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Terrorism, Tourism, and Torts: Liability in the Event of a Terrorist Attack on a Sports or Entertainment Venue

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TERRORISM, TOURISM, AND TORTS: LIABILITY IN THE EVENT OF A TERRORIST ATTACK ON A SPORTS OR ENTERTAINMENT VENUE

I. INTRODUCTION

Trips to "Sin City" Las Vegas, Disney World, or just a day at the home team's ballpark have long been some of America's treasured pastimes. Whether it is luck at the blackjack table, taking a ride on Dumbo's Flying Adventure, or cheering for a favorite team at the stadium, these activities all have two things in common: they represent American freedom and American capitalism. The symbolic values of these activities also make them top terrorist targets. It is difficult to predict exactly where the next terrorist attack may occur, but it is clear that no place in America is safe, especially sports and entertainment venues. Should an attack happen in such a venue, what are the resulting legal consequences for the venue owner? This Comment answers this question. Section II explains why sports and entertainment venues are attractive terrorist targets and what is being done to protect them. Section III examines the

1. See Donna Balancia, Orlando No. 2 as destination, FLA. TODAY, Jan. 15, 2004, at 1C (citing Orlando, Florida, and Las Vegas, Nevada as top vacation spots).

2. For a discussion of sports and entertainment venues as terrorist targets, see infra notes 9-16 and accompanying text. Las Vegas took a tremendous financial hit after September 11th because its tourism industry is highly dependent upon air travel, which came to a virtual halt after September 11th. See Hubble Smith, LV Recovered Quickly from 9-11 Attacks, LAS VEGAS REV.-J., Sept. 11, 2004, at 1A (discussing impact of September 11th on Las Vegas). But Las Vegas also made a relatively quick financial recovery in part because of an advertising campaign portraying Las Vegas as a place where people could escape from the harsh realities of the post-September 11th world. See id.

3. See Martha Stoddard, Official: No place safe from terrorism, OMAHA WORLD-HERALD, June 16, 2004, at 6A (postulating no place is safe, "not even the fly-over, low-profile middle of the country"); see also Fear Factor, DALLAS MORNING NEWS, Sept. 9, 2004, at 11A (citing poll finding "Americans are as fearful of becoming victims of terrorism as they are of losing their jobs or having their homes burglarized.").

4. For purposes of this Comment, sports and entertainment venues are defined to include amusement parks, casinos, and professional sports stadiums.

5. While many terrorist organizations target the United States, this Comment focuses specifically on Al Qaeda. Currently, Al Qaeda is deemed to be the greatest threat to American security. See Current and Projected National Security Threats to the United States: Hearing Before the Senate Select Comm. on Intelligence, 107th Cong., 2nd Sess. 92 (2002) [hereinafter Hearing] (statement of Dale Watson, Executive Assistant Director for Counterterrorism and Counterintelligence, Federal Bureau of Investigation). Dale Watson identified Al Qaeda as the "most urgent threat to U.S. interests." Id. Therefore, this Comment focuses on the attractiveness of sports and

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elements of a potential negligence lawsuit against a venue.\textsuperscript{6} Section IV discusses the legal aftermath of September 11th and how it may set the precedent for government response to future terrorist attacks.\textsuperscript{7} Section V concludes that in the wake of another terrorist attack, venue owners are not likely to be held liable in tort.\textsuperscript{8} Nonetheless, upgraded security measures should still be implemented.

II. SPORTS & ENTERTAINMENT VENUES AS POTENTIAL TERRORIST TARGETS

A. Why Target Sports and Entertainment Venues?

Sports and entertainment venues are types of "soft targets" prone to a terrorist attack for three main reasons.\textsuperscript{9} First, these venues are symbolic. American sports symbolize American culture.\textsuperscript{10} Entertainment venues and casinos in particular, represent American capitalism.\textsuperscript{11} Second, these venues are difficult to secure because large numbers of people are constantly entering and leaving entertainment venues as a target to Al Qaeda. For a discussion of sports and entertainment venues as terrorist targets and what is being done to protect them, see \textit{infra} notes 9-27 and accompanying text.

6. For a discussion of negligence law suits, see \textit{infra} notes 28-109 and accompanying text.

7. For a discussion of legislative responses to the September 11th terrorist attacks, see \textit{infra} notes 115-46 and accompanying text.

8. For a discussion of why sports and entertainment venue owners are not likely to be held liable in tort because of superceding and intervening causes, see \textit{infra} notes 99-108 and accompanying text.

9. "Soft targets" are targets which are not well-protected so terrorists can gain access to them relatively easily. \textit{See CNN Breaking News 15:50: Baghdad Hotel Blast} (CNN television broadcast, Mar. 17, 2004) (defining soft targets as those "readily available" to terrorists); \textit{see also} Tom Clonan, \textit{Any time any place}, \textit{Irish Times}, Oct. 26, 2002, at W1 (opining on terrorists’ shifting focus to civilian “soft targets”); \textit{Canada AM: New Year's Eve Terrorist Threats} (CTV television broadcast, Dec. 31, 2002) [hereinafter \textit{Canada AM}] (discussing Times Square as terrorist target). Times Square on New Year's Eve is a soft target because terrorists “can come and go rather quickly, where they can get in with the least amount of people checking them.” \textit{Canada AM}, supra.


11. “Las Vegas Sheriff-elect Bill Young” was harshly criticized for commenting that because Las Vegas is “America’s playground, . . . we have to be a prime target for fundamentalists whose beliefs are radically different from ours.” Steve Friess, \textit{Securing America’s playground}, \textit{U.S. News & World Rep.}, Mar. 31, 2003, at 37.
the facilities. Small areas with lots of people are especially susceptible to chemical terrorist attacks. For a chemical attack to be effective, an indoor or closed environment is needed so that toxins can affect people quickly. Third, tourist venues have been attacked in other countries, demonstrating the desirability of these locations. Fortunately, such attacks have not been successful in the United States. It is for these reasons that venue owners must be vigilant in their security efforts.

B. What is Being Done to Protect Sports & Entertainment Venues?

Venue owners have implemented a variety of preventative security measures, sometimes with the involvement of state and fed-

12. See Donald Schmidt, From Green to Seeing Red, ACCESS CONTROL & SECURITY Sys., Aug. 2004, at 36 ("Hotel, lodging and convention facilities, for example, face unique security challenges because they encounter a constant flow of guests, vendors, deliveries and vehicles that vary on a daily basis."); see also Is Your Store a Terrorist Target?, IOMA's SECURITY DIRECTOR'S REP., Feb. 2003, at 4-5 (discussing difficulty of securing public spaces like retail stores and shopping malls).


14. See id. at 496-501 (describing chemical terrorist attack).


16. There was one recent unsuccessful plan to attack a shopping mall in Ohio. See David Johnston, Somali Is Accused of Planning a Terror Attack at a Shopping Center in Ohio, N.Y. TIMES, June 15, 2004, at A16 (discussing indictment of Somali man with Al Qaeda ties who allegedly planned to blow up shopping mall); see also Lisa Hoffman, Recent cases point to vulnerability of 'soft targets', at http://www.shns.com/shns/g_index2.cfm?action=detail&pk=SOFTTERROR-06-14-04 (June 14, 2004) (discussing vulnerability of soft targets in light of recently revealed plots to blow up shopping malls and apartment buildings and Al Qaeda's plans to recruit people who do not look Middle Eastern to attack "soft targets").
eral governments. In Nevada, a state law requires resort hotels to create emergency response plans. The National Football League ("NFL") made efforts to improve stadium security when it organized a task force to create a plan for "best practices for NFL stadiums and best practices for security." The Meadowlands Sports Complex (home to the New York Giants) was prompted in part by its proximity to New York City to dramatically increase its security measures. Disney World has improved its security as well. The famed theme park recently added the same type of barricades used to protect "the White House, U.S. embassies and nuclear-waste depots." Disney World and Disney Land also successfully lobbied Congress to pass a law permanently declaring the airspace over both parks as no-fly zones. A recent federal law made restrictions

17. See Roberts, supra note 15, at 31 (describing Nevada law requirements). An emergency response plan must include such information as "the hotel's access routes, . . . notice regarding the presence of unusually hazardous substances and . . . an evacuation plan that would be implemented during an actual emergency." Id.; see also Anjeanette Damon, No teeth in state's emergency response law, RENO GAZETTE-J., Nov. 1, 2003, at 1A (criticizing 2003 Nevada law requiring hotels create emergency plans because of law's lack of enforcement provision); Schmidt, supra note 12, at 4 (noting importance of emergency response plans to insurance carriers especially in facilities "where a large number of people gather").

18. Fordham Symposium, supra note 10, at 352. One challenge in trying to implement NFL policies in individual stadiums is that the NFL commissioner does not have direct control over all stadiums. See id. Rather, "[t]hese venues are owned by cities, states and in some instances, the team owners themselves." Id. The NFL attempted to ensure individual stadium compliance by hiring an independent security firm to audit stadiums. See id. at 353. The audit confirmed that most stadiums are in fact compliant. See id.

