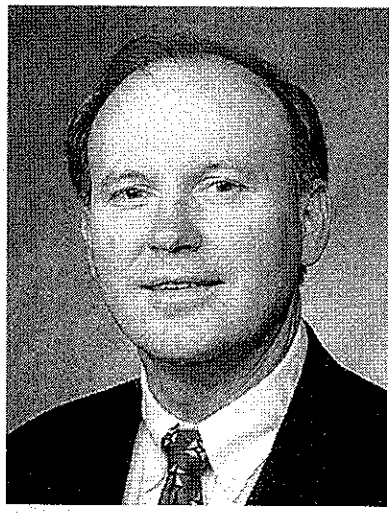
LEGISLATIVE ISSUES IN THE AUTO TORTS CASE

Prepared by:

TOM W. THORNHILL
THORNHILL LAW FIRM, L.C.
SLIDELL, LOUISIANA

LOUISIANA TRIAL LAWYERS ASSOCIATION
2003 AUTO TORTS PROGRAM
FEBRUARY 14, 2003 ● RADISSON HOTEL ● BATON ROUGE, LOUISIANA



Tom W. Thornhill

Thornhill Law Firm, L.C.

1308 9th Street
Slidell, Louisiana 70458-2810
(985) 641-5010
Fax: (985) 641-5011
e-mail: *tom@thornhilllawfirm.com*

Tom W. Thornhill is president-elect of Louisiana Trial Lawyers Association. The founder and senior partner of the Thornhill Law Firm of Slidell, he was a member Louisiana House of Representatives serving District 76 from 1996 until 2000. In the Legislature, he served on the House Appropriations, Insurance and Retirement committees and on the Joint Legislative Committee on the Budget. Tom retired from the Legislature to become a little league coach.

He earned bachelor of arts and juris doctorate degrees from Louisiana State University in 1974 and 1977, respectively, and then studied toward a master's degree in petroleum engineering at Tulane University from 1980 to 1983. Tom has served in the Louisiana State Bar Association House of Delegates.

Tom's practice is litigation oriented, focusing on complex civil litigation and some class action work, including tort, corporate, environmental and insurance matters. He is also involved in business association structuring, private and public project financing and related transactions. He is admitted to every state and federal court in Louisiana, as well as the United States Tax Court and the United States Supreme Court.

He is active in professional associations and is a frequent CLE lecturer on legislative matters. Tom has been recognized by *Who's Who in Global Business Leaders for 1993*, *International Who's Who*, and *Who's Who in Executives and Professionals*.

Legislative Issues in the Auto Torts Case

Tom W. Thornhill
Thornhill Law Firm, L.C.
1308 9th St.
Slidell, LA 70458-2810

***Lauana B. Petre v. State of La., DOTD*, 01-3-0876 (La. 04/03/02)**

Issue: Can DOTD be held liable for damages sustained in a single-car accident when the vehicle driver's intoxication was a major cause of the accident?

The Supreme Court found:

> The roadway, La. Hwy. 107, was a two-lane, asphalt-surfaced highway that became a part of Louisiana's highway system in the 1920s.
>
> It was a gravel road until it received an asphalt surface in 1952.
>
> In 1987, the travel lanes were widened at the expense of the shoulder.
>
> Between 1985 and 1988, DOTD initiated a "substandard road program." District administrators were instructed to place yellow diamond-shaped warning signs reading "DRIVE CAREFULLY SUBSTANDARD ROADWAY" on the most dangerous 10 percent of the roads in their districts and reduce the speed limit in those areas to 45 mph. The choice of the roads to be included was left to the discretion of the district administrators.
>
> Hwy 107 was placed in this program, but in 1990 the program was abandoned, and by the time of the accident, 1992, the "substandard roadway" sign had been removed and the speed limit returned to 55 mph.

The Supreme Court held that the district court and the court of appeal were not manifestly erroneous in finding DOTD breached its duty because:

> It had the care and custody of the roadway that caused the damage.
>
> The roadway was defective and created an unreasonable risk of harm.
>
> DOTD had actual or constructive knowledge of the defect and failed to take corrective actions within a reasonable time.
>
> The defective road caused injury to the plaintiff.
>
> Ms. Petre was not prohibited from recovering in part from DOTD because of her intoxication, but her intoxication was a factor to consider in Louisiana's comparative negligence scheme.

The *Petre* "problem" has already been fixed

The accident in which Mrs. Petre was severely injured and her daughter was killed happened on September 1, 1992. Subsequent to the date of the accident, the Louisiana Legislature enacted the following legislation, all of which would create a different result today.

