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Municipal Liability and Immunity: State Statutes

Author

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The information contained in this article is not intended as legal advice and may no longer be accurate due to changes in the law. Consult NHMA's legal services or your municipal attorney.

This article summarizes the principal statutes that limit municipal liability and that also afford legal protections for public officials, employees and volunteers.

General Municipal Liability- RSA Chapter 507-B

In 1975 the Legislature enacted RSA Chapter 507-B regulating the liability of governmental units. The statute limits the amount of money damages a municipality can be required to pay for claims for bodily injury, personal injury or property damage, arising out of the municipality's ownership, occupation, maintenance or operation of motor vehicles and premises. "Property damage" has been held not to include real property. *Cannata v. Deerfield*, 132 N.H. 235 (1989). A fire department does not "occupy" premises when it is fighting a fire. *Farm Family Cas. Ins. Co. v. Rollinsford*, 155 N.H. 669 (2007). The plaintiff must establish a causal nexus between the injury and the municipality's ownership, occupation, maintenance or operation of a motor vehicle or premises. *Crosby v. Strafford County Correctional, U.S. District Court for New Hampshire, No. 2014 DNH 100* (June 2, 2015).

The statutory limits for damages are \$275,000 per person and \$925,000 per occurrence. These limits of liability, however, do not apply if the insurance coverage applicable to any particular claim exceeds the statutory liability limits. This principle was established in *Marcotte v.*

Timberlane Regional School Dist., 143 N.H. 331 (1999). In that case, an improperly secured metal soccer goal located on school property tipped over and killed a second-grade pupil. The school district's liability insurance policy had a limit in excess of the statutory cap. The Court held that the policy limit, not the statutory cap, was applicable. This principle is now codified in RSA 507-B:7-a. The statute affords the same limits, and principles of coverage apply to individual officials so long as they act within the scope of their office and in good faith. See, RSA 507-B:4, III. Municipal officials should discuss with their legal and risk management advisors the advantages and disadvantages of liability insurance versus pooled risk management programs as they relate to RSA Chapter 507-B.

A municipality is not liable, in the absence of gross negligence, for hazards on its premises caused solely by snow, ice or other inclement weather if the municipality is acting under a policy or set of priorities for responding to the weather hazards. RSA 507-B:2-b.

Highways and Sidewalks, RSA 231:90 – :92-a

RSA 231:90 – :92-a establishes the scope of a municipality's legal duty to travelers using public highways and sidewalks. A municipality's sole legal duty is to correct "insufficiencies." An "insufficiency" exists when a highway or sidewalk is either not safely passable by those persons or vehicles permitted to use such highway or sidewalk, or there exists a safety hazard not reasonably discoverable or reasonably avoidable by a person when using the highway or sidewalk in a reasonable, prudent and lawful manner. Even if an insufficiency does cause damage, there will be no liability (that is, no breach of duty) on the part of the municipality unless:

- The municipality had received a written notice of the insufficiency, warning it of the defect prior to the injury and failed to post warning signs about the hazard; or
- Municipal officials had actual notice or knowledge of the insufficiency and were grossly negligent or exercised bad faith in responding or failing to respond; or
- The insufficiency was created by an intentional act of a municipal officer or employee acting in the scope of his official duty while in the course of his employment, acting with gross negligence, or with reckless disregard of the hazard.

In the case of *Bowden v. N.H. Dep't of Transportation, 144 N.H. 491 (1999)*, the plaintiffs sued the state for negligence under a theory that their motorcycle accident was caused by a road surface defect. The Court concluded that notice of the defect alleged to cause an injury is required in advance of the accident in order to trigger a potential duty on the part of the defendant and that allegations of constructive notice will not suffice.

Bad Weather: Even if the injury was caused by an insufficiency and even if the town had knowledge of the insufficiency in advance, the town will not be liable if the insufficiency was caused by bad weather, so long as the town had a written bad weather policy adopted in good faith prior to the storm and was following that policy without gross negligence or recklessness. This statutory protection, found at RSA 231:92-a, applies to public highways, bridges and sidewalks, but does not apply to public parking lots or driveways. See *Johnson v. Laconia*, 141 N.H. 379 (1996).

