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# Are Wide Streets Negligent?

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## **Zoning and Land Use Planning**

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### **ARE WIDE STREETS NEGLIGENT?**

American commercial streets are typically designed to encourage motorists to drive as rapidly as possible; major streets can be as many as six or eight lanes wide.<sup>1</sup> Such wide streets encourage drivers to drive so rapidly that pedestrians often die when struck by automobiles.<sup>2</sup>

Traditionally, tort law has not impeded the anti-pedestrian orientation of American streets. Courts and juries rely on guidelines set by the American Association of Highway and Transportation Officials (AASHTO), a national association of state and local transportation officials.<sup>3</sup> AASHTO guidelines have traditionally favored wide streets that encourage high-speed traffic.<sup>4</sup> As a result, some transportation planners assume that in order to avoid tort liability, they must build such streets.<sup>5</sup> This perception is probably inaccurate, both because AASHTO guidelines have become more flexible over time, and because in most states, sovereign immunity precludes liability for discretionary policy decisions.<sup>6</sup>

But one recent case suggests that transportation planners may actually risk tort liability by building streets designed

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<sup>1</sup>See, e.g., Angie Schmitt, Miami Hosted “Safe Streets” Summit- Yet Still Hasn’t Fixed Its Unsafe Streets, Streetsblog, Feb. 26, 2019, at <https://usa.streetsblog.org/2019/02/26/miami-hosted-safe-streets-summit-yet-hasn-t-fixed-its-unsafe-streets/> (Miami’s Biscayne Boulevard has eight lanes); *infra* note \_.

<sup>2</sup>See *infra* notes 12–16 and accompanying text (describing relationship between high speeds and severe injuries to pedestrians).

<sup>3</sup>See *infra* note 17 and accompanying text.

<sup>4</sup>See *infra* note 11 and accompanying text.

<sup>5</sup>See *infra* note 18 and accompanying text.

<sup>6</sup>See *infra* notes 19, 32 and accompanying text.

for fast traffic: in the 2016 case of *Turturro v. City of New York*,<sup>7</sup> the New York Court of Appeals upheld a jury verdict against a city because the city failed to engage in “traffic calming measures [to] deter drivers . . . from speeding”<sup>8</sup> Thus, it appears that cities that seek to accommodate high-speed traffic might actually be increasing, rather than decreasing, their risk of tort liability.

Part I of this article discusses the history of American street design, and the negative side effects of 20<sup>th</sup>-century policies favoring high-speed streets. Part II discusses the *Turturro* case and a more recent New York case distinguishing *Turturro*. Part III explains the limits of the *Turturro* holding in more detail.

## I. BACKGROUND

In 1914, state and local highway officials formed the American Association of State Highway and Transportation Officials (AASHTO).<sup>9</sup> AASHTO has been drafting guidelines for transportation planners since 1931.<sup>10</sup> Historically, these guidelines have favored wide streets and high-speed traffic. For example, a 1957 AASHTO manual proposed that major streets have six to eight lanes- far more than most pre-World War II streets.<sup>11</sup>

Such wide streets made walking difficult and dangerous, for several reasons. First, each additional travel lane adds a few seconds to pedestrian travel, thus increasing the amount of time walkers are exposed to high-speed traffic.<sup>12</sup> Second, wide streets make it easier for drivers to travel at rapid

<sup>7</sup>*Turturro v. City of New York*, 28 N.Y.3d 469, 45 N.Y.S.3d 874, 68 N.E.3d 693 (2016).

<sup>8</sup>*Id.* at 485, 68 N.E. 3d at 705, 45 N.Y.S. 3d at 775.

