

CHAPTER 81.

TOWN HIGHWAYS.

81.01	Highways; duties of town board.	81.15	Damages caused by highway defects; liability of town and county.
81.02	Superintendent; appointment; compensation; bond; highway districts.	81.16	Officers, when liable for highway defects.
81.03	Superintendent of highways; duties.	81.17	Highway defects; liability of wrongdoer; procedure.
81.04	Highway funds disbursed.	81.35	Tunnel under highway by landowner.
81.05	Waterways; maintenance by towns.	81.36	Engines upon highways; regulations; damages.
81.06	Entry on lands; purposes; road materials in highways.	81.38	Town bridges; construction and repair; county aid.
81.07	Entry on lands; appraisal of damages; appeals therefrom.	81.39	Special town tax for repair of bridges.
81.08	Temporary highways and detours; damages.	81.42	Dams used for bridges.
81.11	Highway taxes; assessment; amount.	81.43	Street assessments in towns in Milwaukee county.
81.12	Town highway tax; emergency levy; limit of; anticipation and collection.		
81.14	Highways; refusal of town to open; appeal to county board; cost of opening.		

81.01 Highways; duties of town board. The town board shall have the care and supervision of all highways in the town, except as otherwise provided. The town board shall:

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

(3) 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 \$1,000 in any year, unless a greater sum be authorized by the town meeting.

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

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

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

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

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

(9) 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) 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; 1943 c. 334 s. 62]

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. [1943 c. 334 s. 63]

81.03 Superintendent of highways; duties. The superintendent of highways shall supervise the construction and maintenance of all highways in his district required to be maintained by the town, and keep them passable at all times, and perform such other services in connection with said highways as the town board requires, and keep a full account of all his receipts and disbursements. He may make such arrangement for the prosecution of his work as he deems necessary and appoint such foremen as the highway work requires. When any highway under his charge becomes impassable he shall put the same in passable condition as soon as practicable. He 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. The superintendent, and in his absence the town board, shall immediately upon notice of its existence fill or remove any depression, ditch, hump or embankment which impedes the use of any highway in his district. [1933 c. 106; 1943 c. 334 s. 64]

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; 1943 c. 334 s. 65]

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 \$200 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. [1943 c. 334 s. 66]

81.06 Entry on lands; purposes; road materials in highways. The town board may enter upon any lands near any highway in the town and there construct necessary drains or ditches or embankments for the improvement or protection of the highway; and may enter upon any unimproved lands near any highway in the town and take stone, gravel, sand, clay, earth or trees for the purposes of improving any highway, but shall carefully avoid doing any unnecessary injury to the premises; and may take stone, gravel or other suitable materials within the highway of the 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 is found is maintained by the county, in which case the county may use the same for any highway purpose. [1943 c. 334 s. 67]

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 sections 81.01 and 81.06 may apply to the town board to appraise the resulting damages, and such damages may be determined by agreement. If they are unable to agree upon the damages the board shall make and file an award of damages, 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 by section 80.24 and following sections. [1943 c. 334 s. 68]

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 30 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. [1943 c. 334 s. 69]

81.09 [Repealed by 1943 c. 334 s. 70]

81.10 [Renumbered 86.06 by 1943 c. 334 s. 146]

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 7 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 10 mills on the dollar.

(3) No town containing less than 500 inhabitants shall levy or collect in any year a highway tax of more than \$3,000, exclusive of the amount levied under sections 83.01 to 83.14; and no town containing 2 congressional townships or more and more than 500 inhabitants a tax of more than \$4,000 in any year, exclusive of the amount levied under sections 83.01 to 83.14 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 3 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; 1943 c. 334 s. 71]

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 \$600. 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 8 per cent. [1943 c. 334 s. 72]

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, either by the proper officers, or by a majority vote of the electors voting on such question, refuse, fail or neglect to open and put in reasonable condition for travel a highway, within one year from the date when it was laid out, or refuse, fail or neglect to repair any highway or build or repair any bridge thereon, in such town or towns, any 15 freeholders thereof may appeal to the county board of the county in which the highway or bridge is situated, by notice in writing served on the chairman or chairmen of the town or towns. For the purpose of this

section all highways on town lines, which shall have been apportioned between towns, shall be considered as wholly within the town to which such part of said highway or bridge is apportioned. In case of town highways which are upon county lines and which have not been apportioned for the purpose of maintenance, the appeal may be made to the county board of either county. When it is appealed to, the county board shall, at the next regular meeting, either by a majority of its members or by a committee of not less than 3, examine such highway or bridge, and if they determine that it ought to be put in reasonable condition for travel or ought to be repaired, the county board shall thereupon appropriate therefor sufficient funds to defray the estimated cost of opening or repairing the highway or building or repairing the bridge, and the chairman of the county board shall cause the highway to be opened and put in reasonable condition for travel or cause the bridge to be repaired or built, and shall keep an accurate account of the expense thereof, and such expense when audited and allowed by the county board shall be charged to the town and added to the next county tax apportioned thereto and collected therewith.

