

5.20A DANGEROUS CONDITION OF PUBLIC PROPERTY
(Approved 2/96)

The plaintiff charges that

[here describe condition]

is a dangerous condition of public property and that the dangerous condition was a proximate cause of his/her injuries. A public entity is responsible for injuries proximately caused by a dangerous condition of its property only in accordance with the terms of the Tort Claims Act¹. In order for plaintiff to recover against the public entity, he or she must prove each of the following 5 elements.² Failure to prove any one element will defeat his/her claim.

1. That the property was in a dangerous condition at the time of the injury.
2. That the injury was proximately caused by the dangerous condition.
3. That the dangerous condition created a foreseeable risk of the kind of injury which was incurred.
4. **[Use applicable alternative:]**
 - a. That the public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to protect against the dangerous condition. **[or]**

¹ *N.J.S.A. 59:1-1 et seq.*: 59:4-2.

² *Saldana v. DiMedio*, 275 *N.J. Super.* 488, 502 (App. Div. 1994). *N.J.S.A. 59:4-2*. Note, that the burden of proof on all elements, including palpably unreasonable conduct, is on the plaintiff. *See, Thompson v. Newark Housing Authority*, 108 *N.J.* 525 (1987).

- b. That an employee of the public entity (name) acting within the scope of his/her employment either created the dangerous condition or, by his/her inaction, allowed the dangerous condition to be created.
- 5. That any measures taken by the public entity, or its failure to take any measures, were palpably unreasonable.

The plaintiff must prove each of these elements to establish a claim against the defendant. Failure to prove any one element will defeat his/her claim.

I will review each element with you.

1. First Element

The first element is that at the time of the injury, the dangerous condition existed on public property (identify condition).

Plaintiff contends that (describe dangerous condition alleged by plaintiff).

In a claim against a public entity, dangerous condition means a condition of property that creates a substantial risk of injury when the property is used with due care and in a manner in which it is foreseeable that it will be used.³ The risk of the injury must be substantial and not minor, trivial or insignificant.⁴

You must determine whether one utilizing the property in a manner in which it was reasonably foreseeable and with due care would face a substantial

³*Robinson v. City of Jersey City*, 284 N.J. Super. 596 (App. Div. 1995).

⁴*Polyard v. Terry*, 160 N.J. Super. 497 (App. Div. 1978).

risk of injury.⁵ By due care, I mean, the exercise of reasonable care for one's own safety and in a manner that the public entity ought to have reasonably foreseen or expected from people who would use the property.⁶

2. Second Element

The second element is that the dangerous condition proximately caused the injury.

By that, I mean that the dangerous condition (identify) must be an efficient cause of the injury, that it necessarily set the other causes in motion and naturally and probably led to the injury in question.

3. Third Element

The third element is that the dangerous condition created a foreseeable risk of the kind of injury that plaintiff suffered. The plaintiff need not prove that it was foreseeable that the very injury he/she experienced would occur — that is, he/she need not prove that someone would have suffered an injury exactly at the

⁵The foreseeability of the risk of injury by itself is not enough to create a dangerous condition; it must also be accompanied by a defect in the property. *Levin v. County of Salem*, 133 N.J. 35 (1993). The foreseeability of harm need not emanate directly from the condition itself, but may be in combination with the foreseeable acts of third parties. *Id.* at 49-50. *Speaks v. Jersey City Housing Auth.*, 193 N.J. Super. 405 (App. Div. 1984) (missing window in concert with foreseeable acts of third parties throwing objects from the window to common courtyard below).

⁶*Robinson v. City of Jersey City*, 284 N.J. Super. 596 (App. Div. 1995); *Bradford v. Kupper Associates*, 283 N.J. Super. 556 (App. Div. 1995).

time and in the manner he/she experienced it, but he/she must prove that a kind of injury of the same class, order or type he/she experienced was foreseeable.⁷

4. Fourth Element (Choose element a, b or c)⁸

You must also find that the public entity either had actual or constructive notice of the dangerous condition and that it had notice in sufficient time prior to the injury to have corrected the condition.

