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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ADAM VUE,

Plaintiff and Appellant,

v.

GABRIEL LOBOS et al.,

Defendants and Respondents.

A123313

(Contra Costa County  
Super. Ct. No. C07-01238)

There can be no doubt that plaintiff Adam Vue suffered grievous injuries in a horrific incident in which he was shot by an unknown assailant while test driving a car owned by defendant East Bay Mitsubishi while accompanied by defendant Gabriel Lobos, a salesman at the Mitsubishi dealership. The question is whether defendants can be held liable for those injuries. Because we conclude that defendants did not owe Vue a duty of care, we answer that question in the negative. We therefore affirm the summary judgment for defendants.

**BACKGROUND**

The pertinent facts, of which there are few, are largely undisputed. On January 11, 2007, Vue went to the East Bay Mitsubishi car dealership to test drive a car. After Vue selected a car, he and Lobos left on a test drive, with Vue eventually taking the wheel and driving the car onto Interstate 80. At some point during the drive, a car entered the freeway from the right and nearly merged into the car Vue was driving. He abruptly swerved to the left to avoid colliding with the merging car and honked his horn. Lobos then threw his hands in the air as if to indicate, “What are you doing? Learn how

to drive.” Though he did not allege it in the complaint, according to Vue’s deposition testimony, Lobos also “flipped off” the occupants of the other car. Lobos then saw that a passenger in the other car was pointing a gun at them so he ducked, yelling to Vue that someone in the other car was shooting at them. A bullet struck Vue in the head, causing the car to go out of control, strike a tree, and eventually come to rest on its roof.<sup>1</sup> Vue survived but suffered serious injuries.

On June 7, 2007, Vue filed a complaint for negligence against Lobos and East Bay Mitsubishi. In pertinent part, the complaint alleged:

“6. On or about January 11, 2007, Plaintiff was test-driving a vehicle owned by defendant East Bay Mitsubishi, and was operating the vehicle, a Nissan SUV, with the permission and consent of defendant East Bay Mitsubishi, westbound on Interstate 80 near the off-ramp of Interstate 80 and McBryde Avenue. Defendants [sic], Gabriel Lobos, the agent and employee of East Bay Mitsubishi, was a passenger and was accompanying Plaintiff on the test-drive at approximately 1444 hours on January 11, 2007.

“7. Plaintiff, while operating the vehicle in a westbound direction on Interstate 80, nearly collided with an unknown driver, who was operating a Nissan vehicle. Plaintiff sounded the horn on his vehicle to avoid the collision. The unknown driver accelerated and cut off the vehicle being driven by Plaintiff. At that point in time, defendant Gabriel Lobos, for an unknown reason, threw his hands in the air as a sign to the unknown driver indicating ‘What are you doing?’ This hostile reaction on the part of Gabriel Lobos caused the unknown driver of the Nissan to respond by firing a weapon, an unknown caliber firearm, into the interior of the vehicle being driven by Plaintiff,

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<sup>1</sup> In Lobos’s declaration in support of defendants’ summary judgment motion, he stated, “Our car went out of control and I managed to reach over and steer it until it finally came to rest.” This is inconsistent with all other evidence in the record of what happened after Vue was shot. Lobos testified at deposition that he grabbed the steering wheel and pulled it to the right, which caused the car to hit a tree and roll over. Police photos confirm that the car came to rest upside down.

striking him in the head, causing severe and permanent injuries. Plaintiff's vehicle then struck what was believed to be a tree and rolled over, coming to rest on its top.

"8. Defendants, and each of them, knew or in the exercise of reasonable care should have know [sic], that the hostile response on behalf of defendant Gabriel Lobos invited the response which occurred from the unknown driver of the other Nissan. The conduct of defendant Lobos constituted extreme lack of due care and gross negligence which directly and proximately caused Plaintiff to receive life-threatening injuries resulting in his permanent disability."

The complaint alleged that as a proximate result of defendants' conduct, Vue suffered permanent brain damage and physical impairment, incurred and continues to incur medical and incidental expenses as a result of the injuries, and sustained a loss of earnings. He prayed for general damages, medical and incidental expenses, loss of earnings, and costs of suit.

On August 1, 2007, defendants demurred to Vue's complaint, arguing that the complaint failed to state a cause of action because defendants did not owe Vue a duty of care to protect him from an unforeseeable shooting by a third party and because the allegations did not demonstrate causation.