In *Cloutier v. Berlin*, 154 N.H. 13 (2006), the court held that the insufficiency law does not mean that the municipality can never be liable for injuries resulting from defects in a highway, whether in good weather or bad, but it does create a special standard of care that is different from the standard expected of private corporations. The court also clarified that the presence or absence of liability insurance does not change the legal duty owed to users of the highway, but instead changes the amount of monetary damages that may be recovered from a municipality if it is found liable for the injuries caused by a highway defect.

In *Ford v. N.H. Dep't of Transportation*, 163 N.H. 284 (2012), the severe power outage following the 2008 ice storm rendered a traffic signal at the intersection of two state highways inoperable. Local police notified the NH DOT of the problem, but it had not been repaired some 18 hours later when a crash occurred. A person injured in the crash sued both the municipality and the state for negligence. The municipality was found not liable, since it had no duty to maintain the signals on a state highway, and no duty to provide traffic control on a state highway. The state was found not liable because it was following its bad weather policy in good faith and had no additional duty under either state or federal law to provide alternative traffic direction during the period the signal remained in failure.

Good Faith Immunity for Officials, RSA 31:104

Municipal officials, acting in their official capacity and in good faith, are immune from personal liability for claims arising out of discretionary functions. The officials protected include, but are not limited to, members of governing bodies, planning boards and zoning boards of adjustment; city and town managers; county commissioners; regional planning commissioners; school superintendents; welfare officials; and town and city health officers. Note also that this section provides no protection to officials or employees who engage in an intentional tort.

Indemnification for Negligence, RSA 31:105

The governing body of a municipality may vote to indemnify from loss any municipal official or employee against whom a claim is brought after such vote. Indemnification in the context of this statute means to reimburse the official or employee for any financial

loss or expense, including legal fees and costs, arising out of a claim brought against an official or employee in his or her personal capacity. Minutes of the meeting during which the vote is taken should clearly reflect the action. The vote need not be reaffirmed in subsequent years. Once adopted, the decision to indemnify is applicable only to actions constituting negligence and within the scope of the person's employment or office. Indemnification will not be available for intentional or malicious acts.

Indemnification for Civil Rights Violations, RSA 31:106

All municipalities, without the need for local approval, must indemnify officers and employees from damages and awards of attorney's fees for civil rights violations arising their employment or office unless the act or omission was committed with malice.

Protection from Attachment, RSA 31:108

Attachment of an official's or employee's personal assets to secure a judgment is not permissible in those cases where immunity has been granted (RSA 31:104) or indemnification is available (RSA 31:105 and 31:106).

Show Cause Hearing, RSA 491:24

Any time a local official is sued and bad faith is alleged, the trial court must hold a preliminary hearing within 90 days to determine whether there is any basis for the claim. If there is not, and if the judge thinks the suit was filed only to harass the local official, the official may receive his or her costs and attorney's fees incurred in defending the matter.

Immunity for Volunteers, RSA 508:17

Municipal volunteers are immune from liability for negligent acts. In order to be entitled to immunity, there must be a written record indicating that the person is, in fact, recognized by the municipality as a volunteer. The volunteer must have acted in good faith and within the scope of his or her recognized functions and the damage or injury must not have been caused by willful, wanton or grossly negligent misconduct. Be cautious of the definition of "volunteer." "Volunteer" means an individual performing services for a nonprofit organization or government entity who does not receive compensation, other than reimbursement for expenses actually incurred for such services. In the case of volunteer athletic coaches or sports officials, such volunteers shall possess proper certification or validation of competence in the rules, procedures, practices, and programs of the athletic activity.

Although RSA 508:17 no longer requires that a volunteer have prior written approval to act, NHMA recommends that cities and towns continue to require such written authorization for volunteer work. The written authorization should include, at a minimum:

- (a) the scope of work the volunteer is authorized to do, including the applicable time

period, (b) any specific limitations on the scope of work and (c) to whom the volunteer should report.

