

2001 DRAFTING REQUEST

Bill

Received: 11/28/2000

Received By: fasttn

Wanted: As time permits

Identical to LRB:

For: Sheryl Albers (608) 266-8531

By/Representing: self

This file may be shown to any legislator: NO

Drafter: fasttn

May Contact:

Alt. Drafters:

Subject: Transportation - highways

Extra Copies: PJH, RPN - 1

Pre Topic:

No specific pre topic given

Topic:

Highway maintenance liability

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	fasttn 12/14/2000	wjackson 12/14/2000					Local
/1			martykr 12/15/2000		lrb docadmin 12/15/2000	lrb docadmin 01/05/2001	

FE Sent For:

<END>

2001 DRAFTING REQUEST

Bill

Received: 11/28/2000

Received By: fasttn

Wanted: As time permits

Identical to LRB:

For: Sheryl Albers (608) 266-8531

By/Representing: self

This file may be shown to any legislator: NO

Drafter: fasttn

May Contact:

Alt. Drafters:

Subject: **Transportation - highways**

Extra Copies: **PJH, RPN - 1**

Pre Topic:

No specific pre topic given

Topic:

Highway maintenance liability

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	fasttn 12/14/2000	wjackson 12/14/2000		_____			Local
/1			martykr 12/15/2000	_____	lrb_docadmin 12/15/2000		

FE Sent For:

<END>

2001 DRAFTING REQUEST

Bill

Received: **11/28/2000**

Received By: **fasttn**

Wanted: **As time permits**

Identical to LRB:

For: **Sheryl Albers (608) 266-8531**

By/Representing: **self**

This file may be shown to any legislator: **NO**

Drafter: **fasttn**

May Contact:

Alt. Drafters:

Subject: **Transportation - highways**

Extra Copies: **PJH, RPN - 1**

Pre Topic:

No specific pre topic given

Topic:

Highway maintenance liability

Instructions:

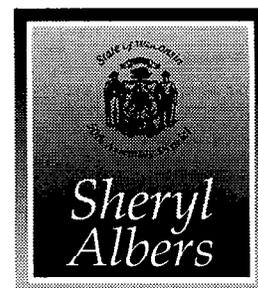
See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	fasttn	1 WLJ 12/14	km 12/15	JJ 12/15 xm 15			

FE Sent For:

<END>



To: LRB – Drafting
From: Representative Sheryl K. Albers

Date: 24 November 2000
Subject: Highway Maintenance Liability of Municipalities
Reference: 1999 AB 580 (attached)

Please re-draft 1999 Assembly Bill 580 as a 2001 Assembly Bill.

Thank you.



1999 ASSEMBLY BILL 580

November 5, 1999 - Introduced by Representatives ALBERS, PORTER, JENSEN, M. LEHMAN, KLUSMAN, SPILLNER, MUSSER, GOETSCH, SYKORA, OWENS, GUNDERSON, HAHN, GROTHMAN, NASS, MONTGOMERY, SERATTI and KREUSER, cosponsored by Senators BRESKE, SCHULTZ and HUELSMAN. Referred to calendar.

1 **AN ACT to repeal** 81.17; and **to amend** 81.15 of the statutes; **relating to:**
2 liability of cities, villages, towns and counties for damages caused by an
3 insufficiency or want of repair of a highway.

Analysis by the Legislative Reference Bureau

Under current law, cities, villages, towns and counties are immune from claims arising out of the performance of a discretionary duty, or duty which requires a governmental entity to use judgment or discretion in carrying out the duty. Cities, villages, towns and counties are liable for damages of up to \$50,000 arising out of the performance of a nondiscretionary duty.

Also under current law, cities, villages, towns and counties are liable for damages of up to \$50,000 to a person or property resulting from an insufficiency or want of repair of a highway, which includes shoulders, sidewalks and bridges. Cities, villages, towns and counties are also liable for damages resulting from the accumulation of snow or ice that has existed on a highway for at least three weeks.

