

Fiscal Estimate — 2001 Session

- Original Updated
 Corrected Supplemental

LRB Number 01-1220/1	Amendment Number if Applicable
Bill Number 2001 AB 00006	Administrative Rule Number

Subject

Liability of cities, villages, towns, and counties for damages caused by an insufficiency or want of repair of highway.

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

- Increase Existing Appropriation Increase Existing Revenues
 Decrease Existing Appropriation Decrease Existing Revenues
 Create New Appropriation

Increase Costs — May be possible to absorb within agency's budget.
 Yes No

Decrease Costs

Local: No Local Government Costs

- | | |
|--|---|
| 1. <input type="checkbox"/> Increase Costs
<input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 3. <input type="checkbox"/> Increase Revenues
<input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |
| 2. <input type="checkbox"/> Decrease Costs
<input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory | 4. <input type="checkbox"/> Decrease Revenues
<input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory |

5. Types of Local Governmental Units Affected:

- Towns Villages Cities
 Counties Others
 School Districts WTCS Districts

Fund Sources Affected

- GPR FFD PRO PRS SEG SEG-S

Affected Chapter 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

1. AB 6 repeals 81.17, Wis. Stats. and amends 81.15, Stats. The bill eliminates the specific immunity exception under which cities, villages, towns and counties may be held liable for an insufficiency or want of repairs of a highway. The bill does not affect the immunity exception under which cities, villages, towns, and counties may be held liable for damages of up to \$50,000 for the accumulation of snow or ice that has existed on a highway for at least three weeks. The bill also eliminates secondary liability for cities, villages, towns, and counties.

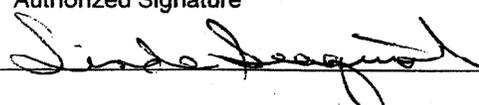
2. It is difficult to attribute a local fiscal effect to the repeal of these statutes. It is difficult to determine what effect the repeal has because another general statute, sec 893.80(3), Stats., provides a similar general limitation of \$50,000, and incorporates a statutory version of the long-standing, common law immunity for discretionary government decisions, sec. 893.80(4), Stats.

3. Section 81.15, Stats., in substantially the same form as today, has been on the books since 1849. The Supreme Court has noted that when the Court and Legislature made changes affecting local government immunity in the 1960s and 1970s, the Legislature never changed this statute. Hence, there is not now and never has been discretionary immunity for highway defects under sec. 81.15, Stats. Rights and remedies under sec. 81.15, Stats., have existed for 150 years. A computer search shows that 175 Wisconsin appellate court cases applied sec. 81.15, Stats., over the years 1884 to the present.

4. This bill is prompted by *Morris v. Juneau County*, 219 Wis.2nd 544 (1998); Motion for reconsideration denied August 25, 1998, affirming *Morris v. Juneau County*, 211 Wis.2d 890 (unpublished)(Ct. App 1997). A subsequent case, *Mariades v. Marquette County*, No. 97-3549 (Unpublished Ct. App. October 15, 1998) had the same result. Juneau County had argued it was immune from liability because maintenance of a highway involved discretionary decisions for which governmental units are immune from liability. The court agreed and dismissed the case based on this legal basis, not on the merits. The injured party, *Morris*, appealed to the Court of Appeals, which ruled no. The case must go to trial because sec. 81.15 Stats., applies and has nothing to do with discretionary functions. The court decided the County is not always immune from damage due to alleged highway maintenance defects.

Long-Range Fiscal Implications

It is not possible to determine whether this legislation will result in a net increase or net decrease in cost for local units of government. The statutory changes do not apply to the State or the Wisconsin Department of Transportation and the legislation has no fiscal effect.

Prepared By: Richard Moss, Bureau of Highway Operations	Telephone No. 608-267-7830	Agency DOT
Authorized Signature 	Telephone No. 6-2836	Date (mm/dd/ccyy) 01/22/2001

Fiscal Estimate Worksheet — 2001 Session
 Detailed Estimate of Annual Fiscal Effect

Original Updated
 Corrected Supplemental

LRB Number	Amendment Number if Applicable
Bill Number AB 00006	Administrative Rule Number

Subject

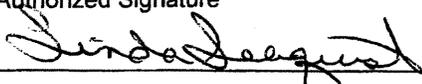
Liability of cities, villages, towns, and counties for damages caused by an insufficiency or want of repair of highway.

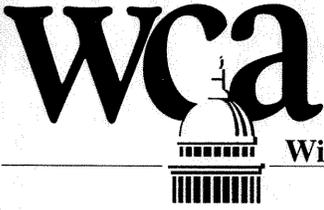
One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):
 No impact for state. Impact unknown for local government.

Annualized Costs:		Annualized Fiscal Impact on State Funds from:	
A. State Costs by Category		Increased Costs	Decreased Costs
State Operations — Salaries and Fringes		\$ 0	\$ - 0
(FTE Position Changes)		(0.00 FTE)	(- 0.00 FTE)
State Operations — Other Costs		0	- 0
Local Assistance		0	- 0
Aids to Individuals or Organizations		0	- 0
Total State Costs by Category		\$ 0	\$ - 0
B. State Costs by Source of Funds		Increased Costs	Decreased Costs
GPR		\$ 0	\$ - 0
FED		0	- 0
PRO/PRS		0	- 0
SEG/SEG-S		0	- 0
State Revenues	Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	Increased Revenue	Decreased Revenue
GPR Taxes		\$ 0	\$ - 0
GPR Earned		0	- 0
FED		0	- 0
PRO/PRS		0	- 0
SEG/SEG-S		0	- 0
Total State Revenues		\$ 0	\$ - 0

Net Annualized Fiscal Impact

	<u>State</u>	<u>Local</u>
Net Change in Costs	\$ 0	\$
Net Change in Revenues	\$ 0	\$

Prepared By: Richard Moss	Telephone No. 608-267-7830	Agency Department of Transportation
Authorized Signature 	Telephone No. 6-2836	Date (mm/dd/ccyy) 01/23/2001



Wisconsin Counties Association

MEMORANDUM

TO: Senate Judiciary, Consumer Affairs, and Campaign Finance Reform Committee
FROM: Allison Bussler, ^{JB}Legislative Associate
DATE: December 18, 2001
RE: Support for Assembly Bill 6

The Wisconsin Counties Association (WCA) strongly supports Assembly Bill 6 (AB 6). AB 6 repeals language in two sections of the Wisconsin statutes that relate to the liability of municipalities and counties for insufficient or inadequately maintained highways.

Section 893.80 (4) Wis. Stats. confers immunity for cities, towns and counties from the performance of a discretionary duty, or duty which requires a governmental entity to use judgement or discretion in carrying out this duty.

The Wisconsin Supreme Court in *Morris v. Juneau County*, held that the statutory provision (Wis. Stats. 81.15 and 81.17) imposing liability on cities, villages, towns and counties for highway defects is an exception from liability arising out of the performance of discretionary duties. However, in the Supreme Court decision in *Morris v. Juneau County*, the court clearly states that it has repeatedly suggested that the legislature repeal Wis. Stats. 81.15 and 81.17. The court states "Because the legislature continued to breathe life into a statute which the court stated was no longer needed, we must now give the statute effect."

Potholes and similar road wear can develop with little warning, as weather conditions in Wisconsin are unpredictable. The Wisconsin Supreme Court set a very dangerous precedence in *Morris v. Juneau County*. Property tax dollars are now being allocated to pay for lawsuit settlements rather than the repair of highways.

To further exacerbate the problem, in the second year of the recently passed state budget, there is a \$40 million shortfall if the state of Wisconsin wants to maintain its current level of highway maintenance. If the legislature does not restore the funding for highway maintenance, county liability will greatly increase and a number of counties have indicated that they will no longer be able to afford to maintain the state's roads.

County highway departments have the very difficult task of maintaining safe roads for a minimal amount of taxpayer dollars. AB 6 ensures that taxpayer dollars go toward repairing roads rather than costly lawsuits. The bill will also afford local governments the same liability immunity that the State currently receives under Wisconsin Statute. For these reasons WCA respectfully requests your positive action on Assembly Bill 6.

Thank you for considering our comments. If you have any questions please do not hesitate to contact me at the WCA office at (608) 224-5330.

