2d Civil No. B184926

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAUL HERZLICH, a minor, by
Allan Herzlich, his guardian ad litem

Plaintiff and Appellant,

v.

LOS ANGELES COUNTY METROPOLITAN
TRANSPORTATION AUTHORITY,

Defendant and Respondent.

Appeal from the Los Angeles Superior Court
Honorable Richard A. Adler, Judge Presiding
Los Angeles Superior Court Case No. LC069522

RESPONDENT'S BRIEF

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INTRODUCTION

An unknown assailant shot plaintiff as he stood waiting at a bus stop. Now plaintiff wants to impose liability on respondent Los Angeles County Metropolitan Transportation Authority (the "MTA") for failing to prevent that assault. Under governing law, he cannot state a viable claim. This is so for numerous reasons:

First, while common carriers owe their passengers a heightened duty of care (including an obligation to protect them from foreseeable assaults by third parties), a person waiting at a bus stop *is not a passenger*. As to non-passengers like plaintiff, a transit authority owes only a duty of ordinary care. That duty does not obligate the transit authority to act affirmatively to protect non-passengers from the conduct of criminal third parties.

Second, plaintiff's shooting was not a foreseeable risk of being left at a crowded bus stop. Thus, even if the MTA owed plaintiff a heightened duty of care, that duty cannot justify the imposition of liability in this case.

Third, any duty that the MTA owed to plaintiff was outweighed by the *supreme* duty it owed to the passengers already on the bus. That preeminent duty required the bus driver to not board the "unruly" "mob" that was "shouting insults" and "banging on the bus." That plaintiff stood in the midst of the mob did not alter the MTA's obligation to protect its existing passengers by refusing to open the bus doors.

Fourth, it is unclear what the MTA could have done to protect plaintiff—indeed, even if the bus driver had boarded the angry mob, there was no guarantee that it would have calmed. Under these circumstances, public policy weighs against imposing the duty plaintiff posits here.

The trial court properly sustained the MTA's demurrer without leave to amend. This Court should affirm.

STATEMENT OF THE CASE

Because this is an appeal from a judgment following an order sustaining a demurrer without leave to amend, we recite the facts as alleged in the complaint. (See *Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214 [for purposes of demurrer, reviewing court regards as true the facts alleged in the complaint].)

A. The Parties.

Plaintiff Paul Herzlich was a student at Taft High School. (19 AA 194 [¶ 13].)[1/] He, like other Taft students, depended upon the buses operated by defendant Los Angeles County Metropolitan Transportation Authority (the "MTA") to transport him to and from school. (19 AA 192-194 [¶¶ 7, 12, 13].)

B. Herzlich Waits At The Bus Stop After School.

On September 9, 2003, Taft advised the MTA that it would be dismissing its students earlier than usual. (19 AA 194 [¶ 12].) Later that day, Herzlich made his way to the bus stop to await a bus home. (1 AA 194 [¶ 13].)

C. The Buses Do Not Pick Up Passengers.

As Herzlich stood at the stop, a bus passed by without picking up the waiting students. (19 AA 194 [¶ 13].) The crowd grew to over 50 people and "became frustrated and angry, its numbers swelling and its mood turning darker." (19 AA 194 [¶ 15].)

[1/] There is only one volume of the Appellant's Appendix. Thus, the references in this brief to the Appellant's Appendix list the tab number first and then the page number ([tab] AA [page]).

A second bus approached the stop and pulled over to board the students. (19 AA 194 [¶ 14].) However, the crowd was "boisterous, vituperative, rambunctious, loud [and] unruly." (19 AA 194-195 [¶ 16].) It was "shouting insults and was banging on the bus." (*Ibid*.)

The bus driver saw that the crowd had turned into an unruly "mob" and decided not to board it, even though he knew that meant it would likely grow larger and become more agitated. (19 AA 195 [¶ 17].)

D. Herzlich Is Shot.

Soon after the second bus left, the mob became more frustrated. (19 AA 195 [¶ 18].) Subsequently, Herzlich was shot and injured. (*Ibid*.)

Herzlich does not allege that his assailant was a member of the crowd congregated at the bus stop. To the contrary, Herzlich's counsel said the shots came from a passing car. (RT D-6 to D-7 [demurrer hearing].)

E. The Trial Court Sustains The MTA's First Demurrer With Leave To Amend.

Herzlich filed a suit for negligence against the MTA. (1 AA 1.) The MTA demurred, arguing that as a governmental entity, it could only be sued on the basis of a statutory violation, and that Herzlich had cited none. (4 AA 57.)

In response, Herzlich argued that the MTA had a duty to him as a passenger riding a common carrier under Civil Code section 2100. (5 AA 61-62.) The MTA replied that section 2100 did not apply because Herzlich's assault occurred at a location that did not trigger the MTA's duty as a common carrier; indeed, Herzlich was shot as he stood on the sidewalk, not when he was boarding a bus. (6 AA 67-69.)

The trial court sustained the demurrer with leave to amend. (8 AA 78.)

F. The Trial Court Sustains The MTA's Second Demurrer With Leave To Amend.

Herzlich filed an amended complaint, specifically citing section 2100 as the basis for his claim. (9 AA 82.) The MTA filed a second demurrer, arguing that the statute did not apply because a common carrier has no duty to protect people at bus stops from unforeseeable attacks by third parties. (10 AA 99-102.)

The trial court's tentative decision was to sustain the demurrer without leave to amend. However, the trial court abandoned that tentative decision specifically so that Herzlich would have an opportunity to conduct additional discovery. (18 AA 177, 189-190; RT B-1, B-7 to B-11, C-2 to C-3.)

G. The Trial Court Sustains The MTA's Third Demurrer Without Leave To Amend.

A month later, Herzlich filed another amended complaint. (19 AA 191.) Once again, the MTA demurred, arguing that Herzlich failed to allege facts permitting an inference that it should have anticipated his random shooting. (21 AA 207.) The MTA also argued that the bus driver's duty to protect his existing passengers outweighed any duty to potential passengers in an unruly crowd. (21 AA 211.)

Although the complaint did not address whether the shot that injured Herzlich came from the mob, plaintiff's counsel made it clear that it did not. He stated: "I don't think there's any dispute that the shot came from a vehicle." (RT D-6 to D-7.)

Before ruling on the demurrer, the trial court asked plaintiff's counsel about the status of his discovery efforts and inquired whether he had any additional facts that he wanted to add. (RT D-2 to D-4, D-9.) Plaintiff's counsel responded that he had nothing to add. (RT D-9.) He stated that he believed his discovery had been sufficient for pleading purposes. (*Ibid*.; see also 26 AA 245 ["Prior to argument, this Court inquired as to whether Plaintiff wished to conduct any further discovery. Plaintiff advised this Court that all essential facts are set forth in the Third Amended Complaint . . . against the Defendant bus company"].)

The trial court sustained the demurrer without leave to amend. (26 AA 245.) Herzlich timely appealed. (28 AA 272.)

STANDARD OF REVIEW

When reviewing a judgment following an order sustaining a demurrer, this Court assumes the truth of all facts properly pleaded by the plaintiff. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

However, "when seeking to establish a statutory cause of action, general allegations are insufficient." (*Shields v. County of San Diego* (1984) 155 Cal.App.3d 103, 107-108, 113.) Rather, "the plaintiff must set forth facts in his complaint sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied." (*Ibid*., internal citation omitted [affirming demurrer where "no factual inferences support[ed] [plaintiff's] conclusory allegations"].)

Whether a duty of care is owed is a question of law, and is therefore reviewable de novo. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674; *Delgado v. American Multi-Cinema, Inc*. (1999) 72 Cal.App.4th 1403, 1406; see also *Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1450-1451.)

The Court reviews the trial court's failure to grant leave to amend the complaint for an abuse of discretion; it may reverse only if it determines there is a reasonable possibility the pleading can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.) The plaintiff has the burden of showing how the complaint can be amended to state a cause of action. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.)

Finally, "[i]t is the validity of the court's action in sustaining a demurrer which is reviewable and not the court's statement of reasons for its action. Accordingly, a judgment based on an order sustaining a general demurrer must be affirmed if any one of the grounds of demurrer is well

taken." (*Beck v. American Health Group Internat., Inc*. (1989) 211 Cal.App.3d 1555, 1566, internal citations omitted; see also *Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119, 127 ["A proper judgment or decision of a lower court will be affirmed regardless of the correctness of the grounds upon which the court reached its conclusion"].)

