

Drainage Law and Drainage Situations and Problems in New York State



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Introduction

In any review of Drainage Law and drainage situations and problems in the State of New York for surface water drainage and watercourses, it is important to distinguish between “surface water drainage” and “natural watercourse drainage” because the legal consequences of the alteration of either of these types of drainage may have a different result. For example, although the drainage activities may be very similar in the construction of a highway, alteration of a drainage ditch, blockage of the flow of the water, increasing the water flow, alteration of the area where the water flows or other similar situations, the legal result and consequences can be very different for each of these types of drainage situations. It is also very important to be aware that the facts can be only slightly different from one situation to another and a different liability or no liability may result.



A “watercourse” is a defined channel along which water flows perennially or periodically with an easily and readily discernible bed and banks that are distinct from the unconsolidated soil that is on either side of the watercourse. A “natural watercourse” is a natural stream flowing in a particular direction, in a defined bed or channel, with banks and sides, having permanent sources of supply. The flow is ordinarily continuous, but it is not essential to constitute a natural watercourse that the flow be uniform or uninterrupted at all times. The other elements existing for a natural watercourse are that the stream does not lose the character of a natural watercourse, because in times of drought, the flow may be diminished or temporarily suspended. It is

sufficient if it is usually a stream of running water. See, Barkley v. Wilcox, 86 NY 140 (1881)¹ and Kennedy v. Moog Servocontrols, Inc., 26 AD2d 768 (4th Dept. 1966),² both of which cases define a natural watercourse. Thus, a natural watercourse is usually a steady flow of water, but legally need not always be continuous to retain its essential character. For example, a natural stream, the flow of which was interrupted during a few months in an exceptionally dry season, continues to be a natural watercourse. Also see, Spink v. Corning, 61 AD 84 (4th Dept. 1901),³ a case which was a natural watercourse situation and the case further defines what is a natural watercourse.

“Surface waters” consist of the accumulation of natural precipitation on the land, and “surface water drainage” is its passage thereof over the land until it either evaporates, is absorbed by the land, or runs into a natural watercourse or water body (See, Drogen Wholesale Elec. Supply v. State of New York, 27 AD2d 763, 763 - 764 (3rd Dept. 1967).⁴ Surface water has been defined as that which is derived from falling rain or melting ice or snow, or which rises to the surface in springs, and is diffused over the surface of the ground while it remains in such diffused state or condition. There is some limited authority for the proposition that flood waters leaving a stream, spreading and settling over the surface of the land, severed from the main current, never to return, become surface waters. However, in such a situation it must be proven that the flood waters were actually surface waters in connection with the flood. Thus, the correct rule is that flood waters that leave a stream and spread and settle over the surface of the land severed from the main current may never return, but such waters are not surface waters. Also, such waters that leave the main channel course and return again and unite with the waters from which they were separated are not surface waters (See, Mendelson v. State of New York, 218 AD 210 (4th Dept. 1926), *aff'd* 245 NY 634 (1927)).⁵



A gully or ravine through which surface water may occasionally flow does not thereby become a natural watercourse. A good way to make a distinction is that a natural watercourse is some variety of aquatic facility which exists or flows independently of any surface water that may flow into it at any given point. So, if the water in a gully or ravine, etc., is derived wholly from surface water drainage (e.g., it only runs following a rain and/or during spring thaws), then in all likelihood it will not be a natural watercourse. In a particular fact setting, a Court may choose to call surface waters what otherwise might be drainage running in a natural watercourse. This is rare, but occasionally it is necessary to make something of an arbitrary decision when dealing with an intermittent stream (which may run, for instance, only in the spring following a thaw) or the alteration of drainage patterns following the relocation of a stream bed. An essential feature in the finding of a natural watercourse will be the existence of regularity or continuity, or

a substantial degree of predictability. The changing contours of land by natural means through erosion, natural disasters, and unforeseen consequences of artificial constructions can cause natural drainage to become a watercourse if a regular flow should eventually develop. Drainage ditches of artificial origin, dug for the purpose of draining low, wet, swampy land, may by the passage of time, become natural watercourses as fully as though they were not artificial in origin (see, Lumley v. Town of Hamburg, 181 AD 441 (4th Dept. 1918).⁶ The Lumley holding, however, has been limited to situations when the continuity of flow in such ditches is almost constant and not just serving from rain or thaw situation. For example, in McGetrick v. Shoecraft, 198 AD 278 (4th Dept. 1921)⁷ the Court found that a property owner of lands may lawfully, when acting in good faith and for the purpose of cultivating his lands, fill them in even though by so doing he prevents the passage of surface water thereon to the injury of an upland owner. The mere fact that surface waters have, for long periods of time, drained from uplands across lower lands in substantially the same courses does not, in itself, establish a watercourse nor a prescriptive right (see, Town of Hamburg v. Gervasi, 269 AD 393 (4th Dept. 1945)⁸ which establishes the definition of banks, beds, streams, or channels in its review of prescriptive right drainage situations).

History of Drainage Law

The current law of surface water drainage has been derived from two distinct lines of legal thought. The first of these is the old English common law rule, often called the “common-enemy rule.” This principle held that upland and lower riparian owners had no duty in regards to each other with respect to treatment of natural surface water drainage. Generally, each landowner was entitled under this rule to take whatever steps he pleased on his own property to dispose of surface water, without risk of liability for any adverse consequences which result to his neighbor. The alternative theory of surface water rights derived from Continental practice, has been designated the “civil law rule,” and created the relation of dominant and servient estate between upland and lower riparian lands. Upland owners, possessing the dominant estate, were entitled to have the normal course of drainage prevail, with the lower land owners bound to accept and dispose of the water which naturally comes to his land from above. The upland owner, however, could not artificially change or increase the normal drainage.

In practice, the second, or “civil law rule,” was obviously more restrictive of the rights of the parties. On the other hand, the common law rule did not give rise to orderly planning and coordination between riparian owners in the same area. Each was entitled to work his lands and provide for drainage (or fail to provide) without respect to damage to others, and was under no duty to cooperate with anyone else to promote the common good. The American Courts at an early point recognized the deficiencies inherent in each theory, and issued decisions that created important modifications and exceptions to both. In a developing country, the practical needs of clearing land, irrigation and cultivation, and the harnessing of water power for the operation of mills made strict application of either rule of little use to the interests of a burgeoning economy. The “common-enemy rule” was generally modified so that a lower landowner was not normally entitled to cast back surface waters by damming a natural watercourse, and an upland owner was not entitled to artificially collect surface waters and discharge them in a mass upon the land below to its damage (e.g., by piping or draining into ditches so that surface waters released on lower land caused erosion or flooding). This second exception to the “common-enemy rule” represents something of a merger between the two basic theories, and the prohibition of the artificial collection and discharge of surface waters now forms the basis of the modern law of the upland riparian owner’s duty to not unreasonably interfere with lower land owner’s riparian rights.

With regard to the “civil law rule,” an exception was also established whereby the rule would not be applied so as to preclude normal cultivation of the upland, and surface water could be directed or collected to some degree in the natural course of drainage even though it might have some detrimental effect on the land below. Even though the “civil law” rule is not effective in New York, this exception to it was an important forerunner of the modern concept of “reasonable use,” which does not prohibit artificial collection altogether but rather allows some artificial drainage consistent with reasonable development and/or use of the upland property.

The conflict between the two prior rules is obvious. The common law rule had its desirability in permitting the free improvement of property, and therefore would be good law in unsettled and unimproved areas. It failed, however, to promote riparian harmony, by discouraging

cooperation between adjacent owners. The civil law rule provided for an easier determination of the rights of the parties, but the very nature of this predictable relationship inhibited the free development of property.

As the nation developed, a third American view emerged combining some of the features of both older theories and attempting to regularize relations between adjacent riparian owners without inhibiting the improvement of property necessary for economic growth. The new rule respecting surface water drainage rights is based on a theory of reasonable use of property, and is not surprisingly identified as the “reasonable use” rule. This “reasonable use” rule would seem to be closer in form to the common law rule than the civil rule, and might be essentially viewed as a limitation of the common law rule as opposed to an exception to it. The law of New York now seems to be basically the old common law rule, modified by the rule of reasonable use. Similar to a legal theory of nuisance, this rule holds that if, considering all of the facts and circumstances, a man can be found to have made only reasonable use of his land within the proscription of certain absolute limits (e.g., building artificial drains or ditches that discharge water in a mass), damage resultant from increased or altered surface water drainage brought on thereby is not actionable.

Application of the New York Rule

The leading case in New York dealing with the application of the reasonable use rule is Kossoff v. Rathgeb-Walsh, Inc., 3 NY2d 583 (1958).⁹ The plaintiff developed his land while the defendant's upland was still in its natural state, with the surface water percolating into the ground. Some time later, in connection with the establishment of a gasoline station, the defendant blacktopped his upland without providing for any sort of drainage system. The Court decided that there was no liability for damage caused by water seeping into plaintiff's building because defendant had the right to develop his property "in good faith to fit the property to some rational use to which it is adapted."¹⁰ The Court reaffirmed New York's version of the modified common law rule by applying a rule of "reasonable use." This rule pinpoints more clearly the basis of the Court's rationale than did previous cases, but more importantly, the Court emphasized in the case that the defendant did not construct a drainage system which collected or channeled the waters and cast them in a body onto plaintiff's land. The Courts have stated "A landowner in this State will not be liable for damages to abutting property for the flow of surface water resulting from improvements to his land 'provided . . . that the improvements are made in good faith to fit the property to some rational use to which it is adapted, and that the water is not drained into the other property by means of pipes or ditches'" Cottrell v. Hermon, 170 AD2d 910, 911 (3rd Dept. 1991),¹¹ *lv. denied*, 78 NY2d 853, (1992) quoting from Kossoff v. Rathgeb-Walsh. In other words, reasonable blacktopping, paving, grading, improvements, or construction done in good faith that disturbs the natural flow of surface water drainage to the damage of a lower owner is not actionable unless the drainage is artificially caused to collect in a mass, as in a pipe, ditch or drain. That was the key factor in reaching a decision for defendant and clearly describes the limits within which an upland owner may operate without liability for the casting of surface water on adjacent land: first, defendant must be operating in good faith; second, he must be putting or adapting his lands to a "reasonable use;" and third, he may not artificially collect or channel his surface waters so that they enter in a mass upon his neighbor's land to that land's damage. It is interesting, however, to review the case of Doundoulakis v. Town of Hempstead, 51 AD2d 302 (2nd Dept. 1976), *rev'd*, 42 NY2d 440 (1977)¹² where the Appellate Division found the Town liable on a strict liability theory of law for a dangerous water situation resulting when the Town was filling in a swamp operation. The Court of Appeals later reversed this finding.

