

“special defect” — like an excavation or obstruction¹ — or that the plaintiff did not know of the condition.² Since nighttime darkness is nothing like an excavation or obstruction, Texas law leaves a plaintiff but one avenue (if you will) of recovery for damages caused by the relatively regular going down of the sun, and that is to prove that he could not see that it was dark.

Now one might say: well, that’s impossible; any fool driving along can tell by looking whether a roadway is light or dark. But the Supreme Court of Texas is not any fool; it has an easy answer for such skepticism when “the dangerous condition alleged is not merely ‘darkness’ but a failed block of artificial lighting that caused a *sudden, unexpected and significant transition from light to darkness.*”³ Mind you, no one claims in this case that he was driving along and the roadway lighting *suddenly went off*. The lights had been off for awhile, long enough for Cameron County to know about it; if that were not true, the County would not be liable for the darkness for another reason, and that is that it did not know the lights were out.⁴ But Cameron County knew the lights were out on a section of the Queen Isabella Causeway for the same reason that Nolan Brown and Hector Martinez and anyone else driving along, or anyone else who just looked, knew it: because it was dark there. So when the Court says the darkness was “sudden”, it means nothing more than that the causeway was lighted for a stretch, and then for a stretch it wasn’t. By saying that the darkness was “unexpected”, I suppose the Court means that Brown and Martinez had not

¹ TEX. CIV. PRAC. & REM. CODE § 101.022(b); *State Dep’t of Highways. & Pub. Transp. v. Payne*, 838 S.W.2d 235, 238 (Tex. 1992).

² *Payne*, 838 S.W.2d at 237.

³ *Ante* at ___ (emphasis added).

⁴ *Payne*, 838 S.W.2d at 237.

anticipated as they were driving along that the lights might be out. But when they came upon the darkness, they surely must have thought to themselves, “Hmmm, the highway’s dark here,” just as if they had come to the end of any lighted roadway. So however unexpected the darkness may have been, it was still plain as day, so to speak. And when the Court says the “transition from light to darkness” was “significant”, I confess I haven’t a clue what it means. The distinction between darkness that is “significant” and plain old insignificant darkness is lost on me.

It seems obvious that any driver moving down the road can see whether it is dark no matter how “sudden, unexpected and significant” that darkness is, so I don’t quite see what difference any of this makes to whether the plaintiff can prove that he did not know that an obviously dark roadway was dark. Either he could see the road was dark or he couldn’t, and how is it possible that he couldn’t and be licensed to drive? It look lighted but it really wasn’t? Well, the Court says, it was the condition of the causeway that made all the difference.

[T]he causeway is narrow, curves, and rises high above the bay. A cement median barrier separates the two travel lanes in each direction and prevents drivers from turning back once embarking upon the bridge. Only a relatively narrow shoulder beside the traffic lanes is available to accommodate vehicles in emergency situations.⁵

I must say that I cannot quite grasp the Court’s point here. The conditions of the unlighted causeway may have made it unreasonably dangerous, but we have already assumed (against all common sense) that every unlighted roadway is unreasonably dangerous, even a straight, wide, flat, low one. The issue is not how narrow or curvy or high a roadway is, or how many lanes it has or how wide its shoulder is; the issue is

⁵ *Ante* at ____.

whether a driver can see that it's dark or not. Dark, narrow roadways look just as dark as dark, wide roadways. Widening roads, or straightening them up, or leveling them off, or giving them shoulders does not lighten them up very much.

Like any driver on any unlighted roadway in the world, Brown should have known when he came upon the dark part of the causeway that if he stopped for some reason, a driver coming along behind him might plough into him, and Martinez should have known that if he outran his headlights, he might hit something. But, again, none of this has anything to do with whether a driver coming up on a dark road can see that it's dark, which determines whether the plaintiffs can possibly win this case.

So is there any point to this part of the Court's discussion? No. Then why is it in the opinion? I can't say. Wholly apart from everything that's been said so far, "[t]he relevant inquiry," the Court says, is "whether the lighting failure was open and obvious to motorists entering the causeway, because that is the point at which they could choose to avoid the condition or otherwise protect themselves."⁶ Now, at last, we're onto something. This at least makes sense. All the plaintiffs must prove in this case is that when Brown entered the causeway, he could not see far enough ahead to know that some of the lights were out. He has not pleaded this, the Court says, but he should be allowed to amend. Well, I for one am strongly in favor of a reasonable opportunity to amend. I do not favor waiver of valid claims and defenses because of the inadvertent mistakes inevitable for even the ablest counsel. But there's no point in having the plaintiffs amend their pleadings if they're still going to lose as a matter of law. Amendment is futile unless, if they