ARGUMENT

I. THE MTA'S DUTY TO ITS EXISTING PASSENGERS TRUMPS ANY POSSIBLE DUTY IT OWED TO HERZLICH.

This Court need not reach the question of whether the MTA owed Herzlich some duty as a prospective passenger waiting at a bus stop. This is so because the MTA's bus driver owed a *supreme* duty to protect his existing passengers. That prevailing duty required that he refuse to board the "angry" "mob" in whose midst Herzlich stood. (See 19 AA 194-195 [¶¶ 16-17].)[2/]

"Common carriers owe their passengers a duty of utmost care and the vigilance of a very cautious person." (*Orr v. Pacific Southwest Airlines* (1989) 208 Cal.App.3d 1467, 1472; Civ. Code, § 2100.) This means the carrier must "do all that human care, vigilance, and foresight reasonably can do under the circumstances" to protect its passengers from harm. (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785; see also cases cited at AOB 28-30.)

This high duty requires common carriers to take affirmative steps to protect their passengers from foreseeable assaults by fellow passengers or by third parties. (*Lopez v. Southern Cal. Rapid Transit Dist.*, *supra*, 40 Cal.3d at pp. 785, 795; *Terrell v. Key System* (1945) 69 Cal.App.2d 682, 686; see also cases cited at AOB 28-30.)

[2/] When the driver declined to board the mob of students waiting at the bus stop, he understandably did so because he feared for the safety of his existing passengers. (See 16 AA 155:12-25 [deposition of bus driver].) Herzlich relied upon and attached excerpts from the bus driver's deposition to his Supplemental Opposition to the second demurrer. (16 AA 141; RT D-2:18-21.)

Here, the "boisterous, vituperative, rambunctious, loud, [and] unruly" "mob" at the bus stop was *the third party* for purposes of the analysis. (See 19 AA 194-195.) As a result, the driver had a prevailing duty to protect his existing passengers from the threat posed by the mob of prospective passengers. That the mob wished to board the bus did not change its fundamental character—i.e., that it was a reasonably foreseeable threat to the passengers already on the bus.

In fact, the MTA could have been liable if it *had boarded* the visibly unruly crowd. Supreme Court authority dictates that bus companies "*must* act to protect passengers from assaults by fellow passengers" who are visibly unruly—including, when necessary, "eject[ing] the unruly passengers." (*Lopez v. Southern Cal. Rapid Transit Dist.*, *supra*, 40 Cal.3d at pp. 780, 787, 794, emphasis in original, citing Civ. Code, § 2188.)[3/] If a bus driver has an obligation to eject unruly passengers, he certainly has an obligation to decline to board them in the first place.

Out of state law is even more to the point—it holds that a driver must *bar* a visibly unruly person from boarding a carrier because he poses a foreseeable threat to the passengers already on board. For example, in *Dupree v. Louisiana Transit Management, Inc.* (La.App. 1983) 441 So.2d 436, a bus passenger suffered injury when another passenger, who had been drinking, stepped on her foot. The court held that the bus driver had breached his duty by permitting the intoxicated passenger to board the bus in the first place: "[A]s a matter of public policy, the law imposes a duty on

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[3/] Civil Code section 2188 states: "EJECTION OF PASSENGERS. A passenger who refuses to pay his fare or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and at any usual stopping-place or near some dwelling house."

a public carrier . . . *to refuse to board a passenger*, whose probable impaired ability to ambulate is known, constructively or actually, by the carrier." (*Id*. at p. 440, emphasis added [held, injured passenger had made out a prima facie case of negligence against the bus company because it was foreseeable that the obviously intoxicated passenger might fall on another passenger].)[4/]

This duty applies with even greater force where, as here, *a mob* waits to enter a carrier. "Mobs always act without regard to law." (*Williams v. East St. Louis & S. Ry. Co.* (1921) 207 Mo.App. 233, 237 [232 S.W. 759, 761]; see also AOB 1, fn. 1.) Thus, as the cases Herzlich cites demonstrate, a driver acts negligently if he allows a mob to board, rather than keeping the doors shut and driving away. (See AOB 30.)

For example, in *Mangini v. Southeastern Penn. Transp. Authority* (1975) 235 Pa.Super. 478 [344 A.2d 621], the passengers of a trolley sued the carrier for injuries they sustained when a mob boarded the trolley and attacked them. The reviewing court concluded that the driver had acted negligently by opening the trolley door when a mob of boys was hurling objects against the trolley: "[I]t is apparent that the trolley driver was on notice that some form of trouble was developing from the time he stopped his trolley at the corner and a mob of boys began hurling objects against the

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[4/] See also *Wachser v. Interborough Rapid Transit Co.* (1910) 69 Misc. 346, 347 [125 N.Y.S. 767, 768] ["A railroad company has the power of refusing to receive as a passenger . . . any one who is drunk, disorderly, or riotous, or who so demeans himself as to endanger the safety, or interfere with the reasonable comfort and convenience, of the other passengers"]; *German-Bey v. National R.R. Passenger Corp*. (2d Cir. 1983) 703 F.2d 54, 55 [suggesting that carrier could be liable for permitting intoxicated passenger to board if "some reason beyond the smell of alcohol on the breath and slurred speech exists to believe that a particular inebriated passenger poses a threat to the safety of others"].

side and the windows of the vehicle. At this show of violence, it became the driver's duty to protect his passengers by moving the trolley away from the crowd of assailants which was clearly too large for him to handle on his own." (*Id*. at pp. 623-624.)

In our case, the bus driver did exactly what *Mangini* suggests he should have done: At the crowd's "show of violence"—here, "shouting insults" and "banging on the bus"—he discharged his "duty to protect his passengers by moving the [bus] away from the crowd of assailants which was clearly too large for him to handle on his own." (See 19 AA 194-195; *Mangini v. Southeastern Penn. Trans. Authority*, *supra*, 344 A.2d at pp. 623-624.)

As the trial court correctly concluded: "[T]he actions of the bus operator, when faced with an admittedly boisterous crowd, are consistent with his duty to known passengers on the bus which outweighs any duty he may owe to 'potential' boarders in an unruly and boisterous crowd." (26 AA 258-259.) "To request the bus driver to stop and pick up passengers under these conditions is to put the driver to a Hobson's choice of endangering the already boarded passengers by moving the angry mob inside the bus or by leaving Plaintiff at the bus stop." (26 AA 265.)

Under governing law, there was no choice. The bus driver had a prevailing duty of "utmost care" to protect his existing passengers by passing the mob by. As a matter of law, that duty trumped any conflicting duty the driver might have owed to the people waiting at the bus stop—including any duty to board willing passengers. (See Section II.D.1., *infra*.)

II. HERZLICH HAS NOT ALLEGED FACTS SHOWING THAT THE MTA HAD A DUTY TO PROTECT HIM FROM BEING SHOT AS HE WAITED AT THE BUS STOP.

Even if the MTA had no supreme duty to its existing passengers, Herzlich would still be unable to state a claim for negligence. This is so because in order to state such a claim, Herzlich must first establish that the MTA owed him a duty to prevent his shooting. (*Adelman v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 352, 361 [establishment of a duty of care is an "essential prerequisite" to any negligence cause of action].) "Without such a duty, any injury is '*damnum absque injuria*'—an injury without a wrong." (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1016 ("*McGettigan*").)

At the time of his assault, Herzlich was not riding on a bus. He was not even trying to board one. Rather, he was standing at a stop, with no bus in sight. Given these facts, Herzlich had an uphill battle to establish that the MTA owed him any kind of duty that could render it liable for his injury at the hands of a criminal third party.

Because this is a suit against a governmental entity, the Tort Claims Act provides Herzlich only two avenues for stating a claim here: direct liability for breach of a statutory duty (under Civil Code section 815) or vicarious liability for the bus driver's common law negligence (under Civil Code section 815.2). As a matter of law, neither avenue goes anywhere.

A. The Existence Of A Duty Is A Purely Legal Question That Can Be Decided On Demurrer.

As a threshold matter, Herzlich complains that the trial court improperly "cut down" this case "in its infancy" by dismissing it on demurrer rather than permitting the discovery process to go forward. (AOB 2.) There are two problems with this argument: the law and the facts.

First, as a matter of law, "[t]he existence of a duty is entirely a question of law" that may properly be determined on demurrer. (*McGettigan, supra*, 57 Cal.App.4th at p. 1016, internal citations omitted.) Numerous cases so hold.[5/]

This rule applies where, as here, the issue presented on demurrer is whether a duty stemming from a carrier-passenger relationship exists. (See, e.g., *McGettigan*, *supra*, 57 Cal.App.4th 1011 [deciding on demurrer that no carrier-passenger relationship existed as to a man waiting on a platform for a train]; see also *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1127 [deciding on demurrer that operator of roller coaster was a common carrier under Civil Code section 2100].)

