Los Angeles County, 132 Cal.Rptr. 142 (Cal.App. 2 Dist. 1976): Right of city and county to flood landowners' property is no less than the right of private landowner in similar situation. For city and county to be liable to landowners for property damage arising out of flooding on landowners' property, their conduct must, minimally, have resulted in more water than would have otherwise flowed onto landowners' land, which greater quantity resulted in damage.

Osgood v. Shasta County, 123 Cal.Rptr. 442 (Cal.App. 3 Dist. 1975): Shoreline of a lake is a "natural condition" thereof within statute exempting municipal entities from liability for injury caused by natural condition of a lake. West's Ann.Gov.Code, § 831.2.

Van Winkle v. City of King, 308 P.2d 512 (Cal.App.1.Dist. 1957): Where city leased land to lessee to manufacture chemicals and authorized lessee to rent living quarters in barrack buildings on the land and to use sewage disposal plant located near the land, and lessee rented a unit in one of the barrack buildings to parents of child two years and ten months of age, and child went from barrack building 850 or 900 feet and then down stairway 85 feet in length to sewage disposal plant where he drowned, there was no implied invitation to child to play at sewage disposal plant, and child would not be deemed an "invitee" in action by parents against city and lessee for death of child. The status of the child was that of a trespasser, or at best a licensee, and parents could not recover from city and lessee for death of child, in absence of evidence of active negligence on part of city or lessee.

Beeson v. City of Los Angeles, 300 P. 993 (Cal.App.4.Dist. 1931): Statute fixing liability of municipalities for defective condition of streets and works held inapplicable to death of child drowning in storm drain when playing therein. St.1923, p. 675, § 2 (repealed. See Govt.Code, § 53051).

De Baker v. Southern Cal. Ry. Co., 39 P. 610 (Cal. 1895): A city which is directed and authorized by legislative act to improve a channel and banks of a river therein is not liable to one injured by an honest error of judgment on the part of the authorities in locating and planning such improvements.

Moore v. City of Los Angeles, 13 P. 855 (Cal. 1887): The city of Los Angeles is not liable for damage to property within its corporate limits caused by the sudden overflow of a river, the bed of which, and the right to sell water from which, belong to the city; there being no provision in its charter requiring it to protect private property from such overflow.

Colorado

1. Landowner's Duty to Inspect/Prepare

2. Act of God Defense

Wilson v. Calder, 518 P.2d 952 (Colo.App. 1973): Defense of act of God is available only when defendants can prove that injury resulted solely from natural causes.

3. Governmental Liability

Lawrence v. Buena Vista Sanitation Dist., 989 P.2d 254 (Colo.App. 1999): A claim that allows recovery without proof of negligence is precluded under the Governmental Immunity Act provision that "unless negligence is proven" no liability shall be imposed for injury resulting from dangerous condition of or operation and maintenance of a public water facility or public sanitation facility. West's C.R.S.A. § 24-10-106(4).

Scott v. City of Greeley, 931 P.2d 525 (Colo.App. 1996): Statutory waiver of public entity tort sovereign immunity under Colorado Governmental Immunity Act (CGIA) in cases of injuries resulting from operation and maintenance of public water facility or sanitation facility by public entity only requires that government be engaged in operation and maintenance of public water facility. West's C.R.S.A. § 24-10-106(1)(f).

Richland Development Co., L.L.C. v. East Cherry Creek Valley Water and Sanitation Dist., 934 P.2d 841 (Colo.App. 1996): Under provision of Governmental Immunity Act (GIA) which waives governmental immunity for injuries resulting from operation or maintenance of any public water or sanitation facility, pertinent act or omission of public entity is deemed to be an operation only if entity is vested by law with respect to purposes of public water or sanitation facility; thus, sovereign immunity is waived only if act or omission relates to purpose of facility. West's C.R.S.A. §§ 24-10-103, 24-10-106(1)(f).

Kershner v. Town of Walden, 355 P.2d 77 (Colo. 1960): In installing a sewer system, usual rules of negligence apply, and without proof of negligence in construction, maintenance or operation of sewer, city may not be held answerable for damage caused by backing up of sewer.

City of Denver v. Capelli, 4 Colo. 25 (Colo. 1877): Where a municipal corporation on which is conferred the power to construct sewers exercises its power, it will be liable for failure in the exercise of its ministerial duty in constructing the work. A city is liable for the negligent construction of a drain; and once constructed there is a duty to keep it in repair. But is not liable for defects in the plan. When the law confers a power judicial in its nature (e.g., to construct all necessary drains and sewers) upon a municipal corporation, no liability attaches so long as the authorities fail or refuse to exercise that power; nor can the city be made to respond for a mere error in judgment in the plan or system adopted. But if the power be exercised the city will be held to a strict performance of whatever ministerial duties may be incident thereto.

Wark v. Board of County Com'rs of County of Dolores, 47 P.2d 711 (Colo.App. 2002): Counties do not waive their immunity for actions arising from injuries resulting from dangerous conditions on county roads. West's C.R.S.A. § 24-10-106(1). County was not among the entities whose immunity was waived for actions for injuries resulting from dangerous conditions on roadways; counties were not included within the statutory waiver of immunity for dangerous conditions of roadways. West's C.R.S. § 24-10-106(1). County's alleged failure to maintain or improve a road, even recklessly or intentionally, did not constitute a due process violation cognizable under § 1983, and thus county was not liable to parents whose daughter was killed in an automobile accident on that road; the county did not have a constitutional duty to make road improvements. U.S.C.A Const.Amend. 14, 42 U.S.C.A § 1983. County was not liable under "danger creation" exception, for due process purposes, to parents whose daughter was killed in accident on county road and who brought a § 1983 against county; county did not affirmatively place the daughter in a position of danger, and any danger on the road was not specific to the daughter, as opposed to the public at large. U.S.C.A Cont. Amend. 14; 42 U.S.C.A § 1983.

Medina v. State, 2001 WL 1491459 (Colo. 2001): To establish a waiver of sovereign immunity under the Colorado Governmental Immunity Act (CGIA) due to a dangerous condition of a public highway which physically interferes with the movement of traffic, a plaintiff must establish that his injuries occurred as a result of: (1) the physical condition of the public facility or the use thereof; (2) which constitutes an unreasonable risk to the health or safety of the public; (3) which is known to exist or should have been known to exist in the exercise of reasonable care; and (4) which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining such facility. West's C.R.S.A. § 24-10-106(1)(d)(I). For purposes of the Colorado Governmental Immunity Act (CGIA), to "maintain" means to keep a road in the same general state of being, repair, or efficiency as initially constructed, whereas to "design" means to conceive or plan out in the mind; the critical distinction is temporal, as the state's duty to maintain can only arise after the road has been designed and constructed. Under the CGIA, whether an injury resulting from a dangerous condition of a public highway is caused by the state's failure to maintain the highway or by the inadequate design of the highway depends on the time at which the dangerous condition of the highway arose. Under the CGIA, an injury results from a failure to maintain when it is caused by a condition of the road that develops

subsequent to the road's initial design, whereas, in contrast, an injury results from inadequate design when it is caused by a condition of the road that inheres in the design and persists to the time of the injury; the CGIA waives immunity only for the former. Under the CGIA, the state's acceptance of the final design of a highway--including the level of risk remaining at the end of the design phase--determines the general state of being, repair, or efficiency of the road as initially constructed before any determination can be made on whether a dangerous condition developed subsequent to the initial design and construction and, thus, was attributable to the state's failure to maintain the road, or was attributable to the road's design. For purposes of the CGIA, the state, on the one hand, waives immunity in an action to recover for injuries resulting from its failure to maintain a public road, given that failure to return a road to the same general state of being, repair, or efficiency as initially constructed would increase the risk of injury above that deemed to be acceptable during the design stage, while the state, on the other hand, does not waive immunity for injuries that arise out of a dangerous condition which is inherent in the design of a highway, which is intrinsic to the general state of being, repair, or efficiency of the road as initially constructed. Under the CGIA, the state is not obligated to mitigate the risk of injury from a dangerous condition inherent in the design of a highway; otherwise the state would be required to reduce the risk of injury below the general state of being, repair, or efficiency of the road as initially constructed, and the statute specifically excludes from the state's maintenance obligation any duty to upgrade, modernize, modify, or improve the design of a facility. Under the CGIA, the state's duty to maintain a public roadway only requires it to ensure that the risk of injury does not increase, due to degradation of the highway, beyond the general state of being, repair, or efficiency of the road as initially constructed; designs that become inadequate over time--because of a change in use of the highway or because of changing safety standards--need not be corrected, as risk attributable to the changing use of a highway is not attributable to the road but to external sources such as an increase in traffic. For purposes of waiver of government immunity under the CGIA, when an injury is caused by breach of duty to maintain the public highway, it is the development of a dangerous condition of a public highway, subsequent to the initial design and construction of the highway, that creates in the state a duty to return the road to the same general state of being, repair, or efficiency as initially constructed; the duty to maintain only requires the state to rectify degradation not obsolescence. A dangerous condition of the public highway occurring subsequent to its initial design and construction triggers the state's duty to return the road to its original state of being, repair, or efficiency, and thus, any injury caused by the state's failure to comply with that duty may fall within the waiver provisions of the Colorado Governmental Immunity Act (CGIA). To prove that the state has waived immunity and, thus, that the trial court has jurisdiction in a motion to dismiss for lack of subject-matter jurisdiction, plaintiffs must prove that their injuries were caused by a breach of the state's duty to maintain the highway through lack of maintenance subsequent to the initial design and construction of the highway; without evidence establishing the original state of being, repair, or efficiency of the road, it is impossible to determine whether plaintiffs' injuries were caused by a dangerous condition of the road that developed subsequent to the initial design and construction of the road or whether their injuries were caused by a dangerous condition that inhered in the design itself.

Connecticut

1. Landowner’s Duty to Inspect/Prepare

Sawicki v. Connecticut Ry. & Lighting Co., 30 A.2d 556, (Conn.,1943): An owner of realty abutting on highway rests under an obligation to use reasonable care to keep his premises in such condition as not to endanger travelers in their lawful use of the highway, and if he fails to do so, and thereby renders the highway unsafe for travel, he makes himself liable though the consequent injury is received on his realty and not on highway.

Ruocco v. United Advertising Corp., 119 A. 48 (Conn. 1922): An owner of property abutting on a highway must use reasonable care to keep his premises in such condition as not to endanger travelers on the highway, and where the line between highway, and private property, is not clear and distinct, the owner may be liable, though the injury is received on his land and not on the highway; the danger being such that a prudent person would foresee that harm might result to travelers on the highway.

Cheeseborough v. Green, 10 Conn. 318 (Conn. 1834): The owner of a lower story of a building cannot maintain an action at law against the owner of an upper story for injuries caused by want of proper repairs to the roof.

2. Act of God Defense

3. Governmental Liability

Filippi v. Sullivan, 829 A.2d 77 (Conn.App. 2003): Statute providing limited waiver of sovereign immunity concerning actions against state Commissioner of Transportation and regarding defective highways is to be strictly construed, since statute was break from common law. C.G.S.A § 13a-144

White v. Town of Westport, 72 Conn.App. 169 (Conn.App. 2002): To bring a successful claim under highway defect statute, the plaintiff must prove: (1) that the highway was defective as claimed; (2) that the defendant actually knew of the particular defect or that, in exercise of its supervision of highways in the city, it should have known of that defect; (3) that defendant, having actual or constructive knowledge of this defect, failed to remedy it having had a reasonable time, under all the circumstances, to do so; and (4) that the defect must have been sole proximate cause of injuries and damages claimed, which means that plaintiff must prove freedom from contributory negligence. C.G.S.A. § 13a-149.

L'Homme v. Department of Transp., 805 A.2d 728 (Conn.App. 2002): To prove a breach of duty under highway defect statute, the plaintiff must prove by a preponderance of the evidence: (1) that the highway was defective as claimed; (2) that the defendant actually knew of the particular defect or that, in the exercise of its supervision of highways in the city, it should have known of that defect; (3) that the defendant, having actual or constructive knowledge of this defect, failed to remedy it, having had a reasonable time, under all the circumstances, to do so; and (4) that the defect must have been the sole proximate cause of the injuries and damages claimed. C.G.S.A. § 13a-144. It is the plaintiff's burden to prove each of elements to show breach of duty under the highway defect statute, and failure to prove any element will preclude a finding of liability under the statute. C.G.S.A. §13a-144.

Bovat v. City of Waterbury**,** 258 Conn. 573 (Conn. 2001): To prove a breach of statutory duty under the defective highway statute, the plaintiff must prove by a preponderance of the evidence: (1) that the highway was defective as claimed; (2) that the defendant actually knew of the particular defect or that, in the exercise of its supervision of highways in the city, it should have known of that defect; (3) that the defendant, having actual or constructive knowledge of this defect, failed to remedy it having had a reasonable time, under all the circumstances, to do so; and (4) that the defect must have been the sole proximate cause of the injuries and damages claimed. C.G.S.A. § 13a-149.

Spears v. Garcia, 785 S.2d 1181, (Conn.App. 2001): Minor and her mother could rely on statute, abrogating governmental immunity for a direct cause of action under certain circumstances, to bring a direct cause of action for negligence against city and its fire department, alleging that motor vehicle struck minor after she was pushed into the road by a high pressure stream of water flowing from a fire hydrant, which had been opened by an unauthorized person, and that hydrant did not have a safety device or a cap to prevent unauthorized openings. C.G.S.A § 52-557n.

Peterson v. Town of Oxford, 459 A.2d 100 (Conn. 1983): Town was not immune from liability for damages to property owners' land caused by flooding which allegedly resulted from town's unreasonable use of an easement.

Morse v. Borough of Fair Haven East, 48 Conn. 220 (Conn. 1880): A town constructed in the borough of F. a highway along a hill above plaintiff's house, and in consequence of removing the earth and filling the excavation with stones to make a better roadbed, water at times ran down into plaintiff's cellar, causing damage. After the building of the highway, but before the injury to plaintiff, the borough provided by amendment to its charter that thereafter the town should not have power to lay out highways within the borough, nor be liable for any damage arising from any defective highway therein, but that the borough should be liable therefor. Held that, if the borough was liable to plaintiff, it was not because of the amendment to its charter, the injury not arising from a "defective highway," but only by reason of its intentionally continuing a nuisance for which the town was originally liable.

Delaware

1. Landowner's Duty to Inspect/Prepare

Wilmington Country Club v. Cowee, 747 A.2d 1087 (Del. 2000): A property owner owes a business invitee a duty to provide safe ingress and egress, including the duty to warn or protect against hazards on adjacent property.

Salevan v. Wilmington Park, 72 A.2d 239 (Del.Super. 1950): Public has right to free and unmolested use of public highways, and abutting landowners may not so use their land as to interfere with rights of persons lawfully using the highways. The inherent nature of a game of baseball is such as to require landowner permitting game to be played on land adjacent to highway to take reasonable precautions for protection of traveling public, and what precautions are reasonable must depend on circumstances of particular case. Only those precautions for

protection of traveling public are required to be taken by landowner permitting baseball to be played on land adjacent to highway which inherent nature of the game and its past history in the particular location make necessary.

2. Act of God Defense

3. Governmental Liability

District of Columbia

1. Landowner's Duty to Inspect/Prepare

The District of Columbia imposes liability for a patent, naturally-occurring hazard , regardless of whether the setting was rural or urban. Dudley v. Meadowbrook, Inc., 166 A.2d 743 (D.C. Mun. Ct. App. 1960) (tree); Turner v. Ridley, 144 A.2d 269 (D.C.App. 1958) (tree).

2. Act of God Defense

3. Governmental Liability

Florida

1. Landowner's Duty to Inspect/Prepare

Liability of a landowner to an adjoining landowner for conditions on the owner's property is determined on a case by case basis under established principles of negligence law, regardless of whether the conditions on the landowner's property are man-made or natural conditions, such as foliage. Whitt v. Silverman, 788 So.2d 210 (Fla. 2001). As noted in Short v. Lakeside Community Church, 700 So.2d 772 (Fla. 2d DCA 1997), the common law duty of all landowners to protect invitees also imposes a duty toward of invitees on nearby property, so long as the landowner's "foreseeable zone of risk" extends beyond the boundaries of the landowner's own property. *See also* Gunlock v. Gill Hotels Co., Inc., 622 So.2d 163 (Fla. 4th DCA 1993); Johnson v. Howard Mark Productions, Inc., 608 So.2d 937 (Fla. 2d DCA 1992). However, the landowner owes no duty of care to invitees off the premises for events that occur solely off the premises and which are wholly unconnected to any activity on the landowner's premises. Concepcion By and Through Concepcion v. Archdiocese of Miami By and Through McCarthy, 693 So.2d 1103 (Fla. 3d DCA 1997).

2. Act of God Defense

Florida imposes liability, even in the face of a so-called Act of God, so long as the result was caused by a "congruence" of the defendant's own negligent act with the natural force or condition. Marrero v. Salkind, 433 So.2d 1224 (Fla. 3d DCA. 1983); Goodman v. Becker, 430 So.2d 560 (Fla. 3d DCA 1983).

In Atlantic Coast Line R. Co. v. Hendry, 150 So. 598 (Fla. 1933), a railroad company constructed a railroad track which bisected the plaintiff's farm. There was a natural waterway near the farm and in order to cross the waterway, the railroad constructed a fill for its trackbed in which it placed a four-foot culvert for the passage of water. During heavy rains, the culvert overflowed and flooded the farm, destroying the plaintiff's crops and the plaintiff sued for damages.

The defendant railroad asserted that the plaintiff's crops were damaged solely as a result of an Act of God. The Florida Supreme Court upheld the determination that the defendant's negligence was a contributing proximate cause of the crop damage. The court determined that the burden was on the defendant who asserts the Act of God defense to show that the damages resulted solely from the Act of God. Further, the Court stated:

> The defense of vis major may be successfully interposed in an action for damages resulting solely from an Act of God; but if the defendant's negligence is a present contributing proximate cause, which, commingled with the Act of God, produces the injury, then the defendant is liable notwithstanding the Act of God. Citing Davis v. Ivey, 112 So. 264 (Fla. 1927).

3. Governmental Liability

a. Notice Requirements:

The claimant must provide written notice within 3 years to the governmental agency and the Department of Insurance. Florida Statute § 768.28(6). Claimant must file suit within 4 years. Florida Statute § 95.11(3)(d), § 11.065(1).

b. Liability Limits

In cases where Florida has waived sovereign immunity, the cap on damages is generally $100,000.

d. General rule: Immunity given for negligent discretionary policy-making activities but not negligent operational activities

Discretionary policy-making or planning activities of governmental entities are immune from tort liability. Lee v. Department of Health and Rehabilitative Servs., 698 So.2d 1194, 1198 (Fla.1997). However, immunity from tort liability is waived for negligent activities that are operational and for which a common law or statutory duty of care exists. Department of Health and Rehabilitative Servs. v. B.J.M., 656 So.2d 906 (Fla.1995); *see also* Trianon Park Condominium Ass'n v. City of Hialeah, 468 So.2d 912 (Fla.1985); Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla.1979).

e. Cities and Counties:

i. Fire protection services are discretionary thus protected:

City of Daytona Beach v. Palmer, 469 So. 2d 121 (Fla. 1985): Held: (1) there is no common-law duty of individual property owners to provide fire protection services; (2) there is no statutory duty of care upon which to base governmental liability for discretionary actions of fire fighters in combating fires; (3) decisions of how to properly fight a particular fire, how to rescue victims in a fire, or what and how much equipment to send to a fire are discretionary judgmental decisions which are inherent in public safety function of fire protection; and (4) governmental entities are clearly liable for negligent conduct resulting in personal injury while fire equipment is being driven to the scene of a fire or personal injury to a spectator from the negligent handling of equipment at the scene, as a result of the enactment of section 768.28, Florida Statutes (1983).

ii. Storm Sewer Systems

City not liable under Florida's waiver of sovereign immunity statute, Florida Statute § 768.28, for claims of negligent design, installation, and maintenance of allegedly dangerous storm sewer system. Collom v. City of St. Petersburg, 400 So.2d 507 (Fla.App. 2 Dist. 1981).

iii. Police protection

Some police actions are discretionary and thus protected but some are statutorily mandated and thus not protected:

Protected Police Activities:

Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970): City and County not liable for riot damage to plaintiffs' businesses incurred during Republican National Convention in Miami Beach, because even though the duty of police protection is owed to the public generally, the duty does not inure to the benefit of particular private citizens.

Everton v. Willard, 468 So. 936 (Fla. 1985): Approving dismissal of wrongful death action for deputy sheriff citing and releasing, rather than arresting, intoxicated motorist who then caused fatal collision 15 minutes later, the court held: (1) the decision to arrest is a discretionary judgmental power basic to police power function of governmental entities for which police are afforded governmental immunity, (2) although there could be a duty of care owed to an individual if a special relationship exists between an individual and a governmental entity, such as where police accept responsibility to protect an individual who has assisted them and the individual is in danger due to that assistance. Court states as follows:

> In our opinion, there is no distinction between the immunity offered the police officer in making a determination of whether to arrest an individual for an offense and the discretionary decision of the prosecutor of whether to prosecute an individual or the judge's decision of whether to release an individual on bail or to place him on probation. All of these decisions are basic discretionary, judgmental decisions that are inherent in enforcing the laws of the state. They are clearly not ministerial acts as contemplated by the Huhn [v. Dixie Insurance Co., 453 So. 2d 70 (Fla. 5th DCA 1984)] decision or the dissent.

Unprotected Police Activities

White v. City of Waldo, 659 So. 2d 707 (Fla. 1st DCA 1995): In claim by motorcyclist injured when his motorcycle collided with a stray horse being pursued by a city police officer in unlit patrol car, court held that: (1) officer owed duty to exercise reasonable care to make his acts safe for others; (2) officer's decision to conduct pursuit in unlit patrol car with private citizen on hood was not discretionary one for which immunity from tort liability was available; and (3) evidence was for jury on issue of whether chasing horse created danger that did not previously exist and whether doing so in unlit patrol car deprived motorists of any notice of such danger. In its decision, however, court noted:

> Law enforcement officers must exercise discretion in enforcing laws and protecting the public safety. For that reason, state and local government enjoys sovereign immunity for actions law enforcement personnel take or omit in performing "discretionary activities … inherent in the act of governing." City of Jacksonville v. Mills, 544 So. 2d 190 (Fla. 1989). Determining probable cause for arrest is an example. A plaintiff victimized by a person the authorities failed to arrest cannot recover damages from the public fisc on that account. Everton v. Willard, 468 So. 2d 936 (Fla. 1985) (no recovery where driver who had been drinking was involved in fatal accident some fifteen minutes after sheriff's deputy stopped but did not arrest him.) The decision when or whether to make an arrest is within the discretion of law enforcement officers in the executive branch, Rodriguez v. City of Cape Coral, 468 So. 2d 963 (Fla. 1985); City of Daytona Beach v. Huhn, 468 So. 2d 963 (Fla. 1985); Everton, subject, of course, to judicially enforceable rights against unlawful arrest.

Simpson v. City of Miami, 700 So. 2d 87 (Fla. 3d DCA 1997): City not entitled to sovereign immunity in wrongful death claim for police releasing from cruiser a violator of a domestic violence injunction:

> If it is determined that the City of Miami Police Officer Fuentes' action of securing the domestic violence injunction violator in the police cruiser, after having responded to a call about an injunction violation, constituted an arrest of the violator, then pursuant to the section 741.30(9)(b), Florida Statutes (1993) provision that upon arrest the violator "shall be held in custody until brought before the court as expeditiously as possible[,]" (emphasis added), the officer had no discretion under sovereign immunity principles to release the violator, *see* Everton v. Willard, 468 So. 2d 936 (Fla. 1985), and was required by statute to take the arrested violator before a judge.

f. School Boards: Not immune for premises liability, which is operational negligence

Green v. School Board of Pasco County, 200 WL 192148 (Fla. 2d DCA 2/18/00): Police officer who fell from unprotected retaining wall on school premises allowed to bring premises liability

action against school board, because (1) school board's alleged failure to illuminate area or erect guardrail on retaining wall was operational negligence for which it was not shielded by sovereign immunity, and (2) issues of fact existed as to whether officer's prior knowledge of retaining wall obviated duty to warn of unprotected ledge. Once a government entity builds or takes control of property or an improvement, it has the same common law duty as a private landowner to properly maintain and operate the property.

g. Highways, Roads, and Bridges

The decision to install traffic control devices and plan and align road or improve or upgrade roads or intersections is governmental, providing governmental immunity for those decisions. Polk County v. Sofka, 2001 WL 1245329, (Fla.App.2.Dist. 2001). However, the general rule has an exception where a governmental entity creates a known dangerous condition which is not readily apparent to persons who could be injured by the condition. Id. A city is not an insurer of the motorist or the pedestrian. Castano v. City of Miami, 840 So.2d 412 (Fla.App.3.Dist. 2003). However, the city may be held liable for defects of which the city had actual or construction knowledge, *i.e.*, defects that have been in existence so long that they could have been discovered by the exercise of reasonable care, and repaired.

Georgia

1. Landowner's Duty to Inspect/Prepare

Motel Properties, Inc. v. Miller, 436 S.E.2d 196 (Ga. 1993): "Approach" to property, which owner or occupier of property has duty of ordinary care to keep safe, generally means that property directly contiguous, adjacent to and touching those entryways to premises, through which owner or occupier, by express or implied invitation, has induced or led others to come upon his premises for any lawful purpose, and through which such owner or occupier could foresee reasonable invitee would find it necessary or convenient to traverse while entering or exiting in course of business for which invitation was extended; "contiguous, adjacent to, and touching" means that property within last few steps taken by invitees, as opposed to mere pedestrians, as they enter or exit premises. O.C.G.A. § 51-3-1. Under certain circumstances, noncontiguous property can be deemed "approach" which owner or occupier of land has duty to exercise ordinary care to keep safe, because owner or occupier has extended approach to his premises by some positive action, such as constructing sidewalk, ramp or other direct approach; exception is based on fact that owner or occupier, for his own particular benefit, has affirmatively exerted control over public way or another's property. O.C.G.A. § 51-3-1.

International Paper Realty Co. v. Bethune, 344 S.E.2d 228 (Ga. 1986): Landowner whose land is immediately adjacent to public way owes duty of due care to guard, cover or protect artificial condition on property that is otherwise so situated that persons lawfully using public way might be accidentally injured thereon.

Sinkovitz v. Peters Land Co., 64 S.E. 93 (Ga.App. 1909): It is the duty of the owner of a building abutting upon a highway to use ordinary care to keep it from being a source of danger to the public after its construction, as much as it is his duty originally to see that it is not a source of

danger by improper construction. Though the owner of a building abutting on a street is not an insurer, he must exercise reasonable care to keep it in such condition that neither the building nor any part thereof will fall and injure passers-by.