19. See Wade, supra note 10, at 18-22 (detailing Meadowlands Sports Complex's changes in security, financial impact of changes, and evaluating effectiveness of changes). Some of the more significant security improvements include: an increased presence of security personnel, a pat-down of every costumer entering the stadium, and a crack down on what items are allowed to be brought into the stadium. See id. at 20.


21. See id. (describing barriers added to Disney World).

22. See Sean Mussenden & Henry Pierson Curtis, No-fly zones shield Disney's resorts, ORLANDO SENTINEL, May 11, 2003, at A1 (recounting passage of law banning flights above Disney theme parks). A no-fly zone bars "planes from flying below 3,000 feet within 3 miles of the center of the parks . . . ." Id. at A20. This flight restriction is suppose to prevent a terrorist from getting a plane close enough to the theme park to attack it. See id. Some local aerial advertisers are critical of the federal law, claiming that it will not protect against a terrorist attack and that Disney's real motive in seeking passage of the law was to stifle aerial advertisements that lure Disney visitors to neighboring entertainment venues. See id. Some also question why Disney is one of the few private sector locations with permanently closed airspace. See id. at A21. Other "targets of symbolic value, including Minnesota's Mall of America, other Central Florida theme parks such as SeaWorld Or-
on airspace over certain sports stadiums permanent as well. Drills are conducted to ensure that venues are ready in the event of an attack. The Department of Homeland Security sponsors drills to train personnel at “soft targets” on how to handle a terrorist attack. Las Vegas also conducted a preparedness drill of its own involving the release of a mock aerial plague on the Las Vegas strip. But venue owners’ implementation of upgraded security measures is not entirely altruistic. Improved security is motivated in part by fear of negligence suits.

III. NEGLIGENCE LAWSUITS ARISING FROM A TERRORIST ATTACK

A. Negligence Lawsuits

To win a negligence suit, a plaintiff must prove five elements: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached the duty of care; (3) the plaintiff suffered actual harm; (4) the defendant’s breach of the duty of care caused the plaintiff’s harm; and (5) the plaintiff suffered damages as a result of the harm.


24. See Shaun Waterman, Training against terrorism uses malls, at http://washingtontimes.com/business/20030717-095939-8773r.htm (July 18, 2003) (discussing Department of Homeland Security’s pilot “counterterrorism training program for the staff of shopping malls, sports stadiums, [and] amusement parks” that will provide training on “the ‘four Ds’—devaluing the target; deterring would-be terrorists; detecting attacks and preoperational surveillance or other preparations; and defending against attacks”); see also Barkett, supra note 13, at 512 (discussing devastating results of “hypothetical smallpox bioattack in shopping malls”).


26. See Fordham Symposium, supra note 10, at 353 (quoting Milton Ahlerich, Vice President of Security for NFL). In describing why NFL team and stadium owners implemented improved security measures since September 11th, Ahlerich noted that implementing these improvements is “first and foremost, . . . a business decision.” Id.

27. One attorney involved in the drafting of new NFL security measures commented, “[y]ou are creating a very, very dangerous set of documents.” Id. at 393. Another attorney advised lawyers counseling sports venue clients that “to the extent to which there are Best Practices developed in your industry, if your client is not abiding by those Best Practices, that will be Exhibit 1 in any litigation.” Id. at 392.
dant breached that duty; (3) the defendant factually caused the plaintiff's harm; (4) the defendant should be legally liable for the harm caused to the plaintiff; and (5) the plaintiff suffered damages as a result of the injury.\textsuperscript{28} One type of negligence occurs when a member of the public is injured by a third-party's criminal act while at a business establishment.\textsuperscript{29} Should a venue fall victim to a terrorist attack, a negligence suit could result.\textsuperscript{30}

The visitors to the venue are the largest class of potential plaintiffs.\textsuperscript{31} The type of owner of the venue will determine whether they are liable.\textsuperscript{32} Amusement parks are generally owned by private corporations and are thus subject to traditional tort law.\textsuperscript{33} Other venue owners can not be sued in tort. Some casinos are owned not

\textsuperscript{28} See Dan B. Dobbs, Law of Torts § 114 (2000) (outlining elements needed for negligence). A duty of care is generally defined as "the duty of reasonable care under the circumstances, no more, no less." \textit{Id.} § 115.

\textsuperscript{29} See \textit{Restatement (Second) of Torts} § 344 (1965) [hereinafter \textit{Restatement}]. This section describes landowner liability as follows:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

\textit{Id.;} see also Josephine M. Pottebaum, Note, Missouri Supreme Court Clarifies: Siding with Business Owners in Negligent Security Actions May Have Been Wrong All Along, 68 Mo. L. Rev. 505, 505 (2003) (analyzing L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P., 75 S.W.3d 247 (Mo. 2002)). A recent Missouri Supreme Court opinion changed a longstanding Missouri law that barred customers injured on a business owner's premises from suing. \textit{See Pottebaum, supra, at 505.} The Missouri Supreme Court allowed a patron injured in a shopping mall to sue the mall owner "as a third party beneficiary of the contract between the shopping center and the security company . . . ." \textit{Id.}


\textsuperscript{31} See Josh Romero, A Victim's Eye View of the September 11th Victim Compensation Fund, Def. Couns. J., Jan. 2004, at 68 (noting World Trade Center and Pentagon ground victims as largest group of victims of September 11th attack). Other categories of September 11th victims include plane passengers, damaged property owners, and holders of life insurance plans. \textit{See id.} at 65-66. Other possible plaintiffs in the hypothetical include employees of the venue or neighboring property owners whose property is injured by the attack.

\textsuperscript{32} See \textit{supra} note 4 (noting sports and entertainment venues are defined to include amusement parks, casinos, and professional sports stadiums).

\textsuperscript{33} See Walt Disney World Co. v. Goode, 501 So. 2d 622, 626-27 (Fla. Dist. Ct. App. 1986) (affirming jury award against Disney in tort).
by private corporations, but by Native American tribes. In fact, tribes own some of the largest casinos in the United States. Sovereign immunity protects them from a tort suit. Sovereign immunity also protects the large number of sports stadiums owned by city or state governments. Many states have laws granting immunity to

34. See Kevin K. Washburn, Recurring Problems in Indian Gaming, 1 Wyo. L. Rev. 427, 427 (2001) ("[A] little more than one third of the 556 federally-recognized Indian tribes nationwide, operate Indian gaming facilities.") (footnote omitted).

35. See The Largest Casinos in the United States, at http://www.jetcafe.org/~npc/gambling/casino_size.html (last updated Jan. 2, 2005) (listing six of top twenty casinos in United States are owned by Native American Tribes). The two largest casinos in the United States are Foxwoods, located in Ledyard, CT and owned by the Mashantucket Pequot Tribe, and Mohegan Sun, located in Uncansville, CT and owned by the Mohegan Tribe. See id.

36. See Frazier v. Turning Stone Casino, 254 F. Supp. 2d 295, 315 (N.D.N.Y. 2003) (dismissing boxer's civil rights suit against casino owned by Native American tribe). The court explained the meaning of sovereign immunity as follows:

Native American tribes are "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of tribal sovereign immunity bars suits for damages against a tribe, including suits arising from its off-reservation commercial activities and the activities of a tribal entity such as the Casino. Id. at 305 (citations omitted). The federal government is also usually immune from suit in tort. See Dobbs, supra note 28, at § 261 (discussing government immunity under Federal Tort Claims Act, 28 U.S.C. § 1491 (2004)). There is a lawsuit pending against the federal government arising from the 1995 Oklahoma City bombing. See Bombing Victims Sue, Nat'l L.J., Mar. 31, 1997, at A8 (describing notice filed by 34 bomb victims' families). The basis of the plaintiff's claim is that "'[t]he United States government neglected to protect persons in and around the Murrah Building, despite knowing that terrorists had discussed plans for violence before April 19, 1995 ....'" Id. The suit has not yet gone forward because not enough evidence has been gathered. See Like Oklahoma Incident?, Conn. L. Trib., Sept. 17, 2001 (stating opinion of attorney for Oklahoma City bombing victims that September 11th will not impact his potential suit because of distinction between foreign versus domestic terrorists).

state-owned recreation facilities. The only possible defendants may be team owners leasing stadiums from the government.

