

Tort Liability After the Dust Settles: An Economic Analysis of the Airline Defendants' Duty to Ground Victims in the September 11 Litigation

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INTRODUCTION

"At its foundation, the common law of torts is a means of apportioning risks and allocating the burden of loss."¹ The unprecedented nature of the September 11 tragedy required an answer to both of these concerns. As the quotation indicates, New York's tort law addresses both the past and future.² Allocating the burden of loss is distinctly concerned with those individuals who have suffered harm. Apportioning risk is forward looking and rests on the assumption that society will organize itself and its activities in the most rational way if the burden of risk is properly assigned. The outcome of a successful tort suit elegantly accomplishes both of these goals by connecting the victim of a past harm with a party who will both compensate the victim and remain liable for any future harms that result from the same activity.

In the wake of September 11, the political branches of the U.S. government preemptively addressed both of these goals outside of the judicial system: the Air

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1. 532 Madison Ave. *Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 750 N.E.2d 1097, 1101 (N.Y. 2001).

2. See generally Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 281 (1999) (describing the development of the understanding that civil remedies serve "as both an instrument that affects future behavior and an instrument that could be used to enforce a scheme of public regulation, supplementing its traditional role as a device to remedy private harms"); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1845–46 (1992); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 199–201 (1998) (describing the "[d]ifferent philosophical paradigms [that] compete to explain the underlying purposes of . . . tort law" as "retrospective justice" and "prospective utility"); Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 784–85 ("Utilitarianism's positive portrait of the individual as a rational maximizer of utility entailed a recognition of the deterrent function of the civil sanction: sanctions necessarily were forward-looking as well as backward-looking; they served to shape future behavior as well as to restore a past status quo.").

Transportation Safety and System Stabilization Act of 2001 (“ATSSSA”)³ capped the airlines’ liability, provided large subsidies to protect the airline industry from immediate collapse, and established the Victims Compensation Fund (“Fund”). Congress effectively made the U.S. taxpayer, rather than the airlines, the medium through which the immediate costs of September 11 were to be distributed. Congress also decided that passenger screening functions of the air travel system should be federalized.⁴ These acts collectively indicate a political determination that the structure of the aviation industry should be maintained and that additional safety measures require government subsidization and control. With this complex backdrop, the U.S. District Court in New York, with exclusive jurisdiction over the lawsuits arising from the tragedy,⁵ faced an important question: whether the airlines owed a legal duty to the “ground victim” plaintiffs who elected to seek recovery in court rather than through the Fund.⁶

This Note will use the analytical framework of Guido Calabresi’s *The Costs of Accidents*, a cornerstone of economic analysis of tort law, to analyze how the district court has met this challenge. I will argue that the district court’s analysis of the duty question was incomplete under New York law in light of the special circumstances created by the legislative response to September 11. Part I will explain the question faced by the district court and how that court answered the question. Part II will explain the economic framework for analyzing tort law issues and Part III will employ this framework to detail the legislative responses to the attacks. Part IV will conclude that Congress’s sweeping policy actions should have been an important factor in the district court’s decision on the question of whether to extend the orbit of duty owed by the airlines to include ground victims.

I. THE DISTRICT COURT

A. *Procedural Posture*

On September 9, 2003, Judge Hellerstein issued the most significant ruling in the two years since the inception of his exclusive jurisdiction over the September 11 litigation: he denied the defendants’ motions attacking the legal sufficiency of the ground victims’ complaints.⁷ This Note is concerned solely with the motion filed by the “Aviation Defendants” (the airlines and airport security companies who were contractors of the airlines),⁸ who “concede[d] that they owed a duty to the crew and passengers on the planes, but contend[ed] that they did not owe any duty to ‘ground

3. Air Transportation Safety and System Stabilization Act (“ATSSSA”), Pub. L. No. 107-42, 115 Stat. 230 (2001) (sections that are relevant to this Note are codified under 49 U.S.C. § 40101).

4. Aviation and Transportation Security Act (“ATSA”), Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified in scattered sections of 49 U.S.C.).

5. ATSSSA § 408(b)(3).

6. ATSSSA § 405(c)(3)(B)(i).

7. *In re Sept. 11 Litig.*, 280 F. Supp. 2d 279, 298 (S.D.N.Y. 2003).

8. *See id.* at 288 n.5.

victims.”⁹ The district court ruled that the Aviation Defendants owed a legal duty to the ground victims and thus allowed the plaintiffs to continue their suit.¹⁰ The following sections review the legal issue of duty as it has been established in New York law, explain why Calabresi’s law and economics analysis of tort law addresses the policy issues raised by the duty question, and argue that the court did not adequately deal with the public policy implications of Congress’ actions in relationship to the economic policy that a judicial finding of duty establishes.

B. The Legal Question of Duty

The ATSSSA provided that “the law . . . of the State in which the crash occurred” would be applied in the suits that resulted.¹¹ The victims and relatives who filed suit all claimed damages under New York and Virginia tort law.¹² The court and both parties agreed that “the law of Virginia does not differ materially from New York law with respect to the issue of duty,” and concluded that New York law would be followed.¹³

The question of duty in a negligence case is a threshold question reserved for the judge.¹⁴ This question of law has implications beyond the facts of the particular case; by finding that a legal duty exists, the judge is performing a precedent-making function.¹⁵ Under New York law, “[t]he injured party must show that a defendant owed not merely a general duty to society but a specific duty to the particular claimant, for ‘without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.’”¹⁶ In other words, no one owes a duty in New York unless the court decides to impose it under the particular fact pattern of each case brought to trial.¹⁷ This presumption is relatively easy to overcome in a case that involves direct causation of an injury.¹⁸

9. *Id.* at 288–89. The other two categories of defendants are the World Trade Center landowners (“WTC Defendants”) and Boeing. *See id.* at 288. The “ground victims” were not passengers of any of the planes that were hijacked by the terrorists and chose to file suit in court rather than file a claim with the Fund. *See id.* at 286–87.

10. *Id.* at 288–89. The court later denied the Aviation Defendants’ request for leave to appeal this decision to the Second Circuit, explaining that “the questions of law to be decided will be better defined, and thus better resolved, by development of the record.” *In re* Sept. 11 Litig., No. 21 MC 97 (AKH), 2003 U.S. Dist. LEXIS 17105, at 8 (S.D.N.Y. Oct. 1, 2003).

11. ATSSSA § 408(b)(2).

12. *In re* Sept. 11 Litig., 280 F. Supp. 2d at 290.

13. *Id.*

14. *See* RESTATEMENT (SECOND) OF TORTS § 328B (1965); *In re* Sept. 11 Litig., 280 F. Supp. 2d at 291.

15. *See* Leon Green, *Foreseeability in Negligence Law*, 61 COLUMB.L. REV. 1401, 1401 (1961).

16. *In re* Sept. 11 Litig., 280 F. Supp. 2d at 290 (quoting *Lauer v. City of New York*, 733 N.E.2d 184, 187 (2000)).

17. This is the opposite of the presumption in California on the question of duty, where everyone owes a duty to everyone else *unless* a court decides that in a particular case no duty should be found. *Tarasoff v. Regents of the Univ. of California*, 551 P.2d 334, 342 (1976) (“As a general principle, 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.”). *See also* Anthony J. Sebok, *What’s Law Got To Do With It? Designing*

In addition to the fact that in New York a court must find that a "special relationship" exists, "New York has been much less willing to find duty in cases where the defendant's conduct enables foreseeable injury."¹⁹ Rather than accepting the argument that direct causation of the damages by the airlines gave rise to a duty, the court framed the duty issue in terms of negligent screening.²⁰ Thus, unlike a direct tort (as in a suit against the driver of a car), the September 11 litigation has been framed as an "enabling" tort, where the risk of liability was taken by the airlines not through simple operation of the aircraft themselves, but in their inadequate safety precautions and subsequent loss of control of the aircraft.²¹

Judge Hellerstein also noted that "the existence of a duty is a 'legal, policy-laden declaration.'" The New York Court of Appeals expressed this point with clarity in *Strauss v. Belle Realty Co.*:

Duty in negligence cases is defined neither by foreseeability of injury nor by privity of contract . . . [I]t is still the responsibility of courts, in fixing the orbit of duty, to limit the legal consequences of wrongs to a controllable degree, and to protect against crushing exposure to liability. In fixing the bounds of duty, not only logic and science, but policy play an important role. The courts' definition of an orbit of duty based on public policy may at times result in the exclusion of some who might otherwise have recovered for losses or injuries if traditional tort principles had been applied.²²

The question of duty in *Strauss* was raised by the defendant power utility in a suit brought by a tenant in an apartment building who fell down a negligently maintained staircase during a blackout.²³ It had already been established in other suits relating to the same blackout that the utility had been grossly negligent.²⁴ The plaintiff in *Strauss* was injured in the public area of the apartment building where the electricity was paid for by the owner of the building.²⁵

Strauss offers an unusually clear view of the distinct role that the duty question plays in a negligence suit. There are four issues the plaintiff must prevail on in a negligence case: causation, duty, negligence, and damages.²⁶ In *Strauss*, there was no doubt that three of these elements were established by the plaintiff: the blackout

Compensation Schemes in the Shadow of the Tort System, 53 DEPAUL L. REV. 501, 506 (2003) ("Unlike some other states, New York has always been somewhat restrictive when it comes to duty.").