2. Act of God Defense

Strange v. Bartlett, 513 S.E.2d 246 (Ga.App. 1999): Where damages are caused by the combination of an act of God and the fault of man, such damages must be attributed entirely to human error; the presence of one excludes the existence of the other. O.C.G.A. §1-3-3(3). Statutory definition of "act of God" that will preclude liability in negligence action incorporates three basic elements: (1) an accident produced by (2) an irresistible or inevitable force of nature or God, (3) which excludes all idea of human agency or conduct. O.C.G.A. §1-3-3(3).

Mann v. Anderson, 426 S.E.2d 583 (Ga.App. 1992): Act which may be prevented by exercise of ordinary care is not "act of God." O.C.G.A. § 1-3-3(3)

Zayre of Georgia, Inc. v. Haynes, 213 S.E.2d 163 (Ga.App. 1975): An "accident," defined by statute as that which takes place without one's foresight or expectation or begins to exist without design, is something which would not have been precluded by exercise of ordinary care on part of either plaintiff or defendant; it may be an "Act of God" or a pure casualty which exists without fault or carelessness on part of either party. Code, § 102- 103. An "accident," defined by statute as that which takes place without one's foresight or expectation or begins to exist without design, is something which would not have been precluded by exercise of ordinary care on part of either plaintiff or defendant; it may be an "Act of God" or a pure casualty which exists without fault or carelessness on part of either party. Code, § 102- 103.

3. Governmental Liability

State sovereign immunity is governed by the Ga. Const. 1983, Art. I, §2, par. 9, which reads:

> (a) The General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for the making, handling, and disposition of actions or claims against the state and its department, agencies, officers, and employees, upon such terms and subject to such conditions and limitations as the General Assembly may provide. …

O.C.G.A §50-21-24, however, sets forth certain exceptions to state liability.

County sovereign immunity is premised upon O.C.G.A. §36-1-4, entitled "When county liable to be sued" and states: "A County is not liable to suit for any cause of action unless made so by statute." The Georgia Supreme Court in Gilbert v. Richardson, 452 S.E.2d 476, 264 Ga. 744 (1994) held that the 1991 amendment to the constitutional doctrine of sovereign immunity, extending immunity to state and all of its departments and agencies, [Const. Art. I, §2, Par. (e)] applied to counties. However, the Court also held that the enactment of a state torts claims act was only one of the ways the legislature could constitutionally waive sovereign immunity. Thus, the Code provisions allowing a waiver of sovereign immunity when a county purchases liability

insurance were upheld. Furthermore, the court also noted that the county's participation in GIRMA, the Georgia Interlocal Risk Management Association, did constitute liability insurance and thus a waiver of sovereign immunity. Claims against counties are governed by O.C.G.A §36-11-1 which provides that claims must be presented within 12 months. Presentation of the claim includes service or process as well as filing of the suit. Failure in this regard is an absolute bar to the claim.

As to municipal sovereign immunity, the Georgia Supreme Court in City of Thomaston v. Bridges, 264 Ga. 4, 439 S.E.2d 906 (1994) held that the constitutional amendment language enacted in 1991 was not a complete blanket reinstatement of sovereign immunity. Thus, as to municipalities, O.C.G.A. §36-33-1 remains viable.

The primary exception to the doctrine of sovereign immunity as it applies in the context of municipal and county immunity is the doctrine of nuisance. Several decisions discuss the theory of nuisance, particularly in the context of water and sewage backups. In City of Thomasville v. Shank, 263 Ga. 624, 437 S.E.2d 306 (1993), Mrs. Shank filed suit against the City when her home was flooded with raw sewage. The Supreme Court first defined the nuisance exception:

> A municipality like any other individual or private corporation may be liabile for damages it causes to a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or ministerial function.

(citations omitted). Next, the court expressly upheld the validity of the nuisance exception since the most recent constitutional amendment:

> Accordingly, we reaffirm the long-standing principle that a municipality is liabile for creating or maintaining a nuisance which constitutes either a danger to life and health or a taking of property. This holding is not in conflict with the 1990(1) amendment as that amendment deals with the concept of waiver, and in the case of nuisance we are dealing not with a waiver of but an exception to sovereign immunity.

Department of Transp. v. Montgomery Tank Lines, Inc., 558 S.E.2d 723 (Ga.App. 2001): Under the Georgia Tort Claims Act, the Department of Transportation (DOT) was not immune from suit by insured and motor vehicle insurer for contribution or indemnity after insured and insurer paid damages for settlement of wrongful death action arising from motor vehicle collision, where insured and insurer alleged that DOT negligently designed and maintained intersection where collision occurred, and DOT could have been joined as defendant in wrongful death action. O.C.G.A. § 50-21-21 et seq.

Trax, Inc. v. City of College Park, 221 S.E.2d 595 (Ga. 1976): City had duty to take steps to maintain flow of water in creek which was part of city's surface water drainage system whenever it became known that changes had occurred which reduced flow of water and made flooding of public or private property likely.

City of Douglas v. Cartrett, 137 S.E.2d 358 (Ga.App. 1964): An effluent line from sewage disposal plant, being a part of the sewage system of a municipality, is for the protection of the public health and its maintenance is a governmental function.

City of Macon v. Cannon, 79 S.E.2d 816 (Ga.App. 1954): City had duty to provide for drainage of the increased run-off of surface water from increased impervious areas within city limits, whether such areas were made directly by municipality or by state with federal funds. A municipal corporation is liable in damages for nuisance created by the grading and drainage of its streets in such a manner as to impair the health of families and produce noxious scents rendering enjoyment of their property impossible. Code, §§ 69-301, 72-101.

City Council of Augusta v. Williams, 58 S.E.2d 208 (Ga.App. 1950): The authorized maintenance by municipality of a drainage system for purpose of surface water is a governmental function, and where no nuisance was involved, owner of realty was not entitled to damages to his realty suffered by negligent maintenance and by overflow of system.

Foster v. Mayor and Aldermen of City of Savannah, 48 S.E.2d 686 (Ga.App. 1948): The duty of a city to maintain its sewerage and drainage system in a good working and sanitary condition is a governmental function for which there is no liability based on negligence where the system is not operated for profit, and no substantial charges are made for the ordinary use, enjoyment and benefits of the system. Code, § 69-301. Action by private property owners would not lie against city for alleged negligence in failing to remove obstructions in its sewerage system causing overflow into property owners' store where system was not operated for profit and no substantial charges were made for ordinary use, enjoyment and benefits of the system. Code, § 69-301.

City of Tallapoosa v. Goebel, 10 S.E.2d 201 (Ga.App. 1940): A municipality is not an insurer of its water or sewer system any more than of its streets, and is required only to use reasonable care in establishing and maintaining such system.

Southland Coffee Co. v. City of Macon, 3 S.E.2d 739 (Ga.App. 1939): It is never to be presumed that the law intended that city's charter right to construct and maintain drainage systems carries with it the right to construct or maintain them in such a way as to endanger the health or life of another. In tort action against city for damages allegedly caused by maintenance of nuisance, consisting of storm-sewer system, wherein it was not contended that there was danger to health or life, negligence of city was an essential element of right to recover, and instruction requiring jury to find "ordinary neglect" was not erroneous. Code 1933, § 72-101; Const. art. 1, § 3, par. 1.

City of Macon v. Douglas, 165 S.E. 922 (Ga.App. 1932): City maintaining drainage system which has become inadequate is liable to owners of adjoining premises on which surface waters overflow.

City of Macon v. Macon Paper Co., 132 S.E. 136 (Ga.App. 1926): City held liable for maintaining drainage system inadequate to carry off surface waters overflowing adjoining premises.

Langley v. City Council of Augusta, 45 S.E. 486 (Ga. 1903): If a municipal corporation negligently constructs a sewer, or maintains it, so as to constitute a nuisance, it is liable to one injured thereby.

Mayor of Savannah v. Donnelly, 71 Ga. 258 (Ga. 1883): Where a municipal corporation gave express permission to an individual to open a ditch across a street in the city, in order to connect the water pipes of a private person with the water works belonging to the city, this was in effect the opening of the ditch by the city itself; it was the act of the city, and the latter became liable for any damage which might accrue to any person by reason of the careless and negligent manner in which the work was done. It was the duty of the city to have superintended and overlooked the work which it permitted to be done on its streets, and to have seen that it was done in such manner that no injury should come to passers on the street from defects therein.

Hawaii

1. Landowner's Duty to Inspect/Prepare

Kaczmarczyk v. City and County of Honolulu, 656 P.2d 89 (Haw. 1982): An occupier of land is under a duty to exercise all reasonable care for the safety of all persons known to be, or reasonably anticipated to be, upon its premises; where premises front upon the ocean, this responsibility extends to those swimming in waters along the property's beach frontage.

2. Act of God Defense

3. Governmental Liability

Wemple ex re. Dang v. Dahman, 72 P.2d 499 (Haw.App. 2002): Owners of road were not immune from negligence liability under the Hawaii Recreational Use Statute (HRUS); although the road was privately owned, it was in fact a public easement open for use by the general public, and the owners could not have directly or indirectly invited the child who was struck by a motor vehicle upon the road for recreational purposes so as to qualify for immunity. HRS §§ 520-1, 520-3

Idaho

1. Landowner's Duty to Inspect/Prepare

Splinter v. City of Nampa, 215 P.2d 999 (Idaho 1950): Private owners of realty are liable for damages inflicted upon persons in or near their premises by their negligence in connection with their property, though injury is inflicted outside and beyond limits of their property.

2. Act of God Defense

3. Governmental Liability

Lundahl v. City of Idaho Falls, 303 P.2d 667 (Idaho 1956): Municipalities are generally held liable for negligence in construction and maintenance of drainage and sewer systems and for negligence in other activities which municipalities are empowered but not required to carry out.

Yearsley v. City of Pocatello, 210 P.2d 795 (Idaho 1949): City is not an insurer of condition of its drainage or water systems but must use ordinary care and skill in constructing and maintaining them, and is likewise bound to take notice that timbers or pipes are liable to decay or deteriorate from time and use, and must take such measures as ordinary care would dictate to guard against breaking of flumes or leaking of system because of decay of timbers or deterioration of pipes used in construction.

Illinois

1. Landowner's Duty

Illinois imposes upon a landowner in an urban or residential setting the duty to inspect the property for defects in trees and other naturally occurring objects. *See, e.g.*, Mahurin v. Lockhart, 71 Ill. App. 3d 691, 390 N.E.2d 523 (1979).

Hanks v. Mount Prospect Park Dist., 614 N.E.2d 135 (Ill.App.1.Dist. 1993): Where landowner has exercised no control over adjacent property, he will not be held liable for injuries which occur on adjacent property. Liability will not be imposed on landowner for injury which occurs on adjacent property where injury is not caused by physical defect in adjacent property but is a result of an independent factor.

Kavanaugh v. Midwest Club, Inc., 517 N.E.2d 656 (Ill.App.2.Dist. 1987): In order for motorist to recover from landowner for negligence in maintaining condition of land adjacent to the road, the complaint must allege facts that demonstrate that the condition of the road was such that a vehicle was likely to deviate from it in the ordinary course of travel and come in contact with the artificial condition on the land.

Nichols by Nichols v. Sitko, 510 N.E.2d 971 (Ill.App.1.Dist. 1987): As a general rule, a possessor of land is not liable for physical harm caused to others outside of land by natural condition of land.

Dealers Service & Supply Co. v. St. Louis Nat. Stockyards Co., 508 N.E.2d 1241 (Ill.App.5.Dist. 1987): Landowner's possession and control of land gives landowner power of control over those whom he allows to enter the land, which he must exercise for protection of those outside premises.

Mahurin v. Lockhart, 390 N.E.2d 523 (Ill.App.5.Dist. 1979): A landowner in a residential or urban area has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on premises, including trees of purely natural origin.

Thomas v. Douglas, 117 N.E.2d 417 (Ill.App.1.Dist. 1954): In action for injuries sustained by pedestrian when falling into a window well on defendant's premises while walking along a private passageway located on land adjoining defendant's premises, defendant had duty to furnish plaintiff with a reasonably safe means of ingress to and egress from her home at night.

2. Act of God Defense

3. Governmental Liability

Mull v. Kane County Forest Preserve Dist., 786 N.E.2d 236 (Ill.App.2.Dist. 2003): Provision of Local Governmental and Governmental Employees Tort Immunity Act relieving public entity from liability for injuries caused by condition of "riding trail" applied to bicyclist's accident on unpaved bicycle path covered with gravel and asphalt in county forest preserve. S.H.A. 745 ILCS 10/3- 107 (a, b). Fact that path on which bicyclist fell while riding on a bicycle path in county forest preserve ran through some developed areas, was adjacent to a road, and was located near entrance of a subdivision, did not deprive preserve of immunity under provision of Local Governmental and Governmental Employees Tort Immunity Act dealing with condition of "riding trail"; trail was unpaved and surrounded by wild grasses and shrubs. The nature of the land next to a bicycle riding path should not determine immunity under provision of Local Governmental and Governmental Employees Tort Immunity Act dealing with condition of "riding trail"; if it did, immunity and non-immunity could vary depending on an adjacent landowner's decision to develop or not develop his land. S.H.A. 745 ILCS 10/3-10(a, b).

Zakoff v. Chicago Transit Authority, 782 N.E.2d 873 (Ill.App.1.Dist. 2002): Duty may be owed to motorist who deviates from ordinary course of travel if such deviation was reasonably foreseeable.

Independent Trust Corp. v. City of Chicago Dept. of Water, 693 N.E.2d 459 (Ill.App.1.Dist. 1998): Tort Immunity Act does not grant general immunity to municipal water providers, so that such providers are as general rule liable for their negligent conduct, unless their specific conduct is encompassed within specific section of Act. S.H.A. 745 ILCS 10/5-101 et seq.

Santelli v. City of Chicago, 584 N.E.2d 456 (Ill.App. 1 Dist. 1991): Although municipality is not liable for failing or refusing to improve its streets, sidewalks, bridges, sewers and the like, once municipality undertakes such project, it is liable when improvement creates unreasonably dangerous condition. S.H.A. ch. 85, ¶ 3-103(a).

Powell v. Village of Mt. Zion, 410 N.E.2d 525 (Ill.App.4.Dist. 1980): Municipalities do not have common-law immunity pertaining to sewer systems.

Bolger v. City of Chicago, 198 Ill.App. 123 (Ill.App.1.Dist. 1916): A city must use ordinary care to see that the safety of the public is not endangered as a result of its arrangement and management of the instrumentalities beneath the street.

Lunger v. City of Chrisman, 145 Ill.App. 543 (Ill.App. 1908): When a city voluntarily constructs a drain for the benefit of the public it becomes its duty to see that the drain is kept in

repair.

City of Peoria v. Eisler, 62 Ill.App. 26 (Ill.App. 1895): A city will be liable where it constructs a sewer to carry off surface water if the sewer is wholly insufficient, and that fact might have been known to the authorities had they exercised reasonable care and judgment, if damages result from such negligence.

Indiana

1. Landowner's Duty to Inspect/Prepare

Sizemore v. Templeton Oil Co., Inc., 724 N.E.2d 647 (Ind.App. 2000): The duty of a landowner to provide safe ingress and egress to a commercial property does not extend to a duty with regard to the condition of adjacent property when that condition was not created by or related to the landowner's use of his own property.

Sheley v. Cross, 680 N.E.2d 10 (Ind.App. 1997): Person may not use his land in such way as to unreasonably injure interests of persons not on his land--including owners of adjacent lands, other landowners, and users of public ways, and thus, landowner does owe duty to traveling public to exercise reasonable care in use of his property so as not to interfere with safe travel on public roadways. Occupier of land abutting on or adjacent to, or in close proximity to, public highway owes duty to traveling public to exercise reasonable care to prevent injury to travelers upon highway from any unreasonable risks, created by such occupier, which he had suffered to continue after he knew, or should have known, of their existence, in cases where such occupier could have taken reasonable precautions to avoid harm to such travelers.

Indiana Limestone Co. v. Staggs, 672 N.E.2d 1377 (Ind.App. 1996): Public right of passage in road carries with it obligation upon occupiers of adjacent land to use reasonable care not to endanger such passage by excavations or other hazards so close to road as to make it unsafe to persons using road with ordinary care.

Tibbs v. Huber, Hunt & Nichols, Inc., 668 N.E.2d 248 (Ind. 1996): One in possession of premises does owe duty to passersby to keep adjoining areas reasonably clear of risks.

Lever Bros. Co. v. Langdoc, 655 N.E.2d 577 (Ind.App. 1995): Plant operator which discharged waste materials into public sewer system had duty not to discharge its waste in unreasonable manner so as to injure interests of other persons served by system, and breached that duty when it discharged material which interfered with system and damaged tenant of neighboring building.

Lutheran Hosp. of Indiana, Inc. v. Blaser, 634 N.E.2d 864 (Ind.App.4.Dist. 1994): Landowner or business enterprise does not normally affect risks outside its boundaries, and, consequently, it is not normally responsible for injuries suffered on abutting property.

Valinet v. Eskew, 574 N.E.2d 283 (Ind. 1991): Neither a possessor of land nor vendor nor lessor nor other transferor is liable for physical harm caused to others outside of the land by a natural condition of the land, except that a possessor of land in an urban area is subject to liability to

persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

Blake v. Dunn Farms, Inc., 413 N.E.2d 560 (Ind. 1980): Duty of landowner to person on adjacent road is not similar to that of landowner to business invitee. Duty of a landowner to a person on an adjacent road is similar to that of a landowner to an invitee. Owner of property adjacent to a highway owes a positive duty to public to exercise reasonable care to prevent injury caused by property's defective or dangerous condition.

Pitcairn v. Whiteside, 34 N.E.2d 943 (Ind.App. 1941): The occupier of land in close proximity of a highway owes duty to traveling public to exercise reasonable care to prevent injury to travelers from any unreasonable risks created by such occupier which he had suffered to continue after he knew or should have known of their existence, in cases where occupier could have taken reasonable precaution to avoid harm to travelers. The traveling public is entitled to make free use of highways and streets and an occupier of land which is adjacent to or in close proximity of such highway or street, cannot so use property occupied as to interrupt or interfere with exercise of such right by creating or maintaining a condition that is unnecessarily dangerous.

Standard Brewery v. Musulin, 125 N.E. 70 (Ind. 1920): Owner of premises, to which a large signboard is attached near the line of the street, is required to exercise only "ordinary care," or such care as person of ordinary prudence would use under like conditions and circumstances, for the safety of persons and property in the street.

2. Act of God Defense

Childs v. Rayburn, 346 N.E.2d 655 (Ind.App.1.Dist. 1976): Concept of concurring negligence or causation is applicable to those situations where one of two proximate causes of injury is an act of God and the other is personal negligence. An act of God does not negate liability for concurring human negligence; where an act of God concurs with human negligence, negligence may result in liability for injury occurring as a consequence of combined forces.

William H. Stern & Son, Inc. v. Rebeck, 277 N.E.2d 15 (Ind.App.1.Div. 1971): In order for a defendant to be relieved from liability under an act of God defense, he must show that plaintiff's injury was caused solely by an act of God.

3. Governmental Liability

Rodman v. City of Wabash, 497 N.E.2d 234 (Ind.App. 4 Dist. 1986): City's decision to install sewer system constituted the performance of a discretionary function immune from liability under State Tort Claims Act. IC 34-4-16.5-3(6) (1982 Ed.).

City of Logansport v. Cotner, 185 N.E. 634 (Ind. 1933): Township trustee has no jurisdiction over maintenance of drains lying entirely within incorporated cities. Burns' Ann.St. §§ 48-503, 48-1902, 48- 1903, 48-3901.

Peck v. City of Michigan City, 49 N.E. 800 (Ind. 1898): In the construction of sewers, cities are liable for consequential injuries resulting from negligence only.

City of Seymour v. Cummins, 21 N.E. 549 (Ind. 1889): Where a city constructs an open ditch upon a street, so near to a plaintiff's lot as to cause portions thereof to fall into the ditch, and so as to deprive him of access to his residence, and to affect the healthfulness of his property by causing filthy water and sewerage to become stagnant adjacent thereto, it is liable in damages.

City of Madison v. Ross, 3 Ind. 236, (Ind. 1851): The corporate authorities of a city are not liable for an injury to private property, caused by the insufficiency of erections to resist an extraordinary flood, if they had proved sufficient for all purposes for a number of years before, and ordinarily careful and thoughtful men and skillful engineers would not have contemplated that such a flood would ever occur.

Iowa

1. Landowner's Duty to Inspect/Prepare

Meyers v. Delaney, 529 N.W.2d 288 (Iowa 1995): It is general rule that one who maintains trees owes duty to avoid injuring persons on adjoining premises by permitting tree to become so defective and decayed it will fall on them.

Weber v. Madison, 251 N.W.2d 523 (Iowa 1977): While an abutting landowner is not liable with respect to highway hazards over which he has no control, he is under an obligation to use reasonable care to keep his premises in such condition and not to create a hazard in adjoining highway.

Goodwin v. Mason & Seabury, 155 N.W. 966 (Iowa 1916): He who erects a building abutting on a public street owes an absolute duty to the public to so erect it that it will be reasonably safe and strong. He cannot delegate this duty to anyone.

2. Act of God Defense

Keystone Elec. Mfg., Co. v. City of Des Moines, 586 N.W.2d 340 (Iowa 1998): When neglect in the employment of a human agency is combined with an act of God, liability for damage results from such neglect. To establish an act of God affirmative defense, a defendant must show: (1) that the act of God in fact occurred, and (2) that the act of God was the sole proximate cause of plaintiff's injuries. When neglect in the employment of a human agency is combined with an act of God, liability for damage results from such neglect. In determining whether a flood should be characterized as ordinary or extraordinary, for purposes of an act of God defense, courts consider whether the floods occurrence and magnitude should or might have been anticipated, in view of the flood history of the locality and the existing conditions affecting the likelihood of floods, by a person of reasonable prudence.

Baker v. City of Ottumwa, 560 N.W.2d 578 (Iowa 1997): With respect to sole proximate cause defense, any event not chargeable to defendant, including "act of God," can insulate defendant

from liability. With respect to sole proximate cause defense, any event not chargeable to defendant, including "act of God," can insulate defendant from liability.

Lanz. V. Pearson, 475 N.W.2d 601 (Iowa 1991): In comparative fault cases, act of God defense may be used only when act of God is alleged to be sole proximate cause of harm in question.

Sponsler v. Clarke Electric Cooparative, Inc., 329 N.W.2d 663 (Iowa 1983): The doctrine of "Act of God" is an example of the sole proximate cause defense.

Dickman v. Truck Transport, Inc., 224 N.W.2d 459 (Iowa 1974): Doctrine of sudden emergency concerns issue of negligence whereas theory of act of God deals with question of proximate cause.

3. Governmental Liability

Davison v. State, 669 N.W.2d 261 (Iowa.App. 2003): Pursuant to discretionary function exception to State Tort Claims Act, State was immune from liability for its inspection and maintenance decisions regarding highway, with respect to negligence action brought by motorist, who was injured when wagon gear became detached from driver's truck and struck motorist's vehicle, and motorist's wife, who was following in her own vehicle and witnessed incident; Department of Transportation's decisions regarding performance of inspections, maintenance, and repairs were matters of judgment left to its discretion, and Department's decisions on how to inspect and maintain State's road system involved making choices with respect to public policy and planning. I.C.A. § 669.14(1).

Hansen v. City of Audobon, 378 N.W.2d 903 (Iowa 1985): When city undertakes performance of ministerial function of maintaining its sewer system, it is chargeable for damages caused by its negligence in building, constructing, and maintaining such drains and sewers.

Scholbrock v. City of New Hampton, 368 N.W.2d 195 (Iowa 1985): Municipality which provides drains and sewers to its residents may be liable in tort if it fails to exercise reasonable skill and care in providing the service. A city is not an insurer in providing sanitary sewer service and is liable only for the negligence in performance of its duty owed public. Duty owed by city in maintaining sanitary sewer system is more appropriately measured by tort law than by concept of implied contract arising from user's obligation to pay for city services. A municipality which undertakes to provide sanitary sewer system owes users to system duty to exercise reasonable care in providing that service; recovery for damages caused by failure of that system may be premised on tort theory but not on theory of implied contract arising out of obligation to pay for the service.

Meeker v. City of Clinton, 259 N.W.2d 822 (Iowa 1977): Municipality is not an insurer of conditions of its drains and watercourses; in order to charge it with damage occasioned by defects or obstructions therein, negligence must be proven, that is, it is not liable except for negligence in the performance of its duty.

McGuire v. City of Cedar Rapids, 189 N.W.2d 592 (Iowa 1971): Statutory delegation of power to a city to provide sewage disposal plants, when exercised, carries with it a duty to use ordinary care or exercise due diligence to maintain and operate such disposal system in a safe manner. I.C.A. §§ 368.26, subd. 2, 394.3. Failure to perform duty arising from delegated power to provide for sewage disposal plants imposes liability upon municipality for injuries to one lawfully coming upon premises who is injured because of such failure and without fault on his part and without any statute expressly authorizing a cause of action. I.C.A. §§ 368.26, subd. 2, 394.3. Principle of municipal liability for a tort arises with equal logic from a city or town's operation and maintenance of sewage disposal plant established under authority of statute. I.C.A. §§ 368.26, subd. 2, 394.3. Liability of city for injuries sustained by plaintiff's husband in a sewage disposal plant was not predicated on doctrine of respondeat superior, but upon city's own negligence in failing to operate and maintain its sewage disposal plant in a reasonably safe manner. I.C.A. §§ 368.26, subd. 2, 394.3.

Elledge v. City of Des Moines, 144 N.W.2d 283 (Iowa 1966): When a storm sewer is installed by a city or town, it becomes the property of the municipality, its care, maintenance and continuance devolves wholly upon the city, and no one can interfere with it.

Sparks v. City of Pella, 137 N.W.2d 909 (Iowa 1965): Common-law definition of nuisance must be applied where action was against city to recover damages for the construction and maintenance of a sewer as nuisance. I.C.A. §§ 657.1, 657.2.

Hunt v. Smith, 28 N.W.2d 213 (Iowa 1947): The rule respecting control of waters as applied to cities and towns is more liberal to them than to nonurban owners similarly situated.

Platter v. City of Des Moines, 21 N.W.2d 787 (Iowa 1946): A city is not an insurer against damage from break in a sewer, and can be held liable only for negligence in the performance of its duty.

Brose v. City of Dubuque, 187 N.W. 857 (Iowa 1922): Where plaintiff's child was drowned in a sewer while she was passing across private property from one house to another, when the bank of the sewer under the path she was traveling caved into the sewer, the city is not liable, under the attractive nuisance doctrine, even though children sometimes played on the sewer bank, since plaintiff's child was not attracted by the sewer. A child who was traveling across private property, through which a city sewer ran, to visit the owner of the property, was no more than a licensee as to the owner of the property, and not more than that as to the city with respect to the city's duty to protect dangerous premises. The drowning of a child by the cave-in of the bank of an open sewer across private property under a path on which the child was walking was an accident so unexpected that the city owed no duty to guard against it and, therefore, the city was not liable for the death.