B. Applying the Negligence Framework to a Hypothetical Terrorist Attack

Consider the following hypothetical: during a football game, a truck bomb explodes outside Giants Stadium in East Rutherford, New Jersey. The largest class of potential plaintiffs is the fans injured while attending the game. The likely defendants are the owners of the New York Giants. This hypothetical examines the

38. See Dobbs, supra note 28, at § 238 (noting state statutes limiting liability for recreation facilities though usually limited to recreational facilities for which there is no charge); see also William E. Westerbeke, The Immunity Provisions in the Kansas Tort Claims Act: The First Twenty-Five Years, 52 U. KAN. L. REV. 939, 941 (2004) (describing Kansas historically following common law doctrine of sovereign immunity from tort suit); see, e.g., KAN. STAT. ANN. § 75-6104(o) (2003) (stating government immunity from suit for injury at state owned recreational facilities); N.J. STAT. ANN. § 59:2-7 (2004) (stating same as Kansas statute).

39. For a discussion of owner liability in the context of the New York Giants, see infra note 42 and accompanying text. Further complications might develop if a terrorist attack occurred at a state owned sports venue not being used by the sports team, but for another event. For example, "[p]romoters and other sport event organizers often use [sports stadium facilities] for only a day or a few days." GLENN M. WONG, ESSENTIALS OF SPORTS LAW § 4.5 (3d ed. 2002). A promoter might rent a sports stadium venue for: concerts, ice shows, circuses, boxing matches, or other events. See id. Thus, their liability in the event that a spectator is injured may differ from the stadium owner whose facility the promoter is leasing. See id. A promoter might be responsible for exercising reasonable care in regard to supervising their specific event, but a stadium owner would be responsible for "patent defects" in the stadium or its security. See id.; see also O'Connell v. N.J. Sports & Exposition Auth., 766 A.2d 786, 788 (N.J. Super. Ct. App. Div. 2001) (noting promoter and sponsor of sporting event do not owe duty to injured security guard).

40. For a discussion of the 1993 World Trade Center bombing, see infra notes 57-59 and accompanying text. This hypothetical situation was chosen because it represents a similar type of attack to the 1993 World Trade Center bombing. Giants Stadium was chosen as the venue because of its proximity to Manhattan, the site of the September 11th attacks. See Fordham Symposium, supra note 10, at 357 n.33 (noting proximity of Giants Stadium to World Trade Center); compare Barkett, supra note 13, at 541-43 (hypothesizing on tort consequences of hypothetical suicide bomber in shopping mall during holidays if Congress does not intervene with insurance coverage) with hypothetical posed in this Comment.

41. For a discussion of different classes of plaintiffs, see supra note 31. Other plaintiffs relevant to our hypothetical might include employees of the New York Giants and the opposing team, or people owning property near the stadium whose property is damaged by flying debris. The fans attending the game were selected as plaintiffs for purposes of this Comment because of the inability to explore every possible scenario. Further, fans would likely be the largest class of potential plaintiffs and are most analogous to victims of the September 11th and 1993 World Trade Center attacks.


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specific negligence elements of duty, breach of duty, factual causation, and proximate causation. Civil suits filed in real terrorist attacks are compared with the hypothetical.

1. Duty

As the first part of their claim, the injured fans need to prove the New York Giants owed them a “duty of care.” Historically, the group owing patrons a duty of protection from third-party criminal acts has been narrowly defined. Today, business owners owe their patrons a duty to exercise reasonable care to protect them from harm. It is easiest for plaintiffs to establish a duty under this general definition. Conversely, the totality of the circumstances test is

Authority ("NJSEA") and the New York Giants are tenants of the stadium. See Giants Stadium Facts & Figures, MEADOWLANDS.COM, at http://www.meadowlands.com/giantsFacts.asp?navID=7 (last visited Apr. 1, 2005). Liability for a terrorist attack would likely fall to the owners of the New York Giants team and not the NJSEA because the NJSEA is a government entity generally immune from suit. See supra notes 37-38; see also O'Connell, 766 A.2d at 791-92. When a plaintiff was injured by snow that was not removed from the aisles, the court dismissed a lawsuit against NJSEA, but not the New York Giants. See O'Connell, 766 A.2d at 791-92. The court recognized that the New York Giants, as lessees, had a duty to third parties “to have the premises in a reasonably safe condition.” Id. at 790. But the dismissal of the NJSEA may have been meaningless since the New York Giants may be able to sue for indemnification under their lease agreement. See id. at 791 n.2; see also Vanchieri v. N.J. Sports & Exposition Auth., 514 A.2d 1323, 1324-27 (N.J. 1986) (holding defendant, security company, could not benefit from NJSEA's sovereign immunity from liability for plaintiff injured by another fan during football game in absence of proof that security company had acted using security plans and deployment provided by NJSEA); Rodriguez v. N.J. Sports & Exposition Auth., 472 A.2d 146, 148 (N.J. Super. Ct. App. Div. 1983) (holding NJSEA immune from suit because state law grants public entities “immunity from liability for injuries and damages resulting from the failure to provide police protection or the failure to provide sufficient police protection”).

43. For purposes of this Comment, damages are not examined because the other four elements are likely to be the more contentious elements.

44. See Dobbs, supra note 28, at § 115 (explaining duty as first element needed to prove negligence suit).

45. See id. § 324 (noting under traditional negligence law, liability for third-party acts was limited to common carriers). Today, most courts follow the rule that all businesses, including sports and entertainment venues, may be held liable for third-party acts. See id.; see also Thomas C. Homburger & Timothy J. Grant, A Changing World: A Commercial Landlord's Duty to Prevent Terrorist Attacks in Post-Septem-

ber 11th America, 36 J. MARSHALL L. REV. 669, 670-71 n.6, 671-72 n.7 (2003) (comparing historical cases where no duty to protect against third-party criminal acts was found with modern cases finding such duty); Wong, supra note 39, at § 4.5 (describing duty owed by sports venues to protect guests from harm).

46. See Restatement, supra note 29, at § 344 cmt. d (defining duty to exercise "reasonable care" for business owners who open their land to public).

47. See Dobbs, supra note 28, at § 115 (stating “[i]n the ordinary case, . . . the defendant does owe a duty of care”).
a slightly more restrictive standard.\textsuperscript{48} This test does not impose blanket liability as a matter of law, but instead considers every factor the defendant should have known.\textsuperscript{49} Some courts define duty more narrowly by using a "prior similar incidents" test.\textsuperscript{50} At its most restrictive application, this rule imposes liability only if similar incidents previously occurred on the landowner’s property.\textsuperscript{51} Finally, some courts utilize the assumption of duty approach to define duty.\textsuperscript{52} Assumption of duty occurs only when the venue owner “expressly or implicitly promise[s] to provide security.”\textsuperscript{53} A court uses the venue owner’s actions as the basis for which to impose duty.\textsuperscript{54}

2. \textit{Applying Duty in Previous Civil Suits and the Hypothetical}

In the context of September 11\textsuperscript{th} litigation, the District Court for the Southern District of New York used a general definition of duty to find that a duty existed.\textsuperscript{55} Therefore, the court declined to dismiss a civil suit filed on behalf of victims’ families against the airlines and similarly situated defendants.\textsuperscript{56} The plaintiffs in the

\textsuperscript{48} See id. at § 324 (explaining totality of circumstances test).

\textsuperscript{49} See id. (noting requirement of previous incident occurring on landowners premises as conservative approach).

\textsuperscript{50} Compare id. (defining "prior similar incidents" test), with \textit{Restatement}, supra note 29, at § 344 cmt. f (defining reasonable care as not necessarily dependent upon prior incidents). Section 344 cmt. f provides:

A Business owner may . . . know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If . . . [the business owner] should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

\textit{Restatement}, supra note 29, at § 344 cmt. f.

\textsuperscript{51} See Dobbs, supra note 28, at § 324 (explaining restrictive application of “prior similar incidents” test).

\textsuperscript{52} See Homburger & Grant, supra note 45, at 678 (discussing landlord assuming duty to her tenant). The Homburger and Grant landlord-tenant analysis can be analogized to the hypothetical. The New York Giants are “in effect” landlords to the fans who fill the role of the tenant. It is this landlord-tenant relationship that creates the duty from the New York Giants to the fans.

\textsuperscript{53} Id.

\textsuperscript{54} See id. (describing court use of assumption of duty in landlord-tenant context).

\textsuperscript{55} See \textit{In re Sept. 11 Litig.}, 280 F. Supp. 2d 279, 287 (S.D.N.Y. 2003) (holding defendant airlines, airplane manufacturer, airport security companies, Port Authority of N.Y. and N.J., and World Trade Center property owner owed duty to ground victims injured on September 11\textsuperscript{th} as matter of law).

\textsuperscript{56} See id. The court reasoned that imposing a duty did not open the defendants to limitless liability. See id. The class of plaintiffs is not infinite and Congress has capped the maximum amount of damages that could be recovered. See id. at
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hypothesised would probably face a similar result. When duty is defined so broadly, it is unlikely a court would find the New York Giants did not owe fans a general duty of reasonable care.