100 River Place, Suite 101 ♦ Monona, Wisconsin 53716 ♦ 608/224-5330 ♦ 800/922-1993 ♦ Fax 608/224-5325

Mark M. Rogacki, Executive Director

Mark D. O'Connell, Chief of Staff
Craig M. Thompson, Legislative Director

Darla M. Hium, Deputy Director
Lynda L. Bradstreet, Administrative Director



202 State Street
Suite 300
Madison, Wisconsin 53703-2215

608/267-2380
800/991-5502
Fax: 608/267-0645

E-mail: league@lwm-info.org
www.lwm-info.org

To: Senator Gary George, Chair, Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform
Members of the Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform

From: Curt Witynski, Assistant Director, League of Wisconsin Municipalities

Date: December 18, 2001

Re: **Support for Assembly Bill 6**

The League of Wisconsin Municipalities supports Assembly Bill 6, which restores a municipality's ability to assert a defense of immunity from liability for discretionary highway maintenance decisions. The bill passed the Assembly last February.

Municipal officials support Assembly Bill 6 for the following reasons:

- It eliminates an exception to the immunity from liability provided to municipalities by sec. 893.80(4), Stats., for discretionary decisions relating to highway maintenance.
- It retains the three-week grace period provided to municipalities for snow and ice removal that has been in existence since 1898.
- It expressly allows a municipality, if sued after the three-week grace period, to raise the defense of immunity for discretionary actions provided by sec. 893.80(4), Stats.

For the forgoing reasons we urge you to recommend passage of Assembly Bill 6. Thank you for considering the concerns of municipalities.



**To: Members, Senate Committee on Judiciary, Consumer Affairs, and
Campaign Finance Reform**

**From: Representative Sheryl K. Albers
Senator Roger Breske**

Date: December 18, 2001

Subject: Questions and Answers – 2001 Assembly Bill 6

1. *Why do we need this legislation?*

In February 1994, a vehicle traveling in Juneau County lost control, crossed the centerline, and struck an oncoming car driven by Mr. John Morris, seriously injuring him. In a subsequent lawsuit against Juneau County, Mr. Morris and his wife alleged that the oncoming car lost control due to a rut between the edge of the road and the shoulder. They contended the county was negligent in maintaining the roadway, and, under §81.15 of the Wisconsin Statutes, therefore liable for damages. §81.15 allows individuals who sustain injuries due to a need of highway repairs to recover up to \$50,000 in damages from the governmental unit responsible for that highway if they can prove negligence on the part of the municipality.

Juneau County claimed immunity from liability under §893.80(4), Wis. Stats., which provides immunity to municipalities for discretionary actions. The county maintained that fixing (or not fixing) the rut on the edge of the road was a discretionary act, and therefore it was immune from liability, notwithstanding §81.15. Note that under §893.80(4), if a duty is “ministerial” (i.e. required of the municipality), the municipality does not receive immunity, and a plaintiff can argue negligence on the part of the municipality in order to recover up to \$50,000 in damages.

The case made its way to the Wisconsin Supreme Court, and in 1998 the court held in favor of the Morris’ [*see Morris v. Juneau County*, 219 Wis. 2d 544, 579 N.W.2d 690 (1998)]. In its opinion, the court held that Juneau County could not raise the defense of discretionary immunity from liability under §893.80(4) of the Wisconsin Statutes because §81.15 operates as an *exception* to this statute. Therefore, the court did *not* address whether highway maintenance is discretionary or ministerial under §893.80(4).

In its decision, the court also “scolded” the legislature for failing to repeal §81.15, as it had recommended in previous decisions:

“Because the legislature clearly had several opportunities to respond to this court’s suggestions but nonetheless acquiesced in our decisions or refused to amend or repeal §81.15, we conclude that the legislature intended to keep in force the exception to governmental immunity provided by §81.15.”

...

“Because the legislature continued to breathe life into a statute which this court stated was “no longer needed,” we must now give [section 81.15] effect.”

...

“In sum, we conclude that if a plaintiff’s injuries occurred by reason of insufficiency or want of repairs of any highway, that is, the plaintiff states an actionable claim under Wis. Stat. §81.15, a governmental entity is not afforded immunity under Wis. Stat. §893.80(4).”

Due to this case, municipalities may fear the need to request additional state dollars in order to maintain their highways. The legislature must now take the initiative to heed the advice of our Wisconsin Supreme Court, and repeal the portions of §81.15 that act as an exception to the ability of a municipality to raise the defense of immunity from liability for discretionary decisions under the provisions of §893.80(4).

2. Why does the legislation remove §81.17, too?

§81.15’s sister statute, §81.17, deals with primary and secondary liability for highway defects. Repeal of this section is prudent for the following reasons:

- (1) Per *Armour v. Wis. Gas Co.*, 54 Wis. 2d 302, 195 N.W.2d 620 (1971), §81.17 applies *only* to highway defects, and must be read in conjunction with §81.15 (which solely deals with highways). Eliminating §81.15 and keeping §81.17 could create confusion.
- (2) §81.17 creates a “primary” and “secondary” liability system. In other words, a court determines who is primarily liable, and (if necessary) who is secondarily liable. The entity with primary liability pays 100%; if they cannot pay all or part of their liability, then the entity with secondary liability pays the entire / remaining amount. This is an antiquated system, since “comparative negligence” (where two or more parties can share liability in a lawsuit) is the modern standard under tort law, codified in §895.045 of the statutes.

3. Is this the only way to allow municipalities to raise the defense of immunity for discretionary highway maintenance?

Yes. Municipalities will not have the opportunity to raise the immunity defense unless the legislature repeals §81.15 – even if the highway maintenance involved is actually discretionary. This puts all municipalities in Wisconsin at risk of costly litigation in years to come.

4. Why does the bill keep and amend the provisions on snow and ice accumulation in §81.15? Why not just eliminate the entire section of the statutes altogether?

The current provisions of §81.15 deal with *all* highway maintenance, including snow removal. While the statute provides an exception to the §893.80(4) immunity *at any time* for negligence in making road repairs, it provides a “mini-immunity” provision for snow removal. The ability to sue a municipality for negligence in removing snow and ice doesn’t trigger until after three weeks of snow or ice accumulation sitting on a highway without normal removal practices. In other words, the statutes provide a three week “grace period” for snow and ice removal.

If the legislature eliminated §81.15 altogether, municipalities would have the ability to raise the defense of immunity from liability for discretionary actions under §893.80(4). However, the 3-week “grace period” (immunity) for snow and ice removal would be lost. In addition, all of the case law established over the years that meticulously deals with snow removal issues would have less force, since the statute it interprets would no longer exist. Therefore, it is in the best interests of the state to leave these provisions of §81.15 in place.

The bill amends §81.15 because, in its current form, the statute allows negligence actions after the three week grace period, *regardless of whether or not the late snow and ice removal in a particular circumstance constitutes a discretionary act*. If a severe snow storm(s) hit Wisconsin, it could take a number of weeks to effectively remove snow and ice from every highway in the state. Municipalities could argue – if sued – that their actions in response to such a storm do not constitute negligence. However, we should provide our municipalities with the opportunity to first argue that snow removal after the three-week grace period is a discretionary action, and therefore falls under the immunity provisions of §893.80(4), just as the bill does for all other highway maintenance issues.

5. Does this legislation provide municipalities with complete immunity?

No. If this legislation becomes law, to be immune from liability under §893.80 of the statutes, municipalities would first have to prove that the highway maintenance in question (repairs or snow and ice removal after three weeks) constitutes a “discretionary” duty. “Discretionary” duties involve the ability of the municipality to weigh facts and circumstances, then make a decision on what action to take regarding the maintenance.

This is contrasted with a “ministerial” duty, which does not allow the municipality any discretion – it must perform the action. If the court were to find that the maintenance issue in question constitutes a ministerial duty, immunity would not apply, and the plaintiff would then need to prove that the municipality is negligent in carrying out its particular ministerial duty. If the court then found the municipality negligent, the plaintiff could receive damages up to \$50,000 (the same as currently provided by §81.15).

As stated previously, in *Morris v. Juneau County*, the Wisconsin Supreme Court did not address the question of whether or not maintaining a highway is or is not a discretionary or ministerial duty of a governmental unit. The court only decided that §81.15 acted as an exception to the immunity provided for discretionary acts under §893.80(4). There is little case law development defining what types of highway maintenance constitute discretionary or ministerial acts. Thus, while we know that governmental units will utilize §893.80(4) as a preliminary defense to a suit for failure to maintain a highway, we do not know whether the statute will actually give them that immunity.

