



STATE OF NEW HAMPSHIRE RETAIL COMPENDIUM OF LAW

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Retail, Restaurant, and Hospitality Guide to New Hampshire Premises Liability

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THE NEW HAMPSHIRE COURT SYSTEM

1. State Court

- A. **Judicial selection.** Supreme Court justices, Superior Court justices, Probate Court judges and District Court judges are appointed for life by the governor with the approval of the executive council and hold their offices "during good behavior." See N.H. Const. Part 2, Art. 73.
- B. **Structure.** New Hampshire's unified judicial system features 3 levels of courts. Those levels from highest authority to lowest consist of the Supreme Court, Superior Court and Circuit Courts (comprising the state District Court, Probate Court and Family Court).
- i. **Supreme Court.** The Supreme Court is New Hampshire's only appellate court. It has "general superintendence of all courts of inferior jurisdiction to prevent and correct error and abuses . . ." *See* N.H. Rev. Stat. Ann. § 490:4.
 - ii. **Superior Courts.** The Superior Courts are courts of general jurisdiction, with power to hear all suits at law and in equity, except those specifically reserved for the district or probate courts. *See* N.H. Rev. Stat. Ann. §§ 491:7, 498:1. New Hampshire has eleven Superior Courts, one in each county with the exception of Hillsborough County which has two.
 - iii. **Circuit Courts.** On July 1, 2011, the New Hampshire Circuit Court began operation. This merged the District Courts, Probate Courts, and the Family Division. The 10 Circuit Courts handles approximately 90 percent of the cases filed in the state court system. Jurisdictions for the district, probate and family divisions of the Circuit Court are the same as the prior District and Probate Courts and Family Division. Court locations, addresses, telephone numbers, rules, filing procedures and scheduling are also the same in the District, Probate and Family Divisions of the Circuit Court.
 - a) **District Courts.** The District Courts are located throughout the state. *See* N.H. Rev. Stat. Ann. § 502-A:1. These courts have exclusive jurisdiction over civil claims that do not exceed \$1,500 and do not involve title to real estate, but trial by jury is not provided in the District Courts. The Circuit Courts have concurrent jurisdiction with the Superior Courts over civil actions where the damages claimed do not exceed \$25,000 and which do not involve title to real estate. Concurrent jurisdiction of any Circuit Court can be increased to \$50,000 by the Supreme Court under certain conditions. *See* N.H. Rev. Stat. Ann. § 502-A:14, II-a. If the amount in controversy is greater than \$1,500 or the title to real estate is involved, a defendant may request a jury trial within statutorily prescribed

time limits. Such a request will result in an immediate transfer to the Superior Court. See N.H. Rev. Stat. Ann. § 502-A:15.

- b) **Small Claims Court.** Small claims court is a non-jury proceeding in the District Court when the claim does not exceed \$5,000 and does not involve title to real estate. It is a simplified and informal procedure and the claim be prosecuted by an individual acting *pro se* or by the individual's attorney. If the amount in controversy is greater than \$1,500, the defendant may request a jury trial within the statutorily prescribed time limit, which will result in an immediate transfer of the claim to Superior Court. *See* N.H. Rev. Stat. Ann. § 503.

C. **New Hampshire Federal Courts**

New Hampshire has only 1 Federal District Court, which sits in Concord. There are 3 full time Article III judges, 2 Senior Judges and 1 United States Magistrate Judge. New Hampshire is a member of the First Circuit. There are 2 members of the First Circuit from New Hampshire, along with retired Supreme Court Justice David Souter who sits with the First Circuit by designation.

NEGLIGENCE

A. **General Negligence Principles**

Under New Hampshire law, premises owners are governed by the test of reasonable care under all the circumstances in the maintenance and operation of their premises. *See Simpson v. Wal-Mart Stores*, 144 N.H. 571, 574 (1999). A premises owner owes a duty to entrants to use ordinary care to keep the premises in a reasonably safe condition, *see True v. Meredith Creamery*, 72 N.H. 154, 156, (1903), to warn entrants of dangerous conditions and to take reasonable precautions to protect them against foreseeable dangers arising out of the arrangements or use of the premises. *Pridham v. Cash & Carry Bldg. Center, Inc.*, 116 N.H. 292, 294-95, (1976). Accordingly, under New Hampshire law, a premises owner is subject to liability for harm caused to entrants on the premises if the harm results either from: (1) the owner's failure to carry out his activities with reasonable care; or (2) the owner's failure to remedy or give warning of a dangerous condition of which he knows or in the exercise of reasonable care should know. *Partin v. Great A & P Tea Co.*, 102 N.H. 62, 63-64 (1959); *see Restatement (Second) of Torts* §§ 341-A, 343 (1965). *Rallis v. Demoulas Super Markets, Inc.*, 159 N.H. 95, 99 (2009)