Fitzgerald v. Town of Sharon, 121 N.W. 523 (Iowa 1909): Under Code, §§ 696, 699, giving municipalities power to prevent and abate nuisances, and to regulate drainage, a municipality cannot escape liability for creating and maintaining a drain, which ends on the property of plaintiffs, on the ground that the acts complained of were ultra vires.

Rand Lumber Co. v. City of Burlington, 97 N.W. 1096 (Iowa 1904): The legislative authority under which a city constructs sewers does not prescribe the system to be adopted nor the manner in which the work shall be performed, and hence, notwithstanding the work may have been done by or under the direction of skilled engineers, if the matters complained of are shown to be the natural or necessary result of the proper exercise of such power or authority, it does not relieve the city from liability to a peremptory writ for the abatement of a nuisance created by their construction.

Cooper v. City of Cedar Rapids, 83 N.W. 1050 (Iowa 1900): Where an open sewer for surface drainage, authorized by law, is constructed by a city, an abutting property owner may maintain an action for damages for injuries to his property in consequence of any negligence or unskillfulness in doing the work.

Loughran v. City of Des Moines, 34 N.W. 172 (Iowa 1887): It would seem that a city is not liable in damages as for a nuisance on account of the filthy and unwholesome condition of a small stream within its limits, where the stream passes over private property only, over which the city has no control.

Wicks v. Town of De Witt, 6 N.W. 176 (Iowa 1880): In an action against a town for the negligent construction of a ditch, the court erred in refusing to strike out evidence of the improper location thereof; the town not being liable for improper location of the ditch.

Kansas

1. Landowner's Duty to Inspect/Prepare

2. Act of God Defense

McFeeters v. Renollet, 500 P.2d 47 (Kan. 1972): An "act of God," as known in the law, is an irresistible superhuman cause, such as no reasonable human foresight, prudence, diligence and care can anticipate and prevent; and to be a defense it must be an intervening cause which was not foreseeable and consequences of which could not be prevented.

Huebert v. Federal Pac. Elec. Co., 494 P.2d 1210 (Kan. 1972): "Act of God" as known in the law is an irresistible superhuman cause, such as no reasonable human foresight, prudence, diligence and care can anticipate and prevent.

3. Governmental Liability

Reynolds v. Kansas Dept. of Transp., 43 P.2d 799 (Kan. 2002): State Department of Transportation has a common-law duty to protect the motoring public. Common-law duty of State Department of Transportation to keep the highways in a reasonably safe condition is nondelegable due to its importance to citizens.

Baldwin v. City of Overland Park, 468 P.2d 168 (Kan. 1970): A city has no duty to provide drainage to take care of surface waters and ordinarily a failure to protect citizens from surface

water is not actionable. K.S.A. 13-428, 13-1055 et seq. Where there was no indication that city disturbed in any way the natural drainage of 20-block area in which plaintiffs' property was located and no new water had been collected and diverted into drainage ditch adjacent to plaintiffs' property from some other area or source, city was not liable for property damage to retaining wall on plaintiffs' property and basement of plaintiffs' home.

Adams v. Arkansas City, 362 P.2d 829, (Kan. 1961): Sewage treatment plant of city is not nuisance per se, but it may be so constructed, maintained, or operated that it becomes nuisance in fact or per accidens.

State v. City of Concordia, 96 P. 487 (Kan. 1908): The right of a municipality to construct drains and sewers must be so exercised as not to create a nuisance, public or private.

Kentucky

1. Landowner's Duty to Inspect/Prepare

Glasgow Realty Co. v. Metcalfe, 482 S.W.2d 750 (Ky. 1972): Building owner had duty to use ordinary care in the upkeep and maintenance of window in building from which the glass fell, so as to make and keep the window in such condition as would make it reasonably safe for persons using the sidewalks adjacent to the building.

A.H. Bowman & Co. v. Williams, 21 S.W.2d 790 (Ky. 1929): Structure cannot be maintained so as to render occupancy of adjoining property dangerous. Owner of building destroyed by fire had duty of using reasonable precaution to protect adjoining owner from danger of falling wall.

2. Act of God Defense

3. Governmental Liability

Louisville and Jefferson County Metropolitan Sewer Dist. v. Simpson, 730 S.W.2d 939 (Ky. 1987): Metropolitan sewer district was at least partially an arm of the county and thus a political subdivision of the state with sovereign immunity.

Talbert v. City of Winchester, 125 S.W.2d 1002 (Ky. 1939): City was not liable for injury to plaintiffs' health and damage to plaintiffs' premises resulting from natural drainage of water onto plaintiffs' premises.

City of Maysville v. Brooks, 140 S.W. 665 (Ky. 1911): While a municipality is not bound to construct sewers and it is not liable for damages occasioned by the lack of them, yet where it either constructs sewers or adopts a private one it is liable for damages occasioned by its failure to keep them in proper repair.

Louisiana

1. Landowner's Duty to Inspect/Prepare

Ledet v. Doe, 762 So.2d 242 (La.App.5.Cir. 2000): In considering whether a landowner's duty should be extended to adjacent or nearby property, factors to be considered include such matters as whether the owner invited its patrons to use that property and whether the property provided a means of access to business premises.

Hammons v. City of Tallulah, 705 So.2d 276 (La.App.2.Cir. 1997): Where owner or possessor of property actually knows of dangerous condition upon adjacent property, adjacent property is utilized for access to owner or possessor's property, and such known condition poses threat to safety of invitees, owner or possessor may be held liable for negligence for breach of duty, measured under duty-risk analysis.

Russell v. Windsor Properties, Inc., 366 So.2d 219 (La.App.3.Cir. 1978): Though proprietor may do with his estate whatever he pleases, he cannot make any work on it which may deprive his neighbor of liberty of enjoying his own or which may be cause of any damage to him. LSA-C.C. art. 667.

Morales v. Tetra Technologies, Inc., 608 So.2d 282 (La.App.3.Cir. 1992): Landowner or possessor cannot escape liability for injuries occurring on adjacent property by mere fact of his status as nonowner; question is whether landowner or possessor was negligent in any manner. LSA-C.C. art. 2315.

Hakim v. Albritton, 552 So.2d 548 (La.App.2.Cir. 1989): Extent of duty, if any, of owner of land to prevent injury to persons on premises or adjacent property, caused by conduct on subject premises, is to be determined by facts and circumstances of each case.

Jones v. Gillen, 504 So.2d 575 (La.App.5.Cir. 1987): Though landowner is generally not liable for injuries which occur from defects on adjacent property, he cannot escape liability by mere fact of his status as nonowner of that property and it must be determined whether his conduct was cause in fact of accident, whether he owed legal duty encompassing particular risk of harm to which plaintiff was exposed, whether he breached that duty, and what damages plaintiff sustained. LSA-C.C. art. 2315.

Sanderson v. Beaugh, 367 So.2d 14 (La.App.4.Cir. 1978): Extent of duty, if any, of owner or possessor of land to prevent injury to persons on premises or on adjacent property, caused by conduct on subject premises, is determined by facts and circumstances of each case.

Glorioso v. Chandler, 337 So.2d 269 (La.App.2.Cir. 1976): Owner of a building is liable to a neighbor injured by the fall of the building caused by the owner's neglect to repair the building.

Town of Jackson v. Mounger Motors, Inc., 98 So.2d 697 (La.App.1.Cir. 1957): The principle that one may not so use his property as to cause damage to his neighbors is a qualification of the general rule that, in the absence of a valid statutory regulation, the proprietor of land may do whatsoever he wishes with or on it, providing such use does not unreasonably disturb his neighbor's use of the latter's own property. LSA-C.C. arts. 491, 667, 668. The doctrine that one may not so use his property as to cause damage to his neighbor's applies only when such use

involves a high degree of risk of harm to others and is abnormal in the community or is unduly dangerous and inappropriate to the place where it is maintained, in light of the character of the place and its surroundings.

Landry v. News-Star-World Pub. Corp., 46 So.2d 140 (La.App.2.Cir. 1950): Owner of building is required only to exercise ordinary and reasonable care for protection of those who may pass or enter and is not an insurer of their safety.

2. Act of God Defense

Brown v. Williams, 36, 863 La.App. 2 Cir. 7/31/03 (La.App.2.Cir. 2003): Once a plaintiff has proven the elements necessary to recover for damage caused by a thing in another's custody, the owner of the thing can avoid liability if he shows that the harm was caused by an Act of God. (Per Williams, J., with one Judge joining in the opinion and one Judge concurring with written reasons.) LSA-C.C. art. 2317. An "Act of God," or "force majeure," for purposes of an owner avoiding liability for damage caused by a defective thing in his custody, is an unusual, sudden and unexpected manifestation of the forces of nature which man cannot resist. (Per Williams, J., with one Judge joining in the opinion and one Judge concurring with written reasons.) LSA-C.C. art. 2317. An injury caused by an Act of God, for purposes of an owner avoiding liability for damage caused by a defective thing in his custody, is one which is due directly and exclusively to natural causes that could not have been prevented by the exercise of reasonable care. (Per Williams, J., with one Judge joining in the opinion and one Judge concurring with written reasons.) LSA-C.C. art. 2317. Recovery for injuries caused by extreme weather conditions may be precluded by the application of the Act of God, or force majeure, rule. (Per Williams, J., with one Judge joining in the opinion and one Judge concurring with written reasons.)

Terre Aux Boeufs Land Co., Inc. v. J.R. Gray Barge Co., 2000-2754 La.App. 4 Cir. 11/14/01 (La.App.4.Cir. 2001): The Act of God defense in maritime law applies only if the following circumstances exist: (1) the accident is due directly and exclusively to natural causes without human intervention, and (2) no negligent behavior by the defendants contributed to the accident.

K&M Enterprises of Slaughter, Inc. v. Pennington, 764 So. 2d 1089 (La.App.1.Cir. 2000): An "act of God" is an unusual, extraordinary, sudden, and unexpected manifestation of the forces of nature which cannot be prevented by human care, skill, or foresight.

Kose v. Cablevision of Shreveport, 755 So.2d 1039 (La.App.2.Cir. 2000): Once the plaintiff proves the elements of strict liability, the owner or guardian responsible for the person or thing can escape liability only if he shows the harm was caused by the fault of the victim, by the fault of a third person, or by an act of God. LSA-C.C. art. 2317.

Greene v. Fox Crossing, Inc., 754 So. 2d 339 (La.App.2.Cir. 2000): Once a plaintiff has proven the elements of strict liability, the owner or guardian responsible for the thing can escape liability if he shows the harm was caused by the fault of the victim, by the fault of a third person, or by an Act of God. LSA-C.C art. 2317.

Caldwell v. Let The Good Times Roll Festival, 717 So. 2d 1263 (La.App.2.Cir. 1998): When Act of God combines or concurs with conduct of defendant to produce injury, defendant may be held liable for any damages that would not have occurred but for his own conduct or omission that constitutes a breach of specific legal duty owed by defendant. "Act of God" or "force majeure" is superior or irresistible force that is, in legal sense, sufficient to excuse defendant's neglect of duty and relieve him of liability to plaintiff.

Saden v. Kirby, 660 So.2d 423 (La. 1995): The concept of "force majeure," meaning a superior or irresistible force, is similar to the common-law concept of "act of God," which has been defined as a providential occurrence or extraordinary manifestation of the forces of nature which could not have been foreseen and the effect thereof avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ. When a "force majeure" or "act of God" combines or concurs with the conduct of a defendant to produce an injury, the defendant may be held liable for any damages that would not have occurred but for its own conduct or omission.

Boyd v. Washington-St. Tammany Elec. Co-op., 618 So.2d 982 (La.App.1.Cir. 1993): Finding that act of God was intervening and superseding cause of damages sustained by plaintiff precludes recovery in strict liability action.

Gabler v. Regent Development Corp., 470 So.2d 149 (La.App.5.Cir. 1985): Not every "act of God" will relieve defendants of liability; where injury is due directly and exclusively to natural causes, without human intervention, "act of God" will provide insulation from liability, but where "act of God" combines or concurs with negligence of defendant to produce injury, defendant is liable if injury would not have resulted but for his own negligent conduct or omission. Not every act or omission of negligence on part of defendant, when combined with "act of God," will produce liability; rather, concurring negligence must be in itself real, producing cause of injury. "[W]here an Act of God combines or concurs with the negligence of a defendant to produce an injury, the defendant is liable if the injury would not have resulted but for his own negligent conduct or omission." Gables v. Regent Development Corp., 470 So.2d 149, 152 (La. App. 5 Cir. 1985).

Hunt v. City Stores, Inc., 387 So.2d 585 (La. 1980): To escape liability under statute imposing liability on custodian of defective person or thing which creates unreasonable risk of harm to others, defendant must show that damage was due to fault of victim, fault of third party, or act of God. (Per Watson, J., two Justices concurring and one Justice concurring specially.) LSA-C.C art. 2317

Bass v. Aetna Ins. Co., 370 So.2d 511 (La. 1979): Notwithstanding that worshiper testified he was trotting under the Spirit of the Lord, "Act of God" defense did not apply in action by worshiper who was injured while praying in the aisle against second worshiper who was running in church inasmuch as "Act of God" meant force majeure.

3. Governmental Liability

Woods v. State ex re. Department of Transp. and Development, 37, 185 La.App. 2 Cir. 8/14/03 (La.App.2.Cir. 2003): In order for Department of Transportation and Development (DOTD) to be held liable for plaintiff's injuries, the plaintiff must prove that (1) DOTD had custody of the thing which caused plaintiff's damages, (2) the thing was defective because it had a condition which created an unreasonable risk of harm, (3) DOTD had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time, and (4) the defect was a cause-in-fact of plaintiff's injuries. Four-part test for holding Department of Transportation and Development (DOTD) liable for injuries caused by defective condition, under which plaintiff must show that DOTD had custody of the thing that caused plaintiff's injuries, that the thing was defective, that DOTD had notice of defect but failed to take corrective measures within reasonable time, and that defect was cause-in-fact of injuries, applies to any defendant; if plaintiff fails to prove any one of the elements, the defendant is not liable. Department of Transportation and Development (DOTD) has a non-delegable duty to maintain safe highways and shoulders.

Cobb v. Delta Exports, Inc., 2003-0033 La.App. 3 Cir. 6/4/03 (La.App.3.Cir. 2003): A negligence or strict liability plaintiff seeking recovery from a government defendant based on defective condition of a roadway must prove that: (1) the defendant owned or had custody of the thing which caused the damage, (2) the thing was defective in that it created an unreasonable risk of harm to others, (3) the defendant had actual or constructive knowledge of the defect and failed to take corrective actions within a reasonable time, and (4) the defect was a cause-in-fact of the accident. LSA-R.S. 9:2800; LSA-C.C. arts 2315, 2317. While a city is not the insurer of the motoring public, it does have a duty to keep its roadways in reasonably safe condition.

Woodbury v. Louisiana Dept. of Transp. and Development, 03-13 La.App. 5 Cir. 5/28/03 (La.App.5.Cir. 2003): In order for Department of Transportation and Development (DOTD) to be held liable under either negligence or strict liability theory, plaintiff must prove that (1) DOTD had custody of thing which caused plaintiff's damages, (2) thing was defective because it had condition which created unreasonable risk of harm, (3) DOTD had actual or constructive notice of defect and failed to take corrective measures within a reasonable time, and (4) defect was cause-in-fact of plaintiff's injuries.

Lockett v. State, Dept. of Transp. and Development, 844 So.2d 949 (La.App.1.Cir. 2003): An unreasonably dangerous condition of a roadway results in a breach of duty by Department of Transportation and Development (DOTD), and such a determination is dependent on the facts and circumstances of each case.

Bader v. Kansas City Southern Ry. Co., 834 So.2d 1 (La.App.2.Cir. 2002): To establish breach of State Department of Transportation and Development's (DOTD) duty to provide a reasonably safe road, the plaintiff must prove: (1) the thing which caused the damage was in the care or custody of the State; (2) a hazardous condition existed; (3) the State had actual or constructive knowledge of the condition; and (4) the State failed to take corrective action within a reasonable period of time.

Hernandez v. State, ex rel. Dept. of Transp. and Development, 841 So.2d 808 (La.App.4.Cir. 2002): A cause of action for negligence against the Department of Transportation and

Development (DOTD) based on an alleged defective condition of the highway requires proof that: (1) the roadway was in the custody of the DOTD; (2) the roadway was defective because of a condition that created unreasonable risk of harm; (3) the DOTD had actual or constructive notice of the risk; and (4) the defect was cause in fact of the injuries.

Updegraff v. State ex rel. Dept. of Transp. and Development, 2001-1048 La.App. 4 cir. 10/2/02 (La.App.4.Cir. 2002): The duty of the Department of Transportation and Development (DOTD) to maintain reasonably safe roadways and shoulders encompasses the risk that motorists may travel onto or partially onto the shoulder; DOTD does not guarantee the safety of those who travel the highways, however. The duty of the Department of Transportation and Development (DOTD) to maintain reasonably safe roadways encompasses persons who are foreseeably placed in danger by unreasonably dangerous conditions, including even motorists who are slightly exceeding the speed limit, momentarily inattentive, or otherwise negligent.

Norris v. State, 2001-1578 La.App. 3 Cir. 4/3/02, (La.App.3.Cir. 2002): Regardless of whether a plaintiff pursues the Department of Transportation and Development (DOTD) under a theory of strict liability or negligence, the plaintiff bears the burden of exhibiting: (1) DOTD had custody of the thing that caused the plaintiff's injuries or damages; (2) the thing was defective because it had a condition that created an unreasonable risk of harm; (3) DOTD had actual or constructive knowledge of the defect and failed to take corrective measures within a reasonable time; and (4) the defect in the thing was a cause-in-fact of the plaintiff's injuries. LSA-C.C arts. 2316, 2317.

Reaux v. City of New Orleans, 2001-1585 La.App. 4 Cir. 3/20/02 (La.App.4.Cir. 2002): A public body is responsible for damages caused a motorist if the public body has either actual or constructive notice of the defect that causes an accident, and fails to remedy the situation within a reasonable time.

Darbone v. State, 815 So.2d 943 (La.App.3.Cir. 2002): Not every imperfection or irregularity in a roadway renders the Department of Transportation and Development (DOTD) liable; it is only a condition that could reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances.

Rosen v. State ex rel. Dept. of Transp. and Development, 2001-0499 La.App. 4 Cir. 1/30/02 **(**La.App.4.Cir. 2002): Department of Transportation and Development (DOTD) has a legal duty to maintain highways in a reasonably safe condition. Duty of DOTD to maintain highways in a reasonably safe condition extends to the protection of those people who may be foreseeably placed in danger by an unreasonably dangerous condition; it extends not only to prudent and attentive drivers, but also to motorists who are slightly exceeding speed limit or momentarily inattentive.

Roy v. Augustine, 2001-1021 La.App. 3 Cir. 12/12/01, (La.App.3.Cir. 2001): Whether a plaintiff pursues Department of Transportation and Development (DOTD) under a theory of negligence or of strict liability, he or she bears the burden of demonstrating, (1) Department had custody of the thing that caused the plaintiff's injuries or damages, (2) the thing was defective because it had a condition that created an unreasonable risk of harm, (3) Department had actual or constructive knowledge of the defect and failed to take corrective measures within a reasonable time, and (4)

the defect in the thing was a cause-in-fact of the plaintiff's injuries.

Cox. v. Moore, 805 So.2d 277, (La.App.3.Cir. 2001): For accident that occurred in 1989, motorist alleging that intersection was defective had to prove that: (1) the Department of Transportation and Development (DOTD) owned or had custody of the thing that caused the damage; (2) the thing was defective in that it created an unreasonable risk of harm to others; and (3) the defect was a cause-in-fact of the accident; statute adding an element of "actual or constructive notice" to strict liability was unconstitutional until 1995. LSA-C.C. art. 2317.

Hicks v. State, 34,890 La.App. 2 Cir. 12/7/01, (La.App.2.Cir. 2001): Under the law as it existed at the time of automobile accident, in order to prove liability in action for negligence against the Department of Transportation and Development (DOTD), survivors of motorists involved in the accident had only to prove that: (1) DOTD owned or had custody of the thing that caused the damage; (2) the thing was defective in that it created an unreasonable risk of harm to others; and (3) the defect was a cause-in-fact of the accident. DOTD has legal duty to maintain the highways in a reasonably safe condition, which extends to the protection of attentive drivers or momentarily inattentive drivers who may be foreseeably placed in danger by an unreasonably dangerous condition.

Adams v. Parish of East Baton Rouge, 804 So.2d 679, (La.App.1.Cir. 2001): Evidence supported findings that condition of road which was in care, custody, and control of parish created an unreasonable risk of harm, and that condition was cause-in-fact of fatal motor vehicle accident on rainy day, and thus, parish was strictly liable for accident; road, which one citizen referred to as "homicide alley," contained a curve which had been referred to as "dead man's curve" for years, road became abnormally slick when wet, there were 136 accidents on road, 52 of which occurred in wet weather, over a one-year period prior to accident, citizens made numerous complaints about road prior to accident, and the vehicle which lost control on curve and crossed center line into path of on-coming traffic was apparently traveling within posted speed limit. LSA-C.C. art. 2317.

Harvey v. State, 2000-1877 La.App. 4 Cir. 9/26/01, (La.App.4.Cir.,2001): The Department of Transportation and Development (DOTD) has the duty of constructing and maintaining its highways in a condition that is reasonable, safe and does not present an unreasonable risk of harm to persons exercising ordinary care and reasonable prudence.

Sharon v. Connecticut Fire Ins. Co., 270 So.2d 900 (La.App.1.Cir. 1972): City has statutory authority under its police power to compel the owners of premises located within 300 feet of sewerage system to connect thereto, but it does not follow from such statutes, and it would be unconscionable, if an owner of such premises who sustains damage after connecting up can seek redress only if he can establish negligence, notwithstanding his having been compelled to connect to a defective municipal-operated sewerage system. LSA-R.S. 33:4004, 33:4041. Statute providing, inter alia, that it is a servitude due by the estate situated below to receive waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude, and that proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of water, is applicable to municipalities. LSA-C.C. art. 660. Once a city has compelled a property owner to connect to its sewerage system, it

incurs the obligation to dispose of sewage properly, and fact that such breach might occur without negligence would not make it inactionable.

Eschete v. City of New Orleans, 231 So.2d 725 (La.App. 4 Cir. 1970): City did not become liable for personal injuries and property damages occasioned by flooding in subdivision by virtue of its authorization and approval of subdivisions despite its knowledge of insufficient drainage facilities in the area. LSA-R.S. 33:4071.

Friedel v. City of New Orleans, 192 So.2d 234 (La.App. 4 Cir. 1966): The sewerage and water board of city was immune from liability for flooding damage under statute. LSA-R.S. 29:613-29:614.

Maine

1. Landowner's Duty to Inspect/Prepare

Quadrino v. Bar Harbor Banking & Trust Co., 588 A.2d 303 (Me. 1991): Property owner owed no duty of care to pedestrian who tripped on curb that was on another's property and was constructed and maintained by state Department of Transportation, even though pedestrian's injuries actually occurred after he tripped, when he struck property owner's driveway.

Beckwith v. Somerset Theatres, 27 A.2d 596 (Me. 1942): Owners of property abutting a public highway have a right to suitably mark corners of their land with appropriate markers, so long as such right is exercised with due regard to rights of others, and especially to rights of travelers lawfully using highway.

Beckwith v. Somerset Theatres, 27 A.2d 596 (Me. 1942): Owners of property abutting a public highway must use reasonable care to keep their premises abutting highway in such a condition as not to endanger travelers in their lawful use of highway.

Leighton v. Dean, 102 A. 565 (Me. 1917): Person injured by fall of awning, while inspecting shop window held invitee to whom owner of shop owed duty of keeping his premises in reasonably safe condition.

2. Act of God Defense

3. Governmental Liability

Kidson v. City of Bangor, 58 A. 900 (Me. 1904): In order to recover against a city for violation of Rev.St. c. 21, § 18, requiring proper maintenance and repair of public sewers, plaintiff must show that the drain was a public one, established by the city, that plaintiff was entitled to drainage through it, that defendant had failed to maintain the sewer or keep it in repair, that the defect was not in the original system, and that plaintiff suffered injury from this neglect of the city.

Attwood v. City of Bangor, 22 A. 466 (Me. 1891): The city of Bangor has the right to extend its sewer across the flats of the Penobscot river, to a point below low-water mark; and, in the performance of its duty to the public in locating the sewer, the city council acts judicially, and the city is not liable for their act to the owners of wharves, unless the sewer is improperly or unskillfully constructed, to their special injury.

Maryland

1. Landowner's Duty to Inspect/Prepare

Rosenblatt v. Exxon Co., U.S.A., 642 A.2d 180 (Md. 1994): Occupier of land owes duty to occupants of neighboring land to use care when conducting activities on land so as to avoid causing harm to neighboring land.

Toy v. Atlantic Gulf & Pacific Co., 4 A.2d 757 (Md. 1939): The basic concept underlying the rule of liability without fault is that a person who elects to keep or bring on his land something which exposes adjacent land or its owner or occupant to an added danger should be obliged to prevent its doing damage. Under the rule of liability without fault, occupier is not under an absolute liability for escape of things which he did not bring or amass on land occupied.

Scott v. Bay, 3 Md. 431 (Md. 1853): Unless a party can show a right either in the nature of a presumed grant or easement, or in some other mode, to use his property in a particular way, he cannot so use it if it occasions injury to his neighbors, in the quiet enjoyment of their legal rights and privileges, and it makes no difference whether precautions were used or not to prevent the injury complained of.

2. Act of God Defense

Mark Downs, Inc. v. McCormick Properties, Inc., 441 A.2d 1119 (Md.Spec.App. 1982): An "Act of God" will excuse mortal man from responsibilities for his conduct only if God is the sole cause.

3. Governmental Liability

Chertkof v. Department of Natural Resources, Water Resources Administration, 402 A.2d 1315 (Md.App. 1979): Where stream is adopted as integral part of public sewage or storm water system, appropriate governmental body is required to maintain stream in such manner as to prevent damage to adjoining landowners.

Massachusetts

1. Landowner's Duty to Inspect/Prepare

Davis v. Westwood Group, 652 N.E.2d 567 (Mass. 1995): Although landowner or possessor typically is not held to any duty with respect to public highways adjacent to or crossing his land, he must exercise reasonable care in use of his land so as not to injure traveler on highway.

Tryon v. City of Lowell, 565 N.E.2d 456 (Mass.App. 1991): Private landowner owes a duty of reasonable care to protect lawful entrants against foreseeable dangers on adjacent property.

O'Gorman v. Antonio Rubinaccio & Sons, Inc., 563 N.E.2d 231 (Mass. 1990): Under Alcoholic Beverages Control Commission regulation describing preexisting common-law duty which licensees owe to their patrons or guests, when bar has served potentially dangerous patron, duty may extend beyond premises; when bar has not served patron, however, duty is based merely upon duty to keep premises safe, and duty applies only on or about premises.