Immunity for Fire and Rescue Members, RSA 508:12-b

Volunteer, "part paid" and "call" members of municipal fire departments and rescue squads are immune from personal liability for personal injury or property damage "arising out of any act performed or occurring in the furtherance of his [or her] official duties." Immunity is not available for damages arising out of willful misconduct, gross negligence or operation under the influence of drugs or alcohol. This statute does not affect the liability of the municipality served by these volunteers. "Call" member means any member other than a full-time paid employee who receives payment for each emergency response. "Official duties" mean emergency duties only. "Part paid" member means any member other than a full-time paid employee who receives an annual retainer or stipend of less than \$5,000 for his services as a member.

Limited Duty for Fire Departments and Firefighting, RSA 154:1-d

RSA 154:1-d establishes that firefighting or other emergency services provided by a fire department shall not create a duty to any person affected by the response or nonresponse to a call, and the tactics used in firefighting. It also provides that the decisions of fire chiefs shall be entitled to discretionary immunity and that firefighters, paid and unpaid, are covered by RSA 31:105 and :106.

Limited Liability for Skateboarding Facilities, RSA 507-B:11

In the absence of gross negligence, municipalities are immune from injuries caused by operation of a facility, without charge, for skateboarding, rollerblading, stunt biking or rollerskiing.

Immunity for Emergency Management Activities, RSA 21-P:41

Municipalities and emergency management workers are immune from liability for bodily injury and property damage arising out of activities relating to emergency management.

Frivolous Lawsuits RSA 507:15-a

Relief is provided for municipalities (and any other defendant in a civil lawsuit) when they are being sued repeatedly by a vexatious litigant. A "vexatious litigant" is defined as an individual who has been found by a judge to have filed three or more frivolous lawsuits which the judge finds, by clear and convincing evidence, were initiated for the primary purpose of harassment. SA 507:15-a, I. The court may require a vexatious litigant to (1) retain an attorney or other person of good character to represent him or her in all actions; or (2) post a cash or surety bond sufficient to cover all attorneys' fees and anticipated

damages. This statute can provide some relief to a municipality which is being harassed by repeated lawsuits by ensuring the plaintiff will be able to pay the municipality its attorneys' fees and damages if the plaintiff loses and the court orders the plaintiff to pay the municipality those costs.

Stephen C. Buckley is Legal Services Counsel with the New Hampshire Municipal Association. He may be contacted at 603.224.7447 or at legalinquiries@nhmunicipal.org.

TITLE III

TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES

CHAPTER 31

POWERS AND DUTIES OF TOWNS

Liability for Damages Limited, Indemnification, Insurance

Section 31:105

31:105 Indemnification for Damages. – A city, town, county, village district or precinct, school district, chartered public school, school administrative unit, or any other municipal corporation or political subdivision may by a vote of the governing body indemnify and save harmless for loss or damage occurring after said vote any person employed by it and any member or officer of its governing board, administrative staff or agencies including but not limited to selectmen, school board members, chartered public school trustees, city councilors and aldermen, town and city managers, regional planning commissioners, town and city health officers, overseers of public welfare, and superintendents of schools from personal financial loss and expense including reasonable legal fees and costs, if any, arising out of any claim, demand, suit, or judgment by reason of negligence or other act resulting in accidental injury to a person or accidental damage to or destruction of property if the indemnified person at the time of the accident resulting in the injury, damage, or destruction was acting in the scope of employment or office.

Source. 1973, 595:1. 1991, 72:2. 1995, 260:2, eff. July 1, 1995. 2008, 354:1, eff. Sept. 5, 2008. 2010, 214:2, eff. Jan. 1, 2011.