(2) If any county fails to aid in putting in reasonable condition for travel any county line highway, the adjoining county may, after not less than 20 days' notice in writing given to the county clerk of such county, put such highway 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 the county whose duty it is to keep the highway in condition for travel. Such county may then charge the expense to the town whose duty it is to keep the highway in repair and add it to the next county tax, apportion it thereto and collect it therewith.

(3) In case the highway was laid out by commissioners upon reversing the decision of supervisors and an appeal is taken as provided in this section, the county board shall at the next regular meeting 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 the county board shall immediately after said meeting cause the highway to be put in reasonable condition for travel, keep an accurate account of the expense thereof; and such expense when audited and allowed by the county board, shall be charged to the towns, in such amounts and in such proportion as the county board shall determine and added to the next county tax apportioned thereto and collected therewith. No highway laid out by commissioners, or for which appeal for the opening thereof has been taken to the county board, as provided in this section, shall be discontinued prior to the time said highway is actually opened for public travel.

(4) In case of a county line highway which has not been apportioned between towns for the purpose of maintenance, and where an appeal may be taken to the county board of any county bounded by said highway, the expense incurred in opening and putting in reasonable condition for travel such highway, or in repairing it, 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 counties to the county to which the appeal is taken, upon presentation of a proper claim therefor, and when such expense has been paid by the counties liable therefor it shall be charged by the respective counties to their proper towns and added to the next county tax apportioned to such towns and collected therewith. [1943 c. 334 s. 73]

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 justified 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.

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) (83.03 (1), Stats. 1943), 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 highway defects; liability of town and county. If damages happen to any person or his property by reason of the insufficiency or want of repairs of any highway which any town, city or village is bound to keep in repair, the person sustaining such damages shall have a right to recover the same from such town, city or village, but 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. If such damages happen by reason of the insufficiency or want of repairs of a highway which any county by law or by agreement with any town, city or village is bound to keep in repair, or which occupies any land owned and controlled by the county, the county shall be liable therefor and the claim for damages shall be against the county. If the damages 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 bridge 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 direct the judgment to be collected from each town for its proportion only. No such action shall be maintained unless within 30 days after the happening of the event causing such damages, 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 damages 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 hereunder 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 damages for which satisfaction is claimed, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby. The amount recoverable by any person for any damages so sustained shall in no case exceed \$5,000. 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 existed for 3 weeks. [1931 c. 133; 1939 c. 373; 1943 c. 334 s. 74]

Cross Reference: See 330.19 (5) for general statute of limitations as to notice of injury.

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 543.

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 523, 11 NW 906, and Hill v. Pond 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, 233 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 104, 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.

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.

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 assume 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 §1.15 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 61.

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 §1.15, 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 30 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 §1.15, 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.

Where the plaintiff alleged in her notice of injury to the city and in her complaint that her injury was caused by the presence of metal spikes protruding several inches above the crosswalk, and introduced proof at the trial that her fall was caused by her foot becoming wedged between a protruding bent spike and a plank, the fact that the plaintiff did not also introduce proof in support of an additional allegation in the notice of injury and complaint, that her injury was caused by the presence of rotted openings in the planks, was not a fatal variance or material conflict or inconsistency, and did not render the notice of injury misleading and insufficient. *Fay v. Green Bay*, 240 W 36, 1 NW (2d) 767.

An obstruction, consisting of a water stop box maintained by the city in its proprietary capacity in operating its waterworks, and projecting 2¼ inches above the sidewalk, but not amounting to an insufficiency or want of repair of the street, within §1.15, Stats. 1939, is not a "nuisance" such as to render the city liable for injuries sustained by a pedestrian in stumbling over such box. *Lindemeyer v. Milwaukee*, 241 W 637, 6 NW (2d) 653.

