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Climate Change and Government Negligence Liability in Massachusetts

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Updated fall 2020

This fact sheet was produced by the Marine Affairs Institute at Roger Williams University School of Law/Rhode Island Sea Grant Legal Program with funding from Rhode Island Sea Grant. This is one of a series of fact sheets designed to highlight key concepts of state and local government liability risks as those governments prepare for the effects of climate change throughout New England. This fact sheet was produced in partnership with MIT Sea Grant and Woods Hole Sea Grant.

1 Scope of this fact sheet

As climate change increasingly affects homes, public infrastructure, and other developments, state and local governments may desire to implement novel policies and regulations to address increasing environmental pressures. If regulation or infrastructure management causes harm to a person, he or she may bring a negligence claim against the government. However, in many instances, governments are protected from negligence liability by sovereign immunity.

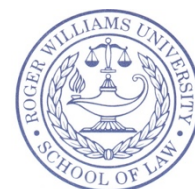
Sovereign immunity is a legal doctrine that prevents a government from being sued without its consent. The Massachusetts Tort Claims Act (MTCA) waives sovereign immunity for harms caused by the negligent or wrongful conduct of government employees acting within the scope of their employment. However, the MTCA also carves out many exceptions where the government will remain immune from suit. This fact sheet walks through the exceptions that are likely to arise in climate change-related litigation, including immunity for discretionary functions, permitting decisions, and acts that fail to prevent harm by a third party or outside condition.

This fact sheet will explore potential government exposure to negligence liability in the climate change context and answer common questions:

- Could a municipality be liable for planning and policymaking decisions, such as deciding whether to upgrade a sewer system?
- Could a municipality be liable when granting or denying a permit, such as when denying a building permit within a floodplain?



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- Could a municipality be liable for its infrastructure maintenance decisions, such as ensuring that stormwater drainage systems are cleaned so they work as designed?
- Could the Commonwealth be liable for disseminating or withholding flood risk information?

2 Elements of negligence

Negligence is one of many tort claims that can be brought by plaintiffs who have been injured by the actions of another. To prevail in a negligence claim, a plaintiff must prove four elements: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty; (3) the plaintiff suffered harm; and (4) the defendant’s breach of the duty of care was a cause of the plaintiff’s harm.¹ Failure of any one of these factors will result in the failure of a claim. In addition, even if they can satisfy all four factors, negligence lawsuits against state and local governments and officials may be barred by sovereign immunity, as described in the next section.

The first element, establishing a duty of care, is often a contentious step in a negligence case. While the duty of care must be determined on a case-by-case basis, the Massachusetts Supreme Judicial Court (SJC) has acknowledged that each person “has a duty to exercise reasonable care to avoid physical harm to others,” so long as the potential for harm is reasonably foreseeable.² This duty “is derived from ‘existing social values and customs’ and therefore changes over time.³ Negligence suits based on damage associated with climate change thus may become more frequent as expanding scientific knowledge increases our ability to foresee future harms.

3 Sovereign immunity

Sovereign immunity is a legal doctrine that prevents a government from being sued without its consent.⁴ This immunity has been waived in several ways under Massachusetts law. The Massachusetts Tort Claims Act (MTCA) waives sovereign immunity only for “injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment,” unless an exception preserves sovereign immunity.⁵ A government may also impliedly waive sovereign immunity if it “takes on a responsibility beyond its inherent or core government functions and therefore serves in a capacity that could just as easily be accomplished by a nongovernmental entity.”⁶ For example, a city that agrees to serve as a trustee accepts a fiduciary duty that could be executed by a private person, and in doing so, the city impliedly waives its sovereign immunity with regard to its execution of that duty.⁷

Before an allegedly wronged person may bring an action under the MTCA, that person must first present a written claim to the government.⁸ The claimant may then bring suit under the MTCA if the government denies the claim or fails to reach a final decision within six months.⁹ In addition to defending actions brought against itself, government entities must indemnify their public employees from claims when an employee “was acting within the scope of his official duties or employment.”¹⁰

