

1984

## Municipal Tort Liability for Criminal Attacks Against Passengers on Mass Transportation

Robert S. Ondrovic

Robert S. Ondrovic

Robert S. Ondrovic

Robert S. Ondrovic

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Robert S. Ondrovic, Robert S. Ondrovic, Robert S. Ondrovic, and Robert S. Ondrovic, *Municipal Tort Liability for Criminal Attacks Against Passengers on Mass Transportation*, 12 Fordham Urb. L.J. 325 (1984).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol12/iss2/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# MUNICIPAL TORT LIABILITY FOR CRIMINAL ATTACKS AGAINST PASSENGERS ON MASS TRANSPORTATION

## I. Introduction

Every day an average of 2.8 million people ride the subways of New York City.<sup>1</sup> New York ranks between third and fifth in annual ridership among cities with subway systems.<sup>2</sup> The numerous problems associated with transporting such large numbers of passengers include crime and the fear it engenders in thousands of passengers annually.<sup>3</sup>

This Note will discuss municipal tort liability for criminal attacks against passengers.<sup>4</sup> The analysis will focus upon the liability of the New York City Transit Authority (TA).<sup>5</sup> Comparisons will be made to other mass transit systems<sup>6</sup> in order to examine various theories concerning the duty owed by the municipally-run transit system to its passengers.<sup>7</sup> Recommendations will be offered to construct a clear standard of care with corresponding limits on liability.<sup>8</sup>

---

1. See N.Y. Times, June 14, 1983, at B3, col. 5. This figure is based on the total average annual ridership of 1 billion. For the twelve months ended June 30, 1982, the total was 991 million, and the total for the fiscal year ended June 30, 1983 was approximately 1 billion. *Id.*

2. See N.Y. Times, Oct. 23, 1982, at B29, col. 3 and at B30, col. 1. The actual rank has fluctuated due to a steady, long-term decline that decreased total annual ridership from a peak of 2.051 billion passengers in 1947 to 991 million in 1982. This rank is compared to Moscow, which has 2 billion riders; Tokyo, 1.8 billion; Paris, 1.1 billion; and Mexico City, slightly over 1 billion. *Id.* at 29, col. 3. The 1982 total marked the first time New York City's ridership fell below 1 billion since 1917. *Id.* However, Richard Ravitch, former chairman of the Metropolitan Transportation Authority, indicated that a "turn-around" was approaching and predicted that the recent increase in ridership may continue. See N.Y. Times, June 14, 1983, at B3, col. 5.

3. See N.Y. Times, Jan. 4, 1983, at A1, col. 1. There were 15,192 reported felonies in 1982 in the New York City subway system. *Id.* This figure included 17 reported homicides, compared with 13 in 1981. *Id.* at B9, col. 2.

4. Although this Note contains comparisons to some mass transit systems that are limited to buses (see *infra* note 74 for a discussion of *New Orleans Public Service, Inc.*), and it is recognized that "mass transit" may include buses, ferries and even vans for the handicapped, discussion will focus upon subways and rails. The availability of data and case law for this narrow area lends itself to such a limited discussion.

5. The New York City Transit Authority was established pursuant to NEW YORK PUBLIC AUTHORITIES LAW § 1201 (McKinney 1982). For a further discussion of the enumerated powers and duties of the TA, see *infra* notes 21, 22 & 25.

6. See *infra* notes 71-150 and accompanying text.

7. *Id.*

8. See *infra* notes 151-65 and accompanying text.

This Note will discuss various safety measures<sup>9</sup> and will analyze the issues of whether the TA has assumed a duty to protect its passengers by developing such measures to combat subway crime<sup>10</sup> and the subsequent funding necessitated by increased tort liability.<sup>11</sup> Ultimately, when a duty is recognized, the TA can avoid an onslaught of litigation by maintaining an efficient security network which would decrease crime and the TA's corresponding tort liability.

## II. Tort Liability of Municipalities

The doctrine of municipal tort immunity grew out of the English concept of sovereign immunity.<sup>12</sup> No state liability in tort exists unless consent is given.<sup>13</sup> Consent has been given in all states to various extents.<sup>14</sup> In New York, this waiver of governmental immunity has been held to apply to a municipality.<sup>15</sup>

Mass transit systems may be operated either by a municipality directly or by some other local governmental entity formed for that specific purpose.<sup>16</sup> A critical factor in determining liability for crimi-

---

9. See *infra* notes 160-65 and accompanying text.

10. *Id.*

11. See *infra* notes 166-85 and accompanying text.

12. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971) [hereinafter cited as PROSSER]. Sovereign immunity developed from the theory, combined with the divine right of kings, that "the king can do no wrong," and carried over from the English crown to the American states. Prosser notes a corollary theory that immunity carried over to the state because of "heavy public debts of the states and their precarious financial condition during the years immediately after the Revolution . . . ." *Id.* at n. 48.

13. *Id.*

14. See generally PROSSER, *supra* note 12, at § 131. Examples of consent include statutory authorization for particular individuals to maintain a suit in special courts of claims, *id.* at note 53, and in the state's own courts for actions against it for particular causes of action. *Id.* New York's consent is given in Section 8 of the Court of Claims Act. The Act provides, in part, that "[t]he state hereby waives its immunity from liability . . . and consents to have the same determined in accordance with the same rules of law as applied . . . against individuals or corporations . . ." N.Y. JUDICIARY COURT OF CLAIMS ACT LAW § 8 (McKinney 1963).

15. See *Becker v. City of New York*, 2 N.Y.2d 226, 140 N.E.2d 262, 159 N.Y.S.2d 174 (1957) (Court of Appeals held that effect of Section 8 of Court of Claims Act is to make State and its subdivisions liable for negligent acts of their paid employees); *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945) (State's waiver of its sovereign immunity put an end to extension of municipal immunity). However, this waiver of immunity has been held not to be absolute. *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960) ("courts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits . . . "). *Id.* at 588, 167 N.E.2d at 67, 200 N.Y.S.2d at 415.

16. See generally 30 AM. JUR. P.O.F. 2d 429, 460-61 (1982).

nal attacks against passengers is the characterization of police protection as a governmental, as distinguished from a proprietary, function.<sup>17</sup> In the absence of a statutory provision, there can be no recovery against a municipal corporation for injuries occasioned by its negligence or nonfeasance in the exercise of functions that are essentially governmental in nature.<sup>18</sup>

This distinction is important with respect to the TA. If the operation of a mass transit system is a proprietary function, the standard of care may be that required of common carriers.<sup>19</sup> A common carrier, although not an insurer of its passengers, is required to exercise the utmost care and diligence for their safety.<sup>20</sup>

---

17. See generally 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 199 (1971). While in its performance of a governmental function, the municipal corporation is "executing the legislative mandate with respect to a public duty . . ." In its performance of a corporate or proprietary function, it is "exercising its private rights as a corporate body." *Id.* at 256.

18. See generally 57 AM. JUR. 2D *Municipal, School, and State Tort Liability* § 27 (1971). The municipal corporation, in the exercise of governmental functions, acts on behalf of the general public as well as the inhabitants of its territory and represents, in such capacity, the sovereignty of the state. *Id.* See also *Bass v. City of New York*, 38 A.D.2d 407, 330 N.Y.S.2d 569 (2d Dept. 1972), *aff'd*, 32 N.Y.2d 894, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973) (Housing Authority's maintenance of police force was governmental activity; court refused to impose liability for rape of nine-year-old girl).

19. See *Kenny v. Southeastern Pennsylvania Trans. Auth.*, 581 F.2d 351 (3d Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979) (Authority has duty to protect its patrons when it reasonably expects criminal activity from anyone at its stations); *McCoy v. Chicago Transit Auth.*, 69 Ill. 2d 280, 371 N.E.2d 625 (1977) (Chicago Transit Authority has duty owed by common carriers); *Eisman v. Port Auth. Trans Hudson Corp.*, 96 Misc. 2d 678, 409 N.Y.S.2d 578 (Sup. Ct. N.Y. County 1978) (governmental transit authority, in performing proprietary functions, performs role of common carrier).