A county, owning and maintaining jail premises abutting a public sidewalk in a city, created a nuisance by excavating under and along a concrete block of the sidewalk and thereby causing an uneven and unsafe surface, and, since the relation of the county to pedestrians using such sidewalk was not that of governor and governed, the county was liable for injuries sustained by a pedestrian in tripping on the uneven surface, although the county's maintenance of the jail premises generally was in the discharge of a governmental function. *Holl v. Merrill*, 251 W 203, 28 NW (2d) 363.

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

81.16 Officers, when liable for highway defects. If any highway, at the time of the occurrence of such damage, was 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 highway 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 is recovered by reason of such defect may recover the amount of the judgment from such superintendent or commissioner or town officer. [1933 c. 106; 1943 c. 334 s. 75]

81.17 Highway defects; liability of wrongdoer; procedure. Whenever damages happen to any person or property by reason of any defect in any highway or other

public ground, or from any other cause for which any town, city, village or county would be liable, and such damages are caused by, or arise from, the wrong, default or negligence thereof and of any person, or private corporation, such person or private corporation shall be primarily liable therefor; but the town, city, village or county may be sued with the person or private corporation so primarily liable. If the town, city, village or county denies its primary liability and proves upon whom such liability rests the judgment shall be against all the defendants shown by the verdict or finding to be liable for the damages; but judgment against the town, city, village or county shall not be enforceable until execution has been issued against the party found to be primarily liable and returned unsatisfied in whole or in part; on such return being made the defendant town, city, village or county shall be bound by the judgment. The unpaid balance shall be collected in the same way as other judgments. [1943 c. 334 s. 76]

Note: Under this section, a county is a proper case. *Holl v. Merrill*, 251 W 203, 28 "person" who may be sued with a city in a NW (2d) 363.

81.18 to 81.20 [Renumbered 86.11 to 86.13 by 1943 c. 334 s. 152 to 154]

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

81.27 to 81.33 [Repealed by 1943 c. 334 s. 77]

81.34 [Renumbered section 86.05 by 1943 c. 145]

81.35 Tunnel under highway by landowner. The owner of land on both sides of a town highway may construct a tunnel under the highway, and the necessary fences for the passage of stock, and other purposes, in such manner as will not interfere with or endanger travel on the highway. Such tunnel shall not be less than 25 feet in length and shall be maintained by the owner and he shall be liable for all damages which may be occasioned by failure to keep the tunnel in repair; but the electors of the town at an annual town meeting may authorize the construction of any designated tunnel not less than 16 feet in length. The chairman of the town shall see that all tunnels in his town are made in accordance with this section and that they are kept in good repair. [1943 c. 334 s. 78]

81.36 Engines upon highways; regulations; damages. (1) The owner of any engine, or any person who propels or causes such an engine to be propelled or otherwise moved or used along or upon any town highway, shall be liable for all damages that may be caused thereby to such highway, or any sluiceway, culvert or bridge thereon, or to any person or corporation by reason of the propelling or otherwise moving or using the same upon any such highway in the following cases:

(a) When such engine with its equipments and attachments and whatever it may be moving upon the highway shall weigh more than 10 tons.

(b) When any such engine shall be set up or used within the limits of any highway, for any other purpose than to be propelled or otherwise moved along or upon it.

(c) When any such engine shall be left unattended within the limits of any highway.

(d) When any such engine shall be in a highway, whether standing or moving, and the person in charge shall not signal and stop it when it is approached within 15 rods in either direction by any team or any person riding or driving any animal, and desiring to pass such engine, or when the person or persons in charge of such engine shall neglect or refuse to render all proper assistance within their power to enable such team or persons to pass in safety.

(e) When the person in charge of any engine shall neglect to span any bridge or culvert having a plank floor before crossing the same, with hardwood planks, at least 2 inches thick and 12 inches wide, or other sound planks of like width, at least 3 inches thick, so that the engine wheels shall rest thereon in crossing such bridge or culvert.

(2) The amount recovered by any town under the provisions of this section, shall, when collected, be credited to the town highway fund.