<sup>9</sup>See Michael Lewyn, *Why Pedestrian-Friendly Street Design is Not Negligent*, 47 U. Louisville L. Rev. 339, 342 (2008) (citation omitted). At the time of its formation, the organization was known as the American Association of State Highway Officials (AASHO). *Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 342. See also *Id.* at 350–54 (describing other anti-pedestrian features in AASHTO manuals, such as suggestions of high speed limits on

speeds,<sup>13</sup> which in turn increases traffic-related danger in a variety of ways. A motorist driving at thirty miles per hour has a 150-degree field of vision; by contrast, a motorist driving at sixty miles per hour has only a 50-degree field of vision, and as a result may have difficulty noticing other road users.<sup>14</sup> Moreover, a motorist who does notice another road user may have difficulty stopping in time to avoid a collision if he or she is driving at a high speed. For example, someone who is driving at forty miles per hour will not be able to stop without traveling 120 feet; by contrast, someone who is driving twenty miles per hour can come to a stop within 40 feet of noticing another road user.<sup>15</sup> Finally, high speeds increase the odds of death when collisions do occur: a pedestrian hit by a vehicle traveling fifteen miles per hour has a 3.5 percent chance of death, while one struck by a vehicle traveling at forty-four miles per hour has an 83 percent chance of death.<sup>16</sup>

Some courts have held that failure to comply with AASHTO guidelines is evidence of negligence.<sup>17</sup> As a result, transportation planners have historically relied on AAHSTO guidelines, because they feared that if they did not do so,

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busiest streets, support for large parking lots, and hostility towards street trees).

<sup>13</sup>See *Turturro v. City of New York*, 28 N.Y.3d 469, 485, 45 N.Y.S.3d 874, 886, 68 N.E.3d 693, 705 (2016) (“it was known among traffic engineers that straight, wide roads . . . encourage speeding because drivers feel more comfortable on roadways with those characteristics”); Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N. Y.U. ENVTL. L.J. 691, 694 (1996) (traffic engineers build wide streets out of “solicitude for fast traffic”).

<sup>14</sup>See Lewyn, *supra* note 9, at 344.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>See, e.g., *Kleinman v. Buzzeo*, 56 Misc. 3d 200, 203, 50 N.Y.S.3d 841, 843 (Sup 2017) (holding that “noncompliance with such highway construction guidelines may form the basis . . . for liability under principles of common law negligence” but noting that New York courts divided on this issue); *Harris v. State ex rel. Dept. of Transp. and Development*, 997 So. 2d 849, 865 (La. Ct. App. 1st Cir. 2008), writ denied, 999 So. 2d 785 (La. 2009) (“whether [government] has conformed to the applicable AASHTO standards is a relevant factor in determining the ultimate issue of whether the highway is unreasonably dangerous.”).

injured motorists might recover damages against municipalities for negligent street design.<sup>18</sup>

However, it no longer makes sense for planners to rely on AASHTO manuals to support anti-pedestrian street design policies, for several reasons. First, discretionary function tort immunity protects most governments from liability for discretionary policy decisions, such as decisions to favor pedestrian safety over high-speed traffic.<sup>19</sup> Second, another planning organization, the Institute of Transportation Engineers (ITE), has issued its own manual of recommended practices, which tends to favor slower traffic and more pedestrian-oriented streets.<sup>20</sup> Third, AASHTO's own guidelines have evolved in recent years. Portions of the 2018 guidelines have been revised to "emphasize transportation of people, rather than focusing primarily on moving vehicles . . . [and to place] greater emphasis on lower-speed, walkable, urban zones."<sup>21</sup> Even the 2011 guidelines acknowledge that streets in developed urban areas should be designed for lower speeds than rural streets with less pedestrian traffic.<sup>22</sup> But even if planners' manuals now allow narrower, more walkable streets, they do not necessarily require such streets. However, the Turturro case seems, at first glance, to do exactly that.

<sup>18</sup>See Lewyn, *supra* note 9, at 339.

<sup>19</sup>*Id.* at 358–61.

<sup>20</sup>*Id.* at 362–63.

