

1987 Assembly Bill 858

Date of enactment: **April 22, 1988**
Date of publication: **May 2, 1988**

1987 Wisconsin Act 377

AN ACT *to renumber and amend 65.07 (1) (n) and 133.18 (1); to amend 48.627 (2) (d), 48.627 (2) (e), 48.627 (2) (f) and (h), 48.627 (3), 65.90 (1), 167.10 (7), 345.05 (3) and 893.80 (1) (intro.); and to create 48.627 (1) (d), 65.07 (1) (s), 65.90 (6), 133.18 (1) (b), 345.05 (1) (bm), 893.80 (1p) and (1t), 895.485 and 895.525 of the statutes, relating to civil liability of foster parents and agencies and claims by foster parents, authorizing the governing body of any municipality to levy taxes in order to accumulate a liability reserve fund, prohibiting damages in antitrust suits against municipalities, limiting municipal liability for motor vehicle accidents, limiting actions against municipalities for negligent inspections and the responsibilities of participants in recreational activities.*

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

PREFATORY NOTE: This bill was developed by the legislative council's special committee on liability law and insurance.

The bill addresses a number of unrelated issues that arise under current laws on tort liability.

A. FOSTER PARENTS AND AGENCIES

1. *Claims involving foster parents and children*

Under present s. 48.627, the department of health and social services may pay claims, not payable by insurance, for the following:

a. Acts or omissions of a foster parent that result in bodily injury to the foster child or that form the basis for a civil action for damages by the foster child's parent against the foster parent.

b. Bodily injury or property damage caused by an act or omission of a foster child in the foster parent's care, for which the foster parent becomes legally liable.

The department is required, rather than permitted, to pay claims involving bodily injury or property damage sustained by a licensed foster parent or member of the foster parent's family as a result of the act of a foster child in the foster parent's care.

The department is not liable for any act or omission by or affecting a foster child but may pay the claims described above or purchase insurance to cover such claims.

A foster parent must have a homeowner's or renter's insurance policy that provides coverage for negligent acts or omissions by a foster child that result in damages to other parties. A licensing agency may waive this requirement under circumstances specified in the statutes.

The bill makes the following changes to present law:

a. [Description omitted to reflect changes made by Assembly Amendment 6.]

b. The maximum amount of a claim for property damage sustained by a foster parent or a member of the foster parent's family is changed from \$25,000 to \$100,000. [Description does not reflect changes made by Assembly Amendment 3.]

c. A foster parent may submit a claim to the state claims board for any amount of the claim submitted to the department that is unpaid because of insufficient funds in the appropriation.

2. Use of fireworks

Under present law, a parent or legal guardian of a minor who consents to the use of fireworks by the minor is liable for damages caused by the minor's use of the fireworks.

This bill provides that a foster parent who consents to the use of fireworks by the minor is also liable for damages caused by the minor's use of the fireworks.

3. Liability of foster parents and agencies

Presently, there is no statutory standard for imposing liability on foster parents for their acts as foster parents or the acts of foster children in their custody. Also, there is no statutory standard for imposing liability on an agency that places a child with a foster parent.

This bill creates standards for determining liability of foster parents and agencies. It provides that, except as provided in statutes relating to the use of fireworks and automobile insurance coverage, a foster parent is immune from civil liability for: (a) any act or omission of the foster parent while acting in his or her capacity as a foster parent; and (b) any act or omission of a foster child in the foster parent's care. However, the immunity will not apply if an act or omission of a foster parent was not done in good faith or was not in compliance with specific written instructions that are provided by the agency regarding the care and supervision of the foster child by the agency that placed the child. The good faith of, and compliance with written instructions by, a foster parent shall be presumed in any civil action.

The bill also provides that an agency that acts in good faith in placing a child with the foster parent will also be immune from civil liability for any act or omission of the agency, the foster parent or the foster child. The immunity does not apply if: (a) the agency fails to provide the foster parent with any information that it possesses or reasonably should possess relating to medical, physical or emotional conditions of the foster child [description does not reflect changes made by

Assembly Amendment 2]; and (b) bodily injury to the child or any other person or damage to the property of the child or any other person is a direct result of that failure.

B. MUNICIPAL LIABILITY

1. Liability reserve fund

This bill authorizes municipalities to create a liability reserve fund to pay liability insurance claims or the premiums on insurance to pay such claims, or both. Current state law does not expressly authorize municipalities to establish a reserve fund for these purposes.