[5/] See, e.g., *Silva v. Union Pacific R.R. Co.* (2000) 85 Cal.App.4th 1024, 1029-1030 [court may properly address legal issue of duty on demurrer]; *Adelman v. Associated Internat. Ins. Co.*, *supra*, 90 Cal.App.4th at p. 361 [same]; see also *Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 477 ["The existence and scope of duty are legal questions for the court"]; *Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal.4th 814, 819 ["the existence of a duty is a question of law for the court"]; *Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 674 ["The existence of a duty is a question of law for the court"]; *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278 [duty is issue of law for the court].

Thus, there is nothing improper or unusual about the trial court's decision to dismiss this case on the basis that the MTA owed no duty that would have obligated it to protect Herzlich from being shot as he waited at the bus stop.

Second, as a matter of fact, Herzlich had ample opportunity to conduct discovery before the trial court sustained the MTA's demurrer without leave to amend. As Herzlich's counsel conceded, the MTA responded to all outstanding discovery. (RT B-9:14-21.) The MTA made available the witnesses that Herzlich wanted to depose. (See, e.g., RT B-1- to B-11.) Moreover, the trial court allowed Herzlich to amend his complaint *three times* so that he could try to develop the facts necessary to survive demurrer. (See pp. 4-6, *supra*.)

At the second demurrer hearing, the trial court abandoned its tentative decision to deny leave to amend *expressly* so that Herzlich would have the chance to conduct depositions and other discovery. (RT B-7 to B-11; RT C-2 to C-4.) As the trial court explained, it wanted Herzlich to "satisfy himself either he has the evidence or he doesn't" to state a claim against the MTA. (RT B-10.)

Prior to sustaining the third demurrer without leave to amend, the trial court asked Herzlich's counsel about the status of his discovery efforts and inquired whether he had "any additional facts [he] want[ed] to add." (RT D-9; see also RT D-2 to D-4.) Herzlich's counsel responded that *he had nothing to add*. (RT D-9.) He stated that he believed his discovery had been sufficient for pleading purposes. (*Ibid*.; see also 1 AA 245 ["Prior to argument, this Court inquired as to whether [Herzlich] wished to conduct any further discovery. [Herzlich] advised this Court that all essential facts

are set forth in the Third Amended Complaint . . . against the Defendant bus company"].)

Herzlich can hardly complain that the "search for truth" was "truncate[d]" "to a nub" in this case. (AOB 2.) In any event, Herzlich concedes that the shot that injured him *did not* come from the crowd gathered at the bus stop, but rather from a random assailant in a passing car. (RT D-6:26, D-7:7-9.) As discussed below, this concession hammers home the futility of any further attempts to amend the complaint to state a claim against the MTA. (See Section III, *infra*.) No amount of additional discovery would permit Herzlich to state a viable claim.

B. Herzlich Cannot State A Claim For Direct Liability As To The MTA.

1. To be liable, a governmental entity must breach a statutory duty of care; breach of a common law duty is insufficient.

To establish that the MTA is directly liable for his injuries, Herzlich must establish that the MTA breached a *statutorily-imposed* duty. This is so because under the Tort Claims Act, "[a] public entity is not liable for an injury," "[e]xcept as otherwise provided by statute." (Gov. Code, § 815, subd. (a); see also *Wright v. State* (2004) 122 Cal.App.4th 659, 671 ["[a] public entity is not liable for tortious injury unless the liability is imposed by statute"].)[6/]

[6/] See also *Tolan v. State of California ex rel. Dept. of Transportation* (1979) 100 Cal.App.3d 980, 986 ["the intent of the act is . . . to confine potential governmental liability to rigidly delineated circumstances. That the exclusive basis of public entity tort liability is

(continued...)

Because common law principles of negligence are inapplicable to governmental entities, the MTA cannot be held liable for breaching a common law duty. (See *Tolan v. State of California ex rel. Dept. of Transportation*, *supra*, 100 Cal.App.3d at p. 986 [Tort Claims Act "abolishes all common law or judicially declared forms of liability for public entities"].)

2. The MTA owed Herzlich no duty under Civil Code section 2100 because he was not a passenger at the time of the shooting.

Herzlich cites Civil Code section 2100 as the sole statutory basis for imposing direct liability on the MTA. That statute imposes a duty of "utmost care and diligence" on common carriers to protect their passengers from harm.[7/]

As we now show, Herzlich cannot state a claim under section 2100 because *he was not a passenger* at the time of the shooting and, even if he were, the MTA's duty as a common carrier did not encompass protecting him from random, unforeseeable shootings.

[6/] (...continued)
statutory has been reiterated in numerous appellate court decisions"]; *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1179 ["the intent of the Tort Claims Act is to confine potential governmental liability"].

[7/] Section 2100 provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." (Civ. Code, § 2100; see also *Gomez v. Superior Court*, *supra*, 35 Cal.4th at p. 1130 [section 2100 requires common carriers to "exercise great care for the safety of their passengers"].)

a. The general rule: No carrier-passenger relationship exists while a person is waiting at a stop.

California courts generally hold that no carrier-passenger relationship exists as to the people waiting on train platforms or at airline terminals. (See, e.g., *Falls v. San Francisco etc. R.R. Co.* (1893) 97 Cal. 114, 117-119 [no carrier-passenger relationship as to person waiting on train platform]; *Orr v. Pacific Southwest Airlines*, *supra*, 208 Cal.App.3d 1467 [no carrier-passenger relationship had arisen as to woman waiting in airline terminal]; *McGettigan*, *supra*, 57 Cal.App.4th 1011 [no carrier-passenger relationship as to person waiting on platform for BART train].)

This is so because carrier-passenger relationships exist as to "carriage-related activities *only*, exempting other activities of the carrier even if on the same property." (*Simon v. Walt Disney World Co.* (2004) 114 Cal.App.4th 1162, 1164, emphasis added; see also *Marshall v. United Airlines* (1973) 35 Cal.App.3d 84, 86 [a "carrier owes its passengers the highest degree of care [only] while 'passengers are *in transitu*, and until they have safely departed the carrier's vehicle'"].)

This rule makes sense because while a passenger is actually in transit, he "is exposed to countless hazards" and thus "gives himself wholly in charge of the carrier." (*Falls v. San Francisco Etc. R.R. Co.*, *supra*, 97 Cal. at p. 119.) However, "a rule properly ceases with the reason for it; therefore, as a passenger's entrance to the carrier's station is characterized by none of the hazards incident to the journey itself, the rigor of the rule above announced is justly relaxed [so that] . . . . the carrier is bound simply to exercise ordinary care, in view of the dangers to be apprehended." (*Id.* at pp. 119-120 [held, railroad obligated to exercise only reasonable care as to

platform], cited with approval, *Marshall v. United Airlines, supra,* 35 Cal.App.3d at pp. 86-87; accord *Robson v. Union Pacific R.R. Co.* (1945) 70 Cal.App.2d 759, 761.)

Thus, a person waiting at a station generally cannot state a claim under section 2100. For example, in *Orr v. Pacific Southwest Airlines*, *supra*, 208 Cal.App.3d 1467, a woman was struck by a stranger as she was waiting for her luggage to arrive at the delivery side of an X-ray machine. She sued the airline for breaching its statutory duty of utmost care as a common carrier. *Orr* affirmed a nonsuit as to plaintiff's section 2100 claim because the plaintiff was not a passenger at the time of the incident: "[B]ecause the passengers' entry into the carrier's station is not characterized by any of such hazards incident to the journey itself, the carrier at such time and place is required only to exercise a reasonable degree of care for the protection of its passengers." (*Id*. at p. 1472, italics omitted; see also *McGettigan*, *supra*, 57 Cal.App.4th at p. 1017.)

The same is true here. Because a bus stop "is characterized by none of the hazards incident to the journey itself," section 2100 does not impose a duty of utmost care on bus companies as to the people waiting there.

In contrast with the statutory duty of utmost care it owes to passengers, a common carrier owes people waiting in stations only a common law duty to exercise ordinary care. (See, e.g., *Sanchez v. Pacific Auto Stages* (1931) 116 Cal.App. 392, 396 ["carriers of passengers are bound simply to exercise ordinary care as to the condition of the station at which passengers are received"]; *Robson v. Union Pacific R.R. Co.*, *supra*, 70 Cal.App.2d at p. 761 ["The care required of a carrier for the protection

of a passenger on its premises involves reasonable care"]; *Falls v. San Francisco Etc. R.R. Co.*, *supra*, 97 Cal. at pp. 119-120 [same].)[8/]

As discussed above, that *common law* duty of ordinary care is insufficient under the Tort Claims Act to impose direct liability on the MTA. (See Section II.B.1., *supra*.) It is also insufficient to create an obligation to act affirmatively to protect Herzlich from the criminal acts of third parties. (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [duty of ordinary care includes no affirmative duty to render assistance].)