Courts may find most highway maintenance discretionary, some maintenance completely discretionary or completely ministerial, or certain specific maintenance discretionary *or* ministerial, depending upon the factual circumstances involved (weather, machinery available, etc.). The Wisconsin Supreme Court could eventually set out some general guidelines for lower courts, too. Given the complexity of such determinations, however, the best course of action involves allowing lower courts to resolve “discretionary versus ministerial” arguments on a case-by-case basis, subject to appellate review, based on the specific facts and circumstances surrounding those cases.

(END)



STATE BAR of WISCONSIN®

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

LEGISLATIVE POSITION

To: Members of the State Senate Judiciary Committee
From: State Bar of Wisconsin Litigation Section
Date: December 18, 2001
Re: AB 6—Immunity for municipalities for damages caused by an insufficiency or want of repair of a highway.

INTRODUCTION

The Litigation Section of the State Bar of Wisconsin opposes 2001 Assembly Bill 6. The Bill is designed to dramatically change Wis. Stats. §81.15 and to repeal Wis. Stats. §81.17 in its entirety. The Legislative Reference Bureau's analysis indicates that the Bill is in response to the Supreme Court's 1998 decision in *Morris v. Juneau County*, 219 Wis. 2d 544.

The Bill has three specific effects.

1. First, the bill eliminates the right of Wisconsin residents to bring a claim against a municipality which has failed to perform its duty in keeping roads and highways in a good state of repair. That has been a right of Wisconsin citizens for almost 40 years.
2. Second, the legislation forbids bringing any action against a municipality for injuries sustained because of the accumulation of snow or ice upon a bridge or highway unless that accumulation existed for three weeks or more.
3. Lastly, the legislation repeals Wis. Stats. §81.17, which governs the procedure by which a municipality may be secondarily liable for accidents or injuries on its roadways when the municipality's conduct combined with the conduct of another to cause the injury.

RATIONALE

The Litigation Section opposes the legislation for several reasons.

First, the legislation is wide ranging; it effects virtually every activity that a municipality undertakes with regard to its roadways: design, construction, and maintenance. As mentioned, the legislation also eliminates important rights that have been in place for almost four decades. If the bill passes, a municipality is no longer responsible for any aspect of road design, construction or maintenance.



Next, the legislation amounts to an effective grant of immunity to a municipality which has failed to perform one of government's most basic functions: clearing snow or ice from its streets or highways in a safe and timely fashion. This is so because the bill makes it incumbent upon the Plaintiff to prove the length of time the accumulation existed. Often times these injuries occur from an auto accident, where those injured have no information and no reasonable opportunity to acquire information about how long the accumulation existed.

Most would agree that three weeks is more than ample opportunity to allow any municipality to clear its roadways, but the most important point about any grant of immunity is that it visits upon those injured - often catastrophically - the full burden of a municipality's neglect or wrongdoing. Whether an injury occurs because a municipality failed to effectively clear or repair its roadway, through the carelessness or neglect of one operating a snowplow or by virtue of improper or imprudent design of a road, the effect on those injured is the same. Such immunity would require those injured to bear full cost of their medical bills, the loss of their wages and to assume all responsibility for the debilitating effects of such accidents for the rest of their lives, even though the accident may have occurred through no fault of their own. The important point is that conferring immunity on a municipality when the municipality has acted in a careless, neglectful or imprudent fashion means that the severely injured must assume full burden of wrongful municipal conduct. This is neither fair nor efficient public policy.

The second reason the Litigation Section opposes this bill is because municipal responsibility for a catastrophic accident is already severely limited. As the Legislative Reference Bureau's analysis shows, a municipality is liable most often only for \$50,000.00 of any damages that may result. In the year 2001, this is small and often inadequate compensation for those injured because of the negligence of a municipality.

Third, and in a related fashion, this is not legislation designed to protect municipal treasuries. Municipalities have, without exception, already procured liability insurance against these hazards. One would expect that with a \$50,000.00 municipal damage cap in place, the savings, if there are to be any, for municipalities in insurance premiums will be minuscule by virtue of passage of this legislation. Thus, the net effect of this legislation will be to ensure that Wisconsin citizens receive no compensation for serious injuries suffered at the hands of careless motorists or workers who happen to be employed by a municipality, while the municipality sees little or no savings in its finances.

Finally, this bill creates very special treatment for municipalities, treatment that it is not afforded to this State's ordinary residents. A truck driver acting carelessly must shoulder full responsibility for any mistakes he or she makes; a municipal

snowplow operator, a vehicle that can be equally or more dangerous to other motorists on the roadway, should be held to no less a standard.

In summary, the Litigation Section opposes this legislation because it creates special rules for municipalities, rules that are directly contrary to those rules that Wisconsin expects its private citizens to live by.

The Litigation Section is a section of the State Bar of Wisconsin whose members include attorneys involved in litigation in Wisconsin's state and federal courts. The Section is composed of attorneys who represent persons injured as well as insurance companies and municipalities who have been alleged to be responsible for those injuries. If you have any questions or concerns for our membership, feel free to contact Cory Mason, Government Relations Coordinator at the State Bar of Wisconsin at 1/800-444-9404 x6128, email at 'cmason@wisbar.org'; or Attorney George Burnett, Chair of the Litigation Section at 920/437-0476, email at 'rgb@lcojlaw.com'.

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EXECUTIVE DIRECTOR
Jane E. Garrott
44 E. Mifflin Street, Suite 103
Madison, Wisconsin 53703-2897
Telephone: 608/257-5741
Fax: 608/255-9285
www.watll.org

WISCONSIN STATE SENATE

Committee on Judiciary

GARY GEORGE, CHAIRPERSON

Public Hearing on
2001 ASSEMBLY BILL 6

DECEMBER 18, 2001

CHAIRMAN GEORGE AND MEMBERS OF THE COMMITTEE, my name is Paul Sicula. I appear today in my capacity as Legislative Representative of the Wisconsin Academy of Trial Lawyers to oppose Assembly Bill 6. Thank you for this opportunity.

The Wisconsin Academy of Trial Lawyers renews its opposition to this proposal which was passed by the Assembly earlier this year. This bill would eliminate portions of Ch. 81 of the statutes that create a specific duty on the part of local governments to keep their roads in good repair. Passing this legislation is unnecessary. It is a statute and a concept that has been part of Wisconsin's laws going all the way back to 1849. Wisconsin has survived for over 150 years with this concept embedded in its statutes.

This statute is used when a citizen who has suffered injury in a motor vehicle crash can prove that a cause of the crash was a failure on the part of a municipality to repair a known defect on a highway. At the time this proposal was adopted in the mid-1800's, it was one of the few areas where liability was imposed on government.

This bill is a reaction to the Supreme Court decision in *Morris v. Juneau County*, 219 Wis. 2d 544 (1998). This decision did not change the law in any radical way. You do not need to take the word of the Wisconsin Academy of Trial Lawyers that the *Morris* case did not change the law. I have attached a "Law Note" dated January 15, 1999 by Jim Thiel of the Wisconsin Department of Transportation. The note begins by asking the

question, "Does *Morris v. Juneau County* change county exposure to liability for maintenance of state trunk highways?" Thiel's answer: "No." (This is a portion of Mr. Thiel's presentation entitled "Liability Issues Concerning Highway Operations: WisDOT Perspectives" prepared for the 1999 Winter Highway Conference in Stevens Point.) Mr. Thiel reminded his audience of municipal highway officials that: "The County is not now and never has been immune from liability due to alleged highway maintenance defects."

The rest of Chapter 81 of the statutes imposes a duty on towns to take care of the roads. Local governments will continue to maintain and repair their roads. It is one of the most common and logical local services offered. Your constituents will continue to expect their local governments to take care of the roads. Passing this bill will not change that.

It is unlikely that local governments will save any money as a result of this bill. Most will continue to carry liability insurance to protect themselves because they will continue to have a statutory duty under Ch. 81 to maintain the roads. You can almost guarantee there will be no savings on local governments' insurance premiums since local governments are not sued often under this provision and their liability for any highway defects is limited to \$50,000. Passing this bill will not change that.