This rule applies with equal force to both upland and lower land owners. Contra to the civil law rule, in New York an adjacent owner of land is not required to take care of the surface water coming onto his property from the lands of another (see, Bull v. State of New York, 231 AD 313 (4th Dept. 1931)¹³ and Scamp v. State of New York, 189 Misc 802 (Ct. of Claims 1947).¹⁴ A lower land owner may, in good faith, and for the purpose of building and improving his land, fill or grade it, although surface water is cast back upon the land above, even if such improvement and filling results in reversing the flow of the surface water so that it is not only prevented from coming upon the improved land, but the surface water formerly accumulating upon the improved land is cast upon the land of another (see e.g., Holmes v. State of New York, 32 Misc.2d 1077 (Ct. of Claims 1962);¹⁵ Bennett v. Cupina, 253 NY 436 (1930);¹⁶ and Barkley v. Wilcox, 86 NY 140 (1881).¹⁷ A

A. Make sure that you read the section of this paper on PRESCRIPTIVE RIGHTS (pages 21-22) since it will affect the respective owners' rights and obligations.

Drainage Law and Drainage Situations and Problems in New York State

In Carrabis v. Brooklyn Ash Removal Co., Inc., 249 AD 746 (2nd Dept. 1936),¹⁸ it was held that even though defendant's filling-in operation results in the grade of his land become higher than that of the plaintiff's, if the filling-in operation does not result in the erection of a defined watercourse or an alteration of an existing one, no liability is created even though surface waters are caused to flow on the land of another. Similarly, a railroad company has the right to improve and grade the railroad bed even though its affect is to block off the flow of surface water from the land of another (also see, Manley v. New York Cent. R.R. Co., 227 AD 206 4th Dept. 1929).¹⁹



Even though a lower owner may ordinarily prevent the running off of surface water, in the event these waters should be carried off by a natural outlet (such as a stream or open ditch which is a natural water course) the lower owner may not dam the channel or direct the water back onto upland property to the owner's injury. The upland owner possesses a riparian right in the natural watercourse to have the waterway pass through his lands without hindrance notwithstanding the

legal principle that damage caused by surface water overflow is otherwise not actionable (see, Buffalo Sewer Authority v. Cheektowaga, 20 NY2d 47 (1967)).²⁰ However, in that case the Town artificially concentrated and discharged waters in quantities beyond the natural capacity of the ditch which did not have the attributes of a natural watercourse and which would have drained elsewhere if left alone so there was liability.

It should be noted that Title 5 of Article 15 of the Environmental Conservation Law (McKinney's Consolidated Laws of New York), restricts work on streams that involve disturbance, damming, or alteration of a watercourse.

An upland owner whose property naturally drains into a lower tract need not ordinarily arrest the natural flow of rainwater or melted snow or deflect it from the lower tract (see, Kazansky v. Bergman, 17 Misc.2d 1015 (Supreme Ct., Sullivan Co. 1959)).²¹

An upland owner is entitled to reasonable artificial drainage which does not increase the flow of surface water upon the lower land owner, and an adjoining upland owner will not be enjoined from maintaining a culvert which passes water through it and does not increase the upland flowage onto the adjoining lower land. (See, Nolan v. Carr, 19 Misc.2d 167 (Supreme Ct., Cayuga Co. 1959)).²² This case stands on its particular proven facts as the plaintiff did not plead or present evidence of erosion and the Court found that the watershed area was not increased. Since a Town road was involved, the case can be examined to see if the facts in the case help municipalities with similar claims.

Water may not be artificially collected by the upland owner and dumped, as surface water, upon the lower land. However, see Tench v. Highfield Estates, 2 AD2d 991 (2nd Dept. 1956)²³ where plaintiff failed to allege that the water was collected or directed by means of ditches, drains, or channels. Therefore, compare the cases of Bennett v. Cupina, 253 NY 436 (1930) at Endnote 16 and Barkley v. Wilcox, 86 NY 140 (1881) at Endnote 1 in which you find different results when water was collected (www.westlaw.com). However, an upland owner will not be held liable for the flow of such water on plaintiff's property which would have accumulated thereon even if there had been no development and construction and maintenance of a catch basin system (see e.g., Board of Educ., Union Free School Dist. No. 6 of Town of N. Hempstead v. Town of N. Hempstead, 261 AD 1102 (2nd Dept. 1941)).²⁴ Therefore, one may not, by artificial means such as the installation of catch basins and culverts, cause the quantity and/or velocity of the flow of surface water to be considerably and substantially increased, causing damage to the lower lands (see, Grossman v. Jenad, Inc., 198 NYS2d 218 (Supreme Ct., Westchester Co. 1960)).²⁵ The mere fact that drainage work was performed with the approval of a municipality and, perhaps, even to the satisfaction of its engineering department, does not in itself render a defendant immune from liability. (See e.g., the Grossman v. Jenad, Inc. case)²⁶.

Many cases cite the Kossoff reasonable use rule with approval, and have helped to expand and define its application, especially in relation to the rights of the State and/or its municipalities in the construction of roads and highways. (See e.g., Nolan v. Carr, 19 Misc.2d 167 (Supreme Ct., Cayuga Co. 1959))²⁷ which adopts the language of Kossoff: "Under the common law adopted in this state, either proprietor can improve his land, according to his own desire [and] in any manner to which the land is suited, without being liable to the abutting owner for change in the flowage of the surface water provided that he does not resort to drains, pipes or ditches."²⁸ In Nolan,

defendant town maintained a roadway and installed ditches and a culvert that released water on plaintiff's land. Beginning with the rule in Kossoff as the basic principle, the Court goes on to apply this principle to the situation:

“Collection of surface water by a municipality into a single channel in an increased volume so as to cause damage to an adjacent owner has been held actionable (see e.g., Noonan v. City of Albany, 79 NY 470 (1880);²⁹ Mennito v. Town of Wayland, 56 NYS2d 654 (Supreme Ct, Steuban Co. 1943);³⁰ Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946);³¹ and Kerhonkson Lodge v. State of New York, 4 AD2d 575 (3rd Dept. 1957).³² The rule is accurately stated in Farnham on the Law of Water and Water Rights, (Vol. 2, §185, p. 966) as follows: “Even courts which hold that the municipality is not liable for changing the flow of surface water so as to cast it onto adjoining property by changing the grade of its streets hold the municipality liable where, by the street improvements, water is collected in one place, and then discharged in a body onto adjoining land. If, for any reason, the water is gathered in a body, it must be taken care of and conducted safely to an outlet in such a way as to do no injury to private property.” Further, at page 965 the following is found: “A municipal corporation cannot collect surface water and discharge it in a mass onto the land of a private owner.” These legal principles are clearly set forth in the Kerhonkson Lodge case where the Court found: “We are constrained to disagree with the trial court’s view as to the effect of good engineering practice. The issue is whether the State so changed, channeled or increased the flow of surface water onto claimant’s land by artificial means so as to cause damage to its property. If it did so, the State cannot escape liability on the theory that the changes were made in conformity with good engineering practice. In that respect the State had no greater rights than an individual under the same circumstances.”³³ However, it is not the mere discharge in a body at a single point which creates liability. The plaintiff must prove that the construction of the roads and ditches so increased the flow of surface water as to result in damage (see, Kerhonkson Lodge³⁴ and Rockwell v. State of New York, 15 Misc.2d 1078 (Ct. of Claims 1959).³⁵ However, a distinction was made in the Connecticut case of Melin v. Richman, 96 Conn. 686 (1921),³⁶ wherein the court said: “The purport of this instruction is, that when a landowner artificially collects water upon his own land, in order to avoid liability he must cause it to be so diffused that it will pass from his land upon that of his neighbor as it would have originally done if not so collected. This statement of law is not accurate in detail, because the diffusion required of artificially collected surface water need only be to such an extent as to prevent this water passing in an increased volume upon the neighbor’s land to his substantial injury.” “In this case, the court fails to find that the continued maintenance of the ditches and sluice will cause any increase in the total amount of surface water that would otherwise flow upon plaintiff’s property.” The Court determined that perhaps there had been a technical violation of a legal right belonging to plaintiff, but in the exercise of its equity jurisdiction, held that closing the road as plaintiff requested would be a greater injury to the public good than the water damage suffered by plaintiff. Thus, this type of ruling is consistent with New York law.

In Holmes v. State of New York, 32 Misc 2d 1077 (1962),³⁷ the State of New York was sued in damages for harm caused by the construction of a bridge and resultant flooding. The Court found that the State had provided inadequate drainage facilities on a new bridge approach by elimination of two former sewer inlets and altering a grade so as to pitch water toward plaintiff's property. Citing the rule in Kossoff, the Court found that the State went beyond what it might do as a lower property owner without incurring liability from the effect of the surface water. The combination of building a dam in the form of a bridge approach across a new street and eliminating two inlets, with no substitution for the drainage affects represented by those inlets, amounted to an artificial gathering of surface water and throwing it upon property in which the claimant had an interest, in derogation of his rights.

In Amitrano v. City of New York, 15 AD2d 478 (1st Dept. 1961)³⁸ plaintiff, who rented a store and stored merchandise in the basement, claimed that mud seeped through a hole in the wall. Another defendant was a contractor who was paving the street outside, and who was charged with proximate cause of the injury to plaintiff. Defendant was not shown to have done anything that directed the flow of water toward the property occupied by plaintiffs, or to have failed to do anything that good or usual practice dictated that should have been done to avoid such a contingency. The making of an improvement which in effect directed the flow of surface water is not in itself actionable; see Kossoff.³⁹ The same is true when the construction is done by the State or a municipality in the course of an improvement.