Unlike the broad definition used for September 11th plaintiffs, the New York Supreme Court applied a totality of the circumstances analysis to a civil suit brought on behalf of victims of the 1993 World Trade Center bombing. The 1993 bombing is factually similar to the hypothetical because it involved a truck bomb in the parking garage of the World Trade Center. In that case, the court found a duty existed. This would be helpful precedent for plaintiffs in the hypothetical. In deciding if a duty existed, a court considers such facts as the likelihood of the attack on that day, any information the New York Giants had about a specific attack, and if similarly situated venues had been attacked before. A court applying the totality of circumstances test to the hypothetical would find


57. See In re World Trade Ctr. Bombing Litig., 776 N.Y.S.2d 713, 736 (N.Y. Sup. Ct. 2004). The court defined duty as follows: "The Port Authority's duty is defined by what risks or dangers were and should reasonably have been anticipated by the Port Authority from having a high profile building, with a public parking garage under it, which permitted 'unvetted' vehicles to enter and exit without encountering any barriers or surveillance." Id. But see Gross v. Empire State Bldg. Assocs., 773 N.Y.S.2d 354, 356 (N.Y. App. Div. 2004) (dismissing claim against Port Authority for lack of duty). Gross involved an incident where a man opened fire on the observation deck of the Empire State Building killing one tourist, injuring six more, and then killing himself. See id. The court explained its unwillingness to define duty as the plaintiff suggested:

[I]t simply cannot be said that in 1997, when, as defendants aptly note, metal detectors were much less prevalent than today, the Empire State Building and its landlords could reasonably have foreseen the events of February 23, 1997 [a man opening fire on the observation deck] and be held to the duty urged by plaintiffs, namely the use of x-ray machines, metal detectors and scanners together with armed security guards and the inspection of all bags and packages.

Id. (footnote omitted).


59. See id. at 736 (explaining why duty found in case).

60. See id. at 738 (listing facts known to defendant). The court noted that the Port Authority should have been aware of specific factors indicating an attack was imminent. See id. (stating Port Authority knew "domestic terrorism was rising, the WTC [World Trade Center] was an attractive terrorist target, car bombs were becoming the terrorists' method of choice, and the underground parking garage was highly vulnerable to a terrorist attack").
a duty existed, assuming there was information indicating the New York Giants should have known of the possibility of an attack.

The "prior similar incidents" test poses more of a challenge for the hypothetical plaintiffs.61 A court adopting this definition of duty will not recognize that the New York Giants must protect their fans from terrorism because no terrorist attacks have occurred at Giants Stadium.62 From a public policy perspective, this would be an unpopular result. A court may decline to apply the "prior similar incidents" test by simply deeming terrorism as a unique type of third-party criminal act to which the traditional "prior similar incidents" test should not apply.63

Under assumption of duty analysis, security improvements are used to define duty.64 Giants Stadium implemented a variety of security upgrades since September 11th, including ones specifically aimed at restricting vehicle access to the stadium.65 A court applying the assumption of duty approach will view these steps as evidence of assumption of duty and impose liability on the New York Giants. In summary, under every test but the antiquated "prior similar incidents" test, a court would find that the New York Giants owed its fans a duty of care.

3. Breach of Duty

Next, injured fans would need to show that Giants Stadium did not have the safety precautions of a reasonable sports stadium and the New York Giants therefore breached the duty they owed to the fans.66 Reasonable care does not mean, though, that the New York Giants must "guarantee safety."67 Determining whether a defen-

61. See id. at 735 (rejecting implicitly "prior similar incidents" test by stating "landlord does not have to have had a past experience with the exact criminal activity, in the same place, and of the same type, before liability can be imposed for failing to take reasonable precautions to discover, warn, or protect").
62. See Dobbs, supra note 28, at § 324 (defining "prior similar incidents" test as requiring previous crimes of similar nature to have occurred on landowner's premises before liability is imposed).
63. See Reynolds, supra note 30, at 169-70 (noting difficulty of applying negligence principles to terrorist attack).
64. See Homburger & Grant, supra note 45, at 670 (identifying assumption of duty in context of landlord's use of security in post-September 11th world).
65. See Wade, supra note 10, at 20 (noting vehicles no longer allowed under Giants Stadium during games and delivery vehicles are restricted and searched).
66. See RESTATEMENT, supra note 29, at § 283 cmt. b ("The words 'reasonable man' denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.").
dant acted reasonably is normally a question of fact for the jury to
decide. What a jury may view as reasonable security measures to-
day may be higher than what they were before September 11th.
Reasonable security measures are viewed in light of any specific
warnings given to the venue indicating that an attack was foresee-
able. Venue owners have a duty to inform the public of credible
threats to their safety. If the New York Giants had specific infor-
mation indicating that an attack was foreseeable, but failed to re-

spectively, they breached their duty of care. The jury
could examine security measures implemented at other sports stadi-

ums to determine if the New York Giants were in accord with indus-

2004) (stating “landlords are not insurers of the safety of those who use their
premises”); Homburger & Grant, supra note 45, at 681-82 (discussing landlord’s
duty). “Like a landlord’s pre-September 11th common-law duty to protect against
third-party criminal acts, a landlord is not an insurer against such terrorist attacks
from occurring.” Homburger & Grant, supra note 45, at 681-82.

68. See Dobbs, supra note 28, at § 115 (outlining elements of negligence suit).

69. See Ed Bethune et al., What’s Expected Now: The “reasonable man” standard for
liability is much higher since Sept. 11, LEGAL TIMES, Feb. 4, 2002, at 24 (noting new
definition of “reasonable man”). “Today’s reasonable man is not the same man he
was before Sept. 11. What the public - the community that is the reasonable man-
considers foreseeable with respect to terrorism and what it regards as reasonable
steps to prevent terrorist attacks have been fundamentally altered.” Id.; see also
Homburger & Grant, supra note 45, at 682 (observing landowners may “now be
required to take all reasonable steps to make the premises safe and secure from
terrorist attacks because these attacks are now foreseeable”).

70. See Steve Friess, In Vegas, fear and insecurity cloud denials of terror threat, Bos-
ton Globe, Aug. 13, 2004, at A8 [herinafter Vegas Threat] (describing events lead-
ing up to press leak). In August 2004, it was leaked to the press that casino officials
declined to view video tapes given to them by the FBI that were collected from
terrorists and suggested the terrorists may be targeting Las Vegas casinos. See id.
Allegedly, the officials did not want to view the tapes for fear of being sued for
negligence should they have viewed them and not responded with appropriate
security measures. See Editorial, Hedging their bets, TIMES UNION (N.Y.), Aug. 16,
2004, at A6. Some have argued in response to the Las Vegas casino owner’s failure
to take the FBI warnings seriously that the law should be changed so that “anyone
in a position of responsibility who deliberately ignores a potential terror threat is
subject to treble liability and criminal penalties.” Id.; see also Bethune, supra note
69, at 24 (suggesting companies use outside counsel in preparing security assessment
reports to prevent use of information later in litigation as evidence of com-
pany awareness of security risks).

71. See RESTATEMENT, supra note 29, at § 344 (describing landowner’s duty “to
exercise reasonable care to . . . give a warning adequate to enable the visitors to
avoid the harm, or otherwise to protect them against it”); see also Dobbs, supra note
28, at § 324 (stating “landowners who open their land to the public for business . . .
[must exercise] care against harms that are generally foreseeable even when the
wrongdoer’s presence is not known and the wrongdoer himself not specifically
identifiable”) (footnote omitted). In response to the August 2004 incident, casino
officials argued that the information reported to them did not indicate a “specific
and credible threat.” See Vegas Threat, supra note 70, at A8 (quoting statements of
Las Vegas officials responding to allegations that they failed to disclose possible
terror threat to public).
If the measures implemented by the New York Giants were reasonable, the jury could conclude that there was no breach. If, however, the jury did find the venue breached their duty of care, the analysis turns to factual causation.

4. Factual Causation

Assuming the injured fans could establish the New York Giants owed them a duty of care and that the New York Giants breached that duty, the fans must then establish that the defendant's actions caused them real harm. Some jurisdictions apply the factual causation concept by using a "but for" test. In other words, "but for" the truck being allowed outside of Giants Stadium and exploding, the plaintiffs would not have been injured. For the hypothetical plaintiffs, establishing factual causation is not a major obstacle. A

72. See Restatement, supra note 29, at § 295A cmt. b (defining use of custom in negligence suit). Section 295A defines the use of custom as follows:
Evidence of the custom is admissible, and is relevant, as indicating a composite judgment as to the risks of the situation and the precautions required to meet them, as well as the feasibility of such precautions, the difficulty of any change in accepted methods, the actor's opportunity to learn what is called for, and the justifiable expectation of others that he will do what is usual, as well as the justifiable expectation of the actor that others will do the same.

Id.; see also Homburger & Grant, supra note 45, at 675 (quoting Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 486 (D.C. Cir. 1970)). In Kline, "the court emphasized that particular landlord-tenant situations and evidence of custom among landlords of the same building type 'may play a significant role in determining if [the] standard [of reasonable care] has been met.'" Id.