> Act. 1, 1996 First Extraordinary Session. Repealed strict liability for damage due to defective things in defendant's care and custody.
>
> Act. 3, 1996 First Extraordinary Session. Amended C. C. Arts. 2323 and 2324(B) and (C) regarding comparative fault and joint and several liability to require the allocation of fault to all nonparties as well as parties to the lawsuit to abolish the last vestiges of solidary liability in negligence claims so that no party pays any more than his assigned fault percentage.
>
> Act. 1224, 1999 Regular Session. Limited recovery to intoxicated plaintiff.

In the 1999 Regular Session, SB 858 by Sen. Jay Dardenne attempted to lower the standards to which DOTD would be held in constructing, repairing and maintaining roads and bridges in a direct attempt to overrule *Aucoin v. State of Louisiana, through DOTD.* The House of Representatives amended SB 858 before it was finally passed to provide some degree of responsibility owed by DOTD to Louisiana motorists and their passengers.

In the 2003 Regular Session, the Louisiana State Law Institute proposes to reintroduce the earlier version of SB 858 that did not meet with the approval of the Legislature, as well as to add a number of additional restrictions on the rights of motorists injured by defective roadways to recover their damages.

What is Louisiana doing about drunk drivers?

According to The Insurance Fact Book, 2001, a publication of the Insurance Information Institute, only three other states, Connecticut, Texas and Tennessee, have as few statutory protections on the books to curb drinking and driving as does Louisiana.

Louisiana's current solution:

> No recovery to a plaintiff who was intoxicated, if the plaintiff was more than 25 percent negligent as a result of the intoxication and the negligence was a contributing factor causing the damage.

Law Institute's proposed solution to state claims:

> Cap **all damages**, including past and future earnings, past and future medicals, property damage and non-economic damages, at **$500,000 per occurrence.** This would include all derivative claims: survival claims, wrongful death claims, consortium claims and bystander claims under C.C. Art. 2315.6.

No recovery to any injured party if the operator of the vehicle that caused the damage was intoxicated and **the operator's intoxication was a cause in fact in any degree of the other person's injury or death**, whether or not the condition of the road, including the shoulder of the road to the full extent of the right-of-way, was in any degree a cause of the injury or death.

Prohibit all class action claims against the state, regardless of the law, legal doctrine or theory of liability under which the claim would be asserted.

Allow failure to use a seat belt as evidence of contributory negligence and to operate as comparative fault to reduce recoverable damages, with no limit. There are only six states that allow evidence of failure to use a seat belt and all limit the percentage reduction that is allowed, in most cases, to 5 percent.

No legal interest, either pre- or post judgment, on claims against the state.

No liability for death or injury caused by things situated off the right of way of public roads, highways, bridges or streets. If you drop off a defective shoulder and sail into a tree that's beyond the right-of-way, the state is not liable because it was the tree that killed you, not the defective roadway. You were still alive when you left the road.

Make all of the above retroactive so as to apply to pending claims filed or any claim that is not yet final and executory.

***Petre* is the rationale, but what is the goal?**

If DOTD's objections to the result in *Petre* have already been legislatively addressed, what is the *real* goal of HCR 34? Judging from the proposal that came out of the Limitation of State Liability Committee of the Law Institute, the real purpose is to take another shot at enacting SB 858 of the 1999 Regular Session in its original form, before the House amended it to provide more protection for the driving public.

The reengrossed version of SB 858 reads almost word for word like the amendment to R. S. 48:35(F) proposed by the Law Institute's Limitation of State Liability Committee. In fact, the proposal submitted to the Council of the Law Institute contains language stating that the provisions are intended to legislatively overrule that portion of *Aucoin* "which imposes liability on the Department of Transportation and Development for failing to maintain and/or reconstruct an existing highway to modern standards." However, the majority opinion did not turn on whether the road met modern standards and the plaintiff did not urge that point. The decision was limited to "a determination of whether, under the specific facts of this case, the trial court erred in finding the roadway in question unreasonably dangerous."

The rationale given for SB 858 was to overturn *Aucoin v. State Through the Dept. of Transp. and Development*, 97-1938 (La. 4/24/98), 712 So.2d 62.