Gage v. City of Westfield, 532 N.E.2d 62 (Mass.App. 1988): In some situations, landowner's duty to exercise reasonable care does not terminate abruptly at borders of his property but may extend to include duty to take safety measures related to known dangers on adjacent property.

Polak v. Whitney, 487 N.E.2d 213 (Mass.App. 1985): Property owner's duty to exercise reasonable care for safety of invitee did not end abruptly at boundary line of property over which she exercised control, but extended in appropriate circumstances to conditions on adjacent property.

Wallace v. Folsom's Market, Inc., 177 N.E.2d 778 (Mass. 1961): Abutter in control and occupation of premises as between himself and public must exercise reasonable care to maintain premises in a reasonably safe condition so as not to cause injury to public traveling on way, and if abutter knows or ought to know that use which he is making or permitting to be made of premises is rendering public way dangerous for those passing, he may be found liable to pedestrian sustaining injury.

Lambert v. Metropolitan Transit Authority, 157 N.E.2d 869 (Mass. 1959): Landowner, who maintains a wall or other structure adjacent to public way, has duty to persons on the way to maintain such a structure in a condition that shall be reasonably safe, having regard to its probable deterioration under exposure to air, wind and water, as also to all other lawful attendant conditions which might reasonably be anticipated.

Burke v. Zatoonian, 36 N.E.2d 385 (Mass. 1941): One must exercise reasonable diligence in the use of his land so as not to injure an adjoining landowner, or an occupant of part of a building upon one's land, in absence of some agreement to the contrary, or a traveler upon the highway.

Haskins v. Grybko, 17 N.E.2d 146 (Mass. 1938): A lessee in possession of land is bound to exercise reasonable care to prevent harm on account of his negligence to trespasser upon land of a third person.

Frizzell v. Metropolitan Coal Co., 10 N.E.2d 115 (Mass. 1937): Defendant's duty toward plaintiff in action for damage to yacht in boatyard when roof of building on adjacent premises blew off must be determined by facts respecting defendant's ownership, possession, and control of premises at such time, without reference to subsequent transactions between defendant and third parties.

Bernard v. Brownell, 173 N.E. 434 (Mass. 1930): Landowner who maintains boundary wall must keep structure reasonably safe in relation to adjacent land.

Blanchard v. Reynolds, 129 N.E. 303 (Mass. 1921): The duty of an owner of land who maintains a wall or other structure adjacent to a public way, to persons upon the way, is to maintain such structure in a condition that shall be reasonably safe, having regards to its probable deterioration under exposure to air, wind, and water, as also to other lawful attendant conditions reasonably to be anticipated.

Moffatt v. Kenney, 54 N.E. 850 (Mass. 1899): Where plaintiff was injured from defects in a way which had been dedicated to a city, but never accepted, at the entrance to which the city posted a sign that the street was a private way, and was dangerous plaintiff was a mere licensee, and hence was not entitled to recover against an abutting owner.

Inhabitants of Milford v. Holbrook, 91 Mass. 17 (Mass. 1864): It is the duty of the occupier of a building who maintains an awning thereon to keep the awning sufficiently strong to sustain the weight of snow to which it may reasonably be expected to be exposed, and to clear the awning when more snow is upon it than it can bear, unless the fall of snow is so extraordinary and sudden that no one would be responsible for it.

2. Act of God Defense

L.G. Balfour Co. v. Ablondi & Boynton Corp., 338 N.E.2d 841 (Mass.App. 1975): The "act of God" concept is an irresistible physical force not attributable in any degree to the conduct of man and not in reason preventable by human foresight, strength or care. A party may escape liability for damage resulting from an act of God only when the force is of such magnitude that the damage cannot be reasonably anticipated or when reasonable preventive measures are insufficient to avoid damage.

Clark-Aiken Co. v. Cromwell-Wright Co., Inc., 323 N.E.2d 876 (Mass. 1975): In cases where the doctrine of strict liability would otherwise be applicable on the facts, the defendant can avoid liability by showing that the "escape" was caused by an act of God or an intervening unlawful act of a third person; likewise, if plaintiff's damage does not directly result from the risk created, or is not a "natural consequence" thereof, recovery will be denied.

3. Governmental Liability

Westcott v. City of Boston, 72 N.E. 89 (Mass. 1904): St.1897, pp. 397, 398, c. 426, §§ 2-5, providing a remedy by petition to recover damages for any land or easement taken by commissioners in the construction of a conduit, or for any injury committed in doing any act with reference thereto under section 4 (page 397) did not deprive a property owner injured by the negligence of those in charge of the construction of such conduit from maintaining an action in tort against the city for the damages so sustained.

Boston Belting Co. v. City of Boston, 67 N.E. 428 (Mass. 1903): A city is liable in an action for tort for damage to real estate caused by the negligent manner in which it has carried out the provisions of a statute authorizing the improvement of a stream.

Allen v. City of Boston, 34 N.E. 519 (Mass. 1893): The negligent omission of a city to make a sewer safe and tight, so as not to injure neighboring property, cannot be excused on the ground that the jurisdiction as to the construction and location of sewers is vested in the aldermen, when it does not appear that they ever exercised such jurisdiction, but left the matter entirely to the superintendent of streets.

Hill v. City of Boston, 122 Mass. 344 (Mass. 1877): For neglect in the construction or repair of any particular sewer, whereby private property is injured, an action may be maintained against a city.

Andrews v. Inhabitants of Boylston, 110 Mass. 214 (Mass. 1872): For neglect in the construction or repair of any particular sewer, whereby private property is injured, an action may be maintained against a city.

Emery v. City of Lowell, 104 Mass. 13 (Mass. 1870): For neglect in the construction or repair of any particular sewer, whereby private property is injured, an action may be maintained against a city.

Child v. City of Boston, 86 Mass. 41 (Mass. 1862): For neglect in the construction or repair of any particular sewer, whereby private property is injured, an action may be maintained against a city.

Michigan

1. Landowner's Duty to Inspect/Prepare

Johnson v. Bobbie's Party Store, 473 N.W.2d 796 (Mich.App. 1991): General principle that defendant's duty, for purposes of premises liability, ends with boundaries of premises does not necessarily preclude liability where passerby is injured outside premises as result of danger posed by condition existing on premises.

Ward v. Frank's Nursery & Crafts, Inc., 463 N.W.2d 442 (Mich.App. 1990): Aside from principles of premises liability, owner or occupier of land may be liable in negligence for affirmative acts done on adjacent public land.

Devine v. Al's Lounge, Inc., 448 N.W.2d 725 (Mich.App. 1989): Occupant of parcel of land may be responsible for condition of adjoining parcel to which another has title where he has exercised possession or control over adjoining parcel.

Rodriguez v. Detroit Sportsmen's Congress, 406 N.W.2d 207 (Mich.App. 1987): Law does not ordinarily impose duty of care upon occupier of land beyond area over which occupier has possession or control.

Cavaliere v. Adults for Kids, 386 N.W.2d 667 (Mich.App. 1986): Possessor of land may not use land in such way as to create unreasonable risk to those traveling on adjacent public roadway. Social utility of airports, military bases, public exhibitions and other potentially attractive roadside activities or construction far outweighs magnitude of risk to those traveling on adjacent public roadways created by mere presence or conducting of such activities.

2. Act of God Defense

Potter v. Battle Creek Gas Co., 185 N.W.2d 37 (Mich.App. 1970): Definition of an act of God relieving defendant from liability for alleged negligence requires an unusual, extraordinary, and unexpected manifestation of the forces of nature and requires the entire exclusion of human agency from the cause of the injury or loss.

3. Governmental Liability

Weaver v. City of Detroit, 252 Mich.App. 239 (Mich.App. 2002): No action may be maintained under the highway exception to governmental immunity unless it is clearly within the scope and meaning of the statute. M.C.L.A. § 691.1402(1).

Sekulov v. City of Warren, 251 Mich.App. 333 (Mich.App. 2002): Governmental Immunity Act limits liability under the highway exception to the governmental agency having jurisdiction over the highway at the time of the injury; only one governmental agency at a time can have jurisdiction over a highway, and there is no concurrent jurisdiction, M.C.L.A.§ 691.1402(1).

Minnesota

1. Landowner's Duty to Inspect/Prepare

2. Act of God Defense

Vanden Broucke v. Lyon County, 222 N.W.2d 792 (Minn. 1974): To fall within purview of doctrine of "act of God" an event resulting from force of nature must be unexpected, unforeseeable and sole cause of the accident.

3. Governmental Liability

Chabot v. City of Sauk Rapids, 412 N.W.2d 371 (Minn.App. 1987): City had no discretionary immunity from liability to homeowner for property damage resulting from flooding of city's storm sewer holding pond; while planning and installation of storm sewer system were planning level decisions falling within discretionary immunity, decision not to remedy problem of holding pond after city had noticed that it was inadequate was an operational level decision for which city was not immune. M.S.A. §§ 466.02, 466.03, subd. 6. By obtaining liability insurance, city waived immunity to extent of its coverage for liability to property owner for property damage resulting from flooding of city's storm sewer holding pond.

Mississippi

1. Landowner's Duty to Inspect/Prepare

Mizell v. Cauthen, 169 So.2d 814 (Miss. 1964): Landowner who owned property which abutted the public way and maintained on property an oak tree some three feet in diameter, which leaned approximately three degrees toward the street, was under duty of using reasonable care to prevent his property from becoming a source of danger to persons using the public way.

2. Act of God Defense

3. Governmental Liability

Missouri

1. Landowner's Duty to Inspect/Prepare

Mills v. Crawford, 822 S.W.2d 548 (Mo.App.S.Dist. 1992): Possessor of land is subject to liability for physical harm to others outside of land caused by activity carried on by him thereon which he realizes or should realize will involve unreasonable risk of physical harm to them under same conditions as though activity were carried on at neutral place.

Butts v. National Exch. Bank, 72 S.W. 1083 (Mo.App. 1903): The owner of a building abutting on a street is required to maintain his building in such a reasonably safe condition that pedestrians on the sidewalk will not sustain injury.

2. Act of God Defense

Robinson v. Missouri State Highway and Transp. Com'n, 24 S.W.3d 67 (Mo.App.W.Dist. 2000): Any negligence on the part of the defendants which concurred with the Act of God as the proximate cause of the accident would reinstate their responsibility; when the result in part is ascribable to the participation of man, either through active intervention or neglect or failure to act, the whole occurrence is thereby humanized and removed from the operation of the rules applicable to the Acts of God.

McCutcheon v. Tri-County Group XV, Inc., 920 S.W.2d 627 (Mo.App.S.Dist. 1996): Defense due to act of nature, often referred to as "act of God," is only available where it is event in nature so extraordinary that history of climatic variations in locality affords no reasonable warning of their coming and is not humanized through participation of human beings.

Arthur v. Royse, 574 S.W.2d 22 (Mo.App. 1978): In order to invoke "Act of God" defense, human actor must have exercised due care prior to intervention of superhuman cause.

3. Governmental Liability

Koppel v. Metropolitan St. Louis Sewer Dist., 848 S.W.2d 519 (Mo.App. E.D. 1993): Metropolitan sewer district was shielded from tort liability by doctrine of sovereign immunity. Waiver of metropolitan sewer district's immunity from tort action for dangerous property condition occurs only when there is dangerous condition on property, plaintiff's injuries directly resulted from dangerous condition, dangerous condition created reasonably foreseeable risk of kind of harm a plaintiff incurred, and public employee negligently created condition or public entity had actual or constructive notice of dangerous condition. V.A.M.S. § 537.600, subd. 1(2).

Fletcher v. City of Independence, 708 S.W.2d 158 (Mo.App.W.Dist. 1986): A municipal corporation which lays out a system of sewers and drains exercises a proprietary function and owes a duty of reasonable care in its construction and maintenance not to injure private property. Power to construct a system of sewers does not authorize a municipality to create a nuisance. A municipality is answerable for private injury from its system of sewers and drains, whether from negligence or from the unreasonableness of the use, and owes the duty to correct the dysfunction in a drain or sewer within reasonable time after notice. A municipal sewer system so constructed or maintained as to be inadequate for its function subverts its intended purpose of benefit, and when that condition invades private premises and interferes with that source of enjoyment, the law strikes the balance, prima facie, in favor of the harm.

Peacock v. City of Dexter, 544 S.W.2d 80 (Mo.App. 1976): City is not required to fence all roadside ditches which become filled with water after heavy rains. Where there was no hidden danger or entrapment, and no deep hole or drop-off in ditch, and where parents were aware that ditch filled with water after heavy rains, city had no duty to fence drainage ditch between sidewalk and street and not liable for death of four-year-old boy who apparently fell into ditch, was washed through culvert and drowned.

Anello v. Kansas City, 286 S.W.2d 49 (Mo.App. 1955): A negligent breach of city's duty to maintain its sewers in a reasonably safe condition is actionable.

Gleason v. City of Kirksville, 118 S.W. 120 (Mo.App. 1909): To hold a city liable for grading a street by a fill with insufficient culverts, obstructing the flow of surface water, it is necessary to show that the work was directed by ordinance.

Montana

1. Landowner's Duty to Inspect/Prepare

Limberhand v. Big Ditch Co., 706 P.2d 491 (Mont. 1985): Fact that instrumentality causing harm is located adjacent to landowner's property does not bar action against landowner for injuries sustained by persons properly using landowner's premises, where instrumentality poses clear and foreseeable danger. MCA 27-1-701.

2. Act of God Defense

3. Governmental Liability

Folda v. City of Bozeman, 582 P.2d 767 (Mont. 1978): City which owned portion of parking lot adjacent to creek had no duty to warn 17-year-old girl using parking lot of danger of creek which was natural condition constituting open and obvious rather than defect or obstruction caused by city. Where creek at time of accident was in flood stage and almost overflowing, danger of creek was obvious and thus city and landowner who were owners of parking lot adjacent to creek were under no duty to warn 17-year-old girl who drowned in creek of danger of creek.

Nebraska

1. Landowner's Duty to Inspect/Prepare

2. Act of God Defense

Maloney v. Kaminski, 368 N.W.2d 447 (Neb. 1985): "Act of God" is a manifestation of nature so unusual and extraordinary that it could not under normal circumstances have been reasonably anticipated or expected.

3. Governmental Liability

Nevada

1. Landowner's Duty to Inspect/Prepare

Harry v. Smith, 893 P.2d 372 (Nev. 1995): Landowners' liability for injuries occurring off the premises does not turn on their status as landowners and they are instead required to conform to normal standards of reasonableness under general principles of tort law.

2. Act of God Defense

3. Governmental Liability

New Hampshire

1. Landowner's Duty to Inspect/Prepare

Lane v. Groetz, 230 A.2d 741 (N.H. 1967): Property owner has duty to exercise reasonable care to see that activities conducted upon owner's premises, or conditions allowed to exist thereon, pose no threat to users of public way abutting the property.

Morin v. Manchester Housing Authority, 195 A.2d 243 (N.H. 1963): Owner or possessor of premises bordering public highway or sidewalk must prevent artificial conditions on his land from being unreasonably dangerous to travelers upon adjoining highway. Housing authority which exercised control over grounds of project and retained possession of them for common use of its tenants was under duty to exercise care to prevent injury to passers-by on highway from conditions maintained on premises.

2. Act of God Defense

3. Governmental Liability

Mitchel v. Dover, 99 A.2d 409 (N.H. 1953P): The duty owed by a municipality to persons liable to be damaged by its operation of a sewage system for the public benefit is that of ordinary care and prudence under circumstances, which includes a duty to anticipate matters that could reasonably be foreseen to cause damage.

Pinsonneault v. City of Concord, 120 A. 257 (N.H. 1923): Towns are liable for damage caused by defective sewers.

New Jersey

1. Landowner's Duty to Inspect/Prepare

Mulraney v. Auletto's Catering, Nat. Valet Parking Services, 680 A.2d 793 (N.J.Super.App. 1996): Business proprietor has duty, at least under some circumstances, to undertake reasonable safeguards to protect its customers from dangers posed by crossing adjoining highway to area proprietor knows or should know its customers will use for parking. Restatement (Second) of Torts § 349.

Black v. Borough of Atlantic Highlands, 623 A.2d 257 (N.J.Super.App. 1993): To ordinary landowners unprotected by statutory immunities, liability in tort to adjoining property owners may be established for damages proximately flowing from dangerous conditions caused by overhanging branches or matter dropping from trees which are not deemed natural when specifically planted for purposes of defendant landowner.

Kolba v. Kusznier, 599 A.2d 194 (N.J.Super.Law 1991): If there is artificial condition on land of which property owner knows, or should know, and that condition causes injury to persons outside land, property owner should be liable.

Warrington v. Bird, 499 A.2d 1026 (N.J.Super.App. 1985): Duty of proprietor to exercise reasonable care for safety of its patrons extends to conditions obtaining at parking lot and requires that patrons not be subjected to unreasonable risk of harm in traversing expected route between two locations.

Brownsey v. General Printing Ink Corp., 193 A. 824 (N.J.Sup. 1937): A landowner must use reasonable care to safeguard his neighbor from risk of harm, known or reasonably foreseeable, through falling of ice and snow from roof of structure erected upon his premises. While possessor is not liable for bodily harm to others outside land by natural condition thereof, he is under a duty in respect of structures and other artificial creations classified as "nonnatural" to safeguard adjacent owner against unreasonable hazards arising from their plan, construction, location, or otherwise, and breach of such duty resulting in damage constitutes actionable negligence. The doctrine that detriment incident to natural coming upon one's land of water naturally collecting on surface of his neighbor's, though its course be diverted by structures

erected upon neighbor's land, is not redressible, is limited to running surface water, and does not bar recovery for injuries from falling of ice and snow.

2. Act of God Defense

3. Governmental Liability

Barney's Furniture Warehouse of Newark, Inc. v. City of Newark, 303 A.2d 76 (N.J. 1973): Municipality does not have positive duty to keep its sewer plant abreast of developing needs.

New Mexico

1. Landowner's Duty to Inspect/Prepare

Bober v. New Mexico State Fair, 808 P.2d 614 (N.M. 1991): Harm that is caused, in whole or in part, by activity or condition on particular premises cannot be viewed as unforeseeable as matter of law merely because it happens to manifest itself beyond property line; extent of existing duty of care is to be determined not with reference to physical locations, but rather with reference to foreseeability of harm from hazardous condition.

2. Act of God Defense

Trotter v. Callens, 546 P.2d 867 (N.M.App. 1976): Supreme Court in abolishing defense of unavoidable accident did not by implication abolish "Act of God" defense.

2. Governmental Liability

Rutherford v. Chaves County, 47 P.3d 448 (N.M.App. 2002): Tort Claims Act waives governmental immunity for maintenance of a highway, but not for the design of a highway. NMSA 1978, § 41-4-11. State Department of Transportation has the common-law duty to exercise ordinary care to protect the general public from foreseeable harm on the highways of the state; counties have the same duty of care with respect to the maintenance of roads and highways under their jurisdiction.

Hanson v. Board of County Road Com'rs of County of Mecosta, 638 N.W.2d 396 (Mich. 2002): County road commission's duty to "repair and maintain" roadways, under highway exception to governmental immunity statute, does not include a duty to design, or to correct defects arising from the original design or construction of highways. M.C.L.A. § 691.1402(1).

Adams v. Japanese Car Care, 743 P.2d 635 (N.M.App. 1987): City's inspection of private sewer clean-out, at time of its initial construction to ensure its compliance with building codes, did not constitute "operation" of liquid collection or disposal utilities for purposes of Tort Claims Act, and thus city's immunity had not been waived. NMSA 1978, §§ 41- 4-8, 41-4-8, subd. A.
See publication Words and Phrases for other judicial constructions and definitions.

Cardoza v. Town of Silver City, 628 P.2d 1126 (N.M.App. 1981): Actual or constructive notice of defect which causes injury loses its effectiveness when city itself, which has full and complete charge of its streets, sidewalks or systems, including sewer system, creates or causes defective or dangerous condition to exist.

New York

1. Landowner's Duty to Inspect/Prepare

532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 N.Y.2d 280 (N.Y. 2001): Landowner's duty of care includes the duty to prevent foreseeable injury to neighboring property. A landowner who engages in activities that may cause injury to persons on adjoining premises owes those persons a duty to take reasonable precautions to avoid injuring them, but a landowner does not owe a duty to protect an entire urban neighborhood against purely economic losses.

Robertson v. Greater Buffalo Auto Auction, Inc., 724 N.Y.S.2d 249 (N.Y.A.D. 4 Dept. 2001): Landowners owed a duty to persons traveling on the adjoining public highway to maintain their premises so as not to impair the free and safe passage on the highway.

Grant v. Schwartz, 713 N.Y.S.2d 769 (N.Y.A.D. 2 Dept. 2000): There is no common-law duty on a landowner to control the vegetation on his or her property for the benefit of users of a public highway.

Golan v. Astuto, 662 N.Y.S.2d 576 (N.Y.A.D. 2 Dept. 1997): Neighbors did not have duty to take reasonable steps to prevent any potential harm that may have occurred to plaintiff on his property as result of his attempt to saw tree that had fallen onto his property from neighbors' adjoining property, where there was no evidence that tree was defective or that neighbors had actual or constructive notice of any defective condition in tree before it fell.

Azriliant v. Newfy, Inc., 644 N.Y.S.2d 805 (N.Y.A.D. 2 Dept. 1996): Generally, owner or occupier of property owes no duty of care to others to warn them of, or protect them from, defective or dangerous condition on neighboring premises.

Kaufman v. Silver, 642 N.Y.S.2d 73 (N.Y.A.D. 2 Dept. 1996): Owner of abutting property owes no duty to warn or repair defective or dangerous conditions on neighboring property unless abutting property owner causes or contributes to those conditions.

Badou v. New Jersey Transit Rail Operations, 633 N.Y.S.2d 530 (N.Y.A.D. 2 Dept. 1995): Owner or occupier of abutting property owes no duty to warn or protect others from defective or dangerous condition on neighboring property unless owner of abutting property causes or contributes to that condition.

Vought v. Hemminger, 632 N.Y.S.2d 606 (N.Y.A.D. 2 Dept. 1995): Generally, owner or occupier of abutting property owes no duty of care to others to warn or to protect them from defective or dangerous condition on neighboring premises. Exception to rule, that owner or occupier of abutting property owes no duty of care to others to warn or to protect them from

defective or dangerous condition on neighboring premises, exists when owner of abutting property created or contributed to dangerous condition.

Pensabene v. Incorporated Village of Valley Stream, 609 N.Y.S.2d 75 (N.Y.A.D. 2 Dept. 1994): As general rule, owner or occupier of abutting property owes no duty of care to others to warn them of or protect them from defect or dangerous condition on neighboring premises.

Ingenito v. Robert M. Rosen, P.C., 589 N.Y.S.2d 574 (N.Y.A.D. 2 Dept.,1992): Landowner has no common-law duty to control vegetation on his or her property for benefit of users of a public highway.

Gayden v. City of Rochester, 539 N.Y.S.2d 211 (N.Y.A.D. 4 Dept. 1989): Owner of property adjacent to concrete waterway in which seven-year-old boy drowned owed duty to exercise reasonable care in maintenance of its property to prevent foreseeable injury that might occur on adjoining property.

Ivancic v. Olmstead, 488 N.E.2d 72 (N.Y. 1985): At least as to adjoining landowners, concept of constructive notice with respect to liability for falling trees is that there is no duty to consistently and constantly check all trees for nonvisible decay; rather, manifestation of such decay must be readily observable to require landowner to take reasonable steps to prevent harm.

Ivancic v. Olmstead, 488 N.E.2d 72 (N.Y. 1985): Fact that landowner did not inspect tree near boundary with neighbors' property, from which tree overhanging limb fell and struck neighbors' son during heavy windstorm, did not render landowner liable for son's injuries, where there was no indicia of decay or disease to put landowner on notice of defective condition of limb so as to trigger her duty as landowner to take reasonable steps to prevent potential harm.

Rochette v. Town of Newburgh, 449 N.Y.S.2d 1013 (N.Y.A.D. 2 Dept. 1982): Holding defendants liable as owners of property adjacent to lake for severe and permanent injuries sustained by minor plaintiff as a result of a collision on lake between two ice sailboats during a racing regatta would not impose an impossible burden upon defendants inasmuch as they were only required to maintain reasonable safety precautions. While difficulties in regulating activities on lake were factors to be considered in determining whether to impose liability upon defendants as owners of property adjacent to lake where severe and permanent injuries were sustained by minor plaintiff as a result of a collision on lake between ice sailboats during a racing regatta, such difficulties in no way vitiated duty of defendants as owners or holders of possessory interests to provide what was deemed to be appropriate safety measures under circumstances then existing.

Drake v. State, 416 N.Y.S.2d 734 (N.Y.Ct.Cl. 1979): Landowner must exercise reasonable care to abate a known dangerous condition existing on his lands if he has an opportunity to do so; it makes no difference whether the source of the danger relates to a physical condition, or arises from third parties' activities, including the known activities of trespassers, or whether the person injured is on the land itself or on an adjacent highway.

DeRosa v. Fordham University, 238 N.Y.S.2d 778 (N.Y.A.D. 1 Dept. 1963): Landowner's possession and control gives him power of control over conduct of those whom he allows to enter land which he is required to exercise for protection of those outside.

Gillette v. Luone Co., 114 N.Y.S.2d 713 (N.Y.Sup. 1952): Owner of a building abutting upon a public street must maintain it in such condition that it will not become dangerous to the traveling public.

Rashid v. Weill, 46 N.Y.S.2d 711 (N.Y.Sup. 1944): An owner of property adjoining vacant lot should have foreseen the probability of a fall into pit by air raid warden and guarded against it by erecting a fence or rail upon her wall.

Douglas v. Johnson, 16 N.Y.S.2d 644 (N.Y.Sup. 1939): The owner of a building abutting upon a public street must maintain it in such condition that it shall not become dangerous to the traveling public.

Kesten v. Einhorn & Singer Development Corp., 249 N.Y.S. 205 (N.Y.A.D. 1 Dept. 1931): Owner permitting employees to toss rubbish from windows of building under construction was bound to use reasonable care not to injure persons on sidewalk.

Nenstiehl v. Friedman, 153 N.Y.S. 120 (N.Y.Sup.App.Term 1915): Defendants, who were casting boxes and refuse on an adjacent lot which was not their own, cannot, having struck a child playing on the property, assert in defense that it was a trespasser.

McNulty v. Ludwig & Co., 138 N.Y.S. 84 (N.Y.A.D. 2 Dept. 1912): One constructing a sign upon a building adjacent to a street must exercise reasonable care as a reasonably prudent man to construct and maintain it, so as to withstand the attack of the elements in the locality such as might be anticipated to occur.

Kleinberg v. Schween, 119 N.Y.S. 239 (N.Y.A.D. 1 Dept. 1909): Defendant maintained upon his land an unguarded opening or areaway, which extended to and abutted upon adjoining land which belonged to another; and plaintiff, being lawfully upon the adjoining premises, in the nighttime, fell into the areaway. Held, that plaintiff could not recover on the theory of the maintenance by defendant upon his land of a structure which, by its operation or its fall, causes injury to a person upon adjoining land, as the plaintiff was in perfect safety as long as he remained upon the adjoining land.