⁶ *Ante* at ____.

allege that Brown did not know when he entered the causeway that some of it was not lighted, they can prevail. Is that allegation, if proved, sufficient to make the County liable for the darkness? Yes, says the Court. Well, then, the County should just pay up. Unless it can prove that Brown had super-vision (including x-ray vision to see through the bridge) or was clairvoyant, it can't possibly escape liability, because no one but Superman and Nostradamus could possibly have known, entering the causeway, that the lights were out ahead. (I assume, as we all must, that Brown hadn't been over the causeway enough at night to know that sometimes the lights were out, and that even if he had, he had every reasonable expectation that the lights would have been fixed since his last crossing.)

To put the Court's holding as plainly as possible: Had the causeway been wider, flatter, or straighter, and had it had wider shoulders, Brown could either have looked down the road and seen that it was dark in one spot and then turned back, or pulled over, or somehow stayed in the light (even though he did not know he needed to because he did not know he was about to wreck his truck on the concrete barrier in the median), but he could do none of those things; and even though Brown saw the darkness when he came upon it, it was sudden, unexpected, and significant, and besides, he did not know of the darkness *when he entered the causeway*; so therefore the County is liable. Logic does not flow through this like a quiet stream, I know, but I am trying to restate the Court's position as accurately as I can. Even if this rule, bizarre as it is, were correct, I am at a loss to understand its application to this case. What difference could it possibly have made to Brown had he known when he entered the causeway that part of it was unlit? He never thought he was going to wreck his truck, in the darkness or the light. No

reasonable driver could possibly have thought, well, if part of this causeway is dark and I wreck my vehicle there, others may not be able to see me, so I'll cross if it's lit, but if it's not, I'm staying on the mainland.

“The relevant inquiry” posited by the Court raises the precise concern expressed by the County as well as amici curiae, the Texas Municipal League, the Texas City Attorneys Association, and the Texas Municipal League Intergovernmental Risk Pool, which is, as the Court recognizes, that “allowing the plaintiffs’ claims to proceed will effectively require governmental entities to either light every stretch of public roadway or remove all lighting, because any unexpected illumination change might constitute a premise defect for which they may be held liable.”⁷ The Court never dismisses this concern because, truth to tell, it’s valid. How often will it happen that a driver enters a lighted portion of a roadway without being able to see a dark spot ahead? Lots. And what difference does it make whether lights are out or whether the lighted portion has just ended? Most drivers still won’t know, when they start out, where the darkness is up ahead. So if the Court means what it says today, and “[t]he relevant inquiry” is what a driver can see when he first enters a lighted roadway, then the governments of Texas simply need to redo their budgets or raise taxes or both to cover the costs of extra lighting and litigation like this.

And if that’s what the Court thinks, why not just say so? Why not just say: Look, if you choose to light a roadway, you must maintain the lighting or face liability for accidents that happen in areas of darkness. Two reasons, I suppose. One, such a rule of liability could move governments not to light roadways at all rather than face liability for inevitable lighting failures, thereby placing the traveling public

⁷ *Ante* at ____.

in greater danger. And two, the rule cannot take into account that lighting must end somewhere, and why the effect of that darkness on motorists is any different from failed lighting is inexplicable.

It may be, however — one cannot always tell for sure — that the Court does not really mean what it says. Indeed, in another case decided today, *Rocor International, Inc. v. National Union Fire Insurance Co.*,⁸ the Court discloses that it did not really mean what it said in *American Physicians Insurance Exchange v. Garcia*.⁹ So it does happen, much too often, and it may be that this case is just another “restricted railroad ticket, good for this day and train only.”¹⁰ While we can’t say that all highways should be lighted, or even that existing lighting should be repaired, maybe the plaintiffs in this undeniably tragic case will get something in settlement. This occasional propensity of the Court to try to help out a particularly sympathetic litigant without destroying the law emerged in an oral argument not long ago. Professor Laurence H. Tribe, arguing a case in this Court, was actually asked, “Can’t we just have a rule for this case alone without implicating other, similar cases?” “Not and be a court,” he replied, more than a little surprised. If the Court’s “relevant inquiry” is for real, then the law of premises liability has been changed fairly significantly — like light to dark. The burden on the governments of Texas will be felt, and we should just say so. If not, then we have not acted like a court.

Either way, I respectfully dissent.

⁸ ___ S.W.3d ___ (Tex. 2002).

⁹ 876 S.W.2d 842 (Tex. 1994).

¹⁰ *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

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