3.1 MTCA exceptions

The MTCA provides ten exceptions where a government retains sovereign immunity and cannot be sued for action that would otherwise be subject to suit under the MTCA. These exceptions include claims based upon:

- (a) a government actor “exercising due care in the execution of” a statute, regulation, or ordinance;
- (b) a government actor performing a discretionary function;
- (c) intentional torts;
- (d) tax assessment or detention of goods;
- (e) the issuance, denial, or other action on a permit application;
- (f) negligent inspection of property;¹¹
- (g) failure to establish a fire department;
- (h) failure of police protection;
- (i) release of prisoners or other detainees; or
- (j) an act or failure to act to prevent harm.¹²

The final exception (j) has its own list of limitations where a government may be sued:

- (1) if a government actor made “explicit and specific assurances” of safety;¹³
- (2) for claims based on “the intervention of a public employee;”
- (3) for “any claim based on negligent maintenance of public property;” or
- (4) for claims of negligent medical or therapeutic treatment.¹⁴

This wide array of exceptions in the MTCA provide the Commonwealth and municipalities with defenses against many negligence actions related to climate change.

3.2 MTCA exceptions likely to arise in climate change litigation

A selection of the exceptions to the MTCA’s waiver of sovereign immunity are particularly important in the context of climate change. These include: (i) the discretionary function exception; (ii) the permitting exception; and (iii) acts or failures to act to prevent harm. This section reviews how each of these exceptions may apply to government decisions related to climate change.

Commonly known as the discretionary function exception, MTCA § 10(b) provides government actors with protection in many planning decisions.¹⁵ Courts use a two-prong test to determine whether the discretionary function exception applies. First, a court will consider “whether the governmental actor had any discretion at all.”¹⁶ If the actor did have discretion, the court then considers whether that discretion was “that kind of discretion” for which the MTCA exception is designed.¹⁷ Though the court will evaluate the second prong on a case-by-case basis, the general standard is that “planning and policymaking” decisions are entitled to immunity while “implementation and execution” of those policies are not entitled to immunity.¹⁸

The SJC's analysis in *Shapiro v. City of Worcester* provides insight into the use of the discretionary function exception.¹⁹ The plaintiffs filed suit against the city when sewer infrastructure repeatedly backed up onto their properties.²⁰ The city had entered into an agreement that allowed additional use of the sewer system with plans to redesign the system to accommodate that load, but the system was never redesigned.²¹ Therefore, the plaintiffs brought suit alleging that the city had foreseen the potential for overloading the sewer and had allowed the increased load without taking action to address the risk, which resulted in harm to the plaintiffs.²² The SJC held that the discretionary function exception did not apply because the city had already used its discretion to create a plan to expand the sewer system, and the failure to execute that plan was not a discretionary function.²³ Thus, while the discretionary function exception commonly shields many decisions related to coastal management, inadequate implementation of management decisions may result in liability.

Another MTCA exception highly relevant in the climate change context is § 10(e), granting immunity for “any claim based upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.”²⁴ This provision has been broadly interpreted in granting sovereign immunity to claims arising from granting, denying, or failing to issue various permits and other authorizations.²⁵ In *Woods v. Massachusetts Department of Environmental Protection*, the plaintiffs brought a claim when the Department issued permits to private landowners to construct shoreline protection structures that resulted in erosion of the plaintiffs' property.²⁶ The Superior Court held that the plaintiffs could not bring tort claims against the Department because the claims were based upon the Department's decisions in issuing or denying permits and therefore barred by § 10(e).²⁷ Decisions about whether to grant, deny, or condition permits for coastal activities therefore will not result in liability absent some other ground for a lawsuit.