But as in *Petre*, the rationale did not match the facts. In *Aucoin*, a mother, Michelle Aucoin, swerved to the right to avoid a dog that ran into the road. When she swerved, her vehicle dropped onto a narrow shoulder and down a steeply sloped ditch. In less

than two seconds, Aucoin's car traveled 123 feet, crashing into a tree growing on the back slope of the ditch in DOTD's right-of-way. Aucoin suffered injuries to her arm and her one-year old daughter, Amber, suffered severe closed-head injuries.

Aucoin was assigned 85 percent fault for failing to maintain control of her vehicle, with DOTD assigned 15 percent fault resulting from its dangerous and defective roadway, namely a combination of shoulder width, slope angle and horizontal clearance that created an unreasonable risk of harm. The court also found that DOTD had negligently failed to maintain the highway in accord with reasonable standards and failed to prioritize maintenance.

The Supreme Court reaffirmed its holdings in *Holloway v. DOTD*, 555 So.2d 1341 (La.1990), and *Myers v. State Farm Mutual Automobile Insurance Co.*, 493 So.2d 1170 (La.1986), that DTOD is not liable where plaintiffs have not proved that the conditions of the road caused the accident and that DOTD's failure to reconstruct the state's highways to meet modern standards did not establish the existence of a hazardous defect.

But the court distinguished these cases from *Aucoin*, holding that the state owes a duty to maintain its right-of-way in a condition that does not present an unreasonable risk of harm. While there was no duty to bring this road, constructed before 1927 and widened in 1958 and 1977, up to modern standards, there was a duty not to allow it to become unreasonably dangerous. DOTD's chief design engineer was unable to name any roadway that was more dangerous than this one. In maintaining the road, DOTD had not followed its own maintenance standards, was fully aware of the danger presented to drivers such as Mrs. Aucoin and had allowed the combination of more than one dangerous condition to accumulate, rendering the off roadway area unreasonably dangerous to the motoring public.

Another significant part of the *Aucoin* decision was its holding that the 1996 amendment to La. Civ. Code Art. 2323 and 2324 that abolished all solidary liability in negligence cases was a substantive change, not procedural and therefore would be applied prospectively only. This is the part of the decision that increased the state's exposure from 15 percent to 50 percent of Amber's damages.

What's the real issue?

No solidary liability in negligence cases for claims arising after April 16, 1996.

Limited recovery for intoxicated drivers.

State has no duty of strict liability for its roads and roadways.

State has no duty to maintain or reconstruct roads to modern standards.

State liability requires actual or constructive notice and opportunity to repair.

Recovery of damages for non-economic injuries is capped at $500,000.

HCR 34 complains of multi-million dollar damage awards for accidental injuries attributed to the condition of the state's highways in such cases as *Petre, Matlock v. State Through the Dept. of Transp. and Development,* 2001-0831(La. 5/4/01), 791 So.2d 662, *writ denied*, 2000-0350 (La. App. 4 Cir. 2/21/01), 782 So.2d 1000; and *Garcia v. LA Dept. of Transp. and Development,* 2001-1771 (La. 10/5/01), 798 So.2d 971, *writ denied*, 2000-0930 (La. App. 4 Cir. 5/16/01), 787 So.2d 1142.

"Multi-million dollar damage awards" that call for tort reform:

> *Petre*: Mr. Petre, father of the deceased child and divorced husband of Mrs. Petre, was awarded judgment against Mrs. Petre and DOTD of **$250,000** in general damages for the wrongful death of his daughter and **$9,120.95** in special damages; Mrs. Petre was awarded **$250,000** in general damages for the wrongful death of her daughter, **$272,000** in general damages for her own injuries, and per a joint stipulation, **$37,430.59** in special damages, but **those damages were reduced by 50 percent**, the portion of fault allocated to her.
>
> *Matlock:* DOTD was found to be 75 percent at fault and the driver, Matlock, 25 percent at fault; Matlock was awarded **$93,230.98**, and his three guest passengers were awarded **$48,949.12, $10, 606.78 and $1,366.13.**
>
> *Garcia*: Mr. Garcia's family was awarded **$850,000** for his death in an auto accident caused by a defective condition in the road. The trial court found no fault on Mr. Garcia's part in causing the accident.

Seat belts: evidence in mitigation of damages, contributory negligence and comparative fault

SB 861, 1999 Regular Session

> This bill, as originally introduced, would have permitted an insurance company to introduce failure to wear a seat belt in determination of comparative negligence, apportionment of fault or mitigation of damages.
>
> SB 861 passed the Senate and House Civil Law and Procedure Committee, but died on the House calendar.