In Attoram Realty Corp. v. Town & Country Bldrs., 14 Misc.2d 81 (Supreme Ct., Westchester Co. 1958),⁴⁰ *rev'd*, Attoram Realty Corp. v. Town & Country Bldrs., 8 AD2d 936 (2nd Dept. 1959)⁴¹, the Court found that defendant builders, who had constructed a housing development and a drainage system employing 18 and 21 inch culverts, had not met the standard of care that the Kossoff rule required. Plaintiff was awarded an injunction, but defendant was allowed several months to improve and rebuild his drainage facilities before the injunction was to take effect. Defendant's development increased the surface water runoff rate by about 30% and collected waters in the drains. Plaintiff was damaged by the runoff on his property, and under the Kossoff rule, was awarded relief that was reversed in the Appellate Division (also see, Osgood v. Bucking-Reddy, 202 AD2d 920 (3rd Dept. 1994)⁴² particularly the dissent on the burden of proof on drainage damage.). The Appellate Division in the Attoram case followed the usual Kossoff rule because the actual evidence in the case failed to prove that the drains were the sole or major cause of the creation of the gullies and that they had been there before the drains were put in.

Kazansky v. Bergman, 17 Misc.2d 1015 (Supreme Ct., Sullivan Co. 1959)⁴³ follows Kossoff. The Court felt that therefore the law is settled and the single issue arose as to whether there was a casual relationship between the wet marshy condition of the plaintiff's land and the outlet pipes of defendant's dam. Plaintiffs did not prove a relationship, and the Court decided that the evidence indicated that defendant neither created a defined watercourse nor altered an existing one. Thus, the rule in Kossoff determined the result. Plaintiff had no riparian right which defendant invaded.

In Keller v. State of New York, 19 Misc 2d 794 (1959),⁴⁴ the Kossoff rule was held not applicable to the facts therein. The State had claimed that it had made a reasonable use of its property in constructing a parkway, and in particular an elevated section of highway that resulted in water

damage to many adjacent owners. The following excerpts from the case may be significant in actions in the future:

“The damage to the lands of the claimants was the proximate result of the indifferent and inadequate manner in which the State erected the culvert . . . It is true . . . that damages resulting from a public improvement, effected under legislative authority, are not recoverable in the absence of trespass or negligence . . . [H]owever, . . . the claimants have proven the State’s negligence herein and are entitled to damages.”⁴⁵ “. . . First of all, the State may not perform any act unless it has a basis in a law passed by the Legislature. When the State, pursuant to such legislated act, acquires land it has the duty as well as the right to use such land reasonably and within the concept of the law permitting such acquisition. It has the right to use such land without causing any unreasonable injury to adjoining lands. It may not construct a dam under the guise of a necessarily elevated highway and be unconcerned as to what may consequentially happen to one, two or ten nearby owners. Normally, such consequential damages occur to the land adjoining the taking, but there may be instances, as here, where the chain of causation extends to other land not contiguous to the direct taking. This may well be compared to the erection of an impounding dam.”⁴⁶

The Court ruled that the Kossoff case defined the rights and duties devolving upon two parties who are adjacent owners, and that the Kossoff rule was inapplicable to a case such as this where there is damage to multiple owners. “The court cannot consider the State in the light only of a lower landowner. The State here artificially created a 14-foot embankment which, because it had of necessity to run north and south, cut athwart the natural drainage of many lands. In addition, its own westerly parkway embankment drained into Keller’s land to which was added the piped surface drainage collected on the surface of the parkway...”

“Because of these factors, the State acknowledged by its own acts that the rule of the Kossoff case, etc., was not applicable in this situation. The State saw its own responsibility in the above-mentioned letter when it proceeded to install the culvert. Up to this point, the State acted commendably. Having seen fit to install the culvert, it was obliged to construct it in such manner that the culvert would serve its purpose. However, when the State now tries to escape its responsibility for the negligent, ineffective erection of the culvert, by claiming its protection in the doctrine affecting adjoining property owners as enunciated in the cases quoted above, it is calling upon the Court to overlook the State’s primary obligation of setting an example of fair play to its very taxpayers and citizens.”⁴⁷ An interesting aspect of the Keller case was the claim by the State that it had acquired the drainage rights by a *de facto* taking.

In *Burk v. High Point Homes*, 22 Misc.2d 492 (Supreme Ct., Nassau Co. 1960),⁴⁸ defendant conducted filling and grading operations and constructed new homes on land adjoining plaintiff’s property. Tons of highly piled loose dirt and sand were pushed onto plaintiff’s land by defendant’s machinery and by surface water runoff carrying dirt, silt, and sand. Such use of land was found to be unreasonable, and defendant was not protected by the Kossoff rule. The defendant’s lack of reasonable care of his own property, with resultant and foreseeable damage to plaintiff’s lands, established negligence, and defendant was liable in damages.

Drive-In Realty Corp. v. Lewis, 28 Misc.2d 237 (Supreme Ct., Westchester Co. 1961),⁴⁹ follows Kossoff expressly in denying plaintiff relief following defendant's paving and grading on his own property with resulting damage to plaintiff. The Court also points out that under the Kossoff rule "the defendants were entitled to grade and pave their land, and if silt was collected from raw soil exposed as a consequence of the improvement and spread through the diffusion of surface water, that in itself would not lay the foundation for liability."⁵⁰

In Gazin v. Gladwin, 31 Misc.2d 640 (County Ct., Oneida Co. 1961),⁵¹ the Court cites Goodale v. Tuttle, 29 NY 459 (1864)⁵² where Judge Denio in 1864 stated: "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. "Such a doctrine would militate against the well-settled doctrine that the owner of land has full domain over the whole space above and below the surface." Following this recital, Kossoff is cited as constituting the modern version of Judge Denio's principle. In Gazin, plaintiffs could not show the existence of a watercourse, so judgment went to defendants based on the Goodale, Kossoff, and Drive-in Realty Corporation cases. In Stonedge Estates v. City of New York, 47 Misc.2d 270 (Supreme Ct., Richmond Co. 1965),⁵³ the point was raised that absent statutory authority to the contrary, plaintiff cannot be required to install storm sewers as a condition precedent to issuance of a license to build sanitary sewers. Kossoff is cited in support of plaintiff's common law right to provide or fail to provide for surface water drainage as he so chooses. "Where it is diffused surface water, neither party (upland or lower land owner) is prevented from improving his parcel of land regardless of what becomes of the surface waters."⁵⁴

Contrast this case with Wolferts Roost v. State of New York, 17 AD2d 1022 (1962)⁵⁵, *aff'd* 13 NY2d 719 (1963),⁵⁶ where a third party had connected defendant State's culvert to a private drainage line maintained by plaintiff country club. Many years later, hydrostatic pressure after heavy rains washed a great deal of highway drainage into plaintiff's main, and subsequently the line broke and extensively damaged the golf course. The Court ruled the third party's action in making the connection notwithstanding, since the State had collected the water in a drain it was strictly liable for resulting damage. In this case, the Court found that the State had knowledge of the connection for many years, and was thus as fully chargeable as though the connection had in fact been made by the State. Wolferts is distinguishable enough upon its facts to prevent any liability of the State or its municipalities for conditions of which it has no knowledge or for those for which it not yet had a reasonable time to rectify. The State and/or its municipalities probably would be liable, however, for negligent maintenance if they fail to discover defects or acts of third parties resulting in artificial collection of the State's drainage which reasonable inspection would uncover. Here the State was not within the Kossoff rule as its culpability lay in its acquiescence to the act of the third party and its full knowledge of the situation.

Seifert v. Sound Beach Property Owner's Assn., 60 Misc. 2d 300 (Supreme Ct, Suffolk Co. 1969)⁵⁷ is an example of a case where there was no direct collection of waters by artificial means, but rather was a particular set of facts where defendant graded his lands so as to purposely pitch off surface water. The Court held that such action constituted negligence and defendant was thereby liable. In most fact situations, negligence will probably continue to be the main issue as the legal rights and duties of all the parties to a riparian action are well established in the law.

Drainage Law and Drainage Situations and Problems in New York State

Any owner's failure to live up to the standards established in Kossoff or any of the cases that follow it will probably have to be demonstrated as negligent unreasonableness for liability to attach. Therefore, no simple rule will cover all situations, for no matter how well established the legal principles might be, each case will have to continue to be judged on the basis of what particular damage the plaintiff suffered and what particular acts of defendant can be said to constitute bad faith or failure to exercise reasonable care (the test for negligence).

State and Municipal Rights and Obligations

Under its rights and obligations stemming from the police power, the State and/or its municipalities construct and maintain highways for the use and enjoyment of the people. Over the years, the State and/or its municipalities has come to own and maintain large tracts of land devoted to highways and other public purposes. By virtue of the Court of Claims Act, the State's rights and duties as to such land as may be riparian are neither diminished nor increased by virtue of the State's position as a sovereign. The same rules apply to the other Courts and the municipalities. The State and its municipalities are just as liable in damages as any other riparian owner for any legally compensable damage done by unreasonable alteration of natural drainage, and conversely, the State and its municipalities has no greater liability than any other riparian landowner for alterations that are not actionable if made by an individual.



In practical application, however, the State and its municipalities continue to be faced with many complex physical and legal problems, notwithstanding the existence of a well-developed body of Drainage Law. Application of the principles to given fact situations remains the root of legal difficulty.

Under the Highway Law in preparing plans and specifications for the construction or improvement of highways, the Commissioner of Transportation and the municipal highway superintendents must provide for the necessary culverts, drains, ditches, waterways, and embankments with respect to the highways. The Commissioner of Transportation is also

charged with aiding other public authorities and the municipalities of the requirements in providing for drainage.

Section 45 of the Highway Law empowers Transportation Department employees to enter upon the lands of adjacent landowners for the purpose of construction, opening, or digging drains and ditches and for preventing damage to highways. Similar provisions apply to municipalities.

The obligations imposed by the Highway Law, however, upon the State and its municipalities to provide for surface water drainage, do not relieve them of their common law responsibility to prevent unreasonable interference with the riparian rights of adjacent owners.