Nonetheless, Herzlich attempts to bring this case within one of the exceptions to the general rule that no carrier-passenger relationship exists as to people who are not on board common carriers. As we now show, none of those exceptions applies here.

b. The MTA did not undertake to escort Herzlich to a waiting bus.

Herzlich cites cases (AOB 26-27) where plaintiffs suffered injuries after carriers "undertook to escort and conduct [them] to the point where" the carriers' vehicles were waiting to depart. (See *Grier v. Ferrant* (1944) 62 Cal.App.2d 306, 311 [disabled plaintiff was injured as defendant taxi driver escorted him from taxi company's waiting room to cab]; *Sanchez v. Pacific Auto Stages*, *supra*, 116 Cal.App. at p. 396 [plaintiff was injured when, after purchasing a bus ticket, an employee of the bus company escorted her across a highway to catch a bus].)

[8/] Out of state law is in accord: while the carrier has the highest standard of care to prevent injuries to passengers, the carrier has only a duty of *ordinary* care "as to potential passengers who have not actually boarded the train." (10 Fletcher, Cyclopedia of the Law of Private Corp. (September 2005) § 4911, citing cases.)

These cases are inapposite. They stand only for the proposition that "if a carrier assumes the responsibility of conducting a person, who has become a passenger, to the point of departure of the transporting vehicle, then the relation of passenger and carrier exists during such period." (*Grier v. Ferrant*, *supra*, 62 Cal.App.2d at p. 311.)

Here, the MTA never undertook to escort Herzlich to a waiting bus. In fact, the MTA never took *any* action suggesting that it was assuming *any* responsibility to conduct Herzlich *anywhere*. As Herzlich's complaint makes clear, the MTA's bus departed without ever opening its doors.

c. Herzlich was not injured trying to board a bus.

Next, Herzlich cites cases involving passengers who were injured *while boarding* a carrier. (AOB 26-27, citing *Ivancich v. Davies* (1921) 186 Cal. 520, 523 [plaintiff injured as he jumped onto the running-board of a jitney bus]; *Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1510 [skier injured as she attempted to board its ski lift]; *Lagomarsino v. Market Street Ry. Co.* (1945) 69 Cal.App.2d 388, 391 [plaintiff hit by trolley car while preparing to board another trolley car].)

These cases shed no light on our case because Herzlich wasn't injured trying to board a bus. In fact, there wasn't even a bus present at the time of the shooting. Thus, the cases involving injuries to boarding passengers are irrelevant.

d. The MTA did not accept Herzlich as its passenger.

Finally, Herzlich cites cases holding that a carrier-passenger relationship exists when the carrier has taken "some action indicating

acceptance of the passenger as a traveler." (See AOB 25-27.) These cases state that a carrier-passenger relationship is "created when one offers to become a passenger, *and is accepted as a passenger* after he has placed himself under the control of the carrier." (*Grier v. Ferrant*, *supra*, 62 Cal.App.2d at p. 310, emphasis added.)

Signs that a carrier has accepted a person as a passenger include taking a fare or having the person surrender a ticket. (See, e.g., *Squaw Valley Ski Corp. v. Superior Court*, *supra*, 2 Cal.App.4th at p. 1510 ["*Having paid for and received a lift ticket*, plaintiff went to the chair lift boarding area and was injured as she got onto the lift. Without question, the relationship of common carrier and passenger had commenced and included the boarding process," emphasis added]; *Orr v. Pacific Southwest Airlines*, *supra*, 208 Cal.App.3d at p. 1474 [no carrier liability under section 2100 because "at the time [plaintiff] was allegedly injured, she had not yet been accepted by [the airline] for carriage. Passengers were accepted for carriage *only upon surrendering their tickets to agents* at the boarding area," emphasis added]; see also *id.* at pp. 1473-1474 [plaintiff "was not in defendants' custody or control" at the time of the incident, but rather "remained free to roam through the terminal at will"].)

In fact, taking money or issuing a ticket is such a strong indication of acceptance by the carrier that those cases that conclude that a carrier-passenger relationship exists *absent* payment of a fare or surrender of a ticket invariably find it necessary to explain why they deviated from the general rule. (See, e.g., *Grier v. Ferrant*, *supra*, 62 Cal.App.2d at p. 311 [fact that plaintiff did not purchase a ticket was not determinative because "[i]t is common knowledge that taxicab fares cannot be computed and therefore are not collected until the termination of the trip or journey"]; compare *Simon v. Walt Disney World Co.*, *supra*, 114 Cal.App.4th at

pp. 1171-1172 [even acceptance of ticket was *insufficient* to create carrier-passenger relationship; held, "carrier-passenger relationship would not exist unless the guest enters the boarding area for a particular ride and is accepted by the ride operator as a passenger"].)

Here, the MTA gave no indication that it accepted Herzlich as a passenger for travel. The driver did not take Herzlich's fare or sell him a ticket. If anything, the MTA signaled that it would *not* accept Herzlich as a passenger; the bus pulled away from the curb without boarding anyone.

Nonetheless, Herzlich argues that a carrier-passenger relationship arose because he was standing at a bus stop with the intention of becoming a passenger and the bus arrived at the scheduled bus stop. (AOB 25-26.) He argues that he was therefore a passenger at the time of the shooting.

This argument lacks merit because it assumes that the carrier-passenger relationship exists in perpetuity. It doesn't. (See *Baker v. City of Los Angeles* (1986) 188 Cal.App.3d 902, 907 [fact that a special relationship was created in the past does not give rise to a continuing duty].) There must be some temporal connection between the carrier's manifestation of acceptance of the passenger and the injury.

For example, Herzlich might have had a claim if he had been injured while trying to board the bus as it stood stopped at the curb. But that isn't what happened here. Instead, Herzlich's injury occurred sometime *after the bus had departed*. None of the cases Herzlich cites supports a conclusion that a carrier-passenger relationship existed at a time when there was no bus in sight.

McGettigan, *supra*, 57 Cal.App.4th 1011 is instructive. There, the plaintiff alleged that defendant transit district owed him a statutory duty of care under section 2100 while he was waiting on a train platform. The

plaintiff had previously been a passenger on another train, but had been ordered off of it while inebriated to the point of incapacity. While waiting on the platform for another train to arrive, the plaintiff fell off the station platform and was injured. The trial court sustained a demurrer without leave to amend and the plaintiff appealed.

The plaintiff argued that "that the carrier-passenger relationship did not terminate because he was either (1) a passenger on the first leg of his trip, (2) a passenger who had begun the second leg, or (3) a passenger during the entire journey which included the transfer between the Richmond and Fremont trains." (*Id*. at p. 1018.)

McGettigan rejected these arguments. It emphasized the temporal nature of the carrier-passenger relationship—it noted that while a carrier-passenger relationship had once existed, that relationship *had ended*; "[o]nce he had safely exited the train, the relationship of carrier and passenger terminated." (*Ibid*.) Once the plaintiff was on the platform, the carrier owed him no special duty of care. (*Ibid*.)

Just as Herzlich does here, the *McGettigan* plaintiff cited *Squaw Valley* as support for his contention that even though he was not yet on board a train, a carrier-passenger relationship existed because he was *waiting* for a train at the platform. (See AOB 26.) Again, *McGettigan* rejected plaintiff's argument. It noted that the defendant ski resort in *Squaw Valley* had created a carrier-passenger relationship with the plaintiff skier by selling her a lift ticket and allowing her to attempt to board the lift. (*McGettigan, supra*, 57 Cal.App.4th at p. 1019.) It distinguished *Squaw Valley* on that basis: "Here, appellant alleges no such facts. Appellant was not attempting to board respondent's train. Merely advising a passenger

that he or she can catch a return train on another platform does not manifest acceptance of the passenger as a traveler." (*Ibid*.)

The same is true here. Standing at a bus stop is not enough to create a carrier-passenger relationship; rather, the MTA needed to have indicated that it accepted Herzlich as its passenger. And, that indication of acceptance had to occur so close to the assault that Herzlich could fairly be said to have been a passenger at that time.

The bare fact that a bus pulled up at the stop sometime in the past and then left sometime before the shooting is insufficient as a matter of law to render Herzlich a passenger at the time of the assault. A bus stopping in the past does not "manifest acceptance" of plaintiff as a passenger in the future. (See *McGettigan, supra*, 57 Cal.App.4th at p. 1019.)

Herzlich has not alleged facts establishing that a statutory carrier-passenger relationship existed at the time he was shot. Accordingly, he cannot state a claim against the MTA for direct liability.

3. Even if the MTA owed Herzlich a statutory duty of utmost care, that duty did not include protecting him from unforeseeable shootings.

Even if Herzlich *was* a passenger at the time he was shot, the MTA had no duty to protect him from the assault. This is so because the statutory duty of utmost care is not limitless—it is circumscribed by *foreseeability*. And here, Herzlich's shooting was not a reasonably foreseeable hazard of the MTA's failure to pick him up from the bus stop.