SB 630, 2001 Regular Session

> This version of the seat belt bill, as originally introduced, was identical to SB 861 of the 1999 Regular Session.
>
> SB 630 made it out of Senate Judiciary A Committee, but was withdrawn from the files of the Senate before being brought to a vote on the Senate floor.

Law Institute Limitation of State Liability proposal

> The Law Institute's Limitation of State Liability Committee has proposed a seat belt bill that would only apply in claims against the state or a political subdivision. This proposal would allow the failure to use a seat belt to be

considered as evidence of contributory negligence and shall operate as comparative fault to reduce recoverable damages under Civil Code Article 2323.

Implications for your client's case:

While the proposition might seem fair on its face and an incentive to encourage the use of seat belts, in practice its effects are far from fair. The plaintiff, whose only negligence was failure to wear the seat belt, could be held more accountable than the at-fault driver who caused the accident. In fact, the more negligent the tortfeasor and the greater the damage he causes, the more the responsibility falls to the plaintiff whose severe injuries were not mitigated by wearing the seat belt.

The real effect of a seat belt bill will be to allow insurance companies another avenue to avoid paying damages.

Lower jury threshold

A perennial in the LABI/insurance legislative packages is a bill to lower the jury trial threshold, this legislative agenda item, together with a proposal to have all trial court judges appointed, constitutes a two-pronged attack on the judicial system and the independence of our courts.

History of jury threshold increases

CCP 1732

1983 Act 534 increased the threshold from $1,000 to $5,000. It added the language "amount in dispute" [changed 1989].

1984 SB 189/Act 30 increased the threshold from $5,000 to $10,000.

1987 HB 13/Act 766 increased the threshold from $10,000 to $20,000.

1989 SB 11/Act 107 changed the standard to the amount of at least one "individual petitioner's cause of action." *Benoit v. Allstate.*

1993 HB 13/Act 661 increased the threshold from $20,000 to $50,000.

Does "tort reform" reduce insurance rates?

The cry for "tort reform" is most often accompanied by warnings of skyrocketing insurance rates, companies leaving the market and individuals unable to afford or to obtain needed insurance coverage. Frivolous lawsuits, runaway juries, greedy trial lawyers and ordinary citizens on the lookout for a jackpot in the "lawsuit lottery" are alleged culprits in driving rates up and companies out of the market.

But do the facts support the cries for tort reform? Does tort reform reduce insurance rates?

J. Robert Hunter, former Texas commissioner of insurance and current director of insurance for the Consumer Federation of America, and Joanne Doroshow, executive director of Center for Justice & Democracy, did the research to answer this question. The results were published in "Premium Deceit: The Failure of 'Tort Reform' to Cut Insurance Rates." Their study is the most extensive review ever undertaken of insurance rate activity in the wake of the liability insurance crisis of the 1980s. It was designed to test the impact of "tort reform" on insurance rates.

Their study found that states with little or no tort law restrictions saw the same level of insurance rates as did states that enacted severe restrictions on victims' rights. The liability insurance crisis of the mid-80s was driven by market forces on the underwriting cycle of the insurance industry. Tort law was not the cause of the crisis and changes in tort law did not fix it. The crisis of the 1980s was "a self-inflicted phenomenon caused by the mismanaged underwriting practices of the industry itself." (Premium Deceit, p. 3)

What does the insurance industry say?

"To be sure, investors have been disappointed that an industry that began to raise prices in the fall of 1999 has not yet produced meaningful bottom-line results. This underscores the horrendous deficiency in pricing and the underwriting sins of the 1990s, all exacerbated by various Murphy's Law components that always arise at the worst possible moments. This would include not only reserve shortfalls, but also a precipitous decline in the yield curve, in some instances too heavy a reliance on returns from alternative investments and a much tougher—but needed—stance from the rating agencies. Many managements (if they are still around) must be taken to task not only for the degree to which they compromised their balance sheets, but also for not reining in earnings expectations over the past few years that were unattainable."

—Myron Picoult, Lazard Freres & Co.; past president of the Assn. of Insurance & Financial Analysts. *Business Insurance*, Feb. 3, 2003. The full article by Mr. Picoult is available on-line at *http://www.businessinsurance.com/cgi-bin/article.pl?articleId=12310&a=a&bt=picoult.*

ENROLLED

Regular Session, 2002

HOUSE CONCURRENT RESOLUTION NO. 34

BY REPRESENTATIVE JOHNS

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study all aspects of liability relating to road hazards and make specific recommendations for limiting the liability of the state.