20. See generally PROSSER, *supra* note 12, at 180.

Common carriers, who enter into an undertaking toward the public for the benefit of all those who wish to make use of their services, must use great caution to protect passengers entrusted to their care; and this has been described as "the utmost caution characteristic of very careful prudent men," *id.* (quoting *Pennsylvania Co. v. Roy*, 102 U.S. 451 (1880)), or the "highest possible care consistent with the nature of the undertaking." *Id.* (quoting *Carson v. Boston Elev. R. Co.*, 309 Mass. 32, 33 N.E.2d 701 (1941)). See also *Letsos v. Chicago Transit Authority*, 47 Ill. 2d 437, 265 N.E.2d 650 (1970) (common carrier's high degree of care toward its passengers includes responsibility to prevent injuries which could have been reasonably foreseen and avoided by the carrier); *Eisman v. Port Auth. Trans Hudson Corp.*, 96 Misc. 2d at 681, 409 N.Y.S.2d at 580 (analogizing common carrier's duty to responsibility of a landlord for criminal acts committed on its premises where there is duty to take steps to prevent predictable criminal activities). See generally 14 AM. JUR. 2D *Carriers* § 916 (1964) (section 916, note 20 lists cases in numerous jurisdictions on the issue of a common carrier's duty of care).

The purpose of the TA, however, is legislatively designated as the performance of a governmental function.<sup>21</sup> Despite this classification, the Authority is responsible for the negligence of its employees in the operation of the transit system.<sup>22</sup> The TA enjoys the benefit of passenger revenue derived from performing what are classified in other jurisdictions as proprietary functions of a common carrier.<sup>23</sup> However, the TA's liability has been limited<sup>24</sup> because it maintains its own police force<sup>25</sup> and its statutory purpose is designated as a governmental function.<sup>26</sup>

---

21. See N.Y. PUBLIC AUTHORITIES LAW § 1202(2) (McKinney 1982). "[S]uch purposes are in all respects for the benefit of the people of the state of New York and the authority shall be regarded as performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title." *Id.* Subdivision one of this statute provides that:

The purposes of the authority shall be the acquisition of the transit facilities operated by the board of transportation of the city and the operation of transit facilities in accordance with the provisions of this title for the convenience and safety of the public on a basis which will enable the operations thereof, exclusive of capital costs, to be self-sustaining.

*Id.* at § 1202(1).

22. *Id.* at § 1212(3).

The authority shall be liable for, and shall assume the liability to the extent that it shall save harmless any duly appointed officer or employee of the authority for the negligence of such officer or employee, in the operation of a vehicle or other facility of transportation under the jurisdiction and control of the authority, upon the public streets, highways or railroads within the city, in the discharge of a duty imposed upon such officer or employee at the time of the accident, injury or damages complained of, while acting in the performance of his duties and within the scope of his employment.

*Id.*

23. See *supra* note 19.

24. See *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982). See also *infra* notes 49-51 and accompanying text.

25. See N.Y. PUBLIC AUTHORITIES LAW § 1204(16) (McKinney 1982):

[The TA has the power] in its discretion to provide and maintain a transit police department and a uniformed transit police force. Such department and force shall have the power and it shall be their duty, in and about transit facilities, to preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs, and insurrections, disperse unlawful or dangerous assemblages and assemblages which obstruct free passage; protect the rights of persons and property; guard the public health; regulate, direct, control and restrict pedestrian traffic; remove all nuisances; enforce and prevent violation of all laws and ordinances; and for these purposes to arrest all persons guilty of violating any law or ordinance . . .

*Id.*

26. See *supra* note 21.

The TA is functionally analogous to the Port Authority of New York and New Jersey<sup>27</sup> (Port Authority), which maintains its own police force<sup>28</sup> while performing the proprietary functions of a common carrier. However, in *Eisman v. Port Authority Trans Hudson Corp.*,<sup>29</sup> the Supreme Court, New York County, held that the Port Authority can be liable for failure to provide police protection where there are foreseeable risks to passenger safety.<sup>30</sup> Liability hinged upon the trial court's determination that the Port Authority had assumed a duty to its patrons by installing surveillance equipment to provide passenger security.<sup>31</sup> Given the theory that a common carrier must exercise the utmost care and diligence for passenger safety,<sup>32</sup> it becomes necessary to examine the corollary duty to provide police protection.

### III. Duty to Provide Police Protection

No municipal tort liability exists for failure to provide police protection absent a special relationship between the police and the victim.<sup>33</sup> The New York Court of Appeals has held that the use of police resources is a legislative-executive decision and that there is no duty to provide protection to any individual.<sup>34</sup> A duty may arise, however, if a special relationship has been established between the City and the victim.<sup>35</sup>

---

27. See N.J. STAT. ANN. § 32:1-1 to 2-35 (West 1963 & Supp. 1983-1984) for statutes concerning the Port Authority of New York and New Jersey.

28. See *id.* § 32:2-25 (powers given to members of police force appointed by Port Authority).

29. 96 Misc. 2d 678, 409 N.Y.S.2d 578 (Sup. Ct. N.Y. County 1978).

30. *Id.* at 681, 409 N.Y.S.2d at 580.

31. *Id.* at 682, 409 N.Y.S.2d at 581.

32. See *supra* note 20.

33. See, e.g., *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968); cf. *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (duty to use reasonable care for protection of persons who collaborate with police in the arrest or prosecution of criminals). See generally E. McQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.51 (3d rev. ed. 1977) (collecting cases); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 822-28 (1981) (discussion of the no-duty rule) [hereinafter cited as *Police Liability*]; Note, *Municipal Tort Liability for Failure to Provide Adequate Police Protection in New York State*, 39 ALB. L. REV. 599 (1975) [hereinafter cited as *Police Protection in New York*]; Comment, *Municipal Liability for Failure to Provide Police Protection*, 28 FORDHAM L. REV. 316 (1959); Note, *A Governmental Duty to Protect the Citizen—The Schuster Case*, 33 ST. JOHN'S L. REV. 289 (1959) (discussion and analysis of *Schuster v. City of New York*, *supra*).

34. See *Riss v. City of New York*, 22 N.Y.2d at 581-82, 240 N.E.2d at 860, 293 N.Y.S.2d at 898.

35. See *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978) (assumption of duty to provide substitute for absent school crossing guard); *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958)

This no-duty rule is recognized, either judicially or legislatively,<sup>36</sup> in most jurisdictions.<sup>37</sup> However, several jurisdictions recognize an exception to this rule for special relationships.<sup>38</sup> New York recognizes a

---

(duty to protect informers); *Baker v. City of New York*, 25 A.D.2d 770, 269 N.Y.S.2d 515 (2d Dept. 1966) (duty owed to persons under court orders of protection).

36. See, e.g., *Police Liability*, *supra* note 33, at 823 n.12 (citing statutes granting general statutory immunity for failure to prevent crime); PROSSER, *supra* note 12, § 53 at 325-26. The tort concept of duty relied upon by the courts involves the question of whether the defendant is under any obligation to the particular plaintiff and is "an expression of the sum total of these considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." *Id.*

37. See, e.g., *Antique Arts Corp. v. City of Torrance*, 39 Cal. App. 3d 588, 593, 114 Cal. Rptr. 332, 335 (Cal. Ct. App. 1974) (California Tort Claims Act of 1963 "provides for immunity if no police protection is provided, or if that protection is provided, if that protection is not sufficient"); *Shore v. Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982) (town not liable to plaintiffs whose decedent was killed by an intoxicated driver who, approximately one hour prior to accident, was stopped and warned but not arrested by police officer); *Freitas v. Honolulu*, 58 Hawaii 587, 574 P.2d 529 (Hawaii 1978) (no liability despite knowledge by police that plaintiff's brother had been convicted of violent crimes, had history of mental instability and had previously threatened his brothers with rifle before actually shooting them); *Simpson's Food Fair, Inc. v. City of Evansville*, 149 Ind. App. 387, 272 N.E.2d 871 (Ind. Ct. App. 1971) (no liability for failure of city police to halt crime wave which resulted in retail grocery going out of business); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979) (recognizing no-duty rule as analogy to failure to discover fire code violation); *Bruttomesso v. Las Vegas Metropolitan Police Dept.*, 95 Nev. 151, 591 P.2d 254 (Nev. 1979) (police not obligated to plaintiff to provide security for outdoor film festival at which plaintiff was stabbed); *Doe v. Hendricks*, 92 N.M. 499, 590 P.2d 647 (N.M. Ct. App. 1979) (duty of police is to protect public generally; no duty to protect individual plaintiff rape victim); *Walters v. Hampton*, 14 Wash. App. 548, 543 P.2d 648 (Wash. Ct. App. 1975) (city had no specific duty to protect the plaintiff shooting victim). See generally 30 AM. JUR. P.O.F. 429, 437 (1982) (almost all states follow no-duty rule); Annot., 46 A.L.R.3d 1084 (1972) (collecting cases).