<sup>21</sup>American Association of State Highway and Transportation Officials, *A Policy on Geometric Design of Highways and Streets, 7th Edition Summary of Key Revisions and Updates*, at [http://downloads.transportation.org/publications/GDHS-7\\_SummaryOfChanges.pdf](http://downloads.transportation.org/publications/GDHS-7_SummaryOfChanges.pdf).

<sup>22</sup>See American Association of State Highway and Transportation Officials, *A Policy on Geometric Design of Highways and Streets* 7-27 (6th ed. 2011) at [http://www.academia.edu/33524500/AASHTO\\_Green\\_Book\\_2011.PDF](http://www.academia.edu/33524500/AASHTO_Green_Book_2011.PDF) (although arterial streets generally designed to support 30-60 mile per hour traffic, "[l]ower speeds apply in central business districts and in more developed areas, while higher speeds are more applicable to outlying suburban and developing areas.") (emphasis added). On the other hand, the 2011 manual emphasized that "the typical range [for such streets is] . . . four to eight through lanes". *Id.* at 7-30. Arterial streets are typically the busiest streets. *Id.* at 7-27 (arterials serve "major activity centers").

## II. RECENT CASE LAW ON SPEED AND STREET DESIGN

On December 5, 2004, 12-year-old Anthony Turturro was riding a bicycle in Gerritsen Avenue in Brooklyn, New York, when he was struck by a motorist who was driving 54 miles per hour.<sup>23</sup> Gerritsen Avenue has four lanes, and the speed limit is 30 miles per hour.<sup>24</sup> In addition to suing the motorist,<sup>25</sup> Turturro and his mother<sup>26</sup> sued the city, presenting evidence that speeding was common on Gerritsen Avenue and that the city had not studied “traffic calming” measures—that is, measures such as street humps and narrower street lanes that are likely to slow down traffic.<sup>27</sup> The plaintiffs also presented evidence that the city had received several letters from neighborhood residents and elected officials complaining about speeding on Gerritsen Avenue.<sup>28</sup> The jury found that the defendants were negligent and responsible for 90 percent of the damages.<sup>29</sup> The city moved to set aside the verdict, and the trial court denied the city’s motion as to liability.<sup>30</sup> An appellate court and the New York Court of Appeals (the state’s highest court) both affirmed judgment for the plaintiffs.<sup>31</sup>

The first question the court addressed was what sort of immunity, if any, was appropriate under New York law.

<sup>23</sup>Turturro v. City of New York, 28 N.Y.3d 469, 474–75, 45 N.Y.S.3d 874, 878–79, 68 N.E.3d 693, 697–98 (2016).

<sup>24</sup>*Id.* at 475, 68 N.E. 2d at 698, 45 N.Y.S. 3d at 879.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 477, 68 N.E. 2d at 699, 45 N.Y.S. 3d at 880 (noting that mother sued for “loss of services”).

<sup>27</sup>*Id.* at 475, 68 N.E. 2d at 698, 45 N.Y.S. 3d at 879.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 476, 68 N.E. 2d at 699, 45 N.Y.S. 3d at 880 (jury “apportioned 10% of the liability to Anthony, 50% to Pascarella [the speeding motorist] and 40% to the City.”).

<sup>30</sup>*Id.* at 477, 68 N.E. 2d at 699, 45 N.Y.S. 3d at 880. However, the court reduced the damages verdict. *Id.*

<sup>31</sup>*Id.* at 477, 68 N.E. 2d at 699–700, 45 N.Y.S. 3d at 880–81. However, the appellate court modified the judgment by deleting the award to Anthony Turturro’s mother, and further reducing the damages awarded. *Id.* at 477, 68 N.E. 2d at 700, 45 N.Y.S. 3d at 880.