Assembly Bill 6 would repeal those portions of s. 81.15 Stats. that are designed to protect the interests of your constituents, yet it would retain the portion of s. 81.15 Stats. that is designed to protect the local government. It is a cruel hoax on your constituents to suggest that this legislation will somehow help them and improve their lives. Your constituents will still expect their local governments to repair known defects in highways that lead to unsafe conditions. Passing this bill will not change that expectation of your constituents.

Last session, the authors of this legislation and other supporters predicted a flood of litigation because of the *Morris* case. That was one of the primary reasons given for the statute's repeal. If the argument is made again that there will be increased litigation, you should demand to know from the bill's sponsors what the experience has been in the last three years. There has never been much litigation under this statute throughout our history, and we certainly have not seen it in the years since the Supreme Court issued the *Morris* decision. There will be no flood of litigation because these lawsuits are difficult to prove, expensive to bring because they require expert engineering testimony, and limited in recovery because the maximum recovery is \$50,000. Passing this bill will not change that.

In the *Morris* decision the Supreme Court explained the history of governmental liability in Wisconsin this way:

In 1962 with the *Holytz* decision, this court completely abrogated common law governmental immunity, applying the abrogation broadly to torts, whether by commission or omission. [citation omitted] “[T]he rule is liability – the exception is immunity.” [citation omitted] However, “[t]his decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions.” [citation omitted]

The Supreme Court’s decision in *Holytz* was written into the statutes and is now s. 893.80, Stats. The courts have never changed the basic rule of *Holytz* that the rule is liability and the exception is immunity. There have been many court decisions, however, interpreting just what are legislative or judicial or quasi-legislative or quasi-judicial functions. Through the years the courts have significantly expanded these terms and granted immunity in more and more situations, so much so that the exception of immunity threatens to swallow the rule of liability.

The Wisconsin Academy of Trial Lawyers filed an amicus curiae brief in the *Morris* case at both the Court of Appeals and Supreme Court levels. The brief discussed the development of the law in the 36 years after the *Holytz* decision. I would be happy to supply the committee with copies of the amicus curiae brief, if you would like them.

One of the ironies of passing AB 6 is that it will likely lead to a different type of litigation. An issue that was discussed in *Morris* but not decided was the proper interpretation of s. 893.80, Stats. in the context of highway maintenance and repair. If you remove most of s. 81.15 and all of s. 81.17 from the statutes, there will most likely be lawsuits in the future to determine whether local governments are liable for negligence in highway maintenance or repair under s. 893.80. The current state of the law is settled after the *Morris* case; passing this bill will make the law unsettled and require further litigation to settle it.

We hope you will strongly consider the needs of your constituents for greater safety on their roads and for redress in the unfortunate circumstances when they have been injured. We urge you to oppose AB 6.

Thank you.

LAW NOTE

DOES MORRIS V. JUNEAU COUNTY CHANGE COUNTY EXPOSURE TO LIABILITY FOR MAINTENANCE OF STATE TRUNK HIGHWAYS?

- Answer: **NO.** It is a procedural case; it does not have any significant effect on county exposure to liability or existing legal relationships between WISDOT and the counties under contracts for maintenance of state trunk highways under sec. 84.07(1), Stats.
- Leading Case: Morris v. Juneau County, 219 Wis.2d 544 (1998); Motion for Reconsideration denied August 25, 1998, affirming Morris v. Juneau County, 211 Wis.2d 890 (Unpublished) (Ct. App. 1997)
- Subsequent Case: Mariades v. Marquette County, No.97-3549 (Unpublished Ct. App. October 15, 1998); Same result as Morris, supra, but CTH.

Abstract:

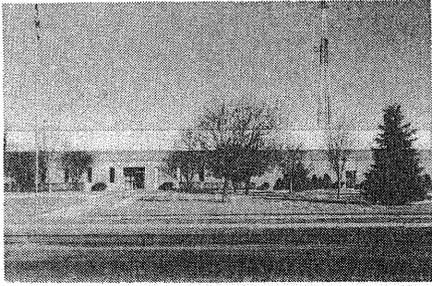
A motorist (Morris) was westbound on STH 82 when an eastbound vehicle went out of control, crossed the center line striking the Morris vehicle. Morris was severely injured and filed a claim against the other motorist and Juneau County. The other motorist settled out-of-court. The claim against Juneau County and Juneau County's insurance company alleged that the vehicle that struck Morris lost control due to a drop-off or rut between the blacktop and the aggregate gravel shoulder of the road. This claim was based on this highway defect and the want of maintenance or repair by the County.

The County answered that it was immune from liability because the maintenance involved discretionary decisions for which governmental units are immune from liability. The trial court agreed and dismissed the case on this legal, procedural basis, not on the merits. Morris appealed to the Court of Appeals. The Court of Appeals said NO. The case must go to trial because there is another statute, sec. 81.15, Stats., that applies that has nothing to do with discretionary functions and makes the county liable for insufficiency or want of repairs of a highway, regardless of whether the acts were discretionary. The statute reads in part:

"81.15 Damages caused by highway defects; liability of town and county. If damages happen to any person or his or her 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 the damages has a right to recover the damages from the town, city or village. If the 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 is liable for the damages and the claim for damages shall be against the county. ... The amount recoverable by any person for any damages so sustained shall not exceed \$50,000."

The County appealed, but the Wisconsin Supreme Court also agreed that sec. 81.15, Stats., meant the case had to go to trial on the merits. **This statute has been on the books since 1849.** Attachment A. [Note: The original statute applied damages to a person, his team, carriage or other property due to insufficiency or want of repairs of any road.] The Supreme Court pointed out that when the Court and Legislature made changes affecting governmental immunity in the 1960s and 1970s, the Legislature **never changed this statute.** Hence, there is not now and never has been governmental discretionary immunity under sec. 81.15, Stats., and the rights and remedies under sec. 81.15, Stats., have existed for 150 years. A computer search shows that 175 Wisconsin appellate court cases applied sec. 81.15, Stats., over the years from 1884 to the present. A subsequent also confirms this decision. The Court also rejected a somewhat specious County argument that the shoulder is not part of the highway. The County did not challenge whether a contract with WISDOT under sec. 84.07(1), Stats., for STH maintenance thereby extended sec. 81.15, Stats. Attachment B.

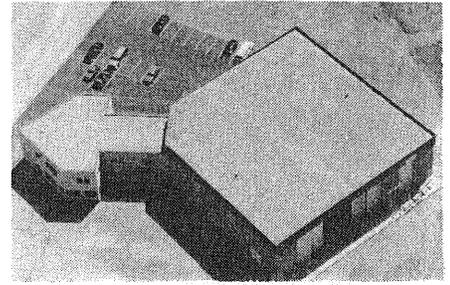
- **What the case decides?** **The County is not now and never has been immune from liability due to alleged highway maintenance defects.** Must go to trial; should never have been dismissed in first place. Section 81.15, Stats., has been on the books for 150 years.
- **What the case does not decide?** It does **not** decide that the County is liable; just that County is not immune as a matter of law from any and all liability for damage due to highway maintenance defects. Understand case scheduled on merits around March 1999.



HIGHWAY DEPARTMENT

DODGE COUNTY HIGHWAY COMMISSION

211 East Center Street
Juneau WI 53039-1309
(920) 386-3650 (phone)
(920) 386-3525 (fax)



AIRPORT TERMINAL BUILDING

COMMISSIONER

Robert A. Sindelar, P.E.
rsindel@co.dodge.wi.us

December 18, 2001

**DODGE COUNTY
HIGHWAY
COMMITTEE**

Dennis M. Kemmel,
Chairperson

Earl Anderson
Chester Coine
William Nass
Edwin J. Qualmann

ENGINEER

Bruce M. Zellner, P.E., L.S.
bzellner@co.dodge.wi.us

**CONSTRUCTION
SUPERINTENDENT**

Mark Bobholz
mbobholz@co.dodge.wi.us

**PATROL
SUPERINTENDENTS**

Ken Stock
kstock@co.dodge.wi.us

Royce Cox
rcox@co.dodge.wi.us

**SHOP
SUPERINTENDENT**

John Haase
jhaase@co.dodge.wi.us

OFFICE MANAGER

Mary Kehmeyer
mkehrmeyer@co.dodge.wi.us

RE: Needed Changes in State Law Regarding
Liability for Damages Caused by Highway Defects

The Wisconsin Counties are in need of a change in the statutes to protect them from lawsuits allegedly caused by highway defects. This change has been needed for years.