73. See Dobbs, supra note 28, at § 114 (discussing jury determination that defendant did not breach duty of care).

74. See id. § 115. The Restatement combines factual and legal causation into one category of "legal causation." See Restatement, supra note 29, at § 9. This Comment distinguishes between factual and proximate causation because this is the approach used by the majority of courts and this analysis is easier to understand. See Jim Gash, At the Intersection of Proximate Cause and Terrorism: A Contextual Analysis of the (Proposed) Restatement Third of Torts' Approach to Intervening and Superceding Causes, 91 Ky. L.J. 523, 529-30 (2002-03) (examining difference in definitions of factual and proximate causation in Restatement First and Second, and drafts of Restatement Third).

75. See Dobbs, supra note 28, at § 115 (explaining "but for" cause in fact test).
similar “but for” analysis will likely be used in the September 11th civil suits pending against the airlines.76

5. **Proximate Causation**

Proximate causation is the most challenging aspect of the hypothetical plaintiffs’ suit. Proximate cause is difficult to define and is often subjected to varying interpretations depending on the jurisdiction.77 At its most basic level, proximate cause asks whether the type of harm the defendant risked is within the scope of harm which should subject someone to liability.78 Proximate cause is generally a question of fact for the jury, but it can be a question of law for the judge to resolve when “reasonable people cannot differ.”79 When proximate cause is a question of law, the court largely engages in an exercise of “line drawing.”80 The court tries to determine whether certain harms are too remote to hold the defendant liable.81 Foreseeability is thus a key part of determining whether an act is the proximate cause of the harm suffered.82

The District Court for the Southern District of New York faced the issue of “line drawing” in the September 11th civil suits.83 The Air Transportation Safety and System Stabilization Act (“Safety Act”) establishes that the only court with jurisdiction over lawsuits arising from the September 11th terrorist attacks is the Southern District of New York.84 The court set a time limit for when a lawsuit

76. See Gash, supra note 74, at 601-02. Gash argues in regard to civil suits by September 11th victims' families that “it is beyond dispute that allowing the terrorists onto the plane with the box-cutters was a factual cause of the harm suffered.” Id.

77. See id., at 528-30 (exploring history of definition of proximate cause); see also W. PAGE KEETON, PROSSER & KEETON ON TORTS § 41 (5th ed. 1984) (noting confusion surrounding application of proximate cause doctrine).

78. See Dobbs, supra note 28, § 180 (citing proximate cause as also called “legal cause” and defining it as “the appropriate scope of responsibility”); see also Keeton, supra note 77, at § 41 (noting influence of policy on proximate causation). “[L]egal limitation on the scope of liability is associated with policy - with our more or less inadequately expressed ideas of what justice demands, or of what is administratively possible and convenient.” Keeton, supra note 77, at § 41.


80. See Dobbs, supra note 28, at § 181 (discussing “line drawing”). “[T]he line against liability must be drawn somewhere and . . . the proximate cause rules reflect the effort courts make to draw that line.” Id.

81. See id. (explaining how courts establish proximate cause).

82. See id. (noting proximate cause often is “question of foreseeability”).

83. For a discussion of the specific suits involved, see infra notes 85-86 and accompanying text.

relating to the September 11th tragedy no longer falls within the jurisdictional limitation Congress imposed in the Safety Act. The reasoning used to determine the limit of the jurisdictional grant of the Safety Act is analogous to a proximate cause analysis. In the context of the Safety Act, the court is asking when it is going too far to say that a case "results from" the terrorist attack such that Congress meant to limit jurisdiction of the case only to the Southern District of New York.

In the hypothetical, proximate causation asks whether a terrorist attack on Giants Stadium is a foreseeable event for which the New York Giants should be liable. If the question is presented to

Section 408(b)(3) requires: "The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001."  

85. See Graybill v. City of N.Y., 247 F. Supp. 2d 345, 347 (S.D.N.Y. 2003). In Graybill, a construction worker was injured while cleaning up the World Trade Center disaster site. See id. at 346. The court determined that jurisdiction over the case was not proper in federal court because: "Despite the rather broad language of the jurisdictional grant in Section 408(b)(3) [of the Safety Act], Congress could not have intended that every possible harm connected to the terrorist crashes of September 11 . . . be brought into the United States District Court for the Southern District of New York . . . ." Id. at 352. The state court was the proper place for the suit because the injuries the plaintiff suffered were "common to construction and demolition sites generally, and risks and duties not alleged to be particular to the special conditions caused by the [September 11 attacks]." Id. at 356; see also Spagnuolo v. Port Auth. of N.Y. & N.J., 245 F. Supp. 2d 518, 521 (S.D.N.Y. 2002) (relying on Graybill to dismiss from federal court similar suit brought by injured construction worker). But see Robert L. Rabin, Indeterminate Future Harm in the Context of September 11, 88 VA. L. REV. 1831, 1869 (2002) (criticizing 9/11 Victim Fund for failing to include "exposure only claimants" in compensation). Had workers who only suffered exposure injuries been included in the 9/11 Fund, they would have been able to recover through the fund or pursue traditional tort options. See id. Thus, the claims in Graybill and Spagnuolo would have been proper in federal court under the Safety Act. For further discussion of the 9/11 Fund, see infra notes 118-37 and accompanying text.

86. See Graybill, 247 F. Supp. 2d at 351-52 (asserting analogy between determining jurisdictional limitation of Safety Act and proximate cause analysis); see also Hickey v. City of N.Y., 270 F. Supp. 2d 357, 376 (S.D.N.Y. 2003) (relying on proximate cause comparison used in Graybill). In Hickey, the court dismissed on the same jurisdictional limitations of the Safety Act relied upon in Graybill, claims for respiratory injuries caused to rescue workers who helped clean up the World Trade Center site after a specified date. See 270 F. Supp. 2d at 361. The court reasoned that if "death or injury occurred as demolition and clean-up efforts proceeded after September 29, 2001, the causal relationship with the terrorist-related aircraft crashes becomes attenuated, and duties and responsibilities associated with the workplace become predominant." Id. at 377.

87. See Graybill, 247 F. Supp. 2d at 351-52 (discussing application of Congressional limitation on jurisdiction).

88. See Dobbs, supra note 28, at § 181 (examining connection between proximate cause and foreseeability).
the jury, the New York Giants will argue that proximate causation should be defined narrowly.\textsuperscript{89} By using a narrow definition, the New York Giants are hoping that liability will not be imposed. The better option for the New York Giants is to have the judge rule as a matter of law that proximate causation can not be found.\textsuperscript{90} Judge determination has a better chance of being based more closely in the law than jury determination because the judge may be less swayed by sympathy for the fans than the jury. A number of factors are relevant to the court deciding whether the act was a proximate cause: (1) symbolic nature of the event attacked; (2) information indicating foreseeability of attack; (3) any superceding and intervening causes; and (4) policy considerations as to who should bear responsibility for compensating victims of terrorism. Each of these factors is discussed below.

The symbolic nature of the venue, a specific event being hosted, or the date an event is taking place are considered under proximate cause analysis.\textsuperscript{91} A symbolic event, such as the Super Bowl, or a symbolic date, such as the Fourth of July, may be tempting and foreseeable targets for a terrorist attack.\textsuperscript{92} High profile events and dates aside, it is difficult to imagine a court holding that a terrorist attack is foreseeable.\textsuperscript{93} In the hypothetical, the court

\textsuperscript{89}. See Gash, \textit{supra} note 74, at 603. The question of foreseeability may be a broad or narrow one depending on who is framing the question. For example, in defining foreseeability in civil litigation involving September 11th, the airline industry may state: “Unless you find that it is foreseeable that individuals allowed onto a plane in Boston with two-inch blades will hijack the plane and intentionally fly it into a skyscraper in New York, you must find that [United or American] was not a proximate cause of the plaintiffs’ injuries.” \textit{Id.} In contrast, the injured plaintiffs would offer an alternative framing of proximate cause to the jury: “If you find that allowing individuals onto a plane with two-inch blades creates a foreseeable risk of personal injury or property damage to others, then you must find that [United or American] was a proximate cause of plaintiff’s injuries.” \textit{Id.} at 604.


\textsuperscript{91}. See Ron Hurst et al., \textit{American Sports As A Target of Terrorism: The Duty of Care after September 11th}, at \url{http://www.mmwr.com/_uploads/UploadDocs/publications/American%20Sports%20As%20A%20Target%20Of%20Terrorism.pdf} (last visited Apr. 2, 2005). It is hard for sports and entertainment venues to know what to prepare for: “[e]xcept for specific high profile events, such as the World Series, the Super Bowl or the Olympics, which logically are greater symbolic targets, the available threat information is general at best, causing leagues, teams and venues to prepare for a range of possible incidents at their facilities . . . .” \textit{Id.}

\textsuperscript{92}. See \textit{id.} (opining relevance of symbolism of event and date to foreseeability of terrorism).