Under New York law, immunity may depend on whether the government's function is classified as "proprietary" or "governmental." In New York (unlike in most other states)<sup>32</sup> discretionary function immunity is limited to policy decisions involving governmental functions.<sup>33</sup> Because New York law defines the duty to keep streets in safe condition as a proprietary function,<sup>34</sup> New York municipalities are more likely than cities in other states to be liable for negligence that causes unsafe streets.<sup>35</sup>

The city argued that motorist speeding arose from police failure to enforce traffic laws, which involves the governmental function of police protection rather than the proprietary function of street design.<sup>36</sup> The court rejected this view, because the negligent act alleged by the plaintiffs was the failure to implement traffic calming, rather than the failure to allocate adequate police resources to speed limit enforcement.<sup>37</sup> The court added that the success of the plaintiffs' claim "depended, in part, upon the jury's conclusion that the City had attempted to address the speeding problem through police enforcement, but that police enforcement was not successful in controlling speeding down the length of Gerritsen Avenue, and the City therefore had an obligation to use [traffic calming]."<sup>38</sup>

One exception to the New York rule that cities are not immune for negligence related to proprietary functions exists when "a duly authorized public planning body has entertained and passed on the *very same* question of risk as would ordinarily go to the jury."<sup>39</sup> However, the court held that this exception was inapplicable because even though the city did

<sup>32</sup>See 2 Barry A. Lindahl, *Modern Tort Law: Liability and Litigation*, sec. 16.22 (2018 update) (proprietary/governmental distinction "has been rejected by most jurisdictions").

<sup>33</sup>See *Turturro v. City of New York*, 28 N.Y.3d 469, 479, 45 N.Y.S.3d 874, 882, 68 N.E.3d 693, 701 (2016) (citation omitted).

<sup>34</sup>*Id.*, 68 N.E. 2d at 701, 45 N.Y.S. 3d at 882.

<sup>35</sup>*Id.* at 480, 8 N.E. 2d at 701–02, 45 N.Y.S. 3d at 882–83 (citations omitted).

<sup>36</sup>*Id.* at 480, 68 N.E. 2d at 702, 45 N.Y.S. 3d at 883.

<sup>37</sup>*Id.* at 481, 68 N.E. 2d at 702, 45 N.Y.S. 3d at 883.

<sup>38</sup>*Id.* at 486, 68 N.E. 2d at 706, 45 N.Y.S. 3d at 887.

<sup>39</sup>*Id.* (emphasis in original).

study the possibility of installing traffic control signals on Gerritsen Avenue, it did not study traffic calming.<sup>40</sup> The court added that this exception did not cover every single case where a city studied a problem, because a city may be liable if its study is “plainly inadequate.”<sup>41</sup>

The court went on to address the substantive issue of whether the city’s negligence caused the collision. The city argued that the motorist’s speeding “was the sole proximate cause of the accident.”<sup>42</sup> The court disagreed, because the motorist’s behavior was itself “a foreseeable consequence of the city’s failure to implement traffic calming measures”<sup>43</sup> and therefore did not break the chain of causation.

The city also argued that plaintiffs had not shown that traffic calming would have prevented the collision at issue.<sup>44</sup> The court rejected this argument, pointing out that even the city’s expert admitted that “people generally drive faster on wide, straight roadways . . . [and that] traffic calming measures are intended to reduce the overall ‘curve’ of speed.”<sup>45</sup> Accordingly, the jury could reasonably “have concluded that traffic calming measures deter drivers such as [the motorist in this case] from speeding, and that the City’s failure to conduct a traffic calming study was a substantial factor in causing the accident.”<sup>46</sup>

On the other hand, one of New York’s intermediate appellate courts distinguished *Turturro* in the case of *Enker v. County of Sullivan*.<sup>47</sup> The *Enker* plaintiff was crossing a street on foot when he was stuck by a vehicle.<sup>48</sup> He then

<sup>40</sup>*Id.* at 486–87, 68 N.E. 2d at 706–07, 45 N.Y.S. 2d at 887–88 (adding that the city’s decision to study traffic control signals were irrelevant because “traffic signals generally are not used to control speed”).

<sup>41</sup>*Id.* at 486, 68 N.E. 2d at 706, 45 N.Y.S. 3d at 887.