Under the Highway Law, drains, ditches, culverts, gutters are considered to be part of the highway itself. Therefore, under the State's Eminent Domain Law, if necessary, property may be acquired to provide for drainage. For example, in *Rose v. State of New York*, 24 NY2d 80 (1969),⁵⁸ it was held that destruction of riparian rights is compensable when the State's diversion of a riverbed was done pursuant to the provisions of the Highway Law. With respect to compensation for the taking of riparian rights, it was held that the Highway Law only codifies existing case law holding that the destruction of such rights by the State and/or its municipalities is compensable.

In *Morey v. State of New York*, 31 AD2d 990 (3rd Dept. 1969),⁵⁹ the majority and the dissent differed first over whether a particular set of facts constituted negligence and second over the interpretation and application of §54-a of the Highway Law. The majority simply held that not only was the State's re-establishment of a driveway to meet the new grade of a highway not negligent, but even if it were negligent, §54-a "immunizes the State from liability in any event, once claimant has invoked its provisions." The dissent agreed with claimant that the State construction of the new grade had been negligent, and argued that Highway Law §54-a only grants immunity for negligence in connection with maintenance, and does not exempt the State from liability for the channeling of water or the negligent construction of the driveway in the first place. The Court of Appeals has not ruled definitively on an interpretation of §54-a, therefore, the question of the State's liability for negligent construction activities may still be open under §54-a.

Section 54-a was amended by the Laws of 1971 to read: "In the construction and reconstruction of any highway on the state's system where a substantial change in the existing grade of the highway is made, such change making necessary the reestablishment of an existing entrance or approach to private lands, the commissioner of transportation may, upon the request of the abutting property owner affected, cause the reestablishment of the entrance ..." "The state shall not be liable for the maintenance of such adjusted and reestablished approaches or driveways beyond the outside edge of the road shoulder nor shall it be liable for damages in connection therewith after the completion of such adjustment work." (Emphasis added) The underlined part formerly read "ditch or gutter line." In the *Morey* case, claimant attempted to recover for water damage to her property following the State's reestablishment of her driveway and the Appellate Division held she had no cause. The Third Department recited that "[t]he State is not liable for damages for change of grade unless a specific statute permits such recovery" citing *Raymond v. State of New York*, 4 AD2d 62 (4th Dept. 1956)⁶⁰, *aff'd* 4 NY2d 961 (1958)⁶¹ and *Bennett v. State of New York*, 284 AD 828 (4th Dept. 1954).⁶² The Court made this finding even though such

change results in increased flow of surface water on adjoining property provided no artificial channeling promotes and directs such flow (see e.g., Bennett v. Cupina, 253 NY 436 (1930);⁶³ Fox v. City of New Rochelle, 240 NY 109 (1925);⁶⁴ and Rutherford v. Village of Holley, 105 NY 632 (1887);⁶⁵ but cf., Kerhonkson Lodge v. State of New York, 4 AD2d 575 (3rd Dept. 1957).⁶⁶

The Kossoff rule would seem to describe the limits of how far the State and its municipalities may go before it incurs the liability described in the Tremblay, Noonan, Laduca, Foster, Gibson, and Minnito cases cited in the above Morey case which is discussed herein above. The reasonable utilization of property for a highway purpose would necessarily include some artificial channeling of drainage water due to reconstruction and rearrangement of natural grades, barriers, banks and embankments, road approaches, and other similar features. The point of difference, then, remains in establishing whether or not the basic set of facts constitute negligence on the part of the State and/or its municipalities.

Natural Watercourses

To digress somewhat from surface water drainage, some attention should be given to natural watercourses. Generally, either an upland or lower land owner has a right to have a natural watercourse flow unaltered through his lands in its natural mode, course, volume and/or velocity (see, Anthony v. Huntley Estates of Greenburgh, 6 AD2d 1054 (2nd Dept. 1958)).⁶⁷ Any change in the watercourse by an adjacent owner that causes damage to the first owner will be actionable in the Courts. This means, for instance, that a lower owner of a natural watercourse may not dam up a stream and cause the water to be cast back and flood the upland owner's land. By the same token, an upland owner may not divert the flow of a watercourse so that it no longer enters the lands of a lower owner or flows in a substantially altered state either in volume and/or velocity (see, Hoffman v. Appleman, 120 AD2d 493 (2nd Dept. 1986)).⁶⁸ Neither may an upland owner diminish or accelerate the natural flow to a lower land owner's damage (e.g., if a lower land owner may be taking water from a stream for irrigation, an upland owner may not diminish the flow of the stream so as to prevent the irrigation. Thus, both riparian owners, have an enforceable right against the other to have a natural watercourse flow in its natural unaltered state. There is nothing unlawful about an alteration that causes no harm. The liability, then, for altering a watercourse is far different from the liability that may attach to drainage damage where the damage is the result of artificial collection and unreasonable disposal or use of surface water and its drainage. Thus, establishing the fact as to whether or not a natural watercourse exists, as in Buffalo Sewer Authority v. Cheektowaga, 20 NY2d 47 (1967),⁶⁹ is crucial.



Under the Highway Law, an alteration by the State or its municipalities of a natural watercourse to the damage of either an upland or lower land riparian owner is a compensable taking, and damaged owners will have an action for payments of losses. For instance, highway construction often requires the diversion of a natural watercourse, e.g., by channeling it through a culvert, or perhaps by redirecting it all together. If, in the latter case, a landowner's property is diminished in value because he/she has lost his/her water usage or waterfront, the State and/or its municipalities must compensate him for his loss. In the former case, if the culvert the State and/or its municipalities installed is not large enough to hold the normal water flow, the State and/or its municipalities will be liable for damage caused by flooding.

This paper has clearly set forth the proposition that should an upland owner collect his surface water into a drain or pipe or intentionally grade his land specifically to direct away large amounts of surface water, the upland owner will be liable for damages to the lower land owner. This more closely fits the situation the State and/or its municipalities are usually in. For State facilities, the Highway Law requires the Transportation Department to provide for drainage, and the construction of ditches, culverts, and embankments is an artificial collection of surface water; see e.g. the Keller⁷⁰ and Holmes⁷¹ cases. The State and its municipalities may not lawfully discharge these waters onto the lands of another in mass causing damage without permission and/or compensation therefor.

The State and/or its municipalities are under no duty to dispose of the surface water of another. The construction of a highway is ordinarily deemed a reasonable use of land, and no liability will attach for drainage caused, for instance, by the construction of a grade that causes surface water to back up across the lands of an adjacent owner where the surface water previously drained away. This rule will only apply, however, when the "good faith" of the State and/or its municipalities is not in issue and is proven. Intentional damage is actionable.

Where the State and/or its municipalities do construct artificial drainage systems, they remain under a duty to maintain them in order to prevent damage (see, e.g., Wolferts Roost v. State of New York, 17 AD2d 1022 (3rd Dept. 1962), *aff'd* 13 NY2d 719 (1963)).⁷² For instance, §45 of the Highway Law gives the Commissioner of Transportation and his authorized representatives permission to enter upon adjoining lands for the purpose of maintaining or constructing drainage systems for State highways, to prevent the encroachment of natural watercourses onto State highways, and remove obstructions which prevent the free flow of water through or under a State highway. Thus, the State has the power to prevent injury that matches its liability for injury to others. The municipalities have similar rights and obligations, but they are not spelled out in the detail as is found at §45.

Prescriptive Easements

It is generally recognized that water and/or drainage rights may be acquired by prescription or adverse user. The general rule is that no prescriptive water and/or drainage rights can be acquired by an individual in the use of or against the rights of the public in the absence of statutory authorization. No person may acquire a prescriptive right to maintain a public nuisance. A prescriptive right may be acquired to the use of water in any way in which it is susceptible of use, and to the use of lands in connection with drainage of surface waters. Included among the rights which may be acquired through prescription are the right of an upland riparian owner, as against a lower land riparian owner, to use water from a natural watercourse, the right to divert a stream running through another's land, the right to maintain a dam, lake, or pond at a particular height or level, and bathing rights.



A prescriptive right to the use of water and/or drainage rights can be acquired only by an adverse user of the character which is similar to the acquisition of rights in lands. To acquire ownership of a water and/or drainage right by adverse user, the use must be continuous, uninterrupted, adverse, and exclusive under a claim of right for the prescriptive period.^B It must either be such that knowledge on the part of the person against whom it is claimed will be presumed from its open, notorious, and uninterrupted character, or it must be with his knowledge. However, a prescriptive easement to continue adverse drainage use will not vest without actual damage. This

B. This is after a ten year period in New York State.

is a very important fact that must be established. All that is required is either actual knowledge or user of such a character that knowledge may be presumed. It is not necessary that the claim be undisputed or that the acts done under it be actually acquiesced in. They may, indeed, be forbidden by the person affected by them, provided no respect is given to his prohibition and user is unaccompanied by an actionable disturbance. It is also suggested that drainage rights for highway facilities may also be acquired after a ten year period under §189 of the Highway Law since the drainage for the highway is a part of the highway facility (see, Dutcher v. Town of Shandaken, 23 AD3d 781 (3rd Dept. 2005)).⁷³

The State and its municipalities may acquire a prescriptive easement for its drainage by the operation of the statute of limitations (ten years). Private owners may acquire a prescriptive easement against other private owners to continue an otherwise actionable drainage system if, for a continuous period of ten years, such drainage has been open, notorious and adverse to the interests of the other riparian owner, actual damage has been done to the other owner, and that other owner is chargeable with actual or constructive notice of the injury to his own lands. By virtue of the three year limitation on claims against the State arising out of appropriation of real property^C (defined to include riparian rights and easements), for all practical purposes, the State apparently can establish a prescriptive drainage easement three years after its establishment, absent enabling legislation giving the injured party the right to sue in the Court of Claims after the limitation period has run. The municipalities have protection against claims for damage under §50-e of the General Municipal Law, but the 90 day period can be extended in certain circumstances by the Court. The municipality may have to correct the drainage situation when §50-e does not apply.

