

CHAPTER 81.

CONSTRUCTION AND REPAIR OF TOWN HIGHWAYS.

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81.01 Highways; duties of town board. The town boards shall have the care and supervision of all highways and bridges in their respective towns, except as otherwise provided. It shall be the duty of each town board and it is given power:

(1) To appoint in writing if it deems advisable a superintendent of highways to supervise, under the direction of the board, the construction and repair of said highways and bridges and fix the compensation and the amount of the bond of such superintendent. Where no superintendent of highways is appointed, it shall be the duty of the town board to perform all the duties that are prescribed by law for the superintendent of highways to perform.

(2) To provide the superintendent of highways with necessary forms and books made in compliance with standards prescribed by the state highway commission.

(3) To provide machinery, implements, material and equipment needed to construct and repair said highways and bridges, and for that purpose may acquire by purchase or by condemnation in the manner provided by chapter 32 gravel pits and stone quarries, but the total sum spent under this subsection shall not exceed one thousand dollars in any year, unless a greater sum be authorized by the town meeting.

(4) To compel the superintendent of highways from time to time to perform his official duties.

(5) To erect and repair guideboards where deemed necessary on main traveled highways.

(6) To assess the highway taxes in their town in each year.

(7) To expend for highway purposes so much of the income taxes of the town as the board shall deem best.

(8) To direct when and where all town moneys received from highway taxes and other available highway funds shall be expended.

(9) To designate highways that shall be known as dragged roads, and divide the same into sections, and to appoint dragmen for each section whose duty it shall be to drag his section under the direction of the town board, or to contract to have any section dragged, and fix the compensation therefor, preference to be given to occupants of lands abutting such road.

(10) To enter any private lands with their employes and agents for the purposes of removing weeds and brush and of erecting or removing such fences as may be necessary to keep highways reasonably free from snow and open for travel during the winter season.

[1933 c. 106]

Note: The town board has no authority to delegate powers to negotiate a contract for road repairs to its chairman or to the chairman of a neighboring town or to the neighboring town itself. *Employers Mut. Liability Ins. Co., v. Industrial Comm.*, 229 W 121, 281 NW 678.

Duty of towns in relation to highway maintenance and snow removal discussed. 24 Atty. Gen. 99.

Town is not authorized to transfer town funds to county treasurer to be used by county in improvement of town roads. 27 Atty. Gen. 45.

Chairman or other member of town board of supervisors may be appointed by town board to supervise construction and repair of town highways and may receive per diem as supervisor for such work. 29 Atty. Gen. 233.

81.02 Superintendent; appointment; compensation; bond; highway districts. The town board may appoint more than one superintendent of highways. If more than one is

appointed the town board shall divide the town into as many districts as there are superintendents. The districts shall be numbered and a superintendent shall be assigned to each district. The term of office of highway superintendents shall be one year from the date of their appointment. A superintendent of highways may be compensated by a regular salary or by a per diem allowance, to be paid out of the highway fund or out of the general fund of the town. In addition to his salary or per diem compensation the superintendent may be paid out of either of said funds a stated amount for the maintenance and upkeep of a horse or automobile or motor truck. Such superintendent before he enters upon his duties shall execute an official bond in such sum as the town board shall require, with sureties to be approved by the board, and file said bond with the town clerk.

81.03 Superintendent of highways; duties and powers. (1) It shall be the duty of the superintendent of highways to supervise the construction and maintenance of all highways and bridges in his district required by law to be maintained by the town, and keep said highways passable at all times, and to perform such other services in connection with said highways as the town board may from time to time require, and to keep a full account of all his receipts and disbursements, and from time to time as required by the board and to each annual town meeting make full and complete reports thereof.

(2) The superintendent of highways may make such arrangement for the prosecution of his work as he may deem necessary, and may appoint such foremen as the highway work may require.

(3) Whenever any highway under his charge shall become impassable from any cause he shall put the same in passable condition as soon as practicable.

(4) Each superintendent of highways shall make a complete and full report of all funds received and disbursed by him whenever requested so to do by the town board, and shall also make a complete and full report to each annual town meeting.

81.04 Highway funds disbursed. All payments for work performed and materials furnished on town highways and payable out of town funds shall be by order drawn upon the town treasurer and signed by the town clerk and countersigned by the town chairman, but in a town where there is a superintendent of highways no order shall be drawn until the claim therefor has been certified by the superintendent of highways to be correct and due and has been entered in the books of the superintendent, showing the date, amount and nature of the claim. [1933 c. 106]

81.05 Waterways; maintenance by towns. The town board of any town in which is situated any waterway suitable for general and useful navigation by boats and launches may, by order to be recorded by the town clerk, adopt the same as a public waterway of the town and may thereupon expend highway funds in the improvement and maintenance of the navigability thereof. But no amount in excess of two hundred dollars shall be expended on any such waterway in any year except in pursuance of a special appropriation therefor, voted at the annual town meeting. No town shall become liable in damages by reason of any defect or insufficiency of such a water highway.

