

Joint Tortfeasors and Apportionment of Damages

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INTRODUCTION

The law governing joint tortfeasors and apportionment of damages is critically important to a personal injury practitioner. If multiple defendants are joint tortfeasors at common law, a plaintiff may collect the entire judgment from one, some or all of them. They are jointly and severally liable, and apportionment of damages is impermissible. Absent joint tortfeasor status, individual defendants are liable only for damages caused by their respective acts or omissions. It follows that the existence of joint tortfeasor status may substantially affect the ability to collect on a judgment.

New Hampshire common law recognizes the joint tortfeasor rule. Recent legislation has modified the common law, and the present state of the rule is unclear. This article will review and analyze New Hampshire's law on joint tortfeasors and apportionment of damages. Foreign authority will be used to predict how selected factual situations might be determined under existing law.

JOINT TORTFEASORS AT COMMON LAW

New Hampshire is a common law jurisdiction,¹ and as such the judiciary possesses authority to promulgate substantive law.² The joint tortfeasor rule is firmly embedded in New Hampshire jurisprudence: if two or more persons engage in an unlawful enterprise, all are jointly and severally liable for damages caused by any one

of them,³ and no apportionment of damages among defendants is allowed.⁴

New Hampshire law imposes joint tortfeasor status if defendants act in concert by entering into a civil conspiracy or aiding and abetting one another in the commission of an unlawful act. The elements of civil conspiracy are: "(1) two or more persons (including corporations); (2) an object to be accomplished (i.e. an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as a proximate result thereof."⁵ It is important to understand that the conspiracy itself is not actionable;⁶ there must be some additional underlying tort⁷ or breach of duty.⁸

³ *E.g.*, Vidal v. Town of Errol, 86 N.H. 1, 9, 162 A. 232, 237 (1932); Tetreault v. Gould, 83 N.H. 99, 101-02, 138 A. 544, 546 (1927).

⁴ Zebnik v. Rozmus, 81 N.H. 45, 47, 124 A. 460, 461 (1923).

⁵ Jay Edwards, Inc. v. Baker, 130 N.H. 41, 47-8, 534 A.2d 706, 709-710 (1987); *e.g.*, Town of Hooksett School Dist. v. W.R. Grace and Co., 617 F. Supp. 126, 133 (D.N.H. 1984) (fraud); Cohn v. Saidel, 71 N.H. 558, 53 A.800 (1902) (malicious prosecution).

⁶ Langley v. Langley, 84 N.H. 515, 516, 153 A. 9 (1931).

⁷ *E.g.*, Fitzhugh v. Grand Trunk Ry. Co., 80 N.H. 185, 115 A. 803 (1921) (slander and interference with advantageous contractual relationships); Blaisdell v. Davis Paper Co., 75 N.H. 497, 501, 77 A. 485, 487 (1910) (fraud). Most reported cases involve intentional torts, but it is possible to conspire to commit a negligent act. *See*, Wolfe v. Liberis, 153 Ill. App. 3d 488, 106 Ill. Dec. 411, 505 N.E.2d 1202, 1208-09, *cert. denied*, 511 N.E.2d 438 (Ill. 1987); Winslow v. Brown, 125 Wis. 327, 371 N.W.2d 417, 420-21 (Wis. App. 1985).

⁸ *E.g.*, United States v. Excellair, Inc., 637 F. Supp. 1377, 1388-1391 (D.Colo. 1986) (conspiracy to defeat valid lien); LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711, 713 (1988) (conspiracy to commit unfair trade practices).

⁹ Plante v. Engel, 124 N.H. 213, 217, 469 A.2d 1299, 1302 (1983) (interference with parental custody).

¹⁰ Restatement (second) of Torts, § 876(b), at 315 (1965); *e.g.*, Cobb v. Indian Springs, Inc., 258 Ark. 9, 522 S.W.2d 383, 387-89 (1975); Alberts v. Devine, 395 Mass. 59, 479 N.E.2d 113, 121 (1985), *cert. denied sub nom.* Carroll v. Alberts, 474 U.S. 1014, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985).