18. See Sebok, *supra* note 17, at 506. Professor Sebok's article includes an excellent and detailed discussion of New York law on the issue of duty in the context of an enabling tort with considerably more detail than is warranted here.

19. *Id.*

20. *In re Sept. 11 Litig.*, 280 F. Supp. 2d at 292-93. See Sebok, *supra* note 17, at 502.

21. Sebok, *supra* note 17, at 507.

22. 482 N.E.2d 34, 36 (N.Y.C.A. 1985) (citations and internal quotation marks omitted).

23. *Id.* at 35.

24. *Id.* (citing *Food Pageant, Inc. v. Consolidated Edison Co.*, 429 N.E.2d 738 (1981) (affirming the jury determination of gross negligence)).

25. *Id.*

26. Green, *supra* note 15, at 1401. See also *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 535 (1981).

contributed to his fall; the power company had been grossly negligent in causing the blackout; and the plaintiff's fall resulted in personal injury.²⁷ In holding that the power company owed no duty to the seventy-seven year-old plaintiff, the court made clear that foreseeability and logic may be trumped by considerations of public policy. If the power company could have foreseen that a customer would be injured as a result of the power company's negligence, then surely they could also foresee that a non-customer could suffer the same damages. Logic would argue that the power company is equally culpable for the damages that result from the same negligent act regardless as to whether the damages occur in a customer's apartment or in the common area of the building. By defining the "orbit of duty" to exclude the plaintiff in *Strauss*, the court was exercising a public policy judgment that "controllable limits on liability" must be established so as to avoid "crushing liability."²⁸ This case exemplifies New York's understanding of the duty question because it makes clear that the judicial determination must be made with an eye toward how liability in this case and other similar situations will change the economic landscape for private enterprise and society generally.

C. Aviation Defendants' Motion to Dismiss

The Aviation Defendants faced a challenging body of case law to overcome in arguing that no duty should exist with respect to the ground victims. In cases where planes have caused ground damage, courts have consistently found a duty exists between the airline defendant and the ground victims.²⁹ The district court, after listing two such cases, concluded: "Such incidents are inevitable in the context of the sheer number of miles flown daily in the United States. None matches the quantity or quality of tragedy arising from the terrorist-related aircraft crashes of September 11."³⁰ The counsel for the Aviation Defendants argued that this case was distinguishable and relied on the extraordinary nature of damages and the intervention of terrorists to give the judge a policy-based justification for finding no duty.³¹

In holding that the Aviation Defendants owed a legal duty to the ground victims, the court listed several factors that New York courts consider when making this policy decision, including the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and the expansion or limitation of new channels of liability.³²

27. *Strauss*, 482 N.E.2d at 35-36.

28. *See Strauss*, 482 N.E.2d at 37, 39.

29. *See In re Sept. 11 Litig.*, 280 F. Supp. 2d at 291 (citing *Rehm v. United States*, 196 F. Supp. 428 (E.D.N.Y. 1961); *In re Air Crash Disaster at Cove Neck*, 885 F. Supp. 434 (E.D.N.Y. 1995)); *see also Hassanein v. Avianca Airlines*, 872 F. Supp. 1183 (E.D.N.Y. 1995); *Sebok*, *supra* note 17, at 506-07 ("To the extent that airplanes are like automobiles, New York, like almost all other states, treats personal and property damages under a rule that suggests that the scope of duty is coextensive with the scope of actual causation.").

30. *In re Sept. 11 Litig.*, 280 F. Supp. 2d at 291.

31. *Id.* at 291-92.

32. *Id.* at 292.

D. The District Court's Duty Analysis

In evaluating the "risk and reparation allocation," the court explained: "This inquiry probes who was best able to protect against the risks at issue and weighs the cost and efficacy of imposing such a duty."³³ It is arguable that by constructing the issue in this way the court missed one of the key considerations of the issue. By phrasing the initial question in the past tense ("who was best able"), rather than the present or future tense, the court avoided dealing with the duty issue as it has been defined by the New York Court of Appeals. Judge Hellerstein observes that the "airlines, and the airport security companies, could best screen those boarding, and bringing objects onto airplanes."³⁴ The word "could" is misleading here because after the passage of the Air Transportation and Security Act ("ATSA") in November of 2001, the federal government assumed security and screening responsibilities.³⁵

Judge Hellerstein then endeavors to distinguish this case from two cases where the New York Court of Appeals found no duty. He observes that in *Waters v. New York City Housing Authority*³⁶ "the court held that the owner of a housing project did not owe a duty to a passerby when she was dragged off the street into the building and assaulted. Imposing such a duty on landowners would do little to minimize crime, and the social benefits to be gained did not warrant the extension of the landowner's duty."³⁷ As this reasoning makes clear, the court in *Waters* was not asking whether the crime in that case "could" have been prevented by extending a duty; but rather, whether liability would distribute the risk of future crime cost-effectively. This focus on the future is critical because it highlights a central issue under New York law: the efficacy of the conduct-regulation that will result from imposing liability in this and similar cases.

The second case discussed by the district court is *Hamilton v. Beretta U.S.A. Corp.*,³⁸ in which the court of appeals held that "gun manufacturers did not owe a duty to victims of gun violence for negligent marketing and distribution of firearms."³⁹ Judge Hellerstein quoted *Hamilton*:

To impose a general duty of care upon the makers of firearms under these circumstances because of their purported ability to control marketing and distribution of their products would conflict with the principle that *any judicial recognition of a duty of care must be based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens.*⁴⁰

As the emphasized portion of the quote above makes clear, the court of appeals was concerned with the purported future benefits of allowing for liability, rather than

33. *Id.* at 293 (citation omitted).

34. *Id.*

35. Aviation and Transportation Security Act ("ATSA"), Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified in scattered sections of 49 U.S.C.).

36. 505 N.E.2d 922 (1987).

37. *In re* Sept. 11 Litig., 280 F. Supp. 2d at 294 (citation omitted).

38. 750 N.E.2d 1055 (2001).

39. *In re* Sept. 11 Litig., 280 F. Supp. 2d at 294 (citing *Hamilton*, 750 N.E.2d at 1063).

40. *Id.* (quoting *Hamilton*, 750 N.E.2d at 1063) (emphasis added).

whether or not the gun manufacturers were responsible for the damages that were alleged in the case at hand.