(3) Any person in charge of any engine having mud lugs on the drive wheels thereof, who shall neglect to span any bridge or culvert before crossing the same with planks of the kind and in the manner as provided in paragraph (e) of subsection (1) of this section, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than \$5 nor more than \$25, or by imprisonment in the county jail not exceeding 20 days. [1943 c. 334 s. 79]

81.38 Town bridges; construction and repair; county aid. (1) When any town has voted to construct or repair any bridge on a highway maintainable by the town, and has provided for such portion of the cost of such construction or repair as is required by this section, the town board shall file a petition with the county board setting forth said facts and the location of the bridge; and the county board, except as herein provided, shall thereupon appropriate such sum as will, with the money provided by the town, be sufficient to defray the expense of constructing or repairing such bridge, and shall levy a tax therefor, which tax when collected shall be disbursed on the order of the chairman of the county

board and the county clerk, when the town board and county highway committee shall file a written notice with the clerk that the work has been completed and accepted. The county board of any county which has never granted aid under this section may in its discretion refuse to make any appropriation.

(2) If the town has an assessed valuation of \$400,000 or over as last equalized by the county board, the county shall pay the cost in excess of \$200 up to \$400. The town and county shall each pay one-half of the cost of construction or repair above \$400. If the town has an equalized assessed valuation of less than \$400,000, the county shall pay the cost in excess of one-twentieth of one per cent of said valuation until the cost equals one-tenth of one per cent of said valuation. The town and county shall each pay one-half of the cost of such construction or repair in excess of one-tenth of one per cent of said valuation of the town. In determining the cost of construction or repair of any bridge, the cost of constructing or repairing any approach not exceeding 100 feet in length shall be included.

(3) Whenever the construction or repair of any such bridge must be made without delay, the town board may file its petition with the county clerk and the county highway committee, setting forth the facts respecting the necessity for immediate construction or repairs. It shall then be the duty of the town board and the county highway committee to make such construction or repairs with the least possible delay. The town board is authorized to borrow the entire cost of the work, and to include the town's share of such cost in the next tax levy. But if the said town's share of such cost shall exceed the amount produced by a tax of 2 mills on the dollar the action of a town meeting shall be required. The construction or repair of a bridge performed and accepted pursuant to this subsection shall entitle the town to the same county aid that the town would have been entitled to had it filed its petition with the county board as provided in subsection (1).

(4) The county highway committee and the town board shall have full charge of letting, inspecting and accepting the work, but the town board may leave the matter entirely in the hands of the county highway committee.

(5) No county order shall be drawn under subsection (1) for the construction of a bridge unless the bridge is constructed in a workmanlike manner and built of creosoted wood or timber, steel, stone or concrete or of a combination thereof.

(6) Any village, by a resolution adopted by a two-thirds majority vote of all members of the village board, may elect to become subject to all of the provisions of this section. Such election shall be effective when a certified copy of such resolution is filed with the county board and approved by a majority vote of the members of the county board representing towns and representing villages which have become subject to the provisions of this section as provided in this subsection; and thereafter, until such village ceases to be subject to the provisions of this section, the words "town" and "town board" as used in this section shall also apply respectively to such village and its village board. A village which has become subject to the provisions of this section as provided in this subsection may cease to be subject to such provisions only by the adoption of a resolution and its approval by the county board in the same manner and by the same procedure by which a village may become subject to such provisions as provided in this subsection.

(7) Except as provided in sections 81.38 (6) and 84.14 (3), nothing herein contained shall authorize the levy of a tax upon the property in any city or village which is required to maintain its own bridges, and the supervisors from such cities and villages shall have no vote upon any matter arising under this section. [1937 c. 52; 1943 c. 334 s. 80; 1945 c. 118]

Note: City participating in construction of bridge under provisions of 87.02 or 87.03, Stats. 1931 (84.11 or 84.12, Stats. 1943), is subject to county tax for bridges. 21 Atty. Gen. 933.

Town officers are not criminally liable for nonfeasance in failing to repair bridge where town has refused to vote necessary funds for repairs. Civil remedies of parties claiming

injury are limited to relief afforded under 81.14 and 81.15, Stats. 1933. 23 Atty. Gen. 601. Procedure whereby county board may improve or construct bridge or culvert in county trunk highway system and assess part of cost to town is provided by 83.03 (6), Stats. 1935 (83.03 (2), Stats. 1943). 24 Atty. Gen. 297.

See note to 80.11, citing 27 Atty. Gen. 53.

81.39 Special town tax for repair of bridges. The town board may levy a tax for the purpose of rebuilding or repairing bridges and culverts which the town is required to maintain and which do not come within the provisions of section 81.38. But no such tax shall exceed \$300 for any bridge or culvert, and not more than one such tax shall be levied in any year. [1943 c. 334 s. 81]

81.42 Dams used for bridges. (1) The town board may contract with the owner of any dam with a roadway thereon for the use of such roadway for highway purposes for such period of time as the board may determine. The contract shall provide that the roadway shall at all times be kept in repair by the owner.