¹¹ University System of New Hampshire v. United State Gypsum Co., 756 F. Supp. 640, 657-58 (D.N.H. 1991).

¹ N.H. Const., Pt. 2, Art. 90 (Supp. 1991).

² State v. Dean, 115 N.H. 520, 523, 345 A.2d 408, 410-11 (1975); *e.g.*, Corso v. Merrill, 119 N.H. 647, 406 A.2d 300 (1979) (adoption of bystander recovery for negligent infliction of emotional distress); Buttrick v. Arthur Lessard & Sons, Inc., 110 N.H. 36, 260 A.2d 111 (1969) (adoption of strict liability in tort).

by an aider and abetter.¹²

Other legal theories to impose joint tortfeasor status are joint enterprise,¹³ ratification,¹⁴ vicarious liability,¹⁵ breach of common duty¹⁶ or consequential indivisible injury.¹⁷ If joint tortfeasor status depends on the existence of an indivisible injury, the defendants have the burden of persuasion on the issue of apportionment.¹⁸

It should be noted that, as a general proposition, the factfinder should apportion damages if possible, providing there is a rational basis to do so.¹⁹ Thus, the principle of joint and several liability precluding apportionment may be considered an exception to the prevailing rule.

STATUTORY MODIFICATION OF THE COMMON LAW

Recent New Hampshire legislation has addressed joint and several liability and apportionment of damages. The common law rule holding actors in concert jointly and severally liable has been retained and codified.²⁰ In other situations, the current law states:

I. In all actions, the court shall: (a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and (b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.²¹

Subparagraph (a) requires apportionment of liability among all parties. Although the statute is broadly worded, there is no recognized division of fault among plaintiffs and defendants for claims involving intentional or reckless torts.²² Allocation of proportionate responsibility to the plaintiff should be limited to those causes of action authorizing comparative fault.²³

Because a plaintiff cannot be jointly and severally liable to anyone, the use of "party" in subparagraph (b) must refer to parties defendant.²⁴ The first clause of this subparagraph is consistent with the common law. The second clause abolishes joint and several liability based upon an allocation of *fault or liability* among plaintiffs and defendants and among defendants themselves.

There was no division of fault among plaintiffs and defendants at the common law: contributory negligence acted as a complete bar to a claim.²⁵ Furthermore, the law did not permit contribution among joint tortfeasors.²⁶ Legislation has changed both of these rules.²⁷ But as previously discussed, the common law did and continues to permit apportionment of damages among joint tortfeasors. Therefore, division of fault historically has not been analogous to apportionment of damages.²⁸ Determination of fault or liability occurs at a preliminary level of analysis. Negligence, for example, has four elements to consider: duty owed, duty breached, causation—and last of all damages.²⁹ If the defendant owes no duty to the plaintiff,³⁰ or breaches no duty owed,³¹ damages are not considered.³² The same holds true absent causation in fact.³³ Consideration of a claim ends in the absence of proof establishing fault or liability, and this occurs before damages are addressed.

¹² Halberstam v. Welch, 705 F.2d 472, 478 (1983).

¹³ See Vidal v. Town of Errol, *supra* note 3, 86 N.H. at 7, 162 A. at 236.

¹⁴ See Derry Elec. Co. v. New Eng. Tel. & Tel. Co., 31 F.2d 51, 52 (1st Cir. 1929) (N.H. Law). Ratification is limited to a principal ratifying the actions of an agent. Vidal v. Town of Errol, *supra* note 3, 86 N.H. at 7-8, 162 A. at 237.

¹⁵ Commercial Union Assur. Cos. v. Town of Derry, 118 N.H. 469, 473, 387 A.2d 1171, 1173 (1978).