The bill permits any municipality (any county, city, village, town, school district, vocational, technical and adult education district and any other public body that has power to levy or certify a general property tax or budget), as part of its annual budget, to establish and maintain a liability reserve fund and to levy a tax to support the fund.

The amount of taxes levied for this purpose is limited to not more than an amount recommended by an actuary that will be sufficient to pay insurance premiums and the uninsured portion of claims that are anticipated to be made based on occurrences during the year in which the tax is collected.

The bill provides that the claims and premiums may be paid directly from the reserve fund or money may be appropriated from the fund to an operating account to make such payments. For municipalities other than the city of Milwaukee, no other transfers may be made except in accordance with the procedure specified in s. 65.90 (5) (a), which requires a two-thirds vote. For Milwaukee, transfers are subject to the three-fourths vote requirement imposed by s. 65.06 (6) (a) on other transfers for 1st class cities.

If the fund is to be dissolved, all claims must have been paid or a sufficient reserve must have been created from the fund to pay such claims. If the fund is to be continued and the types of claims covered or amount of coverage is to be reduced, the balance in the fund must exceed the amount necessary and the amount transferred may not exceed the excess amount.

2. Antitrust suits against municipalities

With the enactment of the federal local government antitrust act of 1984, congress established an absolute prohibition against the collection of monetary damages in suits against local units of government brought under federal antitrust laws. This federal legislation was enacted in response to federal court decisions that have exposed municipalities to potential liability under the federal antitrust laws for engaging in regulatory activities, such as the issuance of licenses and franchises and local zoning restrictions, that have anticompetitive results.

Currently, any person who is injured, directly or indirectly, from a violation of ch. 133, Wisconsin's antitrust law, may recover treble damages, in addition to costs and reasonable attorney fees.

This bill creates the same prohibition against the collection of monetary damages from municipalities under Wisconsin's antitrust law that is now provided under the federal law.

3. Motor vehicle accidents

Current s. 893.80 (3) limits the amount recoverable by any person for damages, injury or death in any tort action against a municipality to \$50,000, except that the amount recoverable against any volunteer fire company may not exceed \$25,000. The statute also prohibits the recovery of punitive damages in tort actions against municipalities. However, s. 345.05 (3) exempts tort actions against municipalities for damages arising from the negligent operation of a motor vehicle owned and operated by the municipality in the course of its business from the general limitations. As a result, there is no monetary limit on recoveries against municipalities in cases alleging the negligent use of a municipal motor vehicle, and punitive damages may also be awarded whenever appropriate.

This bill amends s. 345.05 (3) to provide that the amount recoverable by any person for damages in any action involv-

ing the alleged negligent operation of a municipally owned motor vehicle shall not exceed \$250,000, and that punitive damage awards are prohibited.

This bill creates s. 345.05 (1) (bm) to clarify that, for purposes of the statute, the term "motor vehicle" does not include vehicles that are exempt from registration under Wisconsin's motor vehicle code. Therefore, individual recoveries in tort actions involving the operation of such municipally owned vehicles would be subject to the general \$50,000 limitation contained in s. 893.80 (3). This change responds to the ruling of the Wisconsin supreme court in *Lemon v. Federal Insurance Company*, 111 Wis. 2d 563, 331 N.W. 2d 379 (1983), that a piece of municipally owned and operated road construction equipment was a "motor vehicle" within the meaning of s. 345.05.

4. *Liability for negligent inspections*

In *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 247 N.W. 2d 132 (1976), the Wisconsin supreme court first indicated that a municipality could be held liable to injured parties for negligent inspections conducted by municipal employees.

This bill establishes a statute of limitations for tort actions against certain governmental bodies for negligent inspections by providing that such actions must be commenced within one year after the date the negligence was discovered or, in the exercise of reasonable diligence, should have been discovered.

The supreme court, in *Coffey*, did not specifically rule that potential municipal liability resulting from negligent inspections would apply only to inspections undertaken after the date of the *Coffey* decision. Therefore, the bill also provides that governmental bodies will not be liable for damages if the negligent inspection occurred on or before November 30, 1976 (the date of the *Coffey* decision).

As noted previously, under current law, the amount recoverable by any person for damages in a tort action against a municipality (other than motor vehicle accident cases) may not exceed \$50,000. This bill provides that only one cause of action for property damage may be maintained by 2 or more joint tenants of a single-family dwelling that suffers damage as a result of a negligent municipal inspection.