In opposition, Vue argued that defendants owed him a duty to act with due care, a duty Lobos breached with his affirmative act of making a hostile gesture at the unknown assailant, which in turn caused the assailant to shoot Vue in the head. Citing *Michael R. v. Jeffrey B.* (1984) 158 Cal.App.3d 1059 (*Michael R.*), Vue made a distinction between a situation involving nonfeasance, in which a person who fails to act to protect another from harm inflicted by a third party owes no duty to the injured party absent the existence of a special relationship, and one involving misfeasance, where the defendant engaged in an affirmative act which creates an undue risk of harm. This case, Vue argued, involved Lobos's misfeasance, or his act of making a hostile gesture at the unknown assailant, which created a foreseeable risk of harm to Vue. Vue further argued that because of the prevalence of "road rage," the unknown assailant's violent reaction

was a foreseeable reaction to Lobos's hostile gesture or, at the very least, raised a question of fact regarding foreseeability.

On September 13, 2007, the trial court issued a tentative ruling overruling defendants' demurrer. The court explained: "Plaintiff's complaint is not based on mere nonfeasance. Rather, plaintiff relies on the affirmative act of defendant Gabriel Lobos. (Complaint, paragraph 7.) For purposes of this demurrer, plaintiff has adequately alleged that defendant's at least mildly provocative gesture towards an already hostile driver created an undue risk of injury to plaintiff. (See, *Michael R.*, *supra*, 158 Cal.App.3d 1059, 1070-1071.) Defendants' demurrer raises the kind of fact-intensive issue more appropriately addressed in a motion for summary judgment."

A hearing was held, and on October 23, 2007, the trial court entered an order overruling the demurrer. After unsuccessfully petitioning for a writ of mandate, defendants answered the complaint on December 19, 2007.

On July 28, 2008, defendants moved for summary judgment, asserting the same two grounds on which the demurrer was based, namely that they owed Vue no duty of care to protect him from the criminal act of a third party because the shooting was unforeseeable, and that Vue could not prove a causal link between Lobos's gesture and the shooting.

Vue's opposition largely repeated the arguments made in his opposition to the demurrer. He again disputed that Lobos did not owe him a duty of care, contending instead that Lobos's affirmative act of gesturing at the unknown assailant created an undue, foreseeable risk of harm to Vue. He also argued that the facts clearly support the conclusion that the assailant fired in response to Lobos's hostile gestures.

After defendants filed a reply, the trial court issued a tentative ruling granting the motion as follows:

"Defendants East Bay Mitsubishi and Gabriel Lobos' motion for summary judgment is granted. The elements of duty and causation cannot be established. The California Supreme Court has clearly indicated that a defendant cannot be liable for the criminal act of a third party unless there is a high level of foreseeability of the criminal

act. See *Wiener* [, *supra*,] 32 Cal.4th 1138, 1149-1150; *Castaneda* [, *supra*,] 41 Cal.4th 1205, 1214. There is no evidence that Lobos could, or should have, anticipated such violent and unexpected conduct by third parties, even if Lobos ‘flipped off’ the third party driver. There are also no prior, similar incidents where customers have been shot, or were victims of any crime, during test drives in the area. See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 679-680.

“Evidence of causation is also lacking. In order to survive summary judgment, there must be evidence that Lobos’ actions were a substantial factor in bringing about Plaintiff’s injury. A mere possibility of causation is not enough. See *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th [763, 780]. ‘No one really knows why people commit crime. . . ,’ [*Ann M. v. Pacific Plaza Shopping Center, supra*, 6 Cal.4th at p. 679 citing *7735 Hollywood Blvd. Venture v. Superior Court* (1981) 116 Cal.App.3d 901, 905] and there is no evidence here that Lobos’ gesture was the cause of shooting any more than Plaintiff’s honking at the vehicle or any other factor. *Gregorian v. National Convenience Stores, Inc.* (1985) 174 Cal.App.3d 944, 949.”

After hearing argument, the court granted the motion and entered judgment in favor of defendants.

This timely appeal followed.

## **DISCUSSION**

### **A. Standard of Review**

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. As applicable here, with moving defendants, they can meet their burden by demonstrating that “[a] cause of action has no merit,” which they can do by showing that “[o]ne or more of the elements of the cause of action cannot be separately established . . . .” (Code Civ. Proc., § 437c, subd. (c)(1); see also, *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486 [statute of limitations]; *Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 632 [summary adjudication and judgment properly granted where plaintiffs

suffered no damages].) Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

On appeal “[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]” (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff’s claims. (*Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at pp. 486-487.) Or, as we said in *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807, in affirming a summary judgment for the defendant employer, “We review the evidence presented to the trial court and independently adjudicate its effect as a matter of law. (*Lee v. Crusader Ins. Co.* (1996) 49 Cal.App.4th 1750, 1756.)”