¹⁶ Common duty exists if defendants owe the same duty to a plaintiff at approximately the same time and have the opportunity to guard against one another's actions. Pratt v. Stein, 298 Pa. Super. 92, 444 A.2d 674, 704-05 (1982).

¹⁷ *E.g.*, Shepard v. Gen. Motors Corp., 423 F.2d 406, 408 n.2 (1st Cir. 1970) (dicta) (N.H. Law); Zebnik v. Rozmus, *supra* note 4, 81 N.H. at 46, 124 A. at 460; Carpenter v. W.H. McElwain Co., 78 N.H. 118, 121-22, 97 A. 560, 561-62 (1916).

¹⁸ *E.g.*, McLeod v. Am. Motors Corp., 723 F.2d 830, 833-34 (11th Cir. 1984), *reh'g denied en banc*, 729 F.2d 1468 (11th Cir. 1984); Azure v. City of Billings, 82 Mont. 234, 596 P.2d 460, 470-71 (1979).

¹⁹ Restatement (Second) of Torts, § 433A, at 434 (1965); William L. Prosser & W. Page Keeton on Torts, § 52, at 345 (5th ed. 1984); *e.g.*, United States v. Yale New Haven Hosp., 727 F. Supp. 784, 787-88 (D. Conn. 1990); Glicklich v. Spievack, 16 Mass. App. 488, 452 N.E.2d 287, 292-93 (1983).

²⁰ New Hampshire Revised Statutes [hereinafter referred to as "RSA"] 507:7-e I.(c) (Supp. 1991).

²¹ RSA 507:7-e I.(a)&(b) (Supp. 1991).

²² Restatement (Second) of Torts §§ 481 & 482, at 537-38 (1965); *e.g.*, DeRance, Inc. v. Painewebber, Inc., 872 F.2d 1312, 1322-23 (7th Cir. 1989) (fraud); McLain v. Training And Dev. Corp., 572 A.2d 494, 496-97 (Me. 1990) (assault and battery); see also cases cited at notes 39 & 40 *infra*.

²³ RSA 507:7-d (Supp. 1991) (comparative negligence); Thibault v. Sears, Roebuck & Co., 118 N.H. 802, 813, 395 A.2d 843, 850 (1978) (strict liability in tort). It is reasonable to conclude that personal injury claims brought under the Uniform Commercial Code (RSA Ch. 382-A) would be subject to the affirmative defense of comparative negligence. See Stephan v. Sears, Roebuck And Co., 110 N.H. 248, 251, 266 A.2d 855, 858 (1970) (contributory negligence in a defense to breach of implied warranty of merchantability).

²⁴ This is the intent of the legislation. N.H. Senate Journal, SB 110 at 286 (February 14, 1989); N.H. House Journal, SB 110 at 971 (May 4, 1989); RSA 507:7-e III. (Supp. 1991) which reallocates damages from insolvent to solvent defendants supports this reading of "party."

²⁵ Gates v. Boston & Me. R.R., 93 N.H. 179, 182, 37 A.2d 474, 476 (1944).

²⁶ Kantor v. The Norwood Group, Inc., 127 N.H. 831, 835, 508 A.2d 1078, 1081 (1986).

²⁷ RSA 507:7-d & 507:7-f (Supp. 1991).

²⁸ The terms are often used interchangeably. N.H. Senate Journal, SB 110 at 286 (February 14, 1989); N.H. House Journal, SB 110 at 971 (May 4, 1989). The courts sometimes utilize less than clear terminology to define these concepts. Thibault v. Sears, Roebuck & Co., *supra*, note 23, 118 N.H. at 813, 395 A.2d at 850 (in cases in which there are multiple defendants in actions brought in strict liability in tort, "[T]he jury shall apportion the loss [damages] in the ratio to which each defendant caused or contributed to the loss or injury [damages] to the amount of causation or liability attributed to all defendants against whom recovery is allowed.').

²⁹ Goodwin v. James, 134 N.H. —, —, 595 A.2d 504, 507 (1991).