Third, MTCA § 10(j), commonly known as the statutory public duty rule, provides immunity for:

any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer.²⁸

This provision provides immunity when a government fails to prevent harm caused by a third party or natural condition.²⁹ Courts have reasoned that “[i]t is almost impossible to imagine an injury that could not have been prevented,” so the government should not be held liable for every injury that it could have acted to prevent.³⁰ In *Jacome v. Commonwealth*, for example, the court held that the Commonwealth was entitled to immunity under § 10(j) when the plaintiff's son drowned at a public beach.³¹ The court observed that “it was the conditions in the water” that caused the decedent to drown, not any affirmative act by the beach staff, despite the possibility that alternative actions by beach staff might have kept the son from drowning.³²

As noted above, the MTCA provides limitations to the statutory public duty rule, two of which may prove relevant to climate change-related litigation: assurance of safety and negligent maintenance of

public property. In order for these exceptions to apply, the government actor must have been an “original cause of harm,” meaning the government actor must have actually contributed to the harm and not merely failed to prevent it.³³ The Appeals Court of Massachusetts held that expanding the exceptions in § 10(j) more broadly would allow the exceptions to “encompass the remotest causation” and undermine the purpose of § 10(j) entirely.³⁴

The exception for assurance of safety “requires that ‘explicit’ and ‘specific’ assurances of safety, beyond general representations, be made by” a public employee.³⁵ The assurance cannot be implied from conduct but must be expressly spoken or written.³⁶ To be “specific,” the assurance “‘must be definite, fixed, and free from ambiguity.’”³⁷ By its own terms, § 10(j)(1)’s exception for specific assurances does not include permit language.

Finally, the MTCA provides that a government entity can be liable for negligent maintenance of public property.³⁸ The Appeals Court of Massachusetts noted that this provision would not apply to claims for failure to construct infrastructure.³⁹ However, a government entity must exercise reasonable care in constructing and maintaining public property and may face liability for failure to “maintain the premises in a reasonably safe condition.”⁴⁰ In *Canterbury Automotive, Inc. v. City of Worchester*, the plaintiff brought suit alleging that the city had improperly designed and negligently maintained its sewer and drainage system, resulting in flooding and damage on plaintiff’s property after Tropical Storm Hanna.⁴¹ Although the court granted the city’s motion for summary judgment because the plaintiff had failed to present sufficient evidence to support its claim, the court observed that the MTCA does not immunize a city from inadequate maintenance of its sewer system.⁴²

4 Common negligence claim topics in the climate change context

The Commonwealth or local governments could face negligence claims if they fail to consider the effects of climate change or underestimate those effects in drafting their local plans, granting permits, maintaining infrastructure, and more. They could also risk suit for overestimating the effects of climate change, although these claims are likely to be in the form of takings as the harm will manifest as deprivation of property rights or value. Takings claims in the climate change context are beyond the scope of this fact sheet, but a fact sheet providing a full discussion of such takings claims is available.⁴³ This section reviews how negligence and sovereign immunity may apply to commonly-asked questions about government actions related to climate change.

4.1 Planning and policymaking

Climate change may require a variety of planning and policymaking activities, such as how to address changing patterns of precipitation in water systems and other government-owned infrastructure or decisions about whether and how to allow coastal development. As in many other jurisdictions, Massachusetts courts have recognized that the MTCA provides sovereign immunity for many of these planning and policymaking decisions through the discretionary function exception. Decisions involving “weighing alternatives and making choices” that involve a significant level of discretion are

more likely to be found to qualify for immunity.⁴⁴ The SJC considered this provision in *Shapiro v. City of Worcester*, where the plaintiffs brought suit against the city because an inadequate sewer system caused backups onto the plaintiffs' properties during storm events.⁴⁵ Although the SJC held that the discretionary function exception did not apply to the city's failure to execute the sewer expansion plan, the court noted that the initial decision to expand the sewer was "that kind of discretion for which § 10(b)" was created.⁴⁶ Similarly, the Massachusetts Superior Court found the town was entitled to immunity in *Diloreto v. Town of Winchester* when town employees had to allocate limited resources during a severe storm and prioritized other actions over opening a storm drain near plaintiff's property, which resulted in flooding of plaintiff's property.⁴⁷ The court held that resource allocation is a public policy decision entitled to immunity under the discretionary function exception.⁴⁸ These cases suggest Massachusetts courts may find that municipalities are immune from suit in creating management plans and setting policies in response to sea level rise and other climate change impacts.