<sup>42</sup>*Id.* at 484, 68 N.E. 2d at 704, 45 N.Y.S. 3d at 885.

<sup>43</sup>*Id.*, 68 N.E. 2d at 705, 45 N.Y.S. 3d at 886.

<sup>44</sup>*Id.*, 68 N.E. 2d at 705, 45 N.Y.S. 3d at 886.

<sup>45</sup>*Id.* at 485, 68 N.E. 2d at 705, 45 N.Y.S. 3d at 886.

<sup>46</sup>*Id.* at 485, 68 N.E. 2d at 705, 45 N.Y.S. 3d at 887.

<sup>47</sup>*Enker v. County of Sullivan*, 162 A.D.3d 1366, 79 N.Y.S.3d 722 (3d Dep’t 2018).

<sup>48</sup>*Id.*, 79 N.Y.S. 2d at 723.



sued a county for negligent intersection design,<sup>49</sup> claiming that the county should have prohibited parking and installed a “No Pedestrian Crossing” sign near the site of the accident.<sup>50</sup>

The court wrote that, as noted above,<sup>51</sup> government agencies are immune from liability for negligent highway design when they have studied “the same question of risk that underlies the claim.”<sup>52</sup> The court then held that in *Enker*, unlike *Turturro*, the county had done exactly that, because the plaintiff claimed that the defendant’s design of the intersection endangered pedestrian safety,<sup>53</sup> and the “defendant’s installation of pedestrian push signals at only two cross streets was a deliberate and reasonable planning decision to ensure the safety of pedestrians while navigating the subject intersection.”<sup>54</sup> Thus, *Enker* stands for the proposition that government will not be liable for negligent street designs if planners adopt a “deliberate and reasonable planning decision” to protect walkers.

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<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 1368, 79 N.Y.S. 2d at 724.

<sup>51</sup>See *supra* notes 39–41 and accompanying text.

<sup>52</sup>*Enker v. County of Sullivan*, 162 A.D.3d 1366, 1368, 79 N.Y.S.3d 722, 724 (3d Dep’t 2018).

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* I note that the court’s faith in pedestrian push signals was almost certainly misplaced. A leading authority in the field of pedestrian-oriented city planning, Jeff Speck, writes that these signals cause walkers “to get the message pretty quickly that they are second-class citizens.” Jeff Speck, *Walkable City Rules: 101 Steps to Making Better Places* 178 (2018). Cf. New Hampshire Institute of Art, *NHIA Presents City Planner Jeff Speck*, at <http://www.nhia.edu/about/news-and-events/news/jeff-speck-city-planning-presentation> (describing Speck’s credentials).

### III. WHAT THE CASE LAW DOES NOT DO

After *Turturro*, pedestrian safety advocates proclaimed that the decision would lead to increased use of traffic calming. For example, personal injury attorney Steve Vaccaro described the decision as a “game-changer.”<sup>55</sup> Similarly, transportation activist Paul Steely White said that *Turturro* “puts an end to the notion that traffic safety improvements should be subject to debate and contingent on unanimous local opinion.”<sup>56</sup>

However, a variety of statements in both *Turturro* and *Enker* limit government liability in cases involving high-speed streets. First, the *Turturro* court emphasized that its decision rested upon New York’s narrow view of sovereign immunity. In most states, street design decisions are immune from liability as long as they are related to discretionary policy decisions.<sup>57</sup> In New York, this is not the case because street design is a proprietary function.<sup>58</sup> As a result, *Turturro* has not been heavily cited outside New York.<sup>59</sup>

Second, even in New York, a city is immune from liability if it has adequately studied pedestrian safety issues and then adopted a plausible alternative.<sup>60</sup> Both *Enker* and *Turturro* support this view. *Enker* held that a county was

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<sup>55</sup>Brad Aaron, *State’s Highest Court Holds NYC Liable for Injuries on Streets Without Traffic Calming*, Streetsblog, Jan. 5, 2017, at <https://nyc.streetsblog.org/2017/01/05/states-highest-court-holds-nyc-liable-for-injuries-on-streets-without-traffic-calming/>.

