

6

Exceptions to Immunity

- I. Overview §6.1
- II. Defective Highways
 - A. In General §6.2
 - B. Scope of Exception §6.3
 - C. Definition of *Highway* §6.4
 - D. Duty to Maintain §6.5
 - E. Jurisdiction over Highways §6.6
 - F. Specific Areas of Liability
 - 1. Shoulders §6.7
 - 2. Sidewalks and Crosswalks §6.8
 - 3. Highway Bicycle Paths §6.9
 - 4. Traffic Control Devices and Signs §6.10
 - 5. Street Lighting §6.11
 - 6. Vision Obstructions §6.12
 - 7. Design and Construction §6.13
 - 8. Alleys, Trees, and Utility Poles §6.14
 - 9. Public Parking Lots §6.15
 - 10. Snow and Ice §6.16
 - 11. Bridges §6.17
 - G. Knowledge of Defects §6.18
 - H. Notice of Injury and Defects §6.19
 - I. Procedure and Limitations §6.20
- III. Negligent Operation of Government-Owned Vehicles
 - A. In General §6.21
 - B. Definition of *Motor Vehicle* §6.22
 - C. Agency Ownership of Vehicles §6.23
 - D. Negligent Operation
 - 1. Negligence §6.24
 - 2. Operation §6.25
 - 3. Resulting From §6.26
 - E. Limitations on Personal Injury Claims §6.27
 - F. Police Vehicles §6.28
 - G. Liability and Immunity of Individual Governmental Employees Sued for Automobile Negligence §6.29
- IV. Dangerous or Defective Conditions in Public Buildings
 - A. In General §6.30

- B. Scope of Exception §6.31
- C. What Constitutes a Building
 - 1. In General §6.32
 - 2. Fixtures §6.33
 - 3. Adjacent Areas §6.34
- D. “Under Their Control” §6.35
- E. “Open for Use by Members of the Public”
 - 1. In General §6.36
 - 2. Restricted Access Area in Open Building §6.37
 - 3. Restricted Entry to Building §6.38
 - 4. Locked Building §6.39
 - 5. Privately Leased Premises §6.40
 - 6. Building Closed for Construction or Renovation §6.41
 - 7. Prisons and Jails §6.42
- F. Dangerous or Defective Condition
 - 1. In General §6.43
 - 2. Condition in Building Itself §6.44
 - 3. Safety for Intended Use §6.45
 - 4. Activities Within Buildings
 - a. In General §6.46
 - b. Inadequate Supervision §6.47
 - c. Intervening Misconduct by Third Parties §6.48
 - d. Intervening Misconduct by Plaintiffs: Self-Inflicted Injuries §6.49
 - 5. Failure to Maintain Building/Transitory Conditions §6.50
- G. Proximate Cause Between Alleged Defects and Injuries §6.51
- H. Knowledge of Dangerous Conditions and Reasonable Amount of Time to Repair §6.52
- I. Notice §6.53
- V. Proprietary Functions
 - A. In General §6.54
 - B. Tests §6.55
- VI. Government Hospitals/Medical Care Exception
 - A. 1986 Amendments—Governmental Hospital Exception §6.56
 - B. 2000, 2004, and 2005 Amendments—Medical Care Exception §6.57
- VII. Sewer Overflow or Backup §6.58
- VIII. Other Statutory Exceptions to Immunity §6.59
- IX. Judge-Made Exceptions: Common-Law Tort Claims
 - A. In General §6.60
 - B. Law Applicable to Cases Filed Before April 2, 2002
 - 1. In General §6.61
 - 2. Trespass Nuisance §6.62
 - 3. Public Nuisance §6.63
 - 4. Nuisance Per Se or Nuisance at Law §6.64
 - 5. Attractive Nuisance §6.65
 - 6. Intentional Nuisance and Nuisance in Fact §6.66