38. See, e.g., *Swanner v. United States*, 309 F. Supp. 1183 (D. Ala. 1970) (suit brought pursuant to provisions of Federal Tort Claims Act; government has special duty to protect informant when there is reasonable cause to believe he is endangered as a result of his aid to federal law enforcement officials); *Miller v. United States*, 530 F. Supp. 611 (E.D. Pa. 1982) (government liable for failing to provide police protection to informants); *Stone v. State*, 106 Cal. App. 3d 924, 165 Cal. Rptr. 339 (Cal. Ct. App. 1980) (special relationship arises upon voluntary assumption by public entity or official of duty toward injured party; court declined to follow the exception); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (recognizing special relationship exception to no-duty rule but finding no special relationship in case at bar); *Silverman v. City of Fort Wayne*, 171 Ind. App. 415, 357 N.E.2d 285 (Ind. Ct. App. 1976) (special relationship may exist upon personal promise given to victim by certain city officials); *Bruttomesso v. Las Vegas Metropolitan Police Dept.*, 95 Nev. at 151, 591 P.2d at 254 (recognizing special relationship exception to no-duty rule but finding no special relationship in case at bar); *Doe v. Hendricks*, 92 N.M. at 499, 590 P.2d at 647 (special relationship arises out of some prior circumstance existing between victim and police that imposed a duty on police, which extended beyond ordinary public duty to protect crime victims). See also Note, *Municipal Law—Negligence—Failure of Police to Provide Protection to the Holder of a Family Court*

special relationship exception to the no-duty rule for police protection both to the general public and to transit system passengers.<sup>39</sup> However, the adoption of the no-duty rule is based on a theory that is not wholly applicable to transit systems.<sup>40</sup>

The New York Court of Appeals in *Riss v. City of New York*<sup>41</sup> held that the allocation of police resources for protection from criminal wrongdoings is a legislative-executive decision for which there is no liability.<sup>42</sup> However, the *Riss* court distinguished the duty to protect the public generally from the duty of transit authorities to protect their patrons.<sup>43</sup> This distinction would appear to impose a duty on the TA equivalent to the duty that is required of common carriers.<sup>44</sup>

The *Riss* court indicated that a duty to protect the public would be too great a burden because of limited resources.<sup>45</sup> The court feared that imposing a duty to protect would determine the allocation of such limited resources without predictable limits.<sup>46</sup> However, in the next sentence in the opinion, the court distinguished this unpredictability for protection of the public generally from the predictability of resources for transit systems.<sup>47</sup> This distinction may be interpreted to mean that despite the fact that the TA is statutorily designated as performing a governmental function,<sup>48</sup> the TA owes a higher duty of care towards its passengers than has been recognized.

#### IV. Tort Liability of the TA

In *Weiner v. Metropolitan Transportation Authority*,<sup>49</sup> the New York Court of Appeals held that the TA owes no duty to protect a

---

*Order of Protection States a Valid Cause of Action*, 7 FORDHAM URBAN L.J. 191, 199-200 (1978) (citing cases); cases cited *supra* note 35.

39. See *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982). See also *infra* notes 49-51 and accompanying text.

40. See *infra* notes 41-48.

41. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

42. *Id.* at 581-82, 240 N.E.2d at 861, 293 N.Y.S.2d at 898.

43. "It is necessary immediately to distinguish those liabilities attendant upon governmental activities which have displaced or supplemented traditionally private enterprises, such as are involved in the operation of *rapid transit systems* . . . . Once sovereign immunity was abolished by statute the extension of liability on ordinary principles of tort law logically followed." *Id.* at 581, 240 N.E.2d at 860, 293 N.Y.S.2d at 897-98 (emphasis added).

44. See *supra* note 20 for definition of a common carrier's duty.

45. 22 N.Y.2d at 581, 240 N.E.2d at 861, 293 N.Y.S.2d at 898.

46. *Id.* at 582, 240 N.E.2d at 861, 293 N.Y.S.2d at 898.

47. *Id.* "This is quite different from the predictable allocation of resources and liabilities when . . . *rapid transit systems* . . . are provided." *Id.* (emphasis added).

48. See *supra* note 21 for a discussion of the statute.

49. 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982).



person on its premises from assault by a third person, absent facts establishing a special relationship between the Authority and the person assaulted.<sup>50</sup> The *Weiner* court further held that the allocation of police resources to protect against criminal wrongdoing is a legislative-executive decision for which there is no liability.<sup>51</sup>

Prior to *Weiner*, the TA was held to be a common carrier with a duty to take reasonable precautions for the protection and safety of its passengers.<sup>52</sup> Whether a duty was properly discharged could be determined as a question of fact or as a matter of law depending on the evidence presented.<sup>53</sup> The New York courts had held that where a carrier was on notice that attacks had occurred in the area of its premises, its duty to take reasonable precautions for protection and safety of its passengers extended to taking reasonable precautions to prevent recurrence of such incidents.<sup>54</sup>

Although a common carrier does not insure the safety of its passengers,<sup>55</sup> its duty is analogous to the responsibility of a landlord for criminal acts on its premises when the landlord is on notice of recurring criminal activities.<sup>56</sup> Moreover, a public utility, such as a com-

---

50. *Id.* at 178, 433 N.E.2d at 126, 488 N.Y.S.2d at 143.

51. *Id.* at 181, 433 N.E.2d at 127, 488 N.Y.S.2d at 144.

52. See *Amoruso v. New York City Transit Auth.*, 12 A.D.2d 11, 207 N.Y.S.2d 855 (1st Dept. 1960) (per curiam) (court ordered new trial to determine whether TA, a common carrier, complied with its duty to take reasonable precautions for protection and safety of its passengers); *cf. Bardavid v. New York City Transit Auth.*, 82 A.D.2d 776, 440 N.Y.S.2d 648 (1st Dept. 1981) (passenger attacked at subway station entrance that had prior, recent criminal activity); *Sernov v. New York City Transit Auth.*, 79 A.D.2d 1021, 435 N.Y.S.2d 55 (2d Dept. 1981), *aff'd sub. nom.*, *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175 (1982) (assault and attempted rape of passenger in subway station with history of such assaults).

53. Compare *Langer v. City of New York*, 9 Misc. 2d 1002, 171 N.Y.S.2d 390 (N.Y. Sup. Ct. 1958), *aff'd*, 8 A.D.2d 709, 185 N.Y.S.2d 751 (1959) (court, sitting without a jury, found as matter of fact that carrier had properly discharged its duty toward injured passenger) with *Moriarity v. New York City Transit Auth.*, 11 A.D.2d 654, 201 N.Y.S.2d 600 (1st Dept. 1960) (mem.) (where no proof of prior crimes and officer was present in station at time of assault on passenger, it may be held as matter of law that TA discharged its duty properly).