4.2 Permitting

A person harmed by a government actor's issuance or failure to issue a permit or other authorization could seek redress from that government.⁴⁹ However, the MTCA grants multiple avenues of immunity from such cases. Section 10(e) expressly grants immunity for permitting, licensing, and similar decisions. Additionally, courts have held that permitting decisions are entitled to sovereign immunity under the discretionary function exception.⁵⁰ Finally, MTCA § 10(j)(1) expressly states that language in permits and certificates cannot qualify as an express assurance of safety. In light of these three provisions, a Massachusetts court is unlikely to allow a negligence suit based upon the issuance or denial of a permit. As a result, these cases are most often brought for other forms of relief, such as by alleging violations of the underlying ordinance or state land use law.

4.3 Failure to maintain infrastructure⁵¹

In Massachusetts, governments have an obligation to maintain their infrastructure in functional condition.⁵² Decisions on building or altering infrastructure may fall under the discretionary function exception, allowing the government to avoid liability.⁵³ However, execution of planning decisions, once made, as well as maintaining existing infrastructure in good repair are non-discretionary, as shown in *Shapiro*. Governments therefore will not be immune to claims of negligence if their failure to maintain or execute policy decisions results in damage to persons or property.⁵⁴

4.4 Dissemination or withholding of flood risk information

Government entities could face lawsuits if their employees disseminate incorrect flood risk information. Property owners who under- or over-prepare their properties for flood impacts or owners whose property values decrease due to projected flood risks might seek relief for the costs they endure for reliance on government information. However, a Massachusetts court may find that the government is entitled to immunity because the broad dissemination of information is akin to a planning practice.⁵⁵ However, a claimant may be able to overcome sovereign immunity if a

government actor made “specific assurances of safety” from flooding that proved incorrect.⁵⁶ However, as discussed above, such assurances would need to be express and specific.⁵⁷

Alternatively, governments may face negligence claims for *failing* to disseminate flood risk information. Massachusetts courts recognize causes of action for failure to warn of dangers in suits between private parties, including for failure to warn of flooding risks.⁵⁸ However, courts have noted the importance of using a different standard for government actors in order to balance “[t]wo ‘equally important’ purposes... ‘to allow plaintiffs with valid causes of action to recover in negligence against governmental entities... [and] to preserve the stability and effectiveness of government’” without fear of endless litigation.⁵⁹

Two exceptions within the MTCA may insulate a government for its decision not to disseminate flood risk information. Like an affirmative decision to disseminate information, a court may view a decision to withhold information as a policy-level decision and therefore find it immune under the discretionary function exception.⁶⁰ Under MTCA § 10(j), a government entity may be entitled to immunity because flooding harm is caused by a natural condition, such as the ocean, and withholding risk information does not directly contribute to the harm.⁶¹ The Massachusetts Appellate Court’s treatment of this provision in *Jacome v. Commonwealth* supports the theory that a court may find immunity for a government in future cases where harm results from natural causes. Although the SJC has not directly spoken directly to the scope of the §10(j) exception for climate-related natural harms and each case will be decided on its unique facts, the overall treatment of the MTCA exceptions suggests that a government entity is unlikely to be liable for choosing not to disseminate flood risk information, so long as that choice was based on a discretionary decision process.⁶²

5 Conclusion

Massachusetts’ state and municipal government negligence liability for coastal management in light of climate change is limited by the doctrine of sovereign immunity. However, the Commonwealth and its municipal governments could still face claims for negligent maintenance of public infrastructure, express assurances of safety made by government actors, or negligent implementation or execution of policies. Consultation with local counsel will be critical to minimize the risk of liability for government action addressing flooding and other climate change effects.