Currently, under Wis. Stat. § 893.80(4) no suit may be brought against any political corporation or government subdivision or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions. This statute essentially gives counties immunity for discretionary acts.

However, Wis. Stat. § 81.15 grants an exception to the above-mentioned general immunity statute making counties liable for damages sustained because of insufficiency or want of repair of a highway that a county is responsible to keep in repair by agreement or otherwise.

Wisconsin Stat. §81.15 and §81.17 both need to be repealed in their entirety except for the 3-week provision to remove snow and ice as provided in AB6 to give the counties and all other local municipalities immunity from suits for lack of repairs to highways. In this day of tight budgets and fiscal restraints, it is impossible to fund the level of highway patrols and repairs to maintain a perfect highway system. The counties do the best they can in light of competing demands for county tax dollars. Counties (and all other municipalities for that matter) cannot afford nor should they be required to fund a flawless highway system. Wisconsin Stat. §81.15 and §81.17 should be repealed to relieve this burden on the counties and on the taxpayers of the counties.

The Supreme Court in *Morris v. Juneau County* brought pursuant to §81.15, concluded that the immunity provisions of §893.80 did not apply. We then have a situation where immunity granted to the counties and all other municipalities under §893.80 is removed by §81.15. Therefore, we request that any personal interests in the matter be set aside and vote AB6 out of your committee and get it to the Senate floor for further debate.

In the past couple of weeks the counties have worked with James Thiel, attorney for WisDOT, to minimize our liability doing work on state highways. Passage of AB6 is the other half of that liability equation that needs to be complete.

Thank you,

DODGE COUNTY HIGHWAY COMMISSION

Robert A. Sindelar, P.E.
Commissioner

RAS/clm

Rossmiller, Dan

From: Maassen, Joe
Sent: Monday, October 08, 2001 1:53 PM
To: Rossmiller, Dan
Subject: AB-6 Inquiry

Dan, any chance you could get a read for me on the prospects for AB-6 in senate Judiciary. It is a bill that would eliminate the specific immunity exception in existing law where municipalities can be held liable for insufficient highway maintenance.

What is DOT's interest, a number of the counties have publicly indicated that their potential exposure to liability for maintenance matters on State Trunk Highways, and tighter maintenance budgets as imposed by the legislature in the budget, is causing them to rethink whether they will continue to contract with the state for any highway maintenance on STH's in their counties.

Getting this bill passed would help minimize the possibility of what I just stated. If Sen. George or others have problems with AB-6, it would also be helpful to know that for the purpose of tying to address such concerns. It would, of course, even be helpful to know if there is just plain old fashioned public policy opposition to this bill.

Any information you could share with me on the prospects for this bill would be very helpful...both from the standpoint of looking at other legislative options, and also from the standpoint of contingency planning should counties, in fact, not do winter maintenance because, in part, of their heightened sensitivity on liability exposure!

Joe Maassen
266-7364



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

TO: REPRESENTATIVE SCOTT GUNDERSON, CHAIR, ASSEMBLY COMMITTEE ON
URBAN AND LOCAL AFFAIRS

FROM: Don Dyke, Senior Staff Attorney

RE: 2001 Assembly Bill 6, Relating to Liability of Cities, Villages, Towns, and Counties for
Damages Caused by an Insufficiency or Want of Repair of a Highway

DATE: February 7, 2001

This memorandum, prepared at your request, describes the provisions of the above-captioned bill. The Assembly Committee on Urban and Local Affairs held a public hearing on Assembly Bill 6 on February 6, 2001.

A. CURRENT LAW

1. Sections 81.15 and 81.17, Stats.

Section 81.15, Stats., grants a person who sustains damages "by reason of the insufficiency or want of repairs of any highway" the right to recover damages from a municipality (city, village or town) or county responsible for the highway. The amount recoverable by any person for such damages may not exceed \$50,000. Section 81.15 has been interpreted as establishing a negligence standard; it applies to negligent highway construction or maintenance by a municipality or county. (Note that s. 81.15 also applies to sidewalks and bridges.)

Section 81.15 also provides that no action may be maintained against a municipality or county to recover damages for injuries sustained due to an accumulation of snow or ice on a highway unless the accumulation existed for three weeks. Note that this limitation only applies to natural accumulations of snow or ice, not artificial accumulations. [*Laffey v. Milwaukee*, 8 Wis. 2d 467, 99 N.W.2d 743 (1959).]

Section 81.17, Stats., is a companion statute to s. 81.15. The companion statute makes municipalities and counties secondarily liable for highway defects if another party contributes to the defect; the county or municipality is not liable unless the other party is unable to pay the damages recovered in the action.

2. Section 893.80 (4), Stats.

Current s. 893.80 (4), Stats., prohibits a lawsuit against (i.e., grants immunity to) a local governmental unit and its officials, employees and agents for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." Because case law interpreting this section has equated legislative, quasi-legislative, judicial and quasi-judicial acts with "discretionary acts," the immunity provided by s. 893.80 (4) is sometimes referred to as discretionary immunity; under its provisions (and sub. (3) of s. 893.80), governmental officers and employees and their local governmental units are liable only for the negligent "ministerial" (nondiscretionary) acts of the officers and employees. Damages recoverable for negligent ministerial acts may not exceed \$50,000. [s. 893.80 (3), Stats.]

B. MORRIS V. JUNEAU COUNTY

The recent case of *Morris v. Juneau County*, 29 Wis. 2d 544, 579 N.W.2d 690 (1998), involved the interplay of ss. 81.15 and 893.80 (4), Stats. A lawsuit was brought by a motorist and his wife against Juneau County for injuries they sustained when their vehicle was struck by a driver who allegedly lost control of her vehicle due to a rut on the shoulder of the highway. The Morrisses alleged that the accident occurred in part due to a highway defect resulting from negligent maintenance or repair by Juneau County.

Juneau County claimed it was immune from suit under s. 893.80 (4) because repairing the rut was a discretionary act. The Morrisses claimed that the county was liable under s. 81.15 for negligent maintenance or repair of a highway, regardless of whether the repair was a discretionary or ministerial act.

The Wisconsin Supreme Court concluded that s. 81.15 is an exception to the general grant of immunity found in s. 893.80 (4). Thus, "if a plaintiff's injuries occurred by reason of insufficiency or want of repairs of any highway, that is, the plaintiff states an actionable claim under Wis. Stat. s. 81.15, a governmental entity is not afforded immunity under Wis. Stat. s. 893.80 (4)." [*Id.*, 579 N.W.2d at 696.]

The court noted that s. 81.15 can be traced back to the first publication of the Wisconsin Statutes. [R.S. 1849, ch. 16, s. 103.] In contrast, the predecessor of s. 893.80 (4) providing local governmental immunity for discretionary acts was enacted in 1963. [Ch. 198, Laws of 1963.] When the predecessor of s. 893.80 (4) was enacted the Legislature did not abolish the exception to discretionary governmental immunity found in s. 81.15. The court also noted that in cases prior to *Morris*, the court had urged the Legislature to repeal s. 81.15 but the Legislature had declined to do so.

Given the terms of ss. 81.15 and 893.80 (4) and the legislative history of the provisions, the court decided that it had no choice but to give s. 81.15 effect by expressly determining that s. 81.15 takes precedence over s. 893.80 (4). Thus, s. 81.15 provides an exception to the general grant of immunity found in s. 893.80 (4). [*Id.*, 579 N.W.2d at 695.]

C. ASSEMBLY BILL 6

Assembly Bill 6 *repeals* that portion of s. 81.15, Stats., dealing with liability for highway defects and *repeals* s. 81.17, Stats., in its entirety. Presumably, the effect of the repeal of that portion of s. 81.15

providing liability for negligent maintenance or repair of a highway will be that future actions for highway defects will fall under s. 893.80 (4): if the highway defect involves a discretionary act, s. 893.80 (4) will provide immunity; if the highway defect involves a ministerial act, no immunity will be provided for a negligent ministerial act.