<sup>56</sup>*Id.*

<sup>57</sup>*See supra* notes 19, 32 and accompanying text.

<sup>58</sup>Although New York is in the minority, it is not the only state that adopts this view. *See, e.g.*, *Higgins v. City of Rockville*, 86 Md. App. 670, 678–80, 587 A.2d 1168, 1172–73 (1991) (criticizing rule but acknowledging that it is still good law in Maryland); T.C.A. 29-20-203(a) (abolishing immunity in Tennessee for “any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity.”).

<sup>59</sup>Of the thirty-one cases to date citing *Turturro*, not one was outside New York.

<sup>60</sup>I note that I have found no case applying *Turturro* to pedestrian/vehicle collisions involving excessive speed. However, the cases that have applied *Turturro* in other contexts have emphasized that liability turns on

immune from liability to a pedestrian because it had made “a deliberate and reasonable planning decision to ensure the safety of pedestrians,”<sup>61</sup> even though it had not adopted the pedestrian safety measures sought by the plaintiff.<sup>62</sup> By contrast, the Turturro court emphasized that the city had not even studied traffic calming.<sup>63</sup> Read together, these cases suggest that a municipality that studies traffic calming (unlike the Turturro defendant) but makes a deliberate and reasonable decision to adopt another policy (like the Enker defendant) will avoid liability.

It therefore appears that a negligence claim based on a government agency’s failure to calm traffic is likely to fail if (1) the claim arises in a state that (unlike New York) applies discretionary function immunity in street design lawsuits; or (2) the municipality has adequately studied pedestrian safety issues (especially if it has made some minimal steps to protect pedestrians).<sup>64</sup> It therefore appears that a city may insulate itself from liability by studying pedestrian safety issues, and by adopting minimal safeguards to protect pedestrians.

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whether a municipality has studied the problem alleged by the plaintiffs. *See* *Cohen v. Macaya*, 59 Misc. 3d 888, 892, 72 N.Y.S.3d 813 (Sup 2018) (in case involving bicycle/pedestrian collision, court rejected city’s immunity defense because city had not studied improvements that might have prevented collision); *Olenick v. City of New York*, 56 Misc. 3d 389, 393–94, 52 N.Y.S.3d 839, 843 (Sup 2017) (in cases involving bicycle/pedestrian collision, court denies city’s motion for summary judgment because even though the city was aware of such collisions near site of accident, it had not yet conducted “a study regarding avoidance of bicycle/pedestrian accidents”).

<sup>61</sup>Enker, 162 A.D. 2d at 1368, 79 N.Y.S. 2d at 724.

<sup>62</sup>*Id.* (plaintiff proposed to limit parking and pedestrian crossing of street, while city instead chose to install pedestrian push signals).

<sup>63</sup>*See supra* note 46 and accompanying text.

<sup>64</sup>Because the Turturro court emphasized that police enforcement of anti-speeding laws had not been particularly successful, *see supra* note 38 and accompanying text, it could be argued that a municipality is not liable in cases where such police enforcement has not occurred. However, this possibility is unlikely to be an obstacle to recovery, because police attempts to enforce anti-speeding laws are virtually universal.

## IV. CONCLUSION

After *Turturro*, some supporters of street design reform hoped that *Turturro* would usher in a new age of expanded tort liability for planners who design wide, high-speed streets, causing municipalities to slow down traffic in order to increase pedestrian safety. But both *Turturro* and *Enker* suggest that this may not be the case. The *Turturro* court emphasized that the municipal defendant in that case failed to study traffic calming measures, thus implying that planners who study and reject such policies may avoid liability. Similarly, *Enker* emphasized that the city had adopted other safeguards to protect pedestrian safety, and accordingly found no liability.