The issue of “efficacy” remains unaddressed when Judge Hellerstein attempts to distinguish these cases from the present suit:

Unlike *Hamilton* and *Waters*, the Aviation Defendants could best control the boarding of airplanes, and were in the best position to provide reasonable protection against hijackings and the dangers they presented, not only to the crew and passengers, but also to ground victims. *Imposing a duty on the Aviation Defendants best allocates the risks to ground victims posed by inadequate screening, given the Aviation Defendants’ existing and admitted duty to screen passengers and items carried aboard.*⁴¹

Unlike the court of appeals analysis above, Judge Hellerstein is focused on the past (culpability) rather than the present or future (efficacy in promoting a social benefit). It should also be noted that the use of the word duty is misleading. Using the phrase “admitted duty” in the last sentence of the quoted selection is an unfortunate conflation of the legal term of art with the common usage of the term “duty.”⁴² As discussed above, in the legal context the statement that a duty exists represents a legal conclusion based on public policy that liability may exist.⁴³ The common usage of the word “duty” implies an obligation or responsibility (as in a duty to one’s country). With this distinction in mind, a review of the passage quoted above reveals that the court must have meant: “Imposing a [legal] duty on the Aviation Defendants best allocates the risks to ground victims posed by inadequate screening, given the Aviation Defendants’ existing and admitted [responsibility] to screen passengers and items carried aboard.” This must be what the court meant because the only “admitted” legal duty the airlines have acknowledged thus far in the suit is toward its own passengers and crew, not to ground victims of terrorist acts involving their planes.⁴⁴ As for the airlines’ “existing and admitted” responsibility to screen passengers and items carried aboard, this

41. *Id.* (emphasis added).

42. Webster’s defines “duty” as “obligatory tasks, conduct, service or functions enjoined by order or usage according to rank, occupation, or profession.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 705 (3d ed. 1986). A “legal duty” is defined in Black’s Law Dictionary as follows: “In negligence cases term may be defined as obligation, to which law will give recognition and effect, to conform to particular standard of conduct toward another The word “duty” is used throughout the Restatement of Torts to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor’s conduct is a legal cause.” BLACK’S LAW DICTIONARY 453 (5th ed. 1979). The critical difference between these two senses of the word is that a legal duty is a conclusion of law that is made by a judge in the context of a specific set of facts as opposed to a state of being that is determined by “rank, occupation, or profession.”

43. See *supra* Part I.B.

44. *In re* Sept. 11 Litig., 280 F. Supp. 2d at 291 (“Airlines typically recognize responsibility to victims on the ground. . . . However, counsel [for the Airline Defendants] did not concede duty in relation to those killed and injured on the ground in the September 11, 2001 aircraft crashes.”)

responsibility was transferred to the Transportation Security Administration⁴⁵ and thus is no longer within the purview of the Aviation Defendants. As will be discussed below, this fact should be considered when dealing with the efficacy of finding a duty in this case.

By analyzing the duty issue in terms of pre-September 11 risk allocation, the district court shifts the focus of the duty analysis to culpability, abandoning the future focused policy determination New York law requires in answering the question of duty. The New York Court of Appeals decisions discussed above addressed the question of whether attaching liability would promote good public policy by framing the question in terms of prospective conduct regulation.⁴⁶ In the case of the landowner defendant in *Waters*, the court recognized that allowing liability under the facts of that case would effectively require every landowner to either secure his or her property against its being used by a third person in furtherance of a crime or carry insurance that would cover the potential liability. The question was not whether the landowner in the case at hand could have secured her building in such a way as to prevent the crime that occurred. The question was whether every landowner should be given such a responsibility in the future. Thus, in the September 11 case, the initial question of disproportionate risk and reparation allocation was left unanswered; instead, the district court concluded that the airlines must be held accountable because they were responsible for security when the accident occurred.

The district court did not consistently approach the duty issue with an eye to the past. When discussing a different factor, "likelihood of unlimited or insurer-like liability," the court took judicial notice of the fact that "aggregate liability of the [aviation defendants is] capped by federal statute to the limits of their liability insurance coverage."⁴⁷ Relying on this fact, Judge Hellerstein concluded that this factor "does not weigh heavily against finding a duty."⁴⁸ The fact that liability has been capped in this case ignores the principle import of the duty question under New York law: "[C]ourts must . . . always be mindful of the consequential, and precedential, effects of their decisions."⁴⁹ It is unclear why the court would take judicial notice of the fact that liability has been capped for the purposes of dealing with the likelihood of unlimited or insurer-like liability and yet studiously ignores the fact that airport screening and security functions are no longer the responsibility of the Aviation Defendants.

The final factor addressed by the court is the question of whether finding a duty in this case would "substantially expand or create new channels of liability."⁵⁰ The court frames this issue as whether negligent airlines have ever owed a duty to ground victims. Marshalling several cases that involved ground damages caused by aircraft,

45. Aviation and Transportation Security Act ("ATSA"), Pub. L. No. 107-71, 115 Stat. 597, 597 (2001) (codified in scattered sections of 49 U.S.C.) ("Not later than 3 months after the date of enactment of this Act, the Under Secretary of Transportation for Security shall assume civil aviation security functions and responsibilities.")

46. See *supra* text accompanying notes 22–28, 36–40.

47. *In re Sept. 11 Litig.*, 280 F. Supp. 2d at 293.

48. *Id.*

49. 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 750 N.E.2d 1097, 1101 (N.Y. 2001).

50. *In re Sept. 11 Litig.*, 280 F. Supp. 2d. at 294.

Judge Hellerstein concludes: "Although these cases involved injuries resulting from negligent operation or maintenance of airplanes, rather than negligence in regulating the boarding of airplanes, there is no principled distinction between the modes of negligence."⁵¹ Reserving the question of whether there is a "principled distinction" between holding an airline liable for those damages that are solely the result of negligence in performing the primary responsibilities of air travel and those that occur subsequent to a third-party tortfeasor's intentional intervention, here again the court ignores the policy issues presented and instead focuses on culpability. By extending the orbit of duty to encompass liability for the actions of third parties, there can be little doubt that Judge Hellerstein substantially expanded liability for the airlines by finding that a "special relationship" runs between them and every person on the ground in New York, yet it is unclear why the court thought that this was the appropriate policy decision in the context of the major policy choices made by Congress after September 11.

E. Principled Distinctions

In *Strauss*, the New York Court of Appeals decided that the orbit of duty of the power company, faced with the catastrophic costs created by the power outage, should be limited to those with whom it had a contractual relationship.⁵² The court, however, acknowledged in a footnote the difficulty in drawing the line so cleanly: "In deciding that public policy precludes liability to a noncustomer injured in the common areas of an apartment building, we need not decide whether recovery would necessarily also be precluded where a person injured in the home is not the family bill payer but the spouse."⁵³ The New York Court of Appeals dropped any pretense of subtlety fifteen years later in *532 Madison Avenue*, when it explained that "[p]olicy-driven line-drawing is to an extent arbitrary because, wherever the line is drawn, invariably it cuts off liability to persons who foreseeably might be plaintiffs."⁵⁴

The defense counsel for the Aviation Defendants in the September 11 case sought to make this exact point in argument before Judge Hellerstein when the counsel explained: "We are in an area of policy and there are lines to be drawn that may occasionally seem arbitrary."⁵⁵ After the judge posed a hypothetical that demonstrated the weakness of the argument against finding a duty based on the number of potential suits, the defense counsel argued: "[W]hat really distinguishes our case from [the hypothetical example of an airplane crash into Shea Stadium while taking off from, or landing at, La Guardia airport] is the intentional intervening acts of the third-party terrorist."⁵⁶ The district court clearly did not believe that this was a "principled distinction," given New York's precedents. As this Note will argue, an economic analysis suggests that the principled distinction exists not in the terrorist intervention, but because of Congress's intervention into the legal, economic, and policy landscape that faces airlines after September 11. Congress, in capping liability for future terrorist acts and taking over the security function, appears to have come to the determination

51. *Id.*

52. *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y.C.A. 1985).

53. *Id.* at 37 n.2.

54. 750 N.E.2d at 1103.

55. *In re Sept. 11 Litig.*, 280 F. Supp. 2d at 291.

56. *Id.* at 291-92.

that the best outcome for society is one that preserves pre-September 11 activity levels and roughly maintains the current structure and economies of the airlines. Because New York law considers elements of public policy as part of the issue of duty, the court in this case should have considered the consequences of allowing airlines to be held liable in this case, given the significant changes made by Congress following September 11.