Gordon v. Schween, 117 N.Y.S. 191 (N.Y.Sup. 1909): An owner of premises is under no duty, at common law or by statute, as to a stranger on adjoining premises, to guard an areaway abutting thereon.

Wallace v. John A. Casey Co., 116 N.Y.S. 394 (N.Y.A.D. 2 Dept. 1909): Where a three year old child follows an older child to a place where the latter is sent for wood, and while waiting there is injured by a barrel given to his companion, thrown from a window into the street, he cannot be considered merely a passer-by in the street.

Hughes v. Harbor & Suburban Bldg. & Sav. Ass'n, 115 N.Y.S. 320 (N.Y.A.D. 2 Dept. 1909): One in possession and control of tall buildings, beneath which pedestrians walk must exercise care commensurate with the danger to prevent the fall of articles on passers-by.

McNulty v. Ludwig & Co., 109 N.Y.S. 703 (N.Y.A.D. 2 Dept. 1908): Where a sign had been put up over the entrance to defendant's premises, defendant was not bound at his peril to see that it was properly fastened to the building and to keep it from falling into the street; the duty in such a case being merely to use reasonable care.

Weitzmann v. A.L. Barber Asphalt Co., 83 N.E. 477 (N.Y. 1908): Where an owner or occupier of land uses on it appliances, devices, or methods that may cause injury to persons on adjoining premises or in public places, such owner or occupier must take reasonable precaution to avoid injuring them. Judgment (1907) 105 N.Y.S. 1149, 120 App.Div. 896, reversed.

Mullen v. St. John, 57 N.Y. 567 (N.Y. 1874): The owner of a building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in proper condition, so that it shall not fall into the street or highway and injure persons lawfully there.

2. Act of God Defense

Tel Oil Co., Inc. v. City of Schenectady, 757 N.Y.S.2d 121 (N.Y.A.D. 3 Dept 2003): By asserting the "act of God defense," the burden falls upon negligence defendants to show that those losses and injuries were occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight; if there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God.
See publication Words and Phrases for other judicial constructions and definitions.

Tel Oil Co., Inc. v. City of Schenectady, 718 N,Y.S.2d 410 (N.Y.A.D. 3 Dept. 2000): Act of God denotes those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight, and if there is any co-operation of man, or any admixture of human means, injury is not act of God.

Pickersgill v. City of New York, 642 N.Y.S.2d 469 (N.Y.City Civ.Ct. 1996): Injury is caused by "act of God" when it happens by direct, immediate, and exclusive operation of forces of nature, uncontrolled or uninfluenced by power of man and without human intervention, and is of such character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by any reasonable degree of care or diligence. "Act of God" defense should not be applied where negligent acts or omissions of defendant contribute to injury sustained.

Prashant Enterprises, Inc. v. State, 614 N.Y.S.2d 653 (N.Y.A.D. 3 Dept. 1994): "Act of God" is unusual, extraordinary and unprecedented event.

Lee v. Consolidated Edison Co. of New York, 407 N.Y.S.2d 777 (N.Y.City Civ.Ct. 1978): A loss cannot be attributed to an act of God if it is result of any person's aid or interference, if concurrence of human agency is involved or if injury might have been avoided by human prudence and foresight.

Smith v. ABC Realty Co., 322 N.Y.S.2d 207 (N.Y.City Civ.Ct. 1971): Not every crime is an intervening cause nor is every human intervention, act of God or combination of both sufficient to excuse original neglect. Not every crime is an intervening cause nor is every human intervention, act of God or combination of both sufficient to excuse original neglect.

3. Governmental Liability

Evans v. Stranger, 762 N.Y.S.2d 678 (N.Y.A.D. 3 Dept. 2003): A municipality has a continuing duty to review a roadway design plan in light of its actual implementation, but has no obligation to undertake expensive reconstruction of older roads solely based on updated highway safety standards.

Blount v. Town of West Turin, 759 N.Y.S.2d 851 (N.Y.Sup. 2003): Recreational use statute applied to town roads opened for snowmobiling by specific town action and to those opened for snowmobiling by town action in designating them for seasonal use, and thus town was immune from liability for any general negligence in action by snowmobiler for injuries allegedly sustained during accident which occurred on groomed trail that was on town highway. McKinney's General Obligations Law § 9-103. If a highway is not suitable for snowmobile operation under recreation law, then the recreation use statute limitation on liability does not apply to protect a city from tort liability for general negligence, and ordinary highway liability rules are involved that state that the road needs to be safe only for those lawfully operating on them. McKinney's PRHPL § 25.05; McKinney's General Obligations Law § 9-103. When acting in connection with highways, a municipality acts in a governmental role, that is, a traditional area not primarily reserved to private sector type activities that involve a proprietary role.

Duger v. Estate of Carey, 744 N.Y.S.2d 262 (N.Y.A.D. 3 Dept. 2002): Statute making county liable for injuries caused by defective highways and bridges allows a claim against a county based on constructive notice of a dangerous condition on a county highway. McKinney's Highway Law § 139, subd. 2.

James v. New York State Bridge Authority, 743 N.Y.S.2d 151 (N.Y.A.D. 2 Dept. 2002): Bridge Authority had qualified immunity in negligence action seeking damages for death of tractor-trailer driver who was killed when his vehicle struck a guardrail on a curve approaching a bridge, where Bridge authority had raised speed limit on the curve from 40 miles per hour to 55 miles per hour upon the recommendation of an engineering firm which had conducted a speed report, and the expressed focus of the speed report was the potential impact of an increased speed limit on such issues as safety.

Smith v. State, 742 N.Y.S.2d 792 (N.Y.Ct.Cl. 2002): The state is under a non-delegatory duty to maintain its roadways in a reasonably safe condition for motorists who obey the rules of the road. Where appropriate, the state must erect and maintain guide rails on its roadways, but it is not an insurer of the safety of motorists, and negligence cannot be inferred from the mere happening of an accident.

Affleck v. Buckley, 758 N.E.2d 651 (N.Y. 2001): A governmental body may be liable for a traffic planning decision only when its study is plainly inadequate, or there is no reasonable basis for its plan. Something more than a choice between conflicting opinions of experts is required before a governmental body may be held liable for negligently performing its traffic planning function; rather, plaintiff must show not merely that another option was available but also that the plan adopted lacked a reasonable basis.

Biernacki v. Village of Ravena, 664 N.Y.S.2d 682 (N.Y.A.D. 3 Dept. 1997): Duties of municipal authorities in adopting general plan of drainage, and determining when and where sewers shall be built, of what size, and at what level, are of a quasi-judicial nature, involving exercise of deliberate judgment and large discretion, which is not subject to revision by court or jury in private action for not sufficiently draining particular lot of land.

Sniper v. City of Syracuse, 530 N.Y.S.2d 374 (N.Y.A.D. 4 Dept. 1988): A municipality does not have a continuing duty to insure the safety of buildings after certificates of occupancy are issued or to maintain lateral sewer lines.

Sgarlata v. City of Schenectady, 353 N.Y.S.2d 603 (N.Y.Sup. 1974): Municipality has no immunity from suit where it controls and maintains drainage or sewer system and has obligation to keep drains in good repair and free from obstruction and is liable for negligence in performing this duty.

Beck v. City of New York, 199 N.Y.S.2d 584 (N.Y.Sup. 1960): Duty of providing sewerage and drainage is quasi-judicial, and in determining the necessity, location, capacity, etc., officers upon whom duty is imposed are required to exercise judgment and discretion, and no action lies at instance of an individual for damages based upon either a failure to act or an error of judgment in acting, but this principle cannot be extended so as to grant immunity to municipalities for acts which result in the invasion of private property or creation of public or private nuisances.

Steeley v. City of New York, 157 N.Y.S.2d 734 (N.Y.Sup. 1956): City had a duty to provide an employee of its independent contractor engaged to construct sewer with a safe place to work. Where city which had engaged contractor to construct sewer and connect it to live sewer could have, by exercise of reasonable care, discovered how dangerous were premises where contractor's employees were working, it was guilty of negligence in failing to do so and to provide them with safe place to work when they, in presence of city inspector, broke through bulkhead between new sewer and live sewer and sewage rushed into new sewer and they were asphyxiated in a matter of minutes.

Williams v. State, 74 N.Y.S.2d 647 (N.Y.Ct.Cl. 1947): A municipal corporation acts ministerially in constructing sewers, and in keeping them in repair, and is bound to the exercise of needful prudence, watchfulness and care.

William P. Greiner Bldg. Corporation v. Town of Cheektowaga, 181 N.Y.S. 759 (N.Y.Sup. 1920): Municipalities are not liable for errors of judgment in making such public improvements as streets, sewers, etc.

Messersmith v. City of Buffalo, 122 N.Y.S. 918 (N.Y.A.D. 4 Dept. 1910): A city is liable for the negligence of its employes in constructing and maintaining a waterworks to supply consumers, so that it would be liable for injuries resulting from the bursting of a main by reason of negligently making a connection for a consumer.

Jung v. City of New York, 116 N.Y.S. 368 (N.Y.A.D. 2 Dept. 1909): A city was not liable for damages to abutting property through surface water flowing down the street, where that was the natural course of drainage and the city in no way interfered with it or exercised any authority over the street.

Punsky v. City of New York, 114 N.Y.S. 66 (N.Y.A.D. 2 Dept. 1908): In the absence of negligence in collecting water and furnishing outlet therefor through sewers, a city is not liable for the flooding of a cellar, by the natural flow of water along the street after a heavy downpour.

Munn v. City of Hudson, 70 N.Y.S. 525 (N.Y.A.D. 3 Dept. 1901): Where a city failed to use reasonable care in constructing a sewer according to plans and specifications, and failed to keep it in repair thereafter, and plaintiff's health was injured by sewage therefrom which entered her house, the city was liable for such injuries to her person. Where a city failed to use reasonable care in constructing a sewer according to plans and specifications, and failed to keep it in repair thereafter, whereby plaintiff's property and goods stored therein were damaged, the city was liable.

Bolton v. Village of New Rochelle, 32 N.Y.S. 442 (N.Y.Sup. 1895): Laws 1889, c. 201, and Laws 1893, c. 220, giving to the drainage commissioners the entire charge and control of sewers, and providing that such commissioners may sue and be sued, do not relieve the municipality from liability for a nuisance arising from the manner in which a sewer is maintained.

Garratt v. Trustees of Village of Canandaigua, 32 N.E. 142 (N.Y. 1892): The plan adopted by the trustees of a village under Laws 1886, c. 658, authorizing them to construct a system of drainage and sewerage, was to dispose of the sewage through the outlet of a lake, which required the removal of obstructions therein, in order to produce a more rapid flow. The statute contemplated that such removal would benefit the lands along the stream subject to overflow, which were therefore to be assessed for benefits. The statute also provided that the waters of the lake should be maintained at a height not less than their ordinary height at low-water mark, and for this purpose the trustees were authorized to erect and maintain in the outlet locks with gates. Held, that a landowner along the outlet, who had been assessed for benefits, could not complain of the fact that the gates were kept wide open, thereby causing the waters to flow out to such an extent as to overflow his lands.

Watson v. City of Kingston, 21 N.E. 102 (N.Y. 1889): Plaintiff's premises were on the side of a steep hill or ravine, and on a lower grade than that established for the street, and subject to be overflowed by water collecting on the street between plaintiff's premises and the intersection of another street, where there are sewers. On one or two occasions of great freshets, when the sewers were temporarily clogged by debris, additional water flowed thereon. It did not appear that the premises were subjected to a further burden than would be borne in a natural state. Held, that no action against the municipality would lie.

Smith v. City of New York, 66 N.Y. 295 (N.Y. 1876): A municipal corporation can only be made liable for damages resulting from the overflow of a sewer upon proof of some fault or neglect upon its part, either in the construction of the sewer or in keeping it in proper repair.

Wilson v. City of New York, 1 Denio 595 (N.Y.Sup. 1845): Under 2 Rev.Laws 1813, p. 407, § 175, empowering the authorities of New York City to make sewers, drains, and vaults in any part of the city, an action will lie against the city for a neglect to repair existing sewers and drains, by which an individual is injured.

North Carolina

1. Landowner's Duty to Inspect/Prepare

As of November 2003, no North Carolina cases have been uncovered which directly discuss the degree of precaution necessary in the context of an approaching storm. Absent direct law on the issue, establishing liability of adjoining property owners should begin with the principle that the law imposes a duty or ordinary care upon every person who engages in an active course of conduct. Toone v. Adams, 262 N.C. 403, 409 (1964). In addition, North Carolina law imposes a duty of care on a property owner to maintain man-made structures, cultivated trees, and other pieces of human-cultivated landscaping, and naturally occurring objects which the owner knows are in an unreasonably dangerous condition. Matheny v. Stonecutter Mills Corp., 107 S.E.2d 143 (NC 1959). The duty generally applies to lawful visitors but not to trespassers. Nelson v. Freedland, 507 S.E.2d 882, 892 (NC 1998). It extends, however, to drivers on public roads and to neighboring property owners, so long as the property owner had actual or constructive knowledge of the dangerous condition. Gibson v. Hunsberger, 428 S.E.2d 489 (NC Ct. App. 1993) (landowner is liable to drivers on public roads adjacent to land for dangerous conditions of which the owner had actual or constructive notice, but is not obligated to inspect property in rural, wooded settings); *cf*. Rowe v. McGee, 168 S.E.2d 77 (NC Ct. App. 1969) (owner who knows its tree is decayed and likely to fall and damage plaintiffs' property has duty to eliminate danger but is not liable to defendant if plaintiff had equal ability to control the condition); Annotation, "Failure to Exercise Due Care to Prevent all of Tree", 27 AM. JUR. 2d, *Proof of Facts* 639, section 1, at 645 (noting that both owners and occupiers of property have been held liable where the requisite control was found.).

The Gibson case held that in a rural, wooded setting, a property owner is not obligated to inspect the property to uncover dangerous conditions of which the owner was not previously aware. This is consistent with the common law rule absolving the landowner of any duty to find or remedy naturally occurring conditions, a rule designed to avoid burdening rural landowners with inspection of large unpopulated woodlands. *See generally* Keeton, *Prosser and Keeton on the Law of Torts*, § 57 (5th ed. 1984). Other jurisdictions have held similarly. *See, e.g.*, Ivancic v. Olmstead, 66 N.Y.2d 349, 488 N.E.2d, *cert. denied* 90 L. Ed 658, 106 S. Ct. 1975 (1985) (a duty to remedy the hazard arises where the landowner has actual or constructive knowledge of it, but landowner has no duty to inspect regularly for non-visible decay of trees). However, the *Gibson* case did not specifically address the duty of a landowner in a more populated setting.

2. Trespass and Nuisance

To prove nuisance, plaintiff must show "an unreasonable interference with the use and enjoyment of their property." Whiteside Estate v. Highlands Cove, 553 S.E.2d 431, 436, 146 N.C.App. 449 at ___ (2001). To establish trespass, plaintiff must prove: (1) possession of the land, (2) unauthorized entry onto the land by another, and (3) resulting damage to the property owner. Whiteside Estate, 553 S.E.2d at 438.

Nothing in the elements of these two causes of action requires the defendant's actions to be willful for plaintiff to prevail. Both nuisance and trespass can occur even when the defendant did not intend any damage. Whiteside Estate, 553 S.E.2d at 436. However, an action for nuisance requires some form of wrongful conduct for plaintiff to prevail. Even an "unintentional" nuisance requires plaintiff to show that the defendant's conduct was "negligent, reckless, or ultrahazardous." Whiteside Estate, 553 S.E.2d at 436.

The act of trespass requires, however, may provide a basis for recovery even when there is no negligence, as noted in the following passage from York Industrial Center, Inc. v. Michigan Mutual Liability Company, 155 S.E.2d 501, 506 271 N.C. 158, __ (1967):

> In the absence of negligence, which is not shown in the present case, trespass to land requires an intentional entry thereon. Schloss v. Hallman, 255 N.C. 686, 122 S.E.2d 513. It does not, however, require that such entry be wilful and an action for trespass lies even though the entry was made under bona fide belief by the defendant that he was the owner of the land and entitled to its possession or was otherwise entitled to go upon the property

The above language would hold liable a person who intended to do a certain thing, e.g., cross upon a certain land, even if that person did not know that the land was owned by someone else. The question unanswered in North Carolina case law is whether an intentional act that affects another landowner's property by causing transfer of debris to that property constitutes trespass. Our sister state appears to have answered that question in the affirmative. In *Akers v. Mathieson Alkali Works*, 151 Va. 1, 144 S.E. 492 (1928), the plaintiff sued under theories of continuing trespass and nuisance for leakage of chemical "muck" from the defendant's storage basin. Defendant argued that the right of recovery was predicated upon a finding of negligence by defendant. The court rejected that argument, stating:

> The law requires that every person so use his own property as not to injure the property of another …. When defendant permitted the muck to escape from its land and injure land of the plaintiff, without his fault, defendant was liable for the damages sustained by the plaintiff. The loss in such cases must be borne by plaintiff or defendant and it seems just that it fall upon the defendant by whose conduct it was made possible.

Id.; *accord* Cooper v. Horn, 248 Va. 417 at 423-24, 448 S.E.2d 403 at 407 (1994) ("Although proof of a negligent act may be sufficient to support a civil action for trespass, such proof is not a necessary element of that cause of action."). *See also* Brooks v. Ready Mix Concrete Company,

94 Ga. 791, 96 S.E.2d 213 (Ga. Ct. App. 1956) ("[R]eason and common sense and justice require that the one who sets in motion an agency which directly damages another's property, especially an agency of such a dangerous nature, should suffer rather than an innocent property owner who has done nothing.").

Trespass to Chattels

When personal property is carried away, such as by wind or flood, and comes to rest on the land of another, the property still remains the property of the original owner. The original owner will want to retrieve the property, but doing so can be problematic. To simply entering another's land to retrieve property without the landowner's permission might be viewed as a trespass to real property under certain circumstances. Even if a person causes no actual damage in entering the land of another, the landowner may still be entitled to sue for recovery of nominal damages. Matthews v. Forrest, 235 N.C. 281 69 S.E.2d 553, (1952). On the other hand, if the landowner unreasonably refuses entry onto the land to retrieve the property, the landowner may be liable for trespass to chattels. Trespass to chattels is the intentional, unauthorized dispossession of or intermeddling with another's personal property. Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701, (1999); McDowell v. Davis, 33 N.C. App. 529, 235 S.E.2d 896, *rev. den.* 293 N.C. App. 360, 237 S.E.2d 48 (1977). A landowner's refusal to either allow entry upon the land to retrieve the item or refusal to deliver the item upon request can constitute an intentional dispossession of or intermeddling with that chattel. Ideally, then, permission should be sought to retrieve property that has been carried away. If the landowner is not home or is otherwise not available, care should be taken not to damage any part of the landowner's land in retrieving the property so as to avoid any claim by the landowner for actual damages arising from trespass to real property. Nonetheless, the landowner may still have a claim for nominal damages.

3. Act of God Defense

As held in Safeguard Ins. Co. v. Wilmington Cold Storage Co., 149 S.E.2d 27 (NC Ct. App. 1966), the landowner will be liable if the landowner's negligence acted in concurrence with an act of God:

> "[One may be held liable for his own negligence even through it concurs with an act of God." To the same effect, Southern Ry. Co. v. Cohen Weenen & Co., 156 Va. 313, 157 S.E. 563. Reducing the principle to the terseness of a maxim, "He whose negligence joins with the act of God in producing injury is liable therefor." Kindell v. Franklin Sugar Refining Co., 286 Pa. 359, 133 A. 566.

Safeguard Ins., 149 S.E.2d 27 (N.C. Ct. App. 1966). However, the landowner will not be liable for damages if the damages would have occurred from an act of God *regardless of that negligence*.

> This is said in 1 AM. JUR. 2d, Act of God, § 11: "All the authorities without exception agree that a person is not liable for injuries or damages caused by an act which falls within the meaning of the term 'act of God,' where there is no fault or negligence on his part. Even where the law imposes liability irrespective of

> negligence, liability will not be imposed where the injury or damage is solely the result of an act of God."

The issue was further developed in Lea Co. v. North Carolina Board of Transp., 308 N.C. 603,304 S.E.2d 164 (N.C. 1983), wherein the plaintiff instituted an action against the Board of Transportation for flooding on or across the plaintiff's property which flowed from an easement taken by the Board. This flooding was a result of a 100-year flood (*i.e.*, a flood that is statistically predicted to occur once in every 100 years). Nonetheless, the North Carolina Supreme Court upheld the trial court determination that this flood was a reasonably foreseeable event. *Id.* at 175. That court adopted the definition for an Act of God set forth in Black's Law Dictionary, 31 (Revised 5th Edition 1979) as follows:

> An Act occasioned exclusively by violence of nature without the interference of any human agency. It means a natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening or occurrence, due to natural causes an inevitable accident, or disaster; a natural and inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency.

Lea, 304 S.E.2d at 172 (emphasis added). *See also* Jenkins v. Helgren, 217 S.E.2d 120 (N.C. Ct. App.1975) (even if source of spark was an act of God, for which installers of insulation in return duct connected to furnace could not be responsible, installers could be held liable to homeowners for damage caused by fire if their negligence created the hazardous condition upon which the act operated); Bennett v. Southern Railroad Co., 96 S.E.2d 31 (N.C. Ct. App. 1957) (even when an act of God combines or concurs with the negligence of the defendant to produce the injury or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his/her own negligent act or omission.); Lawrence v. Power Co., 190 N. C. 664, 130 S.E. 735 (1935) (defendant power company, who allowed dry grass to accumulate on its right-of-way under plaintiff's tower, found liable for fire damage to plaintiff's tower after lightning struck defendant's transmission line causing an insulator on the tower to melt and fall upon the combustible grass below); Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925); Supervisor & Commissioner of Pickens Co. v. Jennings, 181 N.C. 393, 107 S.E. 312 (1921); Ridge v. Norfolk Southern R.R. Co., 167 N.C. 510, 83 S.E. 762 (1914).

4. Governmental Liability

Any actions against the state or a state agency or state employee must be submitted to the Industrial Commission by affidavit, N.C.G.S.§143-297 (must list various things), within three (3) years of accrual of the claim, N.C.G.S. §143-299. The limit of liability is $150,000. N.C.G.S. §143-291. There appear to be no notice limitations for claims against municipalities.

Whether a governmental body will be held liable in tort for negligence depends upon the nature of the acts or omissions constituting negligence. There are two categories of governmental functions: "governmental" and "proprietary." Sides v. Hospital, 287 N.C. 14, 213 S.E. 2d 297 (1975); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E. 2d 897 (1972), *pet. for reh.*

denied, 281 N.C. 516 (1972); and Casey v. Wake County, 45 N.C. App. 522, 263 S.E. 2d 360 (1980), *pet. for discr. rev. denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980). A municipality would enjoy sovereign immunity for "governmental" functions, but not for "proprietary" ones.

A good definition of the distinction between governmental and proprietary functions is the following:

> Any activity of the municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

See generally Kizer v. City of Raleigh, 121 N.C. App. 526, 466 S.E.2d 336 (1996).

Case law in North Carolina has helped clarify what functions are governmental and what are proprietary, as follows:

1) Municipal fire departments are generally immune from governmental or discretionary functions, which include the decisions they make in fighting fires, but that immunity is waived to the extent of any insurance limits for that entity, under N.C. Gen. Stat. §§ 153A-435 and 160A-485; *see*, *e.g.*, Willis v. Town of Beaufort, 544 S.E.2d 600 (N.C.Ct.App. 2001). The waiver of immunity must be specifically pleaded in the complaint. Clarke v. Burke County, 117 N.C. 85, 450 S.E.2d 747 (NC Ct. App. 1994).

2) Volunteer fire departments are immune from civil liability for their conduct "at the scene" and "in connection with" their fire suppression efforts. N.C.G.S. §58-82-5(b) (1999); *see* Spruill v. Lake Phelps Volunteer Fire Department, Inc., 351 N.C. 318, 523 S.E.2d 672 (N.C. 2000). Spruill reversed the North Carolina Court of Appeals opinion in Spruill v. Lake Phelps Volunteer Fire Department, Inc., 132 N.C.App. 104, 510 S.E.2d 405 (N.C.Ct.App. 1999) that had interpreted N.C.G.S. §58-82-5(b) (1999) - which protects volunteer fire departments and volunteer firefighters for firefighting activities - as only granting immunity if the activities occurred "at the scene" of a fire. The North Carolina Court interpreted N.C.G.S. §58-82-5(b) (1999) as protecting both a fire department and a fireman not only from activities "at the scene" but also from conduct "in connection with" a fire regardless of the distance from the scene -- in this case, one-half mile.

3) Sewage maintenance is generally considered proprietary in nature, thus conferring liability to municipalities for failure to maintain sewage systems, including storm drains. Howell v. City of Lumberton, 548 S.E.2d 835 (N.C. Ct. App. 2001) ("The general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof," quoting Hotels, Inc. v. Raleigh, 268 N.C. 535, 151 S.E.2d 35 (1966)); Pulliam v. City of Greensboro, 103 N.C. App. 748, 754, 407 S.E.2d 567, 567 (1991) (municipality "not immune from tort liability in the operation of its sewer system."). However,

if some other entity besides the municipality assumed control over the sewage system, the municipality may not be liable. *See, e.g.*, Milner Hotels, Inc. v. City of Raleigh, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on reh'g*, 271 N.C. 224, 155 S.E.2d 543 (1967) (a municipality is responsible for negligent maintenance of drains constructed by third persons only if it adopted them as part of its drainage system or assumed control and management thereof). *See also* Kizer v. City of Raleigh, 466 S.E.2d 336 (N.C.App. 1996) (no governmental immunity for negligent maintenance of storm drains and pipes); Pulliam v. City of Greensboro, 407 S.E.2d 567 (N.C.App. 1991) (no immunity for operation of sanitary sewer system); Ward v. City of Charlotte, 269 S.E.2d 663 (N.C.App. 1980) (no immunity for injuries resulting from lack of due care in upkeep of sewage system, but liability may arise only where a municipality has actual or constructive notice of the existence of an obstruction or defect and fails to act); Mitchell v. City of High Point, 228 S.E.2d 634 (N.C.App. 1976) (city not liable for damages from flow of overloaded stream beneath city street after annexing the area containing a natural stream bed, where stream bed was privately owned, city merely owned right-of-way across stream bed and maintained culverts for passage of stream beneath city street, and city had not augmented flow of water to point of overloading stream or causing overflow); Dize Awning & Tent Co. v. City of Winston-Salem, 224 S.E.2d 257 (N.C.App. 1976) (city not liable for increased flow from watershed merely because city selected design choice for construction of replacement culvert which exposed inadequacy of plaintiff's private drain system for coping with increased flow from watershed); Moser v. City of Burlington, 78 S.E. 74 (N.C. 1913) (city which chooses to construct a sewerage system must exercise the power in such a way as not to create a private nuisance); Barger v. City of Hickory, 41 S.E. 708 (N.C. 1902) (city not liable for sewer nuisance where the only evidence against the city is that some of its employees, years before, acting under direction of the board of aldermen, put in the sewer, and where the damage claimed arises solely from the present use of the sewer by a private person).

