



**University of Iowa
Legal Studies Research Paper Series**

Number 2017-31

November, 2017

UNSAFE STREETS' NEW LIABILITY

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This paper can be downloaded without charge from the Social Science Research Network electronic library at:
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VISION ZERO CITIES



**International Journal of
Traffic Safety Innovation**

CONTENTS

11 Claes Tingvall & Maria Krafft

Defending Vision Zero

17 Tamika Butler

Can Vision Zero Work in a Racist Society?

23 Sarah Jones

Against L.O.S.

29 Salvador Rueda

The Power of the Superblock in Barcelona

37 Gregory H. Shill

Unsafe Streets' New Liability

43 Ayikai Poswayo

Navigating Responsibility for Intervention in Africa

49 John Massengale

Designing Streets for People

55 Javier Vergara Petrescu

Citizens as Problem Solvers in Santiago

61 Anna Luten

The Bicycle Mayor Movement

67 Amit Bhatt & Sarika Panda

The Hurdle of Culture Change in Delhi

73 Kate Fillin-Yeh

The Radical Potential of Bike Share

79 Soo Hong Noh

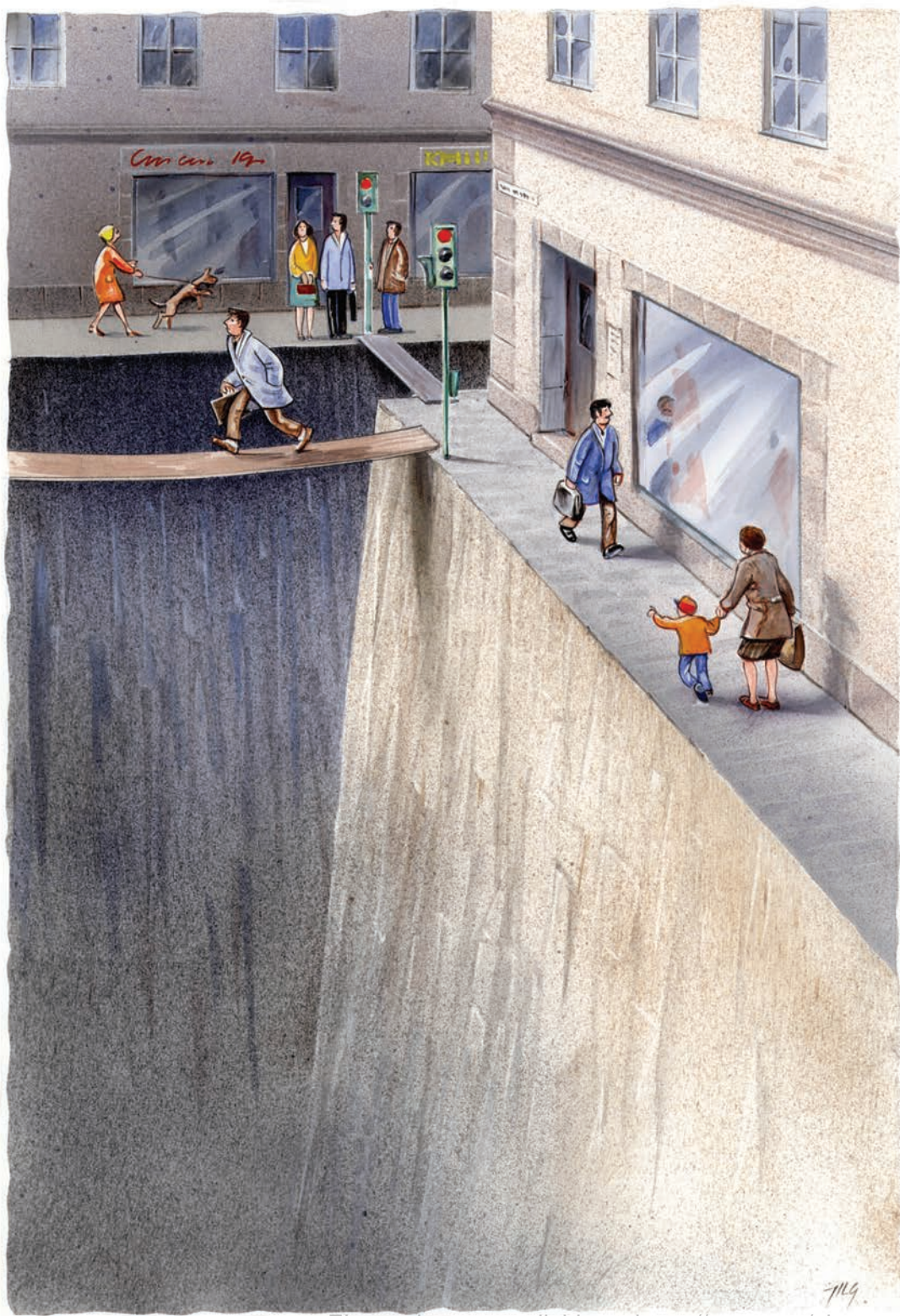
Paradigm Shift in Seoul

85 Sunil Paul

Can Cities Trust Autonomous Cars?

91 Leah Shahum

More or Less Than Visionary



GREGORY H. SHILL

Unsafe Streets' New Liability

In New York, a recent court case could affect the pace of Vision Zero street redesigns across the United States. Harvard Law School fellow Gregory H. Shill explains the history and repercussions of *Turturro v. City of New York*, and what advocates can learn about making their city uphold its responsibility to build and maintain safe streets.





On the Sunday before Christmas in 2004, Anthony Turturro, age 12, set out on his bike in a residential area of Brooklyn, and was struck and nearly killed by a motorist. He suffered extensive skull fractures, subdural hematomas, intracranial hypertension, hip and ankle fractures, and a collapsed lung, and spent five months in a coma. Today, at age 19, Anthony lives with permanent damage to his cognitive and motor skills and a seizure disorder. For decades, victims like Anthony have received only a hollow form of justice, if any at all. Yet now, thanks to a recent ruling in a case brought by his family, Anthony's story may help right that basic unfairness – not only for him, but for all of us: in December 2016, the state's high court, the New York State Court of Appeals ruled by a vote of 6-1 that cities can be held accountable for known unsafe road conditions created by their transportation engineers and other officials. The implications of Anthony's case (*Turturro v. City of New York*) for Vision Zero are tremendous, but the story begins long before he took out his bicycle that day.