WHEREAS, the Legislature of Louisiana is deeply concerned about the serious drain on the state of Louisiana's financial resources due to multi-million dollar damage awards for accidental injuries attributed to the condition of the state's highways in such cases as *Petre v. State Through the Dept. of Transp. and Development*, 01-0876 (La. 4/3/02), 2002 WL 497487; *Matlock v. State Through the Dept. of Transp. and Development*, 2001-0831 (La. 5/4/01), 791 So.2d 662, *writ denied*, 2000-0350 (La. App. 4 Cir. 2/21/01), 782 So.2d 100; and *Garcia v. LA Dept. of Transp. and Development*, 2001-1771 (La. 10/5/01), 798 So.2d 971, *writ denied*, 2000-0930 (La. App. 4 Cir. 5/16/01), 787 So.2d 1142; and

WHEREAS, the Constitution of the state of Louisiana was amended in 1995 to provide that "the legislature by law may limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages"; and

WHEREAS, the Constitution of the state of Louisiana was further amended in 1995 to provide that "the legislature may provide that such limitations, procedures, and effects of judgment shall be applicable to existing as well as future claims"; and

WHEREAS, implementing legislation of this magnitude will require the state of Louisiana to take action in the general public's best interest; and

WHEREAS, it is important that this legislature be aware of the legal ramifications of enacted legislation as well as the fiscal ramifications of judicial decisions implementing legislation; and

WHEREAS, the legislature must consider the protection to the state by removing or minimizing its liabilities, as well as the rights that may be affected.

THEREFORE, BE IT RESOLVED by the Legislature of Louisiana that the Louisiana State Law Institute study all aspects of liability arising from any claims for loss or damages relating to or resulting from road hazards, including issues relating to sovereign immunity, inverse condemnation, the granting of limited expropriation authority, any property, contract, or personal rights, and all relevant jurisprudence and recommend specific legislation limiting the liability of the state.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and that the Louisiana State Law Institute report its findings and recommendations in the form of specific proposed legislation to the Legislature of Louisiana on or before January 15, 2003.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

LOUISIANA STATE LAW INSTITUTE

LIMITATION OF STATE LIABILITY COMMITTEE

Subcommittee on Road Hazards

Limitation of Liability Proposals

Prepared for the
Meeting of the Council

February 14-15, 2003
New Orleans

James C. Crigler, Jr.
Chair

William E. Crawford
Reporter

H. "Hal" Mark Levy
Staff Attorney

R.S. 9:2798.1(B)

§2798.1. Policymaking or discretionary acts or omissions of public entities or their officers or employees

***

B. Liability shall not be imposed under any theory of law on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties, including but not limited to:

(1) All matters pertaining to the collection of and expenditure of public funds.

(2) Prioritizing and scheduling of goods, services and activities.

(3) Establishment or acceptance of construction designs and operating standards.

(4) Granting of construction and development permits.

(5) Actions taken in response to a present or pending emergency involving damage to property or risk to human life.

(6) Conflict of interest determinations.

(7) Compliance with federal statutory and contractual obligations.

(8) All matters for which discretionary immunity is established by law.

R.S. 13:5104(A)

A. All suits filed against the state of Louisiana or any state agency ~~may~~ shall be instituted in the Nineteenth Judicial District Court ~~before the district court~~ of the ~~judicial district in which the state capitol is located~~ parish of East Baton Rouge or in the district court ~~having jurisdiction in~~ of the parish in which the cause of action arises.

***

R.S. 13:5106(B)(1)

B.

***

(1) In all suits for ~~personal~~ injury or death to any one person, the total amount recoverable, including all derivative claims as defined in R.S.13:5106(D)(4), ~~exclusive of~~ property damages, past and future medical care and related benefits and loss of earnings, and loss of future earnings, as provided in this Section, shall not exceed five hundred thousand dollars.

***

R.S. 13:5106(D)(4)

D. ***

(4) "Derivative claims" include, but are not limited to claims for survival or wrongful death damages or damages for loss of consortium.

***

New R.S. 13:5106(E), (F) and (G)

***

E. No action, claim or claims for recovery of damages or compensation for injury, death, or loss, or damage to or loss of property, asserted under any law or legal doctrine or theory of liability shall be brought against the state or state agency or political subdivision as a class action.