In any event, even if the shooting was foreseeable, public policy weighs against imposing a duty on bus companies to protect people waiting

at bus stops against random criminal assaults by third parties or to board people waiting at bus stops regardless of the hazards the drivers apprehend.

a. Herzlich's shooting was not a foreseeable risk of being left at an overcrowded bus stop.

"[F]oreseeability is a 'crucial factor' in determining the existence and scope of a legal duty." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237; *Lopez v. McDonald's Corp*. (1987) 193 Cal.App.3d 495, 508 [courts must determine "whether the risk of harm was reasonably foreseeable, charting out the areas of liability and excluding the remote and unexpected"].)[9/]

However, "[f]oreseeability supports a duty only to the extent the foreseeability is *reasonable*." (*Sturgeon v. Curnutt* (1994) 29 Cal.App.4th 301, 306, emphasis added.) This is so because "[o]n a clear day, you can foresee forever." (*Id*. at p. 307) Only "[b]y invoking a subjective reasonableness standard . . . [can] the courts cloud the view to bring imposition of duty in line with practical conduct." (*Ibid*.) Thus, the reasonableness standard requires courts to ask whether the "injury to another 'is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.'" (*Ibid*., internal citations omitted.) If the answer is no, then the degree of foreseeability is not "high enough to charge the defendant with the duty to act on it." (*Ibid*.)

[9/] The foreseeablility of a given type of harm is a question of law where, as here, "it is one factor to which a court looks in defining the boundaries of 'duty.'" (*Lopez v. McDonald's Corp.*, *supra*, 193 Cal.App.3d at p. 507, fn. 6; see also *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 237 ["[f]oreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court"].)

"[A] duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct *can be reasonably anticipated*." (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 676, emphasis added.) In the common carrier context, this means that "the duty to protect passengers from assault lies only when the common carrier knows or should know that an assault is about to occur." (*City and County of San Francisco v. Superior Court* (1994) 31 Cal.App.4th 45, 48; *Lopez v. Southern Cal. Rapid Transit Dist.*, *supra*, 40 Cal.3d at p. 791 [common carrier is liable for failing to protect passenger from assault "only where, in the exercise of the required degree of care, the carrier has or should have knowledge from which it may reasonably be apprehended that an assault on a passenger may occur, and has the ability in the exercise of that degree of care to prevent the injury"].)[10/]

Knowledge that an assault is about to occur may stem from "prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location." (*Delgado v. Trax Bar & Grill*,

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[10/] Out of state cases are in accord; they hold that a carrier is only liable for failing to protect its passengers from *foreseeable* attack. (See, e.g., *Bass v. Bi-State Development Agency* (Mo.Ct.App. 1983) 661 S.W.2d 609, 612 [even after recognizing that "[t]he law imposes a strict duty of care as to common carriers," the Missouri Court of Appeals held that "[a] carrier is not responsible for the acts of third parties that are not reasonably anticipated. That is too high a duty"; held, bus system could not be held liable for passenger's injuries because driver could not have anticipated that objects would be thrown at bus]; *German-Bey v. National R.R. Passenger Corp.*, *supra*, 703 F.2d at p. 55 ["Under New York law, a carrier is generally not liable to its passengers for the misconduct of fellow passengers unless it anticipated or, in the exercise of reasonable care, ought to have anticipated the likelihood of injury. Without some reason to expect dangerous conduct from [intoxicated passenger], therefore, Amtrak was not negligent for failing to prevent it"; held, rail company not liable to passenger for injuries sustained when intoxicated fellow passenger slashed face in unprovoked attack].)

supra, 36 Cal.4th at p. 240 & fn. 20; see also *Lopez v. Southern Cal. Rapid Transit Dist.*, *supra*, 40 Cal.3d at pp. 785, 795 [passenger injured by another passenger could sue bus company where it "knew assaults regularly occurred on this bus route"]; *Terrell v. Key System*, *supra*, 69 Cal.App.2d at p. 686 [passenger thrown from train car during craps game could sue train company for negligence where previous games of craps put train company on notice of possible danger].)[11/]

Here, Herzlich's shooting was not a reasonably foreseeable risk of being left waiting at an overcrowded bus stop. A bus stop is not an inherently dangerous place such that the MTA should have anticipated that the people waiting there could be shot. As one court observed, people standing by the side of the road (i.e., at a bus stop) are not in danger of being injured "simply by standing still." (*McGettigan, supra,* 57 Cal.App.4th at pp. 1020-1021.) Rather, "[t]hey are subject only to relatively more minor and remote risks, like jostling from other pedestrians and vehicles jumping the curb. They will have to make some effort, like jaywalking, to get seriously injured." (*Id.* at p. 1021 [analogizing train platform to standing on the side of the road and concluding that "a train platform is not a 'perilous' place"].)

[11/] Herzlich's argument that the "prior similar incidents" rule that courts frequently apply in the landlord context does not apply in the common carrier context has no merit. (AOB 23-24.) "The carrier's duty may be analogized to the responsibility of a landlord for criminal acts committed on its premises." (Coltoff, et al., 13 Corpus Juris Secundum (June 2005) Carriers, § 515; *Eisman v. Port Authority Trans Hudson Corp.* (1978) 409 N.Y.S.2d 578, 96 Misc.2d 678.) And, in fact, California courts regularly look to prior similar incidents to determine the reasonable foreseeability of assaults in the common carrier context. (See, e.g., *Lopez v. Southern Cal. Rapid Transit Dist.*, *supra*, 40 Cal.3d at pp. 785, 795; *Terrell v. Key System, supra,* 69 Cal.App.2d at p. 686; *City and County of San Francisco v. Superior Court*, *supra*, 31 Cal.App.4th 45.)

Nonetheless, Herzlich argues that *this* bus stop was dangerous because of the crowd that the MTA had permitted to congregate there. (AOB 1-2.) But even if some sort of injury were foreseeable—i.e., "jostling from other pedestrians"—Herzlich's random shooting still remained an unforeseeable hazard. (Contrast *Terrell v. Key System, supra,* 69 Cal.App.2d 682 [it was foreseeable that plaintiff would be knocked over during a melee].) Nothing in Herzlich's complaint permits a contrary inference:

- Herzlich does not allege that the shooter was a member of the crowd at the bus stop. To the contrary, Herzlich's counsel stated that it was *undisputed* that the shots came from a passing car. (RT D-6 to D-7.) It was not reasonably foreseeable that a criminal third party driving past the stop would shoot into the crowd of waiting students.

- Herzlich does not allege that the bus driver (or anyone else at the MTA) knew of any past similar incidents of violent assault in the area that should have put them on notice of the danger of drive-by shootings at the bus stop. Nor does Herzlich allege that people are randomly shot whenever bus stops become overcrowded and boisterous. Thus, the most danger that the MTA could have reasonably foreseen from leaving Herzlich at the stop was the garden-variety danger inherent to crowds—i.e., being pushed or shoved.

- While Herzlich alleges that the bus driver knew that the mob was angry and would grow angrier if he failed to board it, that bare allegation is insufficient to create an inference that *the shooting* was reasonably foreseeable. (See *Shields v. County of San Diego*, *supra*, 155 Cal.App.3d at pp. 107-108, 113 [demurrer proper where "no factual inferences support[ed] [plaintiff's] conclusory allegations"].)

• Even Herzlich's allegation that the bus driver knew that the unruly mob would be prone to assaults cannot create an inference that the shooting was foreseeable, especially in light of the fact the shooter was *not* a member of that mob. Herzlich's arguments to the contrary prove too much. His logic would make the MTA liable if an errant missile fired from a nearby military base had accidentally landed on the waiting mob.

In sum, Herzlich's assault cannot be characterized as anything other than a terrible, but random act.

The great weight of the authorities dictates that a random assault is *not* a reasonably foreseeable hazard. For example, in *Lopez v. McDonald's Corp.*, *supra*, 193 Cal.App.3d 495, the court held that it was not foreseeable that a mass murderer would assault patrons at a McDonald's restaurant. This was so even though there had been previous violent criminal conduct in the area. (*Id.* at p. 509 ["the general assaultive-type activity which had occurred in the vicinity bear[s] no relationship to purposeful homicide or assassination"].) Because the murderous assault was unforeseeable as matter of law, McDonald's owed plaintiffs no duty to have taken steps to prevent it. (*Id.* at pp. 509-510.)