Legal Steps to Accountability

The stretch of Gerritsen Avenue where Anthony was injured had a speeding problem known to everyone in the neighborhood. It was also a problem known to the City of New York, after local residents spent two years petitioning city officials to fix the street. Everyone from local children to elected officials reached out to the New York City Department of Transportation to complain about the “racetrack” conditions. They demanded traffic studies, and the Department of Transportation complied, conducting three speeding studies at Gerritsen Avenue intersections. The resulting data confirmed residents' concerns: speeding was rampant. Yet the city did not study the larger problem of speeding on Gerritsen Avenue as a whole and took no effective action to curb it. All of this groundwork was laid before Anthony went for a bike ride in December 2004.

After Anthony was struck, the Turturro family filed a civil suit against not only the speeding motorist (who was driving 54 mph, nearly twice the legal limit) but also against New York City, claiming that the design of Gerritsen Avenue had contributed to the crash. The argument, backed by expert testimony and data, was straightforward: poorly designed streets encourage reckless driving. This is the crux of Vision Zero, and while supported by science, it was perhaps the first time the argument had been presented in an American court of law. Anthony's lawyers asked the jury: should the fact that the driver was reckless excuse the city from responsibility for its own role in encouraging that very recklessness?

The jury said no, assigning 40% of the blame for the crash to the city, on top of the 50% that it assigned to the motorist – the largest share of blame – as well as 10% to the child himself. The verdict was upheld by the Appellate Division and later by the New York Court of Appeals. In its opinion, the latter court deemed “significant” the failure of the Department of Transportation to study speeding along the whole of Gerritsen Avenue (as opposed to three discrete intersections), and to look at traffic calming measures. In view of these oversights, the court ruled, the jury was reasonable in faulting the city for failing to address the problem adequately.

