04/03/02 "See News Release 028 for any concurrences and/or dissents."

SUPREME COURT OF LOUISIANA

01-C-0876

LAJUANA PETRE

V.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

C/W

VINCENT PETRE

V.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

ON WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEAL, PARISH OF AVOYELLES

TRAYLOR, J., dissenting[*]

Once again we are faced with "bad facts making bad law." Under the mantra of "manifest error," the majority upholds the lower courts in finding that DOTD was liable in a single vehicle car accident, despite the gross negligence of an intoxicated motorist, because Hwy. 107 contained an unreasonably dangerous condition that caused or was a substantial factor in causing the accident. In doing so, the majority ignores prior decisions by this Court and abdicates an appellate court's obligation on review to make legal determinations regarding whether a defect constitutes an unreasonable risk of harm. Because Hwy. 107 did not contain an unreasonably dangerous condition within the scope of DOTD's legal duty to prudent motorists exercising ordinary care, and the sole cause of the accident was

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[*] Retired Judge Robert L. Lebrano, assigned as Justice *Pro Tempore,* participating in the decision. Retired Judge Melvin A. Shortess, Associate Justice *ad hoc*, sitting for Justice Jeannette T. Knoll, recused.

the plaintiff driver's error, I respectfully dissent.

DOTD has a duty to maintain the public roadways, including adjacent shoulders and areas in the DOTD's right-of-way, in a condition that is reasonably safe and does not present an unreasonable risk of harm to the motoring public exercising ordinary care and reasonable prudence. La. Rev. Stat. 48:21(A); *Campbell v. State, Through Dep't of Transp. & Dev.*, 94-1052 (La. 1/17/95), 648 So. 2d 898, 901-02; *Brown*, 707 So. 2d at 1242; *Oster*, 582 So. 2d at 1289-91. This duty, however, does not render DOTD the guarantor for the safety of all the motoring public or the insurer for all injuries or damages resulting from any risk posed by obstructions on or defects in the roadway or its appurtenances. *See Netecke v. State, Through Dep't of Transp. & Dev.*, 98-1182 (La. 10/19/99), 747 So. 2d 489, 495; *Graves*, 703 So. 2d at 572. Whether DOTD breached its duty to the public, by knowingly maintaining a defective or unreasonably dangerous roadway, depends on all the facts and circumstances determined on a case by case basis. *Campbell*, 648 So. 2d at 901-02.

However, I disagree that this case is decided simply by deferance to "manifest error review." The trial judge may have determined that the road presented a dangerous condition as a finding of fact. The question whether that dangerous condition presented an unreasonable risk of harm is a mixed question of law and fact. *See Boykin v. Louisiana Transit Co., Inc.*, 96-1932 (La. 3/4/98), 707 So. 2d 1225, 1231. The existence of an unreasonable risk of harm may not be inferred solely from the fact that an accident occurred. *See, e.g., Simeon v. John Doe, d/b/a The Sweet Pepper Grill*, 618 So. 2d 848 (La. 1993). As this Court stated in *Lasoyne v. Kansas City Southern R.R.*, 00-2628 (La. 4/3/01), 786 So. 2d 682:

> Further, the fact that an accident occurred because of a vice or defect does not elevate the condition of the thing to that of an unreasonably dangerous defect. The vice or defect must be of such a nature as to constitute a dangerous condition that would be reasonably expected to cause injury to a *prudent person using ordinary care* under the circumstances.

Id. at 694 (citations omitted) (emphasis added). With this decision, the majority continues its trend to expand the scope of DOTD's legal duty to include all claimants, beyond those who are merely inattentive, to those who are grossly negligent. In doing so, the rule of law defining DOTD's duty has changed: DOTD must now maintian the public highways in a condition that is reasonably safe for persons exercising neither care nor prudence.

The unreasonable risk of harm criterion is not a simple rule of law with neat, mathematical formulations. *Oster*, 582 So. 2d at 1289. In attempting to define the test, this Court has previously described the unreasonable risk of harm criterion as a guide in balancing the likelihood and magnitude of harm against the social utility of the thing, all the while considering a broad range of social and economic factors, including the cost to the defendant of avoiding the harm, as well as the risk and the social utility of the party's conduct at the time of the accident. *Netecke*, 747 So. 2d at 498. In every responsible determination, all the circumstances surrounding the particular accident under review must be considered to determine whether DOTD's legal duty encompassed the risk which caused the plaintiff's damages. *Oster*, 582 So. 2d at 1289; *Landry v. State of Louisiana and the Bd. of Comm'rs of the Orleans Levee Dist.*, 495 So. 2d 1284, 1287 (La. 1986). Because everyone cannot be protected from all risks, this Court "must decide which risks are unreasonable." *Graves*, 703 So. 2d at 573-74.