54. See *Bardavid*, 82 A.D.2d at 776, 440 N.Y.S.2d at 648.

55. See *supra* note 20 and accompanying text for a discussion of common carrier doctrine.

56. See *Eisman v. Port Auth. Trans Hudson Corp.*, 96 Misc. 2d at 681, 409 N.Y.S.2d at 580 (duty of common carrier to protect passengers analogous to landlord's responsibility for criminal acts committed on its premises); *cf. Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (although, as general rule, private person does not have duty to protect another from criminal attack by third person, landlord owes duty to take reasonable steps to protect tenant from foreseeable criminal acts committed by intruders on premises). See generally Selvin, *Landlord Tort Liability for Criminal Attacks on Tenants: Developments since Kline*, 9 REAL ESTATE L.J. 311 (1981); Smith, *The Landlord's Duty to Defend His Tenants*

mon carrier, may be required to take additional steps to protect its patrons when there is a reasonable expectation of a dangerous condition on the premises.<sup>57</sup> These additional steps may lead to an assumption of a duty by the common carrier to its passengers when, for example, the carrier installs surveillance monitoring equipment at its stations.<sup>58</sup>

After *Weiner*, a passenger injured by a rock thrown through a train window brought an action against the TA.<sup>59</sup> The trial court interpreted *Weiner* as immunizing the TA in *any* case where a passenger is attacked by a third party, absent a special relationship.<sup>60</sup> However, in *Giamboi v. New York City Transit Authority*,<sup>61</sup> the Civil Court,

---

*Against Crime on the Premises*, 4 WHITTIER L. REV. 587 (1982); Stalmack, *The Illinois Landlord's Obligation to Protect Persons on His Premises Against The Criminal Activities of Third Persons*, 68 ILL. B.J. 668 (1980); Comment, *The Landlord's Duty in New York to Protect His Tenant from Criminal Intrusions*, 45 ALB. L. REV. 988 (1981); Note, *Landlord Liability for the Criminal Acts of Third Parties: Recent Developments in Connecticut*, 14 CONN. L. REV. 843 (1982); Note, *Landlord Has Duty to Protect Tenant from Foreseeable Criminal Acts of Intruders in Common Areas*, 1970 DUKE L.J. 1046 (1970); Note, *Landlord's Duty to Protect Tenants from Criminal Acts of Third Parties: The View from 1500 Massachusetts Avenue*, 59 GEO. L.J. 1153 (1971); Note, *Crime in Apartments: Landlord Liability*, 5 GA. L. REV. 349 (1971); Case Comment, *Landlord Held Negligent for Criminal Assault by Third Party Intruder on Tenant*, 55 MINN. L. REV. 1097 (1971); Note, *Responsibility of Landlords for Criminal Acts of Third Persons*, 48 N.C.L. REV. 713 (1970); Note, *Landlord Liability to Tenants for Crimes of a Third Party: The Status in Florida*, 6 NOVA L.J. 145 (1981); Note, *Landlord's Responsibility to Tenant for Criminal Acts Committed by Third Persons: A View Since Kline vs. 1500 Massachusetts Avenue Apartment Corporation*, 17 S. TEX. L.J. 270 (1976); Note, *Landlords of Multiple-Unit Apartment Houses Have a Duty to Take Protective Measures to Guard Their Tenants from the Perpetration of Foreseeable Criminal Acts by Third Persons*, 49 TEX. L. REV. 586 (1971); Note, *Landlord's Duty to Protect Tenants from Foreseeable Criminal Acts of Third Parties: Kline v. 1500 Massachusetts Avenue Apartment Corporation*, 32 U. PITT. L. REV. 267 (1970); Comment, *A Landlord's Duty to Protect His Tenants from the Criminal Acts of Third Persons*, 5 U.S.F.L. REV. 378 (1971); Note, *Landlord Owes Duty to Provide Protection for Tenants Against Criminal Acts by Third Parties*, 24 VAND. L. REV. 195 (1970); Note, *Landlord Held to a Duty of Reasonable Care to Protect Tenants from Foreseeable Criminal Acts Committed by Third Parties in the Common Areas of an Apartment Building*, 16 VILL. L. REV. 779 (1971); Casenote, *Commercial Landlord's Liability for Criminal Acts of a Third Party*, 22 WAYNE L. REV. 1483 (1976); Annot., 43 A.L.R.3d 331 (1972) (citing cases).

57. See generally RESTATEMENT (SECOND) OF TORTS, § 344 comment e (1965).

58. See, e.g., *Eisman*, 96 Misc. 2d at 682, 409 N.Y.S.2d at 581 ("[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all") (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922)).

59. See *Ammirati v. New York City Transit Auth.*, 117 Misc. 2d 213, 457 N.Y.S.2d 738 (Sup. Ct. Kings County 1983).

60. *Id.* at 217, 457 N.Y.S.2d at 741.

61. 120 Misc. 2d 33, 465 N.Y.S.2d 160 (N.Y. City Civ. Ct. 1983).

Kings County, recently denied a motion to dismiss an action involving a personal injury sustained by a passenger struck by a bottle thrown from a train platform.<sup>62</sup> This court interpreted *Weiner* as not imparting a total shield of tort immunity around the TA.<sup>63</sup> Rather, it held that, although *Weiner* absolves the TA for failure to post additional police at a station, it does not grant immunity when injury results from a dangerous condition.<sup>64</sup>

If *Giamboi* is upheld, the TA's liability would be increased because a dangerous condition can be interpreted to include, as here, any area where the TA has notice of repeated vandalism or criminal activity.<sup>65</sup> This is in line with the analysis of *Bardavid v. New York City Transit Authority*,<sup>66</sup> which cited the appellate division's *Weiner* decision as authority for its holding that a duty to protect arises when the TA has notice of prior criminal activity.<sup>67</sup> However, *Bardavid* was neither discussed nor overruled by *Weiner* in the Court of Appeals. Ultimately, a duty to provide police protection may be recognized despite *Weiner* because of the possibility of particular stations being deemed dangerous, such as those with a high frequency of crimes.<sup>68</sup>

Certain factors considered in the labeling of a station as dangerous may include: the number of passengers using such station; the utilization of adequate lighting or the lack thereof; the architectural design of the station including alcoves, connecting passageways and placement of exits and entrances; the frequency with which trains arrive and depart; and the frequency of and the patterns readily discernible from past criminal activity in the station.<sup>69</sup> Given the ease with which *Weiner* was circumvented,<sup>70</sup> it becomes clear that a more specific

---

62. *Id.*

63. *Id.* at 34, 465 N.Y.S.2d at 161.

64. *Id.* at 161-62. See text preceding note 69 for factors which may be relevant in defining "dangerous condition."

65. See *infra* notes 84-96 and accompanying text.

66. 82 A.D.2d 776, 440 N.Y.S.2d 648 (1st Dept. 1981) (mem.) (involving also a question of whether plaintiff was actually a passenger when she entered alcove to take elevator down to train platform).

67. *Id.* at 776, 440 N.Y.S.2d at 649.

68. See *infra* notes 88-93 and accompanying text for conditions placing a transit authority on notice. A duty to take precautions against crime may include a duty to provide police protection if that is the only feasible safety measure available. See *infra* notes 100-107 and accompanying text for a case where a duty to provide police protection arose because such protection had been given in the past.

69. This is not an exclusive list of possible factors. Although stations need to be examined on an individual basis, TA crime reports should provide a starting point for such an examination.

70. See *Giamboi v. New York City Transit Auth.*, 120 Misc. 2d at 34, 465 N.Y.S.2d at 161 (court limited *Weiner* to include only the issue of police protection,

standard of care is needed. An analysis of other theories is valuable at this point.

## V. Theories of Recovery

### A. Common Carrier

Classifying a municipally-run transit system as a common carrier would impose on it a duty to exercise the highest degree of care and diligence consistent with the circumstances in order to provide for passenger safety.<sup>71</sup> Courts have used this standard for such transit systems as the Chicago Transit Authority,<sup>72</sup> the Southeastern Pennsylvania Transportation Authority,<sup>73</sup> and New Orleans Public Service, Inc.<sup>74</sup> New York courts had applied this standard<sup>75</sup> until *Weiner*

---

thereby distinguishing *Weiner* and adding to ambiguity of this issue by using phrase "dangerous condition").