81.06 Lands near highways; entry on; purposes; road materials in highways. The superintendent of highways may enter upon any lands near any highway in his town and there construct such drains or ditches or embankments as may be necessary for the improvement or protection of such highway; and may enter upon any unimproved lands near any highway in his town and take stone, gravel, sand, clay, earth or trees for the purposes of improving any highway, but he shall carefully avoid doing any unnecessary injury to the premises; and he may take any stone, gravel or other suitable materials within the highway of his town to improve any highway therein. No such material shall be removed from any town without the consent of the town board unless the highway on which the same are found is maintained by the county in which case the county may use the same for any highway purpose. Whenever any highway shall be constructed or maintained by a county the county highway commissioner shall possess all the powers conferred in this section upon town superintendent of highways.

81.07 Entry on lands; appraisal of damages; appeals therefrom. The owner or occupant of lands entered upon or used for any of the purposes mentioned in subsection (10) of section 81.01, section 81.06 and subsection (3a) of section 82.06 may apply to the town board, or county highway committee as the case may be, to appraise the resulting damages and such damages may be determined by agreement. If they are unable to agree upon the same the board shall make and file an award of damages as provided in section 80.09, and the owner or occupant may appeal from said award within the time and in the manner provided by section 80.24, and the proceedings on such appeal shall be governed and shall conform in all things to the provisions of section 80.24 and following sections.

81.08 Temporary highways and detours; damages. (1) When any highway shall be practically impassable or be dangerous to travel or when it shall be deemed necessary on account of construction or repair work thereon or for other reasons to suspend travel

thereon or upon any part of such highway, the town board may upon its own motion lay out and open temporary highways for the accommodation of public travel through any lands. The board may contract in writing with the owner or occupant, or both, of any land through which it proposes to lay out such temporary highways, as to the location of the same, and the damages he is to receive, which contract shall be filed with the town clerk. In the absence of such contract the board shall determine by a written order filed with the town clerk both the location and the damages, and may immediately open such temporary highways. Such highways shall exist only so long as needed and shall be deemed vacated and discontinued when the permanent highway is again opened for public travel.

(2) The owner or occupant of any land occupied by such temporary highway may at any time after it is opened and within thirty days after it is so vacated or discontinued apply to the town board to determine his damages; and thereafter the same proceedings may be had as in the case of a claim for damages under section 81.07.

(3) In case such temporary highway is opened in connection with or on account of road and bridge construction the damages agreed upon or awarded pursuant to this section may be treated as part of the construction cost and paid out of the construction funds in the customary manner of disbursing the same.

81.09 Detours for highways maintained by county. In case the highway in question is maintained or is to be maintained by the county, then the county highway commissioner shall possess the powers conferred by section 81.08 upon town boards. Said powers shall be exercised by him in like manner and the procedure shall be the same except that the contract and orders and claim for damages and other papers relating to the matter shall be filed with the county clerk, and claims for damages shall be acted upon by the county board in the manner provided by section 59.76.

Note: If county has adopted town road traveler would be under 81.15. 21 Atty. Gen. in connection with establishment of detour 955. as county road, its liability for injury to a

81.10 Highways; how closed to travel; penalties. (1) Whenever any highway in charge of the town board is impassable or unsafe for travel or during the construction or repair of any such highway and thereafter until it is ready for traffic the town board may close the same and keep it closed by maintaining barriers at each end of the closed portion. Such barriers shall be of such material and construction and so placed as to indicate that the highway is closed and shall be lighted at night.

(2) Any person who shall, without lawful authority, remove, take down, alter the position of, destroy, pass over or beyond any barrier so erected, or travel with any vehicle upon any portion of a highway closed by barriers as in this section provided, or walk or travel in any manner upon the materials placed thereon as part of the repair or construction work, shall be liable to a fine of not less than ten dollars nor more than one hundred dollars, or to imprisonment not less than ten nor more than sixty days, or both.

81.11 Highway taxes; assessment; amount. (1) The town board, after each annual town meeting and prior to the first day of November following, shall assess the highway taxes for the ensuing year, and certify the same to the town clerk to be by him entered in the next town tax roll and collected as other town taxes are entered and collected.

(2) In addition to the highway taxes voted by the town meeting, the board may assess not less than one nor more than seven mills on the dollar of the taxable property of the town, but the total highway taxes voted by the town meeting and levied by the town board pursuant to this section shall not exceed ten mills on the dollar.

(3) No town containing less than five hundred inhabitants shall levy or collect in any year a highway tax of more than three thousand dollars, exclusive of the amount levied under sections 83.01 to 83.15; and no town containing two congressional townships or more and more than five hundred inhabitants a tax of more than four thousand dollars in any year, exclusive of the amount levied under sections 83.01 to 83.15 and of the mill taxes levied by the town board, upon its own authority without direction from the town meeting.

(4) No taxes shall be levied pursuant to this section which shall have the effect of increasing the total levy of taxes for all town purposes above the limit of one and one-fourth per cent of the assessed valuation of the town for the preceding year.