Comparative Fault. Under New Hampshire law a plaintiff may recover when the plaintiff's own negligence is not greater than the causal negligence of the defendant or defendants, if more than one. When the percentage of negligence attributable to the plaintiff is 50% or less, the amount recovered is calculated by reducing the total damages, as determined by the finder of fact, in proportion to the negligence of the plaintiff.

Apportionment Among Multiple Defendants. Under New Hampshire law, apportionment of liability may include all parties to a transaction or occurrence giving rise to a plaintiff's injuries. This includes parties that have settled, parties that were not sued and parties that are immune. "[A]llegations of a non-litigant tortfeasor's fault must be supported by adequate evidence before a jury or court may consider it for fault apportionment purposes." *DeBenedetto v. CLD Consulting Eng'rs, Inc.*, 153 N.H. 793, 805 (2006). A party found to be less than 50% at fault is only severally liable. Those over 50% at fault are jointly and severally liable.

B. Elements of a Cause of Action of Negligence

New Hampshire recognizes and requires the standard elements for a negligence action: Duty to Exercise Reasonable Care, Breach of Duty, Legal Causation, Damages. The duty of reasonable care is owed only to such persons as a reasonably prudent owner/landlord under the same or similar circumstances should have reasonably foreseen or expected to be exposed to the risk of harm on the premises. *Ianelli v. Burger King Corp.*, 145 N.H. 190 (2000); *Model Jury Instructions* 6.1; 11.1.

C. The "Out of Possession Landlord"

In New Hampshire, it does not matter if the landlord is out of possession. Landlords must act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk. The questions of control, is relevant only inasmuch as it bears on the basic tort issues such as reasonableness of conduct, the foreseeability, failure to act and unreasonableness of the particular risk of harm. *Sargent v. Ross*, 113 N.H. 388, 398 (1973).

"SLIP AND FALL" TYPE CASES

Under New Hampshire law, "owners and occupiers of land shall be governed by the test of reasonable care under all the circumstances in the maintenance and operation of their property." *Ouellette v. Blanchard*, 116 N.H. 552, 557 (1976). A property owner or occupier may be liable for failing to remedy or warn of a dangerous condition of which he knows or in the exercise of reasonable care should know-the landowner's duty of care depends upon whether he had actual or constructive notice of the dangerous condition. *See Partin*, 102 N.H. at 64; *Restatement (Second) of Torts, supra* § 343. In "slip and fall" cases, we have found that a landowner may have constructive knowledge that an item has fallen to the floor based upon the length of time it was there. *See Sears, Roebuck & Co. v. Philip*, 112 N.H. 282, 283 (1972); *Partin*, 102 N.H. at 64.

A. Snow and Ice – The "Storm in Progress" Doctrine

New Hampshire has not adopted the "Storm in Progress" Doctrine. Landlords will be held to the standard of care described above. Of course, a plaintiff will also be held to a standard of care in encountering conditions during a storm in

progress. The landlord must remove ice and snow from entrances and driveways under his control within a reasonable time after the end of the storm. *Dubreuil v. Dubreuil*, 107 N.H. 519 (1967).

B. “Black Ice”

Landlords will be held to the standard of care described above. For example, if the landlord knew or should have known that black ice was likely to occur in a particular location based on past experience and did nothing to address or warn of the potentiality, then liability may attach.

C. Liability of Snow Removal Contractors

When a possessor of business premises employs an independent contractor to maintain such premises, he is subject to liability for the independent contractor's negligence. Although a possessor of business premises “is free to delegate the duty of performance to another ... he cannot thereby avoid or delegate the risk of non-performance of the duty.” *Valenti v. NET Properties Mgmt., Inc.*, 142 N.H. 633, 636 (1998).