C. Real Property Action and Procedure Law (RPAPL).

Municipalities Can Control Potential Drainage Problems

The main way that municipalities can control potential drainage problems is through their building codes, subdivision approvals, driveway permits, special permits and other approvals that are required from the municipality for work that affects the contours of the land and drainage situations. Potential drainage problems should be examined and addressed for the present time and for at least 50 years in the future. The situations discussed in this document will help to guide any required review.



REVIEW OF THE BASIC DRAINAGE RULES

The 2006 case of Zutt v. State, 19 Misc. 3d 1131(A) (Ct. of Claims 2006),⁷⁴ *aff'd* 50 AD3d 1133 (2008)⁷⁵ (the State's claim of prescriptive rights was appealed only) is an excellent case where most of the basic drainage principles in New York State are reviewed. Therefore, it is a good case to review.

The State and its municipalities owe no duty to adjacent landowners to care for surface water drainage from their property (see e.g., Bull v. State of New York, 231 AD 313 (4th Dept. 1931);⁷⁶ Winchell v. Camillus, 109 AD 341 (4th Dept. 1905), *aff'd* 190 NY 536 (1907);⁷⁷ however, cf. Borden v. State, 113 Misc 232 (Ct. of Claims 1920)⁷⁸ and Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946).⁷⁹

The State and its municipalities have the right as well as the duty in the construction and maintenance of a highway to erect and properly care for culverts and/or conduits for the protection of the highway from water. In other words, in relation to the two basic principles, the State and its municipalities owe no duty to adjoining landowners to furnish drainage for surface water naturally collecting on their premises, and cannot be held liable for damages resulting from the fact that the highway prevents surface water from flowing off. Moreover, in the construction or maintenance of a highway, the State and its municipalities are not obliged to protect the adjoining landowners from the natural flow of surface water from the

highway by any affirmative duty to construct culverts, conduits, or other drains (see e.g., Lynch v. Mayor of City of N.Y., 76 NY 60 (1879);⁸⁰ Klein v. Town of Pittstown, 241 AD 202 (3rd Dept. 1934);⁸¹ Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946);⁸² Mennito v. Wayland, 56 NYS2d 654 (1943);⁸³ Fuller v. State, 46 NYS2d 762 (Ct. of Claims 1944);⁸⁴ Foster v. Webster, 8 Misc 2d 61 (Supreme Ct., Broome Co. 1943);⁸⁵ and Wilson v. City of New York, 1 Denio 595 (1845).⁸⁶

When the State or its municipalities construct or reconstruct a highway and its drainage system according to accepted standards and practice applicable to the terrain without interfering with natural channels or watercourses, they are not bound to do more in order to avoid liability for damages occasioned by overflow of surface waters from the highway onto adjacent land, even if caused by change in natural contours of terrain. The State's and/or its municipalities's failure to anticipate and provide against excessive rainfall, causing overflow of surface waters from a highway onto adjoining land, is not such an omission as to constitute actionable negligence rendering the State and/or its municipalities liable for resulting damages to owner of such land. The State and/or its municipalities are only obliged to adopt highway drainage plans reasonably calculated to serve present needs and future needs which could be reasonably anticipated and to maintain drains and ditches properly thereafter (see e.g., Fuller v. State, 46 NYS2d 762 (Ct. of Claims 1944).⁸⁷

The State and its municipalities' liability for improper drainage are well established. The State and its municipalities' liability for damage growing out of the artificial collection of surface water was discussed in connection with the Morey case. The State or its municipalities have "no right to collect surface water into an artificial channel, conduct it to a given point and discharge it in a large and substantially increased volume and/or velocity upon another's premises without liability for the resulting damage". (See, Cooke, J., *dissenting* in Morey v. State of New York, 31 AD2d 990 (3rd Dept. 1969)⁸⁸ citing Tremblay v. Harmony Mills, 171 NY 598 (1902);⁸⁹ Noonan v. City of Albany, 79 NY 470 (1880);⁹⁰ Laduca v. Draves, 145 AD 159 (4th Dept. 1911));⁹¹ Foster v. Webster, 8 Misc 2d 61 (Supreme Ct., Broome Co. 1943);⁹² Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946);⁹³ and Mennito v. Town of Wayland, 56 NYS2d 654 (Supreme Ct. Steuban Co. 1943).⁹⁴ (Also see, Musumeci v. State of New York, 43 AD2d 288 (4th Dept. 1974).

An adjoining landowner can recover damages only by demonstrating that the State and/or its municipalities, in the construction of the highway, collected surface waters which would not naturally flow in the direction of his/her land and by means of drains and ditches cast such water upon his/her lands. (See, Costanzo v. State of New York, 207 Misc 242 (Ct. of Claims 1955).⁹⁵

Further, it is well established that the incorporation of an inadequate culvert or catch basin into a highway so that it interferes with water which previously flowed across or along the highway in a natural channel that causes flooding upon adjoining land, constitutes an act of negligence rendering the State and/or its municipalities liable for damages. (See, Cooke, J., *dissenting* in Morey v. State of New York, 31 AD2d 990 (3rd Dept. 1969),⁹⁶ citing Bowman v. Town of Chenango, 227 NY 459 (1920);⁹⁷ Kerhonkson Lodge v. State of New York, 4 AD2d 575 (3rd Dept. 1957);⁹⁸ Inkawhich v. State of New York, 22 NYS2d 761 (Ct. of Claims 1940);⁹⁹

Logan v. State of New York, 162 Misc 793 (Ct. of Claims 1937), *aff'd* 254 AD 410 (3rd Dept. 1938),¹⁰⁰ and Timerson v. State of New York, 145 Misc 613 (Ct. of Claims 1932).¹⁰¹

The State and its municipalities owe no duty to adjoining landowners to furnish drainage for surface water naturally collecting on their premises, and cannot be held liable for damages resulting from the fact that the highway prevents surface water from flowing off (See, Wilson v. City of New York, 1 Denio 595 (1845)).¹⁰² Moreover, in the construction or maintenance of a highway, the State and its municipalities are not obliged to protect the adjoining landowners from the natural flow of surface water from the highway by any affirmative duty to construct culverts, conduits, or other drains. (See e.g., Lynch v. State of New York, 76 NY 60 (1879);¹⁰³ Klein v. Town of Pittstown, 241 AD 202 (3rd Dept. 1934);¹⁰⁴ Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946);¹⁰⁵ Mennito v. Town of Wayland, 56 NYS2d 654 (Supreme Ct. Steuban Co. 1943);¹⁰⁶ Fuller v. State, 46 NYS2d 762 (Ct. of Claims 1944);¹⁰⁷ Foster v. Webster, 8 Misc 2d 61 (Supreme Ct., Broome Co. 1943);¹⁰⁸ and Wilson v. City of New York, 1 Denio 595 (1845)).¹⁰⁹ The State's and its municipalities' liability for damage growing out of the artificial collection of surface water has already been discussed in the section dealing with the Morey case.

An adjoining landowner can recover damages only by demonstrating that the State or its municipalities, in the construction of the highway, collected in a body, surface water which would not naturally flow in the direction of the owner's land and by means of drains and ditches cast such water upon such owner's land. (See, Costanzo v. State of New York, 207 Misc 242 (Ct. of Claims 1955)).¹¹⁰ Another good case to review on this point is Carbonaro v. Town of North Hempstead, 31 Misc.3d 1231(A) (Supreme Ct., Nassau Co. 2011),¹¹¹ *rev'd as modified*, 97 AD3d 624 (2nd Dept. 2012). This case was reversed by the Appellate Court by granting Summary Judgment to the Town and finding facts outstanding for the County.

The State and/or its municipalities, in the construction and maintenance of a highway, might lawfully interfere with the natural flow of surface water to and from the property of adjacent landowners. It does not follow that the State or its municipalities might turn upon the land of another water which previously flowed across the highway in a natural channel because, for such water, the State or its municipalities are bound to provide a sufficient outlet. (See e.g., Bowman v. Chenango, 227 NY 459 (1920)¹¹² and Cook v. State of New York, 26 Misc 2d 1 (Ct. of Claims 1961)).¹¹³ An inadequate or negligently maintained culvert or conduit under or along a highway that interferes with water which previously flowed across or along the highway in a natural channel, and which causes flooding upon adjoining land, constitutes a defect in the highway within the meaning of statutes (e.g., Highway Law, §58) imposing liability upon the State and/or its municipalities for damages caused by defects in highways. (See cases cited in dissent in Morey v. State of New York, 31 AD2d 990 (3rd Dept. 1969)).¹¹⁴

The State and its municipalities have no rights in the construction of a highway to change unreasonably and unnecessarily the nature of the course and flow of water in a stream from the manner in which it is accustomed to flow, with the result that on occasions of heavy rainfall, the stream is directed toward and against the land of another. (See, McCormick v. State of New York, 289 NY 572 (1942)).¹¹⁵ In any event, the State and/or its municipalities are not liable for damages sustained by another through the flooding of a stream the channel of which has been realigned by

Drainage Law and Drainage Situations and Problems in New York State

the State and/or its municipalities in the course of a highway improvement, where the flooding results from an unusually heavy rainfall constituting an act of God, and not from the negligence of the State and/or municipality. (See, Cook v. State of New York, 26 Misc 2d 1 (Ct. of Claims 1961).¹¹⁶ However, care must be taken for the Act of God defense to assure that there was no negligence on the part of the State and/or its municipalities

One other case worth mentioning in relation to what kind of things might constitute negligence is Christman v. State of New York, 189 Misc 383 (Ct. of Claims 1947).¹¹⁷ The Court of Claims ruled that the State, in connection with a State highway, had the duty to construct a culvert which would be adequate and proper to carry off the water reasonably to be expected from the water shed area bearing in mind the extent, character and topography of the watershed area and nature of the stream, together with the fact that erosion increased the rapidity of “run-off”. Here, the State knew or should have known of the inadequacy of the storm water drainage system constructed in connection with the State highway. The failure of the State to construct and provide adequate culverts and a drainage system constituted negligence for which it was liable in damages to the owner of the flooded property, particularly where the State failed to properly inspect and maintain the system by keeping culverts free of obstructions.