II. ANALYZING TORT LAW USING AN ECONOMIC FRAMEWORK

A. "Primary" Cost Reduction—Market vs. Collective Approaches

In his groundbreaking book *The Costs of Accidents*, Guido Calabresi used economic analysis to develop a framework for evaluating various tort law proposals.⁵⁷ He recognized that in order to sensibly evaluate these proposals, a "theory of accident law"⁵⁸ was required to give structure to any discussion of the relative merits of a proposal. The goal of reducing the costs of accidents is divided into three sub-goals. The first is to decrease the occurrence of accidents in both number and severity; Calabresi calls this "primary" cost reduction.⁵⁹ The goal of "primary" accident reduction is not to reduce the number of accidents to zero but to reduce them to the point where society experiences the maximum net benefits of an activity. Thus, primary cost reduction analysis is concerned with determining the "correct" amount of precaution that should accompany a dangerous activity.⁶⁰ Because precautions create costs, these costs must be weighed against the benefits created.⁶¹ This weighing process may be accomplished through market forces, collective political means, or a combination of the two.⁶² For the purpose of this Note, the distinction between the

57. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 14 (1970).

58. *Id.* at 14. It is important to note that in common usage the word "accident" can communicate a value judgment that is unintended in this context. *Webster's* defines "accident" primarily as "an unforeseen and unplanned event or condition," and secondarily as "a sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance, or a combination of causes and producing an unfortunate result." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 705 (3d ed. 1986). For the purposes of this Note, the term is used in a value-neutral way: an unanticipated event. This distinction is important in that the events of September 11, 2001 were not an accident from the perspective of the terrorists. Rather, this was a meticulously planned, intentional mass murder. However, from the airlines' perspective, this was an unanticipated event.

59. CALABRESI, *supra* note 57, at 26.

60. *See id.* at 69 ("General deterrence attempts to force individuals to consider accident costs in choosing among activities."); *id.* at 73–75.

61. *See id.* at 74–75.

62. Calabresi uses the term "general deterrence" when referring to the market method and "specific deterrence" when referring to the collective method. *See, e.g., id.* at 26–27. Because these terms have a different meaning in the context of criminal law, I will avoid their use in favor of the terms "market method" and "collective method." In the United States, many activities are regulated by a mixture of market and collective rules. For example, many of the costs of accidents caused by cars have been internalized through mandatory insurance paid by drivers.

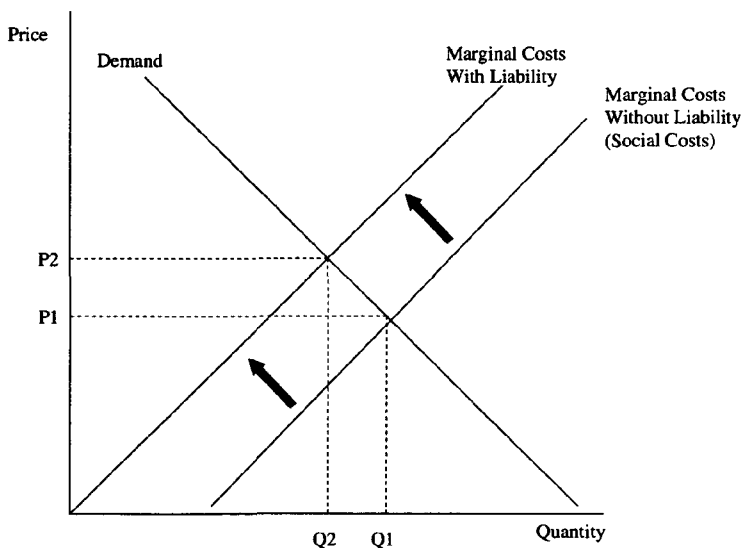
market and collective methods of primary cost reduction is reflected by two possible governmental approaches: legislative (collective) and judicial (market).

The judicial act of attaching liability to a party for the accident costs associated with a certain activity operates to internalize the costs associated with an activity into the price of the activity. For example, if the outcome of a lawsuit determines that a manufacturer of widgets is liable for the accidents created by the widgets, the firms that produce widgets can increase the price of the widget in order to help cover the costs associated with liability (self-insure), purchase an insurance policy that will cover the expected costs if one is available, or invest in the development of a safer widget. Whichever of these choices is selected, the marginal cost of producing widgets increases, and this cost is partially borne by the consumers of the widget, because consumers purchase fewer widgets in equilibrium, and they pay more for the widgets that are purchased.⁶³

Graph One illustrates the impact of internalizing the cost of the liability on the marginal cost curve.⁶⁴ When the costs associated with liability are internalized, the equilibrium price increases and the quantity of widgets produced decreases.⁶⁵ The positivist economic theory of tort law rests on this understanding of market principles when it argues that “[c]ommentators recognized the deterrent effect of tort law but did

Graph One

Market Method: Internalizing an Externality



63. See, e.g., MICHAEL L. KATZ & HARVEY S. ROSEN, *MICROECONOMICS* 112 fig.4.12 (3d ed. 1998) (showing the effect of a price increase on consumer welfare, also known as “consumer surplus”).

64. See, e.g., *id.* at 598–600 fig.18.2 (explaining the effect of an externality on market equilibrium).

not connect the idea that tort principles are based on utilitarian values to the idea that liability deters conduct that is not justifiable on utilitarian grounds.⁶⁶

Collective primary cost reduction is achieved through the legislature rather than the courts. In its most simple form the collective method of primary cost reduction can take two forms: a ban on the injury-causing activity or immunity from liability.⁶⁷ A ban forbids the activity outright when the political decision is made that the net benefit of the activity cannot adequately be justified even if the market would be able to internalize the associated costs.⁶⁸ At the other extreme, immunity from liability relieves the actor of the costs associated with risky behavior, thus functioning as the economic equivalent of a subsidy.⁶⁹ Unlike the market method, the collective method reflects a nonmonetary decision as to what activities should cost.⁷⁰ When employing the collective method, society is expressing its opinion as to the desirability of the act or activity that it either bans or subsidizes.

In Graph Two, the "Marginal Costs with Liability" curve (MC2) represents the economically efficient production level, because the market method would allow for optimum production while paying for the externalities of production.⁷¹ However, a ban on widget production and sale does not incorporate the costs, such as injuries, associated with widget usage into the marginal cost. This is illustrated in Graph Two by the location of the "Marginal Costs with Ban" curve (MC3). The costs that cause the MC curve to shift from MC2 to MC3 are not related at all to the costs associated with using widgets. Rather, this shift reflects the disincentive of possible criminal liability. This collective "intervention" into the market reflects social values. For example, a ban on fireworks, rather than liability for accidents caused by fireworks,

65. See, e.g., *id.* The magnitude of the change to price and quantity will be determined by the elasticity of demand, which is reflected in the slope of the demand curve. See generally *id.* at 73–79.

66. William E. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, in *LAW AND ECONOMICS ANTHOLOGY* 350, 351 (Kenneth G. Dau-Schmidt & Thomas S. Ulen eds., 1998).

67. These are the extremes. Many collective decisions take the form of regulations, but for the purpose of economically distinguishing the collective method from the market method, the distinction remains the same because the legislature is intervening in the market.

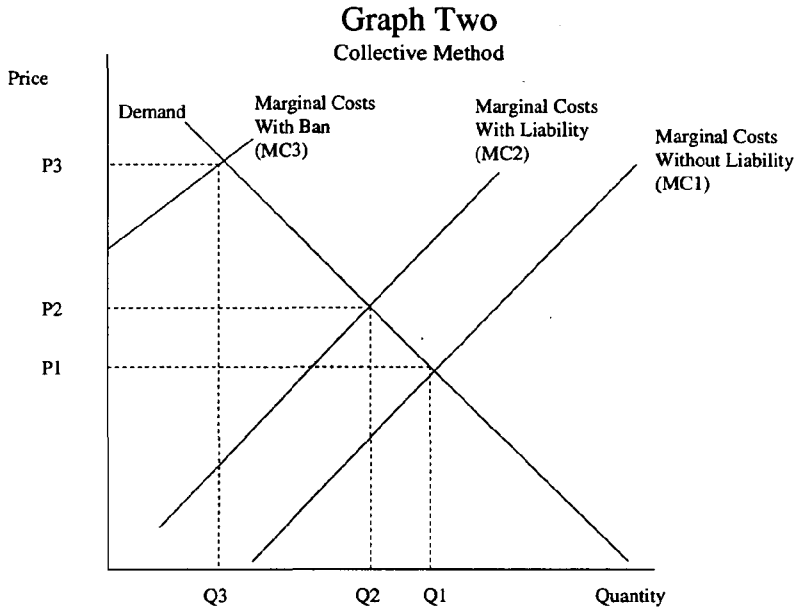
68. CALABRESI, *supra* note 57, at 19–20. ("We ban the general sale of fireworks regardless of the ability or willingness of the manufacturer to pay for all of the injuries resulting from their use. But we cannot deal with every issue involved in every activity through the political process. In most cases, the marketplace serves as the rough testing ground. A manufacturer is usually free to employ a process that occasionally kills or maims if he is able to show that consumers want his product badly enough to enable him to compensate the injured.")

