Climate Change Impacts on Municipal Negligence Liability in Rhode Island

Manta Dircks, Rhode Island Sea Grant Law Fellow

December 2016

Climate change and its related impacts, including sea level rise and increased storm activity, require municipalities to plan and undertake policy and infrastructure actions to avoid future harm. These actions may give rise to potential for litigation by detrimentally affected property owners. Among other legal theories, plaintiffs in such actions could use negligence law as the basis for lawsuits.

This fact sheet presents a brief overview of municipal liability for negligence in Rhode Island and how it may apply to actions related to climate change and resiliency. It first provides an overview of the elements needed to establish a case for negligence, then explores how those elements apply to the state and municipalities through the Rhode Island Tort Claims Act and common law. Finally, it considers how these legal standards may apply to potential negligence claims related to municipal actions in response to climate change.

Elements of negligence in Rhode Island

To establish a case for negligence, a plaintiff must show each of four factors:

(1) the defendant owed a duty of care to the plaintiff;
(2) the defendant breached that duty of care;
(3) the defendant's acts proximately caused the plaintiff's injuries; and
(4) the plaintiff suffered actual (not hypothetical) damages.[1]

Generally speaking, a duty of care is "an obligation imposed by the law upon a person" that requires a person "to conform his or her actions to a particular standard" and "carries with it a recognition that the law will enforce this duty to the benefit of individuals to whom the duty is owed."[2] Courts determine whether a legal duty of care exists on a case-by-case basis, as there is "no clear-cut rule" to determine whether a duty is in fact present in a particular case,[3] and the state "has avoided definitively committing itself to a specific analytical approach."[4]

If the court determines that the defendant owed a legal duty of care, the plaintiff must show the existence of each of the other three elements of the claim. All of these elements are

questions of fact to be determined by a jury and must be supported by evidence.[5] A plaintiff establishes proximate cause "by showing but for the negligence of the tortfeasor, injury…would not have occurred."[6] While proximate cause cannot be based on conjecture or speculation, "a plaintiff is not required to demonstrate with absolute certainty each precise step in the causal chain between the tortfeasor's breach of duty and the injury. Rather, causation is proved by inference."[7]

Negligence liability of state and local governments in Rhode Island

The Rhode Island Tort Claims Act governs the negligence liability of state and local governments and governmental entities.[8] The Torts Claim Act "is a statutory waiver of both state and municipal sovereign immunity."[9] Under the Act, an individual may "sue governmental units in the same manner as private individuals for injuries caused by the negligence of state or local employees."[10] This waiver applies to both the state and to "any political subdivision thereof, including all cities and towns," but damages under the Act are limited to $100,000.[11] Claims against state employees are deemed actions against the state, provided they are certified by the court to arise from the employee's official actions and not to result from fraud, willful misconduct, or malice.[12]

Governmental entity liability in Rhode Island is limited despite the statutory waiver of sovereign immunity. As explained by the state Supreme Court in *Calhoun v. City of Providence*, "abolition of the doctrine of sovereign immunity has never been understood as completely subjecting every and all governmental functions to court action."[13] Governmental liability therefore remains limited in Rhode Island, notably through the public duty doctrine.

Under the public duty doctrine, governments are not liable for torts committed when engaging in non-proprietary functions that by their nature are not ordinarily performed by private persons.[14] This doctrine exists to encourage "the effective administration of governmental operations by removing the threat of potential litigation" arising from discretionary acts.[15] There are two exceptions to the public duty doctrine: special duty and egregious conduct.[16]

The special duty exception requires plaintiffs to "show a breach of some duty owed them in their individual capacities and not merely a breach of some obligation owed the general public."[17] It can be established "when a plaintiff has had prior contact with state or municipal officials who then knowingly embark on a course of conduct that endangers the plaintiff[], or when a plaintiff has otherwise specifically come within the knowledge of the officials so that the injury to that particularly identified plaintiff can be or should have been foreseen."[18] The Rhode Island Supreme Court has "consistently [] held that allegations of

negligent licensing do not establish that the state or a political subdivision thereof owes a special duty to a plaintiff or foreseeable group of plaintiffs."[19]