The Wisconsin Supreme Court in *Morris v. Juneau County*, 219 Wis. 2d 544 (1998), held that the statutory provision imposing liability on cities, villages, towns and counties for highway defects is an exception to the more general provision granting immunity to cities, villages, towns and counties from liability arising out of the performance of discretionary duties.

Finally, under current law, if the negligence or deliberate wrongdoing of a person contributes to the creation of a highway defect that results in damages to a person or property, the negligent or wrongdoing person is primarily liable and the

ASSEMBLY BILL 580

city, village, town or county is secondarily liable only if the negligent person or the person who committed the wrong does not satisfy the judgment, and the city, village, town or county is otherwise liable for the damages.

This bill eliminates the immunity exception under which cities, villages, towns and counties may be held liable for an insufficiency or want of repairs of a highway. This bill does not affect the immunity exception under which cities, villages, towns and counties may be held liable for the accumulation of snow or ice that has existed on a highway for at least three weeks.

The bill also eliminates secondary liability for cities, villages, towns and counties.

For further information see the *local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 81.15 of the statutes is amended to read:

2 **81.15 Damages caused by highway defects accumulation of snow or**
3 **ice; liability of city, village, town and county.** If damages happen to any person
4 or his or her property by reason of the insufficiency or want of repairs of any highway
5 which any town, city or village is bound to keep in repair, the person sustaining the
6 damages has a right to recover the damages from the town, city or village. If the
7 damages happen by reason of the insufficiency or want of repairs of a highway which
8 any county by law or by agreement with any town, city or village is bound to keep in
9 repair, or which occupies any land owned and controlled by the county, the county is
10 liable for the damages and the claim for damages shall be against the county. If the
11 damages happen by reason of the insufficiency or want of repairs of a bridge erected
12 or maintained at the expense of 2 or more towns the action shall be brought against
13 all the towns liable for the repairs of the bridge and upon recovery of judgment the
14 damages and costs shall be paid by the towns in the proportion in which they are
15 liable for the repairs; and the court may direct the judgment to be collected from each

ASSEMBLY BILL 580

1 ~~town for its proportion only. The amount recoverable by any person for any damages~~
2 ~~so sustained shall not exceed \$50,000. The procedures under s. 893.80 shall apply~~
3 ~~to the commencement of actions brought under this section.~~ No action may be
4 maintained against a city, village, town or county to recover damages for injuries
5 sustained by reason of an accumulation of snow or ice upon any bridge or highway,
6 unless the accumulation existed for 3 weeks. Any action to recover damages for
7 injuries sustained by reason of an accumulation of snow or ice that has existed for
8 3 weeks or more upon any bridge or highway is subject to s. 893.80.

9 **SECTION 2.** 81.17 of the statutes is repealed.

10 **SECTION 3. Initial applicability.**

11 (1) The treatment of sections 81.15 and 81.17 of the statutes first applies to
12 actions arising on the effective date of this subsection.

13 (END)

Fast, Timothy

From: Southworth, Scott
Sent: Wednesday, December 13, 2000 4:20 PM
To: Fast, Timothy
Subject: LRB 1220

Tim,

Can you get me LRB 1220 ASAP? It's just a re-draft from last session, with no changes. We need to get cosponsors set up and have the bill introduced right away at the beginning of session. We're preparing it for hearing in mid-January and passage in the Assembly in late January.

I appreciate the expediency with this one. I know you guys are probably swamped over there.

Scott

Attorney Scott Harold Southworth
Research Assistant
Office of State Representative Sheryl K. Albers

2001

Date (time) needed FRIDAY
12/15 NOON

D-NOTE

LRB - 12201 1

BILL

TNF: Wlj

Use the appropriate components and routines developed for bills.

AN ACT . . . [generate catalog] *to repeal . . . ; to renumber . . . ; to consolidate and renumber . . . ; to renumber and amend . . . ; to consolidate, renumber and amend . . . ; to amend . . . ; to repeal and recreate . . . ;* and *to create . . .* of the statutes; relating to:

[NOTE: See section 4.02 (2) (br), Drafting Manual, for specific order of standard phrases.]