(5) The town board, upon its own authority and without direction from the annual town meeting, may levy and collect a tax on property located in a recorded plat situated in a town requiring the approval of such town board, and adjoining a private road used by the public located therein, and on property adjoining, where the owner regularly uses such road which is not a portion of any town, county, state or federal highway system, not exceeding three mills for each dollar of assessed valuation thereof. The proceeds of such tax shall be expended for the improvement and maintenance of any private roads used by the public located within such recorded plat. The town board

shall not expend any of such funds upon a private driveway. [1931 c. 460; 1937 c. 316]

Note: Town meeting cannot limit statutory power of town board to levy highway taxes. 24 Atty. Gen. 772.

81.12 Town highway tax; emergency levy; limit of; anticipation and collection.

(1) Whenever the highway funds provided or available therefor shall be insufficient to keep the highways open and in repair, the town board may levy a special or emergency highway tax, but not to exceed two and one-half mills on the dollar, and said tax shall be certified and entered in the tax roll and collected and expended as other highway taxes are. Not more than one levy shall be made in any year under this section and the amount levied shall not exceed six hundred dollars. The limits contained in section 81.11 and subsection (1) of section 60.18 shall not apply to taxes levied pursuant to this section.

(2) To render such tax available and in anticipation of its collection, the town board may either borrow not exceeding the amount of said tax or may issue interest bearing town orders, and the tax when collected shall constitute a special fund and shall be used so far as needed to pay the debt so incurred or the orders so issued. The total amount borrowed or the total amount of orders issued pursuant to this section shall not exceed the amount of the tax and the rate of interest shall not exceed eight per cent.

81.13 [Repealed by 1923 c. 446 s. 3]

81.14 Highways; refusal of town to open; appeal to county board; cost of opening.

(1) If any town, or towns in case of a town line highway, whether wholly within one county or upon the line between two or more counties, either by its or their proper officers, or by a majority vote of its or their electors, pursuant to section 80.30, or otherwise, voting on such question, shall refuse, fail or neglect to open and put in reasonable condition for travel a highway, within one year from the date when the same has been laid out, or refuse, fail or neglect to repair any public highway or build or repair any bridge thereon, in such town or towns, any fifteen freeholders, whether residents or not of such town or towns, may appeal from such decision, refusal, failure or neglect to the county board of the county in which such highway or bridge is wholly situated, by notice in writing served on the chairman or chairmen of such town or towns. For the purpose of this act all highways and bridges on town lines, which shall have been apportioned between said towns for the purpose of maintenance, such apportioned part of such highway or highways and bridges thereon, shall be considered as wholly within the county wherein the town to which such part of said highway or bridge so apportioned, is situated; provided, that in case of town line highways, and bridges thereon, which are also upon lines between two or more counties and which said highways or bridges have not been apportioned between such towns for the purpose of maintenance, then such appeal may be made to the county board of either or any county, bounded in whole or in part by such highway. When an appeal is taken as hereinbefore provided for, the county board shall, at the next regular meeting thereafter, either by a majority of its members or by a committee of not less than three, examine such highway or bridge, and if after such examination they shall determine that it ought to be opened and put in reasonable condition for travel or ought to be repaired, the said county board shall thereupon appropriate therefor sufficient funds to defray the estimated cost of opening or repairing such highway or building or repairing such bridge, and the chairman of such county board shall cause the said highway to be opened and put in reasonable condition for travel or cause such bridge to be repaired or built, and keep an accurate account of the expense thereof, and such expense when audited and allowed by the county board shall be charged to such town or towns and added to the next county tax apportioned thereto and collected therewith.

(1a) If any county refuses, fails or neglects to aid in putting in reasonable condition for travel any public highway which is a county line highway, the adjoining county or counties may, after not less than twenty days' notice in writing has been given to the county clerk of such county or counties, proceed to put such road in reasonable condition for travel and keep an accurate account of the expense thereof. Such expense when audited and allowed by the county board, shall be prorated and charged to such county or counties whose duty it is to keep such road in reasonable condition for travel. Such county or counties may then charge such expense to the town or towns whose duty it is to keep such highway in repair and add it to the next county tax, apportion it thereto and collect it therewith.

(2) In case such highway is laid out in accordance with a decision of commissioners reversing the decision of supervisors on appeal as provided by sections 80.17 to 80.21, then in case appeal is taken as hereinbefore provided for, the county board shall at the next regular meeting thereafter appropriate sufficient funds to defray the estimated costs and expense, of opening and putting such highway in reasonable condition for travel, and the chairman of said county board shall immediately after said meeting cause such highway to be opened and put in reasonable condition for travel, or cause the same to be repaired, keep an accurate account of the expense thereof; and such expense when audited and allowed by the county board, shall be charged to such town, or towns, in such amounts and

in such proportion as said county board shall determine and added to the next county tax apportioned thereto and collected therewith. Provided, further, that no highway which shall have been laid out in accordance with a final decision of commissioners, as provided in sections 80.17 to 80.21, inclusive, or for which appeal for the opening thereof has been taken to the county board, as provided in this section, shall be discontinued by any town or towns prior to the time said highway is actually opened for public travel.