F. In any claim or action against the state, a state agency, or a political subdivision to recover damages for personal injury, death or loss, or damage to property, a person's failure to wear a seatbelt, or safety belt, as provided in R.S. 32:295.1, that is a contributing cause of the injury or damage for which damages are claimed, shall be admissible as evidence of contributory negligence and shall operate as comparative fault to reduce the recoverable damages, as provided in Civil Code Article 2323.

G. The limitation of recoverable damages or compensation and of the form of procedure set forth under Paragraphs B(1) and (2), and Sections E and F of this Section, shall apply to existing or pending claims and actions as well as those arising in the future.

[Redesignate current R.S. 13:5106(E) as (H)]

~~E.~~ H. The legislature finds and states:

***

R.S. 13:5112(C)

***

C. ~~Legal interest on any claim for personal injury or wrongful death shall accrue at six percent per annum from the date service is requested following judicial demand until the judgment thereon is signed by the trial judge in accordance with Code of Civil Procedure Article 1911. Legal interest accruing subsequent to the signing of the judgment shall be at the rate fixed by Civil Code Article 2924.~~

No claim against the state or any department, board, commission, agency or political subdivision or employees thereof for personal injury, wrongful death, or damage to property shall bear legal or judicial interest whether prior to or subsequent to judgment. This provision shall not apply to claims for property taken in the exercise of eminent domain under the police power of the state, or to contractual obligations of the state or any department, board, commission, agency or political subdivision thereof.

***

R.S. 48:35(F)

§35. Minimum safety standards of highway design, maintenance, and construction; exemptions

***

F.(1)(a) The state, the Department of Transportation and Development, and any political subdivision of the state, ~~has~~ shall not have a duty to maintain, repair, construct, or reconstruct, or prioritize the maintenance, repair, construction, or reconstruction of any public road, highway, bridge, or street, or any portion thereof, ~~in a manner that is not unreasonably dangerous for a reasonably prudent driver~~ in accordance with any standard, regulation, or guideline established or adopted subsequent to the date of approval by the chief engineer, or equivalent official in the case of a political subdivision of the state, of the original or changed design plans for the construction or major reconstruction, whichever is later, of any such public road, highway, bridge, or street, or any portion thereof.

(b) When any public road, highway, bridge, or street, or any portion thereof, is maintained, repaired, constructed, or reconstructed in accordance with the standards, regulations, or guidelines in effect on the date of such approval ~~by the chief engineer, or equivalent official in the case of a political subdivision of the state, of the original or amended~~ of the original design plan for the construction or major reconstruction, ~~whichever is later,~~ of such public road, highway, bridge, or street, or any portion thereof, there shall be a presumption that any such public road, highway, bridge, or street, or any portion thereof, is maintained, repaired, constructed, or reconstructed in a reasonably safe condition.

(c) When any public road, highway, bridge, or street, or any portion thereof, does not conform to one or more standards, regulations, or guidelines established or adopted subsequent to the date of such approval of the original ~~or amended design~~ design plan for

the construction or major reconstruction, whichever is later, of any such public road, highway, bridge, or street, or any portion thereof, such nonconformity shall not render any such public road, highway, bridge, or street, or any portion thereof, unreasonably dangerous or defective.

(2) When ~~determining whether or not an unreasonably dangerous condition exists under this Paragraph, if~~ a standard, regulation, or guideline is not directly applicable to the maintenance, repair, construction, or reconstruction, then required to be met under Paragraph (1)(a) of this Subsection, evidence of failure to adhere to such standard, regulation, or guideline shall not be admissible in a court proceeding for any purpose.

(3) The failure of the state, the Department of Transportation and Development, or any political subdivision of the state to select a particular public road, highway, bridge, street, or any portion thereof, for inclusion in a prioritization program, including those which prioritize maintenance, construction, reconstruction, major reconstruction, or overlay projects, or for priority placement within such a program, shall not be admissible in a court proceeding for any purpose.

(4) As used in this Subsection, "construction or major reconstruction" shall mean the act, operation, and process of building or fabricating a new road, highway, bridge, or street or of bettering any existing road, highway, bridge, street, or any part thereof. Major reconstruction shall not include the following non-exclusive list of activities:

(a) Restoration of the original riding surface to original or better condition provided the total width from the far edge of one shoulder to the far edge of the other shoulder of the road is not widened and such work is performed within an existing right-of-way.

(b) Increasing the width of the riding surface by utilizing part of the shoulder of the road provided such work is performed within an existing right-of-way.

(c) Creation of turning lanes provided such work is performed within an existing right-of-way.

(d) Cleaning and reestablishing drainage ditches, including replacement of deficient drainage structures provided such work is performed within an existing right-of-way.