In Alley v. State of New York, 28 AD2d 1147 (3rd Dept. 1967), *mot. for lv. to app. den.*, 21 NY2d 642 (1968),¹¹⁸ the State’s general lack of responsibility for altered drainage was affirmed. The Court found as to any change precipitated by the elevation of the highway, the State clearly has no legal liability. The Court cited the following: e.g., Fox v. City of New Rochelle, 240 NY 109 (1925);¹¹⁹ Burmaster v. State of New York, 186 AD 131 (3rd Dept. 1919);¹²⁰ and Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946).¹²¹ In Drogen Wholesale Elec. Supply v. State of New York, 27 AD2d 763 (3rd Dept. 1967)¹²² the Court found that in the absence of proof that a stream was interfered with there was no liability. In Holmes v. State of New York, 32 Misc. 2d 1077 (Ct. of Claims 1962)¹²³ there was liability for additional surface water being channeled or piped onto claimant’s property.

Example Situations with Possible Answers to the Examples

It must be remembered that in a litigated matter the proven facts can alter the outcome in any situation. Therefore, if there are facts that are claimed that are incorrect or cannot be proven in a situation, the possible answer set forth may not fit the situation.

Problem 1

A upland property owner paved the area and created no ditches or trenches for the surface water runoff. Was the upland owner responsible for surface water damage to the lower lands?



Upland property without ditches, trenches, or subsurface drainage

Possible answer

No. The upland owner did not collect and transmit the surface waters in drains, pipes and/or trenches to the lower lands.

Problem 2

A Village raised the elevation of a street and as a result more surface water drained onto the adjacent property, but did not construct drainage ditches and/or trenches. The surface water from the street and other uplands had gone into a watercourse for many years, but had never overflowed the watercourse banks. In a very severe rain storm, shortly after the street was raised, there was flooding of the lower lands. Is the Village liable for the damages?



Raised street elevation causing flooding or retention of runoff

Possible answer

No. The Village is not made liable by every change in the natural surface or condition of land made in the improvement of a street that increases the flow of surface waters on adjacent lands. (See, Ruthford v. Village of Holley, 105 NY 632 (1887).¹²⁴ What if there was a substantial change in the direction or volume of the surface water drainage created by the Village's activities? You probably would then have a Noonan v. City of Albany, 79 NY 470 (1880),¹²⁵ situation where there was liability. The line between liability and no liability is very narrow and that is why there should be drainage studies undertaken for such close situations.

Problem 3

A town constructed a drainage system which collected surface waters in an area higher than a private party's property and channeled it into a watercourse on that party's property. That owner filled in the watercourse - which was not a natural watercourse. Was the Town successful in an action to compel the opening of the watercourse.

Possible answer

No. Why could that result occur? A landowner has the right to block surface water that is collected and channeled on to his/her property. (See, Nassau County v. Cherry Valley Estates, Inc., 281 AD 692 (2nd Dept. 1951)¹²⁶

What if the surface waters were not collected and/or channeled, but were going into a natural watercourse? The Town would have won since the blockage was of the natural watercourse and the lower land owner did not have the right to prevent the flow of waters on his/her lands when the waters is in a natural watercourse.

In the first situation, what if the watercourse and the channeled surface water condition had existed for more than ten years? There is a strong possibility that pursuant to the legal principle of acquiring rights by "prescription" would apply. The key fact would be - In the ten year period did the Town do anything in the channel or channels that increased the flow, volume and/or velocity of the surface waters that would have started a new ten year period?



Non-natural watercourse



Surface water course

Problem 4

A party built a dam in a large stream that was a natural watercourse. A very heavy rainstorm contributed to significant downstream flooding of numerous properties. The owners of these properties sought recovery of damages from the flooding by claiming that the owner of the dam negligently interfered with surface water. Can they recover such damages?



Dam in natural watercourse

Possible answer

No. Because the water impounded by the dams/reservoirs was not surface water, the defendants in that situation cannot be held liable for the negligent interference with surface water. In opposition to defendant's defense, the plaintiffs failed to raise a triable issue of fact as to whether the water being impounded in the defendants' dams/reservoirs actually was and constituted surface waters in order to sustain a claim of negligent interference with surface waters (See, Stormes v. United Water New York, Inc., 84 AD3d 1352 (2nd Dept. 2011)).¹²⁷

What if the dam owner had opened the dam so that the flood waters contained waters from the stream and the surface waters? There may have been a different result if there was a showing that the opening of the dam exacerbated the flooding damages.

There is another possible situation that may be present - That is that the dam failed and it could be proven that the dam was negligently constructed and/or maintained.

Once a natural watercourse is altered there is a continuing responsibility for such alteration and the maintenance thereof.

Problem 5

The Town had a drainage ditch along a road that passed water across the road through a pipe and out into a field for many years (many more than 10). A drainage ditch appeared in and through the field, but the Town did no maintenance on it. The land owner of the field filled in the ditch where the water came out of the pipe under the road so that the drainage did not come out into his field. The fill was there for more than ten years. The Town decided to and did reopen the ditch. The land owner sued. Who would win and why?



Unmaintained drainage ditch

Possible answer

The Town won. The drainage ditch became a part of the highway facilities by prescription even though the Town did not maintain it. Since it was a part of the highway facilities, under §189 of the Highway Law, the land owner could not re-obtain the rights therein by prescription. The drainage ditch and drainage easement could remain there as long as needed to drain the highway facility. (See, Dutcher v. Town of Shandaken, 23 AD3d 781 (3rd Dept. 2005).¹²⁸

Problem 6

An owner developed his/her land while the adjoining upland was still in its natural state with the surface water percolating into the ground. Some time later, in connection with the establishment of a gasoline station, the upland owner blacktopped his lands without providing for any sort of drainage system. Is the upland owner responsible for surface water damages to the lower land owner?

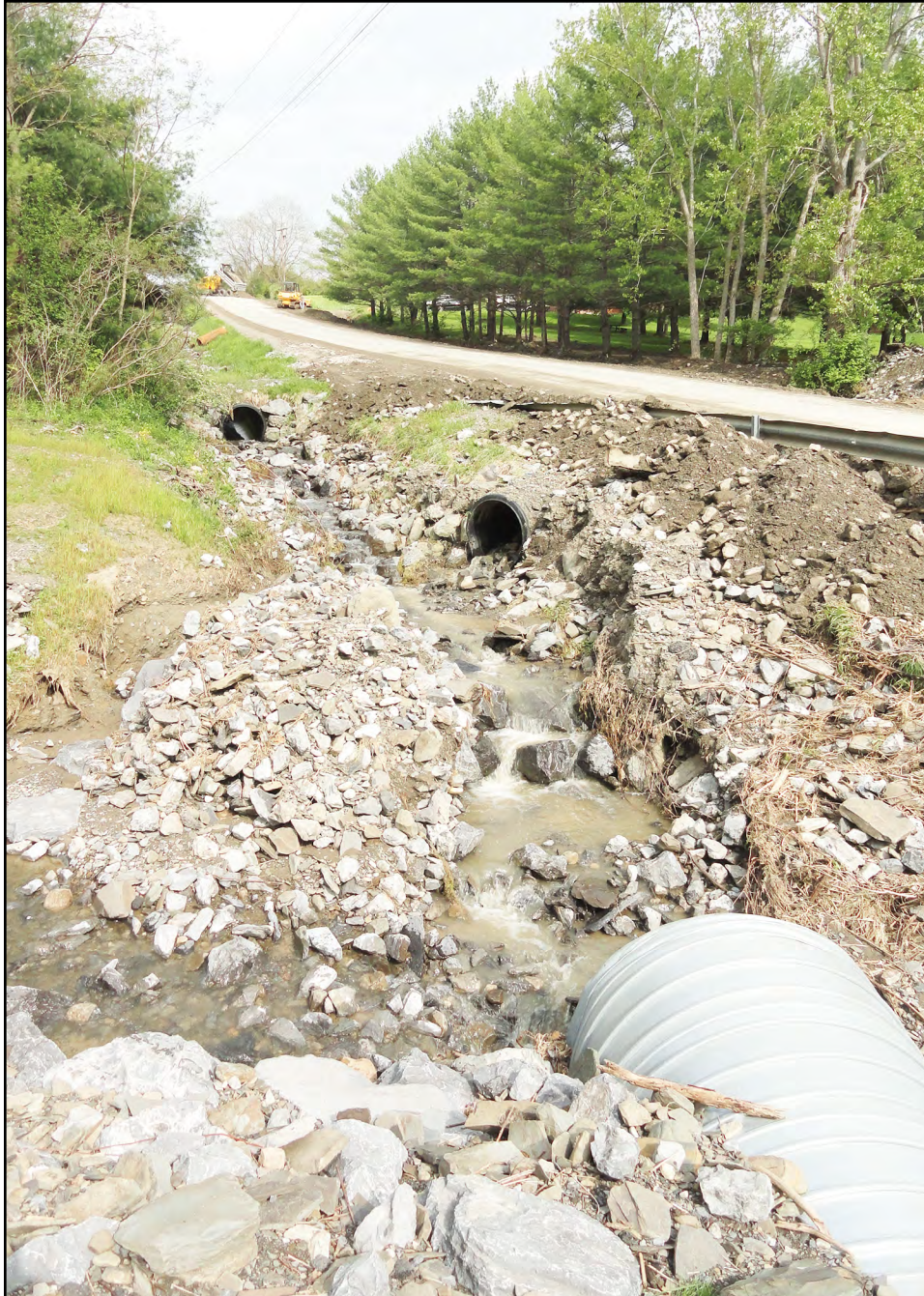
Possible answer

No. The Court decided that there was no liability for damage caused by water damaging the lower land owner because the upland owner had the right to develop his property “in good faith to fit the property to some rational use to which it is adapted” (See, Kossoff v. Rathgeb-Walsh, 3 NY2d 583 (1958)).¹²⁹

What if the upland owner collected the surface waters in a pipe or drain? That probably would have resulted in liability (See, Cottrell v. Hermon, 170 AD2d 910, 911 (3rd Dept. 1991), *leave denied*, 78 NY2d 853, (1992)).¹³⁰ The thing to remember is that reasonable blacktopping, paving, grading, improvements, or construction done in good faith that disturbs the natural flow of surface water drainage to the damage of a lower owner is not actionable unless the drainage is artificially caused to be collected in a mass, as in a pipe, ditch or drain. However, the upland owner is entitled to reasonable artificial drainage which does not increase the flow (volume and/or velocity) of the surface water upon the lower land owner. This can be a very close call either way and will depend on proof. The adjoining upland owner will not be enjoined from maintaining a culvert which passes water through it and does not increase the upland flowage onto the adjoining lower land (See, Nolan v. Carr, 19 Misc.2d 167 (Supreme Ct., Cayuga Co. 1959)).¹³¹ Again, this would be a very close and/or unique situation.