71. See *supra* note 20 for a discussion of the common carrier doctrine.

72. See, e.g., *McCoy v. Chicago Transit Auth.*, 69 Ill. 2d 280, 371 N.E.2d 625 (1977) (common carrier has responsibility to prevent injuries which could have been reasonably foreseen and avoided by carrier); *Fujimura v. Chicago Transit Auth.*, 67 Ill. 2d 506, 368 N.E.2d 105 (1977) (Chicago Transit Authority owes highest degree of care in contrast to other public entities); *Katamay v. Chicago Transit Auth.*, 53 Ill. 2d 27, 289 N.E.2d 623 (1972) (carrier owes duty to exercise highest degree of care for passenger who is in act of boarding, is upon, or is in act of alighting from, carrier's vehicle); *Watson v. Chicago Transit Auth.*, 52 Ill. 2d 503, 288 N.E.2d 476 (1972) (citing *Letsos infra*); *Letsos v. Chicago Transit Auth.*, 47 Ill. 2d 437, 265 N.E.2d 650 (1970) (carrier is bound to exercise high degree of care toward its passengers and has responsibility of preventing injuries which it can reasonably foresee and avoid); *Haynes v. Chicago Transit Auth.*, 59 Ill. App. 3d 997, 376 N.E.2d 680 (Ill. App. Ct. 1978) (common carrier has duty to exercise reasonable care and caution for prevention of reasonably foreseeable assaults in its stations and on its platforms).

73. See, e.g., *Kenny v. Southeastern Pennsylvania Transp. Auth.*, 581 F.2d 351 (3d Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979) (carrier's duty to protect is based on whether it could reasonably have expected criminal activity from anyone at its station); *Carswell v. Southeastern Pennsylvania Transp. Auth.*, 259 Pa. Super. 167, 393 A.2d 770 (Pa. Super. Ct. 1978) (public utility may be required to take additional steps to control conduct of third persons, or otherwise to protect patron against it); *Mangini v. Southeastern Pennsylvania Transp. Auth.*, 235 Pa. Super. 478, 344 A.2d 621 (Pa. Super. Ct. 1975) (common carrier is held to highest degree of care).

74. See, e.g., *Orr v. New Orleans Pub. Serv., Inc.*, 349 So. 2d 417 (La. Ct. App. 1977) (citing *Aime infra*); *Campo v. George*, 347 So. 2d 324 (La. Ct. App. 1977) (citing *Aime infra*); *Vaughan v. New Orleans Pub. Serv., Inc.*, 314 So. 2d 545 (La. Ct. App. 1975) (citing *Aime infra*); *Aime v. Hebert*, 282 So. 2d 566 (La. Ct. App. 1973) (public carrier of passengers for hire is required to exercise highest degree of vigilance, care and precaution for safety of its passengers). The Louisiana Supreme Court, however, held that New Orleans Public Service, Inc. does not owe the highest duty of care associated with common carriers. *Rodriguez v. New Orleans Pub. Serv., Inc.*, 400 So. 2d. 884 (1981). The *Rodriguez* court avoided overruling the prior cases applying the common carrier doctrine by indicating that they, as a practical matter,

immunized the TA without analyzing the applicability of the common carrier doctrine.<sup>76</sup>

The existence of a duty ultimately depends upon a choice between competing policies. The common carrier doctrine, if accepted, requires a high duty of care<sup>77</sup> which logically should include police protection to safeguard the passengers. Alternatively, there is no duty to provide police protection absent a special relationship.<sup>78</sup> Therefore, courts face a situation where they must opt for one of the conflicting rules.

These two policies compete in cases where the municipally-run transit system provides its own police force<sup>79</sup> and where police protection is provided as part of the general city police force.<sup>80</sup> The rule rejecting a duty unless a special relationship is found<sup>81</sup> applies in both instances<sup>82</sup> despite the argument that in the former the transit authority appears to have assumed a duty by providing its own police force rather than relying upon the city.<sup>83</sup>

---

used substantially the same approach even though *Rodriguez* applied a business establishment standard. *Id.* at 888 n.4. See *infra* notes 146-49 for a discussion of the business establishment standard.

75. See *supra* note 52.

76. 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982).

77. See *supra* note 20.

78. See *supra* notes 33-40 and accompanying text.

79. For example, the New York City Transit Authority provides and maintains its own police force. See *supra* note 25 for the statute authorizing this.

80. For example, the city of Chicago has assumed the role of policing the rapid transit stations run by the Chicago Transit Authority. See *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 446 N.E.2d 1183 (Ill. App. Ct. 1983) for an example where this fact was argued as creating a special relationship.

81. See *supra* notes 33-40 and accompanying text.

82. Compare *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d at 175, 433 N.E.2d at 124, 448 N.Y.S.2d at 141 (TA has no duty to provide police protection) with *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 178, 446 N.E.2d 1183, 1188 (Ill. App. Ct. 1983) (“[r]ecognizing a duty of the highest degree of care owed generally by police officers to passengers of the Chicago Transit Authority . . . would place the police department in the position of virtual insurers of the personal safety of every passenger, certainly an untenable result”).

83. In *Weiner*, the court conceded the fact that the TA's maintenance of a police force complicates the issue of what duty is owed to passengers. 55 N.Y.2d at 181, 433 N.E.2d at 127, 448 N.Y.S.2d at 143. However, the court failed to analyze this part of the issue and bypassed the whole argument by deciding that it was not a controlling factor in the determination of liability. *Id.* at 182, 433 N.E.2d at 127, 448 N.Y.S.2d at 144. The court stated that this should not change the responsibility of the TA because the judiciary should not interfere with the legislative-executive decision to provide a police force. *Id.* As noted earlier, however, the *Weiner* court failed to recognize the distinction made in *Riss v. City of New York* between police protection

## B. Notice of Dangerous Condition

A second theory imposes liability where the crime occurred in an area that presented a dangerous condition and where the transit authority had notice of such condition.<sup>84</sup> This is the position taken by the court in *Giamboi v. New York City Transit Authority*.<sup>85</sup> The plaintiff in *Giamboi* was struck by a bottle thrown from an improperly enclosed train station. The court denied summary judgment in light of the factual issues of whether a dangerous condition existed at the station and whether notice had been provided to the TA.<sup>86</sup> The evidence indicated that the TA was aware of repeated acts of vandalism at the station and in its vicinity as a result of several newspaper articles concerning the area.<sup>87</sup>

A transit authority was held to have been on notice when it knew of a robbery committed three months earlier at the same station as the case in point and two robberies a few months earlier at a nearby station.<sup>88</sup> Notice also was found when a train's conductor noted that three men had boarded a train in a high crime area and bothered a

---

generally and police protection for rapid transit systems. *See supra* notes 41-47 and accompanying text.

84. The terms "dangerous condition" and "notice" are not easily defined. Possible factors to be considered by the courts in determining whether a dangerous condition exists may include those listed in the discussion in the text preceding note 69. These factors should be considered by the jury and not ruled on as a matter of law. *See, e.g., Haynes v. Chicago Transit Auth.*, 59 Ill. App. 3d 997, 1001, 376 N.E.2d 680, 683 (Ill. App. Ct. 1978).

The factors determining when a transit authority is on notice may include the number of crimes previously committed at a particular station or on a specific route. This information may be gathered from internal reports and memoranda issued by the transit authority or from privately funded studies and newspaper accounts. Another factor may be the knowledge of transit personnel that a person or persons appear to be engaged in suspicious activity or are inebriated or otherwise mentally unbalanced with possible violent or criminal propensities. *See, e.g., McCoy v. Chicago Transit Auth.*, 69 Ill. 2d 280, 288, 371 N.E.2d 625, 629 (1977); *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 174-75, 446 N.E.2d 1183, 1185 (Ill. App. Ct. 1983); *Mangini v. Southeastern Pennsylvania Transp. Auth.*, 235 Pa. Super. 478, 480, 344 A.2d 621, 622 (Pa. Super. Ct. 1975).

By using these factors, the problems of stereotyping an entire transit system as crime ridden, and the accompanying municipal fear of dramatically increased liability, are avoided. Liability would attach to crimes committed only in those stations or areas where there is knowledge of a dangerous condition or knowledge of previous crimes unless the circumstances for the particular incident indicate that notice had been given immediately prior to such incident.

85. 120 Misc. 2d 33, 465 N.Y.S.2d 160 (N.Y. Civ. Ct. 1983).

86. *Id.* at 162.

87. *Id.* at 161.