C. RECREATIONAL ACTIVITIES

This bill establishes responsibilities for participants in recreational activities in order to decrease uncertainty regarding the legal responsibility for injuries that result from participation in such activities and to help assure the continued availability in the state of commercial enterprises that offer recreational activities to the public.

[Part of description omitted to reflect changes made by Assembly Amendment 1.]

The bill further provides that a participant in a recreational activity must: (1) act within the limits of his or her ability; (2) heed all warnings; (3) maintain control of his or her person and the equipment, devices or animals used while participating in the activity; and (4) refrain from acting in a manner that may cause or contribute to injury to himself or herself or other persons. The bill provides that any violation of these standards of conduct is ordinary negligence and is subject to the comparative negligence statute.

SECTION 2. 48.627 (1) (d) of the statutes is created to read:

48.627 (1) (d) The licensing agency shall specify the amounts of liability insurance coverage required under par. (a).

SECTION 3. 48.627 (2) (d) of the statutes, as affected by 1987 Wisconsin Act 27, is amended to read:

48.627 (2) (d) No claim may be approved in an amount exceeding the total amount available for paying claims under this subsection in the fiscal year dur-

ing which the claim is submitted. No claim for property damage sustained by a foster parent or a member of a foster parent's family may be approved in an amount exceeding ~~\$25,000~~ \$250,000.

SECTION 4. 48.627 (2) (e) of the statutes is amended to read:

48.627 (2) (e) The department may not approve a claim unless the foster parent submits with the claim evidence that is satisfactory to the department of the cause and value of the claim and evidence that insurance coverage is unavailable or inadequate to cover the claim. If insurance is available but inadequate, the department may approve a claim only for the amount of the value of the claim that it determines is in excess of the amount covered by insurance.

SECTION 5. 48.627 (2) (f) and (h) of the statutes, as affected by 1987 Wisconsin Act 27, are amended to read:

48.627 (2) (f) If the total amount of the claims approved during any calendar quarter exceeds 25% of the total funds available during the fiscal year for purposes of this subsection plus any unencumbered funds remaining from the previous quarter, the department shall prorate the available funds among the claimants with approved claims. The department shall also prorate any unencumbered funds remaining in the appropriation under s. 20.435 (4) (cf) at the end of each fiscal year among the claimants whose claims were prorated during the fiscal year. Payment of a prorated amount from unencumbered funds remaining at the end of the fiscal year constitutes a complete payment of the claim for purposes of this program, but does not prohibit a foster parent from submitting a claim under s. 16.007 for the unpaid portion.

(h) If a claim by a foster parent or a member of the foster parent's family is approved, the department shall deduct from the amount approved ~~\$100~~ \$200 less any amount deducted by an insurance company from a payment for the same claim, except that a foster parent and his or her family are subject to only one deductible for all claims filed in a fiscal year.

SECTION 6. 48.627 (3) of the statutes, as affected by 1987 Wisconsin Act 27, is amended to read:

48.627 (3) ~~The~~ Except as provided in s. 895.485, the department is not liable for any act or omission by or affecting a foster child, but shall, as provided in this section, pay claims described under sub. ~~(4s)~~ (1m) and may pay claims described under sub. (1s) or may purchase insurance to cover such claims as provided for under sub. (1c), within the limits of the appropriations under s. 20.435 (4) (cf) and (pd).

SECTION 7. 65.07 (1) (n) of the statutes is renumbered 65.07 (2) and amended to read:

65.07 (2) The common council may allow funds established under ~~para. sub. (1) (c), (i), (k), (o) and (r) may be allowed and (s) to accumulate from year to year in the discretion of the common council.~~

SECTION 8. 65.07 (1) (s) of the statutes is created to read:

65.07 (1) (s) A liability reserve fund for the purpose of paying liability claims against the city or premiums on insurance to pay such claims. The governing body may allow amounts appropriated to the fund to accumulate from year to year. The annual taxes levied for this purpose may not exceed the level necessary to collect the amount recommended by an actuary, in accordance with generally accepted actuarial principles, that will be sufficient to pay any insurance premiums and the uninsured portion of claims that are anticipated to be made based on occurrences during the year in which the tax is collected. Payment of claims and premiums may either be made directly from the reserve account or appropriations may be made from the reserve account to an operating account for such payments. No other transfers may be made from the fund except in accordance with the procedure specified in s. 65.06 (6) (a) and unless:

1. If the fund is to be dissolved, an actuary has determined that all claims that are to be paid from the fund have been paid or a sufficient reserve has been created from the fund to pay such claims; or

2. If the fund is to be continued and the types of claims or the amount of coverage of claims by the fund is to be reduced, an actuary has determined, under generally accepted actuarial principles, that the balance in the fund exceeds the amount necessary to pay claims and premiums and the amount transferred is not more than the excess amount.