- a. The public entity is considered to have actual notice of the dangerous condition if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character. Thus if you find that an employee of the public entity actually saw the condition and should have reasonably discovered its dangerous character, then the public entity had actual notice of the dangerous condition.
- b. The public entity is considered to have constructive notice if the condition existed for such a long period of time and was of so obvious a nature that the public entity, exercising due care, should have discovered the dangerous condition and its dangerous character. In addition, if you find that due to the length of time the dangerous condition was there and the obviousness of the condition, an employee performing his/her job with reasonable care should have discovered the dangerous condition and its dangerous character, then the public entity is assumed to have had constructive notice of the condition.

⁷*Bradford v. Kupper Associates*, 283 N.J. Super. 556 (App. Div. 1995).

⁸This paragraph contains a number of alternative possibilities. To avoid jury confusion, it is desirable to omit mention of those that do not apply. For instance, it may be clear, in a given case, that the condition of the property was (or was not) created by a public employee. If so, part (a) of the paragraph should be charged alone (or omitted).

- c. The public entity shall also be deemed to have actual knowledge of the condition if an employee of the public entity acting within the scope of his/her employment created the dangerous condition through a negligent or wrongful act or failure to act.

5. Fifth Element

The fifth element is that any measures taken by the public entity, or its failure to take any measures, to address the dangerous condition were palpably unreasonable.

That is, the plaintiff must prove that the action taken by the public entity, or the lack of action, to respond to the dangerous condition by either correcting, repairing, remedying, safeguarding or warning was palpably unreasonable. Mere carelessness or thoughtlessness or forgetfulness or inefficiency is not enough. The action of the public entity must be more than that. To be palpably unreasonable, the action or inaction must be plainly and obviously without reason or a reasonable basis. It must be capricious, arbitrary or outrageous.⁹

NOTE TO JUDGE

If the issue of the allocation of public resources is raised legitimately in the case, it will arise with regard to the palpably unreasonable issue and should be addressed in that context. You may wish to consider the following language.

⁹*Williams v. Town of Phillipsburg*, 171 N.J.Super. 278 (App. Div. 1979); approved in *Bradford*, *supra* at 578.

A public entity like the defendant must constantly exercise its judgment whether to seek or to provide the resources necessary to hire personnel, buy or repair equipment, build or maintain facilities, and, in general, decide where, when and how to provide adequate governmental services. In exercising its judgment and making those choices, a public entity is frequently faced with competing demands, not all of which can be satisfied at once or perhaps at all. A public entity does not have the duty to do everything that might be done.

If, in this case, the action the defendant took or failed to take was an exercise of choice among competing demands for allocation of equipment, facilities, personnel or material, then, in order to find for plaintiff you must be satisfied that the public entity's choice was palpably unreasonable, that is, plainly and obviously without reason or reasonable basis, capricious, arbitrary and outrageous. The issues raised by the problem of governmental resource allocation do not exist in every case. The assertion that the public entity chose among alternatives to allocate scarce resources is one that the public entity must make. The burden to persuade the jury that the choice was palpably unreasonable is clearly on the plaintiff.

SUMMARY

To summarize, for (name of plaintiff) to prove his/her claim against the (name of public entity), he/she must prove each of the following elements:

1. That the presence of the (identify condition and property alleged to be dangerous) constituted a dangerous condition.
2. That the dangerous condition proximately caused the injury.
3. That the dangerous condition created a foreseeable risk of the kind of injury that was incurred.
4. **[Choose appropriate alternative:]**
 - a. That the public entity had actual or constructive notice of the dangerous condition in enough time to have corrected it before the accident. **[or]**
 - b. That an employee of the (name public entity) acting within the scope of his/her employment created the dangerous condition.
5. That the measures taken by the public entity, or the failure to take any measures, in response to the dangerous condition were palpably unreasonable.