88. *Haynes v. Chicago Transit Auth.*, 59 Ill. App. 3d 997, 376 N.E.2d 680 (Ill. App. Ct. 1978).

passenger.<sup>89</sup> The court concluded that the conductor knew or should have known of the propensity of the men to cause trouble and had both the time and ability to prevent the subsequent assault, but failed to take necessary precautions.<sup>90</sup>

The Third Circuit Court of Appeals has implied a duty when the transit authority could reasonably have expected criminal activity from anyone at its station.<sup>91</sup> The transit authority was placed on notice when it learned that crime had increased throughout the entire system and when it failed to maintain adequate lighting at a station.<sup>92</sup> The court indicated that although steps had been taken to increase police protection, it could not say as a matter of law that this was enough to preclude tort liability.<sup>93</sup>

A carrier may be liable for reasonably anticipated acts or conduct of third persons.<sup>94</sup> It has been found that negligence occurs when the carrier can reasonably anticipate the force, means or conduct which causes an object to be propelled so as to penetrate a window and injure a passenger.<sup>95</sup> However, the carrier will not be liable solely for the failure to install safety glass if the incident could not be reasonably anticipated.<sup>96</sup>

### C. Special Relationship

*Weiner* leaves open the possibility of a duty to protect passengers if the facts establish a special relationship between the TA and the crime victim.<sup>97</sup> The court cited two cases illustrating such a special relationship in situations involving a duty to protect police informers<sup>98</sup> and assumption of a duty to provide a substitute for a school crossing guard.<sup>99</sup>

---

89. See *McCoy v. Chicago Transit Auth.*, 69 Ill. 2d 280, 371 N.E.2d 625 (1977).

90. *Id.* at 289, 371 N.E.2d at 629.

91. See *Kenny v. Southeastern Pennsylvania Transp. Auth.*, 581 F.2d 351 (3d Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

92. *Id.* at 354-55.

93. *Id.* at 354.

94. See *Jackson v. Bi-State Transit System*, 550 S.W.2d 228 (Mo. Ct. App. 1977) (per curiam) (bus passenger injured when struck in face by object that penetrated window).

95. *Id.* at 233.

96. *Id.* at 232.

97. 55 N.Y.2d at 178, 433 N.E.2d at 126, 448 N.Y.S.2d at 143.

98. See *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

99. See *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978).

In *Crossland v. New York City Transit Authority*,<sup>100</sup> the Supreme Court, Kings County, recently denied a motion to dismiss a wrongful death suit against the TA for the murder of a high school student on a subway platform by "a group of thugs."<sup>101</sup> The court held that since the TA "had already budgeted full twenty-four hour police coverage" at the station as a deterrent because of the "high and violent crime rate" there, a special relationship was established.<sup>102</sup> The court found *Florence v. Goldberg*<sup>103</sup> controlling rather than *Weiner*.<sup>104</sup> In *Florence*, the New York Court of Appeals held New York City liable for voluntarily assuming a duty to protect a particular class of persons, and then negligently withdrawing that protection, causing injury to a member of that class.<sup>105</sup> The *Crossland* court also ruled that a question of fact remained as to when the police officers left their post.<sup>106</sup>

This holding is important because it implies that there is a duty to provide police protection once the TA has posted officers at a particular station on a regular basis.<sup>107</sup> However, since this is the first New York case discussing the possible definition of "special relationship" with respect to the TA, it is necessary to look at cases in other jurisdictions to develop a definition by analogy.

In *Marvin v. Chicago Transit Authority*,<sup>108</sup> the Illinois Appellate Court listed four requirements of the "special duty" exception,<sup>109</sup> whereby the police owe a duty to an individual, as contrasted with the public at large:

---

100. N.Y.L.J., Jan. 19, 1984, at 13, col. 3 (Sup. Ct. Kings County Jan. 18, 1984).

101. *Id.*

102. *Id.*

103. 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978).

104. The court found that the plaintiff in *Weiner* contested "the manner and fashion of where the police protection should have been deployed . . ." whereas "in the instant case, the police were already deployed and, allegedly assigned to guard the 125th Street Station for 'round the clock' protection and the police coverage was withdrawn during a period preceding the shift change." N.Y.L.J., Jan. 19, 1984, at 13, col. 3 & 4.

105. 44 N.Y.2d at 197, 375 N.E.2d at 767, 404 N.E.2d at 577-78.

106. N.Y.L.J., Jan. 19, 1984, at 13, col. 4.

107. The effect of the holding is to require police protection once such a policy is initiated. This would appear to complicate the status of the no-duty rule by recognizing a present and a future duty conforming to past performance.

108. 113 Ill. App. 3d 172, 446 N.E.2d 1183 (Ill. App. Ct. 1983) (plaintiff was beaten by six youths who were permitted by police officer to enter train station despite facts that they appeared intoxicated and had threatened plaintiff in presence of police officer).

109. Plaintiff's first amended complaint alleged that the city assumed a "special relationship" to passengers of the rapid transit system by assuming "almost full" responsibility to police its facilities. On appeal, plaintiff contended that this states a cause of action under the "special duty" exception to the general rule that there is no



(1) [t]he municipality must be uniquely aware of the particular danger or risk to which plaintiff is exposed; (2) there must be allegations of specific acts or omissions on the part of the municipality; (3) the specific acts or omissions must be either affirmative or willful in nature; and (4) the injury must occur while the plaintiff is under the direct and immediate control of employees or agents of the municipality.<sup>110</sup>

The court went on to hold that the plaintiff could not satisfy the fourth requirement merely by alleging that a police officer directed him to descend to the train platform where he was beaten by six youths.<sup>111</sup>

In *Chapman v. City of Philadelphia*,<sup>112</sup> the Pennsylvania Superior Court defined a special relationship as existing only when "an individual is exposed to a special danger and the authorities have undertaken the responsibility to provide adequate protection for him."<sup>113</sup> The court held that such a relationship did not exist between plaintiff's decedent and the City of Philadelphia despite the fact that he was murdered on a train platform in a dangerous area of the City.<sup>114</sup>

In general, municipalities are not liable for inadequate police protection unless they undertake some action which creates a duty.<sup>115</sup> Thus, a municipality may be liable if police act negligently when they have knowledge of a person's situation,<sup>116</sup> but will not be liable if they do not act at all since there is no assumption of a duty.<sup>117</sup> The assumption of a duty was defined, in ambiguous language, by the court in *Riss v. City of New York*<sup>118</sup> as occurring in a "situation where the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses."<sup>119</sup>

By using these definitions, courts have limited municipal tort liability to basically two categories: (1) where the plaintiff is harmed as a

tort liability for failure to exercise general police powers. *Marvin*, 113 Ill. App. 3d at 176, 446 N.E.2d at 1185.

110. *Id.*, citing *Curtis v. County of Cook*, 109 Ill. App. 3d 400, 407, 440 N.E.2d 942, 947 (Ill. App. Ct. 1982); *Bell v. Village of Midlothian*, 90 Ill. App. 3d 967, 970, 414 N.E.2d 104, 106 (Ill. App. Ct. 1980).

111. 113 Ill. App. 3d at 177, 446 N.E.2d at 1185.

112. 290 Pa. Super. 281, 434 A.2d 753 (Pa. Super. Ct. 1981).

113. *Id.* at 283, 434 A.2d at 754.

114. *Id.* at 284, 434 A.2d at 755.

115. See generally *Police Liability and Police Protection in New York*, *supra* note 33.

116. See *supra* note 38 for cases recognizing special relationships.

117. See *supra* note 37 for cases recognizing the no-duty rule.

118. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

119. *Id.* at 583, 240 N.E.2d at 861, 293 N.Y.S.2d at 899.

result of assisting police activities and (2) where the police extended express promises of protection to specific individuals.<sup>120</sup> However, in a recent decision the Oregon Supreme Court has ruled that abused wives can collect damages from police who fail to protect them.<sup>121</sup> The case arose under a 1977 statute<sup>122</sup> that gives abused wives the right to seek judicial protective orders, and states that police "shall" arrest, upon probable cause, any husband believed to be violating such an order of which he has knowledge.<sup>123</sup> By recognizing the legislative creation of a duty, the court expanded the police duty to protect beyond the previous two categories.