Clearly, Ms. Petre suffered a magnitude of harm of tragic proportions. She suffered severe and debilitating injuries and the loss of her ten-year old daughter.

The likelihood of the harm in the present case, however, was minimal. Where a roadway is marked with a yellow warning sign of a curved road ahead with a 40 mph advisory speed,[1] this serves as a warning of apparent and obvious risk to the motoring public exercising ordinary care and reasonable prudence.[2] The DOTD's duty to provide a reasonably safe highway does not require the DOTD to take every conceivable measure to prevent injuries. Also, the likelihood that a reasonably prudent driver would glance away to examine the occupants of passing cars while entering a curve, steer the vehicle out of the travel lane, and onto the shoulder without stopping or significantly slowing is minimal. Compounding the scenario was Ms. Petre's grossly intoxicated state.

The level of risk created by the conduct of the parties differed in drastic degree. At most, DOTD exposed the plaintiffs to a momentary risk of harm as the Petre vehicle passed the particular highway curve in question. However, with Ms. Petre driving in such an intoxicated state, every intersection, other vehicle, and object beside the road posed a tremendous risk of catastrophic injury or death to Shanah, to the plaintiffs and to others.

This Court has also previously recognized the social utility of roadside ditches that contain culverts to keep water from draining onto the travel portion of the highway, which causes a dangerous situation for motorists. *See Netecke*, 747 So. 2d at 499. Further, the driveway is a social necessity for landowners abutting

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[1]The defendants' expert witness testified that he used ball bank tests to verify that the curve could be safely negotiated by a vehicle going at least 50 mph.

[2] DOTD's duty to provide a reasonably safe roadway may be discharged by providing adequate warnings of a defect or hazard. Warnings should be sufficient to alert the ordinary, reasonable motorist, based on considerations of the probable volume of traffic, the character of the road, and the use reasonably anticipated. *See Hardenstein v. Cook Construction, Inc.*, 96-0829 (La. App. 1 Cir. 2/14/97), 691 So. 2d 177, 183-184, *writ denied*, 97-0686 (La. 4/25/97), 692 So. 2d 1093. In the instant case, DOTD arguably discharged any duty it may have had by posting an advisory speed of 40 mph and a warning of the curve ahead in both directions on the road.

state highways. *See Brown*, 707 So. 2d at 1242 (finding DOTD not liable for abandoned driveway on shoulder which driver collided with and which caused his car to become airborne). Landowners must have an access route across DOTD's right-of-way, making their removal in the design of a road infeasible. In contrast, Ms. Petre's use of the highway at the time of the accident lacked any social utility. A motorist, exercising ordinary case and reasonable prudence, would refrain from using the state's highways for any purpose while intoxicated.

Finally, the physical and financial inability of DOTD to maintain the State's roadways, shoulders, and right-of-ways in anything more than a reasonably safe condition has been considered by this Court in the past as a factor in determining whether a particular condition complained of presents an unreasonable risk of harm to the plaintiff. *See, e.g., Hunter v. State, Through Dep't of Transp. & Dev.*, 620 So. 2d 1149, 1153 (La. 1993).

The plaintiffs argue that the shoulder and slopes of the ditch were unreasonably hazardous because they did not meet current design standards. However, the DOTD clearly does not have a duty to bring old highways up to modern standards. *Aucoin v. State, Through Dep't. of Transp. and Dev.*, 97-1938, 97-1967 (La. 4/24/98), 712 So. 2d 62; *Myers v. State Farm Mut. Auto. Ins. Co.*, 493 So. 2d 1170 (La. 1986); *Holloway v. State, Through Dep't of Transp. and Dev.*, 555 So. 2d 1341 (La. 1990). We have held that this duty does not exist unless a new construction or a major reconstruction of the highway has taken place. *See Myers,* 493 So. 2d at 1173. In this case, although an asphalt overlay was placed on the highway in 1952, and the lanes were widened in 1987, no major reconstruction was undertaken. Thus, the DOTD had no duty to bring Highway 107 up to current design standards.

In addition, the testimony of both experts established that the fore slope of the ditch in the path traveled by Ms. Petre was never less than between 3:1 or 4:1, and perhaps high as 5:1 according to DOTD's expert. More to the point, both experts agreed that the reaction time of a sober driver was 1 to 1.5 seconds, and that, if Ms. Petre exited the highway at 45 mph in that time, she would have traveled between 66 and 100 feet. Thus, she would have traversed more than half the distance between the point she left the highway and the culvert/driveway before she could even react to regain control. Therefore, for the sake of argument, even assuming that the fore slope of the ditch was too steep, this fact becomes irrelevant because Ms. Petre ran off the road too close to the driveway embankment to be able to react.