Assembly Bill 6 retains that portion of s. 81.15, Stats., which provides that no action may be maintained against a municipality or county to recover damages for injuries sustained as a result of a natural accumulation of snow or ice upon a highway or bridge unless the accumulation existed for three weeks. The bill expressly provides that any action to recover damages for injuries sustained by reason of an accumulation of snow or ice that has existed for three weeks or more on a highway or bridge is subject to s. 893.80. Thus, among other things, the discretionary immunity provisions of s. 893.80 (4) would apply to such an action.

If you have any questions or need additional information, please feel free to contact me at the Legislative Council Staff offices.

DD:ksm:tlw;wu

State of Wisconsin



draft

GARY R. GEORGE
SENATOR

December 10, 2001

State Senator Judy Robson,
Senate Democratic Caucus Chair
Room 15 South, State Capitol
Madison, Wisconsin

Dear Madam Caucus Chair,

I am writing to request that you call a meeting of the Senate Democratic Caucus as soon as possible so that we may take a vote on whether to continue paying legal fees for caucus employees who are part of the current investigations by district attorneys in Dane and Milwaukee counties.

I am deeply troubled by the use of taxpayer dollars to pay these legal fees. It seems to be a decision without precedent and one that has placed the reputation of our caucus, as well as the other three caucuses, in a questionable light. The integrity of the Senate as an institution is being questioned and I believe a caucus meeting is necessary to clear the air.

The position taken by the four caucuses openly defies both the letter and spirit of Wisconsin's open records law. There is ample precedent for payment of civil legal fees for state employees who are sued in connection with doing their jobs, however there are extremely limited situations under which state employees can get tax-subsidized legal help in criminal cases.

In addition, I believe our caucus should consider releasing the names of those whose legal bills have been paid so far. Wisconsin has a proud tradition of open government and secretly spending public tax dollars has no place in the way we conduct our business.

As the chair of our caucus I believe your leadership is necessary to bring us together to discuss these serious matters. Please respond as soon as possible.

Sincerely,

GARY R. GEORGE
State Senator
Sixth Senate District

Cc: Members, Senate Democratic Caucus

STATE OF WISCONSIN

To _____

Date _____ Time _____

WHILE YOU WERE OUT

M Bob

of Dodge Cty Highway Comm.

Phone 920-386-3653

Telephoned	<input checked="" type="checkbox"/>	Please Call	<input checked="" type="checkbox"/>
Called to See You	<input type="checkbox"/>	Rush	<input type="checkbox"/>
Returned Your Call	<input type="checkbox"/>	Will Call Again	<input type="checkbox"/>

Message Re: AB 6
Out of Committee and
on to the floor



Party Receiving Call

Bob Sindelan (920) 386-3653
Dodge Co.

has issues w/ state over
liability
reimburse

state dictate
how to maintain

Marathon }
Dodge + Rock } self insured

inadequately
funding maintenance

4.4% over
last 10 yrs

\$75,000 deductible / accident

take premiums of counties that at
averages those not self insured
to pay

levy fees
paid to
county roads

that average

AB 6 repeals about 70% of 81.15
which takes away the immunity granted

↓
impro

893.

grants immunity

↓
more for
reconstruction
due to influence road
of contractors

maintenance keeps stuff in
place through

would cities towns villages be be
treated same as state



44 East Mifflin Street, Suite 103
 Madison, Wisconsin 53703-2897
 Phone: (608) 257-5741 Fax: (608) 255-9285

Date: 11/13/01 Time (CST): 3:35 p.m.

To: Dan Ross Miller, Sen. George's office

From: Nancy Rottier

Number of Pages (including cover): 5

Comments: Here is a copy of the Assembly testimony, as requested.

Lakefront Palm Garden

RESERVATION CONTRACT

Date of Booking: _____

NAME: Allen

ADDRESS: _____

CITY, STATE AND ZIP CODE: _____

PHONE #1: _____ #2: _____

FAX #: 608-266-7381

DATE OF EVENT: _____ START/END TIME _____

FUNCTION: _____ ESTIMATED # OF GUESTS: _____

MINIMUM F/B SPENDING: _____
(Not including service charge & tax)

DEPOSIT ACCEPTED: _____
(Please make checks payable to: Lakefront Palm Garden)

CREDIT CARD TYPE: _____
(Master Card or Visa)

DATE ACCEPTED: _____

CREDIT CARD #: _____
Exp. Date: _____

HOW DID YOU HEAR ABOUT US? _____

PRICE GUARANTEED 60 DAYS BEFORE EVENT. Guaranteed not to increase more than 5%-7%.

DEPOSIT IS NON-REFUNDABLE AND NON-TRANSFERABLE UNLESS AUTHORIZED BY LAKEFRONT PALM GARDEN. It is for a specific date, specific event and a specific size.

If canceled one year in advance, no additional amount due. Six months in advance \$1000 is due (non-refundable)

7 days prior to event full amount is due payable by certified check or money order. Catering contract/outline due 21 days prior to event. Final count is due 14 days before the event.

SIGNATURE OF CUSTOMER _____ DATE _____
(Mail signed copy back to Lakefront Palm Garden as soon as possible)

Please mail all payments to: **Lakefront Palm Garden**
1137 N. Old World Third Street
Milwaukee, Wisconsin 53203

SIGNATURE OF SALES PERSON _____

SIGNATURE OF LAKEFRONT BREWERY _____

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Madison, Wisconsin 53703-2897

Telephone: 608/257-5741

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WISCONSIN STATE ASSEMBLY

Committee on
URBAN & LOCAL AFFAIRS

SCOTT GUNDERSON, CHAIRPERSON

PUBLIC HEARING ON
2001 ASSEMBLY BILL 6

FEBRUARY 6, 2001

CHAIRMAN GUNDERSON AND MEMBERS OF THE COMMITTEE, my name is Paul Sicula. I appear today in my capacity as Legislative Representative of the Wisconsin Academy of Trial Lawyers to oppose Assembly Bill 6. Thank you for this opportunity.

The Wisconsin Academy of Trial Lawyers renews its opposition to this proposal which was considered in the last session of the Legislature as Assembly Bill 325, then redrafted and passed as Assembly Bill 580. Passing this legislation is unnecessary. It is a statute and a concept that has been part of Wisconsin's laws going all the way back to 1849. Wisconsin has survived for over 150 years with this concept embedded in its statutes. I suspect we can survive a few more.

This bill is a reaction to the Supreme Court decision in *Morris v. Juneau County*, 219 Wis. 2d 544 (1998). This decision did not change the law in any radical way. You do not need to take our word for it that the *Morris* case did not change the law. I have attached a "Law Note" dated January 15, 1999 by Jim Thiel of the Wisconsin Department of Transportation. The note begins by asking the question, "Does *Morris v. Juneau County* change county exposure to liability for maintenance of state trunk highways?" Thiel's answer: "No." (This is a portion of Mr. Thiel's presentation entitled "Liability Issues Concerning Highway Operations: WisDOT Perspectives" prepared for the 1999

Winter Highway Conference in Stevens Point.) Mr. Thiel's reminded his audience of municipal highway officials that: "The County is not now and never has been immune from liability due to alleged highway maintenance defects."

The rest of Chapter 81 of the statutes still imposes a duty on towns to take care of the roads. Local governments will continue to maintain and repair their roads. It is one of the most common and logical local services offered. Your constituents will continue to expect their local governments to take care of the roads. Passing this bill will not change that.

It is unlikely that local governments will save any money as a result of this bill. Most will continue to carry liability insurance to protect themselves. You can almost guarantee there will be no savings on local governments' insurance premiums since local governments are not sued often under this provision and their liability for any highway defects is limited to \$50,000. Passing this bill will not change that.

Assembly Bill 6 would repeal those portions of s. 81.15 Stats. that are designed to protect the interests of your constituents and retain the portion of s. 81.15 Stats. that is designed to protect the local government. It is a cruel hoax on your constituents to suggest that this legislation will somehow help them and improve their lives. This statute is used when a citizen who has suffered injury in a motor vehicle crash can prove that a cause of the crash was a failure on the part of a municipality to repair a known defect on a highway. At the time this proposal was adopted in the mid-1800's, it was one of the few areas where liability was imposed on government. Your constituents will still expect their local governments to repair known defects in highways that lead to unsafe conditions. Passing this bill will not change that expectation of your constituents.