4) As to debris and/or traffic on state highways, the North Carolina State Highway Commission is immune from suit, except insofar as the right to sue is conferred by the Tort Claims Act. Ayscue v. Highway Comm'n, 270 N.C. 100, 102 (1967). As the Act has been interpreted, the Highway Commission is not liable for negligent omissions or failures to act. *Id.* at 103. Therefore, the owner of a car damaged by a tree that fell in the roadway cannot maintain an action against the highway commission for failure to maintain the tree. Moreover, a plaintiff probably cannot maintain an action for negligent failure to maintain manmade objects such as telephone poles. See id. (plaintiff could not maintain an action against the Commission based on the Commission's negligent failure to removal gravel from a paved intersection, where the gravel had been strewn by cars from a nearby gravel road).

In Wilkerson v. Norfolk Southern Ry. Co., 566 S.E.2d 104 (N.C.App. 2002), the court held that the city was entitled to governmental immunity from a wrongful death claim by a motorist who collided with a train because the city was carrying out a governmental function with respect to a railroad crossing improvement project. The city had not waived its immunity because it had not purchased a liability insurance policy for this project or anything related to this project. As stated in Wilkerson:

> When municipalities lose immunity, it is because they have failed to maintain their own streets and sidewalks in a safe condition. *See* Eakes v. City of Durham,

> 125 N.C.App. 551, 481 S.E.2d 402 (1997); McDonald's Village of Pinehurst, 91 N.C.App. 633, 372 S.E.2d 733 (1988); and Millar [v. Town of Wilson,] 222 N.C. 340, 23 S.E.2d 42 [1942].

The Millar case involved a hole in the road over which a driver drove a truck, resulting in serious injuries. In allowing plaintiff to proceed against the city, the court stated, "While the municipal authorities have discretion in selecting the means by which the traveling public is to be protected against a dangerous defect in the street, provided the means selected are adequate, there is no discretion as to the performance or nonperformance of the duty itself." 23 S.E.2d at 44.

5) Municipalities and agents are given added layer of immunity for the failure to furnish police protection to specific individuals under Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991), but this case appears to apply only to governmental police protection, not governmental fire protection services. Lovelace v. City of Shelby, 351 N.C. 458, 526 S.E.2d 652 (N.C. 2000). The North Carolina Supreme Court reversed the North Carolina Court of Appeals decision in Lovelace v. City of Shelby, 133 N.C.App. 408, 515 S.E.2d 722 (N.C.Ct.App. 1999), which had applied the Braswell "public duty doctrine" to protect the city from a claim that the city owed a "special duty" to a tenant or to tenant's daughter, the daughter having died in a house fire allegedly from a six-minute delay by a the city's 911 system operator in notifying the fire department of fire. The North Carolina Supreme Court held that the public duty doctrine only applied to governmental police protection, not governmental fire protection services, beginning its analysis as follows:

> As early as this Court's decision in Hill v. Olderman of Charlotte, 72 N.C. 55 (1875), the state and its agencies have been immune from tort liability under the common law doctrine of sovereign immunity. Sovereign immunity continues to be a viable protection against tort claims for local governments. It is subject, however, to certain legislatively created exceptions allowing local governments to purchase liability insurance to protect the public, *See* N.C.G.S. §§153a-435 (1999) (applying to counties), 160a-485 (1999) (applying to cities) and court-made exceptions for public officials involved in conduct that is either corrupt, malicious, or outside of and beyond the scope of their official authority, *See* Meyer v. Walls, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997).

The court then noted that further protection is given to a municipality under the public duty doctrine, which protects a municipality and its agents from liability for the failure to furnish police protection to specific individuals. However, the court stated that the public duty doctrine announced in Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991) was "specifically limited to the facts in that case and to the issue of whether sheriff negligently failed to protect a decedent." The court concluded as follows:

> While this court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public's general protection, *See* Hunt v. N.C. Department of Labor, 348 N.C. 192, 499 S.E.2d 747 (1998); Stone v. N.C. Department of Labor, 347 N.C. 473, 495 S.E.2d 711, *certiorari denied*, 525 U.S. 1016, 119 S.Ct. 540, 142 L.E.d 2d 449 (1998), we have never expanded the public

> duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public, *See* Isenhour v. Hutto, 350 N.C. 601, 517 S.E.2d 121 (1999) (refusing to extend the public doctrine to shield a city from liability for the allegedly negligent acts of a school crossing guard). We declined to expand the public duty doctrine in this case. Thus, the public duty doctrine, as it applies to local government, is limited to the facts of Braswell. Because we decline to expand the public duty doctrine as it applies to local governments, we reverse the decision of the court of appeals and remand to the court for reinstatement of the trial court's order denying defendant's Rule 12(b)(6) Motion to Dismiss.

In Willis v. Town of Beaufort, 544 S.E.2d 600 (N.C.Ct.App. 2001), the court of appeals reversed summary judgment granted in favor of city and fire chief in a negligence claim brought by shrimp vessel owner against city and fire chief after fire destroyed interior of vessel, holding that: (1) public duty doctrine, as set forth in Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991) was not available as defense for city; (2) city waived governmental immunity to extent it had insurance coverage; (3) public duty doctrine was not available as defense for fire chief; (4) fire chief was public official, rather than public employee, and was not subject to individual liability for negligence; and (5) fire chief's immunity was waived by city's purchase of liability insurance. The facts were as follows: Plaintiff was attempting to repair the fuel tanks on board his shrimping vessel which was docked in Beaufort, North Carolina, when sparks from a welding machine ignited a fire aboard the vessel, and Plaintiff unsuccessfully attempted to extinguish the fire. He then called 911, which notified the Beaufort Fire Department, which arrived within four minutes of first being contacted, and ordered the vessel owner off the vessel, as he was attempting to extinguish the fire himself. The vessel owner then requested assistance from several additional fire departments, and those additional departments shortly thereafter arrived on the scene. Beaufort Fire Department assumed jurisdiction, and attempted to use water to extinguish the fire, but after a period of time, the fire chief ordered all fire-fighting efforts to cease. Plaintiff sued the fire chief for "gross negligence" as well as simple negligence. The Court held that the Public Duty Doctrine does not extend to protect the municipal provision of fire protection services, in view of Lovelace v. City of Shelby. The Court went on to discuss whether the fire chief was protected under the Sovereign Immunity Doctrine. The court noted that "the organization and operation of a fire department is a governmental function," and that under the doctrine of Governmental Immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function. However, any city may waive its immunity from civil tort liability by purchasing liability insurance, under N.C. Gen. Stat. §160A-485. Accordingly, the fire department and the fire chief, in his capacity as an officer of the fire department, was subject to liability only to the extent of the insurance.

The Court went on to discuss the issue of whether the fire chief was merely a public employee as opposed to a public official, the distinction being that a public employee can be sued for mere negligence whereas a public official cannot. They found him to be a public official entitled to protection from mere negligence, in the performance of their governmental or discretionary duties. Although the fire chief was found to be a public official conducting a governmental or discretionary function, he stood in the shoes of the department itself and was not immune to the extent of liability insurance.

6) "Special Duty" Cases:

Vanasek v. Duke Power Company, 132 N.C.App. 335, 511 S.E.2d 41 (N.C.Ct.App. 1999): City did not owe special duty to worker, who claimed negligence in failing to provide warnings or barriers around a downed power line that electrocuted a worker, and the City was thus immune from liability under the Public Duty Doctrine. The case states, "[T]he Public Duty Doctrine provides that a municipality ordinarily acts for the benefit of the general public when exercising its police powers, and therefore cannot be held liable for negligence or gross negligence in performing or failing to perform its duties." The Court goes on to note, "if a negligence claim survives application of the Public Duty Doctrine, the municipality may nonetheless be insulated from liability by virtue of governmental immunity. See Stafford v. Barker, 129 N.C.App. 576, 584, 502 S.E.2d 1, 5 (holding that a municipality's waiver of governmental immunity does not affect the Public Duty Doctrine inquiry), *discretionary review denied*, 348 N.C. 695, 511 S.E.2d 650 (1998)." The Court noted that a special duty exists "where the municipality promises protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered."

Davis v. Messer, 119 N.C.App. 44, 457 S.E.2d 902, *discretionary review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995): Allegations of a "special duty" were found to be sufficient in a case where a firefighter informed a dispatcher that his fire department would respond, even though the burning home was near the border with an adjacent fire district, but then his fire department turned around when they were within a mile of the house, returning to their station when they observed that the burning home was across the district line. The homeowner alleged that he had relied on that direct promise of protection and thus had not called other fire departments. The court held that the plaintiff's allegations satisfied the substantive elements of the exception to the public duty doctrine.

North Dakota

1. Landowner's Duty to Inspect/Prepare

Rozell v. Northern Pac. Ry. Co., 167 N.W. 489 (N.D. 1917): Where owner of real estate has exercised ordinary care in use of his property, he is not liable for damages incidentally resulting to a traveler on abutting highway.

2. Act of God Defense

Huber v. Oliver County, 602 N.W.2d 710 (N.D. 1999): To prevail on the act-of-God defense, the defendant must establish the act of God was the sole proximate cause of the damage, and if the act of God and the fault or negligence of the defendant combine to produce the injury, the defendant is still liable.

North Shore, Inc. v. Wakefield, 542 N.W.2d 725 (N.D. 1996): If act of God and negligence of defendant combine to produce the injury, the defendant is still liable.

Lang v. Wonnenberg, 455 N.W.2d 832 (N.D. 1990): If an act of God and the negligence of the defendant combine to produce the injury, the defendant is liable.

3. Governmental Liability

Kinnischtzke v. City of Glen Ullin, 57 N.W.2d 588, (N.D.,1953): The Legislature, by endowing municipalities with authority to establish and maintain sewer systems, and, when necessary, to conduct sewage beyond the municipal limits, did not sanction acts of a municipality resulting in private damage where that damage is not the inherent result of the exercise of the statutory authority, but results from the manner in which the authority is exercised. Const. §§ 130, 166-173; NDRC 1943, 40.2202, 40.2203.

Ohio

1. Landowner's Duty to Inspect/Prepare

Nationwide Ins. Co. v. Jordan, 639 N.E.2d 536 (Ohio. Mun. 1994): Maintenance of tree on owner's property was not "absolute nuisance," and thus adjoining landowner, who allegedly suffered damage as result of tree falling, could not proceed merely upon strict liability against owner, but, instead, was required to prove negligence.

Heckert v. Patrick, 473 N.E.2d 1204 (Ohio 1984): Although there is no duty imposed upon the owner of property abutting a rural highway to inspect growing trees adjacent thereto or to ascertain defects which may result in injury to a traveler on the highway, an owner having knowledge, actual or constructive, of a patently defective condition of a tree which may result in injury to a traveler must exercise reasonable care to prevent harm to a person lawfully using the highway from the falling of such tree or its branches.

Barber v. Krieg, 178 N.E.2d 170 (Ohio 1961): Apart from specific statutes, law imposes upon every person duty of using his own properties so as not to injure his neighbors; as conditions change and modes of life alter, duty of observing ordinary care in use of property while not altering in its essentials, will alter in its details.

Hay v. Norwalk Lodge No. 730, B.P.O.E., 109 N.E.2d 481 (Ohio.App.6.Dist.Huron.Co. 1951): An owner of property abutting a highway has the obligation to use reasonable care to keep his premises in such condition as not to endanger travelers in their lawful use of the highway. No duty is imposed upon the owner of property abutting a rural highway to inspect growing trees adjacent thereto to ascertain defects which may result in injury to a traveler on the highway, but an owner having knowledge, actual or constructive, of a patently defective condition of a tree which may result in injury to a traveler must exercise reasonable care to prevent harm to a person lawfully using the highway from the falling of such tree or its branches.

Stern v. City of Cleveland, 14 Ohio Law Abs. 291 (Ohio.App.8.Dist.Cuyahoga. 1933): Where injured person was at time of injury in a public place or on premises of a person other than the person sought to be charged, rule of nonliability for injury to licensees is not available.

Defiance Water Co. v. Olinger, 44 N.E. 238 (Ohio 1896): A guest, by the express or implied invitation of a tenant of premises adjoining land on which water is stored in dangerous quantities, may recover of the adjoining owner for injuries received while on the tenant's premises, because of the escape of the water through the owner's failure to use reasonable care to restrain it.

2. Act of God Defense

Helton v. Scioto City Bd. Of Commrs., 703 N.E.2d 841 (Ohio.App.4.Dist.Scioto.Co. 1997): For an event to be an "act of God," it must not be foreseeable by the exercise of reasonable foresight and prudence. Usually a defendant cannot be held liable for injuries caused by an act of God, but if proper care and diligence would have avoided the act, it is not excusable as an act of God.

Nationwide Ins. Co. v. Jordan, 639 N.E.2d 536 (Ohio.Mun. 1994): Where two causes contribute to an injury, one cause of which is defendant's negligence and the other cause of which arises out of actions for which defendant is not responsible, such as an "act of God," defendant is nonetheless liable if damage would not have occurred but for his negligence.

Bier v. City of New Philadelphia, 464 N.E.2d 147 (Ohio 1984): If proper care and diligence on part of defendant would have avoided act, it is not excusable as act of God.

3. Governmental Liability

Martin V. Ohio Dept. of Transportation, 2003 – Ohio 5558 (Ohio.Ct.Cl. 2003): Motorist, who brought negligence action against state Department of Transportation (DOT) following incident in which her vehicle drove over culvert installation site, failed to demonstrate that DOT was negligent, where motorist failed to provide sufficient evidence to prove that DOT maintained a hazardous condition on the roadway which was the substantial or sole cause of motorist's property damage, motorist failed to prove that construction activity created a nuisance, and there was no conclusive evidence to prove a negligent act or omission on part of DOT caused damage to car.

Bull v. Ohio Dept. of Transp., 2003 – Ohio - 2611 (Ohio.Ct.Cl.,2003): Department of Transportation is not an insurer of its highways.

Harrison v. Ohio Department of Transp., 2003 – Ohio- 2432 (Ohio.Ct.Cl.,2003): To recover on negligence claim against Department of Transportation for failure to maintain roadways, plaintiff must prove either: (1) defendant had actual or constructive notice of defect and failed to respond in reasonable time or responded in negligent manner, or (2) that Department, in general sense, maintains its highways negligently.

Morgan v. Ohio Dept. of Transp., 2003 – Ohio- 1927 (Ohio.Ct.Cl. 2003): Motorist failed to present sufficient evidence to establish that damage to her van's running board was caused by any negligent act or omission on the part of contractors of Department of Transportation (DOT); although DOT was required to exercise due diligence in the maintenance and repair of highways, motorist failed to produce evidence furnishing a reasonable basis for sustaining her claim.

Hellmann, 2003 –Ohio- 1925 (Ohio.Ct.Cl. 2003): Motorist was not entitled to recover from Department of Transportation for damage to vehicle when motorist's vehicle struck pothole on interstate highway, where motorist failed to provide evidence that Department had constructive notice of pothole, and failed to provide evidence that Department negligently maintained roadway.

Shannon v. Johnson & Hughes Excavating Co., Inc., 2002 –Ohio - 7350 (Ohio.App.10.Dist.Franklin 2002): Political subdivision immunity exception for failure to keep public roads free from nuisance was not applicable, and thus, city was immune from liability under Political Subdivision Tort Liability Act in connection with negligence action brought against city by minor bicyclist who was injured when he rode into expansion joint and fell into the joint, thereby throwing him over the handlebar; bicyclist was not local traffic and had chosen to disobey the posted restriction because he did not want to take the extra time to ride his usual route, and just prior to riding into the expansion joint, bicyclist rode his bicycle through wet concrete that had been poured to form the joint. R.C. 2744.02(B)(3).

Justus v. Ohio Dept. of Transp., 776 N.E.2d 131 (Ohio.Ct.Cl. 2002): State Department of Transportation (DOT) was not negligent in failing to ensure that railroad crossing was reopened in a timely manner, and thus DOT's alleged negligence did not cause decedent's death in accident at detour; DOT's employees repeatedly urged railroad to accelerate the pace of construction, and decedent's administrator failed to prove that DOT had any authority either to take over construction on the crossing or to compel railroad to complete the project within the agreed time limit.

Workman v. Ohio Dept. of Transp., 2002 –Ohio- 4640 (Ohio.Ct.Cl. 2002): Motorist failed to produce any evidence to infer that Department of Transportation (DOT), in a general sense, maintained its highways negligently or that DOT's acts caused defective condition on interstate, thereby precluding DOT from being liable to motorist for cost of replacing cracked windshield caused by flying rock on interstate.

Cadman v. Ohio Dept. of Transp., 2002 –Ohio- 4633 (Ohio.Ct.Cl. 2002): Department of Transportation was not liable to motorist for cost of his automotive repair, absent showing that Department had actual or constructive notice of pothole and either failed to respond in a reasonable time or responded in a negligent manner, or that Department negligently maintained roadway.

Haynes v. Franklin, 767 N.E.2d 1146 (Ohio 2002): An edge drop on the berm of a county or city road is not, in and of itself, a "nuisance" within the meaning of the Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets in repair, and free from nuisance. (Per the Chief Justice with two justices concurring and one justice concurring in the judgment). R.C. § 2744.02(B)(3). Circumstances may exist in which a defect in the berm arising after the design and completion of construction of a roadway, including a defect creating an edge drop between the pavement and the adjoining berm, is a "nuisance" as used in the Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets in repair, and free from nuisance. (Per the Chief Justice with two justices concurring and one justice concurring in the judgment).

R.C. § 2744.02(B)(3). A condition in the right-of-way of a road is a "nuisance" within the meaning of the Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets in repair, and free from nuisance, if the condition creates a danger for ordinary traffic on the regularly traveled portion of the road and the cause of the condition was not a decision regarding design and construction. (Per the Chief Justice with two justices concurring and one justice concurring in the judgment). R.C. § 2744.02(B)(3).

Walters v. City of Eaton, 2001 WL 449552, (Ohio.App.12.Dist.Preble.C 2002): When determining a political subdivision's duty to keep its roadways free from nuisance, the focus is on whether a condition exists within the township's control that creates a danger for ordinary traffic on the regularly traveled portion of the road. R.C. § 2744.02(B)(3)

Bibbs v. Cinergy Corp., 2002 WL 537628 (Ohio.App.1.Dist.Hamilton. 2002): Metropolitan sewer district was a "political subdivision," within meaning of political subdivision tort liability statutes. R.C. § 2744.01(F).

Alden v. Summit Cty., 679 N.E.2d 36 (Ohio App. 9 Dist. 1996): Failure of statute which provides for liability of political subdivisions where subdivision fails to keep certain types of property free from nuisance to include sewer system as posing potential liability prevents plaintiff who seeks to recover based on nuisance allegedly created by sewer from relying on statute. R.C. § 2744.02(B)(3).

Masley v. City of Lorain, 358 N.E.2d 596 (Ohio 1976): Municipality is liable for trespass in casting waters upon land of another by seepage and percolation, and it is liable in construction and maintenance of hydraulic or similar work if it fails to use ordinary skill and foresight to prevent injury to others in times of flood which can be reasonably anticipated.

Waugh v. Village of Marble Cliff, 26 Ohio Dec. 477 (Ohio.Com.Pl. 1916): A municipality in establishing and maintaining a purification plant for sewage disposal into a river under statute, acts purely as a governmental agency, and is immune from liability for personal injuries to third person due to the municipality's negligence. Where due to negligent construction and maintenance of a sewage disposal plant required by statute, sewage percolated through the soil and entered a well, causing typhoid fever, the municipality was not liable to owner of well, since it was acting in its governmental capacity.

McWilliams & Schulte v. City of Cincinnati, 7 Ohio Law Rep. 88 (Ohio Super. 1909): A city was not liable for damage caused by extraordinary flood when river back water settled in low ground causing a sewer to collapse where landowners did not allege any faulty construction of the sewer or failure to keep it in proper repair.

City of Norwalk v. Blatz, 19 Ohio C.D. 306 (Ohio Cir. 1906): Recovery from a city cannot be had by a landowner for damage caused by flooding plaintiff's land with water from sewers constructed by the city, when such right has been enjoyed by the city for the prescriptive period, and such damages are the natural consequences of the exercise of such right by the city.

City of Cincinnati v. Frey, 16 Ohio Dec. 77 (Ohio Super. 1905): The mere fact that city sewer in addition to its being inadequate to carry off the refuse and silt, which refuse and silt under certain conditions backed on property of plaintiff, was also insufficient to carry off the surface water in case of heavy rains did not render defendant city's liability any less.

Oklahoma

1. Landowner's Duty to Inspect/Prepare

Boudreaux v. Sonic Industries, Inc., 729 P.2d 514 (Okla.Civ.App.Div.3 1986): Landowner has duty to exercise right to erect a sign with due regard to right of public to use roadway. Property owner owes duty to maintain property in such manner that, when it is put to its normal business use, property does not create unreasonable hazard to travelers on abutting roadway.

Haas v. Firestone Tire & Rubber Co., 563 P.2d 620 (Okla. 1976): Property owner owes a duty to maintain his property in such a manner that when it is put to its normal business use it does not result in the creation of an unreasonable hazard to travelers on abutting roadway.

2. Act of God Defense

Studebaker v. Cohen, 747 P.2d 274 (Okla. 1987): "Act of God" is some inevitable accident that could not have been prevented by human care, skill, and foresight, but which results exclusively from nature's cause, such as lightning, tempest and flood, and which is the sole cause of injury; "Act of God" is a narrower term than "avoidable accident" and does not encompass physical inflictions or medical problems.

3. Governmental Liability

City of Ada v. Canoy, 177 P.2d 89 (Okla. 1947): Municipality may be guilty of maintaining and operating its sewer system in such a manner as to constitute a nuisance. A municipality is not an insurer of its sewer system, but if, after such sewers and drains are constructed, it becomes evident that they as constructed are inadequate to perform functions contemplated, and after due notice thereof municipality fails to take steps necessary to remedy such condition and continues thereafter to operate them in such a manner as to constitute a nuisance, it will be held liable.

Oregon

1. Landowner's Duty to Inspect/Prepare

Hall By and Through George v. Dotter, 879 P.2d 236 (Or.App. 1994): Landowner may be liable for harm to protected interests outside land, caused by negligence on land. Restatement (Second) of Torts § 364.

Hummell v. Seventh St. Terrace Co., 26 P. 277 (Or. 1891): A party in the exercise of a right upon his own land which involves danger to the property of his neighbor is bound to provide against such danger by all reasonable prudence and care.

McLane v. Northwest Natural Gas Co., 467 P.2d 635 (Or. 1970): Presence of injured party on or off a defendant's premises, without more, is irrelevant to any basis for the application of absolute liability.

2. Act of God Defense

3. Governmental Liability

Pennsylvania

1. Landowner's Duty

Okkerse v. Howe, 593 A.2d 431 (Pa.Super. 1991): A neighboring landowner does not have a duty to correct a defective artificial condition on his neighbor's property.

Oswald v. Hausman, 47 Pa. D. & C.3d 498 (Pa.Com.Pl. 1987): Since plaintiff's decedent was a trespasser, the duty owed was that owed to a trespasser even though the land involved was a roadway; section 367 of the Restatement (Second) of Torts concerning dangerous conditions on a road appearing to be a highway is not adopted.

Barker v. Brown, 236 Pa.Super 75, 340 A.2d 566 (1975). Imposing duty upon a landowner in an urban or residential setting to inspect the property for defects in trees and other naturally occurring objects.

Westerman v. Stout, 25 Bucks 303 (Pa.Com.Pl. 1974): An owner or possessor of land adjacent to, or in close proximity to a public highway must exercise reasonable care to avoid injury to the travelling public arising from unnecessarily dangerous conditions created by him on the land where the consequences of his failure to exercise such care are reasonably foreseeable.

Frangis v. Duquesna Light Co., 122 Pitts.L.J. 197 (Pa.Com.Pl. 1974): Possessors of land near a highway have a duty not to create or permit an artificial condition to exist which can reasonably be foreseen to involve an unreasonable risk to others accidentally brought in contact with such condition.

Beury v. Hicks, 21 Chest. 209 (Pa.Com.Pl. 1973): One in possession of land adjacent or in close proximity to a public highway must exercise reasonable care to avoid injury to the traveling public from unnecessarily dangerous conditions created by him on the land.

Volpe v. Nobel, 29 Fay.L.J. 3 (Pa.Com.Pl. 1965): A business operation adjacent to a public highway must be so operated as to avoid, by use of reasonable care, the creation of a hazardous condition on the public highway, and liability for injury and damage to users of the highway will result to one whose failure to observe this duty was the proximate cause of the injury and damage.

Haldeman v. Mercer, 30 Pa. D. & C.2d 435 (Pa.Com.Pl. 1963): Neither a possessor of land, nor a lessor, vendor or other transferor thereof, is subject to liability for bodily harm caused to others outside the land by a natural condition of the land other than trees growing near a highway, restatement, torts, section 363. A possessor of land is subject to liability for bodily harm caused to others outside the land by a structure or other artificial condition thereon, which the possessor realizes or should realize as involving an unreasonable risk of such harm if the condition is created by a third person without the possessor's consent or acquiescence but reasonable care is not taken to make the condition safe after the possessor knows or should know of it, restatement, torts, section 364. An "artificial condition" has to do with a changing of the natural condition of the land itself and the growth of foliage around a stop sign is not a change but rather the failure to alter that which nature created. A "structure" upon land, the negligent maintenance of which will impose liability upon its possessor in favor of those outside of it, consists of an erection which is or may be employed in the utilization of the land itself; and a stop sign, which is not so used nor so intended to be, is not such a structure.

Ressler v. Gerlach, 56 Lanc.L.R. 263 (Pa.Com.Pl. 1959): Every man has the right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is damnum absque injuria.

Broyles v. Speer, 51 A.2d 391 (Pa.Super. 1947): One who is in possession of land adjacent or in close proximity to a public highway or sidewalk must exercise reasonable care to avoid injury to traveling public arising from unnecessarily dangerous conditions created by him on the land, where consequences of a failure to do so are reasonably foreseeable.

Irwin Savings & Trust Co. v. Pennsylvania R. Co., 37 A.2d 432 (Pa. 1944): The defense of no liability for injury to trespasser is personal to owner of premises trespassed upon and does not inure to benefit of strangers to title thereto, adjoining owners, or other trespassers.

Lavelle v. Grace, 34 A.2d 498 (Pa. 1943): A possessor of land adjacent or in close proximity to a public highway must exercise reasonable care to avoid injury to traveling public arising from unreasonably dangerous conditions created by him on the land, where the consequences of a failure to do so are reasonably foreseeable. A possessor of land is subject to liability for bodily harm to others outside the land caused by an activity carried on by possessor on the land which he realizes or should realize as involving an unreasonable risk of bodily harm to others, under the same conditions as though the activity were carried on at a neutral place.