The egregious conduct exception applies when "the state has knowledge that it has created a circumstance that forces an individual into a position of peril and subsequently chooses not to remedy the situation."[20] "Elements considered when evaluating an egregious conduct claim include "creation of circumstances involving extreme peril, actual or constructive knowledge of the perilous situation, and a failure to eliminate the dangerous condition within a reasonable time."[21]

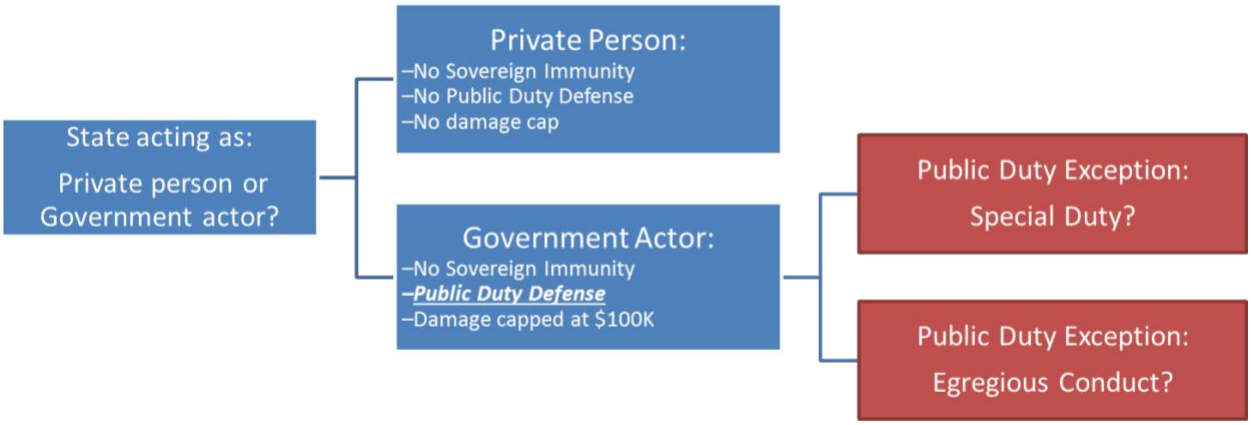

Figure 1. Governmental negligence liability reference chart.

In addition to the public duty doctrine, state law provides additional immunities notwithstanding the Tort Claims Act. Thus, the government can still be immune from negligence lawsuits in where a common law tradition or a specific state statute precludes a claim. For example, Rhode Island statutes provide immunity for police and fire personnel rendering emergency assistance, public school teachers and administrators, constables, and members of public bodies.[22]

Rhode Island governmental negligence liability related to climate change

Rhode Island and its municipalities and other governmental entities are engaging in a number of activities to plan for and adapt to climate change. These include planning and provision of public information (e.g., development of community resilience plans); permitting activity in coastal areas (e.g., issuance of building permits in flood zones); and infrastructure development and maintenance. Each of these types of activities could potentially result in negligence claims.

Rhode Island has seen few cases to date that are based on these actions and related to climate change. However, such cases are likely to become more common with increasing coastal impacts due to sea level rise, additional storm activity, or other causes associated

with climate change. This section provides a brief discussion of negligence liability associated with each category of municipal activities.

Planning and Policymaking

Municipal planning may give rise to negligence claims based on reliance on (in)accurate information or failure to plan for and develop policy responses to climate change impacts. For example, a property owner could sue in negligence if she relies to her detriment on inaccurate information on her property's flood risk provided by a municipality in a resilience plan. Planning and policymaking is an inherently governmental function not carried out by private citizens. Thus, while covered by the Tort Claims Act, the municipality in most such cases would be protected by the public duty doctrine and would have no liability for inaccurate planning information absent a special duty to the plaintiff or egregious conduct in planning and policymaking. A municipality may wish to take proactive steps to reduce the likelihood that its planning and policymaking activities fall under the special duty or egregious conduct exceptions by ensuring that its plans consider and address climate change and that these plan components are based on rigorous scientific information—particularly where potentially-affected property owners have participated in public planning activities and therefore may be owed a special duty by the municipality.