¹ *Correa v. Schoeck*, 98 N.E.3d 191, 198 (Mass. 2018) (citing *Jupin v. Kask*, 849 N.E.2d 829, 834-835 (Mass. 2006)).

² *Id.* at 201 (quoting *Jupin*, 98 N.E.2d at 835) (internal quotation omitted).

³ *Id.* (quoting *Jupin*, 98 N.E.2d at 832). In *Laukkanen v. Jewel Tea Co.*, the Appellate Court of Illinois found that a jury was reasonable in concluding that harm was reasonably foreseeable to a building design firm when a supermarket pylon fell on the plaintiff during high winds that were of greater intensity than any previously recorded at the supermarket site but were “within the range of winds to be expected” in the area. 222 N.E.2d 584, 587, 589 (Ill. App. Ct. 1966). If Massachusetts courts were to follow this same reasoning, previously unobserved extreme conditions brought about by climate change would not provide a shield against potential liability.

Id. (quoting *Jupin*, 98 N.E.2d at 832). In *Laukkanen v. Jewel*

Tea Co., the Appellate Court of Illinois found that a jury was reasonable in concluding that harm was reasonably foreseeable to a building design firm when a supermarket pylon fell on the plain tiff during high winds that were of greater intensity than any previously recorded at the supermarket site but were “within the range of winds to be expected” in the area. 222 N.E.2d 584, 587, 589 (Ill. App. Ct. 1966). If Massachusetts courts were to follow this same reasoning, previously unobserved extreme conditions brought about by climate change would not provide a shield against potential liability.

2d 989, 993 (Mass. 2005) (finding that § 10(f) did not grant immunity to the Commonwealth when it failed to inspect and maintain a stop sign on a public way).

¹² MASS. GEN. LAWS ANN. ch. 258, §§ 10(a)-(j).

¹³ This particular exception applies not only to § 10(j), but it also applies to §§ 10(f), (g), and (h).

¹⁴ MASS. GEN. LAWS ANN. ch. 258, § 10(j).

¹⁵ Section 10(b) provides immunity against “any claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused.” *Id.* § 10(b).

¹⁶ *Shapiro v. City of Worcester*, 982 N.E.2d 516, 524 (Mass. 2013).

¹⁷ *Id.*

¹⁸ *Id.* (citing *Whitney v. Worcester*, 366 N.E.2d 1210, 1216 (Mass. 1977)).

¹⁹ *See id.* at 525.

²⁰ *Id.* at 519.

²¹ *Id.* at 520.

²² *Id.*

²³ *Id.* at 525.

²⁴ MASS. GEN. LAWS ANN. ch. 258, § 10(e) (Westlaw 2018).

²⁵ *See Mello Constr., Inc. v. Div. of Capital Asset Mgmt.*, 999 N.E.2d 1091, 1095 (Mass. App. Ct. 2013) (holding that the Commonwealth was entitled to sovereign immunity for a claim brought after defendant-division denied plaintiff’s application for a license to submit bids for public projects); *Smith v. Registrar of Motor Vehicles*, 845 N.E.2d 389, 391 (Mass. App. Ct. 2006) (finding that § 10(e) applied when the registry of motor vehicles accidentally listed plaintiff’s registration as suspended, resulting in plaintiff’s arrest).

²⁶ No. BACV200700099A, 2011 WL 7788022, at *1 (Mass. Super. Ct. Jan. 7, 2011).

²⁷ *Id.* at *7.

²⁸ MASS. GEN. LAWS ANN. ch. 258, § 10(j).