Problem 7

In connection with building a highway, the County placed a drainage ditch along the side of the highway. After a distance of about four hundred feet, the drainage was carried across the highway in a 24 inch pipe. The drainage flowed onto the adjoining lands for many years and caused almost no damage to the adjoining lands. A developer built a subdivision upland from the highway and placed within the subdivision several 18 inch drainage pipes that directed the surface water drainage toward the highway. In a heavy rain storm the highway and the lower lands were flooded. Is the developer responsible for all the damage? Is the County in any way responsible for some or all of the damages?



Multiple drainage culverts draining into a single cross culvert

Possible answer

The actual fact situation that is proven would be very important in this type of situation. From the facts given above, only the developer would be responsible for the damages since he/she cast the water on others without making sure that it was safely carried to a natural watercourse (See, Cottrell v. Hermon, 170 AD2d 910, 911 (3rd Dept. 1991), *lv. denied*, 78 NY2d 853, (1992).¹³² What would have helped to prevent this situation? The Town, when it approved the subdivision, could have required

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the developer to provide for safe disposal of the surface water drainage and required compliance, but there would still be no viable claim against the Town if it did not have that procedure.

The “Act of God” defense will not help the developer since he was negligent with how he/she handled the disposal of the surface water drainage. (See e.g., Michaels v. New York Cent. R. Co., 30 NY 564 (1864).¹³³ Here the Court found that the Act of God must be the sole and immediate cause of damage in order for that defense to be applied)

Could the Town have been somewhat responsible? It would be possible. If the subdivision drainage situation existed for a long period of time and the Town knew about it and took no action to correct the situation, the Town could have borne some responsibility. If the Town facilities were recently (within the last ten years) reconstructed and the situation of increased drainage from the ditches along the highway facility was not properly addressed, the Town may have some responsibility.

Problem 8

The State raised the grade of the highway and did not replace or reconstruct a culvert that had existed prior to the reconstruction. The old culvert had drained many of the upland properties, including the plaintiff’s. The adjacent property owner filled in and graded his/her property. Prior thereto, the surface waters coming onto and gathering upon the lands had, to a great extent, been absorbed in the soil without much of the surface waters running off onto lower lands. Plaintiff’s property was lower than the adjacent property and the highway. A flood occurred as a result of a heavy rainfall. The plaintiff claimed that the State was negligent for not replacing the old culvert. Did the plaintiff prevail?



Roadway grade elevation increased, but culvert not changed

Possible answer

No. The plaintiff must show that not only was the State negligent relative to what it did with respect to the highway improvement, but also that such negligence was the proximate cause of the flooding of plaintiff's property. That type of proof is very hard to sustain in a Court action. The State was lucky that there had not been a previous flood and the State performed no correction activities

Problem 9

There is a ditch along the side of a road that was constructed for drainage. The adjacent property owner wants to make a driveway connection to the road and he/she fills in the ditch where the driveway connection is made. Is he/she liable for damages from surface water back-ups?



Ditch filled in to create driveway

Possible answer

Yes. The drainage ditch is part of the highway facility and he/she would have had to obtained permission or a permit in connection with the driveway connection. That process should have required a culvert or pipe for the drainage waters and the continuing responsibility to keep it clean.

Problem 10

In connection with building in a subdivision, a driveway connection has a garage that is much higher than the road so that the driveway was directly connected to the road. When it stormed, materials and debris would come down the driveway and onto the road. What could and should be done by the municipality in such situations?



Discharge from higher driveway pouring onto road

Possible answer

First, addressing the situation of new or additional development - The developer should be required to construct something like a dip in the driveway before it gets to the road so water, etc. goes off to the sides of the driveway prior to getting to the road. If the developer does not do this, the municipality should not accept the subdivision road as a public highway until those situations are corrected. Second, the house is built after the highway has been accepted - The building permit process should have provisions where the C/O is not issued if there is no corrective action. Third, the situation has been there for sometime and the C/O has been issued - Maybe a speed bump constructed where the driveway connects to the road would help the situation. Remember, in winter time you will have icing conditions from the melted water coming onto the road.

Problem 11

There is an old 12 inch culvert under the Highway and no real ditches along the road because the adjacent lands are presently farm lands. A developer wants to build a subdivision and the drainage thereof needs drainage pipe connections to the highway facility that will require at least a 24 inch culvert under the highway in a severe storm. Can the developer be required to replace the 12 inch culvert under the highway so that it reduces the chances of flooding?

Possible answer

Yes. In connection with the approval of the subdivision, the municipality can and should require such work. Also, an important consideration is whether or not the drainage facilities (ditches, trenches, etc.) through the lower lands can handle the increased flow until the drainage reaches a natural watercourse. Remember, the drainage rights (riparian rights) through the lower lands that may have been acquired by the municipality for the 12 inch culvert under the highway may be limited as to the amount flow from a 12 inch pipe. The developer can be required to obtain the additional drainage rights. There may also be the problem of a heavy rain storm that overtaxes the drainage system. That should be taken into consideration and the developer should be required to be responsible for any claims for damages.

Problem 12

Must the municipality clean their drainage ditches and/or pipes?



Drainage pipe in need of cleaning

Possible answer

Yes. There is a responsibility to see that the drainage facilities work properly. If you know that the ditches, trenches and/or pipes are plugged, they should be cleaned. The problem arises during a storm and debris is carried into the ditches, trenches and/or pipes. Being aware of such problems and situations is one of the major reasons why the keeping of records of work that is performed and/or that the facility is functioning properly is so important.

Being Prepared When a Drainage Problem Results in a Claim

1. **Standard of the reasonable man or woman.**

In dealing with an drainage problem, certain established principles come into play in determining whether or not there is or could be liability. One of the standards that is applied to any public official or employee is the standard of the reasonable man or woman. This mythical figure acts properly and reasonably in all circumstances. However, this is the standard by which the actions of the public official or employee are measured. One of the standards in determining whether or not the public officer or employee has been reasonable is foreseeing the question of damage in drainage situations. The question is, “What precautions would a person take if there is any foreseeable damage from the drainage situation?” In Court when asked, to look back at a drainage problem and the witness says “Yes, I knew that the drainage pipe was stuffed with debris, but no, I did nothing to determine its potential situation in a heavy or severe rain storm” would not fall within the guidelines of the reasonable man or woman. Therefore, you should observe how the drainage systems are operating in regular rain storms, because when you have severe weather you sure are not going to have drainage systems that operate better

2. **Record keeping.**

No one enjoys or likes the amount of paperwork required in today’s society. However, it is essential for accurate and complete records to be kept. It is important to have adequate records to defend against drainage claims that may take several years in the Courts. Making and keeping such records is a constant, and difficult process for most public officials and employees. Many times your judgment on how various drainage matters should be handled is very important. It is as important to document reconnaissance activities that show *no* defects as it is to document the drainage defects. When a drainage problem is observed it is important to document the potential of the drainage problem and what was done about it and any scheduling of repair work because of lack of resources for any immediate action.

3. **Newer defenses to drainage claims.**

A. Economic theory

A new and rather innovative defense is now being asserted by public officials in claim cases. It is called the *economic theory*. This is where resources are used to the fullest and still not all the poor drainage situations are rectified prior to a second incident even though some reasonable steps to correct the situation have been taken. This would include notifying the party who has created and is liable in the situation to undertake corrective activities. The public official’s or employee’s judgment relative to the priority in fixing the drainage condition should not be second guessed by the court as long as the public official or employee was acting in a professional way related to the situation, and not just responding to political pressures or some other outside influence. The public official or employee should take into consideration the potential danger of the situation and some kind of temporary fix if possible.

B. Obsolescence.

Another theory of law that has been developed is that the repair of the drainage system, equipment or appurtenances is impracticable or impossible because of *obsolescence*. This includes the unavailability of replacement parts or that a fix just cannot be made to the particular facilities. However, many drainage systems are old and are quickly over taxed when more surface waters are directed into them. Thus, this defense will be very hard to sustain in a drainage situation.

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2. Kennedy v. Moog Servocontrols, Inc., 26 AD2d 768 (4th Dept. 1966).
3. Spink v. Corning, 61 AD 84 (4th Dept. 1901).
4. Drogen Wholesale Elec. Supply v. State of New York, 27 AD2d 763, 763 - 764 (3rd Dept. 1967).
5. Mendelson v. State of New York, 218 AD 210 (4th Dept. 1926), *aff'd* 245 NY 634 (1927).
6. Lumley v. Town of Hamburg, 181 AD 441 (4th Dept. 1918).
7. McGetrick v. Shoecraft, 198 AD 278 (4th Dept. 1921).
8. Town of Hamburg v. Gervasi, 269 AD 393 (4th Dept. 1945).
9. Kossoff v. Rathgeb-Walsh, Inc., 3 NY2d 583 (1958).
10. *Id.* at 589-90.
11. Cottrell v. Hermon, 170 AD2d 910, 911 (3rd Dept. 1991), *lv. denied* 78 NY2d (1992), quoting from Kossoff v. Rathgeb-Walsh, *supra* Endnote 9 at 589-590.
12. Doundoulakis v. Town of Hempstead, 51 AD2d 302 (2nd Dept. 1976), *rev'd*, 42 NY2d 440 (1977).
13. Bull v. State of New York, 231 AD 313 (4th Dept. 1931).
14. Scamp v. State of New York, 189 Misc 802 (Ct. of Claims 1947).
15. Holmes v. State of New York, 32 Misc.2d 1077 (Ct. of Claims 1962).
16. Bennett v. Cupina, 253 NY 436 (1930).
17. Barkley v. Wilcox, 86 NY 140 (1881). *Supra* Endnote 1.
18. Carrabis v. Brooklyn Ash Removal Co., Inc., 249 AD 746 (2nd Dept. 1936).
19. Manley v. New York Cent. R.R. Co., 227 AD 206 (4th Dept. 1929).
20. Buffalo Sewer Authority v. Cheektowaga, 20 NY2d 47 (1967).
21. Kazansky v. Bergman, 17 Misc. 2d 1015 (Supreme Ct., Sullivan Co. 1959).
22. Nolan v. Carr, 19 Misc. 2d 167 (Supreme Ct., Cayuga Co. 1959).
23. Tench v. Highfield Estates, 2 AD2d 991 (2nd Dept. 1956).
24. Board of Educ., Union Free School Dist. No. 6 of Town of N. Hempstead v. Town of N. Hempstead, 261 AD 1102 (2nd Dept. 1941).
25. Grossman v. Jenad, Inc., 198 NYS2d 218 (Supreme Ct., Westchester Co. 1960).
26. *Id.*
27. Nolan v. Carr, 19 Misc.2d 167 (Supreme Ct., Cayuga Co. 1959). *Supra* Endnote 22.
28. *Supra* Endnote 27 at page 170.
29. Noonan v. City of Albany, 79 NY 470 (1880).
30. Mennito v. Town of Wayland, 56 NYS2d 654 (Supreme Ct. Steuban Co. 1943).