³⁰ *E.g.*, Rounds v. Standex Int'l, 131 N.H. 71, 77, 550 A.2d 98, 102 (1988); Ritzman v. Kashulines, 126 N.H. 286, 490 A.2d 792 (1985).

³¹ *E.g.*, Fernberg v. T.F. Boyle Trans., Inc., 889 F.2d 1205, 1207 (1st Cir. 1989) (N.H. Law); Collier v. Redbones Tavern & Restaurant, Inc., 601 F. Supp. 927, 930-32 (D.N.H. 1985).

³² Fernberg v. T.F. Boyle Trans., Inc., *supra* note 31, 889 F.2d at 1209 n.6.

³³ *E.g.*, Moaratty v. Town of Hampton, 110 N.H. 479, 481-82, 272 A.2d 606, 608 (1970); Labor v. Public Service Co. of N.H., 92 N.H. 256, 258-59, 29 A.2d 459, 460 (1942).

MULTIPLE APPORTIONMENTS UNDER CURRENT NEW HAMPSHIRE LAW

A New Hampshire personal injury plaintiff presently faces the ominous specter of multiple apportionments. Liability may be apportioned in negligence claims, actions founded in strict liability in tort and breach of warranties under the Uniform Commercial Code. Damages in many personal injury suits are subject to apportionment if there is a rational basis to do so. Moreover, the doctrine of mitigation of damages may result in further reduction of the claim.³⁴ Given the proper fact situation, the optimum value of a case can be shriveled to a cipher. Consider the following examples:

Assume A is driving an automobile and enters an intersection from a road controlled by a yield sign. His vehicle is struck simultaneously from the left by B and the front by C. A suffers traumatic amputation of his left arm and a concussion. He also has acute headaches for one month as a result of the concussion. Tangible damages are as follows:

1) Hospital bills	\$ 10,000.00
2. Pain medication for headaches	300.00
3) Physical therapy and rehabilitation	5,000.00
4) Two month's lost wages	15,000.00
5) Diminished earning capacity	<u>100,000.00</u>
TOTAL	\$130,300.00

A's claim for intangible damages (pain and suffering, emotional distress, alteration of life style, etc.) enhances the reasonable value of the claim to \$750,000.00

In the absence of comparative negligence on A's part, B and C are jointly and severally liable to A for causing the collision. If B and C fail to apportion damages or prove that A failed to mitigate his loss, each is equally responsible to pay the full amount of the judgment.

But what if, all other facts remaining constant, the jury assesses one-third of the responsibility for the collision to A? The respective liability of B and C would be less than fifty percent, and they would not be joint tortfeasors. If B and C were equally at

fault, each individually would be responsible for \$250,000.00

Assume the same percentage of comparative negligence, but at trial C proves that the impact to the left side of A's vehicle caused the loss of A's arm. The hospital records show that \$9,000 (90%) of the bill was related to A's arm injuries. B proves that the front-end collision caused A's headaches. A testifies that 90% of his intangible damages are caused by his continuing loss of arm function. B and C prove that 50% of A's physical limitations and diminished earning capacity could be avoided by the use of a readily available prosthesis. A offers no reason why he has failed to obtain and use the prosthesis. B has \$10,000 of liability insurance and no assets. C has \$1 million of insurance available to cover the claim. A is uninsured.

A's damages would be apportioned as shown in Figure 1 on page 8.

Allocation of the \$280,756.64 to the severally liable defendants would be as shown in Figure 2 on page 8.