Just as Herzlich argues here (AOB 31-33), the *Lopez* plaintiffs argued that it should not matter whether the *particular* harm that occurred was foreseeable, so long as it was foreseeable that *some type* of violent crime could occur. (*Lopez v. McDonald's Corp.*, *supra*, 193 Cal.App.3d at p. 510 [plaintiffs argued that "if any violent crime on the premises was foreseeable, it should not matter what type of crime in fact occurred"].) The Court rejected this argument. It held that an analysis of the general nature of the "third-party conduct involved" shed light on whether the category of defendant's alleged negligent conduct was "sufficiently likely to

result in the kind of harm experienced." (*Id*. at p. 511.) The Court concluded that the mere fact that other violent criminal acts had occurred near the premises did not make a murderous assault reasonably foreseeable. (*Id*. at pp. 510-511.)

Likewise, in *City and County of San Francisco v. Superior Court*, *supra*, 31 Cal.App.4th 45, a passenger on a bus stabbed another passenger in an unheralded attack. The court held that no claim could lie against the bus company, even though there had been two previous assaults in the past year on the same bus line—indeed, that evidence was not enough to put the city on notice that "the *particular* assault was to take place." (*Id*. at pp. 48-49, emphasis added.)

These principles apply here. In the absence of some "indication[] of a reasonably foreseeable risk of violent criminal assaults [at the bus stop]," the MTA had no duty to prevent criminal assaults. (See *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 240 & fn. 20.) And, even if *some* harm was foreseeable at the crowded bus stop, the shooting remained an unforeseeable risk because, as the trial court observed, "it is not foreseeable that a person waiting for a bus will be shot (as opposed to pushed, shoved or knocked down), simply because the stop is overcrowded and boisterous." (26 AA 253; see also *ibid*. [no case law "supports the proposition that overcrowding creates a risk of being shot by a criminal third party"].)

The cases Herzlich cites do not dictate a different result. For example, Herzlich cites *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th 224, as support for his argument that the MTA owed him a duty to protect him against *any* assault since he pled the foreseeability of an assault generally—in other words, the nature of the criminal conduct that *actually* occurred is irrelevant to the duty analysis. (AOB 31-33.)

Delgado held nothing of the sort. There, a gang of twenty men assaulted a bar patron in the bar's parking lot. Prior to the assault, the patron's wife had warned the bar's security guard that "there was going to be a fight," and the guard had observed the hostile stares between the future assailants and the patron and "concluded that a fight was imminent." (*Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at pp. 230-231.)

The Supreme Court held that "because defendant had actual notice of an impending assault involving [plaintiff], its special-relationship-based duty included an obligation to take reasonable, relatively simple, and minimally burdensome steps to avert that danger"—i.e., trying to dissuade the assailants from following plaintiff out of the bar or making sure the outside guard was at his post in the parking lot. (*Id*. at pp. 246-247, 250.) The Supreme Court considered it irrelevant to the duty analysis that "the precise size of the actual gang attack" (i.e., assault by twenty men) differed from the assault that the bar staff "actually anticipated" (assault by five men). (*Id*. at 247, fn. 27.)

Thus, *Delgado* stands only for the proposition that *slight* differences between the harm that actually occurred and the harm that the defendant actually foresaw will not defeat the existence of a duty to take minimally burdensome steps to protect people from harm. The same is true of the other cases Herzlich cites.[12/]

[12/] See *M.W. v. Panama Buena Vista Union School Dist*. (2003) 110 Cal.App.4th 508, 520-521 [where some form of sexual assault was foreseeable, it was not necessary for school to have foreseen that the specific act of sodomy would occur; held, in light of "the relatively minimal burden on school districts to ensure adequate supervision" of students, school had duty to protect students from an assault on campus]; *Robison v. Six Flags Theme Parks Inc*. (1998) 64 Cal.App.4th 1294, 1299, 1305 [where it was foreseeable that an errant car would hit an unprotected picnic

(continued...)

Here, the sort of harm that occurred was not a slight deviation from the sort of harm that one could reasonably anticipate could result from standing at an overcrowded bus stop. While jostling or shoving may have been foreseeable, the shooting is a bridge too far. Because Herzlich's shooting was not foreseeable, the MTA had no duty to prevent it.

b. Even if the shooting was foreseeable, public policy militates against the imposition of a duty.

Even assuming *arguendo* that Herzlich's shooting *was* foreseeable, the MTA nonetheless owed him no duty to prevent it. This is so because "[a] foreseeable injury does not necessarily ordain a conclusion of duty." (*Sturgeon v. Curnutt*, *supra*, 29 Cal.App.4th at p. 306 ["If the court concludes the injury was not foreseeable, there was no duty. . . . However, the opposite is not necessarily true. A foreseeable injury does not necessarily ordain a conclusion of duty"].)

"The determination as to whether a particular duty exists is a question of law and is essentially a public policy decision." (*Anaya v. Turk* (1984) 151 Cal.App.3d 1092, 1098-1099.)[13] Guidelines for such a determination include "the degree of certainty that the injured party suffered

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[12] (...continued)
table directly in the line of traffic, it was not necessary for defendant to have foreseen the circumstances under which a car did just that; held, extent of defendant's duty will require "a balancing of the probability of an accident, the severity of the expectable harm, [and] the burden of providing specific protective measures"].

[13] See also *Sakiyama v. AMF Bowling Centers, Inc*. (2003) 110 Cal.App.4th 398, 407 ["Because the consequences of a negligent act must be limited to avoid an intolerable burden on society, the determination of duty 'recognizes that policy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk'"].

injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant, and the consequences to the community of imposing a duty to exercise care, with resulting [potential] liability." (*Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 237, fn. 15; *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113.)

"Where a public entity is involved, the court considers the following additional factors: the availability, cost, and prevalence of insurance for the risk involved; the extent of the agency's powers; the role imposed on it by law; and the limitations imposed on it by budget. '[W]hen addressing conduct on the part of a defendant that is 'deliberative, and . . . undertaken to promote a chosen goal, . . . [c]hief among the factors which must be considered is the social value of the interest which the actor is seeking to advance.'" (*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1095.)

Analyzing our case under these standards yields only one conclusion: the bus driver did not owe Herzlich a duty to prevent random, unforeseeable shootings by third parties, and he certainly did not breach any duty by declining to permit an angry mob to board his bus.

Foreseeability of harm. As just discussed, Herzlich's random shooting was not a reasonably foreseeable risk of standing at an overcrowded bus stop.

Certainty that plaintiff suffered harm. Herzlich alleges that he suffered injury when he was shot. For purposes of demurrer, this allegation of injury likely suffices. However, as discussed below, there is no connection between the alleged injury and the bus driver's actions.

Closeness of the connection between defendant's conduct and the injury suffered. Herzlich's allegation that the bus driver's failure to pick him up *caused* his injuries is unsupportable. (AOB 35.) Indeed, the bullet fired by a criminal third party caused Herzlich's injury. Thus, as the trial court observed: "If any danger existed, the danger existed regardless of whether the bus was at the bus stop or not." (26 AA 259.)

Scott v. Chevron U.S.A. (1992) 5 Cal.App.4th 510 is instructive. There, a drunk driver struck a guardrail beside a highway and then struck plaintiffs' car. Plaintiffs filed a negligence action against the owner of the property adjacent to the guardrail. Plaintiffs alleged that the state had erected the offending guardrail in order to protect equipment that the landowner had placed on his property. Affirming summary judgment for the landowner, *Scott* observed that "[w]hile plaintiffs certainly suffered injury, [the landowner's] conduct had a negligible connection with that injury, as it was primarily inflicted by [the drunk driver]." (*Id*. at p. 517.)

The same is true here. Herzlich's injury was "primarily inflicted by" the third party assailant who shot him, not by the bus driver who declined to board the unruly mob waiting at the bus stop.

The moral blame attached to defendant's conduct. As discussed above, the bus driver had a prevailing duty to protect his existing passengers from the potential harm presented by the mob waiting at the bus stop. (See Section I., *supra*.) Declining to open the bus doors under these circumstances is therefore the opposite of morally blameworthy; it was *legally-required*.

Vandermost v. Alpha Beta Co. (1985) 164 Cal.App.3d 771, is on all fours. Concluding that a restaurant cashier did not have a duty to protect a patron from being shot by cooperating with a robber, the Court explained,

"there is no 'moral blame' attached to defendant's conduct. The sole moral blame in this setting must be directed toward [the robber who shot the patron]." (*Id*. at p. 779.)

The same is true here. Moral blame lies with the person who shot Herzlich, not with the bus driver.

The public policy of preventing future harm. Because the MTA did not cause Herzlich's alleged injuries, public policy does not weigh in favor of imposing negligence liability here. Even if the MTA were subject to liability similar attacks would remain a possibility because, as the trial court observed, "[t]here are no facts pled in the Third Amended Complaint showing that the Defendant bus company had control, or the ability to control, the car [carrying the assailant], the crowd or the area from where the shots were fired." (26 AA 247.) Thus, in contrast with the cases Herzlich cites (AOB 32-33), where the pathway to protection was clear—i.e., security guards in a parking lot would have prevented a fight—there is no such clear path here. (Compare *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th 224.) Thus, imposing liability will do nothing to prevent future harm.