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31. Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946).
32. Kerhonkson Lodge v. State of New York, 4 AD2d 575 (3rd Dept. 1957).
33. *Id.* at 578.
34. *Id.* at 578-579.
35. Rockwell v. State of New York, 15 Misc.2d 1078 (Ct. of Claims 1959).
36. Melin v. Richman, 96 Conn. 686 (1921).
37. Holmes v. State of New York, 32 Misc.2d 1077 (Ct. of Claims 1962). *Supra* Endnote 15.
38. Amitrano v. City of New York, 15 AD2d 478 (1st Dept. 1961).
39. Kossoff v. Rathgeb-Walsh, Inc., 3 NY2d 583 (1958). *Supra* Endnote 9.
40. Attoram Realty v. Town and Country Builders, 14 Misc 2d 81 (Supreme Ct., Westchester Co. 1958).
41. Attoram Realty Corp. v. Town & Country Bldrs., 8 AD2d 936 (2nd Dept. 1959).
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44. Keller v. State of New York, 19 Misc.2d 794 (Ct. of Claims 1959).
45. *Id.* at 800.
46. *Id.* at 800.
47. *Id.* at 801.
48. Burk v. High Point Homes, 22 Misc.2d 492 (Supreme Ct., Nassau Co. 1960).
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50. *Id.* at 241.
51. Gazin v. Gladwin, 31 Misc.2d 640 (Co. Ct., Oneida Co. 1961).
52. Goodale v. Tuttle, 29 NY 459 (1864).
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54. Kossoff v. Rathgeb-Walsh, Inc., 3 NY2d 583, 590 (1958). *Supra* Endnotes 9 and 39.
55. Wolferts Roost v. State of New York, 17 AD2d 1022 (3rd Dept. 1962).
56. Wolferts Roost v. State of New York, *aff'd* 13 NY2d 719 (1963).
57. Seifert v. Sound Beach Property Owner's Assn., 60 Misc 2d 300 (Supreme Ct., Suffolk Co. 1969).
58. Rose v. State of New York, 24 NY2d 80 (1969).
59. Morey v. State of New York, 31 AD2d 990 (3rd Dept. 1969).
60. Raymond v. State of New York, 4 AD2d 62 (4th Dept. 1956).
61. Raymond v. State of New York, *aff'd* 4 NY2d 961 (1958).
62. Bennett v. State of New York, 284 AD 828 (4th Dept. 1954).
63. Bennett v. Cupina, 253 NY 436 (1930). *Supra* note 16.
64. Fox v. City of New Rochelle, 240 NY 109 (1925).

65. Rutherford v. Village of Holley, 105 NY 632 (1887).
66. Kerhonkson Lodge v. State of New York, 4 AD2d 575 (3rd Dept. 1957). *Supra* Endnote 32.
67. Anthony v. Huntley Estates of Greenburgh, 6 AD2d 1054 (2d Dept. 1958).
68. Hoffman v. Appleman, 120 AD2d 493 (2nd Dept. 1986).
69. Buffalo Sewer Authority v. Cheektowaga, 20 NY2d 47 (1967). *Supra* note 20.
70. Keller v. State of New York, 19 Misc.2d 794 (Ct. of Claims 1959). *Supra* Endnote 44.
71. Holmes v. State of New York, 32 Misc.2d 1077 (Ct. of Claims 1962). *Supra* Endnote 15.
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73. Dutcher v. Town of Shandaken, 23 AD3d 781 (3rd Dept. 2005).
74. Zutt v. State, 19 Misc.3d 1131(A) (Ct. of Claims 2006), *aff'd* 50 AD3d 1133 (2008).
75. Zutt v. State, *aff'd* 50 AD3d 1133 (2008).
76. Bull v. State of New York, 231 AD 313 (4th Dept. 1931). *Supra* Endnote 13.
77. Winchell v. Camillus, 109 AD 341 (4th Dept. 1905), *aff'd* 190 NY 536 (1907).
78. Borden v. State, 113 Misc 232 (Ct. of Claims 1920), *aff'd* 254 AD 410 (3rd Dept. 1938).
79. Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946) *Supra* Endnote 31.
80. Lynch v. Mayor of City of N.Y., 76 NY 60 (1879).
81. Klein v. Town of Pittstown, 241 AD 202 (3rd Dept. 1934).
82. Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946). *Supra* Endnotes 31 and 79.
83. Mennito v. Town of Wayland, 56 NYS2d 654 (Supreme Ct. Steuban Co. 1943). *Supra* Endnote 30.
84. Fuller v. State, 46 NYS2d 762 (Ct. of Claims 1944).
85. Foster v. Webster, 8 Misc 2d 61 (Supreme Ct., Broome Co. 1943).
86. Wilson v. City of New York, 1 Denio 595 (1845).
87. Fuller v. State, 46 NYS2d 762 (Ct. of Claims 1944). *Supra* Endnote 84.
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89. Tremblay v. Harmony Mills, 171 NY 598 (1902).
90. Noonan v. City of Albany, 79 NY 470 (1880). *Supra* Endnote 29.
91. Laduca v. Draves, 145 AD 159 (4th Dept. 1911).
92. Foster v. Webster, 8 Misc 2d 61 (Supreme Ct., Broome Co. 1943). *Supra* Endnote 85.
93. Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946). *Supra* Endnotes 31, 79 and 82.
94. Mennito v. Town of Wayland, 56 NYS2d 654 (Supreme Ct. Steuban Co. 1943). *Supra* Endnotes 30 and 83.
95. Costanzo v. State of New York, 207 Misc 242 (Ct. of Claims 1955).
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100. Logan v. State of New York, 162 Misc 793 (Ct. of Claims 1937), *aff'd* 254 AD 410 (3rd Dept. 1938).
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102. Wilson v. City of New York, 1 Denio 595 (1845). *Supra* Endnote 86.
103. Lynch v. State of New York, 76 NY 60 (1879). *Supra* Endnote 80.
104. Klein v. Town of Pittstown, 241 AD 202 (3rd Dept. 1934). *Supra* Endnote 81.
105. Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946). *Supra* Endnotes 31, 79, 82 and 93.
106. Mennito v. Town of Wayland, 56 NYS2d 654 (Supreme Ct. Steuban Co. 1943). *Supra* Endnotes 30, 83 and 94.
107. Fuller v. State, 46 NYS2d 762 (Ct. of Claims 1944). *Supra* Endnotes 84 and 87.
108. Foster v. Webster, 8 Misc 2d 61 (Supreme Ct., Broome Co. 1943). *Supra* Endnotes 85 and 92.
109. Wilson v. City of New York, 1 Denio 595 (1845). *Supra* Endnotes 86 and 102.
110. Costanzo v. State of New York, 207 Misc 242 (Ct. of Claims 1955). *Supra* Endnote 95.
111. Carbonaro v. Town of North Hempstead, 31 Misc.3d 1231(A) (Supreme Ct., Nassau Co. 2011), *re'd as modified*, 97 AD3d 624 (2nd Dept. 2012). (By granting Summary Judgment to the Town and finding facts outstanding relative to the County).
112. Bowman v. Chenango, 227 NY 459 (1920). *Supra* Endnote 97.
113. Cook v. State of New York, 26 Misc 2d 1 (Ct. of Claims 1961).
114. Morey v. State of New York, 31 AD2d 990 (3rd Dept. 1969). *Supra* Endnotes 59, 88 and 96.
115. McCormick v. State of New York, 289 NY 572 (1942).
116. Cook v. State of New York, 26 Misc 2d 1 (Ct. of Claims 1961). *Supra* Endnote 113.
117. Christman v. State of New York, 189 Misc. 383 (Ct. of Claims 1947).
118. Alley v. State of New York, 28 AD2d 1147 (3rd Dept. 1967), *mot. for lv. to app. den.*, 21 NY2d 642 (1968)
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121. Gibson v. State of New York, 187 Misc. 931 (Ct. of Claims 1946). *Supra* Endnotes 31, 77, 80, 91 and 104.
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123. Holmes v. State of New York, 32 Misc.2d 1077 (Ct. of Claims 1962). *Supra* Endnote 15.
124. See, Endnote 65.
125. See, Endnote 29.
126. Nassau County v. Cherry Valley Estates, Inc., 281 AD 692 (2nd Dept. 1951).

127. Stormes v. United Water New York, Inc., 84 AD3d 1352 (2nd Dept. 2011).
128. Dutcher v. Town of Shandaken, 23 AD3d 781 (3rd Dept. 2005).
129. See Endnote 9.
130. See, Endnote 11.
131. See, Endnote 22.
132. See, Endnote 11.
133. Michaels v. New York Cent. R. Co., 30 NY 564 (1864).

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