69. See *id.* at 31–32 ("If subsidies to developing industries seem sensible, it is best to give them openly, with visible decisions as to who should pay, rather than through a system which removes some or all of the costs of accidents from the activities causing them and hides this subsidization by placing these costs on undefined or unrepresented groups.")

70. See *id.* at 20 ("[W]hen we overrule the market and ban an accident-causing activity that can pay its way or subsidize an activity that cannot, we are not violating absolute laws. We are making the same type of choice between accidents and accident-causing activities that the market makes, but we are choosing, for perfectly valid reasons, to make it in a different way.")

71. See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 44–46 (4th ed. 2004) (discussing the definition of externalities, the effect of externalities on marginal costs, and the meaning of internalizing an externality).

reflects society's decision that the benefits of fireworks reflected by the demand for them are not outweighed by the costs of fireworks, even when those costs are paid for by the manufacturers and reflected in the price.⁷²



Calabresi notes that “systems of accident law seem to have found support in the past because they gave hidden subsidies to developing industries at a time when subsidies to such industries were probably desirable.”⁷³ This Note will treat a legislative decision to limit liability as a collective decision that is the functional equivalent of a ban on an activity. This is justified because immunity from liability rejects the “invisible hand” of the market just as a ban does. Immunity is simply a collective judgment as to the desirability of the relevant activity. Immunizing widget producers from liability is equivalent to giving a subsidy to the widget industry because a portion of the costs attributable to widget production are not incorporated into the price.⁷⁴ This is illustrated by the location of the MC1 curve relative to the MC2 curve in Graph Two. P2 and Q2 are economically optimal because costs associated with widget production and use are internalized. However, P1 and Q1 are socially optimal because a collective decision has been made that there are social benefits that justify the additional costs.

72. See CALABRESI, *supra* note 57, at 19.

73. CALABRESI, *supra* note 57, at 31–32.

74. The same effect can be accomplished judicially by not holding a company liable.

B. "Secondary" Cost Reduction

The second sub-goal of accident cost reduction "is concerned with reducing neither the number of accidents nor their degree of severity. It concentrates instead on reducing the societal costs resulting from accidents."⁷⁵ The goal of compensating victims of accidents, usually through the payment of money damages, is defined by Calabresi as "secondary" cost reduction—not because it is less important than decreasing the number of accidents, but because this goal arises after the first goal has failed to deter the accident-causing behavior in the first place.⁷⁶ The goal of compensation is generally accomplished by shifting the burden of the loss in monetary terms from the person who experienced the loss initially to a group of people so that the loss is "spread."⁷⁷ It is important to recognize that decreasing secondary costs does not necessitate the creation of a financial link between the injurer and the victims. "The question of who should bear the costs of a particular accident, or of all accidents, is to be decided on the basis of the goals we wish accident law to accomplish."⁷⁸ Thus, the question of how costs should be spread or who should bear the costs of an accident is a policy decision.

Just as in the case of primary accident reduction, our political system offers roughly two choices. In the judicial model, the defendants in a lawsuit are held liable to the plaintiff, and thus the realized and potential future losses are spread by passing the costs of accident-causing behavior to the manufacturers and through the manufacturer to the consumers of the injury-producing behavior. Thus, a successful tort suit will address both primary and secondary cost reduction in a single elegant motion. In the legislative model, the government may decide that the accident costs of a particular activity should be borne by taxpayers. The main difference between these two options is the fact that judicial cost spreading is limited to those entities that are determined to be a cause in fact and negligent (or liable through strict liability), whereas legislative cost spreading may be accomplished through an unlimited choice of revenue generating tax schemes. For example, in order to pay the costs of airplane accidents, Congress could choose to tax airline tickets (creating a primary cost reduction by-product), or it could choose to tax a completely unrelated activity, or it could simply use general federal revenue (as is the case with the Victim Compensation Fund established for September 11). Unlike primary cost reduction, a link need not exist between the accident causing activity and the compensation to victims when considering secondary cost reduction. Compensating victims is a goal with policy implications that stands independent of the issues raised by primary cost reduction.

C. "Tertiary" Cost Reduction—Administrative Costs

Calabresi's third sub-goal of cost reduction is the minimization of the costs of administration associated with accidents. "It tells us to question constantly whether an attempt to reduce accident costs, either by reducing accidents themselves or by

75. CALABRESI, *supra* note 57, at 27.

76. *Id.*

77. *See id.* at 39–67.

78. *Id.* at 22.

reducing their secondary effects, costs more than it saves.”⁷⁹ This Note is primarily focused on the issues associated with primary and secondary cost reduction, but administrative costs will merit some discussion.

III. THE LEGISLATIVE RESPONSE TO 9/11

Apart from the airline passengers themselves, the worst and most immediate impact of the events of September 11, 2001 was visited on the people who were in and around the World Trade Center in New York City. The financial blow to the U.S. airline industry was potentially catastrophic. It was apparent to all that this devastation would likely ripple through both the U.S. and world economies. Consequently, Congress and the President reacted by adopting the Air Transportation Safety and System Stabilization Act (“ATSSSA”)⁸⁰ and the Aviation and Transportation Security Act (“ATSA”),⁸¹ legislation that explicitly addressed all three of the sub-goals of tort law discussed above.⁸²

A. Primary Cost Reduction

1. Federalizing Airport Security

Primary cost reduction was addressed by several measures. Most significantly, Congress established the Transportation Security Administration (“TSA”), which federalized the security and screening process at U.S. airports.⁸³ Prior to September 11, the airlines and airport operators were responsible for this process, and they outsourced the job to private companies who were chosen through a low-bid process.⁸⁴ Federal oversight of this system was consistently lenient despite well-known deficiencies:⁸⁵ “Over the years, public and private investigators . . . showed time and time again that they could get by the screeners at various airports even while carrying guns, bombs, and other weapons.”⁸⁶ In passing the ATSA, Congress indicated that direct federal oversight of airport security would “go far toward preventing a repetition of the terrorist attacks” and “help revive the economy by restoring public confidence in the safety of air travel.”⁸⁷ Beyond federalizing the security workforce, the government

79. *Id.* at 28.

80. Pub. L. No. 107-42, 115 Stat. 230 (2001) (sections that are relevant to this Note are codified under 49 U.S.C. § 40101).

81. Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified in scattered sections of 49 U.S.C.).

82. Several of the provisions of the ATSSSA, passed on September 19, 2001, were amended two months later by the ATSA. *See id.*

83. ATSA § 101(a).

84. Lizette Alvarez, *Bush’s Approach on Plane Security Chosen by House*, N.Y. TIMES, Nov. 2, 2001, at A1.

85. Dean E. Murphy & Joel Brinkley, *Rethinking Security at Airports*, N.Y. TIMES, Sept. 19, 2001, at B1.

86. *Id.*

87. Robert Pear, *U.S. Now Faces Big Task to Fill Air-Safety Jobs*, N.Y. TIMES, Nov. 17, 2001, at A1.

overhauled security regulations in light of what was considered to be the new threat of suicide terrorists and made significant new investments in security equipment in the screening process.⁸⁸

2. Liability Cap

The second way that primary cost reduction was addressed is a bit more subtle. The ATSSSA provided for the following: "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 insurance coverage maintained by that air carrier."⁸⁹ At the very least, by including this provision Congress foreclosed a pure market-based approach to the problem of airport passenger screening; by creating this shield from liability, Congress made it impossible for any court to "internalize" the total costs of September 11 into the aviation industry and thereby let market forces determine the "correct" amount of precaution that should be taken. At the same time, it should be noted that by limiting liability for amounts greater than the insurance coverage, Congress appears to have determined that the insurance companies should not benefit from the same protection.