***

[Section ___. The provisions of R.S. 48:35 (F) are intended to legislatively overrule that portion of *Aucoin v. State Through the Dept of Transp. and Development, 97*-193 8 (La. 4/24/98), 712 So.2d 62, which imposes liability on the Department of Transportation and Development for failing to maintain and/or reconstruct an existing highway to modern standards.]

R.S. 48:35(J)

J. The state, the Department of Transportation and Development, and political subdivisions of the state shall have no liability for personal injury, death, or loss caused by things situated off the right-of-way of public roads, highways, bridges or streets. This provision does not apply to things located on property of the state or its political subdivisions.

R.S 48: 35(K)

K. (1) Notwithstanding any other law to the contrary, in any civil action brought against the State or a political subdivision of the State for damages caused by an alleged defect or unreasonably dangerous condition in any road, highway, bridge, or street, or as a result of alleged negligence in the maintenance, repair, or upkeep, including the alleged failure to design or maintain in accordance with standards applicable at the time of construction, of any road, highway, bridge, or street:

(a) Neither the operator nor any other person may recover damages against the State or a political subdivision of the State for the injury or death of the operator of a motor vehicle, or for the injury or death of any other person, if the operator's intoxication was a cause in fact in any degree of the operator's or other person's injury or death, whether of not the condition of the road, highway, bridge, or street was in any degree a cause in fact of said injury or death.

(b) The prohibition of recovery contained in this subsection shall be an affirmative defense, and the party asserting that defense shall have the burden of proving the same by a preponderance of the evidence.

(2) As used in Paragraph , "road, highway, bridge, or street" includes, but is not limited to, the shoulder of the roadway, to the full extent of the right-of-way.

[All of the above would be made retroactive and would apply to claims pending, claims filed, or any claim that is not yet final and executory under the authority of Constitutional Article 12 §10 C.]

SRS 99-1450 (HLS 99-2513) **REENGROSSED**

Regular Session, 1999

SENATE BILL NO. 858

BY SENATORS DARDENNE, EWING, HAINKEL, BARHAM, SCHEDLER, BEAN, DEAN AND ROMERO AND REPRESENTATIVES MCMAINS, DEWITT, DOWNER, JOHNS, BOWLER, CRANE, FLAVIN, SCALISE, SHAW AND WIGGINS

LIABILITY. Provides relative to liability for state highways and bridges. (gov sig)

AN ACT

To enact R.S. 48:35(F), relative to public liability; to provide for the duty of the Department of Transportation and Development or any political subdivision of the state with respect to highway and bridge construction and maintenance; to provide for the inadmissibility of certain evidence; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 48:35(F) is hereby enacted to read as follows:

§35. Minimum safety standards of highway design, maintenance, and construction; exemptions

* * *

R.S. 48:35(F) is all proposed new law.

F.(1)(a) The state, the Department of Transportation and Development and any political subdivision of the state shall not have a duty to maintain, repair, construct, or reconstruct, or prioritize the maintenance, repair, construction, or reconstruction of any public road,

highway, bridge, or street, or any portion thereof, in accordance with any standard, regulation, or guideline established or adopted subsequent to the date of approval by the chief engineer, or equivalent official in the case of a political subdivision of the state, of the original design plans for the construction or major reconstruction, whichever is later, of any such public road, highway, bridge, or street, or any portion thereof.

(b) When any public road, highway, bridge, or street, or any portion thereof, is maintained, repaired, constructed, or reconstructed in accordance with the standards, regulations, or guidelines in effect on the date of such approval of the original or changed design plan for the construction or major reconstruction, whichever is later, of such public road, highway, bridge, or street, or any portion thereof, there shall be a presumption that any such public road, highway, bridge, or street, or any portion thereof, is maintained, repaired, constructed, or reconstructed in a reasonably safe condition.

(c) When any public road, highway, bridge, or street, or any portion thereof, does not conform to one or more standards, regulations, or guidelines established or adopted subsequent to the date of such approval of the original or changed design plan for the construction or major reconstruction, whichever is later, of any such public road, highway, bridge, or street, or any portion thereof, such nonconformity shall not render any such public road, highway, bridge, or street, or any portion thereof, unreasonably dangerous or defective.

(2) When a standard, regulation, or guideline is not required to be met under Paragraph (1)(a) of this Subsection, evidence of failure to adhere to such standard, regulation, or guideline shall not be admissible

in a court proceeding for any purpose.