Doerr v. Rand's, 16 A.2d 377 (Pa. 1940): Occupier of building was not insurer of safety of persons passing on highway in front of premises but its duty was one of reasonable care.

Pope v. Reading Co., 156 A. 106 (Pa. 1931): Person in possession of property must exercise greater care respecting safe- guarding of wall near street than wall not adjoining highway.

Fitzpatrick v. Penfield, 109 A. 653 (Pa. 1920): The defense of no liability for injury to a trespasser is personal to the owner of the premises trespassed upon, and does not inure to the benefit of strangers to the title, adjoining owners, or other trespassers. A person cannot escape

liability for negligence merely because a person injured is a trespasser on adjoining property, where before the commission of the negligent act the presence of the trespasser was known to him, or ought to have been known, and by the use of ordinary care the defendant might have prevented the injury. Owner of wall facing street, left standing after a fire, is not an insurer of the safety of persons and property upon street, but is liable only for want of ordinary care and skill.

Grogan v. Pennsylvania R. Co., 62 A. 924 (Pa. 1906): A railroad company owning real estate abutting on a street is not required to construct a fence sufficiently strong to provide against the contingency of a crowd of trespassers coming on the inclosed property and pushing the fence over on a person walking on the street, though some of the trespassers were the servants of the company.

Pfeiffer v. Brown, 30 A. 844 (Pa. 1895): The general obligation of the owner is to use his property so as not to injure others, and the right to injure another's land at all to any extent is an exception to this general rule of property, and the burden is always on him who alleges the right to bring himself within the exception.

2. Act of God Defense

Shamnoski v. PG Energy a Div. of Southern Union Co., 765 A.2d 297 (Pa. Super. 2000): If a negligent act and an act of God combine to produce damages that would not have occurred absent negligence, and the negligent act was a substantial factor in causing the injury, liability attaches.

In Bowman v. Columbia Telephone Company, 406 Pa. 455 (1962), the Pennsylvania Supreme Court considered a case in which a motorist was injured when four telephone poles snapped and fell on the roadway during a snowstorm. Plaintiff alleged negligent maintenance of the telephone poles. The defendant asserted an Act of God defense claiming that the snowfall was unprecedented and unforeseeable. The court stated:

> Sometimes all the ingenuity and industry *of* man can not avail against the turmoil and turbulence of the elements, but it is not enough to escape responsibility for the owner *of* the instrumentality which inflicts damage to assert that the instrumentality was propelled by the Supreme Being and that, therefore he could shake the clinging snow of responsibility from off his hands.

Id. at 459.

3. Governmental Liability

Mullin v. Com., 2001 WL 1807770 (Pa.Cmwlth.App. 2002): Liability for the design, construction and maintenance of a highway rests solely with the governmental unit that had jurisdiction over the highway at the time of the accident.

Davino v. Tyrone Township, 50 Pa. D. & C.3d 121 (Pa.Com.Pl. 1989): The Political Subdivision Tort Claims Act, 18 Pa.C.S. § 8541 et seq., renders a township and its sewage enforcement officer immune from liability in assumpsit actions arising from the issuance of a sewer permit where the action is based upon underlying negligent conduct.

Baker v. Washington Tp. Mun. Authority, 47 Pa. D. & C.3d 339 (Pa.Com.Pl. 1987): A municipality is not immune from suit for the death of an employee of an independent contractor hired to construct a sewer under section 8542(b)(5) of the Political Subdivision Tort Claims Act, 42 Pa.C.S. § 8541(b)(5), for dangerous conditions of sewers, where an inspector the municipality had placed at the work site observed, but failed to act on, a dangerous condition.

LaForm v. Bethlehem Tp., 499 A.2d 1373 (Pa.Super. 1985): City cannot be held liable for the effects of an incidental increase in surface waters flowing in a natural channel where the increase is owing to normal, gradual development in the city.

Schoenenberger v. Hayman, 465 A.2d 1335 (Pa.Cmwlth.App. 1983): Township and sewage enforcement officer were jointly and severally liable for damages arising from faulty sewage system despite township's assertion that there was no evidence to show that they were in any way negligent in their selection of officer or that they knew officer was performing his tests in negligent manner, since as employer of officer, township was liable for his torts committed in course of his employment.

Johns v. City of Washington, 24 Pa. D. & C.3d 58 (Pa.Com.Pl. 1982): Pursuant to the Political Subdivisions Torts Claims Act, 42 Pa.C.S.A. § 8541, et seq., a municipality is liable for a dangerous condition caused by the operations of a sewer system provided claimant can prove that the dangerous condition created a foreseeable risk of injury and that the municipality had actual notice of the condition. A municipality is liable for damages resulting from injury to land where during a twelve-year period the public sewer system had caused flooding on plaintiff's premises ten or twelve times, and where, despite frequent complaints, both by the owners and tenant, on only one occasion during all of those years did the municipality remove any dirt or perform any maintenance work on its storm system in the vicinity.

Caputo v. Hughestown Borough, 60 Luz.L.R. 8 (Pa.Com.Pl. 1969): A municipality is not required to provide sanitary or storm sewage facilities, although, having undertaken to do so, negligent construction and maintenance will subject it to liability.

DeTillo v. Carlyn Const., Inc., 206 A.2d 376 (Pa. 1965): Knowledge by borough engineer of sewer pipe which allegedly was negligently constructed by contractor and caused damage for which homeowner sought to recover from borough on theory of breach of statutory duty to inspect sewer lines and to indicate location thereof was properly imputed to borough. 53 P.S. § 47106.

Turano v. Borough of Sharpsburg, 90 Pitts.L.J. 177 (Pa.Com.Pl. 1942): In an action for damages against a borough for injuries to plaintiff's property in the alleged negligent construction of a sewer, the court, without a jury, entered judgment for defendant, where the work was done by WPA under supervision of the borough officials, and the ground fell and caved in and subsided

along said street, destroying the lateral support of plaintiff's land and buildings. The costs and expert's fees were divided equally between the parties.

Coates v. Board of Com'rs., of Lower Merion Tp., 54 Montg. 85 (Pa.Com.Pl. 1938): A township is not liable for the consequences of the exercise of their discretion in turning water from the road in a suitable place and along a grade or course along which it naturally flows, unless the plan adopted is clearly unreasonable and unjustifiable.

Freedman v. Borough of West Hazleton, 146 A. 564 (Pa. 1929): City must construct sewer improvement so as to avoid injury to property by emptying sewage thereon.

Graybill v. City of Lancaster, 7 Mun.L.R. 241 (Pa.Com.Pl. 1916): Municipal officers have discretionary powers and municipality is not liable for error of judgment on their part in execution of such powers, as in construction of inadequate sewers, where damage was not caused by negligence in actual work of construction or by failure to maintain work after it was done or failure to take notice of its insufficiency.

Herron v. Duquesne Borough, 34 Pa.Super. 231 (Pa.Super. 1907): In an action against a borough to recover damages for injuries to real estate alleged to have been caused from the leaking of a water main, the plaintiff cannot recover merely by showing that the borough had constructed and maintained its own waterworks and pipes and that the injury was caused by a leakage from one of the borough pipes. He must go further and show that the alleged injuries resulted from either a faulty or negligent construction of the defendant's water pipe, or, the same being properly constructed, that it had become out of repair and was and had been leaking so that the borough was negligent in not repairing the pipe after notice, actual or constructive, of its condition, or that the borough was guilty in failing to exercise such proper care, caution, and diligence as was reasonable and prudent under the circumstances.

Portz v. Borough of Gilbertson, 4 Sch.L.R. 39 (Pa.Com.Pl. 1906): Where there is no evidence of negligence municipal corporation is not liable in damages for failure to provide for drainage or sewerage.

Cooper v. Scranton City, 21 Pa.Super. 17 (Pa.Super. 1902): Cities are not bound to provide sewerage, and, if they do provide it, they are not liable for alleged insufficiency, but may be responsible for negligent construction or repairs.

Fairlawn Coal Co. v. City of Scranton, 23 A. 1069 (Pa. 1892): Cities are not bound to provide sewerage, and, if they do provide it, they are not liable for alleged insufficiency, but may be responsible for negligent construction or repairs.

Philadelphia v. Gallagher, 16 Phila. 15 (Pa.Com.Pl. 1883): Liability of city where the sewer had been changed without ordinance and contract made was considered in.

Fair v. City of Philadelphia, 88 Pa. 309 (Pa. 1879): Cities are not bound to provide sewerage, and, if they do provide it, they are not liable for alleged insufficiency, but may be responsible for negligent construction or repairs. The bureau of sewerage and drainage are the sole judges of the

necessity, character and grip of sewers constructed under their direction, and are not responsible for damages caused by unusual rainfalls, etc.

City of Allentown v. Kramer, 73 Pa. 406 (Pa. 1873): Cities are not bound to provide sewerage, and, if they do provide it, they are not liable for alleged insufficiency, but may be responsible for negligent construction or repairs.

Carr v. Town of Northern Liberties, 35 Pa. 324 (Pa. 1860): Cities are not bound to provide sewerage, and, if they do provide it, they are not liable for alleged insufficiency, but may be responsible for negligent construction or repairs. The bureau of sewerage and drainage are the sole judges of the necessity, character and grip of sewers constructed under their direction, and are not responsible for damages caused by unusual rainfalls, etc.

Rhode Island

1. Landowner's Duty to Inspect/Prepare

2. Act of God Defense

3. Governmental Liability

Yankee v. LeBlanc, 819 A.2d 1277 (R.I. 2003): Evidence that after automobile accident the town decided to make two-lane highway where accident occurred a one-way road did not establish that town failed to remove a perilous situation of which it was aware, or that the town's regulation of roadway was egregious.

Martinelli v. Hopkins, 787 A.2d 1158 (R.I. 2001): When state engages in an activity that a private individual typically would not perform, such as the maintenance of state highways or the issuance of state drivers' licenses, the public duty doctrine will shield the state from liability.

Rotella v. McGovern, 288 A.2d 258 (R.I. 1972): City, whose sanitation main had been servicing homes on street, on which plaintiffs built their home in 1954, since 1932 and which assessed and accepted payment of taxes from plaintiffs for 11 years without taking any action against plaintiffs because of their technical "trespass" in never having obtained permit authorizing plaintiffs to connect their house with city sewer, had constructive knowledge that plaintiffs' home was tied into sanitation sewer main and owed duty of due care to plaintiffs in operation of sewer system.

Eddy v. Granger, 31 A. 831 (R.I. 1895): When a city, in building a sewer as part of its sewerage system, cut off a private drain which had been laid in a street by permission of the town before its incorporation as a city, and the water and sewage which had flowed through the drain were in consequence thrown back on the premises of the plaintiffs. Held, that an action would not lie against the city for cutting off the drain and neglecting to provide for the drainage which had previously flowed through it.

South Carolina

1. Landowner's Duty to Inspect/Prepare

While landowner in residential or urban area has duty to others outside property to prevent unreasonable risk of harm from defective or unsound trees on premises, duty does not extend to owner of trees of natural origin growing on rural, undeveloped land. Ford v. South Carolina Dept. of Transp., 492 S.E.2d 811 (S.C.App. 1997): *See also* Israel v. Carolina Bar-B-Que, Inc., 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1987), *cert. denied*, 293 S.C. 406, 360 S.E.2d 824 (1987).

2. Act of God Defense

The South Carolina Supreme Court in Belue v. City of Greenville, 226 S. C. 192 (S. C. 1954), addressed the Act of God defense in a case against a local municipality that had installed curbing and gutters on a street adjacent to the plaintiff's residence. The installation caused excessive surface water to accumulate (as a result of a five inch rain in three hours) on plaintiff's property. The homeowner sued the municipality to recover damages to his home. *Id.* at 632. The Supreme Court of South Carolina held that even if the five inches of rainfall in three hours was unprecedented and exceptional, it did not relieve the defendant of liability because it was not the sole cause of injury to the plaintiff's property. *Id*. The court stated the test as follows:

> The principles embodied in all definitions is that the Act must be one occasioned exclusively by the violence of nature and all human agency must be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the Acts of God.

Id. at 633, citing Mincey v. Dultmeier Manufacturing Co., 223 Iowa 252, 272 (1937).

3. Governmental Liability

In order to bring a claim against a governmental agency, the South Carolina Tort Claims Act requires that the claim be verified under oath. §15-78-80. The purpose of the oath is to discourage questionable claims. Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534 (S.C. Ct. App. 1994), *rehearing denied, certiorari denied*. The statute that previously had a 180-day notice requirement for municipalities, §5-7-70, was repealed in 1986 with the enactment of the South Carolina Tort Claims Act, so that now there is a two-year period to file a notice. §15-78-100 and §15-78-110.

Under the South Carolina Tort Claims Act, governmental entities - including cities, city police departments, fire departments, and state colleges - are immune from liability for certain actions or inactions. In particular, Code of Laws of South Carolina §15-78-60, sets forth the following immunity provisions applicable to many subrogation cases:

> The governmental entity is not liable for a loss resulting from:
> ….
> (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee;
> (6) civil disobedience, riot, insurrection, or rebellion or the failure to provide the method of providing police or fire protection;
> ….
> (20) an act or omission of a person other than an employee including but not limited to the criminal actions of third persons;
> ….
> (25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner;

These provisions explicitly protect governmental entities from (1) a decision not to perform a service, (2) failure to provide police, (3) criminal actions of non-governmental employees, and (4) failure of a school to protect against or control its students (unless grossly negligent). Courts interpreting these immunity provisions have not been reluctant to grant governmental immunity. *See, e.g.*, Clyburn v. Sumter County School Dist. 17, 311 S.C. 521, 429 S.E.2d 862 (SC Ct. App. 1993), *rehearing denied, certiorari granted, affirmed* 317 S.C. 50, 451 S.E.2d 885 (SC 1993) (School district was entitled to summary judgment in an action, brought by a student who was attacked by a non-student on a school bus, which was based on the district's alleged failure to enforce §59-67-245 (penalties for interference with a school bus), even though the student had been threatened on the bus prior to the attack and the district did not call the police, where the district counseled the student and her assailant after the threat, and attempted to contact their parents; the district exercised at least slight care and thus was not grossly negligent.); Adkins v. Varn, 312 S.C. 188, 439 S.E.2d 822 (SC Ct. App. 1993) (Defendant county entitled to summary judgment in an action to recover for the death of a bicyclist who was fatally injured when she was chased into traffic by several vicious dogs, since the gravamen of the complaint was the county's failure to enforce an animal control ordinance, and thus the county was immune from liability under §15-78-60); *see also* Wells v The City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746, (S.C. Ct. App.1998) (barring homeowners suit against city for failure to maintain or inspect inactive fire hydrants because §15-78-60(6) protects government entity from liability for failure to provide police or fire protection or the method of providing police or fire protection)(citing with approval City of Columbus v. McIlwain, 205 Miss. 473, 38 So.2d 921 (1949) (municipality is not responsible for the destruction of property within its limits by a fire merely because, through the negligence or other default of the municipality or its employees, the members of the fire department failed to extinguish the fire regardless of whether this failure is due to an insufficient supply of water, the interruption of the service during the course of a fire, the neglect or incompetence of the firemen, the defective condition of the fire apparatus, negligence in permitting fire hydrants to become clogged or defective, etc.); Ross v. City of Houston, 807 S.W.2d 336 (Tex.App.1990) (city's policy of inspecting fire hydrants was directly connected to the city's method of providing fire protection; therefore, the state tort claims act exclusion from governmental liability for claims arising from the failure to provide or the method of providing

fire protection barred suit by homeowner); Triplett v. City of Columbia, 96 S.E. 675 (S.C. 1918) (although city can be liable for bodily injury or damages to person or property through defect in street by reason of mismanagement, this does not render city liable to property owner made ill by depression in street filled with stagnant water).

In South Carolina, "the Department of Transportation can be held liable for damages caused by the fall of a tree standing within the limits of or in close proximity to a public highway" depending on "whether the Department knew, or in the exercise of reasonable care should have known, that the condition of the tree would make it hazardous to persons or property in the immediate vicinity." Ford v. South Carolina Department of Transportation, 328 S.C. 481, __, 492 S.E.2d 81, 814 (Ct. App. 1997). The Department, "because of its responsibility to the public," has a higher duty of care than does a landowner "to discovery and potentially remedy potential obstructions, even those obstructions originating on private property." *Id*.

South Dakota

1. Landowner's Duty to Inspect/Prepare

Easson v. Wagner, 501 N.W.2d 348 (S.D. 1993): Landowner must use his property with due regard to rights of other landowners; if landowner uses his property in negligent manner or creates conditions thereon which are unusual or unreasonable, causing damage to adjoining landowners, he may be held liable.

2. Act of God Defense

3. Governmental Liability

Blue Fox Bar, Inc. v. City of Yankton, 424 N.W.2d 915 (S.D. 1988): City acted in proprietary capacity by undertaking construction and maintenance of sewer system and, therefore, could be held liable in tort for wrongs committed in its exercise of that function. SDCL 9-48-2.

Shuck v. City of Sioux Falls, 113 N.W.2d 849 (S.D. 1962): City was liable for damage caused by water which was cast upon property not by natural drainage but by city's work on street.

Tennessee

1. Landowner's Duty to Inspect/Prepare

2. Act of God Defense

Butts v. City of South Fulton, 565 S.W.2d 879 (Tenn.App. 1977): Any misadventure or casualty is said to be caused by "Act of God" when it happens by direct, immediate and exclusive operation of forces of nature, uncontrolled or uninfluenced by power of man and without human intervention, and it must be of such character that it could not have been prevented or escaped from by any amount of foresight or prudence or by aid of any appliances which situation of party might reasonably require him to use.

3. Governmental Liability

Johnson v. Kraft-Phenix Cheese Corp., 94 S.W.2d 54 (Tenn.App. 1935): Inhabitants of city, who invoke its power to construct, and who, after its completion, use, a local sewer improvement which city has right to construct are not severally or jointly liable with city in suit for damages, and injunction on account of effects of city's negligence in constructing and operating sewer. Citizens who request construction of, and use, public improvements are not liable for negligence of city in their construction or operation, because they have no command or control over manner of construction or management thereof and test of liability for acts of another is power to command or control manner of performance of those acts.

Texas

1. Landowner's Duty

Gonzales v. Trinity Industries, Inc., 7 S.W.3d 303 (Tex.App.Houston 1. Dist. 1999): Owners or occupiers of premises abutting a highway have a duty to exercise reasonable care to avoid endangering the safety of persons using the highway for travel and are liable for any injury proximately resulting from their negligence.

De La Garza v. City of McAllen, 881 S.W.2d 599 (Tex.App.Corpus.Christi 1994): Owner or occupier of property abutting highway has duty to exercise reasonable care not to jeopardize or endanger safety of travelers.

Naumann v. Windsor Gypsum, Inc., 749 S.W.2d 189 (Tex.App.San.Antonio 1988): Owner or occupier of premises abutting highway has duty to exercise reasonable care to avoid endangering safety of persons using highway as means of travel and is liable for any injury that proximately results from his negligence. Owner or occupier of property is not insurer of safety of travelers on adjacent highway and is not required to provide against acts of third persons.

Portillo v. Housing Authority of City of El Paso, 652 S.W.2d 568 (Tex.App.El.Paso 1983): Occupier of premises has no greater duty than does public generally regarding conditions existing outside his premises and not caused by occupier.

Alamo Nat. Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981): Owner or occupant of premises abutting highway has duty to exercise reasonable care not to jeopardize or endanger safety of persons using highway as means of passage or travel; owner or occupant is liable for any injury that proximately results from his negligence and delegating this duty to independent contractor does not relieve owner or occupant of liability for his own negligence.

Atchison v. Texas & P. Ry. Co., 186 S.W.2d 228 (Tex. 1945): Generally, owner or occupant of premises abutting highway must exercise reasonable care not to jeopardize safety of persons using highway as means of passage or travel and is liable for any injury, proximately resulting from his wrongful acts in such respect, to any such person.

2. Act of God Defense

McWilliams v. Masterson, 2003 WL 21800236 (Tex.App.Amarillo 2003): One is not responsible for injury or loss caused by an act of God.An event may be considered an act of God when it is occasioned exclusively by the violence of nature. For one to be insulated from liability due to an act of God, it must be shown that: (1) the loss was due directly and exclusively to an act of nature and without human intervention, and (2) no amount of foresight or care which could have been reasonably required of the defendant could have prevented the injury. For purposes of determining whether a party is entitled to jury instruction on act of God, the act of nature must be unusual or unprecedented, and while it need not be the sole, greatest, or harshest violent act ever experienced, it need only be so unusual that it could not have been reasonably expected or provided against.

Luther Transfer and Storage, Inc. v. Walton, 296 S.W2d 750 (Tex. 1956): Flood case. Court held that while the damages resulting from an Act of God are not ordinarily chargeable to anyone, an exception to this general rule exists when the negligence of another person has concurred with the Act of God. In this regard, the court stated:

> The rule of non-liability of a ...company or person for damages caused by an extraordinary and unprecedented flood is subject to the exception that negligence in constructing and maintaining the structure concurring with an extraordinary and unprecedented flood in causing damage to another, makes, ... [the] company or person liable for damages, notwithstanding the fact that the flood was extraordinary and unprecedented.

Id. at 498, quoting *Fort Worth* and D.C. Ry. *Co.* v. *Kiel*, 187 S.W.2d 371,373 (Tex. 1945).

3. Governmental Liability

City of Galveston v. Garza, 2003 WL 21994741 (Tex.App.Waco 2003): To prove gross negligence by city, as lessor and hotel, as lessee, of pier, as would be required to prevail given that recreational use of pier by motorist and passenger imposed on city and hotel a duty owed to trespasser, parents and estates of motorist and passenger were obligated to produce evidence that city and hotel injured motorist and passenger by some contemporaneous activity or conduct. V.T.C.A., Civil Practice & Remedies Code § 75.002.

Schafer v. Texas Dept. of Transpo., 2003 WL 21467007 (Tex.App.Austin 2003): Injured motorist could not satisfy burden that application of state Tort Claims Act, preventing her from bringing negligence action against state Department of Transportation (DOT), deprived her of due process; motorist did not explain what "life, liberty, or property" was being threatened, how application of Act deprived her of such interest, or why it was unreasonable, arbitrary or capricious. U.S.C.A. Cont. Amend. 14.

Department of Transp. v. Sanchez, 75 S.E.2d 24 (Tex.App.San.Antonio 2001): As a general rule, the State, including the Department of Transportation, is immune from suit unless immunity has been waived. V.T.C.A., Civil Practice & Remedies Code § 101.021(2).

Fagan v. Ghade, 2001 WL 1107956 (Tex.App.Waco 2001): In the context of highway construction projects, decisions about highway design and what type of safety features to employ are discretionary policy decisions; however, the implementation of these policy decisions at the subordinate or operational level is a ministerial function not shielded by official immunity.

City of Tyler v. Likes, 962 S.W.2d 489 (Tex. 1997): Acts of city in constructing and maintaining storm sewer are proprietary at common law, so that city may be liable for negligent performance of those acts if they proximately cause damages, both because they are performed in city's private capacity for benefit of those within its corporate limits, and because they are ministerial functions.

Likes v. City of Tyler, 910 S.W.2d 525 (Tex.App.-Tyler 1995): City enjoys sovereign immunity for negligent acts committed while engaged in governmental function of maintaining its sewer system except to extent that Texas Tort Claims Act waives that immunity. V.T.C.A., Civil Practice & Remedies Code § 101.021.

Shade v. City of Dallas, 819 S.W.2d 578 (Tex.App.-Dallas 1991): Operation and maintenance of sanitary sewage system by a city is a governmental function, and municipality is liable for the creation or maintenance of a nuisance in the course of nonnegligent performance of governmental function. While engaged in governmental function of constructing, operating, and maintaining its sewer system, city enjoys sovereign immunity for its negligent acts, except to the extent that the Tort Claims Act waives that immunity; Act provides for recovery of personal damages resulting from negligence of governmental unit. V.T.C.A., Civil Practice & Remedies Code § 101.021(2).

Parr Golf, Inc. v. City of Cedar Hill, 718 S.W.2d 46 (Tex.App.-Dallas 1986): Property owner's claim that he suffered mental anguish at the sight of sewage flooding his property as result of a backup of the city's sewer fell within waiver of sovereign immunity. V.T.C.A., Civil Practice & Remedies Code § 101.021.

Alexander v. City of Dallas, 552 S.W.2d 622 (Tex.Civ.App.Waco 1977): Where 15-year-old boy, who was injured when bank of a drainage ditch maintained by city gave way and he fell into deep hole, knew existence of ditch, that storm sewer was there, that emptying of storm sewer into ditch had dug the hole into which he fell, that the ditch around storm sewer where he determined to push stolen bicycle over the edge was eroding, and knew that pieces of concrete sewer had been caused by erosion to fall into the ditch, city owed him no duty to eliminate or to warn him of such conditions.

Utah

1. Landowner’s Duty to Inspect/Prepare

2. Act of God Defense

Dougherty v. California-Pacific Utilities Co., 546 P.2d 880 (Utah 1976): Even if storm had been of such a nature as to be unexpected and unforeseeable and therefore classifiable as "an Act of God," that would not necessarily insulate defendant from liability if defendant were negligent and his negligence concurred with act of God in such a way that it was proximate cause of damage to another. (Per Crockett, J., with one Judge concurring and one Judge concurring in result.) Whether an occurrence should be classified as "an Act of God," thus precluding liability, depends on whether storm was of such magnitude and severity that it was not reasonably to be foreseen and guarded against by the traditional, reasonable and prudent man under the circumstances. (Per Crockett, J., with one Judge concurring and one Judge concurring in result.)

3. Governmental Liability

Rose v. Provo City, 469 Utah Adv. Rep. 31 (Utah.App. 2003): A city's duty to exercise ordinary care to keep streets which it has opened for travel and which it has invited the public to use in a reasonably safe condition for travel is most frequently applied to accidents on city sidewalks, but also applies to city ways. A city's duty to maintain its city ways in a reasonably safe condition for travel is nondelegable.

Jordan v. City of Mt. Pleasant, 49 P. 746 (Utah 1897): While it is the duty of city authorities to use all reasonable means and precautions to prevent injurious consequences to its people and to property from floods which they should anticipate, in doing so they must use all reasonable means and precautions not to cause the destruction of or injury to other property.

Kiesel & Co. v. Ogden City, 30 P. 758 (Utah 1892): A city is liable for injuries caused by an obstruction in a sewer which was placed there under the supervision of the city engineer, or of which he had actual or constructive notice.

Levy v. Salt Lake City, 16 P. 598 (Utah 1887): The ordinance passed pursuant to Comp. Laws 1876, § 55, empowering Salt Lake City to distribute, control, and regulate water flowing into the city, etc., requires that the applicant for the use of water, before he can receive his allotment, must pay his assessment and the cost of constructing any necessary ditch; and also that the location, construction, and repair of the ditches shall be under control of the city. Held, that the city is liable for an injury caused through its neglect to keep in proper repair a ditch constructed over private property. A city empowered by its charter to control and regulate the use of water, and assuming to do so, is liable for damages occasioned by its negligence in such regulation; and this, though the liability is not expressly imposed by statute.