(3) In case of town line highways, and bridges thereon, which are also upon the line between two or more counties, and which highways and bridges have not yet been apportioned between the adjoining towns for the purpose of maintenance, and where an appeal may be taken to the county board of either or any of the counties bounded in whole or by said highway or highways as hereinbefore provided, the expense incurred in opening and putting in reasonable condition for travel any such highway, or in repairing same, or in building or repairing any bridge thereon, shall be paid primarily by the county to which the appeal is taken, and by said county apportioned among all of the counties which are bounded in whole or in part by such highway, and the proportionate share of such costs and expense shall be paid by the other adjoining county or counties to the county to which the appeal is taken, upon presentation of a proper claim therefor by the latter, and when such expense shall have been paid in the manner aforesaid by the counties liable therefor same shall be charged by the respective counties to their proper town or towns and added to the next county tax apportioned to such town or towns and collected therewith.

Note: Mandamus does not lie to compel a town board to repair a town highway because the statutes do not clearly impose upon town boards the duty to repair highways, and because a person aggrieved by failure or refusal of a town board or the electors to repair a public highway may appeal to the county board under this section, being an adequate remedy. State ex rel. Wisniewski v. Rossier, 205 W 634, 238 NW 825.

Mandamus is the only adequate remedy to procure judicial determination of whether a highway was legally laid out. [State ex rel. Wisniewski v. Rossier, 205 W 634, 238 NW 825, distinguished.] State ex rel. Thompson v. Eggen, 206 W 651, 238 NW 404, 240 NW 839.

While, ordinarily, the exclusive remedy to compel a town board to repair a town highway is by appeal to the county board, the statute affords no opportunity for a judicial determination of the question of whether a road is a public highway, and mandamus is a proper remedy to determine the status of the road. State ex rel. Van Coulter v. Fadden, 209 W 1, 242 NW 899.

In a proceeding by one county against another to recover half the cost of putting a county line highway in reasonable condition for travel, the trial judge is not justifi-

fied in substituting his judgment as to what was proper to put the road in a reasonable condition for travel for the judgment of the county highway committee, there being no proof or claim that the committee did not act in good faith and according to their judgment, or that the total expense of the improvement was not as claimed. Kewaunee County v. Door County, 212 W 518, 250 NW 438.

The fact that the highway was slippery because thawing softened up the surface so that a thin coating of mud was formed did not render it a defective highway. Wisniewski v. Belmont, 213 W 34, 250 NW 859.

Counties are not liable on account of damages due to defects in state trunk highways. 20 Atty. Gen. 824.

County proceeding under 81.14 may charge total cost of construction of bridge back to town and include same in next year's tax. Said county may, under 83.03 (6), assume any portion of cost of construction. If total cost is charged back to town, then whole of such charge must be included in tax before next year. If amount of tax so apportioned exceeds constitutional limitation imposed upon town, then any balance over such limitation will necessarily be carried to following year but will not draw interest. 26 Atty. Gen. 508.

81.15 Damages caused by defects; liability of town and county. If any damage shall happen to any person, his team, carriage or other property by reason of the insufficiency or want of repairs of any bridge, sluiceway or road in any town, city or village, the person sustaining such damage shall have a right to sue for and recover the same against any such town, city or village, provided, however, that no action shall be maintained by a husband on account of injuries received by the wife, or by a parent on account of injuries received by a minor child; but if such damage shall happen by reason of the insufficiency or want of repairs of a bridge, sluiceway or road which any county shall have adopted as a county road or is by law or by agreement with any town, city or village bound to keep in repair, or which occupies any land owned and controlled by the county, such county shall be liable therefor and the claim for damages shall be against the county. If such damages shall happen by reason of the insufficiency or want of repairs of a bridge erected or maintained at the expense of two or more towns the action shall be brought against all the towns liable for the repairs of the same and upon recovery of judgment the damages and costs shall be paid by such towns in the proportion in which they are liable for such repairs; and the court may in its discretion direct the judgment to be collected from or issue execution against each town for its proportion only. No such action shall be maintained against any county, town, city or village unless within thirty days after the happening of the event causing such damage, notice in writing signed by the party, his agent or attorney shall be given to the county clerk of the county, a supervisor of the town, one of the trustees of the village or mayor or city clerk of the city against which damages are claimed, stating the place where such damage occurred, and describing generally the insufficiency or want of repair which occasioned it and that satisfaction therefor is claimed of such county, town, city or village. No notice given herein shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein

in stating the time, describing the place or the insufficiency or want of repairs which caused the damage for which satisfaction is claimed, provided it shall appear that there was no intention on the part of the person giving such notice to mislead the other party and that such party was not in fact misled thereby; and provided further, that the amount recoverable by any person for any damage or injury so sustained shall in no case exceed five thousand dollars. No action shall be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless such accumulation shall have existed for three weeks. [1931 c. 138; 1939 c. 373]

Note: If the plaintiff's team became a runaway team before the wheel of his sulky rake struck a hole in the highway, causing plaintiff to fall, he could not recover, but that was a question for the jury. The town was bound to anticipate danger which might result from a hole in the highway obviously so large as to be dangerous to travelers. *Swiergul v. Suamico*, 204 W 114, 235 NW 548.

