

SUPREME COURT OF LOUISIANA

No. 98-C-1182 c/w 98-C-1197

TRACI ALLEN NETECKE, ET AL.

Versus

**STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
THIRD CIRCUIT, PARISH OF ST. MARTIN**

JOHNSON, Justice, dissenting

By finding that the negligent driver is 100% at fault, the majority has exempted the State from liability for failing to maintain its roads in a reasonably safe condition. The record is replete with evidence that supports the jury's conclusion that the roadway was defective and created an unreasonable risk of harm.

This case closely resembles *Campbell v. La. Dep't of Transp. & Dev.*, 94-1052 (La. 1/17/95), 648 So.2d 898. In *Campbell*, a driver of a vehicle fell asleep at the wheel and struck a bridge abutment that lacked a guardrail. This court held that the driver's failure to maintain control of his vehicle did not relieve DOTD of its duty to maintain the highway in a safe condition. This court further held that, in apportioning fault, courts should look not only at where fault lies for the accident, but also where fault lies for the harm. DOTD was found to be seventy-five percent (75%) at fault in causing the plaintiff's injuries.

In addition to the duty to keep state highways in a reasonably safe condition, DOTD has a duty to keep the *shoulders* of its highways in a reasonably safe condition. *LeBlanc v. State*, 419 So.2d 853, 856 (La.1982) (emphasis added). The DOTD also has a duty to keep the *area off the highway shoulder* in such a condition that it does not pose an unreasonable risk of harm to motorists using the travel lanes or shoulder. *Oster v. Dep't of Transp. and Dev.*, 582 So. 2d 1285, 1286 (La.

1991)(emphasis added). These duties encompass the foreseeable risk that, for any number of reasons, including simple inadvertence, a motorist might find himself traveling on, or partially on, the shoulder. *Begnaud v. Dep't of Transp. and Dev.*, 93-639 (La. Ct. App. 5 Cir. 1/12/94), 631 So.2d 467, 470. A motorist has the right to assume that a highway shoulder is maintained in a reasonably safe condition. *Rue v. Dep't of Highways*, 372 So.2d 1197, 1199 (La.1979).

The Federal Highway Administration cited drainage culverts as among the top five causes of fatalities on the nation's highways in 1980. Additionally, American Association of State Highway Transportation Officials (hereinafter "AASHTO") standards require the removal of actual or potential hazards from the area adjacent to the highway shoulder. Clearly the presence of a three feet by six foot drain, located directly adjacent to the shoulder of a highway, is a potential hazard. Additionally, the AASHTO Traffic Safety Committee stated that a clear recovery area, free of obstructions, should be provided along the roadway thirty (30) feet or more from the highway. The Committee's summary of conclusions and recommendations about highway safety stated:

To increase safety when vehicles leave the pavement, a clear recovery area, free of physical obstruction, should be provided along the roadway thirty (30) feet or more from the edge of the traveled way in rural areas. Corrective programs should be undertaken at once to eliminate from the roadside or to relocate to protected positions, such hazardous fixed objects as trees, drainage structures, massive sign supports, utility poles, and other ground-mounted obstructions that are now exposed to traffic. (emphasis added)

Traffic Safety Committee, AASHTO, Highway Design and Operational Practices Related to Highway Safety 1-2 (1967). Failure to adhere to AASHTO standards may not by itself provide the basis for liability. *Dill v. Dep't of Transp. and Dev.*, 545 So. 2d 994, 996 (La. 1989). However, whether or not the DOTD has conformed to those standards is a relevant factor in determining whether or not a roadway is unreasonably dangerous. *Id.*

In the instant case, the majority mistakenly relies on the fact that Ms. Zebouni swerved to avoid hitting a cat in the road and erred in holding that DOTD did not breach its duty to plaintiff. The court should have allocated fault to both DOTD and Ms. Zebouni. The record clearly supports the conclusion that the location of the drainage culvert in relation to the highway shoulder presented an unreasonable risk of harm. The drainage culvert was located directly adjacent to the paved shoulder. Any vehicle traveling along the shoulder could possibly encounter this drain. The only thing that kept Ms. Zebouni's right tires from falling into this hole was an eight inch wide concrete headwall - the same headwall that Ms. Zebouni's right tires crossed over before she lost control of her car. The

record establishes that Ms. Zebouni lost control of her car when she tried to steer clear of this six foot culvert.

I disagree with the majority's conclusion that the drainage culvert played no active role in the accident, since the location of the drainage culvert was obviously a substantial factor in causing Ms. Netecke's injuries. The accident occurred when Ms. Zebouni attempted to avoid hitting the drainage culvert by steering away from it. Had the drainage culvert not been located adjacent to the highway, Ms. Zebouni would not have encountered it when she was driving along the shoulder.

In support of its conclusion that the drainage culvert did not present an unreasonable risk of harm, the majority reasoned that the cost to relocate the drainage culvert at issue would place an unreasonable burden the State. However, the record shows that cost of moving the culvert further from the road was \$2,789.00. In fact, in Iberia Parish, the parish directly adjacent to St. Martin Parish where the accident occurred, the drainage culverts located along Highway 182 were extended four to five feet away from the paved shoulder to enhance safety.

In this case, the accident occurred when Ms. Zebouni attempted to avoid hitting the drainage culvert by steering away from it. It is not unreasonable for the jury to have concluded that, had the culverts in St. Martin Parish been extended away from the shoulder as well, Ms. Zebouni would not have encountered the culvert, perceived it to be a hazard, and lost control of her car.

Despite our system of comparative fault which allows the courts to apportion fault among several negligent parties, in recent cases this court has indicated a reluctance to award any damages to negligent drivers. Philosophically, we may be returning to a time when a driver who is only 1% at fault will be denied recovery. In this case, we have an innocent victim. The driver's negligence should not defeat her recovery.

For the foregoing reasons, I respectfully dissent.