An analogy may be drawn to the duty of the TA police as described in section 1204(16) of the New York Public Authorities Law.<sup>124</sup> Among those listed are the duties to "prevent crime,"<sup>125</sup> to "detect and arrest offenders,"<sup>126</sup> and to "protect the rights of persons and property."<sup>127</sup> The Oregon Supreme Court has relied heavily on the mandatory "shall" language of the abuse protection law<sup>128</sup> to infer the existence of a statutory tort that did not have to be grounded in common law negligence.<sup>129</sup> New York courts may find a similar tort action since the New York statute uses the same type of mandatory language when it states that the TA transit police department "shall have the power and it shall be their duty . . ." to perform the enumerated functions.<sup>130</sup> Given a similar interpretation, this language may create both a special relationship between the TA and its passengers and a concomitant duty to protect such passengers.

120. See generally *Police Liability*, *supra* note 33 at 825-26.

121. *Nearing v. Weaver*, 295 Or. 702 (1983). See also *National Law Journal*, Oct. 24, 1983, at 3, col. 1 (discussion of *Nearing*).

122. OR. REV. STAT. § 133.310 (1981).

123. The statute provides:

(3) A peace officer *shall* arrest and take into custody a person without a warrant when the peace officer has probable cause to believe that:

(a) There exists an order issued pursuant to ORS 107.095 (1)(c) or (d), 107.716 or 107.718 restraining the person; and

(b) A true copy of the order and proof of service on the person has been filed as required by ORS 107.720; and

(c) The peace officer has probable cause to believe that the person to be arrested has violated the term of that order.

*Id.* (Emphasis added)

124. See N.Y. PUBLIC AUTHORITIES LAW § 1204(16) (McKinney 1982), *supra* note 25.

125. *Id.*

126. *Id.*

127. *Id.*

128. See *National Law Journal*, Oct. 24, 1983, at 3, col. 1.

129. *Id.*

130. N.Y. PUBLIC AUTHORITIES LAW § 1204(16) (McKinney 1982).

A special relationship may also arise upon installation of security measures such as surveillance equipment.<sup>131</sup> This was at issue in *Eisman v. Port Authority Trans Hudson Corp.*,<sup>132</sup> where the plaintiff was assaulted and raped at a PATH station. One of the counts in the complaint alleged that defendants failed "to adequately maintain and monitor a remote control television surveillance system which had been installed to prevent criminal activity."<sup>133</sup> The court denied a motion to dismiss since it may be found that defendants assumed a duty to the plaintiff if it can be proved that the surveillance equipment was installed to provide passenger security.<sup>134</sup>

In summary, a special relationship exists where a person assists the government in a capacity such as informer,<sup>135</sup> where the police expressly promise or actually provide protection,<sup>136</sup> where a statute creates a duty,<sup>137</sup> and possibly where transit systems install security devices.<sup>138</sup> Upon consideration of analogous situations, the TA may be found liable under the latter two examples of this theory and possibly under the second.<sup>139</sup>

#### D. Other Theories

Liability may attach to the municipality where it knows that a particular assailant has dangerous propensities.<sup>140</sup> Thus, there will be no liability for a criminal attack by an unknown assailant even if the attack occurs in a dangerous area.<sup>141</sup> However, there will be liability where, for example, a passenger is attacked and the attacker escapes but returns shortly thereafter and commits another assault.<sup>142</sup> The

---

131. The reference to surveillance equipment relates to passenger security, not to internal devices to insure that token clerks handle money properly.

132. 96 Misc. 2d 678, 409 N.Y.S.2d 578 (Sup. Ct. N.Y. County 1978).

133. *Id.* at 679, 409 N.Y.S.2d at 579.

134. *Id.* at 682, 409 N.Y.S.2d at 581.

135. *See supra* notes 38 and 120.

136. *Id.*

137. *See supra* notes 121-23 and accompanying text.

138. *See supra* notes 132-34 and accompanying text.

139. A possible argument for liability under the second example may be based on a reliance theory. If police protection is provided on a regular basis at a specific station, the TA may be liable for a criminal attack if such police protection is withdrawn. *See, e.g., infra* notes 100-107 and accompanying text.

140. *See Hall v. Seaboard Air Line Ry. Co.*, 84 Fla. 9, 93 So. 151 (1921); *Alvarez v. Metropolitan Dade County*, 378 So. 2d 1317 (Fla. Dist. Ct. App. 1980) (citing *Hall*).

141. *See Alvarez*, 378 So. 2d 1317, 1318.

142. *Id.* at 1318 (citing *Hall v. Seaboard Air Line Ry. Co.*, 84 Fla. 9, 93 So. 151 (1921) as still the law in Florida).

carrier would not be liable for the first attack, but since it was on notice of the person with dangerous propensities, it would be liable for the second attack.<sup>143</sup> This theory, however, does not help the victims because recovery appears to be limited to crimes committed by repeat offenders. It seems illogical to award damages for a murder committed by a known criminal but not to award damages in an identical case involving an unknown assailant, or no award for a murder but an award for a subsequent assault.

A variation on the common carrier theory involves a duty to exercise a high degree of foresight as to possible dangers and a high degree of prudence in guarding against them.<sup>144</sup> This duty has been held to be satisfied where a municipal bus driver warned his passengers to quiet down and later stopped his bus to seek police assistance when one passenger produced a gun.<sup>145</sup> The foresight requirement is acceptable inasmuch as it comports with the duty required under the other theories. However, the duty and the fulfillment thereof appear contradictory since seeking police assistance after an altercation has begun may be considered hindsight. A subsequent finding of no municipal tort liability would, in effect, absolve the municipality for its failure to guard against possible dangers.

A final theory uses the standard required of business establishments.<sup>146</sup> The Supreme Court of Louisiana has held that since public carriers are essentially operating a business that permits the public to enter its premises, they should be held to the same duty as a reasonable business establishment with respect to hazards not associated with the nature of carriage of passengers.<sup>147</sup> This duty includes keeping the premises safe from unreasonable risks of harm or warning persons of known dangers.<sup>148</sup> When the independent, intentional or criminal acts of a third person constitute the unreasonable risk, the duty can be discharged by summoning the police at the time the

---

143. *Id.*

144. *See* *City of Dallas v. Jackson*, 450 S.W.2d 62 (Tex. 1970) (plaintiff's decedent was shot and killed on municipal bus by another passenger).

145. *Id.* at 63.

146. *See generally* Annot., 93 A.L.R.3d 999 (1979) (citing cases discussing liability of owner or operator of shopping center, or business housed therein, for injuries to patrons on premises from criminal assaults by third parties); Annot., 72 A.L.R.3d 1269 (1977) (citing cases discussing liability of storekeeper for death or injury to customer in course of robbery); 57 AM. JUR. 2D *Negligence* §§ 63, 206-208 (1971); 62 AM. JUR. 2D *Premises Liability* §§ 26, 200, 253 (1972); PROSSER, *supra* note 12, at § 61.

147. *See* *Rodriguez v. New Orleans Pub. Serv., Inc.*, 400 So. 2d 884, 887 (La. 1981).

148. *Id.*

proprietor knows or should know of the third person's intention and apparent ability to execute the acts.<sup>149</sup> As with the previous two theories, the duty can be used in search of a definition of the TA's duty but its discharge cannot be considered analogous. While in theory a transit authority may be analogized to a business proprietor, the TA must be distinguished by the fact that it maintains its own police force,<sup>150</sup> which cannot be said of the typical business owner.

## VI. Proposals

### A. Standard of Care and Duty Owed

The TA should be held to the standard of care required of common carriers.<sup>151</sup> This is the standard used by other jurisdictions.<sup>152</sup> The TA has avoided liability<sup>153</sup> because it is statutorily designated as performing a governmental function<sup>154</sup> and because it maintains its own police force.<sup>155</sup> Except for these two facts, the TA performs what other jurisdictions label as proprietary functions. Therefore, the appropriate standard of care should be that required of a common carrier.