### **B. Applicable Law of Negligence**

To prevail on an action for negligence, a plaintiff must show that defendant owed him or her a legal duty, that defendant breached the duty, and that the breach was a proximate or legal cause of plaintiff’s injuries. (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188; *Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 673.) Thus, the threshold question here is whether defendants owed Vue a duty of care, the existence of which is a question of law. (*Sharon P. v. Arman, Ltd.*, *supra*, 21 Cal.4th at p. 1188.)

It is a fundamental principle of tort law that a “defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.” (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 399; accord, *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 46 [“[E]very case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct. [Citation.]”].) And it is likewise well established that “as a general matter,

there is no duty to act to protect others from the conduct of third parties.” (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 234-235.)

Courts have, however, recognized exceptions to this general no-duty-to-protect rule. (*Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th at p. 235.) For example, courts have recognized exceptions in cases of nonfeasance, where defendant’s failure to take certain precautions, typically in the context of a special relationship such as landlord/tenant, resulted in injury caused by a third party. (*Ibid.*) In fact, we recently recognized that a jailer owes a prisoner a duty of care to protect the prisoner from foreseeable harm inflicted by a third party in light of the special relationship between the jailer and the prisoner. (*Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 246.) Courts have also recognized a duty of care in cases of misfeasance, or when defendant’s affirmative conduct has increased the risk of harm to plaintiff by a third party. (See, e.g., *Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 488-489 (*Burns*); *Weirum v. RKO General, Inc., supra*, 15 Cal.3d at pp. 48-49; *Michael R., supra*, 158 Cal.App.3d at pp. 1068-1071; *Pamela L. v. Farmer* (1980) 112 Cal.App.3d 206, 209-210.)

Although the parties, and Vue in particular, discuss the nonfeasance/misfeasance distinction at length, there is no dispute that in the matter before us, Vue alleges that his injuries resulted from defendants’ misfeasance, that is from Lobos’s hostile hand gestures that supposedly prompted the shooting. And in such a case, “the question of duty is governed by the standards of ordinary care. . . .” (*Weirum v. RKO General, Inc., supra*, 15 Cal.3d at p. 49; accord, *Pamela L. v. Farmer, supra*, 112 Cal.App.3d at p. 209 [“where the defendant, through his or her own action (misfeasance) has made the plaintiff’s position worse and has created a foreseeable risk of harm from the third person . . . the question of duty is governed by the standards of ordinary care”].)

In *Rowland v. Christian* (1968) 69 Cal.2d 108, our Supreme Court enunciated numerous factors relevant to a consideration of whether to depart from the general principle that one is not liable for injuries caused by a third party. It identified the “major” factors as “the foreseeability of harm to the plaintiff, the degree of certainty that

the plaintiff suffered 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 consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian, supra*, 69 Cal.2d at p. 113. See *Burns, supra*, 173 Cal.App.4th at pp. 488-489; *Castaneda v. Olsher, supra*, 41 Cal.4th at p. 1213; *Wiener v. Southcoast Childcare Centers, Inc., supra*, 32 Cal.4th at p. 1145.)

The question whether one owes a duty to another is decided on a case-by-case basis. (*Weirum v. RKO General, Inc., supra*, 15 Cal.3d at p. 46.) But our colleagues in Division Four have recently reminded us, however, that in determining whether such a duty exists, our task " 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' " (*Burns, supra*, 173 Cal.App.4th at p. 488, quoting *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6; accord *Dillon v. Legg* (1968) 68 Cal.2d 728, 741 ["Such reasonable foreseeability does not turn on whether the particular plaintiff as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected."]); *Jackson v. Ryder Truck Rental, Inc.* (1993) 16 Cal.App.4th 1830, 1839.)

With these principles in mind, we turn to the question of whether defendants owed Vue a duty of care.

### **C. Defendants Did Not Owe Vue a Duty of Care**

As directed by a long line of authorities, we begin with an examination of the primary consideration identified in *Rowland v. Christian, supra*, 69 Cal.2d at p.113:

foreseeability of the risk of harm.<sup>2</sup> (*Dillon v. Legg, supra*, 68 Cal.2d at p. 739; *Weirum v. RKO General, Inc., supra*, 15 Cal.3d at p. 46; *Castaneda v. Olsher, supra*, 41 Cal.4th at p. 1213.) Vue insists that the trial court erred in granting summary judgment because road rage is so prevalent in the United States that the shooting was a foreseeable response to Lobos’s hostile gestures or, at the very least, “[was] definitely foreseeable enough to create a question of fact for the jury.” In fact, “[f]oreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court.’ [Citation.]” (*Sharon P. v. Arman, Ltd., supra*, 21 Cal.4th at p. 1188.)<sup>3</sup> And, we conclude, it is not reasonably foreseeable that someone in another vehicle would respond to a hand gesture made over a traffic dispute with deadly force.

