

A municipal builder constructed a strip mall in an area designated as a flood zone, which had a one percent annual chance of flooding. The municipal builder negligently failed to adhere to a local building code that set forth flood-resistant construction requirements on structures built within the zone and imposed penalties for failing to meet those requirements.

Upon completing construction, the municipal builder leased storefronts to various local businesses. The following year, one of the storefronts flooded, destroying all of the merchandise therein. Even if the builder had adhered to the local building code, however, the storefront would have suffered the same damage due to the unusual severity of the flood.

The tenant of the flooded storefront sued the municipal builder in a negligence action for the value of the merchandise destroyed by the flood.

The jurisdiction continues to follow traditional rules regarding municipal tort immunity.

Will the tenant be likely to prevail?

- A. No, because the municipal builder enjoys immunity from tort liability.
- B. No, because the storefront would have suffered the same damage even if the municipal builder had adhered to the local building code.
- C. Yes, because the municipal builder's failure to adhere to the local building code was negligence per se.
- D. Yes, because the risk of damage to the merchandise was the type of risk that the local building code was intended to prevent.

## Explanation:

### Government immunity from tort liability

<b>Federal government</b>	Immunity governed by Federal Tort Claims Act U.S. government waives immunity in tort actions except for: certain enumerated torts (not including negligence) discretionary functions government contractors in products liability cases certain traditional government activities
<b>State governments</b>	Immunity governed by state tort-claims acts (which vary greatly)
<b>Municipalities</b>	Immunity governed by state tort-claims acts Traditional rule – immunity for performance of traditional <i>government</i> functions but not <i>proprietary</i> functions Public-duty rule – no liability to one citizen for failure to fulfill duty owed to public at large unless special relationship exists
<b>Government officials</b>	Immunity for <i>discretionary</i> acts done without malice or improper purpose but not <i>ministerial</i> acts (eg, driving while on government business)

Traditionally, the immunity of a **municipal actor** depended on the act giving rise to the tort claim.\* **Immunity attached** to the performance of **traditional government functions** (eg, police, court systems) but **not** to the performance of a **proprietary function** that is often performed by a private company (eg, utilities, parking lots). Building a shopping mall falls under the latter category, so the municipal builder here is *not* immune from tort liability **(Choice A)**.

However, the tenant will only prevail in this **negligence** action if the tenant proves that the builder's negligent failure to adhere to the local building code actually and proximately **caused** the tenant's harm. **Actual causation** exists when, **but for** the defendant's **tortious conduct**, the plaintiff's **harm would not have occurred**. Since the storefront would have suffered the same damage *even if* the builder had adhered to the building code, the builder's negligence was not the actual cause of that harm. Therefore, the tenant is unlikely to prevail.

\*Today, municipal tort liability is usually governed by the provisions of state tort-claims acts.

**(Choice C)** Violating a statute (eg, building code) can constitute **negligence per se** (ie, negligence as a matter of law). But unless that negligence actually and proximately caused the plaintiff's injuries, there can be no liability.

**(Choice D)** While the risk of flood damage (eg, destruction of merchandise) was the very risk that the local building code was imposed to address, compliance with the code would not have prevented the damage to the storefront here.

**Educational objective:**

Traditionally, municipal tort immunity attached to the performance of traditional government functions but not to the performance of proprietary functions that are usually performed by a private company.

**References**

Restatement (Second) of Torts § 895C cmt. e (Am. Law Inst. 1981) (governmental and proprietary functions).

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