\textsuperscript{93}. See Homburger & Grant, \textit{supra} note 45, at 680 (noting changing definition of foreseeability post-September 11th). “In light of the September 11th attacks, is any terrorist attack now foreseeable, even in parts of the United States far removed from major U.S. cities like New York City and Washington D.C.?” \textit{Id.}; see also Robert L. Rabin, \textit{The September 11th Victim Compensation Fund: A Circumscribed
would consider the proximity of Giants Stadium to the World Trade Center as a factor indicating that terrorism may be foreseeable at the venue. The court could also consider any circumstances that would make the stadium particularly vulnerable that day, such as a significant event or special guests in attendance, perhaps an important government official.

A second factor relevant to proximate cause is whether there was specific information available indicating that a terrorist attack might take place on that particular day or within a time period. The Department of Homeland Security’s color-coded terrorism ranking system indicates foreseeability. If the threat level is particularly high at the time of the hypothetical attack, the court may hold that a terrorist attack was foreseeable to the New York Giants.

Superceding and intervening causes also influence the court’s analysis. An intervening cause is an act that occurs between the initial act of negligence and the injury that does not sever the chain.
of causation. In contrast, a superceding cause does sever the chain of causation between the original act and the harm suffered. In the context of a negligence lawsuit based on injuries inflicted by terrorism, the terrorist's actions may arguably constitute a superceding cause relieving the defendant of liability. The New York Giants would argue that even if they were negligent in failing to implement adequate security measures, terrorist actions sever the chain of causation. The jury will determine if the terrorist's actions are a superceding cause. The jury could be influenced by the difficulty the victims may encounter in executing a judgment against the terrorists if they are held as the only liable defendants.

100. See BLACK'S LAW DICTIONARY 234 (8th ed. 2004) (defining intervening cause).
101. See id. at 235 (defining superceding cause).
102. See In re Sept. 11 Litig., 280 F. Supp. 2d 279, 289 (S.D.N.Y. 2003) (identifying unsuccessful argument by World Trade Center owners in their motion to dismiss civil suit brought by victims of September 11th). “The Port Authority and WTC Properties argue that they did not owe a duty to protect occupants in the towers against injury from hijacked airplanes and, even if they did, the terrorists' actions broke the chain of proximate causation, excusing any negligence by the WTC Defendants.” Id.; see also Gash, supra note 74, at 579-88 (discussing history of superceding and intervening causes and application to civil suits arising out of September 11th). But see Port Auth. of N.Y. & N.J. v. Arcadian Corp., 189 F.3d 305, 319 (3d Cir. 1999) (dismissing claim against fertilizer manufacturer regarding 1993 bombing of World Trade Center because terrorists' actions were “superceding and intervening events breaking the chain of causation . . . [and thus the] bombing was not proximately caused by the defendants”); Gaines-Tabb v. ICI Explosives, USA, Inc., 160 F.3d 613, 621 (10th Cir. 1998) (holding terrorists' use of fertilizer manufactured by defendant in Oklahoma City bombing as superceding cause relieving defendants of liability).
103. See Gash, supra note 74, at 586 n.199 (citing cases where jury determined whether intervening act is foreseeable).
104. See Reynolds, supra note 30, at 162 (noting due to difficulty of recovering judgment from terrorist groups, “the likely target for injured plaintiffs will be the solvent party with the most broadly defined responsibility for protection – the landowner”); see also Bob Van Voris, Sept. 11 laws raise fears of tort reform, NAT'L L.J., Dec. 3, 2001, at A1 (discussing difficulty of collecting judgment if suit successful against Osama Bin Laden); Anthony Sebok, Understanding Victims' Rights Under the New Air Transportation Safety and System Stabilization Act, FINDLAW.COM, at http://writ.findlaw.com/sebok/20011008.html (Oct. 8, 2001) [hereinafter Understanding Victims' Rights] (discussing difficulty of suing terrorists). “Needless to say, it is a fantasy to dream of suing the terrorists responsible [for September 11th]. At least 19 are dead. Their remaining compatriots will be hard to find, and, if found, will have other things to worry about than defending a tort suit.” Understanding Victims' Rights, supra. But see Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 91-92 (D.D.C. 2003) (allowing some claims filed by September 11th victims' families to go forward against “nearly two hundred entities or persons – governments, government agencies, banks, charitable foundations, and individuals, including members of the Saudi royal family . . .” for supporting terrorists); Smith v. Islamic Emirate of Afg., 262 F. Supp. 2d 217, 220, 240-41 (S.D.N.Y. 2003) (awarding September 11th victim families default judgment against "Emirate of Afghanistan, the
Proximate cause “line drawing” necessarily implicates policy questions as to how American society should compensate victims of domestic terrorism. Courts balance inflicting an unfair burden on privately funded victim compensation with ensuring that the private sector does its part to prevent terrorism. But these interests may be properly resolved by the legislature and not the courts. Such was the federal government’s response to September 11th. It remains to be seen whether this response will assist future defendants such as the New York Giants in the hypothetical.

IV. THE LEGAL AFTERMATH OF SEPTEMBER 11TH

Section III discussed the potential success of a negligence lawsuit against a sports or entertainment venue arising from a terrorist attack under the pre-September 11th legal environment. An important caveat to Section III is the legislative response to September 11th. Two pieces of legislation are particularly relevant: the Taliban, al Qaeda, and . . . Osama bin Laden” for economic losses and pain and suffering); Jess Bravin & Kara Scannell, Sept. 11 Victims Can Sue Airlines, Boeing and Landlord, WALL ST. J., Sept. 10, 2003, at B1 (discussing suit filed by large insurance companies against “Osama bin Laden, al Qaeda, Saudi Arabia, Iraq, Iran, Sudan” in order “to recover damages from assets belonging to the defendants and frozen by the U.S. government under antiterrorism legislation”).

105. See Reynolds, supra note 30, at 200. Reynolds discusses compensation for victims of the 1993 World Trade Center bombing. See id. Her analysis is an eerie premonition of the issues that have erupted concerning victim compensation regarding September 11th and future terrorist attacks. See id. Reynolds warns of the counter-productivity that can result from tort-based victim compensation: Our goals as a society are crime/terrorism prevention and victim compensation, but landlord liability seems equitable only as a prevention technique, not as a compensation mechanism. Expansive theories of liability, which have as their primary goals giving compensation to victims, while certainly desirable, are best run by the government with funds raised from society as a whole. Any rules placing burdens on landowners should therefore have prevention, rather than compensation, as their primary goal.

Id.

106. See id. (discussing importance of balancing victim compensation with terrorism prevention).

107. For a further discussion of the role of the private sector versus the government in victim compensation, see infra notes 133-37 and accompanying text.

108. See Rabin, supra note 85, at 1867 (opining reasons 9/11 Fund was created was “mix of genuine outpouring of sympathy for the victims of September 11 and great concern that the airline industry faced instant meltdown”). See generally September 11th Victim Fund, supra note 84, at §§ 401-09 (creating 9/11 Fund).

109. For a discussion of the possibility of government-funded compensation being used as a model in the future, see infra notes 133-37 and accompanying text.

110. For a discussion of a negligence lawsuit, see supra notes 28-109 and accompanying text.
tember 11th Victim Compensation Fund of 2001 ("9/11 Fund") and the Terrorism Risk Insurance Protection Act of 2002 ("TRIA"). These documents illustrate a commitment by the government to ease the financial burden of the attacks on the private sector. In the event of another terrorist attack, the 9/11 Fund will serve as a model response. In such a case, the effects of the hypothetical lawsuit would be diminished.

A. The 9/11 Fund

This section discusses the 9/11 Fund and its importance in establishing future government-funded victim compensation schemes should a terrorist strike a sports or entertainment venue. First, background on the creation of the 9/11 Fund is provided. Second, civil suits filed by September 11th victims who have decided not to participate in the fund are considered. Third, arguments offered for and against using the 9/11 Fund as a model are presented.

1. Creation of the 9/11 Fund

The 9/11 Fund is a government-funded compensation program for victims of the September 11th tragedy. Congress cre-


114. For a discussion of the use of the 9/11 Fund as a model for the future, see infra notes 133-37 and accompanying text.