²⁹ *Id.* It is worth noting that while independent contractors are generally considered third parties under this provision, a government actor’s negligent supervision of independent contractors could result in a court treating the contractor as an employee for the purposes of evaluating sovereign immunity. *See Ku v. Town of Framingham*, 816 N.E.2d 170, 173-74 (Mass. App. Ct. 2004).

³⁰ *Moore v. Town of Billerica*, 989 N.E.2d 540, 543 (Mass. App. Ct. 2013) (applying § 10(j) when a child was struck by a baseball hit beyond netting erected by the defendant-town even though the plaintiff argued that the netting could have been extended to block stray balls).

³¹ 778 N.E.2d 976, 979 (Mass. App. Ct. 2002).

³² *Id.*

³³ *McCarthy v. City of Waltham*, 924 N.E.2d 316, 322 (Mass. App. Ct. 2010) (holding that the defendant-city was immune from suit and the exception under § 10(j)(1) did not apply when city police failed to notify the plaintiff of his son’s release from custody when his son later committed suicide, reasoning that the son’s “suicidal frame of mind” was the cause of his death, not any action or failure to act by the police).

³⁴ *See id.*

³⁵ *Ariel v. Town of Kingston*, 867 N.E.2d 367, 370 (Mass. App. Ct. 2007) (quoting MASS. GEN. LAWS ANN. ch. 258, § 10(j) (Westlaw 2018)). The full language of § 10(j)(1) provides that immunity does not apply for:

any claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances. A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance.

MASS. GEN. LAWS ANN. ch. 258, § 10(j)(1).

³⁶ *Ariel*, 867 N.E.2d at 370 (citing *Lawrence v. Cambridge*, 664 N.E.2d 1, 3 (Mass. 1996)).

³⁷ *Id.* (quoting *Lawrence*, 664 N.E.2d at 3); *see* *Thomas v. Town of Chelmsford*, 267 F.Supp.3d 279, 313 (D. Mass. 2017) (finding that a statement from a school superintendent to a concerned parent, “We have teachers in the hallways that monitor things and he will be fine,” satisfied the requirements for an explicit assurance of safety).

³⁸ MASS. GEN. LAWS ANN. ch. 258, § 10(j)(3). The full language of § 10(j)(3) provides that immunity does not apply for “any claim based on negligent maintenance of public property.” *Id.*

³⁹ *Moore v. Town of Billerica*, 989 N.E.2d 540, 543 (Mass. App. Ct. 2013).

⁴⁰ *Greenwood v. Town of Easton*, 828 N.E.2d 945, 951-52 (Mass. 2005) (finding that the defendant-town was not entitled to immunity when it failed to secure telephone poles used as parking barriers in a high school parking lot and a pole struck and injured plaintiff when a third party hit the pole with a vehicle).

⁴¹ No. 2011-01486, 2014 WL 841628, at *1 (Mass. Super. Ct. Jan. 15, 2014).

⁴² *Id.* at *3.

⁴³ MELISSA R. CHALEK, *TAKINGS LIABILITY AND COASTAL MANAGEMENT IN MASSACHUSETTS* (May 2019) (on file with author).

⁴⁴ *Diloreto v. Town of Winchester*, No. CIV.A.2000-590-C, 2001 WL 1517564, at *3 (Mass. Super. Ct. Oct. 22, 2011).

⁴⁵ *Shapiro v. City of Worcester*, 982 N.E.2d 516, 519 (Mass. 2013).

⁴⁶ *Id.* at 524-25.

⁴⁷ *Diloreto*, 2001 WL 1517564, at *3.

⁴⁸ *Id.*

⁴⁹ *See, e.g., Brennen v. City of Eugene*, 591 P.2d 719, 723 (Or. 1979) (holding that defendant-city could be liable to an injured passenger for issuing a taxi permit when company’s insurance coverage did not meet state requirements).

