

of lights was not functioning. They had been malfunctioning for some time, and the County's park-system director considered this fact to be "a serious safety hazard." Nolan Brown lost control of his truck at that site and the truck hit a median and overturned. Another vehicle crashed into the overturned truck, resulting in Brown's death. These tragic facts are unique, but then, so are the facts of many other accidents.

The Court identifies a number of factors that purportedly distinguish this case from other thoroughfares. We are told, for example, that this case involves a causeway that curves and ascends, has narrow shoulders, concrete barriers, and a block of malfunctioning lights that caused "a sudden and unexpected change in driving conditions." __ S.W.3d __. Although the number of causeways in this State are relatively few, the remaining factors, alone or in combination, describe highways and byways in every county and city throughout the State.

Public roads are generally constructed, owned, and maintained by governmental entities. For that reason, those entities are potential defendants in nearly every automotive accident case. In many cases, competent attorneys can argue plausibly that the circumstances in their client's case are at least as unique as the circumstances here. Because the Court's opinion does not identify any limiting principle, accidents on roads with defective illumination, curves or hills, or with concrete barriers or narrow shoulders, will be sure to inspire litigation in which *County of Cameron* will become the standard rebuttal to jurisdictional pleas.

The installation of roadway lighting is a discretionary decision that governmental agencies balance along with other resource-allocation decisions. No statute requires that governmental entities provide roadway lighting. And no statute requires governmental entities to warn of absent lighting or changed conditions of roadway lighting. The Legislature has entrusted these matters to governmental discretion. But beginning today, governmental entities must exercise this discretion at their peril.

After today, governmental entities will balance the decision to illuminate roadways against the real possibility that those lights, once installed, might fail and thrust drivers into "sudden darkness" at night. They will weigh the social utility of additional lighting against the very real threat that scarce resources will be spent defending claims involving accidents where some segment of those lights has malfunctioned.

Assuming those entities are risk averse, the prudent course may well be to adopt a conservative stance and reduce or eliminate highway-lighting initiatives. However, this Court should not impose that Hobson's choice on governmental entities.

More than two decades ago, in *Jezek v. City of Midland*, 605 S.W.2d 544 (Tex. 1980), this Court recognized the obvious dangers in imposing a similar duty on counties. We stated: "It would be a rigorous burden indeed for a rural county in a state such as Texas to police and remove vegetation from roads when they cause visual obstruction." *Id.* at 547. But today, instead of reaffirming what we said in *Jezek*, the Court attempts to distinguish this case because "the condition alleged here is not simply a naturally occurring one that causes a visual obstruction, but rather a malfunctioning block of artificial lighting that the defendants failed to maintain" __ S.W.3d __. I am not persuaded by the Court's distinction. Darkness is certainly naturally occurring and a governmental entity's failed attempts to protect against the dangers posed by darkness do not create an unreasonably dangerous condition. At some point along every highway, streetlights end, plunging drivers into darkness. And requiring governmental entities to shield drivers from every transition from light to dark along a roadway would be a heavy burden indeed.

Today's decision is even more alarming because, under the Court's analysis the ultimate question – whether the roadway is "unreasonably dangerous" – is answered not only by the existence of malfunctioning lights, but also by the extent to which the roadway has hills or curves, barriers or narrow shoulders. Because these roadway design decisions are discretionary, they should not be used to aid in establishing liability. *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999) ("Design of any public work, such as a roadway, is a discretionary function involving many policy decisions, and the governmental entity responsible may not be sued for such decisions."). While I do not believe the Court intends to impose liability for discretionary acts, the absence of any principled basis for limiting the scope of the Court's opinion is deeply troublesome and will undoubtedly jeopardize discretionary road-design decisions.

Some areas of the law permit case-by-case development, leaving it to later courts to discern any emerging pattern. But in my view, it is unnecessary in this area of the law. Darkness, however characterized, cannot constitute an unreasonably dangerous condition. The harm to our jurisprudence of

so holding is simply too great. We generally allow litigants to amend to cure pleading defects when the pleadings do not allege enough jurisdictional facts. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). While it may be unlikely that the respondents will be able to plead sufficient jurisdictional facts, they should be allowed that opportunity. For this reason only, I concur in the Court's judgment.

WALLACE B. JEFFERSON
JUSTICE

OPINION DELIVERED: May 23, 2000