D. Slippery Surfaces – Cleaner, Polish, and Wax

Landlords will be held to the standard of care described above. For example, if the landlord knew or should have known that surfaces were made slippery or were usually slippery after application of cleaner, polish or wax, did nothing to address or warn of the potentiality, then liability may attach.

E. Defenses

The most common defense to slip and fall type accidents is comparative fault – i.e. the plaintiff knew or should have known of the hazard and proceeded nonetheless. Often called assumption of the risk, New Hampshire treats this as part of comparative fault. Because of the non-delegable duty placed on property owners, pointing to the party contracted to provide the maintenance will be of no avail.

LIABILITY FOR VIOLENT CRIME

Under New Hampshire Law, landlords have no general duty to protect tenants from criminal attack. However, such a duty may arise when a landlord has created, or is responsible for, a known defective condition on a premises that foreseeably enhanced the risk of criminal attack. Moreover, a landlord who undertakes, either gratuitously or by contract, to provide security will thereafter have a duty to act with reasonable care. Where, however, a landlord has made no affirmative attempt to provide security, and is not responsible for a physical defect that enhances the risk of crime, New Hampshire will not impose such a duty. The New Hampshire Supreme Court has rejected liability based solely on the landlord-tenant relationship or on a doctrine of overriding foreseeability.

Walls v. Oxford Mgmt. Co., Inc., 137 N.H. 653, 659 (1993); *Ward v. Inishmaan Associates Ltd. P'ship*, 156 N.H. 22, 26 (2007).

CLAIMS ARISING FROM THE WRONGFUL PREVENTION OF THEFTS

A. False Arrest and Imprisonment

A merchant, or his agent, is justified in detaining any person who he has reasonable grounds to believe has committed the offense of willful concealment or shoplifting, as defined by RSA 644:17, on his premises as long as necessary to surrender the person to a peace officer, provided such detention is conducted in a reasonable manner. The merchant must act reasonably under the circumstances. RSA 627:8-a; *Panas v. Harakis*, 129 N.H. 591, 615 (1987)

B. Malicious Prosecution

Under New Hampshire law, malicious prosecution is a civil action following a criminal prosecution that was brought without probable cause and with malice, and which resolved in favor of the plaintiff. *Model Jury Instruction* 21.1. In other words, the defendant initiated or procured the criminal prosecution not to seek justice, but rather out of ill will or to seek personal advantage. *Welch v. Bergeron*, 115 N.H. 179 (1975); *Robinson v. Fimbel Door Co.*, 113 N.H. 348 (1973).

C. Defamation

To establish defamation, a plaintiff must prove that defendant failed to exercise reasonable care in publishing without a valid privilege a false and defamatory statement of fact about the plaintiff to a third party. *Independent Mech. Contrs. v. Gordon T. Burke & Sons*, 138 N.H. (1993).

D. Negligent Hiring, Retention, or Supervision of Employees

New Hampshire recognizes a cause of action for negligently hiring and retaining an employee that the employer knew or should have known was unfit for the job, so as to create a danger of harm to third persons. *Marquay v. Eno*. 139 N.H. 708 (1995).

INDEMNIFICATION AND INSURANCE PROCUREMENT AGREEMENTS

A. Generally. Indemnity is a common law remedy that shifts the entire loss from one who is compelled by legal obligation to pay a judgment occasioned by the initial negligence of another, despite no active fault on his part, and for which that person only is liable secondarily. *Jaswell Drill Corp. v. Gen. Motors Corp.*, 129 N.H. 341, 346 (1987). “[O]ne joint tortfeasor ha[s] a right to indemnity ‘against another where the indemnitee’s liability is derivative or imputed by law . . . or where an express or implied duty to indemnify exists.’” Id.