(3) The failure of the state, the Department of Transportation and Development, or any political subdivision of the state to select a particular public road, highway, bridge, street, or any portion thereof, for inclusion in a prioritization program, including those which prioritize maintenance, construction, reconstruction, major reconstruction, or overlay projects, or for priority placement within such a program, shall not be admissible in a court proceeding for any purpose in a suit for personal injury or property damages.

(4) As used in this Subsection, "construction or major reconstruction" shall mean the act, operation, and process of building or fabricating a new road, highway, bridge, or street or of bettering any existing road, highway, bridge, street, or any part thereof. Major reconstruction shall not include the following non-exclusive list of activities:

(a) Restoration of the original riding surface to original or better condition provided the total width from the far edge of one shoulder to the far edge of the other shoulder of the road is not widened and such work is performed within an existing right-of-way.

(b) Increasing the width of the riding surface by utilizing part of the shoulder of the road provided such work is performed within an existing right-of-way.

(c) Creation of turning lanes provided such work is performed within an existing right-of-way.

(d) Cleaning and reestablishing drainage ditches, including replacement of deficient drainage structures provided such work is performed within an existing right-of-way.

R.S. 48:35(G) is all proposed new law.

G. The provisions of this Section shall not apply to regulations affecting the installation or design of signs imposed by the United States Department of Transportation.

Section 2. The provisions of this Act are intended to legislatively overrule that portion of *Aucoin v. State Through the Dept. of Transp. and Development*, 97-1938 (La. 4/24/98), 712 So.2d 62, which imposes liability on the Department of Transportation and Development for failing to maintain and/or reconstruct an existing highway to modern standards.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

The original instrument was prepared by Thomas L. Tyler. The following digest, which does not constitute a part of the legislative instrument, was prepared by Tracy Sudduth.

Dardenne (SB 858) DIGEST

Proposed law provides for the limitation of liability for the Dept. of Transportation and Development or any political subdivision of the state with respect to public roads, highways, bridges, or streets by establishing that the department or political subdivision shall not have any duty to maintain, repair, construct, or reconstructing or prioritize the maintenance or repair of public roads, highways, bridges, or streets to a standard higher than the standard in effect at commencement of the original design.

Proposed law provides when a standard, regulation, or guideline is not required to be met, evidence of failure to adhere to such standard, regulation, or guideline shall not be admissible for any purpose.

Proposed law provides that the failure of the state, a state agency, or any political subdivision of the state to prioritize the maintenance or repair of any public road, highway, bridge, or street, or any portion thereof shall not be admissible for any purpose.

Proposed law specifically overrules portions of *Aucoin v. State Through the Dept. of Transp. and Development*, 97-1938 (La. 4/24/98), 712 So.2d 62.

Proposed law shall not apply to the regulations affecting the installation or design of signs imposed by the U.S. Dept. of Transportation.

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Adds R.S. 48:35(F) and (G))

Summary of Amendments Adopted by Senate

Senate Floor Amendments to engrossed bill.

1. Provides that state, DOTD, or political subdivisions shall not have any duty to construct or reconstruct any public road, highway, bridge, or street to a higher standard than the standard in effect for the original design.

2. Deletes prohibition of evidence of failing to met AASHTO standards in cases where the AASHTO standards are not required to be met.

3. Adds presumption that any public road, highway, bridge, or street is in reasonably safe condition when it is maintained, repaired, constructed, or reconstructed in accordance with the standards, regulations, or guidelines in effect on the date of approval.

4. When any public road, highway, bridge, or street does not conform to one or more standard, regulation, or guideline that is adopted subsequent to the date of approval of the original design, such nonconformity shall not render such public road, highway, bridge, or street unreasonably dangerous or defective.

5. Prohibits evidence of failing to met any standard, regulation, or guideline from being admissible in any court proceeding when such standard, regulation, or guideline is not required to be met.

6. Prohibits evidence from being admissible in a court proceeding for any suit for personal injury or property damage when the state, DOTD, fail to select a particular road, highway, bridge, or street to be included in a prioritization program.

7. Adds a definition for construction or major construction.

8. Deletes provision that this Act is applicable to all claims existing or actions pending on its effective date.

9. Adds "changed" design date to be considered as well as the original design date for the purpose of being in accordance with the standards, regulations, or guidelines.

10. Adds provision that state law on minimum safety standards of highway design, maintenance, and construction shall not apply to the regulations affecting the installation or design of signs imposed by the U.S. DOT.