

1999 DRAFTING REQUEST

Bill

Received: **11/04/1999**

Received By: **isagerro**

Wanted: **As time permits**

Identical to LRB:

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

By/Representing: **Scott**

This file may be shown to any legislator: NO

Drafter: **isagerro**

May Contact:

Alt. Drafters:

Subject: **Transportation - highways**
Transportation - miscellaneous

Extra Copies: **TNF**
PEN

Pre Topic:

No specific pre topic given

Topic:

Liability of a municipality for damages caused by highway defects

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	isagerro 1 1/04/1999	wjackson 1 1/04/1999		_____			Local
/1			jfrantze 1 1/04/1999	_____	lrb_docadmin 1 1/04/1999	lrb_docadmin 11/04/1999	

FE Sent For:

G 11-08-99

<END>

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I?	isagerro	1 WLj 11/4	To 11/4	To / KM 11/4			

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<END>



1999 ASSEMBLY BILL 325

RM
not
run

May 6, 1999 – Introduced by Representatives ALBERS, PORTER, JENSEN, M. LEHMAN, KLUSMAN, SPILLNER, MUSSER, GOETSCH, SYKORA, OWENS, GUNDERSON, HAHN, GROTHMAN, NASS, MONTGOMERY, SERATTI and KREUSER, cosponsored by Senators BRESKE, SCHULTZ and HUELSMAN. Referred to Committee on Urban and Local Affairs.

Today
Done

Regen

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

Analysis by the Legislative Reference Bureau

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

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

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

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

ASSEMBLY BILL 325

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

This bill eliminates the immunity exception under which cities, villages, towns and counties may be held liable for an insufficiency or want of repairs of a highway ^{or} for ~~an~~ accumulation of snow or ice that has existed on a highway for at least three weeks. ^{the} The bill also eliminates secondary liability for cities, villages, towns and counties.

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

This bill does not affect the immunity exception under which cities, villages, towns and

counties may be held liable

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

1 SECTION 1. 81.15 of the statutes is repealed.

2 SECTION 2. 81.17 of the statutes is repealed.

* → Insert 2-2 ✓

3 SECTION 3. Initial applicability.

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

6 (END)

**ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 1999 ASSEMBLY BILL 325**

August 24, 1999 - Offered by Representative ALBERS .

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

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

set 2-2

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

5 **81.15 Damages caused by highway defects accumulation of snow or**
6 **ice; liability of city, village, town and county.** ~~If damages happen to a person~~
7 ~~or his or her property by reason of the insufficiency or want of repairs of any highway~~
8 ~~which any town, city or village is bound to keep in repair, the person sustaining the~~
9 ~~damages has a right to recover the damages from the town, city or village. If the~~
10 ~~damages happen by reason of the insufficiency or want of repairs of a highway which~~
11 ~~any county by law or by agreement with any town, city or village is bound to keep in~~
12 ~~repair, or which occupies any land owned and controlled by the county, the county is~~

insert 2-2 (cont)

1 ~~liable for the damages and the claim for damages shall be against the county. If the~~
2 ~~damages happen by reason of the insufficiency or want of repairs of a bridge erected~~
3 ~~or maintained at the expense of 2 or more towns the action shall be brought against~~
4 ~~all the towns liable for the repairs of the bridge and upon recovery of judgment the~~
5 ~~damages and costs shall be paid by the towns in the proportion in which they are~~
6 ~~liable for the repairs; and the court may direct the judgment to be collected from each~~
7 ~~town for its proportion only. The amount recoverable by any person for any damages~~
8 ~~so sustained shall not exceed \$50,000. The procedures under s. 893.80 shall apply~~
9 ~~to the commencement of action brought under this section. No action may be~~
10 ~~maintained against a city, village, town or county to recover damages for injuries~~
11 ~~sustained by reason of an accumulation of snow or ice upon any bridge or highway,~~
12 ~~unless the accumulation existed for 3 weeks. Any action to recover damages for~~
13 ~~injuries sustained by reason of an accumulation of snow or ice that has existed for~~
14 ~~3 weeks or more upon any bridge or highway is subject to s. 893.80.~~

i5 SECTION 2. 81.17 of the statutes is repealed.

16 (END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1811 dn 3889/1 dn
ISR:jlg:hmh

November 5, 1999
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).

Amending 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. *repealing section*

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.

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3889/1dn
1SR:jlg:jf

November 4, 1999

Representative Albers:

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

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

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

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

Ivy G. Sager-Rosenthal
Legislative Attorney
Phone: (608) 2614455
E-mail: Ivy.Sager-Rosenthal@legis.state.wi.us

**SUBMITTAL
FORM**

**LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and **sign** on the appropriate line(s) below.

Date: 1/04/1999

To: Representative Albers

Relating to LRB drafting number: LRB-3889

Topic

Liability of a municipality for damages caused by highway defects

Subject(s)

Transportation - highways, Transportation - miscellaneous

1. **JACKET** the draft for introduction SA

in the Senate **or the Assembly** (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Ivy G. Sager-Rosenthal, Legislative Attorney
Telephone: (608) 261-4455