7. Intentional Torts §6.67

I. Overview

§6.1 The Governmental Tort Liability Act (GTLA) provides immunity from all tort liability arising from activities where the governmental agency was engaged in the exercise or discharge of a governmental function, “[e]xcept as otherwise provided in *this* act.” MCL 691.1407(1) (emphasis added). The act contains five statutory exceptions to immunity: (1) the failure to maintain and repair highways, (2) the negligent operation of government-owned vehicles, (3) dangerous or defective conditions in public buildings, (4) the performance of proprietary functions, and (5) the ownership or operation of a government hospital. In 2002, the GTLA was amended to provide that, under certain circumstances, a governmental agency may be liable for property damage or physical injury as a result of a sewer system overflow or backup. While immunity conferred on governmental agencies is broad, the exceptions are “narrowly drawn” and are to be narrowly construed. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618, 363 NW2d 641 (1984); see also the consolidated cases of *Nawrocki v Macomb County Rd Comm’n* and *Evens v Shiawassee County Rd Comm’rs*, 463 Mich 143, 615 NW2d 702 (2000) (highway defect); *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 664 NW2d 165 (2003) (public building defect); *Vargo v Sauer*, 457 Mich 49, 576 NW2d 656 (1998) (operation of public hospital); *Coleman v Kootsillas*, 456 Mich 615, 575 NW2d 527 (1998) (proprietary function); *Stanton v City of Battle Creek*, 466 Mich 611, 647 NW2d 508 (2002) (negligent operation of publicly owned motor vehicle). Terms in the statute should be construed according to their plain meaning whenever possible, consistent with traditional rules of statutory construction, to give effect to the intent of the legislature. *Scheurman v Department of Transp*, 434 Mich 619, 628, 456 NW2d 66 (1990).

The common-law exception to governmental immunity for trespass-nuisance was abrogated, prospectively, for cases brought on or after April 2, 2002. *Pohutski v City of Allen Park*, 465 Mich 675, 641 NW2d 219 (2002).

II. Defective Highways

A. In General

§6.2 MCL 691.1402(1) requires each governmental agency having jurisdiction over any highway to “maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.” It further provides that “[a]ny person sustaining bodily injury or damage to his or her property by reason of failure of any governmental agency to keep any highway ... in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered ... from the governmental agency.” Note that liability under this section is imposed on governmental agencies, not on individuals. As explained below, liability is not identical for all governmental agencies because the duty of county road commissions and the state department of transportation are not as broad as the duty of local governmental units with jurisdiction over roads and streets.

Highway is a statutory term of art and is defined in the GTLA as “a public highway, road, or street that is open for public travel.” MCL 691.1401(c). It includes bridges, sidewalks, crosswalks, and culverts on any highway, and excludes trees, utility poles, and alleys. *Id.*

Of the statutory exceptions to immunity, the highway exception has arguably been the most unsettled over the last decade. There were shifting majorities and pluralities on the supreme court as differing interpretations of the statute competed for ascendancy. Repeated use of special panels in the court of appeals has also been necessary to resolve conflicts between separate panels. However, in the consolidated cases of *Nawrocki v Macomb County Rd Comm’n* and *Evens v Shiawassee County Rd Comm’rs*, 463 Mich 143, 615 NW2d 702 (2000), the supreme court “return[ed] to a narrow construction of the highway exception” and brought to an apparent end the wide conceptual divergence about the highway exception that characterized earlier decisions.

B. Scope of Exception

§6.3 Just as the immunity conferred on governmental agencies is “a broad grant of immunity,” it is subject only to “narrowly drawn statutory exceptions.” *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 618, 363 NW2d 641 (1984). This language has been cited with approval in literally scores of decisions since *Ross*, including several cases interpreting the scope of the highway exception. Although caselaw before *Ross* adhered to the rule that immunity was narrow and the highway exception was to be liberally construed, *Endykiewicz v State Highway Comm’n*, 414 Mich 377, 324 NW2d 755 (1982), the analysis in such decisions is flawed, even when the same result might be reached under post-*Ross* analysis. Since *Scheurman v Department of Transp*, 434 Mich 619, 456 NW2d 66 (1990), the supreme court has emphasized that the scope of the highway exception is narrow when properly interpreted in a manner consistent with the intent of the legislature. The *Scheurman* court observed in a footnote, “[The] rule [of strict construction] has been most emphatically stated and regularly applied in cases where it is asserted that a statute makes the government amenable to suit.” 434 Mich at 628 n17 (quoting 3 *Sands, Sutherland Statutory Construction* §62.01, at 113 (4th ed 1991).

The *Scheurman* court noted that, by its terms, the duty of the state and the counties under MCL 691.1402 “shall extend only to the improved portion of the highway designed for vehicular travel.” 434 Mich at 630.

The purpose of the highway exception is not to place upon the state or the counties an unrealistic duty to ensure that travel upon the highways will always be safe. Looking to the language of the statute, we discern that the true intent of the Legislature is to impose a duty to keep the physical portion of the traveled roadbed in reasonable repair.

Id. 631.

Because the highway exception is a narrowly drawn waiver of the broad grant of immunity otherwise available to governmental units, the *Scheurman* court emphasized that “there must be strict compliance with the conditions and restric-