Permitting

Municipal permitting activity could give rise to negligence claims if permits are improvidently granted for activities that foreseeably may result in harm. These may include activities that are not or will not be safe due to climate change (e.g., buildings that may be subject to flooding due to sea level rise) or activities that are designed to adapt to climate-related impacts but cause damage to other property owners (e.g., permits for seawalls or other infrastructure that causes erosion in other areas.

Issuance of permits and other similar approvals for private activity is an exclusively governmental activity under Rhode Island law, such that the public duty doctrine applies. As a result, plaintiffs asserting negligence claims arising from permits must show they are owed a special duty by the municipality or that the municipality engaged in egregious conduct in the permitting activity.

The Supreme Court of Rhode Island has interpreted such claims for exceptions from the public duty doctrine on several occasions relevant to climate hazards. In *Haworth v. Lennon*, two homeowners sued the Town of Warren for negligently inspecting and issuing certificates of occupancy for their property, which was subjected to repeated flooding.[23] The Court held that the Town lacked a special duty to the property owners, who were unknown when the Town conducted its inspection—the certificate was issued to the developer rather than the homebuyers.[24] In addition, the town's conduct was held not to be

egregious, as "nothing in the record indicates that the town was aware that the houses were subject to flooding when it issued the certificate of occupancy or that the flooding posed a position of extreme peril."[25]

Haworth's interpretation of the special duty clause can be contrasted with that in *Quality Court Condominium Association v. Quality Hill Development Corp.*, in which the Court held the City of Pawtucket liable to the condominium association under the special duty exception to the public duty doctrine.[26] While noting that a single inspection of a building would be insufficient for the special duty to attach, the plaintiffs provided evidence of repeated discussions and inspections after receiving notice of building code violations, and under these facts the Court found a special duty.[27]

These cases suggest that permitting activity for coastal development may expose municipalities to negligence claims in certain circumstances. The degree of engagement between the town and a property owner may result in a special duty, as in *Quality Court*, and it is possible that a town with actual or constructive knowledge of flooding that creates a hazard to property owners could be found to engage in egregious conduct if its permits do not seek to address the hazard. Such a case could, for example, involve permitting of a dwelling without flood protections in an area identified in a resiliency plan as being subject to increased flooding in the future. Municipalities may wish to take proactive steps to minimize their liability exposure by employing rigorous standards for granting permits and variances, including by explicitly discussing and providing disclaimers related to flood risks in permits, conditioning permits or variances on adaptation actions, and ensuring that permits and variances conform to town climate change policies or standards that are included in planning and zoning requirements.

Infrastructure maintenance

Coastal infrastructure, including but not limited to roads and storm and sewer systems, may be adversely impacted by climate change. Coastal roadways may be eroded or made temporarily or permanently impassable as a result of storms or sea level rise, and sewer systems likewise are often located along the shoreline and require protection or renovation so they are not undermined by infiltration or other climate-related causes. Municipalities could be sued for failure to adequately maintain this or other infrastructure or for failure to plan for the future operation of new infrastructure.

While few Rhode Island cases are directly applicable, the Supreme Court has held that operation of sewers is a proprietary function, under which the public duty doctrine does not apply, and has found that a municipality that fails to maintain the system that causes retroflux flooding is tortious.[28] Cases from other jurisdictions have raised additional claims. In *Pickle v. Board of County Commissioners of the County of Platte*, the Wyoming Supreme Court held that the defendant County Commissioners had a duty to exercise reasonable

care in reviewing a subdivision application, and that the duty extended to analysis of flood risk.[29] While no cases alleging failure to plan for climate change were identified, such a claim was raised in *Illinois Farmers Insurance Company v. County of Lake*, in which the plaintiff argues that regulatory findings of fact about increasing rainfall due to climate change created a duty in the defendant counties to plan for that rainfall in designing its sewer systems.[30] This case, however, has not proceeded beyond the pleadings to date.

With respect to transportation infrastructure, municipalities are subject to a statutory duty to maintain roadways,[31] and they cannot evade this duty by failing to maintain them.[32] However, roadway creation and maintenance generally is a non-proprietary activity that is eligible for the public duty doctrine.[33] As a result, plaintiffs would need to present evidence to support a determination that a municipality owed them a special duty, or that its failure to maintain roadways constituted egregious conduct, in order to recover. No cases specific to these issues have been decided to date in Rhode Island.