⁵⁰ *Wilson v. Commonwealth*, 583 N.E.2d 894, 898-99 (Mass. App. Ct. 1992) (finding that denial of applications to build revetments to protect the plaintiff’s waterfront homes was immune from negligence claim because it was a discretionary function and therefore immune under MTCA § 10(b)).

⁵¹ *See generally* MELISSA R. CHALEK, *MAINTENANCE OF WATER AND SEWER INFRASTRUCTURE IN RESPONSE TO SEA LEVEL RISE IN MASSACHUSETTS* (May 2019) (on file with author) (discussing this concept of infrastructure maintenance, specifically in relation to water and sewer infrastructure).

⁵² *Twomey v. Commonwealth*, 825 N.E.2d 989, 993 (Mass. 2005) (citing MASS. GEN. LAWS ANN. ch. 258, § 10(j)(3)).

⁵³ *See Canterbury Automotive, Inc. v. City of Worcester*, No. 2011-01486, 2014 WL 841628, at *3 (Mass. Super. Ct. Jan. 15, 2014).

⁵⁴ *See* MASS. GEN. LAWS ANN. ch. 258, § 10(j)(3); *Shapiro v. City of Worcester*, 982 N.E.2d 516, 525 (Mass. 2013).

⁵⁵ *See* MASS. GEN. LAWS ANN. ch. 258, § 10(b); *Shapiro*, 982 N.E.2d at 524.

⁵⁶ MASS. GEN. LAWS ANN. ch. 258, § 10(j)(1).

⁵⁷ *Id.*; *see Ariel v. Town of Kingston*, 867 N.E.2d 367, 370 (Mass. App. Ct. 2007).

⁵⁸ *Maxwell v. Ratcliffe*, 254 N.E.2d 250, 252 (Mass. 1969) (holding that a broker owes a duty to disclose known basement flooding to a prospective buyer when the buyer explicitly indicated a desire to furnish the basement and asked whether it was dry); *see Harnish v. Children’s Hosp. Medical Center*, 439 N.E.2d 240, 243 (Mass. 1982) (holding that a physician may be liable in negligence for failing to inform a patient of significant medical risks associated with a surgical procedure if the patient would not have consented had she known about the risks).

⁵⁹ *See Estate of Gavin v. Tewksbury State Hosp.*, 9 N.E.3d 299, 306 (Mass. 2014) (quoting *Vasys v. Metropolitan Dist. Com’n*, 438 N.E.2d 836, 840 (1982)).

⁶⁰ *See* MASS. GEN. LAWS ANN. ch. 258, § 10(b). The Massachusetts Superior Court indicated that a government entity may be entitled to immunity under the discretionary function exception when it actively decides not to issue a warning

for public policy reasons, but a mere failure to warn is not itself sufficient for immunity. *Griem v. Town of Walpole*, No. 0400726, 2006 WL 2678488, *2 (Mass. Super. Ct. 2006) (defendant-town was not entitled to immunity under the discretionary function exception when it failed to place signs warning of low head clearance under a set of public bleachers because there was no evidence that the town made an affirmative decision to not place warning signs).

⁶¹ See MASS. GEN. LAWS ANN. ch. 258, § 10(j).

⁶² In most jurisdictions, courts have not held government actors liable for electing not to issue warnings or disseminate flood and other hazard information. JON A. KUSLER, *A COMPARATIVE LOOK AT PUBLIC LIABILITY FOR FLOOD HAZARD MITIGATION* 25-26 (2009). However, the Supreme Court of Washington held that the state could be liable when it received a warning of avalanche danger from an avalanche expert and failed to notify the at-risk residents. *Brown v. MacPherson's, Inc.*, 545 P.2d 13, 17, 18 (Wash. 1975). The court reasoned that, because the state employee had indicated that he would notify the developer of the findings, it accepted a duty to warn because the expert might otherwise have warned the residents directly. *Id.* at 18. Therefore, the circumstances surrounding a decision to withhold flood risk information could expose a government entity to liability.