Last session, the authors of this legislation and other supporters predicted a flood of litigation because of the *Morris* case, and that was one of the primary reasons given for the statute's repeal. If the argument is made again that there will be increased litigation, you should demand to know from the bill's sponsors what the experience has been in the last three years. There has never been much litigation under this statute throughout our history, and we certainly have not seen it in the years since the Supreme Court issued the *Morris* decision. There will be no flood of litigation because these lawsuits are difficult to prove, expensive to bring because they require expert engineering testimony, and limited in recovery because the maximum recovery is \$50,000. Passing this bill will not change that.

In the *Morris* decision the Supreme Court explained the history of governmental liability in Wisconsin this way:

In 1962 with the *Holytz* decision, this court completely abrogated common law governmental immunity, applying the abrogation broadly to torts, whether by commission or omission. [citation omitted] “[T]he rule is liability – the exception is immunity.” [citation omitted] However, “[t]his decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions.” [citation omitted]

The Supreme Court’s decision in *Holytz* was written into the statutes and is now s. 893.80, Stats. The courts have never changed the basic rule of *Holytz* that the rule is liability and the exception is immunity. There have been many court decisions, however, interpreting just what are legislative or judicial or quasi-legislative or quasi-judicial functions. Through the years the courts have significantly expanded these terms and granted immunity in more and more situations, so much so that the exception of immunity threatens to swallow the rule of liability.

The Wisconsin Academy of Trial Lawyers filed an amicus curiae brief in the *Morris* case at both the Court of Appeals and Supreme Court levels. The brief discussed the development of the law in the 36 years after the *Holytz* decision. I would be happy to supply the committee with copies of the amicus curiae brief, if you would like them.

One of the ironies of passing AB 6 is that it will likely lead to a different type of litigation. An issue that was discussed in *Morris* but not decided was the proper interpretation of s. 893.80, Stats. in the context of highway maintenance and repair. If you remove most of s. 81.15 and all of s. 81.17 from the statutes, there will most likely be lawsuits in the future to determine whether local governments are liable for negligence in highway maintenance or repair under s. 893.80. The current state of the law is settled after the *Morris* case; passing this bill will make the law unsettled and require further litigation to settle it.

We hope you will strongly consider the needs of your constituents for greater safety on their roads and for redress in the unfortunate circumstances when they have been injured. We urge you to oppose AB 6.

Thank you.

January 15, 1999

LAW NOTE

Jim Thiel/OGC/DOT

**DOES MORRIS V. JUNEAU COUNTY CHANGE COUNTY
EXPOSURE TO LIABILITY FOR MAINTENANCE OF STATE TRUNK HIGHWAYS?**

Answer:

NO. It is a procedural case; it does not have any significant effect on county exposure to liability or existing legal relationships between WISDOT and the counties under contracts for maintenance of state trunk highways under sec. 84.07(1), Stats.

Leading Case:

Morris v. Juneau County, 219 Wis.2d 544 (1998); Motion for Reconsideration denied August 25, 1998, affirming Morris v. Juneau County, 211 Wis.2d 890 (Unpublished) (Ct. App. 1997)

Subsequent Case:

Mariades v. Marquette County, No.97-3549 (Unpublished Ct. App. October 15, 1998); Same result as Morris, supra, but CTH.

Abstract:

A motorist (Morris) was westbound on STH 82 when an eastbound vehicle went out of control, crossed the center line striking the Morris vehicle. Morris was severely injured and filed a claim against the other motorist and Juneau County. The other motorist settled out-of-court. The claim against Juneau County and Juneau County's insurance company alleged that the vehicle that struck Morris lost control due to a drop-off or rut between the blacktop and the aggregate gravel shoulder of the road. This claim was based on this highway defect and the want of maintenance or repair by the County.

The County answered that it was immune from liability because the maintenance involved discretionary decisions for which governmental units are immune from liability. The trial court agreed and dismissed the case on this legal, procedural basis, not on the merits. Morris appealed to the Court of Appeals. The Court of Appeals said NO. The case must go to trial because there is another statute, sec. 81.15, Stats., that applies that has nothing to do with discretionary functions and makes the county liable for insufficiency or want of repairs of a highway, regardless of whether the acts were discretionary. The statute reads in part:

"81.15 Damages caused by highway defects; liability of town and county. If damages happen to any person or his or her 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 the damages has a right to recover the damages from the town, city or village. If the 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 is liable for the damages and the claim for damages shall be against the county. ... The amount recoverable by any person for any damages so sustained shall not exceed \$50,000."

The County appealed, but the Wisconsin Supreme Court also agreed that sec. 81.15, Stats., meant the case had to go to trial on the merits. This statute has been on the books since 1849. Attachment A. [Note: The original statute applied damages to a person, his team, carriage or other property due to insufficiency or want of repairs of any road.] The Supreme Court pointed out that when the Court and Legislature made changes affecting governmental immunity in the 1960s and 1970s, the Legislature never changed this statute. Hence, there is not now and never has been governmental discretionary immunity under sec. 81.15, Stats., and the rights and remedies under sec. 81.15, Stats., have existed for 150 years. A computer search shows that 175 Wisconsin appellate court cases applied sec. 81.15, Stats., over the years from 1884 to the present. A subsequent also confirms this decision. The Court also rejected a somewhat specious County argument that the shoulder is not part of the highway. The County did not challenge whether a contract with WISDOT under sec. 84.07(1), Stats., for STH maintenance thereby extended sec. 81.15, Stats. Attachment B.

What the case decides? The County is not now and never has been immune from liability due to alleged highway maintenance defects. Must go to trial; should never have been dismissed in first place. Section 81.15, Stats., has been on the books for 150 years.

What the case does not decide? It does not decide that the County is liable; just that County is not immune as a matter of law from any and all liability for damage due to highway maintenance defects. Understand case scheduled on merits around March 1999.



STATE BAR of WISCONSIN®

5302 Eastpark Blvd.
P.O. Box 7158
Madison, WI 53707-7158

LEGISLATIVE POSITION

To: Members of the Wisconsin State Assembly
From: State Bar of Wisconsin Litigation Section
Date: February 13, 2001
Re: AB 6—Immunity for municipalities for damages caused by an insufficiency or want of repair of a highway.

INTRODUCTION

The Litigation Section of the State Bar of Wisconsin opposes 2001 Assembly Bill 6. The Bill is designed to dramatically change Wis. Stats. §81.15 and to repeal Wis. Stats. §81.17 in its entirety. The Legislative Reference Bureau's analysis indicates that the Bill is in response to the Supreme Court's 1998 decision in *Morris v. Juneau County*, 219 Wis. 2d 544.

The Bill has three specific effects.

1. First, the bill eliminates the right of Wisconsin residents to bring a claim against a municipality which has failed to perform its duty in keeping roads and highways in a good state of repair. That has been a right of Wisconsin citizens for almost 40 years.
2. Second, the legislation forbids bringing any action against a municipality for injuries sustained because of the accumulation of snow or ice upon a bridge or highway unless that accumulation existed for three weeks or more.
3. Lastly, the legislation repeals Wis. Stats. §81.17, which governs the procedure by which a municipality may be secondarily liable for accidents or injuries on its roadways when the municipality's conduct combined with the conduct of another to cause the injury.

RATIONALE

The Litigation Section opposes the legislation for several reasons.

First, the legislation is wide ranging; it effects virtually every activity that a municipality undertakes with regard to its roadways: design, construction, and maintenance. As mentioned, the legislation also eliminates important rights that have been in place for almost four decades. If the bill passes, a municipality is no longer responsible for any aspect of road design, construction or maintenance.



Next, the legislation amounts to an effective grant of immunity to a municipality which has failed to perform one of government's most basic functions: clearing snow or ice from its streets or highways in a safe and timely fashion. This is so because the bill makes it incumbent upon the Plaintiff to prove the length of time the accumulation existed. Often times these injuries occur from an auto accident, where those injured have no information and no reasonable opportunity to acquire information about how long the accumulation existed.