Analysis by the Legislative Reference Bureau

If titles are needed in the analysis, in the component bar:

For the main heading, execute: create → anal: → title: → head

For the subheading, execute: create → anal: → title: → sub

For the sub-subheading, execute: create → anal: → title: → sub-sub

For the analysis text, in the component bar:

For the text paragraph, execute: create → anal: → text

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION #.

~~1999 ASSEMBLY BILL 580~~

~~November 5, 1999 - Introduced by Representatives ALBERS, PORTER, JENSEN, M. LEHMAN, KLUSMAN, SPELLNER, MUSSER, GOETSCH, SYKORA, OWENS, GUNDERSON, HAHN, GROTHMAN, NASS, MONTGOMERY, SERAFFI and KREUSER, cosponsored by Senators BRESKE, SCHULTZ and HUELSMAN. Referred to calendar.~~

①

~~AN ACT to repeal §1.17; and to amend §1.15 of the statutes relating to~~

②

liability of cities, villages, towns and counties for damages caused by an insufficiency or want of repair of a highway.

3

Analysis by the Legislative Reference Bureau

Under current law, cities, villages, towns and counties are immune from claims arising out of the performance of a discretionary duty, or duty which requires a governmental entity to use judgment or discretion in carrying out the duty. Cities, villages, towns and counties are liable for damages of up to \$50,000 arising out of the performance of a nondiscretionary duty.

Also under current law, cities, villages, towns and counties are liable for damages of up to \$50,000 to a person or property resulting from an insufficiency or want of repair of a highway, which includes shoulders, sidewalks, and bridges. Cities, villages, towns and counties are also liable for damages resulting from the accumulation of snow or ice that has existed on a highway for at least three weeks.

The Wisconsin Supreme Court in *Morris v. Juneau County*, 219 Wis. 2d 544 (1998), held that the statutory provision imposing liability on cities, villages, towns and counties for highway defects is an exception to the more general provision granting immunity to cities, villages, towns and counties from liability arising out of the performance of discretionary duties.

Finally, under current law, if the negligence or deliberate wrongdoing of a person contributes to the creation of a highway defect that results in damages to a person or property, the negligent or wrongdoing person is primarily liable and the

ASSEMBLY BILL 580*specific*

city, village, town or county is secondarily liable only if the negligent person or the person who committed the wrong does not satisfy the judgment, and the city, village, town or county is otherwise liable for the damages.

This bill eliminates the immunity exception under which cities, villages, towns and counties may be held liable for an insufficiency or want of repairs of a highway. This bill does not affect the immunity exception under which cities, villages, towns and counties may be held liable for the accumulation of snow or ice that has existed on a highway for at least three weeks. *for damages of up to \$50,000*

The bill also eliminates secondary liability for cities, villages, towns and counties.

For further information see the *local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 SECTION 1. 81.15¹ of the statutes is amended to read:

2 81.15 Damages caused by highway defects accumulation of snow or
 3 ice; liability of city, village, town^(B) and county. If damages happen to any person
 4 or his or her property by reason of the insufficiency or want of repairs of any highway
 5 which any town, city or village is bound to keep in repair, the person sustaining the
 6 damages has a right to recover the damages from the town, city or village. If the
 7 damages happen by reason of the insufficiency or want of repairs of a highway which
 8 any county by law or by agreement with any town, city or village is bound to keep in
 9 repair, or which occupies any land owned and controlled by the county, the county is
 10 liable for the damages and the claim for damages shall be against the county. If the
 11 damages happen by reason of the insufficiency or want of repairs of a bridge erected
 12 or maintained at the expense of 2 or more towns the action shall be brought against
 13 all the towns liable for the repairs of the bridge and upon recovery of judgment the
 14 damages and costs shall be paid by the towns in the proportion in which they are
 15 liable for the repairs; and the court may direct the judgment to be collected from each