- i. **Express or implied.** The right of indemnification may be based upon a contract to indemnify. “[E]xpress language is not necessary to obligate a contractor to protect against injuries resulting from the owner's negligence where the parties' intention to afford such protection is clearly evident.” *Commercial Union Assurance Co. v. Brown Co.*, 120 N.H. 620, 623 (1980). “In interpreting an indemnification contract, In interpreting indemnity provisions the same rules apply as are used to interpret contracts generally.” *Id.* The New Hampshire Supreme Court has “found an implied duty to indemnify in two cases: *Sears, Roebuck & Co. v. Philip*, 112 N.H. 282 (1972), and *Wentworth Hotel v. Gray, Inc.*, 110 N.H. 458 (1970). In each case the indemnitor had agreed to perform a service for the indemnitee. In each, the indemnitor was assumed to have performed negligently. And in each, the result was a condition that caused harm to a third person in breach of a non-delegable duty of the indemnitee. In neither was the indemnitee assumed to have been negligent, at least beyond a failure to discover the harmful condition.” *Collectramatic v. KY Fried Chicken Corp.*, 127 N.H. 318, 321 (1985). “The rationale for finding an implied agreement to indemnify in that situation is based on ‘the fault of the indemnitor as the source of indemnitee's liability in the underlying action and, conversely, the indemnitee's freedom from fault in bringing about the dangerous condition.’” *Jaswell Drill Corp. v. Gen. Motors Corp.*, 129 N.H. 341, 346 (1987).
- ii. **Indemnification for own negligence.** Although New Hampshire law generally prohibits exculpatory contracts which indemnify a person for his own negligence, the court will enforce them if: (1) they do not violate public policy; (2) the plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and (3) the plaintiff's claims were within the contemplation of the parties when they executed the contract. *See Barnes v. N.H. Karting Assoc.*, 128 N.H. 102, 106-07 (1986). In interpreting an exculpatory contract, the court gives the language used by the parties its common meaning and gives the contract itself the meaning that would be attached to it by a reasonable person. As long as the language clearly and specifically indicates the intent to release the defendant from liability for personal injury caused by the defendant's negligence, the agreement will be upheld. New Hampshire strictly construes exculpatory contracts against the defendant. *Id.*

B. Insurance Procurement Agreements

Parties to a contract are free to contractual obligate one party to obtain insurance and to name the other as an insured, usually as part of an express indemnification clause. In addition to a claim for express indemnification, failure to acquire such insurance would expose the failing party to a breach of contract action. *Mansfield v. Federal Services Finance Corp.* 99 H.H. 352 (1955).

C. The Duty to Defend

The duty to defend is determined by whether the cause of action against the insured alleges sufficient facts in the pleadings to bring the claim within the express terms of the policy, regardless of whether the suit may end up in favor of the insured. *USF&G v. Johnson Shoes, Inc.*, 123 N.H. 148 (1983). The duty to defend is broader than the duty to indemnify. *Id.* Any doubt as to whether or not the claim triggers insurance coverage must be resolved in favor of the insured. *Happy House Amusement, Inc. v. N.H. Ins. Co.*, 135 N.H. 719 (1992).

DAMAGES

A. Introduction – the Importance of Understanding Damages

Damages in New Hampshire are designed to be remedial and not punitive. Compensatory damages are supposed to restore an injured person to as near a position as he would have been but for the injury. *Durocher v. N.Y. Cas., Co.*, 99 N.H. 129 (1954). New Hampshire does not recognize or allow punitive damages. N.H. Rev. Stat. Ann. § 507:16. The best outline of damages and the manner of calculating those is found in Murphy & Pope, *New Hampshire Civil Jury Instructions* (revised edition) Chapter 9; *see also* McNamara, *New Hampshire Practice: Personal Injury Tort and Insurance Practice*, Section 11 (Third Edition) (“McNamara”).

B. Compensatory Damages

i. General Damages

Disfigurement. Disfigurement is impairment of or injury to the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner. See BLACK’S LAW DICTIONARY 468 (6th ed. 1990). Disfigurement is a recognized element of common law damages. See *Alonzi v. Ne. Generation Servs. Co.*, 156 N.H. 656 (2008). (distinguishing workers compensation recovery from tort recovery).

Disability. Future disability as a result of permanent injury is an accepted element of personal injury damages. *See* McNamara §11.05. Such

permanent impairment damages are often subsumed within the Hedonic Damages category. See *Bennett v. Lembo*, 145 N.H. 276 (2000). New Hampshire recognizes the AMA Guidelines for Evaluation of Permanent Injuries, but has indicated that competent expert testimony is required on the application of the Guidelines. *Figliori v. R.J. Moreau Cos., Inc.*, 151 N.H. 618 (2005).