Most would agree that three weeks is more than ample opportunity to allow any municipality to clear its roadways, but the most important point about any grant of immunity is that it visits upon those injured - often catastrophically - the full burden of a municipality's neglect or wrongdoing. Whether an injury occurs because a municipality failed to effectively clear or repair its roadway, through the carelessness or neglect of one operating a snowplow or by virtue of improper or imprudent design of a road, the effect on those injured is the same. Such immunity would require those injured to bear full cost of their medical bills, the loss of their wages and to assume all responsibility for the debilitating effects of such accidents for the rest of their lives, even though the accident may have occurred through no fault of their own. The important point is that conferring immunity on a municipality when the municipality has acted in a careless, neglectful or imprudent fashion means that the severely injured must assume full burden of wrongful municipal conduct. This is neither fair nor efficient public policy.

The second reason the Litigation Section opposes this bill is because municipal responsibility for a catastrophic accident is already severely limited. As the Legislative Reference Bureau's analysis shows, a municipality is liable most often only for \$50,000.00 of any damages that may result. In the year 2001, this is small and often inadequate compensation for those injured because of the negligence of a municipality.

Third, and in a related fashion, this is not legislation designed to protect municipal treasuries. Municipalities have, without exception, already procured liability insurance against these hazards. One would expect that with a \$50,000.00 municipal damage cap in place, the savings, if there are to be any, for municipalities in insurance premiums will be minuscule by virtue of passage of this legislation. Thus, the net effect of this legislation will be to ensure that Wisconsin citizens receive no compensation for serious injuries suffered at the hands of careless motorists or workers who happen to be employed by a municipality, while the municipality sees little or no savings in its finances.

Finally, this bill creates very special treatment for municipalities, treatment that it is not afforded to this State's ordinary residents. A truck driver acting carelessly must shoulder full responsibility for any mistakes he or she makes; a municipal

snowplow operator, a vehicle that can be equally or more dangerous to other motorists on the roadway, should be held to no less a standard.

In summary, the Litigation Section opposes this legislation because it creates special rules for municipalities, rules that are directly contrary to those rules that Wisconsin expects its private citizens to live by.

The Litigation Section is a section of the State Bar of Wisconsin whose members include attorneys involved in litigation in Wisconsin's state and federal courts. The Section is composed of attorneys who represent persons injured as well as insurance companies and municipalities who have been alleged to be responsible for those injuries. If you have any questions or concerns for our membership, feel free to contact Cory Mason, Government Relations Coordinator at the State Bar of Wisconsin at 1/800-444-9404 x6128, email at 'cmason@wisbar.org'; or Attorney George Burnett, Chair of the Litigation Section at 920/437-0476, email at 'rgb@lcojlaw.com'.

Conversation w/ Joe Maaser

11-09-01

Re: AB 6

AB 6 would make counties feel better
but wouldn't change very much

counties want DOT to indemnify them
(would probably be unconstitutional for
DOT to do so)

if state does maintenance - state is
immunized - has never allowed itself to be
sued

if state makes directive - actions would
be protected

AB 6 would immunize counties

can be liable up to \$50k

Conversation vs Ron Shlansky

11-12-01

RE: AB6

§ 893.80, Stats.

if local gov't exercising discretion
it is immune from suit

if performs ministerial act negligently
it may be sued and can be liable
for up to \$50,000

immunity under 893.80 (4)

Ct. : 81.15, Stats. interpreted such that
it allows suit not only for
performance of ministerial duty
but for discretionary actions

Bill :

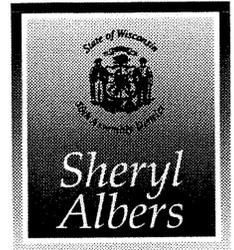
would restore 893.80, Stats.
⇒ immunity for discretionary acts
but not for ministerial acts

State Bar litigation section opposes

members & committees already have
insurance

\$50,000 limit medical liability

November 9, 2001



Senator Gary George
Chair, Judiciary Committee
Room 118 South
State Capitol
P.O. Box 7882
Madison 53707-7882

Dear Senator ^{Gary} George,

^{consider}
Please act on 2001 Assembly Bill 6 that addresses county liability concerns. This legislation provides for necessary increases in the State Highway Maintenance and Traffic Operations funding for the next fiscal year beginning July 1, 2002.

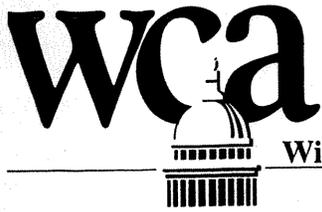
Thank you in advance for you attention to this request. Best wishes!

Sincerely,

Sheryl K. Albers
State Representative
50th Assembly District

See memo!

Office: P.O. Box 8952 • State Capitol • Madison, WI 53708-8952 • (608) 266-8531
Home: S6896 Seeley Creek Road • Loganville, WI 53943 • (608) 727-5084



MEMORANDUM

TO: The Wisconsin State Legislature
DATE: November 1, 2001
RE: Highway Safety and Adequate Highway Maintenance Funding

The Wisconsin Counties Association, the Wisconsin Department of Transportation and the Wisconsin County Highway Association request the legislature increase State Highway Maintenance and Traffic Operations funding for the next State Fiscal Year beginning July 1, 2002. Increased funding is needed for the maintenance of safe highways through our state and county contracting partnerships.

The 2001-03 State Biennial Budget provided a one-time transfer of \$27 million from the highway rehabilitation appropriation to highway operations. The budget also provided a process to request an additional \$10 million. In all likelihood, this increased funding will only be sufficient for the current fiscal year, July 1, 2001 to June 30, 2002. There is no question there are not adequate funds for the next State Fiscal Year. The one-time increase simply does not provide the same level of funding for the State Fiscal Year beginning July 1, 2002. We also agree that additional funds are needed to pay for operating and maintaining new lane miles and increased usage of the State System and to fund higher maintenance costs. It is good business to assure that we are able to operate and maintain the important public investment in its state highway system. These activities are essential to providing reliable mobility, public safety, and security. **We request that the Wisconsin Legislature work to increase highway maintenance funding for public safety reasons.** Our challenge is to work together to meet these future maintenance-funding needs while preserving our long-standing state and county partnerships and contracts in an effective way to continue to maintain safe state highways.

Concerns have been raised regarding county exposure to liability. We are, of course, more concerned with adequate maintenance funding for safety, but these county liability concerns are being addressed separately as follows:

Revisions to the State Highway Maintenance Manual that were recently recommended by county legal counsel and the Wisconsin County Mutual Insurance Corporation are all entirely satisfactory to the Wisconsin Department of Transportation and will be incorporated in the revised Manual with a target effective date of November 1, 2001.

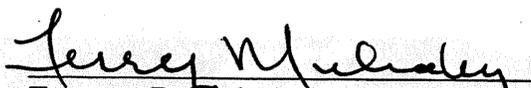
Page 2
Highway Safety Memo
November 1, 2001

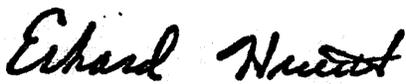
We believe 2001 Assembly Bill 6 correctly addresses county liability concerns raised by the Supreme Court's decision in Morris v. Juneau County under Wis. Stat. 85.15 and 85.17. This legislation was introduced January 16, passed the Assembly 51- 47 on February 13, 2001 and is now in the Senate Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform.

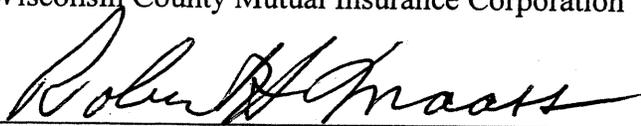
Please help us meet these current challenges. We ask that you support Assembly Bill 6 and increase State Highway Maintenance and Traffic Operations funding for the next State Fiscal Year beginning July 1, 2002. We can and need to continue our long-standing and effective state and county contracting partnerships for the maintenance of safe state highways.

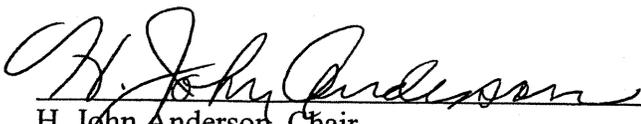
Sincerely,


Mark Rogacki, Executive Director
Wisconsin Counties Association


Terrence D. Mulcahy, P.E., Secretary
Wisconsin Department of Transportation


Erhard Huettl, President
Wisconsin County Mutual Insurance Corporation


Robert Maass, President
Wisconsin County Highway Association


H. John Anderson, Chair
Wisconsin County Highway Association