There can be little doubt that in federalizing the security function at airports, Congress acknowledged the necessity of taking additional precautions to avoid a future catastrophe like the September 11 attack. It is less clear what this means in relation to fault-based tort law. In conjunction with the limitation of liability there are several conclusions one may draw. Federalizing security does not, by itself, indicate that the government accepted responsibility for terrorists slipping through security. The screening measures taken by the airlines up until September 11 were government-regulated, and two-inch box cutters, the primary weapon used by the terrorists, were not restricted by Federal Aviation Administration ("FAA") guidelines.⁹⁰ Indeed, a pocket knife with a four-inch blade was not restricted by the FAA screening guidelines prior to September 11.⁹¹ At the time that the screening system was created, "[t]he thinking . . . was that the airlines would have the greatest incentive to make sure the system worked smoothly and efficiently because they would pay the price for any failings. It is the same thinking that gives airlines responsibility for aircraft maintenance."⁹² After the events of September 11, policymakers determined that the aviation industry's self-interest is an insufficient measure of the security precautions that are necessary for adequate protection from future attacks of this nature, as reflected by the creation of the TSA.

88. Matthew L. Wald, *Official Says He'll Miss Screening Goal*, N.Y. TIMES, Nov. 28, 2001, at B9.

89. ATSSSA § 408(a).

90. *Excerpts From Debate on Airport Security Bills*, N.Y. TIMES, Nov. 2, 2001, at B6.

91. *Id.*

92. Murphy & Brinkley, *supra* note 85, at B1.

B. Secondary Cost Reduction—Compensating the Victims

The ATSSSA also addressed the issue of secondary cost reduction through the creation of the “September 11th Victim Compensation Fund of 2001.”⁹³ The explicit legislative purpose for creating the Fund was “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 aircraft crashes of September 11, 2001.”⁹⁴ The source of the awards is general federal revenue, although a fund was established whereby private citizens could donate money that would be used prior to any governmental spending.⁹⁵ Eligibility for compensation from the fund includes both the survivors of the passengers of the airplanes, and:

[any] individual who—

(i) was present at the World Trade Center, (New York, New York), the Pentagon (Arlington, Virginia), or the site of the aircraft crash at Shanksville, Pennsylvania at the time, or in the immediate aftermath, of the terrorist-related aircraft crashes of September 11, 2001; and

(ii) suffered physical harm or death as a result of such an air crash.⁹⁶

The awards available for eligible applicants include both economic and noneconomic damages.⁹⁷ This unprecedented system⁹⁸ was placed under the control of Kenneth Feinberg, a special master appointed by the Attorney General to formulate and carry out the specifics of the policy.⁹⁹ Feinberg is the sole person responsible for the total amount of damages that will be paid out of the federal budget and thus “has been granted what amounts to a blank check on the Federal Treasury.”¹⁰⁰

The Fund was described by the Special Master as “an unprecedented expression of compassion on the part of the American people to the victims and their families . . . designed to bring some measure of financial relief to those most devastated by the events of September 11 . . . [and] an example of how Americans rally around the less

93. ATSSSA § 401.

94. ATSSSA § 403.

95. ATSSSA § 406.

96. ATSSSA § 405.

97. *Id.* Economic losses are defined as “any pecuniary loss resulting from harm (including the loss of earnings or other benefits related to employment, medical expense loss, replacement services loss, loss due to death, burial costs, and loss of business or employment opportunities) to the extent recovery for such loss is allowed under applicable State [sic] law.” Noneconomic losses are defined as “losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.” ATSSSA § 402.

98. Elizabeth Kolbert, *The Calculator: How Kenneth Feinberg Determines the Value of Three Thousand Lives*, THE NEW YORKER, Nov. 25, 2002, at 42.

99. See ATSSSA § 404.

100. Kolbert, *supra* note 98, at 42.

fortunate.”¹⁰¹ The verity of this sentiment is unchallenged. There was, however, a widely acknowledged additional motive for establishment of this Fund: “The [Fund] was in fact created not for the victims’ sake but for the airlines’, and, more specifically, for protecting the airlines from the victims.”¹⁰² The commercial airlines were dealt a body blow by the September 11th attacks:

Without passengers and cash flows, the resultant dislocations from the attack credibly threatened to bring the entire commercial airline industry down in an apocalyptic crash like the four aircraft that disintegrated in New York, Washington and Pennsylvania. Confronted with the potential failure of the industry, and operating in a wartime mode, the U.S. Congress enacted the [ATSSSA] to shore up the industry financially for the short term, to assure our cross-continental economy a viable air transportation system.¹⁰³

Whether the Fund was primarily a benefit for the airlines, the victims, or both, from a secondary cost reduction perspective it “reduce[es] the societal costs” that were inflicted by the terrorist hijackings.¹⁰⁴ In opening the Federal Treasury to pay for the damages realized by those who were on the planes and on the ground, Congress effectively spread the costs of September 11 across the tax base and made the U.S. government the after-the-fact insurer of all of the eligible victims. This act also lowered the aggregate cost of September 11 by stabilizing the airline industry.

It should be noted here that this is a perfect example of how secondary cost reduction and primary cost reduction goals may be in conflict with each other. By dealing with the secondary costs through the Fund, any market-method approach that seeks to attain the “correct” amount of activity will be flawed. This is because a significant portion of the costs will have been spread by means of the U.S. tax base rather than through the air-travel industry and its consumers.

C. Tertiary Costs

Finally, Congress was not blind to the issue of tertiary or administrative costs that attend any tort response. There are three limitations built into the Fund that limit its costs. The first is a two-year deadline for filing a claim which fell on December 22, 2003.¹⁰⁵ Roughly 3,000 people are estimated to have died in the attack, and 97% of the

101. September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274 (Dec. 21, 2001) (codified at 28 C.F.R. § 104).

102. Kolbert, *supra* note 98, at 46; Richard P. Campbell, *The September 11th Attack on America: Ground Zero in Tort and Insurance Law*, 9 CONN. INS. L.J. 51, 56 (2002/2003) (“The ATSSSA may be fairly characterized as a bargain between business interests intending to bail out the large domestic commercial airlines and consumer interests looking to provide a ready source of funds to compensate injured individuals and families who lost loved ones.”).

103. Campbell, *supra* note 102, at 53.

104. CALABRESI, *supra* note 57, at 27.

105. Tom Perrotta, *Volunteer Lawyers Needed for Sept. 11 Fund Claims*, N.Y. LAW JOURNAL, Dec. 3, 2003, at 1.

eligible survivor families decided to seek compensation from the Fund rather than to seek compensation through the judicial system.¹⁰⁶

The second cost control measure is not specific to the Fund but rather is targeted at the aggregate costs associated with September 11 recovery efforts. "Upon the submission of a claim [to the Fund] under this title, the claimant waives the right to file a civil action (or to be a party to an action) in any federal or state court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001."¹⁰⁷ The costs associated with litigation include court administrative costs and the time spent by courts, lawyers, and victims who would have invested time into the litigation process. By forcing people to choose between filing a claim with the Fund and a suit against the airlines, Congress decreased the total costs that September 11 threatened to visit on the judicial branch.¹⁰⁸ The advantages of filing a claim with the Fund instead of in court, including fast and certain payment, made a difference: less than one hundred of the families who qualified for benefits from the Fund chose to pursue litigation.¹⁰⁹

Finally, because of the widespread nature of the crashes—planes crashed in New York, Virginia, and Pennsylvania—and the fact that families and victims were from all over the world, Congress established a single federal cause of action that would serve as "the exclusive remedy for damages arising out of the hijacking and subsequent crashes."¹¹⁰ Congress assigned original and exclusive jurisdiction over all of these claims to the U.S. District Court for the Southern District of New York.¹¹¹

IV. AN ECONOMIC ANALYSIS OF THE QUESTION OF DUTY IN THE 9/11 LITIGATION

A. Primary Cost Reduction

As explained in Part II, the issue of primary cost reduction focuses on the problem of how society can achieve the "correct" amount of accidents. There are two methods available for making this determination: the market method, where the accident costs attributable to an activity are "internalized" into the price of production through the mechanism of liability; and the collective method, where the government intervenes in the market by banning, regulating, or subsidizing the activity. When the government intervenes, there are two basic forms that a subsidy can take. If the government becomes an insurer, the taxpayers in society will bear the burden of the costs created by the accident causing activity. Alternatively, the government has the power to simply immunize the producer of the accidents from liability, and thus the costs created by the activity will be narrowly born by those who are injured. Under either of these examples of the collective method, the "invisible hand" of the market is guided to attain the

106. *Only 100 Families Choose Lawsuits over 9/11 Fund*, N.Y. L.J., March 31, 2004, at 1.