B's insurer tenders policy limits of \$10,000. C's carrier satisfies A's judgment against its insured. Under existing law, A could recover only \$24,727.84 of his damages initially calculated at \$750,000.³⁸

As previously stated, the defense of comparative negligence does not apply

to intentional³⁹ or reckless⁴⁰ torts. The allocation of proportionate fault between a plaintiff and defendant under RSA 507:7-e I.(a)&(b) (Supp. 1991) is inapplicable in these circumstances. Nevertheless, a claim based upon intentional or reckless misconduct is still subject to significant reduction under existing law. Assume, for example, the following facts:

A employs B, who is assisted on the job by C. C may or may not be a volunteer. B confronts D, who he believes has stolen property from A's business. B assaults and batters D. During the altercation, C intervenes to assist B. B and C jointly assault and batter D. B stabs D. D suffers severe permanent injuries and damages in the amount of \$2 million. A has \$5 million of insurance to cover D's claim. B and C are covered by A's insurance if they were acting within the scope of employment; otherwise they are judgment proof.⁴¹

The incident arose out of B's employment; *i.e.*, B's actions were intended to benefit A.⁴² Thus, A and B are jointly liable to D⁴³ without apportionment.⁴⁴ Likewise, if C were

³⁴ N.H. Civil Jury Instructions, No. 9.7 (1989); see *Parem Contracting Corp. v. Welch Constr. Co., Inc.*, 128 N.H. 254, 259-260, 512 A.2d 1104, 1107 (1986).

³⁵ Ten percent (\$41,313.33) of this element of the claim relates to damages other than those for continuing loss of arm function and is not subject to the mitigation defense. Ninety percent (\$371,819.98) is subject to the mitigation defense and must be reduced to \$185,909.99. A's damages are calculated by adding \$41,313.33 to \$185,909.99.

³⁶ One month's lost wages resulted from a combination of A's headaches and arm injury. B and C are liable for one-half of \$5,000.00. B is responsible for the second month's loss of \$5,000.00.

³⁷ C is liable for one-half of \$22,722.33, that 10% of the damages not reduced by A's failure to mitigate. B is responsible for the residuum, or 95% of A's claim for intangible damages.

³⁸ This model was adapted from Halverston v. Voeller, 336 N.W. 2d 118, 121-22 n.2 (N.D. 1983). *Accord*, *Acculog, Inc. v. Peterson*, 692 P.2d 728, 732-33 (Utah 1984) (Oaks, J., concurring).

³⁹ *E.g.*, *Schumann v. McGinn*, 307 Minn. 466, 240 N.W.2d 525, 530 (1976); *Peterson v. Campbell*, 105 Ill. App. 992, 61 Ill. Dec. 572, 434 N.E.2d 1169, 1171-72 (1982), *cert. denied*.

⁴⁰ *E.g.* *Stallworth v. Illinois Cent. Gulf R.R.*, 690 F.2d 858, 863 (11th Cir. 1982); *Norris v. ACF Indus.*, 609 F. Supp. 549, 553 (S.D.W. Va. 1985).

⁴¹ This model was adapted from *Reilly v. DiBianco*, 6 Conn. App. 556, 507 A.2d 106 (1986), *cert. denied*, 200 Conn. 804, 510 A.2d 192-93 (1986).

⁴² Older authority held that, as a matter of law, assaults committed by employees were outside the scope of employment. *Morin v. People's Wet Wash Laundry Co.*, 85 N.H. 233, 156 A. 499 (1931). This issue now is a factual question falling under standard rules of *respondeat superior*. *Daigle v. City of Portsmouth*, 129 N.H. 561, 579-581, 534 A.2d 689, 698-700 (1987).

⁴³ *Commercial Union Assur. Cos. v. Town of Derry*, *supra* note 15.

⁴⁴ *Caldwell v. Cleveland-Cliffs Iron Co.*, 111 Mich. App. 721, 315 N.W.2d 186, 188-89, *appeal denied*, 417 Mich. 914, 330 N.W.2d 854 (1983). A vicariously liable employer may still seek indemnity against an employee. *Kantor v. The Norwood Group, Inc.*, *supra* note 26, 127 N.H. at 835, 508 A.2d at 1081; *e.g.*, *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 368 (7th Cir. 1990); *Biggs v. Surrey Broadcasting Co.*, 811 P.2d 111, 114-15 (Okla. App. 1991).

deemed an employee of A, all would be joint tortfeasors. A's insurance would then cover A, B and C, and D could recover full compensation for his injuries.

