Primer on State and Municipal Immunity Issues

I. Introduction

Cases that involve state and/or municipal immunity issues are rife with legal landmines. Some issues are easy to spot, while others are not. In addition, the brief history of New Hampshire case law on state and municipal tort liability has revealed that local courts are far from reluctant to enter judgment against Plaintiffs on account of immunity. For these reasons and more, it is imperative to issue spot and screen potential cases against municipal or state defendants pre-suit and as effectively as possible. Ultimately, a complaint in a case against a state or municipal defendant should be uniquely detailed and read more like an opposition to a motion to dismiss than a boilerplate car accident complaint. The article aims to provide a 30,000-foot view of the more prevalent immunity issues that local practitioners may consider in assessing any such case.

I. Municipal vs. State Tort Liability

In New Hampshire, there are many immunity issues that differ appreciably depending on whether the defendant is a municipal or state entity. New Hampshire is one of just a handful of states that features entirely different statutes governing the tort liability of municipal defendants and state defendants. In short, RSA 507-B, which applies to claims against municipalities, shares little in common with RSA 541-B, which applies to claims against the state.

The first important difference to be aware of is the applicable pre-suit procedure and notice requirement. Sending appropriate notice should be your first step after being retained, and it certainly should not be delayed by your pre-suit investigation, which may take months or longer. Per RSA 507-B:7, it is a condition precedent to filing suit against a municipality that the clerk of the government unit must be notified by registered mail within 60 days after the time of injury or damage or discovery of the injury of the damage. While the burden is on the governmental unit to show that it was substantially prejudiced if it did not receive timely notice, it is often easy to avoid this becoming an issue. Conversely, RSA 541-B:14 allows for a little more time, requiring notice within 180 days after the time of the injury or damage or discovery of the injury or damage.

These two immunity statutes also take opposite approaches to the scope of tort liability. Whereas RSA 541-B:19 permits all claims against the state except for those prohibited by statute, RSA 507-B:2 and RSA 507-B:5 prohibits all claims against municipalities except for those permitted. The permitted claims against municipalities under 507-B are limited to those "arising out of ownership, occupation, maintenance or operation of all motor vehicles, and all premises." The Supreme Court of New Hampshire has made it clear that there can be no liability if this nexus is not met - even while recognizing that "most personal injury actions are unlikely to involve a nexus with a premises or a vehicle."[1] Thus, the scope of claims permitted against municipalities under RSA 507-B is much more limited than those permitted against the state under RSA 507-B. If there is any doubt as to whether the requisite nexus will be met in a claim against a municipality, legal research must be conducted before filing suit. If you determine pre-suit that your potential claim against a municipal defendant does not

[1] *Dichiara v. Sanborn Reg'l Sch. Dist.*, 165 N.H. 694, 698, 82 A.3d 225, 229 (2013)

satisfy this nexus requirement, certain alternative approaches to liability may still be available as discussed in section III below.

Even if a municipal claim satisfies this required nexus, there are additional and unique legal standards that may apply depending on the type of municipal case at issue. For example, per RSA 507-B:2, the liability of a municipality "with respect to its sidewalks, streets, and highways shall be limited as provided in RSA 231." RSA 231:92 sets forth lofty legal standards for any sidewalk or roadway claims and, in short, allows liability only when the municipality has actual notice of the hazard and an adequate opportunity to respond. RSA 507-B:2 also states that the "liability of any governmental unit with respect to publicly owned runways and taxiways shall be limited as set forth in RSA 422."

Moreover, RSA 507-B:11 affords immunity to municipalities and school districts that, without charge, permits any person to use a facility operated by the municipality or school district for the purpose of skateboarding, rollerblading, stunt biking, or rollerskiing - but only in the absence of gross and wanton negligence. And, RSA 507-B:2-b affords immunity when the hazard(s) at issue are: 1) "caused solely by snow, ice, or other inclement weather;" and 2) "the governmental unit's failure or delay in removing or mitigating such hazards is the result of its implementation, absent gross negligence or reckless disregard of the hazard, of a winter or inclement weather maintenance policy or set of priorities with respect to such premises…"

It is critical to determine upfront what statute(s) and legal standard(s) will apply to your state or municipal claims because all else will flow from that. For starters, the applicable legal standard will dictate the scope and purpose of your pre-suit investigation. Consider that the "gross and wanton negligence" standard for skatepark claims is more relaxed than the actual notice/opportunity to respond standard for highway and sidewalk claims. For skatepark claims, a viable claim may be founded on complaints about the skatepark posted on a local town's Facebook page, and which the town disregarded or failed to act on. For a highway or sidewalk claim, this type of constructive knowledge may not be enough, and one may need to do a more comprehensive investigation, including 91-A Right to Know requests for prior, similar incidents, and minutes from town meetings. For any claim against a municipality involving inclement weather, one may also consider issuing a 91-A Right to Know request to the municipality for "any and all winter or inclement weather maintenance policies or written set of priorities regarding the same." If no such policy exists, then the RSA 507-B:2-b immunity defense would not even be available based on the plain language of the statute.