107. Air Transportation Safety and System Stabilization Act ("ATSSSA"), Pub. L. No. 107-42, § 405(c)(3)(B)(i), 115 Stat. 230 (2001) (sections that are relevant to this Note are codified under 49 U.S.C. § 40101).

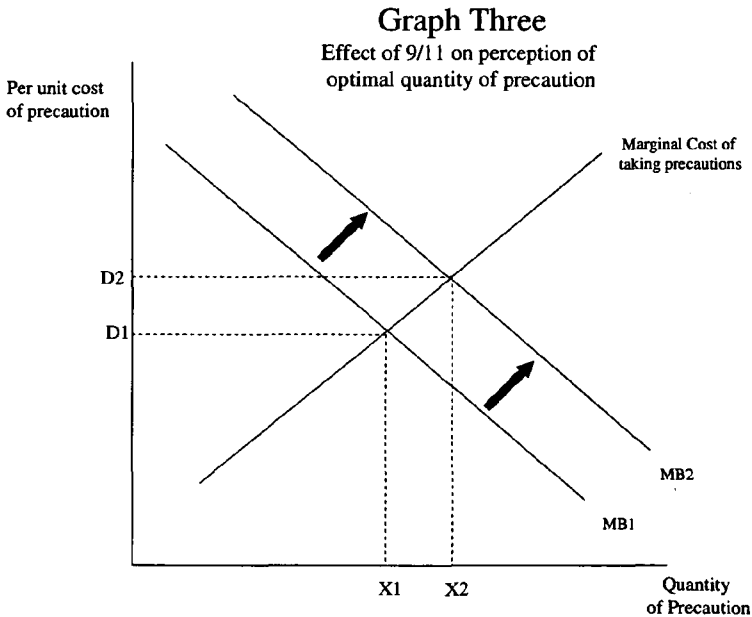
108. This also decreased secondary costs because it discouraged victims from filing law suits against the airlines.

109. *Only 100 Families Choose Lawsuits over 9/11 Fund*, *supra* note 106, at 1.

110. ATSSSA § 408.

111. *Id.*

“correct” number of accidents in accordance with political determinations rather than through the individual decisions that—in the aggregate—compose the market. In the context of the September 11 litigation, the district court’s decision that a duty exists for the airlines implies that a market solution should be employed in addition to the significant collective method that was undertaken by Congress. The events of September 11 clearly demonstrated that more precaution was required for airline security. Graph Three illustrates this change in perceptions and the resulting increased precaution costs. The MB1 (marginal benefits) curve represents the pre-September 11 perception of the benefits of precaution in airport security. The MB2 curve represents the post-September 11 perception of the benefits of airport security precautions. The shift in the MB curve occurred because the suicide attacks caused society to recognize that the probability of a catastrophic event was higher than previously perceived. The effect of this shift is to increase the optimal level of precaution from X_1 to X_2 , and thus the amount spent on precaution must increase as well, from D_1 to D_2 .



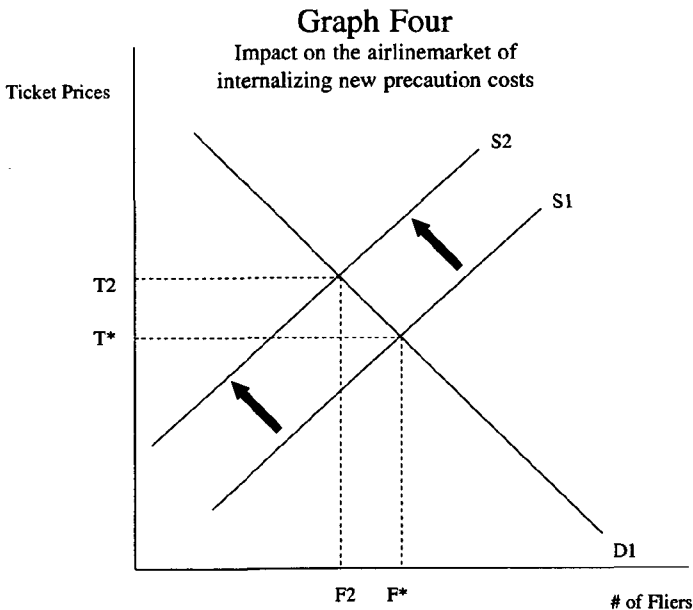
But Congress, in passing the ATSSSA in conjunction with the ATSA, determined that imposing the costs of this enhanced precaution ($D_2 - D_1$) on the airline industry would have unacceptable deleterious consequences for the air-travel market.¹¹² Graph Four illustrates how forcing firms to bear the cost of enhanced precaution would lead to a shift in the air-travel industry supply curve. The result of this contraction in the supply curve (based on the increased costs associated with new precaution costs illustrated in Graph Three) would be decreased flights supplied by the industry and increased prices for consumers. Congress’s action implies that decreasing the number

112. See *supra* Part III.A.

of flyers (from F^* to F_2) would create a social cost of tremendous proportions because our economy and society are structured around cheap air-transportation costs. This conclusion is justified because by relieving the airline industry of the costs associated with increased security, Congress allows the airline industry's supply curve to remain at S_1 . Indeed, one might argue that by taking over the responsibility for costs related to providing airport security and screening, the government was actually subsidizing the airlines in order to keep the number of flyers at pre-September 11 levels. Thus, F^* must be the socially optimal amount of flying for our society.

This conclusion is understandable. In economic terms, the number of flyers (F^*) functions as an input into the production of other goods. When the price of an input increases, it contracts the supply curves of the goods that airline travel is an input for, raising equilibrium price and lowering equilibrium quantity in all markets for goods that airline travel is an input for.¹¹³ In other words, Congress likely feared that the cost of many goods and services in our mobile society would increase if air travel became more expensive and less available.

By federalizing the screening function of air travel, a collective decision resolved the question of what the "correct" amount of air travel should be in the future. Congress's action strongly indicates that there are social benefits to maintaining the current structure of the airlines and to maintaining the pre-September 11 price and quantity of air travel. By federalizing the screening and security function, the costs that would have shifted the supply curve from S_1 to S_2 in Graph Four were reallocated



113. See, e.g., Ronald M. Ayres & Robert A. Collinge, MICROECONOMICS: ENHANCED EDITION 65–66 (1st ed. 2005) (discussing why increases in input prices cause supply curves to

from the airlines to the government. Congress appears to want to counteract the effect illustrated in Graphs Three and Four and thus to maintain ticket prices and the number of flyers at the socially optimal levels that existed prior to September 11.

A second effect of Congress's intervention was to short-circuit the "conduct-regulating" effect of a successful tort suit. As discussed above in Part II.A., the optimal primary cost reduction that results from internalizing costs through tort suits is achieved because market forces determines the new equilibrium point once liability is established. But in the case of the September 11 litigation, risk of liability for failure to properly screen passengers cannot be accurately balanced against the associated costs of precaution because the Aviation Defendants are no longer responsible for this function. Thus, liability in this case will necessarily have an inefficient "primary cost reduction" effect, because a collective policy response has already been imposed in a way that makes a market (or judicial) solution ineffective.

In addition, by limiting the liability of the airlines to the total amount of insurance associated with the four flights and allocating up to \$10 billion in federal loan guarantees and \$5 billion dollars in direct compensation to the airlines¹¹⁴ in the immediate aftermath of the tragedy, the political branches clearly demonstrated their willingness to support and subsidize the airline companies as they are currently organized. The existence of these subsidies has clear implications for the judicial policymaking function of determining the existence of a legal duty.

