

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2181/1dn
ISR:jlg:hmh

March 18, 1999

Representative Albers:

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

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

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

Also note that currently the secondary liability provision in s. 81.17 requires a person injured by a highway defect caused in part by the negligence of a person to collect damages first from the negligent person. If the negligent person cannot pay all of the damages, the injured person may then collect the balance from the municipality. See *Dickens v. Kensmoe*, 61 Wis. 2d 211, 214 (1973). By repealing s. 81.17 a municipality may be held jointly and severally liable for damages arising from a highway defect caused in part by the negligence of another person. This means that

if damages to a person or property are caused in part by another person's negligence, but for which the municipality is also liable, the person injured may sue the municipality for all of the damages and would not have to collect from the negligent person. The municipality would then have to sue the negligent person to recover the negligent person's share of damages. Is this your intent?

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

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