115. For a discussion of the background on the creation of the 9/11 Fund, see infra notes 118-24 and accompanying text.

116. For a discussion of the civil suit alternative, see infra notes 125-32 and accompanying text.

117. For a discussion of the competing arguments regarding the 9/11 Fund, see infra notes 132-37 and accompanying text.

118. See Anthony Sebok, Disaster Plan: Can the Sept. 11 fund's alternative to court resolve future mass torts?, LEGAL TIMES, Mar. 25, 2002, at 26 [hereinafter Disaster Plan] (describing 9/11 Fund). See generally September 11th Victim Fund, supra note 84, at § 403 (describing purpose of Act). Section 403 states: "It is the purpose of this title to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related
ated the 9/11 Fund to provide fast, guaranteed, and “no fault compensation” to victims. The 9/11 Fund also ensured the financial solvency of the airline industry from the inevitable lawsuits that resulted in the wake of the tragedy. The 9/11 Fund received much attention from legal commentators due to the relative haste with which legislation creating the fund passed and the rareness of government-funded compensation. The 9/11 Fund offers an alternative to a traditional tort suit. Most victims took advantage of the 9/11 Fund, thereby forfeiting their right to a civil suit, except

aircraft crashes of September 11, 2001.” Id. The process for submitting a claim is proscribed in the Act. See id. § 405. Kenneth R. Feinberg was appointed as Special Master of the 9/11 Fund. See Holt, supra note 111, at 516 n.19 (describing Feinberg as “one of the forerunners in third party dispute resolution” and former assistant to Senator Edward Kennedy). Feinberg developed the procedures used to administer the 9/11 Fund including refining the definitions of who qualifies as an eligible claimant and drafting the paperwork necessary to receive compensation. See id. at 518-19. Once a claim is filed, Feinberg then uses a formula to compute the amount of compensation awarded. See id. at 519-22.

119. See Peter H. Schuck, The Last Days of the September 11th Victim Compensation Fund, LEGAL TIMES, June 7, 2004, at 76 (noting 9/11 Fund awards as “more generous and quickly and easily obtained than most tort remedies”); see also Understanding Victims’ Rights, supra note 104 (weighing advantages of victims accepting compensation through 9/11 Fund versus tort suit). Section 405(b)(3) requires that a determination of compensation be given “[n]ot later than 120 days after that date on which a claim is filed . . . .” See id. § 405(b)(3). Section 405(c) qualifies anyone physically injured or the relatives of an individual killed as a result of the September 11th attacks as eligible for compensation. See id. § 405(c). Section 405(b) (2) authorizes no-fault compensation because the Special Master is not to “consider negligence or any other theory of liability” in reviewing claims. Id. § 405(b)(2).

120. See Rabin, supra note 95, at 771 n.2 (commenting that title, “Air Transportation Safety and System Stabilization Act” is symbolic of primary purpose of Act); see also Disaster Plan, supra note 118, at 26 (observing airline industry only initially sought Congressional limitation on liability and only supported government-funded victim compensation when realizing limited liability would not be provided without it); Jessica Ramirez, Note, The Victims Compensation Fund: A Model for Future Mass Casualty Situations, 29 TRANSP. L.J. 283, 288 (2002) (citing criticism that 9/11 Fund was established mainly as “cost saving mechanism for the airlines” and not victim compensation).


122. See Romero, supra note 31, at 64 (providing comparison of benefits of 9/11 Fund versus traditional tort suit); see also Assessing Law, supra note 121 (offering analysis of Safety Act in comparison to traditional tort reform).
against the terrorists themselves.123 Others turned to the courts for recovery.124

2. Pursuing Tort Suit over Compensation from the 9/11 Fund

There are three main reasons why a victim's family might choose to pursue a civil remedy instead of opting for compensation from the 9/11 Fund.125 First and foremost, some victims' families want what the 9/11 Fund cannot provide: accountability from those who played a role in allowing the September 11th tragedy to happen.126 While a tort suit may not provide these answers, it does open the door to getting answers that receiving compensation from the 9/11 Fund would shut.127 Second, the 9/11 Fund may not adequately compensate a victim's family, especially those of wealthier victims.128 But a tort suit will not guarantee these families fairer compensation because the Safety Act imposes a cap on the amount

123. See Schuck, supra note 119, at 76 (noting number of claims filed). “[A]pproximately 97 percent of the death claimants and more than 4,000 personal injury claimants . . .” filed for compensation with the 9/11 Fund. Id. See generally, September 11th Victim Fund, supra note 84, at § 405(c)(3)(B)(i) (excluding right to civil suit for victims filing under 9/11 Fund and section 408(c) allowing civil suits against terrorists). For a discussion of the civil suits filed against the terrorists, see supra note 104 and accompanying text.


125. See Bravin & Scannell, supra note 104, at B1 (offering reasons why September 11th victim would sue instead of pursuing compensation from 9/11 Fund); see also Anthony J. Sebok, The Hardest Job in the Law: The Judge Who Hears September 11 Suits, and His Recent Decision to Let The Suits Go Forward, FINDLAW.COM, at http://writ.findlaw.com/sebok/20030922.html (Sept. 22, 2003) [hereinafter Hardest Job] (evaluating whether it is more advantageous for 9/11 victim's family to take advantage of 9/11 Fund or tort suit). Sebok notes that a victim's family who chooses the civil litigation route faces “months or years of uncertainty and litigation may only result in the plaintiffs receiving the same amount - or, worse, far less - than they would have received from the Fund.” Hardest Job, supra; see also Understanding Victims' Rights, supra note 104 (comparing tort suit versus 9/11 Fund recovery).

126. See Ramirez, supra note 120, at 295-97 (discussing inability of 9/11 Fund to offer victims' families accountability for the attack); see also Garcia, supra note 124, at A9 (reporting one victim's family decided to sue to “search for answers”).

127. See Bravin & Scannell, supra note 104, at B1 (quoting University of California, Berkeley law professor Stephen Sugarman). Sugarman remarked, “'[n]ow we'll have a chance to decide whether America was at fault instead of the foreigners . . . [a]nd that's very much what Congress and the [P]resident were trying to avoid [by creating the 9/11 Fund].’” Id.

128. See Ramirez, supra note 120, at 287 (noting awards to higher income victims are lower because law requires them to be offset by amounts received from collateral sources like life insurance); see also Michael I. Meyerson, Editorial, Losses of Equal Value, N.Y. TIMES, Mar. 24, 2002, at WK15 (opining that “families of the firefighter and the financier, the broker and the busboy, with their shared emotional losses, should be compensated equally”). See generally Holt, supra note 111, at 520-22 (explaining how awards are calculated).
of damages recoverable. Further, liability is limited to the amount of insurance a defendant carried on September 11th. Third, individuals who suffered property damage or loss of a business are not eligible to receive compensation from the 9/11 Fund. If their insurance does not adequately cover their loss, the traditional civil suit is the only possibility they have for receiving money.

3. Government-Funded Victim Compensation as an Alternative to Tort Law

The 9/11 Fund is the first time government-funded compensation has been provided to victims of terrorism and their families. The 9/11 Fund could be a model for future recovery programs. The 9/11 Fund is therefore relevant to the discussion of the liability of sports and entertainment venues in the event of a terrorist attack. The main argument supporting use of this model is that the costs of a terrorist attack are more properly borne by the government than the private sector.

129. See September 11th Victim Fund, supra note 84, at § 408(a) (imposing limitation on liability for damages).

130. See id. Section 408(a), Limitation on Air Carrier Liability, states: "[n]otwithstanding any other provision of law, liability for all claims, whether for compensatory or punitive damages, arising from the terrorist-related aircraft crashes of September 11, 2001, against any air carrier shall not be in an amount greater than the limits of the liability coverage maintained by the air carrier." Id.; see also Disaster Plan, supra note 118, at 26 (discussing insurance coverage limitation).

131. See September 11th Victim Fund, supra note 84, at § 405(c) (limiting 9/11 Fund eligibility only to those suffering physical injuries or death).

132. See Romero, supra note 31, at 64 (discussing possible suits over property insurance coverage and noting insurance may not fully compensate those suffering property damage and related purely economic losses).

133. See Ramirez, supra note 120, at 289 (noting 9/11 Fund as first government-funded terrorist victim compensation, and citing criticism by victims of previous terrorist attacks as to why September 11th victims deserve special treatment); see also Stuart Taylor Jr., Fairness Without Suits, LEGAL TIMES, Jan. 7, 2002, at 35 (arguing September 11th victims are no more entitled to compensation than other victims of terrorism who have not been given same benefits).

134. See Ramirez, supra note 120, at 298 (analyzing 9/11 Fund and hypothesizing about its use in future).

135. See Assessing Law, supra note 121 (advocating 9/11 Fund). One commentator noted, "the debt owed to the victims should fall on all our shoulders . . . [T]ort litigation . . . [has its] place when tragedies come in two and threes. But not when they come as a national wound." Id.; see also Reynolds, supra note 30, at 169 (concluding it is inequitable to impose liability against landlords); Stephen P. Watters & Joseph S. Lawder, The Permanent Impact of September 11th, BENCH & B. OF MINN., Sept. 2002, at 21 (recognizing "business[es] cannot be expected to carry out a governmental function, such as police-force security, justif[y]ing the creation of and compensation of victims from the ‘no fault’ Fund").
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culty the private sector faces in protecting against terrorism. Further, the use of tort law would allow the imposition of liability on “blameless defendants.”