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<sup>2</sup> The trial court applied a heightened foreseeability standard, and defendants urge us to do so here, arguing that such a standard applies where plaintiff seeks to hold defendant liable for harm resulting from a third party’s criminal acts. (See *Castaneda v. Olsher, supra*, 41 Cal.4th at pp. 1220-1221; *Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th at p. 243.) Case law makes clear, however, that in cases involving alleged misfeasance, ordinary standards of care apply. (*Weirum v. RKO General, Inc., supra*, 15 Cal.3d at p. 46; *Pamela L. v. Farmer, supra*, 112 Cal.App.3d at p. 209.)

<sup>3</sup> In *Ballard v. Uribe, supra*, 41 Cal.3d 564, the California Supreme Court recognized that there is “confusion . . . over the respective roles played by the court and the jury in determining liability . . . [which] may stem, at least in part, from the fact that the ‘foreseeability’ concept plays a variety of roles in tort doctrine generally; in some contexts it is a question of fact for the jury, whereas in other contexts it is part of the calculus to which a court looks in defining the boundaries of ‘duty.’ ” (*Id.* at pp. 572-573, fn. 6.) The court explained: “The foreseeability of a particular kind of harm plays a very significant role in [the duty] calculus [citation], but a court’s task—in determining ‘duty’—is not to decide whether a *particular* plaintiff’s injury was reasonably foreseeable in light of a *particular* defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party. [¶] The jury, by contrast, considers ‘foreseeability’ in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant’s conduct was negligent in the first place. Second, foreseeability may be relevant to the jury’s determination of whether the defendant’s negligence was a proximate or legal cause of the plaintiff’s injury.” (*Ibid.*)

As noted, in support of his claim that it was foreseeable the gunman would respond as he did to Lobos's gesture, Vue argues that road rage is so prevalent in the United States that such a response is to be expected. As his sole evidence, Vue cites a 1995 survey of 526 motorists commissioned by the Automobile Association and summarized in an article entitled *Road Rage*.<sup>4</sup> According to Vue, the survey found that almost 90 percent of motorists had experienced road rage incidents during the prior 12 months, and 60 percent admitted to losing their tempers behind the wheel. The article also reported, based on "unverified figures," that up to 1200 deaths a year are attributable to road rage incidents. According to Vue, "the criminal act of road rage is a foreseeable probability every time a person gets behind the wheel." We simply cannot agree.

In the context of duty of care, foreseeability does not mean the mere possibility of occurrence. (*Hegyesh v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1133 ["[C]reation of a legal duty requires more than a mere possibility of occurrence since, through hindsight, everything is foreseeable"].) Rather, in assessing foreseeability, "[T]he court evaluates . . . whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may be appropriately imposed on the negligent party. [Citation.] What is 'sufficiently likely' means what is 'likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.'" (Martinez v. Bank of America (2000) 82 Cal.App.4th 883, 895.) And it cannot be said that a hand gesture is sufficiently likely to prompt a deadly response such that liability should be imposed on defendants.

It is undeniable that so-called road rage incidents happen. And it goes without saying that what happened to Vue was a terrible tragedy perpetrated by antisocial

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<sup>4</sup> Joint, *Road Rage*, The Automobile Association Group Public Policy Road Safety Unit (1995) <<http://www.aaafoundation.org/resources/index.cfm?button=agdrtext#Road%20Rage>> (as of July 9, 2009).

cowards. Nevertheless, our society is not as *Vue* portrays—that is, a society in which one runs a risk of death by gunshot every time one gets in a car and drives down the road. Yes, there are acts of aggression that result from disagreements between drivers. Yet, that does not make it foreseeable that shrugging one’s hands at, or even “flipping off,” the occupants of a car that just made a dangerous move would prompt the occupants to respond with a deadly weapon. Considering that in one year alone, Americans drive over two trillion miles,<sup>5</sup> the likelihood of encountering a driver who responds to a disagreement with deadly force is so infinitely small that it cannot be said to be reasonably foreseeable. (See, e.g., *Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 466 [“foreseeability of any serious harm [from a TB test] to a sufficiently appreciable segment of the general public is too remote to justify the imposition of a duty to warn on the defendants”].)