ASSEMBLY BILL 580

1 town for its proportion only. ~~The amount recoverable by any person for any damages~~
2 ~~so sustained shall not exceed \$50,000. The procedures under s. 893.80 shall apply~~
3 ~~to the commencement of actions brought under this section.~~ No action may be
4 maintained against a city, village, town or county to recover damages for injuries
5 sustained by reason of an accumulation of snow or ice upon any bridge or highway,
6 unless the accumulation existed for 3 weeks. Any action to recover damages for
7 injuries sustained by reason of an accumulation of snow or ice that has existed for
8 3 weeks or more upon any bridge or highway is subject to s. 893.80. ✓

9 SECTION 2. 81.17[✓] of the statutes is repealed.

10 SECTION 3. Initial applicability.

11 (1) The treatment of sections 81.15[✓] and 81.17[✓] of the statutes first applies to
12 actions arising on the effective date of this subsection.

13 (END)

D-NOTE

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

1220
LRB-3889/1dn
KBJ:jlj
TNF: WJ:

~~November 4, 1999~~

~~Representative Albers:~~

Please note that this draft does not grant a municipality absolute immunity from claims for damages sustained as a result of the negligent repair or maintenance of a highway. The effect of this draft is to provide a municipality with immunity from suits arising out of negligent repair or maintenance of a highway if the duty to repair or maintain a highway is a discretionary duty as opposed to a ministerial duty. Wisconsin courts define a discretionary duty as a duty that involves a choice or judgment on the part of the government. In contrast, a ministerial duty is defined as a duty that involves the performance of a specific task within certain parameters prescribed by law and does not require the use of one's judgment or discretion. See *Lister v. Board of Regents*, 72 Wis. 2d 282, 301; *Bauder v. Delavan-Darien Sch. Dist.*, 207 Wis. 2d 310, 314 (Ct. Apps. 1996).

Section 893.80 (4), stats., grants immunity to government entities for discretionary acts. Amending section 81.15, stats., and repealing section 81.17, stats., does not guarantee a municipality absolute immunity from liability for highway defects. If the repair and maintenance of the highway is not a discretionary duty, then the municipality may be held liable. If, however, repair and maintenance is a discretionary duty, s. 893.80 (4) ensures that a municipality will not face liability.

At this time, it is difficult to determine to what extent highway maintenance and repair is a discretionary duty. The Wisconsin Supreme Court in *Morris* declined to decide whether Juneau County's duty to keep the highway in good repair constituted a discretionary duty. If your intent is to ensure that municipalities are immune from all claims for damages arising from an "insufficiency or want of repairs of any highway," it might be best to include language in the statutes that affirmatively states that a municipality may not be held liable for damages resulting from an insufficiency or lack of repairs of any highway.

~~Please review this draft carefully to make sure it reflects your intent. If you have any questions or comments, please feel free to contact me.~~

TNF

Ivy G. Sager-Rosenthal
Legislative Attorney
Phone: (608) 261-4455
E-mail: ~~Ivy.Sager-Rosenthal@legis.state.wi.us~~

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1220/1dn
TNF:wlj:kim

December 15, 2000

Please note that this draft does not grant a municipality absolute immunity from claims for damages sustained as a result of the negligent repair or maintenance of a highway. The effect of this draft is to provide a municipality with immunity from suits arising out of negligent repair or maintenance of a highway if the duty to repair or maintain a highway is a discretionary duty as opposed to a ministerial duty. Wisconsin courts define a discretionary duty as a duty that involves a choice or judgment on the part of the government. In contrast, a ministerial duty is defined as a duty that involves the performance of a specific task within certain parameters prescribed by law and does not require the use of one's judgment or discretion. See *Lister v. Board of Regents*, 72 Wis. 2d 282, 301; *Bauder v. Delavan-Darien Sch. Dist.*, 207 Wis. 2d 310, 314 (Ct. Apps. 1996).