Under the undisputed evidence, a city is not liable for an injury sustained by a pedestrian slipping on frozen mist on a slanting concrete approach across a sidewalk to a garage, the presence and condition of which he knew, regardless of any defective construction. [*Stilling v. Thorp*, 54 W 528, 11 NW 906, and *Hill v. Fond du Lac*, 56 W 242, 14 NW 25, so far as inconsistent with said statute and with *Mundell v. Milwaukee*, 191 W 508, 210 NW 677, and later cases, overruled.] *Thiele v. Green Bay*, 206 W 660, 238 NW 834.

Though a county agreeing with the state highway commission to maintain state highways within its boundaries, as authorized by 84.07, imposing the duty to maintain them upon the state, may have been bound by contract to do so, it was not "by law bound" to keep them in repair and therefore is not liable for injuries resulting from defects in such a highway. *Larsen v. Kewaunee County*, 209 W 204, 244 NW 578.

Negligent use of a defective and unguarded flare, placed for the purpose of giving warning of danger on top of planks covering an excavation in a public street necessitated by a service installation in the conduct of its municipal water system by a city, was an act done in its proprietary capacity so as to render it liable to a child burned by coming into contact with the open flame; hence a demurrer to the complaint in an action for damages based on such facts was properly overruled. The acts which resulted in injury to the child were no part of street construction, repair, or maintenance so as to constitute a defect therein, requiring service of notice of injury. *Badten v. Stevens Point*, 209 W 379, 245 NW 130.

City's liability for failure to construct sufficient highway is absolute, whereas liability for failure to discover and repair subsequent defects rests on failure to exercise ordinary care. *Morley v. Reedsburg*, 211 W 504, 248 NW 431.

In an action against a city for injuries sustained by one coasting on a street, a portion of which was blocked off by the city for coasting purposes, in colliding with a sleigh parked on the street by an abutting property owner, the complaint, sustainable only if charging a failure of the city to perform its statutory duty to maintain the street in a reasonably safe and sufficient condition, is demurrable for failure to allege the giving of written notice of injury to the city within the time required. *Skiris v. Port Washington*, 223 W 51, 269 NW 556.

In an action against a town, the act of the plaintiff motorist in swerving into a part of the roadway which was not in proper condition for travel, in order to avoid running over a cat, even if negligent, is considered neither so unforeseeable nor so extraordinary as to supersede as the cause of the injury of the motorist the condition of the highway caused by the negligence of the town. *Scheibe v. Lincoln*, 223 W 417, 271 NW 43.

Whether a rut five to seven inches deep, fourteen to eighteen inches wide and about two hundred feet long on a highway within a city, used only by farmers adjacent to the highway and persons having business with them, constituted a defect in the highway,

so as to render the city liable for injuries received by the plaintiff when a wagon tipped over because of the condition of the highway, was a jury question. *Blaschke v. Watertown*, 226 W 1, 275 NW 528.

A motorist, injured when his automobile ran into a washout at night, had the right to assure that the public highway was reasonably safe for travel, and that the road would be blocked off if there was a washout. A minor, suing a county for injury sustained by reason of a defective highway, is not entitled to recover medical expenses on the ground that the father had assigned all his claims to the son, since the father under 81.15 had no right of action against the county. An emancipated minor may recover for such medical expenses. *Tande v. Vernon County*, 226 W 602, 276 NW 359.

A difference of two and three-eighths inches in the level between adjacent cement squares of a sidewalk did not, in the absence of other contributory conditions, constitute an actionable insufficiency or want of repair such as would render the city liable for injuries sustained by a pedestrian who stumbled over the defect. *McCormick v. Racine*, 227 W 33, 277 NW 646. But a difference of four inches in sidewalk levels presents a jury question as to sufficiency of the walk. *Le May v. Oconto*, 229 W 65, 281 NW 688.

Where a highway was changed so that it turned instead of continuing straight ahead, and at the turn the county had merely dug a ditch across the abandoned road without placing a guard or warning of any kind the highway was insufficient as a matter of law. *Martinson v. Polk County*, 227 W 444, 279 NW 60.

Where a highway was changed so that it turned instead of continuing straight ahead, and at the turn the county had merely dug a ditch across the abandoned road without placing a guard or warning of any kind, and a motorist, driving at night without knowledge of the change drove straight ahead as had been his custom for many years and struck the ditch, and he could not have avoided the accident had his brakes been in perfect condition, he was not negligent. *Martinson v. Polk County*, 227 W 447, 279 NW 60.