Conclusion

Rhode Island law provides that municipalities are subject to negligence claims, but their liability is limited by the public duty doctrine when engaging in non-proprietary actions that are not engaged in by the public. This doctrine is limited by two exceptions, however: municipalities will be liable when plaintiffs present evidence that a municipality owed them a special duty or engaged in egregious conduct. Municipalities may be liable under these principles for a variety of activities affected by climate change. Municipal plans and policymaking, permitting, and infrastructure development and maintenance may all give rise to claims arising from negligence. Municipalities therefore may wish to engage in proactive steps to limit their potential exposure to liability, including science-based consideration of potential future impacts, provision of information on climate-related hazards to citizens, including in permitting and variance processes, and active planning for and maintaining public infrastructure that is threatened by climate-related impacts.

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[1] Medeiros v. Sitrin, 984 A.2d 620, 625 (R.I. 2009).
[2] Kuzniar v. Keach, 709 A.2d 1050, 1055 (R.I. 1998).
[3] Ferreira v. Strack, 652 A.2d 965, 967 (R.I. 1995).
[4] Bucki v. Hawkins, 914 A.2d 491, 495 (R.I. 2007) (quoting Ferreira, 652 A.2d at 685) (internal quotations omitted).
[5] Hall v. City of Newport, 138 A.3d 814, 820 (R.I. 2016).
[6] Skaling v. Aetna Ins. Co., 742 A.2d 282, 288 (R.I. 1999) (internal citation and quotation omitted).
[7] *Id.*
[8] R.I. GEN. LAWS §§ 9-31-1 – 9-31-13.
[9] Seide v. State, 875 A.2d 1259, 1267 (R.I. 2005).
[10] Catone v. Medberry, 555 A.2d 328, 330 (R.I. 1989), *citing* R.I. GEN. LAWS § 9-31-1.
[11] R.I. GEN. LAWS §§ 9-31-1, 9-31-2 (limitation of damages to the state), 9-31-4 (limitation of damages to political subdivisions).
[12] R.I. GEN. LAWS §§ 9-31-12.

[13] 390 A.2d 350, 355 (R.I. 1978) (reviewing history of sovereign immunity and governmental tort liability).
[14] O'Brien v. State, 555 A.2d 334 (R.I. 1989).
[15] Catone v. Medberry, 555 A.2d 328, 333 (R.I. 1989).
[16] *See* Torres v. Damicis, 853 A.2d 1233 (R.I. 2004) (reviewing public duty doctrine and exceptions).
[17] Ryan v. State Dep't Transp., 420 A.2d 841, 843 (R.I. 1980).
[18] Boland v. Town of Tiverton, 670 A.2d 1245, 1248 (R.I. 1996).
[19] Torres, 853 A.2d at 1241.
[20] *Id*.
[21] Catri v. Hopkins, 609 A.2d 966, 968 (R.I. 1992)
[22] R.I. GEN. LAWS §§ 9-1-27 (police and fire personnel rendering emergency assistance); 9-1-27.1, 9-1-34 (emergency assistance); 9-1-31 (public school teachers, supervisors and administrators); 9-1-31.1 (members of public bodies); 23-28.2-17 (fire marshal, deputies and assistants); 45-16.4.5 (constables).
[23] 813 A.2d 62 (R.I. 2003).
[24] *Id.* at 64-65.
[25] *Id.* at 65.
[26] 641 A.2d 746 (R.I. 1994).
[27] *Id.* at 750-51.
[28] Rotella v. McGovern, 288 A.2d 258 (R.I. 1972).
[29] 764 P.2d (Wyo. 1988).
[30] No. 2014L281, 2014 WL 2488893 (Ill. Cir. Ct. Apr. 17, 2014).
[31] R.I. GEN. LAWS § 24-5-1.
[32] O'Reilly v. Town of Glocester, 621 A.2d 697 (R.I. 1993).
[33] Tedesco v. Connors, 871 A.2d 920, 924 (R.I. 2005); Toegemann v. City of Providence, 21 A.3d 384 (R.I. 2011).