SECTION 9. 65.90 (1) of the statutes is amended to read:

65.90 (1) ~~It~~ Unless otherwise provided, in this section, "municipality" means each county other than counties having a population of 500,000 or more, each city, excepting cities of the 1st class, village, town, school district, vocational, technical and adult education district and all other public bodies that have the power to levy or certify a general property tax or budget. Every municipality shall annually, prior to the determination of the sum to be financed in whole or in part by a general property tax, funds on hand or estimated revenues from any source, formulate a budget and hold public hearings thereon.

SECTION 10. 65.90 (6) of the statutes is created to read:

65.90 (6) As part of the annual budget required under sub. (1), the governing body of any municipality and of any county having a population of 500,000 or more may establish and maintain, and levy a tax for, a liability reserve fund for the purpose of paying liability claims against the municipality or premiums on insurance to pay such claims. The governing body may allow amounts appropriated to the fund to accumulate from year to year. The annual taxes levied for this purpose may not exceed the level necessary to collect the amount recommended by an actuary, in accordance with generally accepted actuarial princi-

ples, that will be sufficient to pay any insurance premiums and the uninsured portion of claims that are anticipated to be made based on occurrences during the year in which the tax is collected. Payment of claims and premiums may either be made directly from the reserve account or appropriations may be made from the reserve account to an operating account for such payments. No other transfers may be made from the fund except in accordance with the procedure specified in sub. (5) (a) and unless:

(a) If the fund is to be dissolved, an actuary has determined that all claims that are to be paid from the fund have been paid or a sufficient reserve has been created from the fund to pay such claims; or

(b) If the fund is to be continued and the types of claims or the amount of coverage of claims by the fund is to be reduced, an actuary has determined, under generally accepted actuarial principles, that the balance in the fund exceeds the amount necessary to pay claims and premiums and the amount transferred is not more than the excess amount.

SECTION 11. 133.18 (1) of the statutes is renumbered 133.18 (1) (a) and amended to read:

133.18 (1) (a) ~~Any~~ Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited by this chapter may sue therefor and shall recover threefold the damages sustained by the person and the cost of the suit, including reasonable attorney fees. Any recovery of treble damages shall, after trebling, be reduced by any payments actually recovered under s. 133.14 for the same injury.

SECTION 12. 133.18 (1) (b) of the statutes is created to read:

133.18 (1) (b) No damages, interest on damages, costs or attorney fees may be recovered under this chapter from any local governmental unit or against any official or employe of a local governmental unit who acted in an official capacity.

SECTION 13. 167.10 (7) of the statutes is amended to read:

167.10 (7) PARENTAL LIABILITY. A parent, foster parent or legal guardian of a minor who consents to the use of fireworks by the minor is liable for damages caused by the minor's use of the fireworks.

SECTION 14. 345.05 (1) (bm) of the statutes is created to read:

345.05 (1) (bm) "Motor vehicle" does not include a vehicle that is exempt from registration under s. 341.05.

SECTION 15. 345.05 (3) of the statutes is amended to read:

345.05 (3) A claim under this section shall be filed in the manner, form and place specified in s. 893.80. The limitations under s. 893.80 (3) are ~~not~~ applicable to a claim under this section, except that the amount recoverable by any person for any damages, injuries or death in any action shall not exceed \$250,000.

SECTION 16. 893.80 (1) (intro.) of the statutes is amended to read:

893.80 (1) (intro.) Except as provided in ~~sub.~~ subs. (1m) and (1p), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

SECTION 17. 893.80 (1p) and (1t) of the statutes are created to read:

893.80 (1p) No action may be brought or maintained with regard to a claim to recover damages against any political corporation, governmental subdivision or agency thereof for the negligent inspection of any property, premises, place of employment or construction site for the violation of any statute, rule, ordinance or health and safety code unless the alleged negligent act or omission occurred after November 30, 1976. In any such action, the time period under sub. (1) (a) shall be one year after discovery of the negligent act or omission or the date on which, in the exercise of reasonable diligence the negligent act or omission should have been discovered.