The court's opinion has powerful implications for Vision Zero and street safety. Simply put,



ABOUT

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streets that are known to be unsafe are now the legal responsibility of their municipality, meaning that crashes caused by reckless driving on those streets cannot be dismissed as private, individual acts of recklessness, but must also be addressed on a systematic basis by the city.

National Implications

In legal terms, the ruling – that cities must address known unsafe street designs – represents only an incremental change. The court simply placed street design in the same legal category as the physical condition of the roadbed, meaning that the city must address known design failures just as it must address known potholes. Maintaining reasonably safe road conditions is well established as a “proprietary” function of government, where the city is acting like a property owner, as distinguished from a “governmental” function, where the city is acting in a quintessentially governmental capacity, as in policing. This means that rather than enjoying a broad legal immunity, cities in New York State can be held liable for unsafe street designs under the ordinary rules of negligence that apply to property owners and other private parties.

Because street design implicates a variety of conditions, from road width to the presence of bicycle lanes, in each case, the question before a court would be whether an allegedly unsafe condition (a) was known to the city in advance and (b) contributed to a crash.

Though modest legally speaking, and limited to municipalities within New York State, it is difficult to overstate the significance of the court’s decision as a practical matter.

The lone dissenting justice emphasized this point: not only was the motorist who injured Anthony driving well over the speed limit, but prior to the crash, he had his license suspended 18 times, had been convicted of driving under the influence, and had even been ticketed for speeding on the very stretch where he struck Anthony.

It is difficult to imagine a clearer or more relevant pattern of personal recklessness than what the motorist exhibited in Anthony’s case. Yet crucially, the majority rejected the argument that the motorist’s behavior excused the city from its own responsibility to ensure safe street design. While the court upheld the jury’s determination attaching the largest share of responsibility to the motorist, it also upheld the jury’s finding that the city’s choices had played a role as well, and were actionable under familiar principles of negligence.

Simply put, streets that are known to be unsafe are now the legal responsibility of their municipality, meaning that crashes caused by reckless driving on those streets cannot be dismissed as private, individual acts of recklessness, but must also be addressed on a systematic basis by the city.

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Institutionalizing Vision Zero

While remarkable, the ruling in Anthony's case provides only a blueprint for realizing Vision Zero, not a guarantee of that outcome. To make its promise a reality, advocates and policymakers must be vigilant in identifying, documenting, and reporting hazardous streets.

First, documenting and notifying municipal authorities of unsafe road conditions is critical. A cursory reading of the opinion might suggest that New York municipalities that fail to maintain safe street design are now generally or automatically liable for crashes in which unsafe design plays a role. The rule established by the court's holding, however, is more exacting. For liability to attach, cities must first be placed on notice of specific, unsafe conditions.

Second and related, skillful advocacy is necessary when interacting with municipalities around traffic safety issues. In this case, Anthony's lawyers did not base his claim on the fact that the police had failed to prevent speeding on the corridor in question. This was wise; the city would almost certainly have been immune from challenges to police effectiveness or discretion since they are core "governmental" functions. Anthony's family was also not deterred by the fact that

the city had conducted a number of speeding studies on Gerritsen Avenue already; had the city affirmatively concluded that no further action was necessary, it would have enjoyed a similar form of immunity (despite safe road conditions being a "proprietary" function). Instead, Anthony's lawyers alleged that the city was negligent for failing to conduct an appropriately targeted speeding study, and for failing to study or implement traffic calming. This framing, built on the foundation laid by local residents' complaints prior to the incident, enabled the claim to proceed. Third, when fighting for Vision Zero principles, persistence is critical. Anthony and his family endured a dozen years of trials, appeals, and reductions in compensation in their fight for justice. Vision Zero has faced periodic setbacks since getting its start in the U.S., and more will surely follow this ruling. In time, other U.S. courts may embrace the vision embedded in the opinion of the New York Court of Appeals. In your city, bear in mind the importance of properly notifying public officials of unsafe street conditions, and document that process meticulously. The persistence and carefulness of advocacy efforts will help determine whether streets are made safe for all.