While RSA 541-B is less nuanced than RSA 507-B in many regards, it is still important to be intimately familiar with RSA 541-B. For example, 541-B:9 provides that jurisdiction depends on the amount of damages claimed, with the superior court only having original and exclusive jurisdiction for claims above $50,000. And RSA 541-B:21 and RSA 541-B:21-a state that claims arising from the clinical services provided to the Department of Health and Human Services and the Department of Corrections are limited to the cap afforded by RSA 541-B:14, even if the nonprofit entity procured an insurance policy.

RSA 507-B and RSA 541-B also afford different statutory caps. RSA 541-B:11 limits awards against the state to "an award not to exceed $475,000 per claimant and $3,750,000 per any single incident, or the proceeds from any insurance policy procured pursuant to RSA 9:27." RSA 507-B:4 limits awards against a municipality to $325,000, which applies in the aggregate to all actions by one person against a governmental unit in a "single incident or occurrence," and further limits awards to "any number of persons in a single incident or occurrence" to $1,000,000. There is no bright line rule as to what would

be considered a "single incident" or "occurrence" under either statute. For example, in a claim against one of New Hampshire's county-operated nursing homes, it is certainly possible to envision circumstances in which one may argue that there are two or more incidents or occurrences at issue (e.g. two or more falls resulting in injury), and that the applicable cap should therefore be $325,000 multiplied by the number of incidents or occurrences at issue. If a case involves two or more municipal or state defendants, it could also be argued that the cap should be applied per defendant, and therefore multiplied by the number of defendants.

II. Global Immunity Issues

There are certain immunity issues that will be governed by the same legal standard regardless of whether the defendant is a municipal or state defendant.[2] Unlike the previously discussed statutory immunity provisions that were created by the legislature, most of these global immunity issues are rooted in common law. Examples of such global immunity issues that are rooted in common law include: 1) Discretionary function exception; 2) Public duty doctrine and, more generally, the existence of duty owed; and 3) qualified and/or official immunity. Recreational use immunity would be the rare example of a global immunity issue rooted in statute.[3] These global immunity issues have been well developed in case law, and they are all deserving of their own dedicated article.

III. Alternative Approaches and Considerations

There may be cases in which one can develop causes of action that will not be subject to any immunity provision, be it RSA 507-B, RSA 541-B, or those rooted in common law. A potential case against a county correctional facility for lack of medical treatment for an inmate is a good example of such a case. It may be possible to assert federal causes of action, like a § 1983 claim or an ADA claim, in which case the state law statutes and common law addressed herein would not apply. It may also be possible to assert a medical malpractice claim against private physician(s) tasked with overseeing the care being delivered, whereas certain municipalities in New Hampshire contract such medical services out to private third parties.

One should also be intimately familiar with the history of sovereign immunity in New Hampshire, both to understand the public policy factors in play, as well as to identify new and novel angles and arguments. The first seminal case is *Merrill v. Manchester*, 114 N.H. 722 (1974), in which the Supreme Court of New Hampshire abolished common law blanketed immunity. Shortly after, the legislature would respond by enacting the original versions of RSA 507-B and RSA 541-B. *City of Dover v. Imperial Cas. & Indemn. Co.,* 133 N.H. 109, 575 A.2d 1280 (1990) discusses the legislative response to *Merrill*, and finds unconstitutional a prior version of RSA 507 B:2. Then, just a year later in *Opinion of the Justices,* 134 N.H. 266, 592 A.2d 180 (1991), the Supreme Court of New Hampshire addressed the constitutionality of the legislature's proposed response to *City of Dover*, ultimately finding the proposed RSA 231:92 constitutional. Read together, *City of Dover* and *Opinion of the Justices* seem to support an overlooked proposition – that it is unconstitutional to afford complete immunity to a governmental unit if it has actual notice of a hazardous condition and has had an adequate opportunity to correct that condition. While this ruling was reached in the context of roadway and sidewalk claims,

---

[2] *Bergeron v. City of Manchester*, 140 N.H. 417, 421, 666 A.2d 982, 984 (1995)

[3] RSA 508:14 and RSA 212:34

there does not appear to be any reason why it should not apply equally to any claim against any governmental unit. There are a variety of different ways this "actual notice/opportunity to respond" argument could be applied in novel ways, including in a municipal case in which the circumstances do not meet the requisite nexus to a vehicle or premises. Accordingly, whenever appropriate, one should be careful to plead "actual notice/opportunity to respond" in order to preserve this argument.