Recognition of this standard requires an attendant duty to exercise a high degree of care to prevent injuries to passengers.<sup>156</sup> The TA, admittedly, cannot protect all of its 2.8 million daily passengers.<sup>157</sup> However, it should be held liable for criminal attacks when it reasonably could expect criminal activity from anyone at its stations and it fails to take necessary preventative action.<sup>158</sup> Whether it could reasonably expect criminal activity to occur at a particular station depends upon whether the TA is on notice that the station presents a dangerous condition.<sup>159</sup>

---

149. *Id.*

150. See N.Y. PUBLIC AUTHORITIES LAW § 1204(16) (McKinney 1982), *supra* note 25.

151. See *supra* note 20.

152. See *supra* notes 71-83 and accompanying text.

153. See *supra* notes 49-51 and accompanying text.

154. See N.Y. PUBLIC AUTHORITIES LAW § 1202(2) (McKinney 1982), *supra* note 21.

155. See N.Y. PUBLIC AUTHORITIES LAW § 1204(16) (McKinney 1982), *supra* note 25.

156. See *supra* note 20 for a discussion of the common carrier doctrine.

157. See *supra* note 1 for the total annual ridership.

158. See *supra* notes 91-93 and accompanying text for a discussion of how notice affects liability.

159. See *supra* note 84 for a discussion of the possible definitions of "notice" and "dangerous condition."

An alternative argument for liability rests upon the assumption of a duty which creates a special relationship between the TA and its passengers.<sup>160</sup> Just as a duty may have been assumed when a carrier installed surveillance cameras,<sup>161</sup> a duty may be assumed when, for example, the TA creates off-hour waiting areas;<sup>162</sup> installs mirrors and closed-circuit televisions;<sup>163</sup> or uses colored lanterns to alert night riders that a station is closed or does not have a token booth in operation.<sup>164</sup> Liability would then attach to the TA if it negligently failed to maintain the safety measures and operate the protective systems.<sup>165</sup>

### B. Funding Municipal Liability

The argument that to increase the TA's tort liability would be financially disastrous must be tempered by the counter-argument that the "floodgates" will remain shut so long as the TA corrects the problems posing threats to passenger safety. The TA maintains statistics that illustrate the patterns of criminal activity; this enables it to determine which are the most dangerous stations.<sup>166</sup> By holding the TA liable for crimes occurring at stations which are known to have dangerous conditions, the TA would be encouraged to develop, operate and maintain safety measures at these stations.

If the TA should fail to take preventative safety measures, or be negligent in the operation and maintenance of existing systems, funding to cover the cost of the increased liability may be generated in a number of ways. The TA should adopt the automatic fare collection system that is used in cities such as Boston<sup>167</sup> and Paris.<sup>168</sup> The system

---

160. See *supra* notes 97-138 and accompanying text for a discussion of the "special relationship" theory of tort liability.

161. See *supra* notes 131-34 and accompanying text for a discussion of the theory that a duty is created upon the installation of surveillance equipment for passenger security.

162. See N.Y. Times, Mar. 8, 1982, at B1, col. 1.

163. See N.Y. Times, Feb. 9, 1982, at B4, col. 3.

164. *Id.*

165. A recent example may indicate grounds for liability: in May 1981, the TA installed closed-circuit television cameras in the 59th Street - Columbus Circle subway station and a system of 76 television screens was monitored by police around the clock. See N.Y. Times, Feb. 5, 1983, at 27, col. 3. During the year ending May 1982, reported felonies actually increased 30% over the previous year without the equipment. *Id.* Given the theory posited in *Eisman*, it would appear that the TA assumed a duty and may be liable for at least some of these crimes. See *supra* notes 131-34 and accompanying text.

166. See, e.g., N.Y. Times, Jan. 4, 1983, at B9, col. 4.

167. See N.Y. Times, May 2, 1983, at B1, col. 1.

168. See N.Y. Times, Mar. 3, 1983, at B2, col. 1.

involves passenger use of a plastic card with a magnetic strip, similar to a credit card, that is inserted into a turnstile "reader" to gain entrance to the station.<sup>169</sup> These cards would be purchased either on a monthly basis with unlimited trips for a flat fare or on an individual trip basis.<sup>170</sup> The board of the Metropolitan Transportation Authority has committed \$150 million to the purchase and installation of an automatic fare collection system on New York's subways, buses and commuter lines over the next three years.<sup>171</sup>

Such a system would reduce costs and the savings could be earmarked to offset the cost of increased liability. The automatic system would concentrate revenue collection at the beginning of the month which would enable the TA to get a more profitable return on its investments.<sup>172</sup> Moreover, there would be manpower savings at the token booth and the laborious task of collecting fare-box revenue would be virtually eliminated.<sup>173</sup>

The TA would also save money by reducing the amount of fare-evasion. Currently, a major problem in this area involves the presence of "slam gates" which are supposed to be used only for exiting but which are often used to obtain free entrance.<sup>174</sup> It is estimated that the TA loses \$30-40 million annually because of fare-evasion.<sup>175</sup> The TA proposes to close permanently the "slam gates" after the automatic system becomes operational and this would effectively reduce its revenue loss.<sup>176</sup>

Since it will take an estimated three years to install an automatic fare collection system,<sup>177</sup> the TA can recoup part of its loss to fare-evaders by encouraging the adoption of a more efficient process to collect fines from these persons. An average of 250,000 summons are issued annually to fare-evaders and approximately 16% of them appear in court.<sup>178</sup> A special tribunal should be established to handle the fare-evaders in order to centralize the problem and remove it from an already burdened court system.<sup>179</sup> If fare-evaders do not appear at the

---

169. *Id.* at A1, col. 4.

170. *Id.*

171. *See* N.Y. Times, May 2, 1983, at B1, col. 1.

172. *Id.* at B2, col. 3.

173. *Id.*

174. *See* N.Y. Times, Mar. 3, 1983, at B2, col. 4.

175. *Id.*

176. *Id.*

177. *See supra* note 171.

178. Telephone interview with Captain Dilberger, New York City Transit Police (Nov. 28, 1983).

179. WPIX Editorial #83-203 written and delivered by Richard N. Hughes (Nov. 11, 1983) (available in Fordham Law School library).

tribunal, the case should be turned over to a collection agency which could collect the fines through garnishment and other similar remedies.<sup>180</sup> Moreover, the fines should be increased and the collected revenue earmarked either for passenger safety or for offsetting the cost of liability for failure to provide for passenger safety.<sup>181</sup>

Finally, the TA should investigate the availability of federal grants. When surveillance cameras were installed in the Columbus Circle and Times Square subway stations,<sup>182</sup> eighty percent of the \$500,000 and \$1.2 million installation costs, respectively, was paid by the Federal Urban Mass Transit Administration.<sup>183</sup> The remaining twenty percent was paid by New York State and New York City.<sup>184</sup> With such a large percentage of funding coming from federal grants, the TA should continue to pursue such programs,<sup>185</sup> which would then reduce the potential tort liability for crime.

## VII. Conclusion

Upon creation of the Department of Transportation and the Department of Housing and Urban Development, Congress received the following message from President Johnson:

As long as he has lived in cities, man has struggled with the problem of urban transportation.

But:

—Never before have these problems affected so many of our citizens.

—Never before has transportation been so important to the development of our urban centers.

—Never before have residents of urban areas faced a clearer choice concerning urban transportation

—shall it dominate and restrict enjoyment of all the values of urban living, or shall it be shaped to bring convenience and efficiency to our citizens in urban areas.<sup>186</sup>

---

180. *Id.*

181. *Id.*

182. See *N.Y. Times*, Feb. 5, 1983, at 27, col. 3.

183. *Id.*

184. *Id.*

185. See 49 U.S.C. §§ 1602, 1604 (West Supp. 1983) for discussion about the federal urban mass transit grant program.

186. See 49 U.S.C. § 1608 note, Reorg. Plan of 1968, No. 2 (West 1976) for the text of the message to Congress.



Although this message was delivered in 1968,<sup>187</sup> the language is still applicable to crimes perpetrated upon mass transit passengers. If crime is allowed to continue because the TA has no tort liability, then the fear of such crime will restrict urban life. Passenger security should be a goal of the TA and must be encouraged through the recognition of a duty owed by the TA to its passengers.

*Robert S. Ondrovic*

---

187. *Id.*