The extent of the burden to the defendant and the consequences to the community of imposing a duty. These policy considerations are especially relevant in the common carrier context because carriers serve the public. Accordingly, the courts must be careful not to set "an unwarranted and dangerous precedent" that could adversely affect bus service. (See *Falls v. San Francisco, Etc. R.R. Co., supra*, 97 Cal. at p. 121; *McGettigan, supra*, 57 Cal.App.4th at p. 1023.)

Burden to defendant: The burden to the MTA of requiring it to protect against any and all harm that could befall those it leaves waiting at

its stops is both onerous and contrary to governing law. Supreme Court authority holds that "a carrier is liable for injuries resulting from an assault" on a passenger "only where" the carrier "has the ability in the exercise of [the required] degree of care to prevent the injury." (*Lopez v. Southern Cal. Rapid Transit Dist., supra*, 40 Cal.3d at p. 791.)

Here, in light of the bus driver's primary duty to protect his existing passengers from being harmed by the mob waiting at the bus stop, the MTA had *no ability* to board Herzlich, let alone prevent his injury. (See Section I., *supra*.) Even boarding the mob may not have prevented harm since there is no guarantee that once inside the bus, the mob would have calmed. (See *Williams v. East St. Louis & S. Ry. Co.*, *supra*, 232 S.W. at p. 761 ["Mobs always act without regard to law"].) Thus, it is unclear what the MTA could do to discharge the duty Herzlich posits.

McGettigan sheds light on this case. There, the court weighed "the extent of the burden to the defendant" of imposing a duty on a train company to protect an inebriated passenger from harm by assisting him off of a train platform. *McGettigan* noted that "it is unclear where the alleged duty in this case would end" because "[t]he world at large, and not just the train platform, may have been a menace to appellant in his condition. He probably could have injured himself in a hundred different ways before sobering up, and it is not apparent which of these risks respondent would be called upon to eliminate." (*McGettigan, supra*, 57 Cal.App.4th at pp. 1022-1023.) Because there was no "clear limit on the duty appellant posits," *McGettigan* concluded that its imposition would not be sound policy. (*Id*. at p. 1023.)

The same is true here. The duty that Herzlich would have this Court recognize would make the MTA strictly liable for any harm that befalls people waiting at bus stops once a crowd has been permitted to congregate.

This isn't the law. Rather, the Supreme Court has held that "[c]ommon carriers are not . . . insurers of their passengers' safety." (*Lopez v. Southern Cal. Rapid Transit Dist., supra*, 40 Cal.3d at p. 791.) By the same token, carriers are not insurers of the safety of people standing on sidewalks waiting for buses. Yet imposing liability in this case would make the MTA vulnerable to lawsuits stemming from unforeseeable and unpreventable attacks by criminal third parties. This Court should decline to impose such a crushing burden on bus companies.

Consequences to the community: Imposing the duty that Herzlich wishes to impose would prevent bus drivers from using their best judgment as to when it is safe to open the bus doors. It would bar drivers from bypassing foreseeable hazards—i.e., an unruly mob shouting insults and banging on the bus—and instead *require* drivers to jeopardize the safety of those already on board. This Court should decline to set such "an unwarranted and dangerous precedent." (*McGettigan, supra*, 57 Cal.App.4th at p. 1023 [declining to impose a duty on common carriers to ensure the safety of passengers who had disembarked; citing, among other reasons, the consequences to the community of doing so].)

Availability of insurance. Where, as here, the defendant's liability under the proposed duty would be potentially unlimited and the risks would be difficult to manage, insurance is likely to be "difficult and costly to obtain." (See *Totten v. More Oakland Residential Housing, Inc*. (1976) 63 Cal.App.3d 538, 545 ["The responsibility proposed by appellants would border on absolute liability which due to its enhanced risk would call for increased insurance premiums if, indeed, insurance would be available at all"]; *Preston v. Goldman* (1986) 42 Cal.3d 108, 126 ["Given the potential unlimited liability of predecessor landowners, and the difficulty for insurers and former owners to ascertain the condition of property previously sold

over which the predecessor landlord has no present right of access or control, insurance for such risks would likely be difficult and costly to obtain"].)

In any event, even if insurance were available to cover transit authorities for all harm—including injures inflicted by criminal third parties—to people waiting at bus stops, "this factor has 'little relevance' where significant policy considerations militate against the imposition of a duty of care." (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 274 [defendant police officers owed no duty of care to prevent decedent from committing suicide].) Here, the imposition of a duty that would require buses to stop regardless of the risks is bad precedent.

Interplay between foreseeability and burden to defendant. Next, Herzlich cites cases holding that "the scope of the duty is determined in part by balancing the foreseeability of the harm against the burden to be imposed." (AOB 33; *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 237.) Those authorities state that the "imposition of a high burden [on the defendant] requires heightened foreseeability, but a minimal burden may be imposed upon a showing of a lesser degree of foreseeability." (*Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 243.)[14/] In other words, where

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[14/] "In circumstances in which the burden of preventing future harm caused by third party criminal conduct is great or onerous (as when a plaintiff . . . asserts the defendant had a legal duty to provide guards or undertake equally onerous measures, or as when a plaintiff . . . asserts the defendant had a legal duty to provide bright lighting, activate and monitor security cameras, provide periodic 'walk-throughs' by existing personnel, or provide stronger fencing), heightened foreseeability—shown by prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—will be required. By contrast, in cases in which harm can be prevented by simple means or by imposing merely minimal burdens, only 'regular' reasonable foreseeability

(continued...)

the proposed security measures are burdensome, vague and of dubious efficacy, the foreseeability of criminal acts by third parties will not create a duty to protect people from those acts. (*Id*. at p. 238.)

Here, even "onerous" security measures such as posting security guards at bus stops would not have prevented Herzlich's harm.[15/] Indeed, Herzlich himself proposes *only one* course of action that he alleges would have prevented his injury at the hands of a criminal third party—allowing him to board the bus. As discussed above, even this course of action would be of dubious efficacy, as there is no guarantee that the unruly mob would have calmed once on board the bus. In any event, boarding an angry mob and taking the concomitant risk that it would injure the existing passengers is anything but a "minimal" burden. In light of these facts, *heightened* foreseeability was required.

Role imposed on the public entity defendant and social value of defendant's acts. As Justice Baxter noted in his concurring opinion in *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, "[t]he decision whether to impose liability requires a delicate balancing of competing interests, particularly when the defendant at law is a public entity and the defendants in fact are the taxpayers." (*Id*. at p. 235.) Indeed, "a public entity often cannot reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is

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[14/] (...continued)
as opposed to heightened foreseeability is required." (*Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 243, fn. 24.)

[15/] Herzlich conceded that the bus company had *no* duty to provide security at the bus stop and stated "that would be an onerous duty" that would require foreseeability meeting "a much greater higher standard." (RT D-6:19-24.)

required to furnish services that cannot be adequately provided by any other agency." (*Ibid*.)

Here, the defendant is a transit district charged with operating buses throughout the greater Los Angeles metropolitan area. (See *Lopez v. Southern Cal. Rapid Transit Dist*., *supra*, 40 Cal.3d at pp. 786-787 [RTD "operates some 220 bus lines over an area of 2,200 square miles"].) Some of the routes those buses travel are fraught with dangers on a regular basis. Others will present bus drivers with only occasional dangers. On all occasions when danger presents itself, the bus drivers carry the serious burden of deciding when and under what circumstances it is safe to open the bus doors.

Indeed, as our Supreme Court has explained, the nature of bus travel makes the bus driver uniquely responsible for protecting his passengers' safety:

> "[P]assengers have no control over who is admitted on the bus and, if trouble arises, are wholly dependent upon the bus driver to summon help or provide a means of escape. These characteristics of buses are, at the very least, conducive to outbreaks of violence between passengers and at the same time significantly limit the means by which passengers can protect themselves from assaults by fellow passengers."

(*Lopez v. Southern Cal. Rapid Transit Dist*., *supra*, 40 Cal.3d at p. 789.) These same principles require the bus driver to decline to board people who may pose a threat to the safety of the existing passengers. (See Section I., *supra*.) Yet the imposition of the duty Herzlich advocates will hamstring bus drivers' ability to protect their passengers by requiring that they open the bus doors regardless of the hazards they perceive.