Ms. Petre herself testified that she did not leave the highway due to any defect in the road, but rather because she lost her concentration. If she looked away to observe a passing car, she would have passed over the shoulder in a fraction of a second and began her descent into the ditch, whether the shoulder width was eighteen inches or several feet. Neither the shoulder width nor the fore slope angle played any significant role in causing this accident.

In addition, the majority relies on the fact that DOTD put in place a "substandard road program" between 1985 and 1988. However, DOTD initiated the program only at the advice of DOTD's legal counsel at the time. No measurements, monitoring, or other data were used to determine the appropriate locations for the signs or appropriate speed limits for these identified areas. At the time of the accident, the approach to the area from either direction was marked by yellow warning signs depicting the curve configuration and advising that the curves be navigated at 40 mph. In fact, this Court has considered the relative **safety** of

this road in another case, *Ryland v. Liberty Lloyds Insurance Co.*, 93-1712 (La. 1/14/94), 630 So. 2d 1289, where the Court found that DOTD did not breach its duty to keep the roadway reasonably safe:

> Further, no other accidents have occurred on this portion of Southbound LA 107, although there was one northbound single-car accident on LA 107 south of the curve [the same prior accident presented in Petre]. This non-existent complaint history and low accident rate existed despite the vicinity's average daily traffic count, tallied for both the north and south-bound lanes as follows: 1985--2750 vehicles; . . . 1990--3212 vehicles.

The fact that the width of the shoulder did not meet any design standards is irrelevant because DOTD did not design the road; rather, they incorporated the existing road into the highway system in 1920. To find otherwise, and require that DOTD reconstruct the road, the adjoining shoulder and the private driveway, in my view requires overruling *Myers*. *See Aucoin*, 712 So. 2d at 71 (Traylor, J., dissenting).

Generally, in other cases such as this one, where no road defect caused the driver to leave the road and the driver hit an object in the DOTD's right of way, the DOTD has been relieved of liability. *See Cormier v. Comeaux*, 98-2378, (La. 7/7/99), 748 So. 2d 1123, 1130-31 (imposing no liability where an intoxicated motorist left the roadway at a sharp angle and hit the back slope of an adjacent ditch); *Graves*, 703 So. 2d at 573-74 (finding no duty by DOTD to keep the highway right of way clear of vegetation that creates site obstructions because "[t]he duty to maintain the roadway and shoulder does not encompass the risk that an intoxicated oncoming driver, traveling at a high rate of speed, will cross over into a motorist's lane of travel."); *Myers*, 493 So. 2d at 1173 (finding no duty on DOTD's part when driver swerved off the road to avoid a car and ran into a tree in the ditch that had a fore slope of 2:1 because, "overall the highway was improved

and made more safe for persons traveling on it" even though the travel lanes had been widened which reduced the width of the shoulders); *Holloway*, 555 So. 2d at 1341 (finding no liability by DOTD when driver left the pavement for unknown reasons because no defects existed in the roadway or shoulder, and the roadway was unobstructed with a clearly visible shoulder sloping into a ditch).

Both *Myers* and *Holloway* involved Greenwell Springs Road, a highway built in the 1930's, with subsequently widened lanes that left a one-to-two-foot shoulder and an adjacent ditch. In both cases, this Court held that while DOTD has a duty to correct conditions existing on old highways that are unreasonably dangerous, it has no duty to bring old highways up to current safety standards unless the highway has undergone major reconstruction. *See Cormier*, 748 So. 2d at 1130; *see also Hunter*, 620 So.2d at 1149 (finding DOTD had duty to bring narrow median up to AASHTO standards because highway underwent a major reconstruction).[3]

As stated in *Graves*, one cannot be protected from all risks. Undoubtedly, it would be desirable for the DOTD to design roads so that no accidents would ever occur, however, economic realities make such a goal impossible to reach. As we stated in *Myers*, "many Louisiana roads have narrow shoulders and steep roadside ditches and are lined with trees, culverts, fences, and other objects . . ." making it "physically and financially impossible to bring all of the state's roads up to modern standards." 493 So.2d at 1173. Although old highways must be reasonably safe,