(2) Whenever any town board shall file its petition with the county board, setting forth the fact that said town board has voted to acquire the right to use any such roadway,

designating as near as may be the location of such dam and roadway, and stating the amount agreed to be paid to the owner for the use thereof, the county board shall appropriate a sum equal to one-half the amount so agreed to be paid for such use, and shall cause such sum to be paid to the treasurer of said town on the order of the chairman of the county board and county clerk whenever the town board shall notify them that a contract for the use of such roadway has been executed. [1943 c. 334 s. 82]

81.43 Street assessments in towns in Milwaukee county. (1) The town board of any town in any county having a population of 250,000 or more may cause any street or alley or any part of any street or alley not less than 16 rods in length to be graded, paved, macadamized or otherwise improved, including the establishment of the grade, the construction of curbs and gutters, upon a petition therefor in writing signed by at least a majority of all the owners of real estate bounding both sides.

(2) Before ordering any such work to be done, there shall be filed with the town clerk plans and specifications for the same, and an estimate of the cost of said work, and the town board may thereupon cause the work to be done. At any time after the filing of the plans and specifications for said work, the town board shall view the premises and determine the entire cost of the contemplated work and the benefits that shall accrue to the several lots, tracts or parcels of land fronting or abutting upon such street or part of street or alley to be improved, as the case may be, and the amount that shall be assessed under the provisions of this section to each such lot, tract or parcel of land as benefits accruing thereto by such contemplated work, and shall make and file with the town clerk a report of such determination upon such question. The town board shall thereupon levy and cause to be collected upon the lots, tracts or parcels of land fronting or abutting upon such street or part of street or alley, a tax sufficient to pay the expense of constructing such improvement as ordered opposite said property to the center of street or alley.

(3) The town board shall make such levy by resolution, and immediately after the adoption of the same, such resolution, signed by the chairman and town clerk, shall be published once in each week for 2 weeks in a newspaper published regularly in such town, and if there be no such newspaper, 3 copies thereof shall be posted by the town clerk in 3 public places in such town, and a notice therewith that at a certain time therein stated, the said town board will meet at their usual place of meeting and hear all objections which may be made to such assessment or any part thereof.

(4) At the time so fixed, the said town board shall meet and hear all such objections, and for that purpose shall adjourn from day to day, not more than 3 days, and may by resolution modify such assessment in whole or part. At any time before the first day of November any party liable may pay any such tax to the town treasurer. On such first day of November, if any such tax remains unpaid, the town treasurer shall make a certified statement showing what taxes levied remain unpaid, and file same with the town clerk, who shall extend the same upon the tax roll of such town in addition to and as a part of all other town taxes therein levied on such land to be collected therewith.

(5) Whenever a contract is let for the construction or improvement of any street or alley, and the building of curbs and gutters, such contract may provide that the amount chargeable may be paid in certificates against the lots, or that payment may be in part made in certificates and part in cash, such certificates to be issued in similar manner and subject to the provisions of section 62.20 or 66.54 of the statutes, except that the duties therein defined to be exercised by the board of public works or the comptroller shall be exercised and performed by the town board and the town clerk. [1943 c. 334 s. 83; 1943 c. 553 s. 24]

82.01 [Renumbered section 84.01 (1) to (3) by 1943 c. 334 s. 116]

82.02 [Renumbered sections 27.20 (1a), 84.01 (4) to (17), 84.011 and 86.08 by 1943 c. 334 s. 3, 116a, 117, 148]

82.025 [Renumbered section 109.06 by 1933 c. 461 s. 2]

82.03 [Renumbered section 83.01 by 1943 c. 334 s. 86]

82.04 [Renumbered sections 83.01 (7) and 86.06 by 1943 c. 334 s. 87, 88, 146]

82.05 [Renumbered section 83.015 (1) by 1943 c. 334 s. 89]

82.06 [Renumbered section 83.015 (2) by 1943 c. 334 s. 90]

82.065 [Renumbered section 83.17 by 1943 c. 334 s. 112]

82.07 [Renumbered section 83.016 by 1943 c. 334 s. 91]

82.216 [Created by 1947 c. 149 renumbered section 85.216 by 1947 c. 601]