Prosser and Keeton colorfully explain it this way: “There is normally much less reason to anticipate acts on the part of others which are malicious and intentionally damaging than those which are merely negligent; and this is all the more true where, as is usually the case, such acts are criminal. Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law. Under such ordinary circumstances, it is not reasonably to be expected that anyone will hurl a television from an apartment building window, rob and beat up a boy in a public restroom, forge a check, push another man into an excavation, abduct a woman from a parking lot and rape her, hold up a patron in the parking lot of a bank, or shoot a patron in the parking lot of a restaurant. Although such things do occur, as must be known to anyone who reads the daily papers, they are still so unlikely in any particular instance that the burden of taking continual precautions against them almost always exceeds the apparent risk.”

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<sup>5</sup> This estimate is derived from an online December 12, 2008 *Wall Street Journal* article reporting that in 2008, miles driven by Americans fell 3.5 percent to 2.45 trillion miles. <[www.marketwatch.com/story/americans-drive-100-billion-fewer-miles-in-past-year](http://www.marketwatch.com/story/americans-drive-100-billion-fewer-miles-in-past-year)> (as of July 9, 2009).

(Prosser & Keeton, Torts (5th ed. 1984) § 33, p. 201, fns. omitted; see also *Weirum v. RKO General, Inc.*, *supra*, 15 Cal.3d at p. 47, citing Prosser, Law of Torts (4th ed. 1971) pp. 146-149 [“It is true, of course, that virtually every act involves some conceivable danger. Liability is imposed only if the risk of harm resulting from the act is deemed unreasonable—i.e., if the gravity and likelihood of the danger outweigh the utility of the conduct involved.”].) Likewise here—although serious road rage incidents happen, they are so unlikely that the imposition of liability would cause an undue burden.

Having exhausted the first *Rowland v. Christian* factor, we turn to the remaining considerations and conclude that another factor weighs in favor of finding no duty under these circumstances. That is, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach. At first glance, the burden on defendants and consequences to the community of imposing a duty might seem slight. In these circumstances, it is a matter of not gesticulating in response to a traffic-related conflict. On further reflection, however, the issue is more complicated. How is a driver to know what reaction is acceptable and what is not? Is it acceptable to shake one’s head when someone cuts off one’s car? To honk one’s horn? Where is the line to be drawn? And how is a driver to know where that line is? It would be virtually impossible to determine under what circumstances one must stifle one’s reactions for fear of retaliation. For example, if a driver is patiently waiting for a parking space and just as the departing car pulls out, another car quickly pulls into the space, must the driver forebear from saying, “Hey, I was waiting for that parking space.”? Or suppose a driver is in his parked car when someone in the car next to him opens the door and hits his car; must he check himself from informing the other driver that he just hit his car door for fear of igniting an argument? If we were to impose a duty under the circumstances of this case, it could conceivably lead to endless and unwarranted extensions of liability to situations where defendants simply failed to stifle reasonable reactions. This we cannot abide.

Finally, the remaining *Rowland v. Christian* factors, while less significant than the foregoing, generally militate against imposition of a duty. The certainty of Vue’s

injury cannot be disputed. As to the closeness of the connection between Lobos's gestures and Vue's injury, however, there is no evidence connecting the shooting to Lobos. It is possible that the shot was fired in response to Lobos's conduct, but it is also possible it was fired in response to Vue's driving, his act of honking the horn, or simply because the driver of the other car entered the freeway with a passenger intent on committing an assault. The moral blame attached to Lobos's conduct is minimal if not nonexistent: shrugging one's hands or even "flipping off" another motorist in response to a near collision is fairly innocuous behavior. As to the prevention of future harm, certainly the elimination of road rage incidents is an admirable objective in the abstract, but nothing suggests that imposing a duty of care under these circumstances would in any way effect that objective.

In light of the foregoing, we agree with the trial court that defendants did not owe Vue a duty of care. Summary judgment was therefore properly granted. And because we conclude that summary judgment was properly granted based on the absence of a duty, we need not address defendants' alternative ground for summary judgment, namely whether Lobos's alleged breach of that duty was a proximate cause of Vue's injuries. (*Ann M.*, *supra*, 6 Cal.4th at p. 674.)

#### **DISPOSITION**

The summary judgment for defendants East Bay Mitsubishi and Gabriel Lobos is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.