A three-year-old child playing on a sidewalk with a tricycle was a traveler and had the same rights as an adult traveler as against the municipality for injuries caused by a defective sidewalk. Bicycle and tricycle riders on the sidewalk cannot recover for injuries resulting from defects in the sidewalk if it was in proper condition for pedestrians, but such riders may recover if the walk was not in proper condition for pedestrians. *Le May v. Oconto*, 229 W 65, 281 NW 688.

A driveway in a public park maintained by a city, which driveway was not laid out, constructed or opened by the public authorities to whom the laying out of roads and streets is delegated by statute, but by the park authorities, on whom its care and control devolved by virtue of 27.08(2)(a), and which driveway had never been used as a way of any kind until opened by the park authorities, was not a public "road" within the purview of 81.15, imposing liability on cities and other municipalities for injuries sustained by reason of the insufficiency or want of repair of any "road" therein, and hence the city in question was not liable for injuries sustained by a bicyclist when he ran into a pile of black-top on the edge of such driveway. *Kernan v. Eau Claire*, 232 W 587, 288 NW 198.

The fact that some thirty years previously the water-main shutoff box over which the

plaintiff fell was placed so as to rise about one and four-fifths inches above the surrounding surface did not constitute the street or the shutoff box a "nuisance," and the liability of the village, the street not being a place of employment within the safe-place statute, was controlled by 81.15, relating to municipal liability for injuries to travelers from defects. *Padley v. Lodi*, 233 W 661, 290 NW 136.

In an action against a city for injuries sustained by occupants of an automobile when the automobile collided with a leaf of a drawbridge as the leaf started to rise, the evidence established that the bridge was sufficiently equipped to warn and protect persons traveling on it if properly operated, and that the plaintiffs' injuries were caused, not by any insufficiency of the bridge for public travel, but by the manner of operating the bridge, which constituted the performance of a governmental function for which the city was not liable. *Sylvester v.*

Milwaukee, 236 W 539, 295 NW 696.

A triangular shaped hole or depression in a concrete sidewalk on a city street—about 11 inches long, 3 inches wide at one end and tapering to a blunt point at the other end, about one inch deep at the wider end and less at the pointed end—was not an actionable defect in itself, and a metal trap door—with hinges about three-fourths of an inch high, set in the walk about 20 inches from the pointed end of the hole, and not shown to be unusual or insufficient or in a state of negligent disrepair—was not in itself an actionable defect, and the hole and the trap door in combination did not constitute an actionable "insufficiency or want of repair" such as would render the city liable under this section for injuries sustained by a pedestrian who caught her left foot in the hole and fell when her right foot came in contact with a hinge of the trap door as she was attempting to regain her balance. *Reynolds v. Ashland*, 237 W 233, 296 NW 601.

81.16 Officers, when liable for highway defects. If any such bridge, sluiceway or road, at the time of the occurrence of such damage, shall have been insufficient or out of repair in consequence of the neglect or default of the superintendent of highways or town officer of the town or district in which the same is situated or in consequence of the neglect or default of any commissioner appointed by the county board, then the town or county against which any judgment shall have been recovered by reason of such defect may recover the amount of such judgment against any such overseer or commissioner or town officer. [1933 c. 106]

81.17 Highway defects; liability of wrongdoer; procedure. Whenever any damage shall happen to any person or property in any town, city, village or county by reason of any defect in any highway, street, alley or other public ground, or from any other cause for which any such corporation would be liable, and such damage shall be caused or produced by, or arise from, the wrong, default or negligence thereof and of any person or private corporation, such person or private corporation responsible for such wrong, default or negligence shall be primarily liable therefor; but such town, city, village or county may be sued in the same action with the person or private corporation so primarily liable, and the complaint may allege such primary liability. If the town, city, village or county shall deny the allegation concerning its primary liability and show upon whom such liability rests the court shall enter judgment for the amount plaintiff is entitled to against all the defendants shown by the verdict or finding to be liable for such damage; but judgment against the town, city, village or county shall not be enforceable until execution has been issued against the parties found to be primarily liable and returned unsatisfied in whole or in part; on such return being made the town, city, village or county made a defendant in such action shall be bound by the judgment therein to pay whatever amount is unpaid thereon, which amount shall be collected in the same way that other judgments against such corporation are collected. In any action brought against any town, city, village or county to recover such damages in which it shall be alleged in the answer that the defendant is not primarily liable and that some person or private corporation is so liable and such person or corporation is not made a party, the plaintiff may amend his complaint as provided in section 269.48, and if any such action shall be brought against any person or private corporation, such town, city, village or county not being made a party, the plaintiff may amend his complaint in like manner by making the proper corporation a party.