In contrast, those critical of the 9/11 Fund argue that government-funded compensation fails to encourage the private sector to prevent terrorism. It is difficult to know which argument is stronger. Hopefully the question will never need answering. Assuming terrorists do not strike again, victim compensation will never become an issue.

B. The TRIA

Another significant piece of post-September 11th legislation is the TRIA. The TRIA is aimed at stabilizing the insurance industry. Following September 11th, insurance companies were wary of insuring against future terrorist attacks. The government responded with the TRIA to help absorb the cost of terrorism insurance and to make the insurance more affordable for businesses.

136. Taylor, supra note 133, at 35; see also Loubier & Aro, supra note 15, at 20 (noting “there is little a building owner can do to prevent attacks like those of September 11. Responsibility for preventing such acts of terrorism falls largely to the federal government.”). But see In re Air Disaster at Lockerbie, Scot. on Dec. 21, 1988, 811 F. Supp. 84, 86 (E.D.N.Y. 1992) (denying defendant security company’s motion for judgment as a matter of law, and thus, affirming jury verdict finding defendant security company and airline company’s “willful misconduct” proximately caused terrorist bombing of plane); Roberts, supra note 15, at 31 (criticizing tourism venues that “mistakenly view issues related to terrorism and security as matters for the government and not the private sector”).

137. See Leo V. Boyle, Victims Fund Will Work, but Don’t Toss Torts, LEGAL TIMES, Jan. 28, 2002, at 53 (noting President of Association of Trial Lawyers offering skepticism on ability of government to protect public from private sector dangers and citing tort law as “only meaningful and effective deterrent”).


139. See Pietanza, supra note 138, at 94. The TRIA was enacted “to provide continued coverage and affordable and predictable premiums for terrorism insurance while the insurance sector stabilizes from its September 11 losses.” Id.

140. See id. (discussing motivation for passage of TRIA).

141. See id. Many companies are not purchasing terrorism insurance. Some company executives argue the coverage is still too expensive or, more interestingly, because they think the government will offer the same financial assistance it provided after September 11th. See Joseph B. Treaster, Insurance For Terrorism Still a Rarity, N.Y. TIMES, Mar. 8, 2003, at C1. A future terrorist attack may be more financially devastating “today than on Sept. 11... because [t]errorism was regarded as a
An earlier version of the TRIA had another goal in mind: permanent tort reform.\textsuperscript{142} The House of Representatives ("House") passed a version of the TRIA that permanently limited the ability of future terrorist victims to sue anyone but the terrorists themselves.\textsuperscript{143} Had this version passed the Senate, the New York Giants would not need to be overly concerned about the financial impact of the hypothetical lawsuit. The House version represents the hope expressed by some business owners that the government will shield them from liability in the event of another terrorist attack.\textsuperscript{144} Thus, the House version is a disincentive for companies to improve security measures. If businesses know they will not be liable in the event of an attack, they have little incentive to pay for expensive improvements.\textsuperscript{145} The final version of the TRIA, however, does not give

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  \item rarity in the United States then and coverage for such attacks was included free in commercial policies." \textit{Id.} Consequently, in the absence of companies purchasing the terrorism insurance, government assistance may be necessary in the event of another attack. \textit{See id.}
  
  \textsuperscript{\textcircled{142}} \textit{See Anthony J. Sebok, Why Congress Should Reject the Republicans’ Proposal to Limit All Future Terrorism Victims’ Ability to Seek Compensation in Court, FINDLAW.COM, at http://writ.news.findlaw.com/sebok/20011203.html (Dec. 3, 2001) (advocating 9/11 Fund but criticizing TRIA provision allowing for permanent bar on future civil suits).}
  
  \textsuperscript{\textcircled{143}} \textit{Id.} The key limitation provisions of the House version of the TRIA can be described as follows:
  
  [T]he bill would bar punitive damages, eliminate joint and several liability for non-economic damages (under which a plaintiff can go after any or all defendants for compensation), require that all damage awards be offset by collateral sources such as insurance or gifts, and limit lawyers' fees to 20% of the award. \textit{Id.}
  
  Other commentators are also critical of the House version. \textit{See Dhooge, supra note 138, at 772 (describing criticism of TRIA provision for limiting future terrorist civil litigation); see also U.S. Sen. Patrick Leahy, President Signs Terrorism Insurance Bill – Reaction Of Senate Judiciary Chairman Patrick Leahy, at http://leahy.senate.gov/press/200211/112602a.html (Nov. 26, 2002) [hereinafter Reaction] (criticizing House bill). Senator Leahy remarked: "[t]he liability limits for future terrorist attacks in the House-passed bill were irresponsible because they restricted the legal rights of victims and their families and discouraged private industry from taking appropriate precautions to promote public safety." \textit{Reaction, supra.}}
  
  \textsuperscript{\textcircled{144}} \textit{See Pietanza, supra note 138, at 107-08 (noting corporate expectance of government assistance). “In the event of another terrorist attack, corporations may simply expect federal assistance just as they did following the September 11 attacks.” \textit{Id.; see also Editorial, Next bailout: Insurers?, S.F. CHRON., Oct. 28, 2001, at C6 (fearing government is establishing precedent of permanent “bail out” plan at taxpayers’ expense to help industries affected by terrorism instead of lending plan); Treaster, supra note 141, at C1 (noting small number of companies purchasing terrorism insurance possibly because of belief that in event of another attack government will provide funding).}
  
  \textsuperscript{\textcircled{145}} \textit{See Pietanza, supra note 138, at 99-100 (quoting TRIA § 107(a)(1)).}

Pietanza discusses criticism of the limitation as follows:

Members of Congress argue that if such protection was afforded, it could prevent businesses from taking precautionary steps against a future terrorist attack. Corporations fear the potentially devastating amounts of
businesses tort immunity.\textsuperscript{146} The fact that the House version ever existed may bode well for the coffers of sports and entertainment venues in the future. Perhaps a similar limited liability provision will surface again in a future government-funded compensation plan.

\textbf{V. Conclusion}

The risk of terrorist attacks on sports and entertainment venues is a reality in post-September 11th America.\textsuperscript{147} It is also a reality that even the greatest security in the world might not stop a terrorist. It makes good business sense for venue owners to prevent their venues from being targeted by terrorist groups.\textsuperscript{148} Consumers will avoid going to venues if the owners do not offer assurances that they are committed to security. A decline in attendance causes decreased profits. Venue owners must balance this business interest with the possibility of liability.\textsuperscript{149} Should the venue owner be subject to a tort suit, it would be difficult for victims to establish all of the elements necessary for a negligence case.\textsuperscript{150} Should a case make it to the jury, they may be swayed by sympathy for the victims and hold the defendant liable, especially if the attack is as large and tragic as that of September 11th.\textsuperscript{151} Mass tort suits may not reach the courts, though, if Congress passes legislation similar to the House version of the TRIA, banning all suits against defendants other than the terrorist themselves.\textsuperscript{152} The government could also intervene with a victim compensation scheme like the 9/11 damages awarded to victims of civil lawsuits. However, because TRIA allows for consolidation of suits, uncertainty is reduced because of the single forum and legal standard to be employed.

\textit{Id.} (footnotes omitted).

\textsuperscript{146} See \textit{id.} at 96 (quoting TRIA § 107(a)(1)).

\textsuperscript{147} For a discussion of why sports and entertainment venues are susceptible to a terrorist attack, see \textit{supra notes} 9-16 and accompanying text.

\textsuperscript{148} For a discussion of possible negligence lawsuits should a sports venue not implement adequate security measures, see \textit{supra notes} 28-109 and accompanying text.

\textsuperscript{149} For a discussion of the possibility of future government-funded compensation intervening to prevent a tort suit, see \textit{supra notes} 133-37 and accompanying text.

\textsuperscript{150} For a discussion of the elements of a negligence case as applied to a hypothetical terrorist attack, see \textit{supra notes} 40-109 and accompanying text.

\textsuperscript{151} For a discussion of sympathy swaying a jury into holding a defendant liable, see \textit{supra note} 104 and accompanying text.

\textsuperscript{152} For a discussion of the House version of the TRIA, see \textit{supra notes} 142-45 and accompanying text.
The government may not be as willing to fund compensation, though, especially if evidence shows businesses are relying upon it and not implementing adequate security measures as a result. Venue owners, while realizing it is not likely they will be liable in tort, must still be vigilant in improving their security measures. This motivation should not be driven entirely by public expectation, but primarily because it is the right thing to do.

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153. For a discussion of the 9/11 Fund, see supra notes 118-37 and accompanying text.

154. For a discussion of a business owner's expectation of government assistance in the wake of another terrorist attack, see supra notes 135-37 and accompanying text.