Now assume C were not A's employee. If B and C had entered into a civil conspiracy to assault and batter D, each would be responsible for the other's actions.⁴⁵ A would be a joint tortfeasor with B and C, and all three would be covered by A's insurance.

Given the stated facts, D would have a difficult time proving conspiracy. More likely he could show that C aided and abetted B. That would make B the principal tortfeasor and C the aider and abetter. But if D's injuries were indivisible, B would be responsible for C's conduct, and A and his insurance carrier would be liable for all of D's damages.

Modify the facts so that C stabbed D. At trial, the jury determines that D provoked the situation and reduces his damages by 25%.⁴⁶ B proves that 90% of D's injuries resulted from the stabbing. D's claim would be apportioned as follows:

Optimum Recovery	\$2,000,000
Reduction due to provocation	\$1,500,000
Amount allocated to B	\$ 150,000
Amount allocated to C	\$1,350,000

Remember that B, the principal tortfeasor, is not responsible for damages caused by C, the aider and abetter.⁴⁷ Thus, C's misconduct is not imputed to A, and A's insurance does not cover C. Under these facts, D could recover only \$150,000, a mere 7.5% of the optimum value of his claim.

CONCLUSION

Current New Hampshire law allows multiple apportionments of a personal injury claim. One way to limit drastic reduction is to impose joint tortfeasor status upon multiple defendants. This creates joint and several liability and prevents apportionment of damages. It is incumbent upon counsel to understand the subtle interplay of the controlling principles outlined above and utilize them to maximum advantage, lest the value of the case suffer serious compromise.

⁴⁵ RSA 507:7-e I.(c) (Supp. 1991).

⁴⁶ Although provocation will not support an apportionment of liability, it does permit the fact-finder to reduce damages. *E.g.*, *Santamaria v. Manship*, 7 Conn. App. 537, 510 A.2d 194, 199, *cert. denied*, 201 Conn. 807, 515 A.2d 378 (1986); *Baugh v. Redmond*, 565 So.2d 953, 959 (La. App. 1990).

⁴⁷ Halberstam v. Welch, *supra* note 12.

Figure 1

<u>OPTIMUM RECOVERY</u>	<u>REDUCED BY 1/3 COMPARATIVE NEGLIGENCE</u>	<u>REDUCED BY FAILURE TO MITIGATE</u>
1) Hospital bills \$ 10,000.00	1) Hospital bills \$ 6,666.66	1) Hospital bills \$ 6,666.66 (no reduction)
2) Pain medication for headaches 300.00	2) Pain medication for headaches 200.00	2) Pain medication for headaches 200.00 (no reduction)
3) Physical therapy and rehabilitation 5,000.00	3) Physical therapy and rehabilitation 3,333.33	3) Physical therapy and rehabilitation 3,333.33 (no reduction)
4) Two months' lost wages 15,000.00	4) Two months' lost wages 10,000.00	4) Two months' lost wages 10,000.00 (no reduction)
5) Diminished earning capacity 100,000.00	5) Diminished earning capacity 66,666.66	5) Diminished earning capacity 33,333.33
6) Intangible damages 619,700.00	6) Intangible damages 413,133.32	6) Intangible damages ³⁵ 227,223.32
TOTAL: \$750,000.00	TOTAL: \$499,819.97	TOTAL: \$280,756.64

Figure 2

	<u>B</u>	<u>C</u>
1) Hospital bills	\$ 5,999.99	\$ 666.67
2) Pain medication for headaches	None	200.00
3) Physical therapy and rehabilitation	3,333.33	None
4) Two month's lost wages ³⁶	7,500.00	2,500.00
5) Diminished earning capacity	33,333.33	None
6) Intangible damages ³⁷	215,862.14	11,361.17
TOTAL	\$ 266,028.79	\$ 14,727.84