* * * * *

As one court observed almost a century ago: "The case is a sad one, the injuries and sufferings of the plaintiff being of a most distressing nature, but we cannot, without injustice to the company . . . establish[] an unwarranted and dangerous precedent." (*Falls v. San Francisco, Etc. R.R. Co., supra*, 97 Cal. at pp. 120-121.)

These same thoughts govern this case as well. This Court should decline to recognize the duty Herzlich advocates.

C. Herzlich Cannot State A Claim For *Vicarious Liability* Based On The Bus Driver's Conduct.

Having failed to state a claim for *direct* liability, Herzlich is left with his allegation that the MTA is *vicariously* liable for its bus driver's negligence under Government Code section 815.2. (Gov. Code, § 815.2 [a government entity is vicariously liable for the torts of its employees].)[16/]

Here, Herzlich does not assert that the bus driver breached a duty to exercise ordinary care. This makes sense because in the absence of a special relationship, the bus driver had no obligation "to *act affirmatively* to prevent harm." (*McGettigan, supra*, 57 Cal.App.4th at p. 1017, emphasis in original.)

[16/] Government Code section 815.2 provides: "(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative. (b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability." General tort principles apply—i.e., "plaintiff must show that defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury. (*Munoz v. City of Union City*, *supra*, 120 Cal.App.4th at p. 1093 ["[w]here a legal duty is not created by statute, the question of whether a legal duty exists is analyzed under general principles of tort law"].)

Rather, the crux of Herzlich's non-statutory theory of liability is that the bus driver created a situation of peril by failing to board the "angry" "mob" waiting at the stop. (19 AA 194-195.) He argues that the bus driver therefore had a duty to rescue him from that situation of peril by letting him board the bus.

But the bus driver's duty stemming from having allegedly placed Herzlich in a situation of peril cannot be any greater than the duty that the MTA allegedly owed Herzlich under section 2100. Indeed, the "affirmative duty to render assistance" can arise in one of two ways: (1) where the defendant stands in a special relationship to the plaintiff, or (2) has put the plaintiff in a position of peril. (*Williams v. State of California*, *supra*, 34 Cal.3d at p. 23.)

As discussed above, there can be no liability *even if Herzlich was a passenger* and thus was in a "special relationship" with the MTA. (See Section II.B.3., *supra*.) Thus, Herzlich's vicarious liability theory adds nothing to the mix. It too fails as a matter of law.

D. None Of Herzlich's Other Arguments Have Merit.

Herzlich raises a number of additional arguments. We respond to them here.

1. The MTA's common law duty to pick up willing passengers does not change the result.

Herzlich argues that the MTA can be liable for breaching its common law duty to board all willing passengers. (AOB 12-15.) This allegation is insufficient to save Herzlich's complaint.

First, the common law duty "to receive all persons as passengers who offer to become such" is not grounded in a statute. Accordingly, it cannot support a claim for direct liability against the MTA. (See pp. 16-17, *supra*.)

Second, the purpose of the common law duty to "transport passengers and freight without discrimination" is to promote trade. (See AOB 13, fn. 2.) It is not designed to prevent assault and thus, it is not reasonably foreseeable that a failure to board willing passengers will lead to an assault.

Third, the common law duty to carry all goods or passengers is not absolute. Rather, if a common carrier has "some just ground" or "legal excuse" for declining passage, the carrier will *not* be liable. (See *Samuelson v. Public Utilities Com*. (1951) 36 Cal.2d 722, 729 [carrier liable "if he refuse[s], *without some just ground*, to carry goods for any one," emphasis added]; *People v. Stolzoff* (1945) 71 Cal.App.2d Supp. 849, 852-853 [common carrier undertakes "to carry all persons indefinitely who may apply for passage, so long as there is room, *and there is no legal excuse for refusing*," emphasis added]; see also Cal. Civ. Prac. Torts § 28:18 (2006) [common carriers may refuse to carry a passenger if it has "just cause or excuse"]; *Pensick & Gordon, Inc. v. California Motor Exp*. (9th Cir. 1963) 323 F.2d 769, 771 [for carrier to be liable, failure to carry freight must be "unjustified"].)

Here, as a matter if law, the bus driver had just cause to decline to board the students waiting at the bus stop. Indeed, Herzlich's complaint describing "the mob" waiting at the bus stop as "frustrated and angry," "boisterous, vituperative, rambunctious, loud, [and] unruly"; the crowd was "shouting insults and was banging on the bus" (19 AA 194-195.) Given

these circumstances, the driver's "utmost" duty to protect his existing passengers trumped any possible duty that he might have owed to board people in the angry mob, regardless of whether they wished to board the bus. (See Section I., *supra*.)

2. The fact that Herzlich is a minor does not change the result.

Herzlich argues that this case is unique because he is a child and thus he should benefit from the law's strong policy of preventing harm to children. (AOB 4, 38.) However, even where liability is based on a special relationship, the potential harm must still be reasonably foreseeable, if not *actually known*. (See *Romero v. Superior Court* (2001) 89 Cal.App.4th 1068, 1080-1084.)

This is so even where a case involves injury to children; in such cases "a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1145-1146 [because it was not foreseeable that a man would deliberately drive his car through a chainlink fence at a child care facility, the facility had no duty to erect a stronger barrier].)

For example, *Romero* held that parents holding a party for teenagers had no duty to prevent a sexual assault by a 16-year-old against a 13-year-old where they had no prior knowledge of the offender's assaultive propensities. (*Romero v. Superior Court*, *supra*, 89 Cal.App.4th at pp. 1092-1095.) In so holding, *Romero* concluded that "the special relationship the adult assumed by inviting the child into the home, standing alone, is insufficient as a matter of law to impose on the adult a duty of care to protect the injured minor." (*Id*. at p. 1084.) Rather, there still had to be

"evidence showing facts from which the trier of fact could reasonably infer that the adult had prior *actual knowledge*, and thus *must have known*, of the offender's assaultive propensities." (*Ibid*., emphasis in original.)

Here, Herzlich's shooting was not reasonably foreseeable. (See Section II.B.3.a., *supra*.) Even if it were, policy reasons weigh against the imposition of the duty Herzlich posits. (See Section II.B.3.b., *supra*.) That Herzlich is a minor does not obviate these concerns.

III. HERZLICH CANNOT AMEND HIS COMPLAINT TO STATE A CLAIM.

To justify a reversal of the trial court's decision to decline leave to amend the complaint, Herzlich must show that the trial court abused its discretion—i.e., he must show how his complaint can be amended to state a cause of action. (*Schifando v. City of Los Angeles*, *supra*, 31 Cal.4th at p. 1081.)

Herzlich hasn't even tried to carry this burden; indeed, he does not argue that he could add additional facts that would allow his complaint to survive demurrer. Rather, he argues that his complaint is sufficient as it stands today. As discussed above this is not so.

Moreover, Herzlich admitted during oral argument that his assailant was not a member of the mob, but rather that he was *driving past the bus stop*. (RT D-6:25 to D-7:9.) This admission was not made in passing;

plaintiff's counsel made it on several occasions, even going so far as to state that it was undisputed.[17/]

This admission defeats any possible claim against the MTA. This is so because even if this Court were inclined to believe that the MTA had a duty to prevent Herzlich from being injured by the mob that it had allegedly permitted to congregate and then inflamed, a gunshot from a passing car is not within the range of foreseeable hazards *originating from that mob*.

In other words, even giving Herzlich the benefit of every doubt, the injury that occurred was still not a result of what the MTA did. Any other conclusion proves too much—i.e., it would suggest that if an airline cancels a flight and allows people to congregate at a boarding gate, the airline is liable if an earthquake hits and injures someone who, but for the flight cancellation, wouldn't have been standing in the terminal at that moment.

The trial court did not abuse its discretion by denying leave to amend the complaint. This Court should affirm.

[17/] The relevant colloquy is as follows:
The Court: "Did the shot come from the crowd?"
Mr. Chapman: "It came from a vehicle."
The Court: "But you don't allege that."
Mr. Chapman: "I thought it was alleged, but it did."
The Court: "Could you show me where in the complaint it alleges [that?]"
Mr. Chapman: "If it is not alleged, it is not alleged. The shot came from a vehicle."
The Court: "See, I have read over the complaint now half a dozen times. If it is in there, I have missed it."
Mr. Chapman: "Then—I will take your word for it if it is not in there. I don't think there is any dispute that the shot came from a vehicle." (RT D-6:25 to D-7:9.)

CONCLUSION

The "essential facts" set forth in Herzlich's complaint are insufficient to state a claim against the MTA. (1 AA 245.) This Court should affirm the trial court's order sustaining the MTA's demurrer without leave to amend.

DATED: June 8, 2006

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CERTIFICATION

Pursuant to California Rules of Court, Rule 14, I certify that this Respondent's Brief contains 13,237 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: June 8, 2006

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Cynthia E. Tobisman

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