Past and Future pain and suffering. “Reasonable compensation for pain and suffering experienced to date and which will probably be experienced in the future” may be awarded. *Model Instruction 9.6.4*. While a plaintiff may not use a “per diem” argument for such an award, *Duguay v. Gelinis*, 104 N.H. 182 (1962), he can argue a lump sum to the jury. *Rodriquez v. Webb*, 141 N.H. 177 (1996). Formulae or mathematical tools are not allowed to compute such damages. *Steel v. Bemis*, 121 N.H. 425 (1981).

Emotional Distress. Emotional distress damages are recoverable for both negligent and intentional infliction claims. For both, the plaintiff must prove that the emotional distress has manifested itself through physical symptoms. He must use expert testimony to prove that the physical symptoms are due to the emotional injury. *In re Crematory, LLC*, 155 N.H. 781 (2007); *Morancy v. Morancy*, 134 N.H. 493 (1991). For claims of intentional infliction, the plaintiff must prove that the defendant acted intentionally or recklessly; the acts were extreme and outrageous; and that the caused distress was severe. *Morancy*, 134 N.H. at 494

Hedonic damages. New Hampshire has defined hedonic or loss of enjoyment of life damages as “the deprivation of certain pleasurable sensations and enjoyment through impairment or destruction of the capacity to engage in activities formerly enjoyed by the injured plaintiff.” *Bennett v. Lembo*, 145 N.H. 276 (2000). They are available in cases in which the plaintiff is claiming permanent injury or death and are designed to compensate a plaintiff for not being able to carry on and enjoy a life in the same manner he would have had the accident not occurred. *Model Jury Instruction 9.9*; *DeBenedetto v. CLD Consulting Eng’rs, Inc.*, 153 N.H. 793 (2006) (upholding \$3 million hedonic damages award in wrongful death case).

ii. Special Damages

Past medical bills. Past medical bills are recoverable and are not subject to set-off for insurance proceeds received under the collateral source rule. There is presently a split among trial courts on whether a plaintiff is entitled to put before the jury the entire medical bill for services, or only that amount which her insurer paid, provided that the provider “wrote off” the balance.

Future medical bills. Future medical bills are recoverable if the plaintiff proves by a preponderance of the evidence that such expenses will probably be required and given in the future. *Model Jury Instruction 9.6.1.*

C. Nominal Damages

New Hampshire permits Nominal Damages.

D. Punitive Damages

New Hampshire does not allow Punitive Damages. N.H. Rev. Stat. Ann. § 507:16; Crowley v. Global Realty, Inc., 124 N.H. 814 (1984); Munson v. Raudonis, 118 N.H. 474, (1978); Vratsenes v. N.H. Auto Inc., 112 N.H. 71 (1972).

Enhanced Compensatory Damages. Enhanced Compensatory Damages may be awarded when the tort is committed wantonly, maliciously, or oppressively. In Munson v. Raudonis, 118 N.H. 474, 479 (1978), the Court stated “instead of allowing an award of damages to be based on implied or legal malice [citation omitted], we prefer to base such an award only on a showing of actual malice. [Citation omitted]. It must be ill will, hatred, hostility or even motive on the part of the defendant. Without such a showing, the mere commission of a tort will not give rise to the aggravated circumstances necessary for the award of liberal compensatory damages. Enhanced compensatory damages are awarded only in exceptional cases, and not in every intentional tort.” Id. The enhanced damages must bear some relationship to the actual compensatory damages suffered by the plaintiff and reflect aggravating circumstances. Id.; Model Instruction 9.14.

E. Wrongful Death

i. Pecuniary Loss

An administrator of the estate of a decedent in a wrongful death action may seek to recover the mental and physical pain suffered by the deceased in consequence of the injury, the reasonable expenses occasioned to the estate by the injury, the probable duration of life but for the injury, and the capacity to earn money during the deceased party's probable working life, may be considered as elements of damage in connection with other elements allowed by law, in the same manner as if the deceased had survived. N.H. Rev. Stat. Ann. § 556:12, I.

ii. Survivor Action

Loss of consortium. New Hampshire defines “loss of consortium” to include loss of comfort, society, companionship, sex and services of the decedent spouse. N.H. Rev. Stat. Ann. § 556:12, II; Model Instruction 9.10. It is available to surviving spouses subject to a \$150,000 cap and to each surviving minor child subject to a \$50,000 cap per child. N.H. Rev. Stat. Ann. §§ 556:12(II) and (III). Any loss of consortium claim is subject to reduction for the comparative fault of the decedent. Id.