Vermont

1. Landowner’s Duty to Inspect/Prepare

Baisley v. Missisquoi Cemetery Ass'n, 708 A.2d 924 (Vt. 1998): An abutter must keep his property from becoming a source of danger to those on adjoining lands by reason of any defect in construction, use, or repair, so far as exercise of care of prudent man can guard against such danger.

Butterfield v. Community Light & Power Co., 49 A.2d 415, (Vt.,1946): An abutter must keep his property from becoming a source of danger to traveling public by reason of any defect in construction, use, or repair, so far as exercise of care of prudent man can guard against such danger.

Murray v. Nelson, 122 A. 519, (Vt.,1923): It is the duty of an abutter to keep his property from becoming a source of danger to the traveling public by reason of any defect either in construction, use, or repair, so far as the exercise of the care of a prudent man can guard against it.

2. Act of God Defense

3. Governmental Liability

Lane v. State, 2002 WL 1940970 (Vt. 2002): A breach of state's duty to maintain its roads in reasonably safe condition occurs where the state fails to correct a defect and has either actual or constructive notice of the existence of a defect, and a reasonable amount of time in which to correct it.

Stoneking v. Orleans Village, 243 A.2d 763 (Vt. 1968): In the construction and maintenance of sewers and drains, a municipal corporation is required to exercise needful prudence, watchfulness, and care.

Town of South Burlington v. American Fidelity Co., 215 A.2d 508 (Vt. 1965): Neither statute giving injured person right to recover for insufficiency or want of care of culvert, nor municipality's liability policy extending coverage in such case, applies when hole causing accident derives solely from condition of street itself, without operating causation of leaky culvert. 19 V.S.A. § 1371; 29 V.S.A. § 1403.

Sanborn v. Village of Enosburg Falls, 89 A. 746 (Vt. 1914): The liability of towns for maintaining insufficient culverts, etc., only extends to liability for injuries to travelers.

Virginia

1. Landowner's Duty

In Virginia, "[t]he law requires that every person so use his own property as not to injure the property of another, *sic utere tuo ut alienum non laedas*." Akers v. Mathieson Alkali Works, 151 Va. 1, 144 S.E. 492 (1928). As stated in City of Portsmouth v. Culpepper, 192 Va. 362 (1951), "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected."

2. Trespass and Nuisance

In Akers v. Mathieson Alkali Works, 151 Va. 1, 144 S.E. 492 (1928), for example, the plaintiff sued under theories of continuing trespass and nuisance for leakage of chemical "muck" from the defendant's storage basin. Defendant argued that the right of recovery was predicated upon a finding of negligence by defendant. The Virginia Supreme Court rejected that argument, stating:

> The law requires that every person so use his own property as not to injure the property of another …. When defendant permitted the muck to escape from its land and injure land of the plaintiff, without his fault, defendant was liable for the damages sustained by the plaintiff. The loss in such cases must be borne by plaintiff or defendant and it seems just that it fall upon the defendant by whose conduct it was made possible.

3. Act of God Defense

Virginia law does not allow the Act of God defense where the defendant's negligence was a concurring force that proximately contributed to the damages. As explained long ago by the Supreme Court of Virginia in E.T. White v. Southern Railway Co., 151 Va. 302, 320 (1928):

> It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, **including the 'act of God,'** or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage . . ..

The Supreme Court of Virginia further discussed the Act of God defense in City of Portsmouth v. Culpepper, 192 Va. 362 (1951). In Culpepper, Vernon Culpepper sued the City of Portsmouth for damage to his crops that occurred when a city-maintained canal overflowed and flooded Culpepper's farm in 1948. *Id.* at 365. Years before the flood, the city attempted to replace a washed-out dam located within the canal by constructing an earthen dam across the canal with dirt from the eastern bank of the canal. *Id*.

The removal of the dirt by the city lowered the bank to normal ground level for a distance of one hundred yards. *Id.* at 365-66. Before the city finished the dam, however, it was enjoined from completing its work and ultimately abandoned the project, leaving the earthen dam unfinished. *Id.* at 366. When severe rainstorms hit the area in 1948, water in the canal was obstructed by the partially finished dam and overflowed the canal at the very point where the city had lowered its eastern bank, ultimately flooding Culpepper's farm. *Id*.

The City of Portsmouth raised the Act of God Defense and introduced evidence at trial showing that rain that caused the flood was the heaviest downpour on record. *Id*. Specifically, the City showed that the rainfall causing the flood was "in excess of anything shown since the Weather Bureau was created in 1879." *Id*. The jury returned a verdict in favor of Culpepper and the City of Portsmouth appealed.

The Supreme Court of Virginia upheld the jury's verdict and specifically rejected the City's Act of God defense stating: "Undoubtedly the record shows that the rainfall in question was

extremely severe, but under the circumstances and facts in this case, it cannot be termed an 'Act of God'. It has been held in Virginia since 1849 that all human agency is to be excluded from creating or entering into the cause of mischief, in order that it may be deemed an Act of God." *Id.* at 367 (citing Friend v.Woods, 6 Gratt. (47 Va.) 189) (emphasis added).

The court pointed to the following definition of "Act of God" in support of its reasoning: "Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected." *Id.*; *see also* Ellerson v. Chesapeake & Ohio Railway Co., 149 Va. 809 (1928) (defining "Act of God" as such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or foreseen).

Accordingly, defendants raising the Act of God defense in Virginia have the burden of establishing that no human intervention entered into the cause of a loss and that the so-called Act of God was so unusual and extraordinary that it could not have been foreseen.

4. Government Liability

Virginia has a specific **six-month notice** requirement for actions against a governmental agency. Virginia Code 1950 § 8.01-222. Fortunately, in Miles v. City of Richmond, 373 S.E.2d 715 (Va. 1988), the Virginia Supreme Court found the notice-of-claim statute, Virginia Code 1950 § 8.01-222, to be mandatory but not jurisdictional. The statute is to be construed liberally, and substantial compliance with its terms is sufficient. The statute reads as follows:

> § 8.01-222 Notice to be given cities and towns of claims for damages for negligence.
> No action shall be maintained against any city or town for injury to any person or property or for wrongful death alleged to have been sustained by reason of the negligence of the city or town, or of any officer, agent or employee thereof, unless a written statement by the claimant, his agent, attorney or representative of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with the city attorney or town attorney, or with the mayor, or chief executive, within six months after such cause of action shall have accrued, except if the complainant during such six-month period is able to establish by clear and convincing evidence that due to the injury sustained for which a claim is asserted that he was physically or mentally unable to give such notice within the six-month period, then the time for giving notice shall be tolled until the claimant sufficiently recovers from said injury so as to be able to give such notice; and statements pursuant to this section shall be valid, notwithstanding any contrary charter provision of any city or town.

This must be sent by certified mail, return receipt requested.

Virginia deems a governmental entity immune for governmental functions but not for proprietary functions. While the planning, designing, laying out, and construction of streets and roads are

governmental functions, the routine maintenance of existing streets and roads is proprietary. Bialk v. City of Hampton, 242 VA 56, 58, 405 S.E.2d 619 (1991); Taylor v. City of Charlottesville, 240 Va. 367, 370-71, 397 S.E.2d 832 (1990).

For sewage systems, the general rule is in Virginia that the maintenance and operation of a sewer system is a governmental function for which a municipality is entitled immunity from tort liability. *See*, *e.g.*, Gayda v. Gibbs, 45 Va. Cir. 176, 1998 Va. Cir. LEXIS 122 (Va. Cir. Ct. City of Norfolk 1998); Mitchum v. Albemarle County Service Authority, 34 Va. Cir. 208, 1994 Va. Cir. LEXIS 14 (Va. Cir. Ct., Albemarle County 1994) (Sewage authority acted as municipal corporation performing governmental functions in servicing a manhole which was part of its sewer system, and was thus entitled to immunity from liability and tort: "If collecting garbage and removing trash and debris are governmental functions, then collecting and disposing of other forms of waste must also be."); Stover v. Keystone Builders, Inc., 36 Va. Cir. 595, 1993 Va. Cir. LEXIS 717 (Va. Cir. Ct., Fairfax County 1993); Linda Lee Corp.v. Covington Company, 36 Va. Cir. 590, 1993 Va. Cir. LEXIS 716 (Va. Cir. Ct. Bedford County 1993) (The doctrine of sovereign immunity applies to the maintenance and operation of a storm water drainage system by a municipal corporation.); Wilshin v. City of Fredericsburg, 26 Va. Cir. 329, 1992 Va. Cir. LEXIS 577 (Va. Cir. Ct., City of Fredericksburg 1992) (Plaintiff's, neighbors sued for damages caused by sewage backup, claiming the system malfunctioned, backed up or overflowed causing raw sewage to invade the lower levels of their homes; court held, "If collecting garbage and removing trash and debris are governmental functions, then collecting and disposing of other forms of waste must also be. In cities--which almost by definition are densely populated--where drain fields and other individualized modes of sewage disposal are impractical of not impossible, it is difficult to imagine anything more tied to public safety and safety for the benefit of all than the provision of a sanitary sewer system. . . . Therefore, the Court is of the opinion that in Virginia the operation and maintenance of a sewer system is a governmental function."); Jackson v. City of Danville, 26 Va. Cir. 488, 1990 Va. Cir. LEXIS 444 (Va. Cir. Ct., City of Danville 1990) (Plaintiff alleged that her goods and property were damaged by sewage which backed up and flowed into her home as a result of the negligence of the City: "In this case, the City of Danville's operation of a sanitary sewer system, in the Court's opinion, falls within the Protective Doctrine of Sovereign Immunity. For this reason, the Court is of the opinion that the City of Danville is entitled to summary judgment as requested in its Motion.").

However, a few cases are distinguishable from the general rule. In Mjornell v. Town of Front Royal, 41 Va. Cir. 399, 1997 Va. Cir. LEXIS 44 (Va. Cir. Ct., Warren County 1997), the court held that a municipality is immune from liability for an alleged negligent design of a sewer system, but may be liable for damages caused by its negligence with regard to the construction, operation and maintenance of water and sewer systems, which activities are proprietary functions. In addition, the case of Hampton Road's Sanitation District v. McDonnell, 234 Va. 235, 360 S.E.2d 841, (Va. 1987) allowed recovery where the action of the municipality was done as a continuing trespass. Similarly, in McConnell v. Board of Supervisors of Fairfax County, 20 Va. Cir. 5, 1989 Va. Cir. LEXIS 402 (Va. Cir. Ct., Fairfax County 1989), the court allowed plaintiff to maintain a cause of action for inverse condemnation in the case of an alleged continuing trespass. The case involved a storm drain which backed up from time to time, causing flooding which damages Plaintiffs' nearby property. The court held as follows:

> Plaintiffs alleged that the Defendant is responsible for this flooding since they are charged with the allegation of designing and maintaining this storm sewer system. In their second amended petition, Plaintiffs allege one court for declaratory relief and one count for inverse condemnation. They presently seek leave to add a count for trespass. … [A] claim for inverse condemnation is essentially a claim that the government has 'taken' property without the due process of law in violation of the Fifth Amendment to the U.S. Constitution. As explained in Barnes v. United States, 538 F2d 865 (Ct. Cl. 1976), case law has developed the law of eminent domain as applied to instances of flooding. Property may be taken by the invasion of water where subjected to "intermittent, but inevitably recurring, inundation due to authorized government action." Id. at 870, citations omitted. A cause of action for unconstitutional taking therefore does not accrue until the flooding becomes inevitable. . . . [T]he Court simply cannot say on the basis of this record that flooding became inevitable at least three years prior to the commencement of this suit, as the defendant contends. Rather, this poses a question of fact to be determined at trial.

As to post-disaster remediation, in Fenon v. City of Norfolk, 203 Va. 551, 125 S.E.2d 808 (1962), the Virginia Supreme Court considered a tort claim against a city for failure to clear a tree from the road and found the city immune. Plaintiff claimed injury for striking a tree that fell by a storm and was obstructing a street. The fallen tree was one of some 800 downed trees blocking the streets of Norfolk in the wake of Hurricane Donna, which struck the area in 1960. The Court held that the city's effort to cope with the "emergency situation" resulting from the storm was the exercise of a governmental function, not routine street maintenance. 203 Va. at 555-56.

Similarly, in Bialk v. City of Hampton, 242 Va. 56, 58, 405 S.E.2d 619, 620 (1991), the City of Hampton was deemed immune from plaintiff's suit for personal injuries received when he was struck by snow thrown from the blade of a snowplow which was being operated by a city employee. The Court cited Fenon and held that the City of Hampton was entitled to sovereign immunity for negligence committed during its snow-removal efforts. Specifically, the court stated:

> Because the City's snow-removal operations in this case were acts done for the common good in coping with an emergency, they constituted the exercise of a governmental function. Although that function coincided with the City's proprietary function of keeping its streets in safe condition for travel, where those functions coincide, "the governmental function is the overriding factor." The trial court correctly ruled, therefore, that the City was entitled to governmental immunity.

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However, the case of Burson v. City of Bristol, 10 S.E.2d 541 (Va. 1940) found the city liable in post-fire repair efforts to a building. Five days after a fire had been extinguished members of city volunteer fire department were employed to pull down walls of burned building to make

streets safe for passers-by. The court held that the members of volunteer fire department were not acting in the discharge of their duties as firemen so as to relieve city from liability for damages to adjoining property caused by firemen's negligence, nor was city relieved from liability under the statute relating to the destruction of houses to prevent the spread of fire. Code 1936, §§ 3133-3135. *See also* City of Richmond v. Wood, 63 S.E. 449 (Va. 1909) (no liability for extraordinary flood); City of Richmond v. Gallego Mills Co., 45 S.E. 877 (Va. 1903) (city has duty, from the time it acquires a sewer, to maintain it in a reasonably safe condition, despite former owner's prior upkeep or lack thereof); Miller & Meyers v. City of Newport News, 44 S.E. 712 (Va. 1903) (city has right to build drainage system but must exercise reasonable care and skill in doing the work).

Washington

1. Landowner's Duty to Inspect/Prepare

Zuniga v. Pay Less Drug Stores, N.W., 917 P.2d 584 (Wash.App.Div.1 1996): In context of homeless person's suit against premises lessee to recover for injuries sustained when lessee's truck ran over him as he lay sleeping near lessee's loading dock, duty associated with ownership of land was not replaced by duty to use reasonable care by virtue of fact that driver of truck was not on lessee's property when accident occurred; common-law categories of invitee, licensee, and trespasser consider the location of the plaintiff at the time of the accident, and the location of the landowner or his agents is not relevant.

Kelly v. Gifford, 386 P.2d 415 (Wash. 1963): Abutting property owner must use and keep his premises so as not to render adjacent highways unsafe for ordinary travel.

Mills v. Orcas Power & Light Co., 355 P.2d 781 (Wash. 1960): One must exercise reasonable care to maintain his property so as not to injure those using adjacent highway.

2. Act of God Defense

Burton v. Douglas County, 539 P.2d 97 (Wash.App.Div.3 1975): When two causes combine to produce injury, both of which are, in their nature, proximate and contributory to the injury, one being culpable negligent act of defendant, and other being an act of God for which neither party is responsible, then defendant is liable for such loss caused by his own act concurring with the act of God, provided loss would not have been sustained by plaintiff but for such negligence of defendant.

3. Governmental Liability

Minahan v. Western Washington Fair Ass'n, 73 P.3d 1019 (Wash.App.Div.2 2003): School district and county fairground association had no duty to district employee, who was injured by an intoxicated driver while working for employer on high school dance at county fairgrounds, to make dangerous parking condition where employee was hit by driver safe, where dangerous condition existed on public street bordering fairgrounds. School district and county fairground association had no duty to district employee, who was injured by an intoxicated driver while

working for employer on high school dance at county fairgrounds, to reasonably protect against driver's criminally reckless conduct, where driver's conduct did not occur on premises of fairgrounds but on public street bordering fairgrounds. Restatement (Second) of Torts § 344.

Owen v. Burlington Northern Santa Fe Railroad, Inc., 56 P.2d 1006 (Wash.App.Div.1 2002): City's allegation that motorist and passenger had been negligent, regarding train's collision with motorist's and passenger's vehicle at railroad crossing in city, did not excuse city from its duty to build and maintain its roadways in a condition that was reasonably safe for ordinary travel. A municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel.

Keller v. City of Spokane, 44 P.2d 845 (Wash. 2002): A municipality owes a duty to all persons, whether negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel; overruling Wick v. Clark County, 86 Wash.App. 376, 936 P.2d 1201. West's RCWA 4.96.010.

Howe v. Douglas County, 43 P.3d 1240 (Wash. 2002): Statute allowing governments to limit harms caused by private developers who constructed improvements that are accepted by government is limited to plat subdivisions subject to a dedication, to damage occasioned to the "adjacent land," to roads and the associated drainage systems, and to infrastructure that is already established. West's RCWA 58.17.165.

Rothweiler v. Clark County, 29 P.3d 758 (Wash.App. Div. 2 2001): A municipality has no common law duty to drain surface water.

Patterson v. City of Bellevue, 681 P.2d 266 (Wash.App. 1984): As general rule, municipality is not liable for increased flow of surface water caused by opening of streets, building of houses, and other private development; any problem in such regard has its solution in concerted political action rather than in courts.

Sigurdson v. City of Seattle, 292 P.2d 214 (Wash. 1956): Where city assumes sole control and management of water drainage system, the city becomes liable for injuries resulting therefrom, and it is immaterial by whom the system was constructed. Where, upon construction of water drainage system by federal relief agency, city had assumed its sole management and control, and city had frequently, extensively repaired system during past 18 years, and private property was not shown to have been benefited more than incidentally to its primary public purpose of preventing landslides onto and flow of water upon city streets, city had duty to maintain system, and was liable to landowner whose property was damaged as result of city's negligent performance of duty.

Yakima Central Heating Co. v. City of North Yakima, 149 P. 341 (Wash. 1915): Where water leaked from flumes maintained by the city above the pipes of a heating plant, causing excessive condensation, the injury was not actionable, as it resulted from natural conditions.

Liability for Failure to Maintain Fire Break:

In Autery v. United States, No. 04-35105, http://www.ca9.uscourts.gov/ca9/newopinions.nsf/A0B18BFB1437346F8825707A004DE706/$file/0435105.pdf?openelement , (Sept. 12, 2005), the Ninth Circuit Court of Appeals reviewed actions arising out of a wildfire in Washington State.

Numerous individual and corporate victims of a large wildfire in southeastern Washington State appeal the district court's dismissal for lack of subject matter jurisdiction of their suit brought under the Federal Tort Claims Act (FTCA) 28 U.S.C. §§ 1346(b), 2671-80. The suit sought substantial damages, alleging, among other things, negligence against the United States in not maintaining firebreaks. The district court dismissed based upon the FTCA's independent-contractor and discretionary-function exceptions.

The Ninth Circuit agreed with the district court that relevant decisions regarding fire prevention were encompassed in the government's contracts with Fluor Daniel Hanford, Inc., a.k.a. Fluor Hanford, Inc., (Fluor) and Fluor's corresponding subcontract with DynCorp Tri-Cities Services, Inc. (DynCorp). The action was therefore barred by the independent-contractor exception to the FTCA. *See* 28 U.S.C. § 2671 ("As used [in the FTCA] the term 'Federal agency' . . . does not include any contractor with the United States"). Because the court affirmed on that ground, It did not reach whether the suit is also barred by the discretionary-function exception in 28 U.S.C. § 2680(a).

The suit arises from the 24 Command Wildland Fire (a.k.a. the 24 Command Fire), which burned from June 27 to July 1, 2000. The wildfire was triggered by an automobile crash on Washington State Route 24 (SR-24). SR-24 is located on an easement over federal property granted by the United States to the State of Washington. The wildfire eventually charred some 164,000 acres of public and private lands on and near the United States Department of Energy's (DOE's) Hanford Site. The Hanford Site encompasses over 560 square miles of government property in the southeastern part of Washington in Benton County near Richland.

The Hanford Site includes within it the 120-square-mile Fitzner-Eberhardt Arid Lands Ecology Reserve (ALE Reserve or ALE). The ALE Reserve is an ecologically sensitive area with significant natural and cultural resources. The DOE transferred, or began transferring, management of the ALE to the United States Fish and Wildlife Service (FWS) in June of 1997. The terms of the transfer are set forth in a June 20, 1997, Permit and Memorandum of Understanding (MOU) between the DOE and FWS.

Specific control of the ALE is important here because the fire started on the ALE — or, more particularly, on SR-24 — and quickly spread to the ALE. Plaintiffs' primary FTCA claim is that the United States (either the DOE or the FWS) negligently maintained firebreaks near SR-24 along the ALE and such negligence caused fire to spread from SR-24 onto the ALE and ultimately to Plaintiffs' properties. The DOE had a large (over $2.8 billion, as of August 27, 1999) contract with Fluor for "planning, managing, integrating, operating and implementing" a wide range of activities at the Hanford Site. In turn, Fluor subcontracted with DynCorp, to provide certain services, including "Emergency Services."

The subcontract was effective October 1, 1996, and was modified effective March 27, 2000 (although there apparently has been a similar contractual relationship from at least 1984). The subcontract defines "Emergency Services" as:

1. Fire Protection Engineering.
2. Fire Department Emergency Response, including:

a. Fire Suppression.
b. Rescue.

c. Emergency Medical/Ambulance.
d. Hazardous Material Spill Response.
e. Incident Command.
3. Fire Protection System Inspection and Maintenance.
4. Fire Prevention.

The Hanford Fire Department (HFD) was a subsidiary of DynCorp during the relevant period. Thus, HFD is a private entity and is the subcontractor retained to provide "Emergency Services." HFD's fire chief at relevant times was Don Good.

The government argued that the plain terms of these contracts established that the DOE contracted with Fluor, which subcontracted with the HFD, to provide fire prevention and fire protection on the Hanford Site, including the ALE. Accordingly, the government contended (and the district court agreed) that the independent-contractor exception to the FTCA immunizes the United States from the alleged negligence that could have contributed to the 24 Command Fire.

West Virginia

1. Landowner's Duty to Inspect/Prepare

Andrick v. Town of Buckhannon, 421 S.E.2d 247 (W.Va. 1992): Business operator's or owner's duty of care to invitees using adjacent property arises when operator or owner has actual constructive knowledge that invitees regularly use adjacent property in connection with its business, and liability attaches if it is shown that operator or owner was aware of hazard that caused injury.

Cox v. U.S. Coal & Coke Co., 92 S.E. 559, (W.Va. 1917): A coal company, knowing that pedestrians frequently use a railway company's main line nearby its coal tipple located on a side track 10 or 12 feet above the main line, whose custom is to pick the slate out of the coal as it is being loaded in the cars at the tipple and cast it in the direction of the railroad, is bound to use reasonable care to avoid injury to such pedestrians.

2. Act of God Defense

3. Governmental Liability

Wisconsin

1. Landowner's Duty to Inspect/Prepare

Hass v. Chicago & N. W. Ry. Co., 179 N.W.2d 885 (Wis. 1970): Duty of landowner in respect to one not on his land but who is injured by activities that originate there is simply one of reasonable care.

Schiro v. Oriental Realty Co., 76 N.W.2d 355 (Wis. 1956): A declevity, 19 1/2 inches wide and with a three inch slope, in plaintiffs' lawn, caused by breach in defendant's retaining wall, was not necessarily too insignificant a defect to be actionable where plaintiff fell and was injured.

Delaney v. Supreme Inv. Co., 29 N.W.2d 754 (Wis. 1947): Under the common law, a building abutting on a highway must be so constructed and maintained that it will not fall and injure persons lawfully on the highway, and although the owner of person in control of such structure is not an insurer, he must use reasonable care in construction and maintenance thereof and is bound to inspect from time to time. Action by pedestrian for injuries sustained when struck by glass block falling from front of public building while she was walking along the street with no intention of entering the building should have been tried upon the issues of common law negligence and not upon the safe-place statute. St.1945, §§ 101.01(5, 11, 12), 101.06.

Cook v. Rice Lake Milling & Power Co., 130 N.W. 953 (Wis. 1911): A person has the right to use his own property in the usual conduct of his business with the usual incidents to such use, and is only required to exercise ordinary care in order to relieve him from liability for damages on account of injuries incidentally resulting to a traveler on an adjacent highway. Ordinary care in using one's property contemplates that the owners of land abutting on a highway may freely use the same in the regular conduct of their business, not creating unusual or unnecessary noises or appearances known to be liable to dangerously disturb passing horses under control of persons of ordinary care and capability.

2. Act of God Defense

3. Governmental Liability

Wyoming

1. Landowner's Duty to Inspect/Prepare

Timmons v. Reed, 569 P.2d 112 (Wyo. 1977): Landowner in close proximity to public highway must exercise reasonable care to avoid injury to traveling public arising from unnecessarily dangerous conditions created by him on land, where consequences of failure to do so are reasonably foreseeable, and violation of this duty constitutes negligence.

2. Act of God Defense

Ely v. Kirk, 707 P.2d 706 (Wyo. 1985): An act of God is any action due directly and exclusively to natural causes without human intervention and which could not have been prevented; there can be no combination of an act of God and fault of man; for the act of God defense to be available, the act of God must be the sole cause of the injury.

Cox v. Venieuw, 604 P.2d 1353 (Wyo. 1980): Act of God doctrine would not encompass physical afflictions or medical problems of a defendant. Defense of an act of God should not be considered in any case in which recovery is sought upon a theory of negligence.

Wheatland Irr. Dist. V. McGuire, 537 P.2d 1128 (Wyo. 1975): Landowner is not absolutely liable for damage resulting from extraordinary use of his land if the damage is due to acts of God, public enemies or third persons. Landowner is not absolutely liable for damage resulting

from extraordinary use of his land if the damage is due to acts of God, public enemies or third persons.

Sky Aviation Corp. v. Colt, 475 P.2d 301 (Wyo. 1970): Ordinary forces of nature, such as winds which are usual at time and place, are conditions which reasonably could have been anticipated and will not relieve from liability a negligent defendant relying on defense of act of God. If negligence of defendant directly contributed to injury of plaintiff, so that it is reasonably certain that force of nature alone would not have sufficed to produce injury, defendant cannot escape liability on ground that injury was allegedly caused by act of God. Ordinary forces of nature, such as winds which are usual at time and place, are conditions which reasonably could have been anticipated and will not relieve from liability a negligent defendant relying on defense of act of God. Term "act of God" is any accident, due directly and exclusively to natural causes, without human intervention, which by no means of foresight, pains or care, reasonably to have been expected, could have been prevented. An "act of God" is the cause of an injury to person or property, where such injury is due directly and exclusively to natural causes, which are without human intervention, and which could not have been prevented by exercise of reasonable care and foresight.

3. Governmental Liability