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[3] In a third case involving Greenwell Springs Road, this Court found DOTD liable for failing to correct road conditions when the "DOTD could not name a more dangerous road given the combination of dangerous conditions." *Aucoin*, 712 So. 2d at 66-7. However, the circumstances in this case are easily distinguishable from those in *Aucoin*: namely, in this case the driver was intoxicated; the road was marked with a fog line; the drunk driver ran off the road because she looked away from the road; there were no DOTD standards applicable to Hwy. 107 that the DOTD was compelled to meet, such as the 3:1 sloping in *Aucoin*, yet the fore slope in this case met the 3:1 design standards; and the driver had no time to react before hitting the driveway, making the fore slope irrelevant.

the DOTD's duty to maintain old highways does not include the risk that a highly intoxicated driver will look away from the road, drive off the road, and subsequently launch her car airborne upon hitting a private driveway. To hold otherwise would essentially render DOTD the guarantor for the safety of all the motoring public and the insurer of all risks.

In addition to urging DOTD was liable because of the design of the curve, the plaintiffs urged that DOTD was liable for failure to provide chevrons, which were recommended by DOTD's engineers and installed after the accident. Mr. Evans testified that, at the time of the accident, the approach to the curve lacked reflective chevrons. In his opinion, had chevrons been present, they would have both warned and assisted motorists in negotiating the curve.

However, the post-incident placing of additional chevrons in the curve matters only if Ms. Petre was unfamiliar with the road. Ms. Petre had successfully negotiated the curve minutes prior to the accident. In addition, chevrons serve as further notification to the oncoming motorist of a change in horizontal alignment, but under the circumstances of this case would have done nothing to prevent the plaintiff from looking away from the road, and consequently driving off. Furthermore, her visual acuity was already affected by her level of intoxification as explained by the DOTD’s expert, Dr. Ronald N. Padgett, who testified concerning the negative effect alcohol has on a person's ability to react.[4] Thus, Ms. Petre's failure to keep her eyes on the road, despite her knowledge that she was re-entering the curve in question made it immaterial whether the chevrons were in place.

The failure to provide the chevrons did not constitute a cause in fact of the

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[4] Dr. Padgett testified that above blood alcohol content levels of 0.20, the vision blurs because the eye muscles cannot work sychronously, and the visual field contracts, making things look smaller and further away.

accident. Ms. Petre was not a driver "exercising ordinary care and reasonable prudence." *Brown*, 707 So. 2d at 1242. She made the disappointing choice to drink excessive amounts of alcohol in violations of statutes La. Rev. Stat. 14:98 and La. Rev. Stat. 14:32.1. In this case, the blood-alcohol results were not contested, and the driver with two prior DUI convictions was convicted of vehicular homicide for grossly negligent, reckless and criminal behavior in the death of her daughter. The significant cause of this accident was Ms. Petre's intoxication.

Ms. Petre's own misjudgment, and not any defective condition created by DOTD, caused Ms. Petre to negotiate her vehicle in such a negligent and dangerous manner. Dr. Padget used the hospital's results on blood alcohol content two hours after the accident to back calculate that Ms. Petre had a blood alcohol content of 0.2753 at the time of the accident. In his opinion, anyone with a blood-alcohol content of 0.20 is "severely impaired." The record evidence clearly establishes that the accident was caused solely by driver error.

Moreover, the majority adds insult to injury in affirmingthe lower courts' finding that DOTD was 50% at fault. Ms. Petre, a criminally negligent driver, should be assigned a significant majority of the fault for driving off the road at the curve and launching off the driveway, a driveway that DOTD had no duty to correct. *See Brown,* 707 So. 2d at 1245 (reapportioning fault assigned to DOTD from 75% to 25% for *sober* driver who fell asleep); *Cay v. State, Through Dep't of Transp. & Dev.*, 93-0887 (La. 1/14/94), 631 So. 2d 393, 399 (reapportioning 90% fault to an intoxicated pedestrian); *Molbert v. Toepfer*, 550 So. 2d 183 (La. 1989) (assigning 5% liability to DOTD when driver had .13% blood alcohol level).

DOTD cannot be held responsible for all injuries on the state's highways that

result from careless driving. My sympathy goes to Ms. Petre for her severe injuries and to both Petres for the unfortunate loss of their daughter. However, DOTD is not responsible for these tragically unnecessary consequences. The road and shoulder of Hwy. 107 were not unreasonably dangerous because DOTD was not required to upgrade Hwy. 107 to current design standards, the highway met design standards for the ditch fore slope at the time it entered the highway system, the curve was properly signed to alert drivers, and the curve could be negotiated at speeds higher than the advisory signs or the speed plaintiff was traveling. Accordingly, I dissent.