(1t) Only one action for property damage may be brought under sub. (1p) by 2 or more joint tenants of a single-family dwelling.

SECTION 18. 895.485 of the statutes is created to read:

895.485 Civil liability exemption; foster parents; and agencies. (1) Except as provided in ss. 167.10 (7) and 343.15 (2), any foster parent licensed under s. 48.62 is immune from civil liability for any of the following:

(a) An act or omission of the foster parent while he or she is acting in his or her capacity as a foster parent.

(b) An act or omission of a foster child while he or she is in the foster parent's care.

(2) The immunity specified in sub. (1) does not apply if the act or omission of a foster parent was not done in good faith or was not in compliance with any written instructions, received from the agency that placed the child, regarding specific care and supervision of the foster child. The good faith of a foster parent and the compliance of the foster parent with any written instructions received from the agency that placed the child are presumed in a civil action. Any person who asserts that a foster parent did not act in good faith, or did not comply with written instructions received from the agency who placed the child, has the burden of proving that assertion.

(3) Any agency that acts in good faith in placing a child with a foster parent is immune from civil liability for any act or omission of the agency, the foster parent or the foster child unless all of the following occur:

(a) The agency has failed to provide the foster parent with any information relating to a medical, physical, mental or emotional condition of the foster child

that it is required to disclose under this paragraph. The department of health and social services shall promulgate rules specifying the kind of information that an agency shall disclose to a foster parent which relates to a medical, physical, mental or emotional condition of the foster child.

(b) Bodily injury to the child or any other person or damage to the property of the child or any other person occurs as a direct result of the failure under par. (a).

SECTION 19. 895.525 of the statutes is created to read:

895.525 Participation in recreational activities. (1) **LEGISLATIVE PURPOSE.** The legislature intends by this section to establish the responsibilities of participants in recreational activities in order to decrease uncertainty regarding the legal responsibility for injuries that result from participation in recreational activities and thereby to help assure the continued availability in this state of enterprises that offer recreational activities to the public.

(2) **DEFINITION.** In this section, "recreational activity" means any activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "Recreational activity" includes, but is not limited to, hunting, fishing, trapping, camping, bowling, billiards, picnicking, exploring caves, nature study, dancing, bicycling, horseback riding, horseshoe-pitching, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, curling, throwing darts, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, participation in water sports, weight and fitness training, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature and any other sport, game or educational activity.

(3) **APPRECIATION OF RISK.** A participant in a recreational activity engaged in on premises owned or leased by a person who offers facilities to the general public for participation in recreational activities accepts the risks inherent in the recreational activity of which the ordinary prudent person is or should be aware. In a negligence action for recovery of damages for personal injury or property damage, conduct by a participant who accepts the risks under this subsection is contributory negligence, to which the comparative negligence provisions of s. 895.045 shall apply.

(4) **RESPONSIBILITIES OF PARTICIPANTS.** (a) A participant in a recreational activity engaged in on premises owned or leased by a person who offers facilities to the general public for participation in recreational activities is responsible to do all of the following:

1. Act within the limits of his or her ability.

2. Heed all warnings regarding participation in the recreational activity.

3. Maintain control of his or her person and the equipment, devices or animals the person is using while participating in the recreational activity.

4. Refrain from acting in any manner that may cause or contribute to injury to himself or herself or to other persons while participating in the recreational activity.

(b) A violation of this subsection constitutes negligence. The comparative negligence provisions of s. 895.045 apply to negligence under this subsection.

(5) EFFECT ON RELATED PROVISION. Nothing in this section affects the limitation of property owners' liability under s. 895.52.

SECTION 20. Initial applicability. (1) FOSTER PARENT AND AGENCY LIABILITY. The treatment of sections

48.627 (2) (d), (e), (f) and (h), 345.05 (1) (bm) and (3) and 895.485 of the statutes applies to:

(a) Causes of action which accrue on or after the effective date of this paragraph.

(b) Claims in which the negligent act or omission occurs on or after the effective date of this paragraph.

(2) ANTITRUST ACTIONS AGAINST LOCAL GOVERNMENTAL UNITS. The treatment of section 133.18 (1) of the statutes and the creation of section 133.18 (1) (b) of the statutes apply to causes of action which accrue on or after the effective date of this subsection.