81.18 Highways; railroad crossings; grade separation. Whenever any highway crosses a railroad at grade and the town, village or county board or the city council or city commissioners other than in a city of the first class, as the case may be, shall deem it for the best interest of the public that said highway and railroad shall cross at separate grades, and when an agreement can be made between such board and the railroad company as to the manner of constructing of such separated grade crossing and doing the necessary work they may contract therefor; and such board shall after entering into such contract levy a tax sufficient to raise the money required to carry out such contract on its part, which tax shall be collected at the time and in the manner as other taxes are, and when collected shall be set aside as a special fund and used for said purpose. The plans for such grade separation shall have the approval of the state highway engineer before the contract shall be binding or the change shall be made.

81.19 Highway railroad grade crossings; construction and repair. It shall be the duty of all steam railroad companies owning or operating tracks crossing streets or highways at grade to keep the surface of the crossings between the tracks and rails and extending four feet on either side of the outside rails, in good condition and repair for highway travel; the common council, the village board, or town board of the municipality in

which the crossing is located, may by resolution require any such railroad company to pave, plank, repair, change or otherwise improve such crossings, as the needs require, and the clerk of such city, village or town shall cause to be served upon the local agent of such railroad company a copy of such resolution; and if the railroad company shall fail for thirty days thereafter to comply with such resolution, the city, village or town may pave, plank, repair, change or otherwise improve such crossing as designated by said resolution, and may recover the reasonable cost thereof from the railroad company in the manner provided in section 66.22. The duty imposed upon railroad companies, and the remedy given by this section, shall be in addition to other duties and remedies, and shall not be construed to repeal any other duties or remedies.

81.20 Railroads to improve and maintain crossings; duty enforced. (1) Whenever any street or other public highway crosses any railroad track or right of way at grade, the company owning or operating such railroad shall grade, construct and maintain in good and safe condition for public travel the portion of such street or highway extending upon, over or across said track or tracks. Whenever any such street or highway in any town or village shall be or is about to be paved, surfaced or otherwise improved, or any street or highway in any city shall be or is about to be paved or surfaced or otherwise improved under the provisions of sections 83.01 to 84.09, such railway company shall at its own expense improve, pave or surface such crossing between the tracks and rails and extending four feet beyond the outside rails on the right of way of such railway company in substantially the same manner and with substantially the same materials. The provisions of this section shall restrict in no manner the application of section 66.21 relating to special assessments against railroads for street improvements.

(2) Whenever such improvement of the portion of a street or highway adjacent to and on either side of such a railroad crossing has been decided upon, notice thereof may be given to the railway company. Unless the railway company shall within thirty days after receipt of such notice inform the public board, committee or officer in charge of such improvement that it will do the improvement work at the crossing with its own forces, the railway company shall be deemed to have elected to have such work done by and under the direction of the highway authorities in charge of the adjacent improvement, and to pay the cost thereof as in case of failure to improve said crossing as required by law.

(3) Whenever any railway company shall fail to grade, construct, pave, surface or otherwise improve or to maintain in good and safe condition for public travel as required by this section any such street or highway crossing after having been notified so to do by the officer in charge of such highway or of the highway improvement for thirty days after such notification the public highway authorities may grade, construct, pave, surface, improve or repair such street or highway across such railroad right of way, and the cost thereof shall be paid by the railway company to and may be collected by that unit of government out of whose treasury the original cost of the work was disbursed.

(4) The notice to the railway company shall be in writing and shall specify with reasonable certainty the work to be done by the railroad company and may be served on any station agent of the company in this state. But failure to give such notice shall not prevent a recovery from the company of such sum as may be equitably due for the performance of a duty imposed by this section upon the company. [1939 c. 249]

81.21 to 81.26 [*Renumbered sections 66.21 to 66.26 by 1927 c. 473 s. 28a*]

81.27 Sprinkling town roads. Whenever a petition signed by the owners of a majority of the lineal feet of land fronting or abutting upon any public road or part thereof in any town, praying that such road or part thereof be sprinkled, is presented to the clerk of the town in which such road or part thereof is situated and is accompanied with an undertaking, signed by at least three of such petitioners, and which said clerk shall approve as to its form and sufficiency, indemnifying the town against liability for all expense that may be incurred by reason of complying with the prayer of such petition, the supervisors of such town may, if they think the public interest requires it, advertise for sealed proposals for doing such sprinkling during the time specified in such petition, which time shall not extend beyond the end of the year in which such petition is dated. For the purpose of signing such petition every person in the actual possession of any parcel of land fronting upon the road or part thereof mentioned therein under a contract of any kind for the purchase thereof shall be deemed to be the owner of such land. Every person who signs such a petition shall write after his signature thereto a brief description of the real estate situated on such road or part thereof so owned by him, and annex to the petition an affidavit stating that he is the owner thereof; thereupon he shall be taken to be such owner, and such petition shall have the same effect as if he were in fact the owner of the property so described, regardless of whether he is such owner or not.