Section 893.80 (4), stats., grants immunity to government entities for discretionary acts. Amending section 81.15, stats., and repealing section 81.17, stats., does not guarantee a municipality absolute immunity from liability for highway defects. If the repair and maintenance of the highway is not a discretionary duty, then the municipality may be held liable. If, however, repair and maintenance is a discretionary duty, s. 893.80 (4) ensures that a municipality will not face liability.

At this time, it is difficult to determine to what extent highway maintenance and repair is a discretionary duty. The Wisconsin Supreme Court in *Morris* declined to decide whether Juneau County's duty to keep the highway in good repair constituted a discretionary duty. If your intent is to ensure that municipalities are immune from all claims for damages arising from an "insufficiency or want of repairs of any highway," it might be best to include language in the statutes that affirmatively states that a municipality may not be held liable for damages resulting from an insufficiency or lack of repairs of any highway.

Timothy N. Fast
Senior Legislative Attorney
Phone: (608) 266-9739
E-mail: tim.fast@legis.state.wi.us

Fast, Timothy

From: Southworth, Scott
Sent: Friday, December 15, 2000 12:02 PM
To: Fast, Timothy
Subject: Highway Maintenance Liability -- 2001 LRB 1220/1 Drafter's Note

Tim,

Thanks for your excellent drafter's note on LRB 1220. We are aware that the legislation will not provide absolute immunity - in fact, I can't tell you how many times I had to reiterate that last session! Your note actually helps immensely for purposes of explaining the legislation to opponents who believe we're giving municipalities immunity. I wrote an Q&A last session which discussed this very issue - since the Q&A will be re-circulated this session, I'm reformulating the memo. If you get a chance, note my discussion below and let me know if I've made any blaring legal mistakes! Nonetheless, staff attorneys in legislative offices are always viewed as "partisans" (we are, of course!), and so a non-partisan analysis from you will help nail this point down during the hearing and debate.

Thanks again.

Scott

Attorney Scott Harold Southworth
Research Assistant
Office of Representative Sheryl K. Albers

Does this legislation provide municipalities with complete immunity?

No. Under §893.80 of the statutes, municipalities would first have to prove that the highway maintenance in question (repairs or snow and ice removal after three weeks) constitutes a "discretionary" duty. If the court were to find that the maintenance constitutes a ministerial duty, immunity would not apply, and the plaintiff would then need to prove that the municipality is negligent in carrying out its particular ministerial duty. If the court then found the municipality negligent, the plaintiff could receive damages up to \$50,000 (the same as currently provided by § 81.15).

Again, in *Morris v. Juneau County*, the Wisconsin Supreme Court did not address the question of whether or not maintaining a highway is a discretionary or ministerial duty of a governmental unit. The court only decided that §81.15 applied - to the exclusion of §893.80(4). There is little case law development defining what types of highway maintenance constitute discretionary or ministerial acts. Thus, while we know that governmental units will utilize §893.80(4) as a preliminary defense to a suit for failure to maintain a highway, we do not know whether the statute will actually give them that immunity.

Courts may find most highway maintenance discretionary, some maintenance completely discretionary or completely ministerial, or certain specific maintenance discretionary or ministerial, depending upon the factual circumstances involved (weather, machinery available, etc.). The Wisconsin Supreme Court could eventually set out some general guidelines for lower courts, too. Given the complexity of such determinations, however, the best course of action involves allowing lower courts to resolve "discretionary" versus "ministerial" arguments on a case-by-case basis, subject to appellate review, and based on the specific facts and circumstances surrounding those cases.



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

100 NORTH HAMILTON STREET
5TH FLOOR
MADISON, WI 53701-2037

STEPHEN R. MILLER
CHIEF

LEGAL SECTION: (608) 266-3561
LEGAL FAX: (608) 264-6948

December 15, 2000

MEMORANDUM

To: Representative Albers

From: Timothy N. Fast, Senior Legislative Attorney

Re: LRB-1220/ Highway maintenance liability
1

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

JACKET FOR ASSEMBLY JACKET FOR SENATE
5 January 2001

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 266-9739 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266 3561 if you have any questions regarding this memorandum.