Indeed, the New York Court of Appeals took judicial notice of legislative action within the context of a tort suit when it decided *Hymowitz v. Eli Lilly*.¹¹⁵ The class action suit was brought by those who were injured by the drug diethylstilbestrol when it was ingested by their mothers during pregnancy.¹¹⁶ There were several major legal difficulties facing the plaintiffs, including the fact that the statute of limitations had run prior to the discovery of their injuries. In allowing the plaintiffs to recover in what it characterized as "a singular case,"¹¹⁷ the court noted that one of the factors that made this case worthy of special attention was the fact that the legislature had passed a "revival statute" in order to change the statute of limitations in favor of these plaintiffs.¹¹⁸ This is a good example of how a court may face a legal issue while taking notice of the policy implications of legislative action.

When analyzing the primary cost reduction consequences of increasing the "orbit of duty" in the September 11 litigation, economic analysis suggests two conclusions. First, liability will not result in the optimal safety precautions because Congress has acted in a way that insulates the airlines from the desired market effect. Second, it is possible that liability may counteract the policy choice imposed by Congress.¹¹⁹ In

shift to the left); see also *id.* at 73, fig. 3-11 (discussing the impact of a shift in the supply curve on equilibrium price and quantity).

114. Campbell, *supra* note 102, at 56.

115. 539 N.E.2d 1069 (N.Y. 1989).

116. *Id.* at 1071.

117. *Id.* at 1075.

118. *Id.* at 1075, 1079-80.

119. Judge Hellerstein's decision will operate to increase the secondary costs of September 11 because Congress has changed the structure of the aviation market since that date in such a way that "internalizing" the damages becomes a pure cost to society without the

passing the ATSSSA and the ATSA, Congress indicated a preference for maintaining the current structure of the airlines, presumably because of the social benefits that an artificially cheap air transportation network provides to the U.S. economy. Whether or not this is the correct policy, New York's law on the question of duty clearly requires an evaluation of what effect liability in this case would have on the airlines. It is this evaluation that is missing from Judge Hellerstein's opinion.

B. Secondary Cost Reduction and Tertiary Costs

The issue of compensating the victims of September 11 was directly addressed by Congress in providing for the creation of the Fund. This fact does not have any direct bearing on the question of duty faced by the district court, but it does have some relevance to considerations of fairness. When the court focused on the issue of "risk distribution," it is surprising that the existence of the Fund was not taken into account. By creating the Fund, Congress made a risk distribution choice: the taxpayers of the United States are bearing most of the burden of September 11. Yet the court, in finding a duty, has distributed a portion of the risk of future attacks to the airlines. There is no inherent disadvantage to allow for two different avenues of recovery. Indeed, Congress might well have contemplated such an outcome, as evidenced by the fact that it only limited liability beyond the insurance coverage of the air carriers. By capping the liability of the airlines in the September 11 litigation, rather than immunizing them outright, Congress appears to have virtually invited a court to allow recovery without concern for the impact such a decision would have on the industry.¹²⁰ However, the fact that a method of recovery exists outside of the judicial system should generally weigh against expanding the orbit of duty because such an expansion opens new "channels of liability" unnecessarily, which is precisely the issue the New York Court of Appeals has said should weigh heavily in the duty analysis.¹²¹

Additionally, the tertiary costs of this ruling are independently significant. The ultimate success of this suit is doubtful for a number of reasons.¹²² For example, beyond the ultimate issue of negligence, the defendants have already made clear that they will argue that the terrorists' intentional acts should operate as an intervening act that independently cuts off liability under the doctrine of proximate cause.¹²³ The existence of these difficult issues guarantees that this litigation will be protracted and costly. These costs are unnecessary in light of the creation of the Fund and could have served as an independent policy justification for denying that a duty exists in this case.

proportional benefits that would normally accrue in the form of increased safety (lower primary costs).

120. "The amount of insurance policies held by American and United Airlines for such terrorist-related incidents is estimated to be approximately \$1.5 billion per plane, resulting in a total of \$6 billion in accessible funds for those seeking remedies against the airlines in tort." Erin G. Holt, Note, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513, 514 & n.12 (2004).

121. *In re Sept. 11 Litig.*, 280 F. Supp. 2d at 292; see also *supra* Part I.D.

122. See, e.g., Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 721-22 & n.12.

123. *In re Sept. 11 Litig.*, 280 F. Supp. 2d at 292 n.7. It is unclear why the court did not deal with this issue under duty analysis.

Thus, the significant difference between the September 11 case and prior cases of aircraft damage to ground victims is not in the scope of the damage, or even in the presence of the terrorists, but in the significant policy decisions made by the federal government in relation to the defendants. By taking note of this “principled distinction” between the September 11 litigation and other aircraft crashes, the court could have avoided setting such a broad precedent while at the same time leaving open the possibility that if future terrorist strikes are not adequately addressed by Congress, liability might be justified.

C. Conclusion

Judge Andrews, in a famous dissent touching on the issue of the role of judicial public policymaking, said, “It is all a question of expediency, . . . of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.”¹²⁴ Judge Hellerstein’s empathy for the plaintiffs in this case is certainly understandable, and there is little doubt that the cumulative effect of the ATSSSA and the ATSA operates as an invitation to a court to access the money that may be available from the insurance taken by the airlines. However, the district court’s sweeping language justifying the existence of a duty in this case goes far beyond the particulars of this case:

Ours is a complicated and specialized society. We depend on others charged with special duties to protect the quality of the water we drink and the air we breathe, to bring power to our neighborhoods, and to enable us to travel with a sense of security of bridges, through tunnels and via subways. We live in the vicinity of busy airports, and we work in tall office towers, depending on others to protect us from the willful desire of terrorists to do us harm. Some of those on whom we depend for protection are the police, fire and intelligence departments of local, state and national governments. Others are private companies, like the Aviation Defendants. They perform their screening duties, not only for those boarding airplanes, but also for society generally. It is both their expectation, and ours, that the duty of screening was performed for the benefit of passengers and those on the ground, including those present in the Twin Towers on the morning of September 11, 2001.¹²⁵

Thus, the district court’s reasoning leads to the conclusion that the aviation defendants owe a duty to “anyone within reach of their planes once they [are] airborne.”¹²⁶

The logic of this rule has staggering implications for any number of industries in our economy and society. On September 11, criminals took advantage of our own modern technology and infrastructure to achieve their own unconscionable aims. What if the weakness that was exploited were found within the telephone companies’ network? Or within the electrical power grid? It may be that the answer to this concern is simply to

124. *Palsgraff v. Long Island R.R. Co.*, 248 N.Y. 339, 354–55 (1928).

125. *In re Sept. 11 Litig.*, 280 F. Supp. 2d at 292–93.

126. Anthony J. Sebok, *Judge Hellerstein’s Ruling on the September 11 Suits: Is It Right About New York Tort Law?*, at <http://writ.findlaw.com/sebok/20031006.html> (Oct. 6, 2003) (last visited Feb. 20, 2005).

point to the fact that our society has consistently adapted to new channels of liability.¹²⁷ However, New York precedent requires a court that is making this type of decision to weigh and balance these policy issues in making the decision about duty.

In interpreting the orbit of duty as Judge Hellerstein has, the question of legal duty as it has been framed in New York law loses meaning.¹²⁸ If Congress had not capped liability in this case, just the threat of these lawsuits would have put all of the airlines into bankruptcy.¹²⁹ A policy decision was made by Congress that this result would be undesirable, yet Judge Hellerstein's opinion does not address the important economic and policy implications that such a sweeping expansion of duty in the context of enabling torts would accomplish.

127. For a complete summary of this argument as well as the counterarguments, see Holt, *supra* note 108, at 558–59.

128. Sebok, *supra* note 15 at 513. Indeed, the central purpose of New York's law on the issue of duty is that if a duty is to be found, it must have limits. "As the *Milliken* court explained in somewhat poetic language, *Strauss* stands for the proposition that New York rejected the plaintiff's 'reasoning because it would hold . . . [defendants] liable to every tenant in every one of the countless skyscrapers comprising the urban skyline.'" *Id.*

129. See *supra* notes 102–03 and accompanying text.