81.28 Advertisement; contract. If the supervisors of such town shall grant the prayer of such petition they shall advertise for sealed proposals for doing the sprinkling in accordance therewith by publishing notice of the conditions under which the work must

be done and of the time and place at which proposals for doing the same will be opened. Such notice shall be published at least once, and not less than six days before the time so fixed, in some newspaper printed in the town, if there be one; otherwise in some newspaper published at the county seat of the county in which such town is situated. The doing of such sprinkling shall be let by the supervisors to the lowest and best bidder who will enter into a contract with them to do the same according to the conditions which they may prescribe and as prayed for in the petition; the performance of the contract for doing the same shall be guaranteed by a bond executed by one or more sureties and approved by said supervisors. Said contract shall provide that the town represented by the supervisors shall in no event be liable to pay for such sprinkling or any part thereof; that the contractor shall accept in full payment for his services certificates issued by the supervisors as hereinafter provided; and whether such contract so provide or not, no liability whatever shall attach to any town because of the doing of any such sprinkling.

81.29 Assessment and certificate of cost. At any meeting of the supervisors after the performance of such contract they may assess upon the land fronting or abutting upon the road or part thereof sprinkled the cost of such sprinkling, including the cost of sprinkling crossings where other roads are intersected by such road. Such assessment shall be equal per lineal foot of frontage of each parcel of such land separately owned, and a separate certificate shall be made for each such parcel. Each certificate shall be signed by the chairman of the supervisors and the town clerk, shall state the sum due for doing the sprinkling, and contain a brief description of the land against which such sum is assessed. Such certificates shall be transferable by indorsement and bear interest at the rate of fifteen per centum per annum from the time of the next tax sale after their date. When such assessment is completed the town clerk shall file in his office a statement of the whole cost of such sprinkling, a brief description of each parcel of land owned separately and fronting or abutting upon the road or part thereof sprinkled and the amount assessed against the same, which description and amount shall be entered upon the next tax roll of such town.

81.30 Certificate a lien. From the time of filing such statement the amount due on each such certificate shall be a lien upon the land described therein, and shall be collected, and the collection thereof may be enforced, for the benefit of the holder thereof in all respects as taxes assessed against such land are collected, and the same fees may be charged for the collection thereof. Such collection may be made notwithstanding the limit fixed by law for the levy of taxes for town or other purposes may be exceeded because thereof.

81.31 Performance of contract. The supervisors shall have power to determine whether the sprinkling required to be done under the contract is done in accordance therewith, and if they shall be of opinion that it is not so done may notify the contractor of the fact and indicate in what particular he has failed. If, after receiving such notice, he shall, in their judgment, fail to comply with the terms of his contract they may forbid him to continue such sprinkling, and may employ, by private contract, other parties to do the same; in which event they shall issue separate certificates to the contractor and the parties so employed for such amount as they shall deem each to be entitled to; but the total amount for which certificates shall be issued shall not exceed the sum designated in the original contract. If the whole amount due both parties shall exceed such sum, the original contractor and the sureties on his bond shall be liable in an action brought by the parties who were subsequently contracted with for the excess; in no event shall the town be liable for any amount whatever.

81.32 Incidental expenses. The supervisors may fix the amount of compensation that the town clerk or any other person who renders services on account of such sprinkling shall be entitled to receive therefor, which amount and the expense of the advertising required and other incidental expenses incurred shall be assessed in the same manner that the expense of the sprinkling is assessed, be regarded as a part of such expense and be collected in the same way. No liability whatever for such expense or any part thereof shall rest upon such town.

81.33 Informality; reassessment. Whenever a petition for sprinkling shall be presented, a contract therefor entered into and certificates for the cost thereof issued in substantial conformity with the provisions of the foregoing sections, no error in or failure to carry out any other of such provisions shall invalidate such certificates; provided, that the sprinkling be done and that the land described in the certificate shall abut upon the part of the road sprinkled; but if any parcel of land is assessed for more than its just share of the cost of such sprinkling any certificate against it shall be invalid as to the excess beyond such share. If any such certificate is invalid for any reason whatever, or there shall be an omission to assess any parcel of land which ought to have been assessed the supervisors may, at any time within five years after the sprinkling was done, reassess the land described or intended to be described therein, or assess that omitted with the amount that should be equitably charged against it and issue certificates therefor.

81.34 Entrances to highway restored. Whenever it is necessary, in making any highway improvements under the provisions of chapter 81, 83 or 84, except in counties having a population of five hundred thousand or more, to excavate a cut or construct a fill or otherwise grade such highway in front of any entrance to abutting premises, in order to properly construct, improve or maintain such highway, there shall be constructed as a part of said improvement one grade or culvert to provide suitable ingress and egress to such premises; and if said premises are divided by such highway, then one such grade or culvert shall be constructed on each side of said highway. Thereafter each such grade or culvert shall be maintained by the owner of such premises. During the time such highway is under construction, the state, county, city, village or town shall not be responsible for any damage that may be sustained through the absence of egress or ingress to any such premises.

Note: Town is not required to build necessary bridges or culverts along highway on right-of-way to enable abutting owners to gain access on them to center of highway, except one such bridge or culvert as provided in this section. 25 Atty. Gen. 720.