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CHAPTER 31
POWERS AND DUTIES OF TOWNS

Liability for Damages Limited, Indemnification, Insurance

Section 31:106

31:106 Indemnification; Civil Rights Suits. – All cities, towns, counties, village districts and precincts, school districts, chartered public schools, school administrative units, and other municipal corporations and political subdivisions shall indemnify and save harmless any person employed by it and any member or officer of its governing board, administrative staff, or agencies including but not limited to selectmen, school board members, chartered public school trustees, city councilors and aldermen, town and city managers, regional planning commissioners, town and city health officials, overseers of public welfare, and superintendents of schools from personal financial loss and expense including reasonable legal fees and costs, if any, arising out of any claim, demand, suit, or judgment by reason of any act or omission constituting a violation of the civil rights of an employee, teacher or student, or any other person under any federal law if such act or omission was not committed with malice, and if the indemnified person at the time of such act or omission was acting within the scope of employment or office.

Source. 1973, 595:1. 1991, 72:3. 1995, 260:3, eff. July 1, 1995. 2008, 354:1, eff. Sept. 5, 2008. 2010, 214:3, eff. Jan. 1, 2011.

Fw: Forms, Guidelines, and Questions :)

From Welfare - Elizabeth Labbe <welfare@warnernh.gov>

Date Tue 2023-12-05 1:14 PM

To Alfred 'Butch' Burbank - Interim Town Administrator <administrator@warnernh.gov>

 4 attachments (4 MB)

Forms for Welfare Admin.zip; 2021 NHMA Model Welfare Guidelines with comments.pdf; Edited Warner's Welfare Guidelines.pdf; Welfare app.pdf;

Hi Butch - this is the email that has the links about the RSAs we should adopt to protect employees. Please see below - RSA 31:105 and 31:106.
Elizabeth

From: Welfare - Elizabeth Labbe

Sent: Wednesday, September 28, 2022 5:21 PM

To: Diane Ricciardelli - Town Administrator <administrator@warnernh.gov>; Judy Newman-Rogers - Selectboard Admin <selectboard@warnernh.gov>; Sam Bower - Selectboard <sbower@warnernh.gov>; Lois Shea - Selectboard <loisshea@warnernh.gov>; Christine Frost - Selectboard <christinefrost@warnernh.gov>

Subject: Forms, Guidelines, and Questions :)

Hi All,

Hope this finds everyone doing well!

I'm going to try to get everything in this email.

Thank you, Diane, for updating the job description!

Thank you, Lois, for sending the information about the resource centers!

We've tackled a big responsibility - Please see section IX:E of the edited guidelines. Speaks to our allowable levels of assistance.

Please let me know if Warner has adopted RSA 31:105 and 31:106? These were mentioned in my last training and have to do with indemnification on private property. <http://gencourt.state.nh.us/rsa/html/III/31/31-105.htm> <http://www.gencourt.state.nh.us/rsa/html/III/31/31-106.htm>

Section 31:105 Indemnification for Damages. - New Hampshire General Court

TITLE III TOWNS, CITIES, VILLAGE DISTRICTS, AND UNINCORPORATED PLACES CHAPTER 31 POWERS AND DUTIES OF TOWNS Liability for Damages Limited, Indemnification, Insurance



gencourt.state.nh.us

I've included a copy of the original/template guidelines and the edited version, so you can see what I changed if interested.

Please see the 3-ring binder for a visual picture of the application process - there are a couple of flow charts to help with the process and the most up to date version of our edited guidelines.

I've also attached a .zip file of all other documents and updated application.

I also want to take a moment to point out that we had, what I believe to be, an exceptional case at the beginning of the year. The cost was over \$10000 for this one case. I do not think this will happen often.

I'd love to see a training for small town Overseers of Public Welfare. <https://www.nhmunicipal.org/demand-training>

On-Demand Training | New Hampshire Municipal Association

New Hampshire Municipal Association 25 Triangle Park Dr. Concord, NH 03301 603.224.7447
nhmainfo@nhmunicipal.org

www.nhmunicipal.org

Please let me know if you have any questions or suggestions.

Thank you,

Elizabeth Labbe

